20-P-46 Appeals Court

WILLIAM DONAHUE[1] vs. TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 20-P-46.

Suffolk. December 10, 2020. - February 5, 2021.

Present: Vuono, Meade, & Lemire, JJ.

Labor, Failure to pay wages, Wages, Overtime compensation, Collective bargaining, Unfair labor practice, Public employment. Massachusetts Wage Act. Trial Court, Court officers, Probation officers. Public Employment, Collective bargaining. Governmental Immunity. Immunity from suit. Penal Institution. Common Law.

Civil action commenced in the Superior Court Department on October 29, 2018.

A motion to dismiss was heard by Renee P. Dupuis, J.

Christopher J. Trombetta for the plaintiff.
Jesse M. Boodoo, Assistant Attorney General, for the defendant.

[1] On behalf of himself and others similarly situated. Donahue's motion to certify a class was denied without prejudice by a Superior Court judge for failure to comply with Superior Court Rule 9A.

MEADE, J. In 2018, the plaintiff, William Donahue, commenced this putative class action on behalf of himself and all court officers and probation officers who have not been paid for wages and overtime earned. Thereafter, Donahue amended his complaint and moved to certify a class. The amended complaint alleged statutory claims for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 (FLSA); the Massachusetts Wage Act, G. L. c. 149, §§ 148, 150; and the Massachusetts overtime statute, G. L. c. 151, § 1A, as well as purported "common-law" claims for unpaid wages and overtime.

The defendant, the Trial Court of the Commonwealth of Massachusetts (Trial Court), moved to dismiss the amended complaint as barred by sovereign immunity, and for failure to state a claim. A Superior Court judge allowed the motion, and Donahue timely appealed the dismissal of the amended complaint. We affirm.

Background. Donahue is a court officer employed by the Trial Court.[2] Pursuant to the collective bargaining agreement

[2] The facts alleged in Donahue's amended complaint are sparse at best. He merely alleges that he is a court officer who has not been paid "wages and overtime compensation," and that he has not consented to the withholding of these wages. The relevant background provided here is drawn largely from the documents filed in connection with Donahue's motion for class certification. See Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000) (in evaluating motion to dismiss, court may consider "items appearing in the record of the case" and "matters of public record" [citation omitted]).

(CBA) between court officers, associate court officers, and probation officers and the Trial Court, court officers are not directly paid for the first seventy-five hours of accrued overtime, but instead receive compensatory time off in lieu of pay for overtime worked.[3] Court officers are generally limited to accumulating seventy-five hours of such compensatory time, but they may exceed that cap based on special circumstances requiring additional overtime work. Although the Trial Court pays the officer for any unused compensatory time when a court officer's employment ends, the CBA does not establish how accrued overtime over the seventy-five hour limit is to be paid during a court officer's term of employment. Instead, the CBA contemplates a separate negotiation in which the Trial Court and the court officers' union will develop a policy that will authorize "a limited amount of accrued compensatory time to be paid at the end of each fiscal year" to court officers who are over the seventy-five hour cap, if funds are available.[4]

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[3] "Under the . . . FLSA . . ., [the Commonwealth] and [its] political subdivisions may compensate [its] employees for overtime by granting them compensatory time . . ., which entitles them to take time off work with full pay. [29 U.S.C.] § 207(o). If the employees do not use their accumulated compensatory time, the employer [must] pay cash compensation under certain circumstances. [29 U.S.C.] §§ 207(o)(3)—(4)." Christensen v. Harris County, 529 U.S. 576, 578 (2000).

[4] In 2016, Donahue filed a union grievance alleging that he had not been paid for any portion of his accrued overtime for Fiscal Year 2015 or 2016. The grievance proceeded to an

Donahue's amended complaint alleges that the Trial Court failed to pay "more than $10 [million] in wages and overtime compensation" to him and other court officers and probation officers, but it does not specify the particular amounts of compensation at issue or the time periods during which such compensation accrued. Donahue appears to contend that he still has some compensatory time accrued from prior overtime work for which he has not been paid, and that he is entitled to be paid for this balance without regard to the terms of the CBA.

Discussion. 1. Standard of review. We review the allowance of a motion to dismiss de novo, and in reviewing the sufficiency of a complaint under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), "[w]e take as true 'the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor.'" Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004), quoting Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998). "What is required at the pleading stage are factual 'allegations plausibly suggesting

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arbitration hearing, and in December 2017, the arbitrator dismissed Donahue's grievance as not arbitrable because Donahue was not entitled to receive immediate payment for his accrued compensatory time under the terms of the CBA. The CBA's only mandate was that the union and the Trial Court establish a policy to address the issue, and payment would occur only if funds were available. In 2017 and 2018, the union and the Trial Court entered into a series of memoranda of agreement for the payment of such compensation.

(not merely consistent with)' an entitlement to relief . . . ." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

2. Sovereign immunity. "Sovereign immunity is an ancient doctrine, which applies with full rigor today." New Hampshire Ins. Guar. Ass'n v. Markem Corp. 424 Mass. 344, 351 (1997). Sovereign immunity "protects the public treasury against money judgments and public administration from interference by the courts at the behest of litigants except in instances and by procedures the Legislature has authorized." Id. The Commonwealth "cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed in the statute" (citation omitted). General Elec. Co. v. Commonwealth, 329 Mass. 661, 664 (1953). See DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 12 (2006).

In counts II, III, and IV of the amended complaint, Donahue alleges that the Trial Court violated the FLSA; the Wage Act, G. L. c. 149, §§ 148, 150; and the Commonwealth's overtime statute, G. L. c. 151, § 1A, by allegedly failing to pay him, and others similarly situated, overtime wages and wages exceeding $10 million, entitling the plaintiffs to damages in excess of $30 million and attorney's fees. All three claims, which are discussed below, are barred by sovereign immunity, and

were properly dismissed. See Vining v. Commonwealth, 63 Mass. App. Ct. 690, 696 (2005) (courts lack subject matter jurisdiction over claims barred by sovereign immunity).

a. FLSA. In Alden v. Maine, 527 U.S. 706 (1999), a group of probation officers filed suit against their employer, the State of Maine, in State court.[5] The officers alleged that the State had violated the overtime provisions of the FLSA. Id. at 711-712. The United States Supreme Court held that sovereign immunity prevented a private party from suing a State in that State's court to enforce the FLSA. Id. at 754. See Bergemann v. Rhode Island Dep't of Envtl. Mgt., 665 F.3d 336, 342 (1st Cir. 2011); Lopes v. Commonwealth, 442 Mass. 170, 175 (2004). The same is true here. Donahue does not claim that the Trial Court waived its sovereign immunity or otherwise consented to be sued by its employees under the FLSA. In fact, Donahue offers nothing to counter the Trial Court's sovereign immunity claim.

[5] In Alden, the plaintiffs originally brought their suit in Federal court. While the suit was pending, the Supreme Court decided Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), which made it clear that Congress lacked the authority to abrogate the States' sovereign immunity from suits commenced or prosecuted in the Federal courts. In light of Seminole Tribe, the plaintiffs' Federal action was dismissed, and the United States Court of Appeals for the First Circuit affirmed the dismissal. Mills v. Maine, 118 F.3d 37 (1st Cir. 1997). The plaintiffs then filed suit in State court. See Alden, 527 U.S. at 711-712.

The motion judge properly dismissed Donahue's FLSA claim as barred by sovereign immunity.

b. Wage Act. "[S]tatutes regulating persons and corporations engaged in trade and industry are ordinarily construed not to apply to the Commonwealth or its political subdivisions unless the Legislature has expressly or by clear implication so provided." Grenier v. Hubbardston, 7 Mass. App. Ct. 911, 911 (1979). The Wage Act is a statute that expressly applies to the Commonwealth and its instrumentalities. However, it does so only in certain limited circumstances. The Wage Act provides, in pertinent part:

> "Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him . . . and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution . . ." (emphasis added).

G. L. c. 149, § 148.[6] Donahue claims that as a court officer, he is a mechanic, workman, or laborer, or alternatively, that his work takes place in a penal institution. We disagree.

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[6] Pursuant to G. L. c. 149, § 150, "[a]n employee claiming to be aggrieved by a violation of section[] . . . 148" is permitted to file suit "[ninety] days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing." Donahue received a right to sue letter from the Attorney General's Office. However, that letter does not bear on the merits of Donahue's claims. See, e.g., Tortolano v. Lemuel Shattuck Hosp., 93 Mass. App. Ct. 773, 780 (2018) (right to sue letter cannot confer private right of action where Legislature has not provided for such right).

"The words 'mechanic, workman and laborer' and 'penal or charitable institution' are not defined in G. L. c. 149[, § 1]. In construing the words 'mechanic, workman and laborer,' we turn to the common meaning attributed to these words in other legislation pertaining to the rights of workers in this Commonwealth." Newton v. Commissioner of the Dep't of Youth Servs., 62 Mass. App. Ct. 343, 347-348 (2004). A review of early workers' compensation cases reveals the common meaning of "laborer" to describe "a person without particular training who is employed at manual labor . . . while workmen and mechanics broadly embrace those who are skilled users of tools." Devney's Case, 223 Mass. 270, 272 (1916). As we noted in Newton, supra at 348, where these definitions were applied, the following were determined not to be workmen, laborers, or mechanics: a call firefighter, Randall's Case, 279 Mass. 85, 86-87 (1932); an industrial school teacher, Lesuer's Case, 227 Mass. 44, 46 (1917); and a supervisory janitor, White's Case, 226 Mass. 517, 521 (1917). Whether an individual fits the definition or classification of a "mechanic, laborer or workman" depends on the work performed by him or her. Tracy v. Cambridge Jr. College, 364 Mass. 367, 372 (1973).

Even though the amended complaint does not allege in any particular fashion the work Donahue performed, we have held that:

> "The essential duties of court officers in all departments of the Trial Court include, but are not limited to, the provision of security for the public, jurors, parties, witnesses, attorneys, judges, court personnel, and prisoners, in the courtroom and in other designated areas of the courthouse; maintenance of order and response to disruptive events in the courtroom; custody, care, escort, and documentation of prisoners within the courthouse; confinement or release of defendants at the direction of the court; location and direction of trial participants; and the communication of information of court procedures to the public, litigants, witnesses, attorneys, jurors, and citizens summoned for jury service."

Chief Justice for Admin. & Mgt. of the Trial Court v. Commonwealth Employment Relations Bd., 79 Mass. App. Ct. 374, 375 (2011). Furthermore, many of the duties performed by court officers are set forth in various statutes. See, e.g., G. L. c. 185, § 13; G. L. c. 185C, § 15; G. L. c. 217, § 30; G. L. c. 221, § 69A.[7] Also, pursuant to G. L. c. 221, § 70A, court officers "may perform police duties and have police powers in or about the areas of the court to which they have been assigned." See Lunn v. Commonwealth, 477 Mass. 517, 528–529 (2017). See also Commonwealth v. Howard, 446 Mass. 563, 568 (2006) (court officers are "agents of law enforcement" who "are authorized to perform police duties, . . . wear a uniform and a badge, and may be required to report observations of criminal activity to a

[7] Although not a requirement at the time Donahue became a court officer, any applicant for appointment as a court officer must pass a written examination that "shall test the knowledge, skills and abilities which can be objectively and reliably measured and which are required to perform the duties of the position of court officer." G. L. c. 211B, § 10D (a).

supervisor or the police"). Given our review of the work performed by court officers, as described above, and keeping in mind that a statute governing the waiver of sovereign immunity must be construed stringently, Onofrio v. Department of Mental Health, 411 Mass. 657, 659 (1992), we conclude that Donahue is not a mechanic, workman, or laborer.

In an attempt to fit within another facet of the limited waiver of sovereign immunity found in G. L. c. 149, § 148, Donahue claims that he is employed in a "penal institution" because prisoners may be temporarily held at court houses for court appearances. We disagree.

To determine whether a particular agency or office is a "penal . . . institution," we must look not to the tasks performed by court officers, but instead to the functions of the agency or office as a whole. See Newton, 62 Mass. App. Ct. at 349. With that in mind, we note that the term "penal institution" is not defined in G. L. c. 149. See Newton, supra at 348. However, G. L. c. 125, § 1, defines the term "penal institution" as follows: "As used in [G. L. c. 125] and elsewhere in the general laws, unless the context otherwise requires . . . 'penal institution' [means] correctional facility." General Laws c. 125, § 1 (n), defines a "state correctional facility" to mean "any correctional facility owned,

operated, administered or subject to the control of the department of correction . . . ."

While court house holding cells are utilized to confine criminal defendants before or after their court appearances, that function is ancillary to the overall purpose of a court house. Cf. Newton, 62 Mass. App. Ct. at 349 (forestry camp operated by Department of Youth Services [DYS]). As the motion judge properly held, a court house is "a justice center where both civil and criminal matters are adjudicated," not a "penal institution" or "correctional facility" for "the custody, control and rehabilitation of committed offenders." See G. L. c. 125, § 1 (d), (k). Cf. Newton, supra (analyzing purpose of DYS to conclude it was not penal institution despite having custody of "youths involuntarily committed to the department's care"). In fact, when we apply the ordinary and common sense meaning of "penal institution," see Commonwealth v. Brown, 481 Mass. 77, 81 (2018), we conclude that it refers to State prisons and houses of correction. See G. L. c. 127, §§ 87, 152 ("penal institution" refers to prisons and jails). Again, mindful of the narrow construction we must apply to waivers of sovereign immunity, see Onofrio, 411 Mass. at 659, we conclude that court houses are not penal institutions.[8] The motion judge properly

[8] We also find no merit in Donahue's claim that because G. L. c. 268, § 16, punishes an escape from "any penal

dismissed Donahue's Wage Act claim as barred by sovereign immunity.[9]

c. Overtime pay statute. In count IV of the amended complaint, Donahue claims that the Trial Court has failed to pay him for numerous hours of overtime, in violation of G. L. c. 151, § 1A. We disagree.

Once again, the Newton case informs our decision. There we held that the Commonwealth's overtime statute, G. L. c. 151, § 1A, simply does not apply to those employed by the Commonwealth. Newton, 62 Mass. App. Ct. at 350. Here, as the motion judge properly noted, the Commonwealth's obligation to pay overtime may be found in G. L. c. 149, § 30B, which does not provide a private right of action. See Tortolano v. Lemuel Shattuck Hosp., 93 Mass. App. Ct. 773, 780 (2018). Rather, the

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institution including a prisoner who is held in custody for a court appearance," court houses must be penal institutions. Like G. L. c. 149, § 148, the escape statute does not define "penal institution." The fact that the Legislature chose to punish those who escape from court houses as well as from correctional institutions, does not alter the overall purpose of court houses discussed above. See Commonwealth v. Clay, 65 Mass. App. Ct. 215, 217 (2005) (penal institution refers to correctional facilities where committed offenders are held). Cf. Newton, 62 Mass. App. Ct. at 349.

[9] To the extent Donahue relies on Parris v. Sheriff of Suffolk County, 93 Mass. App. Ct. 864 (2018), to support his claim, his reliance is misplaced. In Parris, there was no dispute that the employees were employed by a penal institution, see id. at 865 & n.3, which placed them within the Legislature's limited waiver of sovereign immunity. See G. L. c. 149, § 148.

authority to enforce G. L. c. 149, § 30B, rests with the Attorney General. See G. L. c. 149, § 2. Accordingly, the motion judge properly dismissed the G. L. c. 151, § 1A, claim as barred by sovereign immunity.

3. Common-law claims. In counts I and V of the amended complaint, Donahue claims that the Trial Court has failed to pay him wages and overtime compensation in violation of common law. We disagree.

At common law, an employee's right to seek recovery of alleged unpaid wages sounded in contract or quasi-contract, Lipsitt v. Plaud, 466 Mass. 240, 240, 247-248 (2013). However, Donahue made no reference to the CBA in the amended complaint and he has not asserted a breach of contract claim. Moreover, Donahue has failed to provide any authority for his claim that he possessed a right at common law,[10] that has not been superseded by statute, to earn time-and-a-half pay for working more than forty hours per week, or for unpaid wages. For that reason alone, the claim is waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019). In any event,

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[10] Donahue does cite Crocker v. Townsend Oil Co., 464 Mass. 1, 6-7 (2012), for the proposition that "[a] common law claim for unpaid wages exists in Massachusetts." However, Crocker does not stand for that proposition. Instead, in Crocker, the court held that an employment termination agreement that includes a general release will be enforceable as to the release of Wage Act claims "only if such an agreement is stated in clear and unmistakable terms." Id. at 14.

as the motion judge properly held, the right to overtime compensation is purely a creature of statute. See G. L. c. 149, § 30B; G. L. c. 151, § 1A. The motion judge properly dismissed Donahue's common-law claims.

Judgment affirmed.