

*11 Mass.L.Rptr. 52*  
*Superior Court of Massachusetts.*  
*Robert CHARLES, et al.,*  
*v.*  
**ROADS CORPORATION, et al.**  
*No. 9801380.*  
*|*  
*Sept. 29, 1999.*

Memorandum Of Decision And Order On Plaintiffs'  
Motion For Partial Summary Judgment And Defendants'  
Cross-Motion For Partial Summary Judgment

The plaintiffs, Robert **Charles**, Jeffrey Hicks, Walter Lane, Norman Scafidi, and Thomas Sheahan, on behalf of themselves and all others similarly situated (the “Plaintiffs”), have brought this action against three corporations for whom they were employed, along with each of these corporation's presidents and treasurers: **Roads** Corporation, John F. Sarao, Jr. and Richard A. DeFelice (“**Roads**”); LMX Ltd., John F. Sarao, Jr. and Richard A. DeFelice (“LMX”); and **Roads** Paving, Inc., John Keating and Alan Monaghan (“RPI”). They allege, on a number of grounds, that the defendants have shortchanged them on the wages and benefits they were due as employees of the defendants on public works construction projects.

Plaintiffs have moved for partial summary judgment on Counts I, III, IV, V, XI, XIII, XIV and XV of the complaint. The Roads defendants have filed a cross-motion for partial summary judgment as to Counts I, III, IV, and V. The RPI defendants have filed a cross-motion for partial summary judgment as to Counts XI, XIII, XIV and XV of plaintiffs' complaint. These counts allege that Roads and RPI:

- violated the prevailing wage law, G.L. c. 149, § 27, by failing to pay the benefits portion of the prevailing wage rate for each overtime hour worked (Counts I and XI);
- violated the prevailing wage law, G.L. c. 149, § 27, by deducting an amount from the wage rate paid for holiday pay for each hour worked (Counts III and XIII);
- violated the weekly payment of wage law, G.L. c. 149, § 148, by failing to pay weekly or bi-weekly wages when they did not pay the full amount of the prevailing wage rate due for each hour worked (Counts IV and XIV); and
- violated the overtime law, G.L. c. 151, § 1A, by failing to pay wages at the rate of one and one half times the prevailing wage rate for each overtime hour worked (Counts V and XV).

For the reasons stated below, plaintiffs' motion for partial summary judgment is *DENIED* and defendants' crossmotions for partial summary judgment are *ALLOWED*.

BACKGROUND

**Roads** and RPI are non-union construction companies that paid their employees a cash wage and a separate benefits contribution for each hour worked. The benefits contribution may be applied by the employee toward health and disability insurance, a retirement plan, a supplemental unemployment benefits plan, and paid holidays.

Both **Roads** and RPI were contractors on public works projects for the Commonwealth of Massachusetts, and were required on these jobs to pay the prevailing wage rate as determined by the Commissioner of the Department of Labor and Workforce Development (“Commissioner”). G.L. c. 149, §§ 27 and 27. The prevailing wage rate includes both hourly cash wages and payments by employers to health and welfare plans, pension plans, and supplementary unemployment benefit plans. *Id.* There is no dispute that the total hourly cash wages and benefits paid by **Roads** and RPI to the plaintiffs for the first forty hours per week they worked met or exceeded the prevailing wage rate set by the Commissioner. For each hour worked beyond forty hours, **Roads** and RPI paid their employees “time and a half” (150 percent) of the normal hourly cash wage only; they did not pay any benefits for overtime work. Nevertheless, the total of the normal hourly cash wage plus the 50 percent overtime premium exceeded the prevailing wage rate. Plaintiffs claim that defendants violated the prevailing wage law by not paying a benefits contribution during overtime hours; they contend that the prevailing wage law compels the defendants to pay them 150 percent of their hourly cash wage plus their benefits for all overtime hours.

As a Massachusetts employer, both **Roads** and RPI were obligated under G.L. c. 151, § 1A to pay its employees “at a rate not less than one and one half times the regular rate” for hours in excess of forty during the work week. G.L. c. 151, § 1A. The plaintiffs claim that **Roads** and RPI violated this overtime law by only paying time and a half on the nonbenefit portion of the wage rate for overtime hours.

Finally, plaintiffs claim that defendants wrongfully included an amount designated for holiday pay as a part of the benefit component of the prevailing wage rate.

Upon becoming aware of plaintiffs' allegations against them, **Roads** and RPI conducted “self audits” of their benefits plans and decided in January 1998 to credit persons who worked more than forty hours per week on the site of public works projects during 1995, 1996, and 1997 with the applicable weekly benefit for their job classification. This money was deposited into the pension fund and each person was credited with compound interest based upon the fund's performance in 1995, 1996, and 1997. On February 6, 1998, **Roads** and RPI contacted plaintiffs **Charles**, Hicks, Lane, Scafidi and Sheahan and informed them that their pension accounts had been credited. Defendants claim that these actions go above and beyond the requirements of state law and are consistent with the federal Davis-Bacon Act, 40 USC § 276a, et seq. As such, defendants argue that plaintiffs' claims, even if valid, are now moot.

## DISCUSSION

To prevail on summary judgment, the moving party must establish that there is no genuine issue of material fact on every element of a claim and that it is entitled to judgment on that claim as a matter of law. See generally, Mass.R.Civ.P. 56(c); *Highlands Insurance Co., v. Aerovox, Inc.*,

424 Mass. 226, 232, 676 N.E.2d 801 (1997). Where, as here, the party opposing summary judgment has the burden of proof at trial, the moving party is entitled to summary judgment if it “demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case.” *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991). “To be successful, a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim.” *Id.* It is sufficient to demonstrate that “proof of that element is unlikely to be forthcoming at trial.” *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809, 575 N.E.2d 1107 (1991).

### Prevailing wage law

The Massachusetts prevailing wage law, G.L. c. 149, § 26 provides in relevant part:

The rate per hour of the wages paid to said mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works shall not be less than the rate or rates of wages to be determined by the commissioner as hereinafter provided; ... Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.

This provision establishes a minimum wage to be paid by contractors...

... the prevailing wage rate. This Court finds that it is.

The so-called 50 percent overtime premium is not a separate category of benefits; it is simply a calculation of additional hourly wages that an employee is entitled to under the overtime law for work beyond the 40-hour work week. Regardless of how an employer may break down the hourly wage into a variety of components, such as an overtime premium, a risk premium, or a skill premium, the result is cash that is paid directly to the worker in his weekly paycheck. Cash paid to an employee based on the hours he worked, regardless of its characterization, is an hourly wage that, if above the prevailing wage rate, satisfies the contractor's obligation under the prevailing wage law. Consequently, as long as **Roads** and RPI paid its employees a wage equal to or greater than the prevailing wage rate for every hour they worked, there can be no violation of the prevailing wage law. This interpretation conforms with that of both the Massachusetts Highway Department and the Massachusetts Attorney General, who apply and enforce the prevailing wage law. The Attorney General's Office advisory to contractors declares:

The Prevailing Wage Rate for public works is established by collective bargaining agreements in private industry for the job classification and the town where the public works are to be performed. The Prevailing Wage Rate generally includes the following:

Hourly Wage + Health & Welfare + Pension + Supplementary Unemployment = Prevailing Wage Rate.

Overtime at the rate...

... by the Attorney General: “the regular rate” includes only hourly cash wages, not employer contributions to benefit plans. This allows every employee to be treated the same under the

overtime law, regardless of whether or not the employee is working on a public works project. This Court is mindful that this interpretation penalizes employers who choose to pay their employees more in cash wages and less in benefit contributions, but it is hardly surprising that the Legislature would wish to provide an incentive for employers to shift employee compensation towards benefits contributions, given that these benefits generally assist employees in coping financially with poor health, old age, disability, and unemployment.

Since there is no dispute that the defendants **Roads** and RPI paid the plaintiffs time and a half on their hourly cash wages, summary judgment in favor of the defendants must be granted on the overtime claims.

#### C. Weekly Payment of Wages

Plaintiffs claim that since defendants allegedly violated the prevailing wage law and the overtime law, then they must have also violated the Massachusetts weekly payment of wage law, G.L. c. 149, § 148, which provides:

Every person having employees in his service shall pay biweekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is...

... decision, partial summary judgment on behalf of these defendants is also *ALLOWED*; and

4. The only claims that survive are those regarding whether the defendants violated the prevailing wage law by failing to pay the benefits portion of the prevailing wage rate for each hour in excess of 900 worked on an annual basis (Counts II, VII, and XII).