

NEW ENGLAND LEGAL FOUNDATION

ADVANCE SHEET

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**The Massachusetts Supreme Judicial Court Agrees with NELF that an employee suing his employer for underpayment under the Massachusetts Prevailing Wage Act cannot also sue the employer’s corporate officers for personal liability under the Massachusetts Wage Act.**

*Donis v. American Waste Services, LLC* (Massachusetts Supreme Judicial Court)

This case was before the Massachusetts Supreme Judicial Court (SJC) on further appellate review, and the Court requested amicus briefing on an important issue of personal liability under Massachusetts’s wage laws: When an employee sues his employer for underpayment under § 27F of the Massachusetts Prevailing Wage Act, G. L. c. 149, § 27F, a detailed statute that regulates the wages of employees performing under certain public works contracts, can that employee also sue the employer’s “president and treasurer . . . and any officers or agents having the management of such corporation,” as provided under the general Massachusetts Wage Act, G. L. c. 149, § 148? Section 27F contains its own liability and private remedies provisions, which do not impose any such personal liability on corporate officers.

Nonetheless, despite 27F’s comprehensive remedial scheme and its lack of personal liability, both the Superior Court and the Appeals Court in this case held that the plaintiffs, ten former employees of American Waste Services, LLC (AWS), a company that contracts with cities and towns, under § 27F, for trash and recycling services, could sue both AWS and AWS’s officers, under the general Wage Act. As a result, the Appeals Court affirmed a final judgment of \$357,108, representing a mandatory trebling actual damages of \$119,036, against the individual defendants Christopher Carney and Michael Galvin, who were the co-owners and, respectively, AWS’s president and vice president.

The imposition of personal liability in this case was especially harsh because of the troubling fact that, while AWS did violate the Prevailing Wage Act, it did so through no fault of its own. Instead, it is undisputed that certain town officials who awarded the contracts to AWS failed to fulfill their statutory obligation, under § 27F, to obtain from the Commonwealth’s Division of Labor Standards a current prevailing wage rate schedule to attach to each contract when it was renewed or extended. As a result, AWS was unknowingly paying less than the prevailing wage on some of its renewed or extended contracts. Nevertheless, § 27F imposes liability on “whoever pays less than said rates of wages,” and the Appeals Court interpreted this language to establish strict liability.

NELF filed an amicus brief in support of the individual defendants, arguing that the comprehensive remedy scheme of § 27F of the Prevailing Wage Act should be deemed the *exclusive remedy* for employees who perform under those public works contracts that are regulated by that statute. NELF argued that §27F focuses narrowly on the prevailing wages and other contractual requirements pertaining to certain non-construction public works contracts. This is unlike the Wage Act, which is a general, catch-all statute ensuring the timely payment of wages earned, affording a statutory remedy to the employee who has no other specific statutory

remedy available. NELF also argued that the Legislature's omission of any personal liability provision in § 27F should be deemed a deliberate policy choice that must be honored, especially because the Legislature did include a personal liability provision in the Wage Act *and* in a neighboring, related section of the Prevailing Wage Act that regulates construction contracts.

Finally, NELF argued that the Appeals Court misinterpreted the SJC's decision in *Crocker v. Townsend Oil*, which, in fact, actually defeats the duplicative remedies sought by the plaintiffs. In *Crocker*, the SJC held that an employee could *not* evade the restrictions of a specific wage law by attempting to recover the specialized wages available under that statute, as if they were regular "wages earned" under the Wage Act. To the contrary, the Court in *Crocker* made it clear that an employee who seeks to recover specialized wages available under a specific wage statute cannot avoid the restrictions of that statute by seeking to recover those specialized wages as if they were regular "wages earned" under the Wage Act.

In its unanimous decision of July 21, the Court agreed with NELF on many of the points discussed in its brief and held that the employee suing for underpayment under the Prevailing Wage Act is confined to the remedies provided by that specific statute and, therefore, cannot sue his employer's officers under the Wage Act:

Allowing the plaintiffs to recover under the Wage Act would provide them with a duplicative means of recovering for the defendants' purported failure to pay their employees at rates required only by the Prevailing Wage Act. This would render the remedies provided by the Prevailing Wage Act meaningless. Moreover, under the Wage Act, the plaintiffs may recover directly from the officer defendants for underpayment of wages, whereas, under the applicable provision of the Prevailing Wage Act, they may not. Therefore, to preserve the Legislature's intent in enacting these separate statutes, the plaintiffs may not avoid the limitations that the Prevailing Wage Act places on their recovery by pursuing an otherwise duplicative claim under the Wage Act.

*Donis v. Am. Waste Servs., LLC*, 485 Mass. 257, 2020 WL 4107019, at \*1 (Jul. 21, 2020). Moreover, the Court agreed with NELF that its decision in *Crocker* was not only distinguishable but also *defeated* the plaintiffs' claim here:

Following *Crocker*, we hold that the plaintiffs may not recover under the Wage Act, where their only contention is that the defendants failed to pay the wage rates mandated by the Prevailing Wage Act. If, as in *Crocker*, the plaintiffs had argued that the defendants did not pay them for the hours they had worked, the plaintiffs' Wage Act claims would represent a distinct cause of action under which they could seek recovery. Where, however, the sole basis for their claim is a violation of the Prevailing Wage Act, the plaintiffs may not restate their claims under the Wage Act to evade the limitations of the Prevailing Wage Act on the scope of potentially liable defendants.

*Donis*, 2020 WL 4107019, at \*8.

*If you would like to obtain a copy of NELF's amicus brief in this case, please contact Ben Robbins at [benrobbins@nelfonline.org](mailto:benrobbins@nelfonline.org).*