IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GERALD SEENEY, HENRY NICHOLS, GRIGORIY KISOROTS, and DELAMAS MARSHALL, JR., Plaintiffs,	)	
v.	)	C.A. 03C-03-302 PLA
HARMONY CONSTRUCTION, INC. and **TORO TRANSIT, INC.** formerly known as **HARMONY TRUCKING** Defendants.	)	

Submitted: February 10, 2005
Decided: February 11, 2005

UPON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
DENIED

ORDER

Gary W. Aber, Esquire, Aber, Goldlust, Baker & Over, Wilmington, Delaware, Attorney for Plaintiffs

Neal J. Levitsky, Esquire, Fox Rothschild LLP, Wilmington, Delaware, Attorney for Defendants

ABLEMAN, JUDGE

Upon consideration, Defendants' Motion For Summary Judgment must be **DENIED**. It appears to the Court that:

1. Plaintiffs worked as truck drivers for Defendant corporations, including driving supplies to and from construction sites for jobs the defendants held pursuant to contracts with the State of Delaware. They allege that Defendants paid them less than the statutorily established "prevailing wage" required for workers on State contracts. Rather than complain to their employer or the Department of Labor, the plaintiffs filed an action in this Court to collect back wages. Defendants now move for summary judgment, arguing that the Court should exercise its discretion not to find subject matter jurisdiction until the plaintiffs exhaust the administrative remedies available to them through the Department of Labor. Because the applicable statute clearly grants workers in the plaintiffs' position the right to pursue relief in the Superior Court in the first instance, the motion must be **DENIED**.

2. A motion for summary judgment is considered under the familiar *Celotex* standard: whether, taking all facts and inferences in a light most favorable to the non-moving party, any genuine issue of material fact exists to require a trial.[1] What the defendants request here, however, is something entirely different. The

[1] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

defendants ask the Court to abstain from hearing the matter so that the plaintiffs will be forced to pursue their claims administratively. The defendants acknowledge that application of the doctrine of administrative exhaustion is a case management decision consigned to the sound discretion of the trial court.[2]

3. The prevailing wage requirement is found in 29 Del. C. § 6960. This statute provides a two-track method for ensuring that employers pay their workers a pre-defined minimum wage for their work on state projects. Section 6960(d) requires the Department of Labor to investigate any claims of underpayment, and provides serious consequences for failure to remedy any non-compliance discovered. Section 6960(f) provides the following:

> Any laborer or mechanic employed by any employer, or the Department of Labor on behalf of any laborer or mechanic employed by any employer, who is paid in a sum less than the prevailing wage rates provided for under this section shall have a right of action against the employer in any court of competent jurisdiction to recover treble the difference between the amount so paid and the prevailing wage rate.

This section, by its plain language, gives workers a private right of action against employers who violate the prevailing wage statute. The position of the commas and the word "or" seem intended to create a regime in which a worker may choose to file suit himself or ask the Department of Labor to sue for him.

4. Similarly, the collection of unpaid wages in general is regulated by 19 Del. C. § 1113, titled *Remedies of Employees*. Subsection (a) of that statute provides:

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[2] *Levinson v. Delaware Compensation Rating Bureau, Inc.*, 616 A.2d 1182, 1189 (Del. Supr. 1992)("[A]pplication of the doctrine of exhaustion of administrative remedies is a matter of

> A civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction.

Given the title of the Section, it is reasonably clear that, again, employees possess a private right of action to recover unpaid wages. Subsection (b), on the other hand, pertains to the Department of Labor:

> Whenever the Department determines that wages, as required under this chapter, have not been paid, the Department may bring any legal action necessary to collect such a claim.

The language in Subsection (b) is permissive; it provides only that the Department "may" pursue an action on behalf of a wronged employee, not that it "shall." Employees again seem to have a private right of action irrespective of the Department's enumerated powers to enforce wage claims, or the Department's choice not to use them.

5. Considering both of these statutes, the Court is satisfied that the plaintiffs were not required to seek redress through the Department of Labor before filing this action. It is clear that the defendants would rather be exposed to the potentially harsh but rarely enforced remedies that the Department of Labor may pursue, rather than the treble damages available under § 6960(f). It may even be true that forcing employees through an administrative process before allowing them to sue in Superior Court would be a fairer and more efficient regime for addressing unpaid wage claims. That, however, is not what the statutes require. The statutory scheme specifically separates the employee's private right of action

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judicial discretion.").

from the Department's powers, and does not make one dependent upon the other, even though it easily could have. I will therefore use the discretion afforded me by *Levinson v. Delaware Compensation Rating Bureau, Inc.*[3] and similar cases to find subject matter jurisdiction, and allow this matter to proceed.

6. For these reasons, Defendants' Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Gary W. Aber, Esquire
Neal J. Levitsky, Esquire

[3] *Id.*