IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Ct. App. No. 34,867

WILLIAM SHAWN CATES and BOBBY CHERESPOSY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MOSHER ENTERPRISES, INC.,

Defendant-Appellee.

Appeal from the State of New Mexico
Second Judicial District Docket, County of Bernalillo,
The Honorable Nan G. Nash, No. D-202-CV-2011-03068

DEFENDANT-APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This case presents a clean question of statutory interpretation. The PWMWA does not provide a worker a private right of action in district court to recover wages allegedly owed, and the Legislature never intended to create such a right of action. The exclusive means by which a worker can pursue a PWMWA claim is through the administrative process led by the Department of Workforce Solutions ("DWS").

The District Court, therefore, correctly held that it had no subject matter jurisdiction over Appellants' Collective Action Complaint for Violations of the PWMWA ("Complaint"), because Appellants cannot file a lawsuit to complain about wages. Although Appellants urge the Court to recognize a private cause of action under the PWMWA, they present no authority to justify such a broad expansion of district court jurisdiction. Additionally, even if the PWMWA gave Appellants a private right of action against Mosher Enterprises, Inc. ("Mosher"), which it does not, Appellants cannot proceed in District Court because they did not first exhaust their administrative remedies.

Appellants may not be happy with the remedies the PWMWA and related regulations provide them, but the Legislature intended that framework to balance the interests of contractors and their employees. Allowing claimants to simply skip the administrative process would strip contractors, such as Mosher, of the

important procedural and substantive protections the PWMWA affords them. For these reasons more fully explained below, the Court should affirm the District Court's Order dismissing the case.

ARGUMENT

I. The District Court Correctly Determined That the PWMWA Does Not Provide a Private Right of Action.

Appellants cannot sue Mosher because the PWMWA does not provide them a private right of action. First, it is undisputed that the PWMWA does not expressly allow a private right, i.e. it does not contain the phrase "private right of action." See generally PWMWA, NMSA 1978, §§ 13-4-10 through -17 (1963, as amended through 2011). Second, there is no basis to imply a private right of action where the Legislature intended the only remedies to come through the administrative process. Because Judge Nash reached the same conclusion, the Order of dismissal should be upheld.

a. Comparison to the Davis-Bacon Act Shows No Implied Right of Action.

By its plain language, the PWMWA does not provide litigants a private right of action. The PWMWA's closest analog is the Davis-Bacon Act ("DBA"), the federal statute after which it was modeled, which is also silent as to private enforcement. Federal courts almost always uphold the DBA's plain language and refuse to imply a private right of action, leaving litigants with the enforcement procedures the statute expressly provides, and the Court should do the same here.

See, e.g., Grochowski v. Phoenix Constr., 318 F.3d 80 (2d Cir. 2003) (holding that the DBA does not provide employee with a private right of action for unpaid wages); U.S. ex rel. Glynn v. Capeletti Bros., Inc., 621 F.2d 1309, 1313 (5th Cir. 1980) (same); Operating Eng'rs Health &Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998) (same). See also Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc., 2000-NMSC-030, ¶ 26, 129 N.M. 677 (The PWMWA was modeled after the DBA.).

One common reason that federal courts refuse to add a private right of action where none exists is that the DBA sets forth complex administrative mechanisms for workers to pursue their claims. Grochowski, 318 F.3d at 85. Another is that, simply, Congress would have included a private right if it had desired. Id.

Appellants' private claims fail for some of the same reasons as those of federally-contracted workers under the DBA. Just like the DBA, the PWMWA provides a comprehensive administrative process to resolve claims. Compare generally DBA, 29 CFR Parts 1, 3, 5, 6 and 7, with PWMWA, 11.1.2 NMAC. The DBA does not provide for a private right of action; neither does the PWMWA. The fact that Appellants' claims fall under a state statute as opposed to a federal one, such as the DBA, is irrelevant. Appellants, like the DBA claimants in almost every federal opinion to address the issue, must follow the administrative process

the PWMWA provides, and not attempt to "circumvent" the provisions they do not like. See Grochowski, 318 F.3d at 87.

Federal cases interpreting the DBA are fatal to Appellants' position, and there is no basis on which to distinguish them from this case. The Brief in Chief ("BIC") notes that the PWMWA, unlike the DBA, allows "attorney fees and costs to an employee" in an action brought pursuant to NMSA 1978, § 13-4-14(C) (2009). **[BIC 15-16]**; see § 13-4-14(D) NMRA. Appellants read this to mean that they may file suit under Subsection (C), "because an employee would not have 'attorney fees' if he or she had no right to a private right of action." **[BIC 18]** (quoting § 13-4-14(D)). That conclusion is illogical, however, because a party can incur attorneys' fees pursuing administrative remedies as easily as it can by filing a lawsuit. Moreover, while fee provisions in statutes have led some courts to infer a private right of action, others hold it is a sign that no remedy exists outside of administrative relief. See, e.g., San Carlos Apache Tribe v. U.S., 417 F.3d 1091, 1099 (9th Cir. 2005) ("At best, the absence of any private right of action language . . . and the presence of the fee provision render the [National Historic Preservation Act of 1966] ambiguous on the cause of action point. Without explicit language, such an ambiguity can hardly be converted into an implied right of action."). The possibility of an award of attorneys' fees and costs under the PWMWA is therefore not a fundamental difference from the DBA.

b. The Legislature Did Not Intend the PWMWA to be Enforced Through Private Actions.

The Legislature has consistently refused to allow workers to sue under the PWMWA, even when explicitly asked to do so. The Court's "principal objective" should be "to determine and give effect to the intent of the legislature." Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401 (internal quotation marks and citation omitted). Appellate courts consider three factors when asked to imply a private right of action in a statue that does not expressly grant it. Those factors are: (1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member?; (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy?; and (3) Would a private remedy either frustrate or assist the underlying purpose of the legislative scheme? Nat'l Trust for Historic Pres. v. City of Albuquerque, 1994-NMCA-057, ¶ 7, 117 N.M. 590 (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

Regarding the first factor, Mosher will assume for purposes of this appeal only that Appellants are among the "various classes of laborers and mechanics" that the PWMWA was meant to benefit. NMSA 1978, § 13-4-11 (2009). However, this is not determinative, as the Legislature has many different ways to protect classes of people aside from giving them private enforcement rights. See, e.g., Capeletti Bros., 621 F.2d at 1313 ("Recognizing that Congress intended [the

DBA] to benefit laborers and mechanics, however, does not establish that Congress intended additionally that section 1 would be enforced through private litigation.").

The second factor definitively speaks against an implied right of action, because the Legislature has already refused to add one. In 2005, Senate Bill 634 was introduced, proposing amendments to NMSA 1978, § 13-4-11. **[RP 519-531]** Among the proposals was a new Subsection D, which read: "In addition to all other remedies, an employee adversely affected by a violation of the [PWMWA] by a contractor, subcontractor, employee or person acting as a contractor shall have a private right of action for damages, attorney fees and reasonable costs." **[RP 519-531]** The committee considering the bill, however, struck all language that would have conferred a private right of action, and the bill passed in that form. **[RP 519-531]** Senate Bill 634 shows that in this context, as in others, the Legislature will provide an express damages remedy if it wants to. See, e.g., the New Mexico Minimum Wage Act, NMSA 1978, § 50-4-26(D) (2013) (specifying a private right of action for its violation). The fact that the PWMWA originally contained no such remedy, and that such a remedy was rejected upon later consideration, should conclude the inquiry into its intended scope.

Turning to the third factor, the underlying purpose of the legislative scheme indicates that the Legislature did not intend to allow workers to bring suit. The PWMWA requires state public works contracts to promise a prevailing wage to

mechanics and laborers. § 13-4-11(A). It also allows the contracting authority to withhold payments until it is satisfied the prevailing wage has been paid. § 13-4-11(C). The statute thus carefully balances the interests of contractors and their employees. The contractor is able to work approximate labor costs into its bid, while the worker enjoys the government's help in collecting the prevailing wage. To imply a private right of action to sue for PWMWA wages would destroy this careful balance.

The Legislature has considered but rejected a private right of action, and the Court must affirm the Order of dismissal to effectuate that intent.

c. The District Court Cannot Exercise Concurrent Jurisdiction Because Appellants Have No Right of Action.

The District Court could not have exercised jurisdiction over Appellants' claims concurrently with DWS because, as stated above, it had no jurisdiction over the claims. **[BIC 20-21]** "Agency jurisdiction is defined by statute" and, when a statute allows no private right of action as with the PWMWA, the district court simply cannot hear the case. See Eldridge v. Circle K, 1997-NMCA-022, ¶ 7, 123 N.M. 145. While there are instances in which a trial court and an administrative agency may simultaneously consider different claims arising from the same set of facts, this appeal does not present such an instance.

The concept of concurrent district court jurisdiction does not apply when a litigant's only remedy is administrative, as shown by the authority Appellants cite.

Regents of E. N.M. Univ. v. Baca, 2008-NMSC-047, ¶ 16, 144 N.M. 530, actually confirmed the rule that "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." (Citations omitted). Footnote One of that opinion contemplates a situation different from this one, in which a litigant is not required to start at the administrative level before filing a lawsuit. Id. at n.1. The footnote cites a case involving the estate of a worker, killed on the job, that sued the former employer for common law damages while an action in the Workers' Compensation Administration ("WCA") was pending. Eldridge, 1997-NMCA-022 at ¶¶ 4, 5. This Court noted that each forum had jurisdiction to hear its respective action – the district court action involved an intentional tort, which was outside of workers' compensation exclusivity, while the WCA case addressed non-intentional injury – and that the only question was which should assert jurisdiction first. Id. at ¶¶ 17, 21.

The PWMWA does not allow Appellants to choose between remedies, and they can only seek damages administratively. This case is therefore different from Eldridge, in which the district court and the WCA could each hear certain claims. Because this argument wrongly supposes that Appellants have a private right of action, the Court should reject it.

II. The District Court Correctly Determined That the PWMWA Requires Appellants to Exhaust Administrative Remedies for Any Alleged Violation.

Appellants have no right of action under the PWMWA. Even if they did have such a right, however, they cannot proceed in district court because they did not exhaust their administrative remedies. "Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with." In re Application of Angel Fire Corp., 1981-NMSC-095, ¶ 5, 96 N.M. 651. When a plaintiff fails to exhaust its administrative remedies, the district court has no subject matter jurisdiction and must dismiss the complaint. Luboyeski v. Hill, 1994-NMSC-032, ¶ 7, 117 N.M. 380; Angel Fire, 1981-NMSC-095 at ¶ 5.

a. The Statutory Framework Requires Administrative Exhaustion.

The Director of the DWS Labor Relations Division ("Director") determines prevailing wages on projects subject to the PWMWA. NMSA 1978, § 13-4-11(A) (2009). If, upon a complaint or by his own decision, the Director "has determined that a person or firm has failed to pay the prevailing minimum wages, then the certification procedure outlined in Subsection 13-4-14(A)-(B) must be followed." Id. (emphasis added). In other words, Appellants must start the administrative process by receiving a certification that they were paid less than the prevailing wage. **[RP513]** (setting forth an example of such certification).

The "certification procedure" offers two main remedies, in Subsections (A) and (B) of § 13-4-14. The first remedy allows the contractor to pay the difference between wages paid and the prevailing wage, using amounts withheld for that purpose. § 13-4-14(A). When there are not enough withheld funds to cover certified claims, the alternate remedy requires that the "[D]irector shall refer such matters to the district attorney . . ." who has "the duty and responsibility . . . to bring civil suit [on the workers' behalf] for wages and fringe benefits due . . ." § 13-4-14(B); see Grauerholtz v. Labor & Indus. Comm., 1986-NMSC-071, ¶ 10, 104 N.M. 674 (stating that, when retained funds are insufficient to pay workers, they only "have a direct path to the courts by way of the district attorney").

After making their initial complaint to DWS, complaining workers do not directly participate in the processes of certification or referral to the district attorney; what they may do is appeal the Director's decisions in those regards to the Labor and Industrial Commission and then to the District Court. NMSA 1978, § 13-4-15 (2009). Thus, district courts only have jurisdiction over a PWMWA claim when (1) a worker appeals a decision of the Commission or (2) the district attorney files an action for a violation when withheld funds are insufficient to pay workers. This participation follows NMSA 1978, § 39-3-1.1(C) (1999), which limits a party's ability to appeal from an administrative decision where "standing is further limited by a specific statute . . . ."

Because Appellants did not complete the remedial process required by the PWMWA, the District Court correctly concluded it had no jurisdiction.

b. The Implementing Regulations Require Administrative Exhaustion, as Well.

Appellants next argue that DWS itself desired workers to have an immediate right to sue in district court, without having to wait for DWS to investigate complaints under § 13-4-14(A) and (B). **[BIC 20-21]** In support, Appellants cite to 11.1.2.15(A)(2) NMAC, which currently states: "The provisions of this subsection do not affect any worker's right to make a claim through the wage and hour bureau or appropriate court for payment of prevailing wages and does not diminish the prime's or subcontractor's duty to cooperate with the wage and hour bureau." **[SRP PWMWA 2009]**

This argument fails because the cited provision did not exist in the New Mexico Administrative Code at any time relevant to this appeal. The quoted language was added effective March 15, 2012, after the first wage decision in question was issued in 2008 **[RP 288]**, after the second decision was issued on January 1, 2009 **[RP 296]**, and after Appellants filed their Complaint in 2011. **[RP 1]** No part of the Administrative Code in effect during that time period contemplated workers making claims to any entity other than the Director. See generally 11.1.2 NMAC (5/31/1972, as amended through 12/31/2009). **[SRP PWMWA 2009]** It is inconsequential how DWS might currently view

administrative exhaustion, because its regulations permitted nothing else during the relevant time period.

III. Allowing Workers to Skip the Administrative Route, or Creating a Private Right of Action Where None Exists, Would Deny Mosher Procedural and Substantive Due Process.

The process by which DWS investigates claims of PWMWA violations prudently balances the rights of workers and contractors. To allow Appellants to skip this measured practice, or to create a private right of action where none exists, would deny Mosher the due process it is afforded in the determination and appeal processes. See NMSA 1978, § 11-4-13 and 13-4-15. It would also predicate those due process rights on whether a worker's prevailing wage claims are based on a federally-funded project – under the DBA – or one funded by state or local money. Accepting Appellants' argument would mean that only employers working on federally-contracted projects are entitled to such due process. Finally, a ruling in Appellants' favor would allow workers to take advantage of state and local prevailing wage pay classifications, while ignoring the due process requirements meant to apply to all parties. This is yet another reason for the Court to affirm the decision of the District Court.

CONCLUSION

Based upon the foregoing, the Court should affirm the trial court's Order dismissing the case for lack of subject matter jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served upon counsel for the Appellants via U.S. Mail on May 12, 2016 at the following address:

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