NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-969-A

MASSACHUSETTS ASSOCIATION OF COURT INTERPRETERS, INC. & others[1]

vs.

LEWIS "HARRY" SPENCE, in his capacity as Administrator of the Trial Court, and his successors in office & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Notice sent 11.03.16 JOH NR JOH AJR RLPC MD

The individual plaintiffs are "*per diem*" court interpreters for the Trial Court. The defendants are Trial Court employees sued in their official capacities. The plaintiffs' Amended Complaint contains the following counts: violation of G. L. c. 149, § 148B (Count I), violation of the Fair Labor Standards Act (Count II), "Standards and Procedures constitutes a contract" (Count III), "S&P in violation of federal law" (Count IV), unjust enrichment (Count V), quantum meruit (Count VI), retaliation (Counts VII, VIII, and X), and breach of contract (Count IX). The matter is before the court on the defendants' Motion to Dismiss Plaintiffs' Amended Complaint. For the reasons that follow, the defendants' Motion to Dismiss is **ALLOWED** in part and **DENIED** in part.

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[1] Moussa Abboud, Soledade Gomes DeBarros, Anahit Flanagan, Norma V. Rosen-Mann, and Michael R. Lenz, individually, and on behalf of other persons similarly situated

[2] Maria Fournier, in her capacity as the Director of the Support Services Department of the Trial Court Office of Court Management and the Office of Court Interpreter Services Coordinator for the Administrative Office of the Trial Court, and her successors in office, and Bruce Sawayer, in his capacity as Manager of Accounting of the Fiscal Affairs Department of the Trial Court, and his successors in office.

BACKGROUND

The court accepts as true the allegations in the complaint and draws every reasonable inference in favor of the plaintiff. Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist., 461 Mass. 366, 374 (2012).

The Office of Court Interpreter Services ("OCIS"), a department of the Trial Court, has twenty-seven in-house court interpreters. To fill a shortfall, OCIS has relied on approximately 180 court interpreters who work on a *per diem* basis. The Trial Court classifies the *per diem* interpreters as independent contractors and requires them to submit a monthly or bi-monthly schedule, indicating their availability for assignments. The *per diem* interpreters do the same work as staff court interpreters.

The plaintiffs allege unequal treatment between staff interpreters and themselves. They also claim that they should be considered employees rather than independent contracts, are inconsistently paid for their half or full day commitments, do not receive adequate travel expenses, do not receive pay in a timely manner, and are occasionally replaced by Screened Interpreters whom they allege are less qualified. Finally, the plaintiffs allege that OCIS improperly retaliated against them for bringing complaints concerning pay.

DISCUSSION

To withstand a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a plaintiff's complaint must contain factual "allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect [a] threshold requirement . . . that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007) (internal

quotations omitted). While a complaint need not set forth detailed factual allegations, a plaintiff is required to present more than labels and conclusions, and must raise a right to relief "above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 127 S. Ct. at 1964-1965 (internal quotations omitted).

I. Count I – Violation of G. L. c. 149, § 148B

The plaintiffs claim that the defendants have violated G. L. c. 149, § 148B because they have misclassified them as independent contractors and not employees.[3] The defendants contend that the plaintiffs' claim is barred by sovereign immunity.

The doctrine of sovereign immunity provides that the Commonwealth "cannot be impleaded into its own courts except with its consent." Walter E. Fernald Corp. v. The Governor, 471 Mass. 520, 523 (2015) (citation omitted). Sovereign immunity may be waived expressly by statute or implicitly, where "governmental liability is necessary to effectuate the legislative purpose." Woodward Sch. For Girls, Inc. v. Quincy, 469 Mass. 151, 177 (2014) (citation and quotations omitted). In reading a statute to determine whether there has been an implied waiver of sovereign immunity, courts have been "reluctant to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference." Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 544 (1998).

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[3] The plaintiffs have brought suit under G. L. c. 149, § 150 which provides that an employee claiming to be aggrieved by a violation of G. L. c. 149, § 148B can "institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits." Further, "[a]n employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees." G. L. c. 149, § 150.

Nothing in G. L. c. 149, §148B expressly provides a private right of action against the Commonwealth. Thus, the court must consider whether the Legislature has, by necessary implication, authorized a private right of action against the Commonwealth for failing to comply with G. L. c. 149, §148B. While there is no appellate case in the Commonwealth in which a court has considered whether the Commonwealth has waived its sovereign immunity for claims under G. L. c. 149, §148B, this court recently addressed the issue in Jergensen v. Massachusetts Historical Comm'n, 2015 Mass. Super. LEXIS 58 (May 13, 2015) (Krupp, J.). In Jergensen, Judge Krupp considered the language used in Section 148[4] because of its "interrelationship" with §148B. Jergensen, 2015 Mass. Super. LEXIS 58 * 5. Theoretically, if the Commonwealth misclassifies one of its workers covered by Section 148 as an independent contractor in violation of Section 148B, and as a result fails to pay the worker as required under Section 148, a private cause of action will lie under G. L. c. 149, §§148 and 150. Jergensen, 2015 Mass. Super. LEXIS 58 *10-11. Judge Krupp noted that Section 148 contains specific provisions for government employers which define the scope of the government employers' obligations to comply with the timing obligations for payment of earned wages under Section 148. Jergensen, 2015 Mass.

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[4] G. L. c. 149, § 148 provides, in relevant part:

> Every person having employees in his service shall pay weekly or bi-weekly 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 . . . ; 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, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him . . . .

Super. LEXIS 58 *7. The Commonwealth's obligations under Section 148 apply to a narrower group of employees than are covered by Section 148 if employed privately or by a county or municipality. Jergensen, 2015 Mass. Super. LEXIS 58 *7-8. Specifically, the Commonwealth is obligated to pay its mechanics, workmen, laborers, and every person employed in any other capacity at a penal or charitable institution in accordance with Section 148. See G. L. c. 149, § 148. Judge Krupp determined that because Section 148 applies only to certain limited categories of state employees, the waiver of sovereign immunity to allow claims under Section 148 is similarly limited only to those employees. Jergensen, 2015 Mass. Super. LEXIS 58 *9, citing Newton v. Commissioner of the Dep't of Youth Servs., 62 Mass. App. Ct. 343, 347 (2004) (stating that time limits for payment of wages under § 148 apply only to Commonwealth employees who are a "mechanic, workman [or] laborer" or are employed in any other capacity "in a penal or charitable institution").

The plaintiffs ask this court to abrogate sovereign immunity in this case. See Randall v. Haddad, 468 Mass. 347, 356 (2014), quoting Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 615 (1973) (court has long recognized that "sovereign immunity is a judicially created common law concept," and, as such, is subject to judicial abrogation or limitation); see also Walter E. Fernald Corp., 471 Mass. at 524, quoting Whitney v. Worcester, 373 Mass. 208, 209 (1977) and Morash & Sons, Inc., 363 Mass. at 621 (recognizing that "an overly comprehensive rule of sovereign immunity is 'unjust and indefensible as a matter of logic and sound public policy'" because "sovereign immunity creates an 'inversion of the law,' shielding the government from liability for wrongs that ordinarily would be redressed."). The Supreme Judicial Court has identified three "reasons of justice and public policy" where it would continue

to apply sovereign immunity: if sovereign immunity would (1) protect the discretionary functions of a public official, (2) prevent the unauthorized actions of a public official, or (3) shield the public fisc from the specter of virtually unlimited liability. Walter E. Fernald Corp., 471 Mass. at 524-525, citing Randall, 468 Mass. at 358-359 (purposes of sovereign immunity not served where, in violation of court order, public employee deposited funds in State retirement account); Bates v. Director of the Office of Campaign & Political Finance, 436 Mass. 144, 174 (2002) (purposes not served where Legislature failed to appropriate funds to effect law enacted by ballot measure).

The plaintiffs, however, have not provided the court with any reason that would allow the court to waive sovereign immunity in this case. In fact, the trial court's classification of certain employees as independent contractors would seem to be a discretionary function of the court. See Patrazza v. Commonwealth, 398 Mass. 464, 467 (1986) (generally, discretionary conduct is "characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning"); Whitney, 373 Mass. at 217 ("appropriate dividing line" from governmental immunity "falls between those functions which rest on the exercise of judgment and discretion and represent planning and policymaking and those functions which involve the implementation and execution of such governmental policy or planning"). Further, the plaintiffs have stated in no uncertain terms that they are not mechanics, workmen, or laborers nor are they persons performing work for a penal or charitable organization. See e.g., Plaintiffs' Opposition to Defendants' Motion to Dismiss, page 3 ("Plaintiffs are not going to insult the intelligence of this Court by trying to compare themselves to persons performing work for a penal or charitable organization, or workmen, laborers, or

mechanics . . . ."). Indeed, the plaintiffs have stated that they are "highly-skilled and trained professionals . . . ." Plaintiffs' Opposition to Defendants' Motion to Dismiss, page 3. Thus, the Commonwealth's waiver of sovereign immunity to allow mechanics, workmen, and laborers or persons performing work for a penal or charitable organization to bring claims under Section 148 does not apply to them. See Jergensen, 2015 Mass. Super. LEXIS 58 *9.

As the court cannot waive sovereign immunity in this case, the plaintiffs' claim for violation of G. L. c. 149, § 148B cannot stand.[5]

II. Counts III and IX - Breach of Contract

A. Count III

Court interpreters are required to sign a document stating that they will abide by and uphold the *Standards and Procedures of the Office of Court Interpreter Services* ("*Standards and Procedures*") when providing interpretation services for the Trial Court. The plaintiffs claim that the *Standards and Procedures* constitutes a contract between it and the Trial Court and that the Trial Court has violated certain provisions of that contract.

Section 7.01 of the *Standards and Procedures* provides that the rate of compensation for

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[5] The plaintiffs conceded in open court that if the court does not waive sovereign immunity for its claim regarding violations of G. L. c. 149, § 148B, then its claims for retaliation (Counts VII, VIII, and V) also fail. See G. L. c. 149, § 148A ("No employee shall be penalized by an employer in any way as a result of any action on the part of an employee to seek his or her rights under the wages and hours provisions of this chapter.").

Further, the plaintiffs' claims for violation of the Fair Labor Standard Act (Count II) and for violation of 29 C.F.R. § 785.35 (Count IV) are dismissed as the plaintiffs did not address the defendants' arguments regarding these claims in their opposition papers or at the hearing. See also Edelman v. Jordan, 415 U.S. 651, 673 (1974), overruled on other grounds, Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) (citation omitted) (court will find waiver of a State's constitutional protection under the Eleventh Amendment only when stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction").

per diem court reporters is set by the Committee for the Administration of Interpreters for the Trial Court. Section 7.02 states that

> Compensable time shall be calculated beginning at the time the court interpreter arrives at the assigned court and reports to the Court Liaison. A 'half day' shall be calculated as time spent up to and including fours hours of actual interpreting or the time when the court interpreter is available and waiting to perform actual interpreting. 'Full day' means a period of time that is more than four hours. . . . If the court interpreter is present at the courthouse for the four-hour period, the court interpreter will receive payment for a half day as long as the court interpreter is available for the full four hour period or is otherwise excused from providing services during that period by OCIS.

There is nothing in the *Standards and Procedures* regarding an hourly payment system except Section 7.04, which is not relevant here, stating that per diem court interpreters will be paid an hourly rate after eight hours of work. The plaintiffs have alleged, in their complaint, and in affidavits attached to their complaint, that the Trial Court changed its interpretation of this provision in 2014 and started paying them an hourly rate, as opposed to the half-day/full-day rate set forth in Section 7.02. At this stage, the court determines that the plaintiffs have sufficiently alleged a violation of the *Standards and Procedures* against the defendants. Thus, the defendants' motion to dismiss with respect to Count III is denied.

B. Count IX

Section 4.05(j) of the *Standards and Procedures* states: "Court interpreters shall wear their official identification badges in such a manner as to make their presence clear to all persons in court in need of their services." The plaintiffs claim that after they filed their complaint, the defendants failed to renew their identification badges in retaliation for their filing of the complaint and also in violation of the *Standards and Procedures*.

The court agrees with the defendants that, at most, Section 4.05(j) creates a condition

(wearing identification badges) that cannot be enforced until the defendants provide the plaintiffs with identification badges. See Twin Fires Inv., LLC v. Morgan Stanley, 445 Mass. 411, 420-421 (2005) (citation and quotations omitted) ("A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract. If the condition is not fulfilled, the contract, or the obligations attached to the condition may not be enforced."). Thus, there is no breach of contract and Count IX is dismissed.

III. Counts V and VI - Unjust Enrichment and Quantum Meruit

The defendants argue that these claims should be dismissed because the plaintiffs have alleged that a contract exists. See Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 250 (1993) ("Recovery in quantum meruit presupposes that no valid contract covers the subject matter of a dispute. Where such a contract exists, the law need not create a quantum meruit right to receive compensation for services rendered."). The parties, however, have not briefed the issue of whether the *Standards and Procedures* can be considered a contract between the plaintiffs and the Trial Court. Thus, the court will not dismiss the unjust enrichment and quantum meruit claims at this stage as the plaintiffs have alleged that they performed services for which they were not properly compensated.

ORDER

For all of these reasons, it is hereby **ORDERED** that Defendants' Motion to Dismiss is **ALLOWED** as to Counts I, II, IV, VII, VIII, IX, and X and **DENIED** as to Count III, V, and VI.

Robert N. Tochka
Associate Justice

Dated: 11/3/16