

April 2006

Prevailing Wages: Court of Appeal Decides That General Contractor Not Liable For Subcontractor's Failure To Pay Its Employees Prevailing Wages

1. Introduction.

The legal landscape regarding “prevailing wages” continues to change for the better. On April 19, 2006, the Court of Appeal published its decision in *Margarito Violante et al., v. Communities Southwest Development and Construction Company et. al. (Violante)* and held that a subcontractor’s employees on a public works project cannot sue the prime or general contractor on theories of statutory or contractual liability for the nonpayment of prevailing wages by the subcontractor, the employees’ direct employer. This is a significant case for any developer or contractor involved in a project that has a “public works” component under California Labor Code section 1720 et. seq.

2. Background.

In *Violante*, the plaintiffs were construction workers seeking to launch a class action against the prime contractor and developer, for recovery of prevailing wages. The project at issue was a master planned community of 2,000 residences, including many public

improvements, costing more than \$65 million. Plaintiffs alleged that the project was a “public work” due to the terms of a Reimbursement Credit Agreement and a Community Facilities District Agreement entered into between the City of Yucaipa and the developer.

Plaintiffs alleged they, and hundreds or even thousands of other workers, were paid less than prevailing wages as required by Labor Code section 1771 for public works projects. Plaintiffs sued the defendants for violation of Labor Code section 1774, breach of contract and unfair business practices.

The Court of Appeal rejected the plaintiffs’ claims, finding that the plain language of Labor Code section 1774 failed to support plaintiffs’ interpretation. In a common sense decision, the Court held that the entire statutory framework gave no indication of a private right of action by a subcontractor’s employee against a prime contractor and concluded that to import one would not be consistent with a harmonious interpretation of the statutory scheme, applying *State Farm Mutual Automobile Ins. Co. v. Garamendi*

(2004) 32 Cal.4th 1029, 1043 and *Southern Cal. Lab. Management etc. Committee v. Aubry* (1997) 54 Cal.App.4th 873, 881-882.

Additionally, in the absence of a valid claim for violation of the prevailing wages law, plaintiffs could not proceed on their claims of unfair business practices or unfair competition under the Business and Professions Code, as these claims needed some underlying wrongful conduct to exist. The *Violante* Court, in excluding these claims, distinguished the prior case of *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177 that held that wages unlawfully withheld from an employee showed that the employer acquired the money by means of an unlawful practice that constitutes unfair competition. In contrast, the present case did not involve an unlawful practice by plaintiffs’ employer that constituted unfair competition.

3. Employees Still Have Claims Against Sub-Contractor.

Having exonerated the general contractor on the prevailing wages claims, the Court noted that plaintiffs still had a right of action against the subcontractor, their direct employer. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 775-779; Labor Code section 1194, subd. (a).) Further, a joint labor-management committee may bring an action against a direct employer who does not pay prevailing wages to its employees. Plaintiffs had other claims including breach of contract against their employer; rescission and restitution for deceit, fraud, or misrepresentation; and unfair competition claims (*Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1532-1539), as well as recovery on a payment bond. (*Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 346.)

The *Violante* Court was emphatic that the Labor Code nowhere requires or permits a subcontractor's employee to sue the prime contractor when the subcontractor fails to pay prevailing wages. Nor did the *Violante* Court find a private right of action delineated in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, a case that involved overtime claims against a corporate employer's officers, directors and shareholders, not a claim for prevailing wages against the prime contractor on a public work. In short, the subcontractor employees had no claim against the prime contractor.

4. Labor Commissioner May Be Able To Bring Claim.

The *Violante* decision did, however, highlight the role of the Labor Commissioner. The Labor Commissioner may seek penalties against a contractor and any contractor under him (Labor Code section 1775, subd. (a).) The Court observed that it is the Labor Commissioner who determines whether there has been any violation of the prevailing wage law and then issues wage and penalty assessments. (Labor Code sections 1741, 1775, subd. (a).) Labor Code section 1743 assesses joint and several liability against the contractor and the subcontractor for these assessments. (*O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal. App.3d 434, 462.) However, it is the Labor Commissioner, not an employee, who pursues such claims. Furthermore, as described in Labor Code section 1775, subdivision (b), the prime contractor is not liable for any monetary penalties unless the prime contractor knew the subcontractor had not paid prevailing wages to the subcontractor's employees or unless the prime contractor fails to: (1) provide for the payment of prevailing wage in its contract with the subcontractor; (2) monitor such payments by reviewing the payroll records of the subcontractor; (3) undertake withholding, if necessary; and (4) obtain an affidavit from the subcontractor asserting payment was made.

5. Conclusion.

This case and other DIR decisions indicate a more reasonable and positive application of the prevailing wages law.

M. Alim Malik is a shareholder and Chair of the Litigation and Employment Departments of Jackson, DeMarco, Tidus & Peckenpaugh, a Law Corporation in Irvine, California. He represents employers in employment litigation, workplace audits, prevailing wage assessments and business litigation. Mr. Malik is a graduate of Oxford University and Harvard Law School. Mr. Malik is an Adjunct Professor of Law, Chapman University School of Law. He is a Contributing Author to *Trade Secret Litigation and Protection in California*, published by the Intellectual Property Section of the State Bar of California (2005). He can be reached at 949.752.8585 or amalik@jdtplaw.com.

www.jdtplaw.com

Disclaimer

This bulletin has been prepared by Jackson DeMarco Tidus Peckenpaugh ("JDTP") for informational purposes ONLY. The information contained in this bulletin is not intended to nor does it create an attorney-client relationship between you and JDTP and is not a substitute for legal advice from a qualified attorney licensed in the appropriate jurisdiction.