

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-43

ROXANNE GIONEST, ET AL

Plaintiff

v.

ORDER ON DEFENDANTS' MOTION
TO DISMISS COUNTS I, II, III AND IV

IRVING OIL CORPORATION, ET AL

Defendant

Before the court is the motion of Defendants, Irving Oil Corporation, Irving Oil Terminals, Inc., and Irving Oil Transportation Company, LLC (collectively "Defendants" and/or "Irving"), to Dismiss Counts I, II, III and IV of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. M.R. Civ. P. 12(b)(6). Plaintiffs' Complaint alleges the following facts:

FACTUAL BACKGROUND

Plaintiffs, Roxanne Gionest, Cher Herbert, and Alicia Cyr (collectively "Plaintiffs") are all current or former employees of Irving. Ms. Gionest was employed as a full time employee from January 1997 until her resignation in April 2008. Ms. Herbert was employed as a full time, hourly employee from June 6, 2006 through June 18, 2008. As of June 22, 2008, Ms. Cyr remained employed by Irving.¹

Since approximately July 1, 2002, Defendants have paid their employees variable performance bonuses, based on actual work performed, in addition to their regular earned compensation. Compl. at ¶¶ 21-22. Plaintiffs maintain that when Defendants calculated and paid Plaintiffs overtime, they failed to include the performance bonuses in their calculation as required by Maine's wage and hour laws, resulting in an underpayment of overtime wages.

¹ The complaint was filed on June 30, 2008.

In a letter dated June 19, 2008, Plaintiffs' counsel demanded that Defendants pay Plaintiffs all unpaid wages due to them as a result of the alleged miscalculation of overtime rates. Compl. at ¶¶ 34 & 48-54. Although Defendants made some payment to Ms. Gionest and Ms. Herbert,² Plaintiffs contend that Ms. Cyr and other similarly situated employees are also entitled to payment. Plaintiffs further contend that the payments made to Ms. Gionest and Ms. Herbert were inadequate and did not include all remedies permissible under the wage and hour laws.

Counts I, II, III and IV of the Complaint allege violations of Title 26 M.R.S., Ch. 7, Subchapter 2 (Wages and Medium of Payment). More specifically, Plaintiffs contend that Defendants' miscalculation of overtime payments resulted in a failure to timely pay Plaintiffs their wages under 26 M.R.S. §§ 621-A (Timely and Full Payment of Wages) and 626 (Cessation of Employment). Plaintiffs seek damages for those violations under section 626-A (Penalties), which include the amount of the unpaid wages and "an additional amount equal to twice the amount of unpaid wages as liquidated damages." 26 M.R.S. § 626-A.

Defendants, however, counter that the failure to adequately calculate and pay all overtime wages is not a violation of those sections of Subchapter 2 of the wage and hour laws. Rather, they argue that any miscalculation is governed by 26 M.R.S. §§ 664(3) (Minimum Wages and Overtime Rates) and 670 (Employees Remedies) in Subsection 3. Under section 670, an employee who prevails in an unpaid wages action for violations of subchapter 3 is entitled to recover, *inter alia*, the amount of the unpaid wages and "an additional amount equal to such wages as liquidated damages." 26 M.R.S. § 670.

² According to representations made in Defendants' Motion to Dismiss, Defendants have apparently conceded that overtime payments to Plaintiffs were due and owing. Defendants informed the court that they "have already paid [Plaintiffs], as well as other similar[ly] situated employees, all damage amounts that could arguably be due under 26 M.R.S. § 670." Defs.' Mot. at 2 n.2. What remains at issue in the instant Motion is whether Plaintiffs are entitled to additional damages under Section 626-A.

Therefore, in the context of Defendants' motion, the dispute focuses on Plaintiffs' claim that a failure to properly calculate and therefore timely pay *all* overtime wages constitutes a violation Sections 621-A and 626, entitling an employee to treble damages under Section 626-A; and on Defendants' counter assertion that the miscalculation constitutes a violation of Section 664(3), entitling an employee to double damages under Section 670. Of critical importance, then, is which sections of the wage and hour laws apply to Plaintiffs' claims, and whether and to what extent the remedial provisions within each of the individual subchapters of the wage and hour laws are exclusive of those contained in other subchapters.

DISCUSSION

I. Standard of Review.

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)).

II. Counts I Through IV of the Complaint and Maine's Wage and Hour Laws

Plaintiffs allege that, under Section 621-A (for both current and former employees) and Section 626 (for former employees who have made demand), they were entitled to timely payment *in full* of all wages due them, including all overtime wages. Although Plaintiffs concede that

Defendants timely paid overtime wages, they maintain that Defendants miscalculated the proper amount of those wages and that that miscalculation resulted in an underpayment. Therefore, Plaintiffs claim they are entitled to recover under Section 626-A for Defendants' alleged failure "to [timely] pay Plaintiffs all wages earned."

After a review of the statute and of relevant and applicable case law interpreting the statute, the court concludes that the miscalculation and underpayment of overtime wages does not constitute a violation of sections 621-A or 626 notwithstanding that the miscalculation resulted in the untimely payment of a portion of the overtime wages due. As a result, Plaintiffs may not recover liquidated damages under Sections 626 or 626-A. The court bases its conclusion both on the language of exclusivity contained in the remedial sections of Subchapters 2 and 3 and on a string of Maine cases that suggest to this court that the Law Court has already decided the issue in a manner contrary to Plaintiffs' position.

Section 626-A expressly states that its liquidated damages provision applies only to unpaid wage claims stemming from violations of Subchapter 2, which encompasses Sections 621-A and 626. Similarly, Section 670 expressly provides that its liquidated damages provision relates only to claims brought under Subchapter 3, which encompasses Section 664. As Defendants correctly explain, under general rules of statutory construction, "express mention of one concept implies the exclusion of others not listed." Defs.' Mot. at 5 (citing *Musk v. Nelsen*, 647 A.2d 1198, 1201). Because Subchapter 2 relates to the timely payment of wages, rather than the calculation of overtime, and because Subchapter 3 both mandates the payment of overtime and provides the remedy for an employer's failure to comply with that mandate, the court concludes that section 670 is the sole and exclusive remedy for failure to properly calculate and pay overtime wages.

This interpretation is neither contrary to recent amendments to Section 621-A nor to Maine case law as it has developed both before and since those statutory amendments. In *In re Wage Payment Litig.*, 2000 ME 162, 759 A.2d 217, the Law Court was called upon to determine, among other things, whether failure to timely pay minimum wages violated Sections 661-672. *Id.* ¶¶ 17-18, 759 A.2d at 224. As the court in that case explained:

The employees do not contend . . . that the employers have violated the minimum wage statute as to the *amount* of the hourly wage paid; rather, they argue that this claim should not have been dismissed because a “minimum wage” must be paid promptly when due, and that they could prove facts to show a violation of this requirement.

The minimum [and overtime] wage statute, however, contains no time-of-payment language. The protection granted by the statute is of a different kind than the protections provided for in section 621. The statute is meant to protect employees from being paid too little. Sections 621 and 626-A protect employees from not being paid in a timely manner. Enforcement of the time of payment of employees is limited to the scheme expressly provided by the Legislature in sections 621 and 626-A. The employees’ claims under the Act were properly dismissed.

Id. (emphasis added).

Although the court in *In re Wage Payment Litigation*, was not faced with the precise question presented here, namely whether an employee can recover under section 626-A for an employer’s failure to timely pay the full amount of wages mandated under Section 664,³ its holding in that case is still relevant and applicable because it explains that the protections and remedies accorded by Subchapters 2 and 3 are distinct.

Following *In re Wage Payment Litigation*, the Law Court further developed its analysis of the interplay of Sections 626-A and 670. In *Avery v. Kennebec Millwork, Inc.*, 2004 ME 147, 861 A.2d 634, the court explained that the right to receive overtime is premised on Section 664 and “[t]he liquidated damages for a violation of that right is statutorily set by the ‘corresponding

³ Instead, the issue presented in that case was whether failure to timely pay minimum wages violates section 664 and is compensable under section 670.

remedies provision, section 670,' not section 626." *Orr v. Julia*, 2008 U.S. Dist. LEXIS 49687 (D. Me. June 27, 2008) (discussing and quoting *Avery*, 2004 ME 147, ¶ 10, 861 A.2d at 637).

Notwithstanding that *Avery* was, in many ways, a reiteration of the Law Court's holding in *In re Wage Litigation*, the *Avery* opinion itself is of limited assistance to the issue presented here. Unlike the instant case, "the plaintiff in *Avery* apparently limited his plea under section 626 to a claim for unpaid vacation time and did not include his claim for unpaid overtime within his section 626 plea." *Id.* In other words, although *Avery* confirms that Section 664 does not contain a timeliness requirement, it does not answer the question presented here because "plaintiff's counsel in that case did not . . . plead an entitlement to relief under sections 626 and 626-A for the overtime violation." *Id.*⁴

⁴ Dealing with a motion for summary judgment in *Orr*, Federal Magistrate Judge Kravchuk recognized the very issue raised by the motion to dismiss in the instant case. Discussing Count II of the complaint in *Orr*, Judge Kravchuk noted a "theoretical possibility of recovery on count two for overtime wages, liquidated damages, costs and attorney fees per 26 M.R.S. § 670", and also recognized "a thorny question of state law woven into this remote claim because *Orr* includes in his second count a plea for treble damages under 26 M.R.S. §§ 626 & 626-A." Although Judge Kravchuk did not need to decide the "thorny issue" at the summary judgment stage, her description of the issue and the attendant limitations of the *Avery* decision is worthy of note.

Sections 626 and 626-A afford a claim for unpaid wages upon cessation of employment[.] But in this case any right *Orr* has to unpaid wages for [] alleged overtime work [] arises solely by virtue of the "minimum wage; overtime rate" provisions of 26 M.R.S. § 664. [] *Orr* argues that his post-termination demand for unpaid overtime also triggers a claim under sections 626 and/or 626-A, which yield treble rather than double damages. [] The *Julia* defendants object to any claim under section 626 or section 626-A because they see the section 670 claim as the exclusive state law claim for failure to pay overtime. [] The Law Court has never squarely said whether *any* claim under section 626 and section 626-A in a factual scenario like the one in this case would be foreclosed. *Orr's* alleged right to payment of alleged overtime [] is premised on 26 M.R.S. § 664(3). The liquidated damages for a violation of that right is statutorily set by "the corresponding remedies provision, section 670," not section 626. *Avery v. Kennebec Millwork, Inc.*, 2004 ME 147, P 10, 861 A.2d 634, 637. Unfortunately, it is unclear from the *Avery* opinion whether the Law Court would restrict a plaintiff like *Orr* to the section 670 remedy because the plaintiff in *Avery* apparently limited his plea under section 626 to a claim for unpaid vacation time and did not include his claim for unpaid overtime within his section 626 plea. *Id.*, 2004 ME 147, P 2, 861 A.2d at 635. *Avery*, in other words, is not especially helpful because plaintiff's counsel in that case did not even try to plead an entitlement to relief under sections 626 and 626-A for the overtime violation.

Since *Avery*, the Law Court has been presented with the precise question at issue in this case. In a recent memorandum of decision the Law Court appears to have confirmed that the holding in *Avery* is in fact applicable to claims brought under Section 626-A. In *Daniel G. Lilley Law Offices, P.A. v. Aquavision, Ltd.*, 2007 Me. Super. LEXIS 143 (Me. Super. Ct., July 5, 2007), the trial court denied a request for liquidated damages under section 626-A for overtime violations. Unlike *Avery*, the Plaintiff in *Aquavision* did in fact contend that failure to pay overtime constituted a violation of Section 626. In that case, the trial court adhered “to the view that under *Avery v. Kennebec Millwork*, 2004 ME 147, ¶¶ 9-10, 861 A.2d 634, 636-37, liquidated damages for overtime fall under 26 M.R.S. § 670 rather than 26 M.R.S. § 626-A” and limited the employee’s liquidated damages accordingly. *Id.* On appeal, the Law Court affirmed the trial court’s decision and, citing *Avery*, concluded that an award of liquidated damages for overtime violations is properly calculated under Section 670. *Daniel G. Lilley Law Offices, P.A. v. Aquavision, Ltd.*, 2008 Me. Unpub. LEXIS 175.

This court is mindful that the memorandum of decision in *Aquavision* does not establish precedent. However, it appears to provide a strong indication that the holding in *Avery* extends to claims brought pursuant to Section 626 as well as claims brought under Section 670. Further, in a separate, reported opinion, the Law Court affirmed a similar award of liquidated damages in a case claiming violation of Section 621-A. *See Gould v. A-1 Auto, Inc.*, 2008 ME 65, ¶¶ 3& 9, 945 A.2d 1225, 1228. While the Law Court does not expressly articulate a holding in either of these cases that Sections 621-A and 626 do not contemplate claims involving the calculation and payment of overtime, this court considers the Law Court’s conclusion regarding the proper measure of damages in *Aquavision* and *Gould* to be persuasive indications of the Law Court’s likely view regarding the issues in the instant case.

Id. at 48-51.

In addition, Defendants persuasively note that “[i]f, as Plaintiffs argue, an employer’s miscalculation of overtime wages allows an employee to ignore the damages provision set forth in Section 670 to pursue a more lucrative recovery under Section 626-A, Section 670 becomes a mere nullity because, if given the option, an employee will always seek to recover treble versus double damages.” Defs.’ Supp. Reply at 5. Further, because the wage and hour laws do not expressly require an aggrieved employee to choose between treble damages under Section 626-A or double damages under Section 670 where an employer miscalculates and underpays overtime wages, Plaintiffs’ interpretation of the law could logically allow an aggrieved employee to recover under both sections and collect a veritable windfall of five times the amount of unpaid overtime. The court cannot conceive that either result, nullification of Section 670 or windfall, was intended by the legislature.

In light of all of the foregoing, the court concludes that an employer’s failure to properly calculate and pay overtime gives rise to a claim under Section 664(3), not Sections 621-A or 626, for which Section 670, not 626-A, provides the exclusive remedy. Accordingly, the court further concludes that Counts I, II, III, IV, which allege claims under Sections 621-A and 626 based on the miscalculation of overtime wages, fail to state claims upon which relief may be granted.

Pursuant to Rule 79(a) M.R. Civ. P., the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

Defendants’ Motion to Dismiss Counts I, II, III and IV of Plaintiffs’ Complaint is GRANTED.

Date: April 28, 2009



Chief Justice, Superior Court

JUDGMENT ENTERED: May 6, 2009