Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-001435 06/21/2024

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
C. Lockhart
Deputy

ASSOCIATED MINORITY CONTRACTORS OF ARIZONA, et al.

JOHN N THORPE

v.

CITY OF PHOENIX, et al.

JEAN JACQUES CABOU

JUDGE ASTROWSKY

RULING RE: DEFENDANTS' MOTION TO DISMISS & PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

The Court has considered Defendants' Motion to Dismiss, filed May 14, 2024, Plaintiffs' Response, and Defendants' Reply. The Court also considered Plaintiffs' Cross-Motion for Summary Judgment, filed April 8, 2024, Defendants' Response, and Plaintiff's Reply. The Court held oral argument on these motions on May 30, 2024. The Court also reviewed the Amici Curiae Brief of AzLTA, HBACA, the Arizona Chapter of NAIOP, the Greater Phoenix Chamber, SAHBA,

and the Tucson Metro Chamber[1]. In addition, the Court reviewed the Amicus Curiae Brief of the State of Arizona.[2]

Background and Legal Standard

The issue presented here concerns the effect a voter-approved initiative concerning Arizona's minimum wage had upon an existing state statute that addressed a city's ability to compel a contractor to pay its workers not less than the prevailing wage. This involves a legal analysis of statutory interpretation. What is not before this Court is whether the policy underlying Plaintiffs' position is better or worse than, as a matter of public policy, the policy underlying Defendants' position. This Court is not tasked, by the present filings, to determine whether an increase in Arizona's minimum wage was necessary and in line with the interests of a majority of Arizona voters. Moreover, this Court is not tasked with deciding whether the Arizona legislature is or ever was hostile to fairly paying working Arizonans. Such determinations are political in nature and are better suited to be resolved, if necessary, in arenas that concern the legislative and executive branches. "The matter of determining what is 'good public policy' is for the executive and legislative departments." *Harrison v. Laveen,* 67 Ariz. 337, 344 (1948). Whereas the judicial branch's duty is to say what the law is. See *Marbury v. Madison,* 5 U.S. 137 (1803); Ariz. Const. art 3; *Ariz. Sch. Bds. Ass'n v. State,* 252 Ariz. 219 ¶ 45 (2022). Accordingly, any portions of the briefs and arguments that involved partisan political rhetoric served no legitimate purpose in this legal action and did not influence this Court's decision in any way.

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[1] The Arizona Rules of Civil Procedure do not include a provision which allows for the filing of amicus curiae briefs before a trial court. Trial judges, however, "have inherent power and discretion to adopt special individualized procedures designed to promote the ends of justice in each case that comes before them." *Hedlund v. Sheldon,* 173 Ariz. 143, 146 (1992). This Court, like all other trial courts in this state, does not make policy decisions. Therefore, arguments made in an amicus curiae brief concerning the substantive benefits and/or detriments of a particular policy are of no relevance to determinations of matters of law, which is the focus of this Court. However, the legal discussion concerning the distinction between "minimum wages" and "prevailing wages" is helpful to this Court. Accordingly, the Court permitted the Amici Curiae Brief submitted by the Arizona Lodging & Tourism Association ("AzLTA"), Home Builders Association of Central Arizona ("HBACA"), the Arizona Chapter of NAIOP ("NAIOP") Arizona, Greater Phoenix Chamber, Southern Arizona Home Builder's Association ("SAHBA"), and the Tucson Metro Chamber.

[2] The Court permitted the State to file an amicus brief as the matter before the Court concerns the interplay between the State's legislative authority, the people's authority to enact voter-adopted initiatives, and municipal ordinances.

Plaintiffs, associations comprised of contractors and subcontractors that work on projects throughout the State of Arizona, filed their Verified First Amended Complaint for Declaratory Judgment ("FAC") in order to enjoin the enforcement of separate but similar ordinances passed, both on January 9, 2024, by the City of Phoenix and the City of Tucson. Ordinance G-7217 (the "Phoenix Ordinance") requires that any contractor or subcontractor under a City of Phoenix construction contract with an aggregate value of $4,000,000 or more, pay its workers not less than the prevailing wage rate for the same class and kind of work in the Phoenix metropolitan area. The Phoenix Ordinance also includes record keeping requirements and penalties for violations, to include contract recission and disqualification from future City of Phoenix contracts. Ordinance No. 12066 (the "Tucson Ordinance") was approved by the Tucson City Council, and it is similar to the Phoenix Ordinance, but it applied to construction contracts with a total project cost of $2,000,000 or more. It also includes record keeping requirements and penalties for violations, including liquidated damages in the amount of three (3) times the wages owed. The ordinances at issue are commonly referred to as "prevailing wage laws."

Plaintiffs, in their FAC, claim that the two ordinances at issue are preempted by state law. *City of Scottsdale v. Scottsdale Associated Merchs., Inc.*, 120 Ariz. 4, 6 (1978). A.R.S. § 34-321(B) ("Prevailing Wage Statute") prohibits any city from enacting an ordinance that requires any public works contract from containing a provision that requires "the wages paid by the contractor or any subcontractor to be not less than the prevailing rate of wages for work of a similar nature in the state or political subdivision where the project is located." Defendants contend that Arizona voters, through Prop 202, commonly referred to as the Raise the Minimum Wage for Working Arizonans Act ("Minimum Wage Act"), repealed, in effect, Arizona's Prevailing Wage Statute. Accordingly, Defendants argue, there is no valid law in place that can preempt the two ordinances at issue.

Defendants' motion is premised upon Rule 12(b)(6), Ariz.R.Civ.P, i.e., Plaintiffs' FAC fails to state a claim upon which relief may be granted. Dismissal of a complaint, pursuant to this rule, is permitted only when a "plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.,* 191 Ariz. 222, 224, ¶4 (1998). A motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true. *Cullen v. Auto–Owners Ins. Co*., 218 Ariz. 417, 419, ¶7 (2008). Plaintiffs' cross-motion is premised upon Rule 56, Ariz.R.Civ.P. A motion for summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves,* 166 Ariz. 301, 309 (1990); Ariz. R. Civ. P. 56(c)(1). Here, there are no disputed issues of fact. See Defendants' Response to Plaintiffs' Statement of Facts. Instead, the issue present by the parties' respective

motions is whether the Minimum Wage Act served to repeal the Prevailing Wage Statute. Accordingly, this ruling not only resolves the present motions, but also serves as a final disposition of Plaintiffs' FAC.

Discussion

Arizona law provides that:

> Agencies and political subdivisions of this state shall not by regulation, ordinance or in any other manner require public works contracts to contain a provision requiring the wages paid by the contractor or any subcontractor to be not less than the **prevailing rate of wages** for work of a similar nature in the state or political subdivision where the project is located.

A.R.S. § 34-321(B). This Prevailing Wage Statute, by its plain language, prohibits any Arizona political subdivision, such as the City of Phoenix and the City of Tucson, from enacting an ordinance that requires contractors and subcontractors to pay their workers less than the prevailing rate of wages. Nevertheless, both cities did just that on January 9, 2024.

The City of Phoenix enacted Ordinance G-7217, amending Chapter 43 of the Phoenix City Code. The Phoenix Ordinance required:

> Every mechanic, laborer or other worker employed by any contractor or subcontractor under any applicable City Construction Contract to perform Construction Contracting shall be paid not less than the Prevailing Wage Rate for the same class and kind of work in the Phoenix metropolitan area.

§ 43-52(A). This prevailing wage ordinance applied to every City of Phoenix construction contract with an aggregate value of four million dollars ($4,000,000). § 43-52(C). Tucson's Ordinance is materially identical. It also sets "the minimum wages to be paid for every class of mechanic, laborer and worker performing construction work" for the city as "not less than the prevailing wage rate for the same class and kind of work in the Tucson metropolitan area." Tucson Ordinance §§ 28-160-161.

Prior to the passage of these ordinances, the people of the State of Arizona passed, via a ballot initiative, the Minimum Wage Act. That Act established the minimum wage employers shall pay employees. A.R.S. § 23-363. The term "wage" means monetary compensation due to an employee by reason of employment…. A.R.S. § 23-362(E). The Minimum Wage Act does not address the term prevailing wage. Nevertheless, Defendants argue that the Minimum Wage Act impliedly repealed the prohibition on prevailing wage ordinances. "It is generally disfavored to find an implied repeal of a statute." *Jurju v. Florin Ile*, 255 Ariz. 558 (App. 2023). Indeed, courts find implied repeal only in the rare case "where it appears by reason of repugnancy, or inconsistency, that two conflicting statutes cannot operate contemporaneously," *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001), "when conflicting statutes cannot be harmonized to give each effect and meaning," *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7 ¶ 24 (2013), and where "no reasonable construction can [reconcile the] two statutes." *State ex. rel. Larson v. Farley*, 106 Ariz. 119, 122–23 (1970).

A prevailing wage ordinance is not a minimum wage law, and the Minimum Wage Law did not impliedly repeal the prevailing wage prohibition because the two laws can be harmonized by "reasonable construction." *State ex. rel. Larson v. Farley*, 106 Ariz. at 122– 23 (1970); see also *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. at 7 ¶ 24 (2013) (explaining "the finding of an implied repeal or amendment is generally disfavored" and applies only when "conflicting statutes cannot be harmonized to give each effect and meaning"). "Prevailing wage regulations are substantially different from minimum wage statutes." *San Francisco Labor Council v. Regents of Univ. of Cal*., 608 P.2d 277, 279 (Cal. 1980). They have fundamentally different underlying policy goals. Moreover, unlike minimum wage laws, which set a single, across-the-board floor on wages, prevailing wage measures impose a complex, fluctuating schedule of wage standards (determined by federal law and regulation) meant to approximate average wages for specific occupations and localities. See, e.g., *Mullally v. Waste Mgmt. of Mass., Inc*., 895 N.E.2d 1277, 1282 (Mass. 2008) (explaining that a "prevailing wage law endeavors to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry"); *Cipparulo v. David Friedland Painting Co*., 353 A.2d 105, 109 (N.J. Super. Ct. 1976) (describing the variable nature of prevailing wage schedules). In sum, the Ordinances here do not "address the same substantive issue," *In re Riggins*, 116 Ariz. Cases Digest 18 (Ariz. 2024), and it is inappropriate to apply the doctrine of implied repeal, because there is a straightforward way to construe both laws harmoniously. As both ordinances here violate the intact prevailing wage prohibition, they are preempted and cannot stand.

Defendants also contend that A.R.S. § 1-245 is all that is needed to be reviewed to support their position. That statute reads as follows: "When a statute has been enacted and has become a law, no other statute or law is continued in force because it is consistent with the statute enacted,

but in all cases provided for by the subsequent statute, the statutes, laws and rules theretofore in force, whether consistent or not with the provisions of the subsequent statute, unless expressly continued in force by it, shall be deemed repealed and abrogated." Here, the prevailing wage prohibition and the Minimum Wage Act, as explained above, do not address the same substantive issue. The Arizona Supreme Court already concluded that A.R.S. § 1-245 only applies when two applicable statutes address the same substantive issue. *In re Riggins, supra.* The minimum wage and the prevailing wage are two different things. The Minimum Wage Law allows cities to "regulate minimum wages," A.R.S. § 23-364(I), i.e., to set across-the-board wage floors for private and public employees and employers generally. The prevailing wage prohibition, on the other hand, bans cities from requiring contractors on public works projects to follow detailed wage requirements based on locality, occupation, and market conditions, as a requirement for contracting with the city, and the minimum wage and the prevailing wage are not necessarily the same. On some occasions, the prevailing wage for a particular worker may be the minimum wage, but on other occasions it may be higher. Certainly, the laws, when read together, mean that the prevailing wage cannot be less than the minimum wage, and as they can be harmonized, they both can co-exist. While the prevailing wage can be said, and was so said by Defendants, to be the "minimum wage" an employer must pay when involved in a city contract, this does not mean that the prevailing wage is **the** minimum wage as established by A.R.S. § 23-363. The two are not calculated in the same method, thus, to equate same is not logical. Unlike minimum wage laws, they set entire schedules of pay rates for specific industries. Moreover, these schedules are highly variable, and they represent an average wage based on a particular trade and locality, not an across-the-board floor. A superficial overlap in the colloquial meaning of the word "minimum" does not mean that "minimum wage laws," as a term of art, encompasses "prevailing wage laws."

Defendants are correct that the Minimum Wage Act, being a voter initiative, is protected by the Voter Protection Act ("VPA"). The VPA restricts the legislature's ability to repeal or supersede it, and any amendments must further its purpose and require a three-fourths vote in both chambers of the legislature *Meyer v. State*, 246 Ariz. 188 (2019). This indicates a high threshold for making any legislative changes to laws established by voter initiatives, including potentially the prevailing wage statute if it were directly impacted by the Raise the Minimum Wage Act. However, the prevailing wage prohibition preceded the Minimum Wage Act. Accordingly, the legislature did not affirmatively do anything to frustrate the purpose of a voter initiative through the passage of the prevailing wage statute. Therefore, the Minimum Wage Act, as a voter initiate that did not specifically repeal or address the prevailing wage statute has no effect upon same.

IT IS ORDERED denying Defendants' Motion to Dismiss and granting Plaintiffs' Motion for Summary Judgment.

IT IS FURTHER ORDERED that as Plaintiffs are the prevailing party, they are entitled to an award of their allowable costs. Plaintiffs shall file a Statement of Costs and a draft form of judgment no later than **twenty (20) days** after the entry of this Order. Defendant shall file a Response to same no later than **ten (10) days** after receipt of the Statement of Costs.

IT IS FURTHER ORDERED no attorneys' fees shall be awarded. Plaintiffs, in their Amended Complaint requested an award of attorneys' fees via the private attorney general doctrine. The private attorney general doctrine permits a court to award attorneys' fees to a part who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance. *Cave Creek Unified School Dist. V. Ducey,* 233 Ariz. 1 (Ariz. 2013). This litigation outcome impacts contractors and subcontractors who have contracts with either the City of Phoenix or the City of Tucson that are above a certain dollar value. This does not appear to impact, therefore, a large number of people. As the Attorney General's Opinion supported the Defendants' position, private enforcement was necessary to cease the impact of the two ordinances. The payment of a prevailing wage versus a minimum wage in the context presented here does not rise to the level of societal importance that would give rise to an award of fees. Overall, in weighing the applicable factors, the Court finds that an award of attorneys' fees is not warranted.