
COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

SUFFOLK, SS.

No. 2016-P-0751

ANTHONY WHYTE,
Plaintiff-Appellant,

v.

SUFFOLK COUNTY SHERIFF'S DEPARTMENT; COMMONWEALTH OF
MASSACHUSETTS,
Defendant-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF THE DEFENDANT-APPELLEES

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QUESTIONS PRESENTED

1. Are U.S. Immigration and Customs Enforcement ("ICE") detainees held in the Suffolk County House of Correction inmates subject to the Massachusetts statutes and regulations governing compensation of inmates in state and county correctional facilities, or are those detainees employees of the Suffolk County Sheriff's Department?
2. Did the plaintiff successfully challenge the propriety of his confinement in the appropriate forum prior to filing his suit, as required before making any argument premised on the unlawfulness of that confinement?

STATEMENT OF THE CASE

ICE detainee Anthony Whyte filed a purported class action¹ complaint alleging that defendants failed to pay him and other ICE detainees the minimum wage, failed to pay him on a biweekly basis, and otherwise failed to treat him as an employee. (A. 3-11.) Defendants successfully moved to dismiss because Massachusetts statutes and regulations, like those of

¹ No class was ever certified. (A. 1-2.)

other jurisdictions, permit inmates to be paid less than the minimum wage for work performed in prison and otherwise be treated as inmates, not employees. (A. 12-29.)

In his opposition, Whyte conceded that the Commissioner of Correction "undoubtedly" and "undeniably" has authority to regulate wages for inmates. (A. 35-43.) Whyte argued, however, that the laws governing inmate wages do not apply to him, because he was being held "contrary to Massachusetts law, not *in accordance* with it" and thus could not be considered a "person . . . placed in custody in a correctional facility in accordance with law" as that phrase is used to define inmates and prisoners in G.L. c. 125, § 1. (A. 44(emphasis in original).)

In a reply brief, Defendants argued that the Superior Court could not decide the lawfulness of Whyte's detention because (1) a person who seeks to challenge the lawfulness of his detention must do so through the adjudication and appeals process applicable to that detention, not through a civil lawsuit seeking damages; (2) ICE was a necessary party to any such proceeding, which would likely have to occur in federal court; and (3) the remedy for such a

claim would not be to release Whyte (or to treat Whyte as an employee), but rather to have ICE reassign him to a facility in which he could be lawfully detained. (A. 134-53.) Further, the issue of whether Whyte was lawfully detained was not raised in the complaint. (A. 3-11, 134.)

The defendants also moved to strike several documents attached to the opposition to the motion to dismiss that were not identified in or referenced in the complaint. (A. 154-57.) Given that Defendants' reply brief was limited to 3 pages (A. 1), Defendants had no opportunity to respond to the substantive issues raised by these documents. (A. 155.)

Oral argument was held on December 7, 2015. (A. 1.) Following argument, plaintiff provided notice that Whyte had been released from custody after his immigration proceedings concluded in his favor. (A. 161-84.)

The Superior Court allowed the motion to dismiss, ruling that Whyte was an inmate subject to the wage and hour regulations applicable to inmates, not the general laws covering employees. (A. 185-91.) The court declined to address Whyte's argument that he was held contrary to law, because it was not alleged in

the complaint and was beyond the court's purview. (A. 188 n.4.) Because the court resolved the motion without resorting to the supplemental documents provided by Whyte, it denied defendants' motion to strike as moot. (A. 186, 192.) Judgment entered in favor of defendants on January 11, 2016 (A. 193), and Whyte filed a notice of appeal on February 4, 2016. (A. 2, 194-95.)

STATEMENT OF FACTS

The following facts are alleged in the complaint:²

Plaintiff Anthony Whyte is a citizen of Jamaica, detained by ICE at Suffolk County House of Correction ("SCHC") since approximately September 16, 2013.³ (A. 4, ¶ 4.) SCHC houses civil detainees for the duration of their immigration removal proceedings, pursuant to a contract with ICE. (A. 5, ¶ 7.)

Any immigration detainee housed at SCHC may sign up for a work detail and receive \$1 per day. (A. 5, ¶ 8.) Duties of the work detail include serving food

² The facts alleged in the complaint were taken as true for purposes of Defendants' Motion to Dismiss and must be taken as true for purposes of this appeal.

³ Although Whyte was released in December 2015 following the conclusion of his immigration proceedings, no amended complaint was filed.

and drink, cleaning tables, sweeping, mopping, taking out garbage, laundry, cleaning staff and communal bathrooms, cleaning the infirmary, barbering, shoveling snow, and buffing floors. (A. 5-6, ¶¶ 10-13.) Detainee-laborers receive \$1 per day for their work, regardless of the number of hours worked, which may range from 1-8 hours per day. Detainee laborers work seven days a week. (A. 7, ¶ 17.) Some detainees work more than 40 hours a week in advance of Massachusetts Department of Correction ("DOC") or ICE inspections, which occur about two or three times a year. (A. 7, ¶ 18.)

At the beginning of each month, SCHC deposits each detainee-laborer's monthly earnings for the previous month into their respective inmate accounts. The amount is usually \$30 or \$31, corresponding with the number of days in that month. These payments are not immediately available as liquid funds due to the Sheriff's Department's standard delays in issuing checks from detainee-laborers' financial accounts. (A. 7, ¶ 19.)

SUMMARY OF THE ARGUMENT

The plaintiff is an ICE detainee in the custody of the Suffolk County House of Correction. His legal

relationship with the Suffolk County Sheriff's Department ("Sheriff's Department") and the Commonwealth is that of prisoner/inmate and jailer, not that of employer and employee. As such, the laws governing work in county correctional facilities by inmates, not the laws governing independent contractors, minimum wage, and timely payment of wages generally, apply here. Because both state and federal law permit detainees like the plaintiff to be paid \$1 a day and otherwise be treated in the manner alleged in the complaint, the complaint was properly dismissed. See *infra* Section I.A.

Massachusetts law is similar to that of other jurisdictions, where Courts have uniformly held that convicts and pretrial detainees do not have to be paid minimum wage for work done in prisons or through prison work programs. There is nothing about the Massachusetts statutes that would require a different outcome here. See *infra* Section I.B.

While the plaintiff has additionally claimed that the defendants treated him as an independent contractor rather than an employee, and also failed to pay wages within the timeframe required for paying employees, statutory protections in these areas

similarly do not apply to inmates who are not employees. To the extent there is a conflict between the specific laws governing inmates, and the general provisions that protect all employees in the workforce, rules of statutory construction dictate that the provisions of the specific statute govern, as the Superior Court correctly concluded. See *infra* Section I.C.

The plaintiff's argument, though not his complaint, calls into question the lawfulness of holding ICE detainees in county correctional facilities. In order to make such a claim, the plaintiff must first establish in the appropriate forum that his detention was unlawful. He does not allege that he did so. The Superior Court correctly declined to address this issue. See *infra* Section II.

ARGUMENT

- I. The Superior Court Properly Dismissed The Complaint Because Plaintiff Is An Inmate, Not An Employee, Under Massachusetts Law.**
 - A. Massachusetts Law Permits Inmates, Including ICE Detainees, To Be Paid Less Than The Minimum Wage For People Who Are Not Inmates.**

The plaintiff's claims should be dismissed because they fail to allege a violation of Massachusetts law. "Massachusetts has, by statute and

administrative regulation, established a compensation system that pays inmates less than minimum wage for work they do for the Prison Industries Program or in the servicing and maintenance of the correctional institutions in which they are held." *Shea v. Spencer*, NOCV2013-01139, 2013 WL 6858589, *2 (Mass. Super. Ct. Nov. 29, 2013),⁴ quoting *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992).

ICE detainees are both inmates and prisoners subject to these laws governing inmate work. Massachusetts law broadly defines an inmate as "a committed offender or such other person as is placed in custody in a correctional facility in accordance with law." G.L. c. 125, § 1 (emphasis supplied). "Prisoner" is similarly broadly defined as "a committed offender and such other person as is placed in custody in a correctional facility in accordance with law." G.L. c. 125, § 1 (emphasis supplied). Prisoners have a custodial relationship with their prisons. G.L. c. 126, § 16.

Under Massachusetts law, the Commissioner of Correction establishes standards for all county

⁴ A copy of this unpublished decision can be found at A. 26-29.

correctional facilities and is broadly authorized to promulgate rules and regulations incident to the exercise of those powers, including rules and regulations regarding employment for persons committed to correctional facilities. G.L. c. 124, § 1 (d) and (q); see also G.L. c. 127, § 1A. Control over compensation for inmates is expressly included in the Commissioner's authority:

Subject to appropriation from the General Fund, the commissioner shall establish a system of compensation for inmates of the correctional institutions of the commonwealth who perform good and satisfactory work either within the industrial program or in the servicing and maintenance of the correctional institutions or in the prison camps.

G.L. c. 127, § 48A.

Pursuant to these authorizations, 103 CMR 944.01 directs county correctional facilities to develop an inmate work assignment plan that provides for inmate employment, subject to the number of work opportunities available and the security of the facility. Under the regulations promulgated by the Commissioner, the inmate work assignment plan shall include, among other provisions, that "pretrial and unsentenced detainees shall not be required to work, except to do personal housekeeping;" 103 CMR 944.01(1)(a); that "any inmate may volunteer for work

assignments;" 103 CMR 944.01(1)(b); and that "work shall be offered in facility maintenance and operations." 103 CMR 944.01(1)(d). Further, with respect to incentives and compensation, the inmate work plan "shall provide for any incentives and/or compensation approved by the Sheriff or designee for inmates in work programs, which may include, but not be limited to" "special housing," "extra privileges," and "good time credits, as statute permits." 103 CMR 944.04. There is no allegation that the defendants have violated any of these regulations.

Although 103 CMR 944.04 does not set any minimum wage that the Sheriff must follow, or require the Sheriff to pay any wage at all, it is clear from another DOC regulation authorized by G.L. c. 127, § 48A that any wage paid may be less than the minimum wage. 103 CMR 405.08, governing "Inmate Wages and Stipends" in state, as opposed to county, correctional facilities, sets an inmate wage scale covering various types of inmate work, and permits paying inmates as little as \$5 a week. 103 CMR 405.08(6). While the precise rates set by this regulation do not apply in SCHC because it is a county, rather than a state, correctional facility, both 103 CMR 405.08(6) and 103

CMR 944.04 are regulations promulgated by the DOC Commissioner. The DOC Commissioner has set the rates below minimum wage at DOC facilities, and left the specific rates to be set at County facilities to the Sheriff. The Commissioner's authorization to the Sheriff includes authority to pay inmates less than the minimum wage, similar to the rates the Commissioner set in DOC's own facilities.

Courts have relied on G.L. c. 127, § 48A, and the related regulations to deny inmate and civil detainee claims that they are entitled to minimum wages. *Shea*, 2013 WL 6858589, *2 (denying inmate claim that he was entitled to prevailing minimum wage for work he was directed to perform on behalf of private company through prison industries program); *Miller*, 961 F.2d at 10 (denying civilly committed sexually dangerous persons' claim that they were entitled to minimum wage). There are good reasons for treating inmates differently from employees who work in contexts other than prisons. The minimum wage is not required to protect inmates' well-being and standard of living, because they are cared for by the Sheriff's Department, and their standard of living is determined by the Sheriff's Department, within constitutional

limits. *Miller*, 961 F.2d at 9. Paying inmates less than minimum wage creates no threat of unfair competition to other employers who must pay the minimum wage to their employees, because the Sheriff's Department does not operate in a marketplace and has no business competitors. *Id.* "People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside None of these goals is compatible with . . . regulation of their wages and hours." *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

The plaintiff's status as an ICE detainee does not change this outcome. Federal law specific to immigration detainees similarly permits "payment of allowance (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555. In *Alvarado Guevara v. I.N.S.*, immigration detainees challenged an

identical \$1 per day rate,⁵ claiming that they were employees under the federal Fair Labor Standards Act ("FLSA"), and were therefore entitled to the federal minimum wage for work in grounds, maintenance, cooking, laundry, and other services. 902 F.2d 394, 395 (5th Cir. 1990). Although the definition of "employee" under the FLSA broadly included "any individual employed by an employer," the court ruled that the detainees were not employees under the FLSA. *Id.* at 396. Instead, the court ruled that the detainees were similar to prison inmates, because they were incarcerated and under the direct supervision and control of the prison, and were not intended to be covered by the FLSA. *Id.*

In sum, "state law does not create an entitlement to the minimum wage, as [plaintiff] claim[s]; rather, it quite plainly expresses the Commonwealth's intention not to pay [plaintiff] the minimum wage." *Miller*, 961 F.2d at 10. Federal law governing ICE detainees is similarly clear in its intent. For these

⁵ The amount of payment was set by congressional act at \$1 per day. *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396 (5th Cir.1990), citing Department of Justice Appropriation Act, 1978, Pub.L. No. 95-86, 91 Stat. 426 (1978).

reasons, plaintiff's claim that the defendants failed to pay him the minimum wage under the minimum wage statute (Count II) was correctly dismissed. To the extent his claims for breach of contract (Count IV) and unjust enrichment (Count V) are similarly based on the failure to pay the minimum wage, those counts were correctly dismissed as well.

B. Like Massachusetts, Other Jurisdictions Do Not Extend Wage Law Protections To Inmates Working For Prisons.

As the Superior Court and First Circuit have recognized in applying the inmate compensation laws rather than the wage laws that would apply in other contexts, courts in other jurisdictions have also consistently denied FLSA and state minimum wage law coverage to inmates working for the prisons in which they are held. *Shea*, 2013 WL 6858589 at 2; *Miller*, 961 F.2d at 8.

[N]o Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying minimum wage. Prisoners may thus be ordered to cook, staff the library, perform janitorial services, work in the laundry, or carry out numerous other tasks that serve various institutional missions of the prison, such as recreation, care, and maintenance of the facility, or rehabilitation. Such work occupies prisoners' time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing

that prisoners bear a cost of their incarceration.

Danneskjold v. Hausrath, 82 F.3d 37, 43 (2d Cir. 1996).

This is true in every circuit that has decided the issue, whether the plaintiffs are civil detainees or convicts. *Danneskjold*, 82 F.3d at 43 ("prison labor that produces goods or services for institutional needs of the prison, whether voluntary or involuntary, inside or outside the institution, or in connection with a private employer, is not an employment relationship within the meaning of the FLSA."); *Tourscher v. McCullough*, 184 F.3d 236, 243-44 (3rd Cir. 1999) (pretrial detainee not an employee entitled to minimum wage under FLSA because, like a prisoner, his standard of living is protected and the work "bears no indicia of traditional free-market employment"); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (inmates working in prison industries program "do not enjoy the employer-employee relationship contemplated by the [FLSA], but instead have a custodial relationship to which the [FLSA's] mandates do not apply."); *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) ("a prisoner doing work in or for the prison is not an 'employee' under the FLSA and

is thus not entitled to the federal minimum wage."); *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008) (civilly committed sexually dangerous persons not employees under FLSA for the same reasons as prisoners); *McMaster v. State of Minn.*, 30 F.3d 976, 980 (8th Cir. 1994) (inmates required to work within correctional facility as part of prison industries program are not employees under FLSA); *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994) (inmate in prison industries program not employee under FLSA); *Franks v. Okla. St. Indus.*, 7 F.3d 971, 972-73 (10th Cir. 1993) (inmate working in state prison industries program not entitled to minimum wage under FLSA); *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997) (pretrial detainees performing translation services for prison not employees under FLSA); *Henthorn v. Department of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994) ("where the inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodian, the prisoner is barred from asserting a claim under the FLSA, since he is definitively not an 'employee.'"); *Ohio v. Hamilton Cty. Bd. of Comm'rs*, 705 N.E.2d 1247, 1254 (Ohio App. 1997) ("We conclude that the Ohio prevailing wage law

does not apply to inmates performing voluntary labor on jail premises for good-time credit pursuant to the work-detail program.")

Prisoners are excluded from the FLSA not because of any express language in the statute, but rather because of presumed legislative intent. *E.g.*, *Bennett*, 395 F.3d at 409. As Judge Posner explained, "The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress." *Id.* at 410.

Courts consistently recognize that wage laws intended to apply broadly outside of the prison context do not apply to prisoners. Whyte points to no authority, in Massachusetts or elsewhere, treating inmates or detainees as employees. Plaintiff argues only that none of these cases have decided the precise permutation at issue here, specifically involving ICE detainees under Massachusetts rather than federal law. There is no reason this permutation should result in a different outcome from every other case that has decided similar issues.

C. The Remaining Claims Arise from Statutes Not Applicable To Inmates in the Plaintiff's Position.

The specific laws governing inmate work and wages control the plaintiff's treatment by the Sheriff's Department. See Section I.A., *supra*. While the plaintiff has additionally claimed that the defendants treated him as an independent contractor rather than an employee, and also failed to pay wages within the timeframe required for paying employees, statutory protections in these areas similarly do not apply to inmates who are not employees. To the extent there is a conflict between the specific laws governing inmates and the general provisions that protect all employees in the workforce, rules of statutory construction dictate that the provisions of the specific statute govern. *Reiter Oldsmobile, Inc. v. General Motors Corp.*, 378 Mass. 707, 711 (1979). Nor would it make sense to expand the scope of those general statutes to include the plaintiff, for the same reasons the defendants are not required to pay him the minimum wage.

1. The Independent Contractor Statute Does Not Apply To Inmates, Who Are Under The Complete Control Of Prisons Whether They Work Or Not.

The Massachusetts independent contractor statute, G.L. c. 149, § 148B, does not transform the plaintiff from an inmate to an employee of the Sheriff's Department or the Commonwealth. That section "establishes a standard to determine whether an individual performing services for another shall be deemed an employee or an independent contractor for purposes of our wage statutes." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 589 (2009). The plaintiff is neither an independent contractor nor an employee. He is a prisoner, subject to the laws governing prisoners doing work rather than the wage statutes, as set forth in Section I.A. The independent contractor statute does not readily apply to inmates, who would be under the complete control of the prison whether they worked or not. In independent contractor cases, "the question is essentially whether there is enough control over the individual to classify him as an employee. But here we are coming at the definition of 'employee' from the opposite direction: there is obviously enough control over the prisoner; the problematic point is that there is too

much control to classify the relationship as one of employment." Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992) (emphasis in original).

Nor would the purposes of the independent contractor statute be served by classifying the plaintiff as an employee. "The purpose of the independent contractor statute is to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees." *Depianti v. Jan-Pro Franchising Intern., Inc.*, 465 Mass. 607, 620 (2013) (quotation omitted). In addition to hurting employees, misclassification as independent contractors imposes financial burdens on state and federal government through lost tax and insurance revenue, and gives employers who misclassify employees an unfair competitive advantage. *Id.* at 621. Those concerns are not present here, as the plaintiff is an inmate by statute, not an employee, and his needs are taken care of by the Sheriff's Department. Further, the Sheriff's Department does not compete in a marketplace and is thus not gaining any unfair advantage over any competitors by treating the plaintiff as an inmate. For these reasons, and

the reasons set forth in Section I.A. and I.B, the plaintiff's claim under the independent contractor statute (Count I) should be dismissed.

2. Laws Governing The Timing Of Payment Of Wages Do Not Apply To Inmates.

The plaintiff similarly has no claim under G.L. c. 149, § 148, for failing to pay the plaintiff on a weekly or bi-weekly basis within six days of the termination of the pay period, because that statute applies only to employees. The law governing inmate compensation provides that "No money shall be paid directly to any inmate during the term of his imprisonment." G.L. c. 127, § 48A. While the regulations governing payment of inmates in county correctional facilities set no requirement for the time within which payments to inmates, if any, must be made, the regulation governing payment of inmates in state correctional facilities provides a useful guideline. That regulation requires only that inmates be notified monthly of funds, if any, to be credited to their accounts. 103 CMR 405.08(3). This is what plaintiff alleges occurred here, so he has not alleged a violation of the applicable regulation. (A. 7, ¶ 19.) For these reasons, and the reasons set forth in Section I.A., the plaintiff's claim that he was not

paid in a timely manner (Count III) were properly dismissed. To the extent his claims for breach of contract (Count IV) and unjust enrichment (Count V) are similarly based on the failure to pay his wages in a timely manner, those counts were properly dismissed as well.

II. The Superior Court Properly Declined To Address Plaintiff's Argument That He Was Not Being Held In Accordance With Law.

In the Superior Court, Whyte conceded that the Commissioner of Correction "undoubtedly" and "undeniably" has authority to regulate wages for inmates. (A. 35, 43.) To circumvent this otherwise dispositive concession, Whyte argued in his opposition in Superior Court (A. 44), and continues to argue in this appeal, that he does not meet the definition of inmate because he and others are being held "contrary to Massachusetts law, not *in accordance* with it."

(Whyte's Brief at 15 (emphasis in original).) Whyte's complaint does not raise this issue, and in arguing it in his brief and in the Superior Court, he does not seek freedom from unlawful confinement, reassignment to a location where he and others could be lawfully

held, or damages for false imprisonment.⁶ Rather, he seeks only the minimum wage for his work while confined unlawfully.

The Superior Court properly declined to resolve this issue. (A. 188 n.4.) The legality of Whyte's custody was not raised in the complaint, is not a proper issue for this Court, and would likely require the ICE to be brought in as a party. Mass. R. Civ. P. 19. If the Court decides to address the issue, it should rule that Whyte is being held in accordance with law.

Whyte's complaint contains no allegation that there was anything unlawful about his detention during his immigration removal proceeding. The Superior Court properly decided the motion to dismiss based on the factual allegations in the existing complaint, taken as true -- not allegations that Whyte made for the first time in his opposition brief.

Furthermore, it would have been improper for Whyte to inject the legality of his detention into

⁶ This is particularly significant given that Whyte was in custody at the time he filed his complaint, and the complaint is purportedly on behalf of others who would similarly be unlawfully confined if his argument is correct.

this case through an amended complaint. A person who seeks to challenge the lawfulness of his detention must do so through the adjudication and appeals process applicable to that detention, not through a civil lawsuit. Cf. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) ("when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."). A ruling in Whyte's favor would have far broader implications than a single plaintiff, as in *Heck*, as it would necessarily imply that all ICE detainees held by the Suffolk County Sheriff's Department, as well as those held in other correctional facilities in other counties across Massachusetts, could not be lawfully held in those facilities. Such a broad ruling must be made in a direct challenge to the detainees' confinement, not as a collateral implication of a wage suit. See *Heck*, 512 U.S. at 486-87.

While it is true that Whyte was released following the conclusion of his immigration proceedings, (A. 161-184), that is not the same as a judicial determination that the act of holding him until the conclusion of those proceedings was unlawful. He was still lawfully held pending the conclusion of his immigration proceedings. 8 U.S.C. § 1226; A. 5, ¶ 7. Any challenge to Whyte's detention needed to be raised in his then-pending immigration proceedings, not in this case.

Further, because Whyte was in ICE custody (A. 5, ¶ 7), ICE is likely a necessary party to any claim that ICE detainees are being unlawfully detained. The remedy for such a claim would not be to release those detainees (or to treat them as employees), but rather to have ICE reassign them to a facility in which they could be lawfully detained. Because such a facility might be outside the Commonwealth and beyond this Court's jurisdiction, and because the United States has sovereign immunity and usually consents to be sued only in federal court, this Court might not have the authority necessary to resolve such a claim. Indeed,

the contract between ICE and the Sheriff⁷ anticipates these issues, and expressly states that ICE will ask the U.S. Attorney to defend any suit against the Sheriff challenging the legality of a detainee's incarceration, move to have the Sheriff dismissed, have ICE substituted as the proper defendant, or have the case removed to a court of proper jurisdiction. (A. 147.)

If the Court decides to reach this issue notwithstanding the problems identified above, it should rule that the record below does not support a conclusion that Whyte was being held contrary to law. Federal law permits Whyte to be detained pending immigration proceedings. 8 U.S.C. § 1226; A. 5, ¶ 7. Federal law authorizes contracts with state agencies to hold ICE detainees, 8 U.S.C. § 1357(g), and Massachusetts law encourages the county sheriffs to enter such contracts with the federal government. St. 2009, c. 61, § 12.

⁷ The contract is referenced in paragraph 7 of the Complaint. (A. 5.) It is not necessary for a document to be physically attached to the complaint in order for documents referenced in the complaint to be incorporated into a motion to dismiss, and attaching such a document does not convert the motion to one for summary judgment. *E.g., Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004).

While Whyte correctly notes that each county "shall" provide houses of correction for the safe keeping of "offenders . . . committed by the courts and magistrates of the Commonwealth or of the United States," G.L. c. 126, § 8, that statute does not state a restriction on the Sheriff's authority to house others as well. While Whyte claimed in the Superior Court that detainees may only be held in jails, not houses of correction (A. 44 & n.7), a sheriff may reassign inmates between jails and houses of correction within a county. G.L. c. 127, § 115. Although that statute by its terms does not apply to Suffolk County, in 1991 the legislature transferred control over the new Suffolk House of Correction from the Boston Penal Commission to the Sheriff, and the Sheriff gained the ability (like sheriffs in other counties) to freely assign inmates between the facilities. St. 1991, c. 138, § 1A, line item 8910-0030 and §§ 356-363.

The definition of inmates and prisoners is intended to broadly cover all persons lawfully held in custody in state and county correctional facilities. Like other inmates, Whyte was not free to leave, and his room and board were paid for by the Commonwealth

as long as he was held. While he remained in custody, until ICE reassigned him, released him, or, as happened here, he successfully petitioned a court for his release under the immigration laws, he was an inmate. He was not an employee.

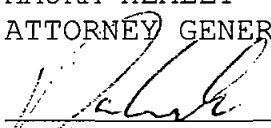
CONCLUSION

For the foregoing reasons the Court should affirm the Superior Court's decision dismissing the plaintiff's complaint.

SUFFOLK COUNTY SHERIFF'S DEPARTMENT
and COMMONWEALTH OF MASSACHUSETTS,

By their attorney,

MAURA HEALEY
ATTORNEY GENERAL

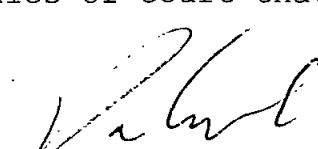


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September 28, 2016

Rule 16(k) Certification

I, Daniel G. Cromack, Assistant Attorney General, hereby certify, pursuant to Rule 16(k), that this brief complies with the rules of court that pertain to the filing of briefs.



Daniel G. Cromack
Assistant Attorney General

Affidavit of Service

I, Daniel G. Cromack, Assistant Attorney General, swear under the pains and penalties of perjury that I have this day, September 28, 2016, served two copies of the foregoing document upon counsel of record by mailing them postage pre-paid, to:

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