Compensation for *Per Diem* Court Interpreters: A Road Block at the Intersection of Employer Classification and Sovereign Immunity ©

by

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I. Introduction

On October 20, 2015, the Massachusetts Association of Court Interpreters (MACI) and others filed a class action complaint[1] in the Massachusetts Supreme Judicial Court (SJC)[2] on behalf of *per diem* language interpreters[3] against administrators of the Massachusetts Trial Court.[4] The complaint alleged that defendant administrators wrongly classified *per diem* interpreters as independent contractors despite the fact that they were providing the same services and were subject to the same standards of practice as staff interpreters.[5] As a result of the classification, the complaint stated that the defendants were unlawfully providing less pay to plaintiffs than that provided to staff interpreters and were also denying the requisite benefits.[6] In February, 2016, the SJC without comment transferred the case[7] to the Superior Court for Suffolk County. Plaintiffs filed an amended complaint in that court[8] that included the wrongful classification count and

[1] Mass. Ass'n of Ct. Interpreters, Inc. v. Spence, No. SJ-2015-0422 (Mass. Sup. Jud. Ct., Oct. 16, 2015). The Massachusetts Association of Court Interpreters is a non-profit corporation organized in November 2014 "to advocate for meaningful language access and equal justice to people of limited English proficiency ("LEP") and improved interpreter services available to courts of the Commonwealth. Its purposes include, advocating for fair and just pay and working conditions for all judicial interpreters, e.g., fair budgets, rate reviews, recognition, merit, seniority, and grievance procedures, as well as other conditions relating to employment by Massachusetts courts." Complaint at 1-2.

[2] The complaint was filed in the Supreme Judicial Court in the first instance pursuant to state statute, which provides, "The Supreme Judicial Court shall have general superintendence of all courts of inferior jurisdiction to prevent errors and abuses therein…for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration…." MASS. GEN. LAWS ch. 211, § 3 (2016).

[3] In addition to MACI, individual named plaintiff interpreters included Moussa Abboud, Soledad Gomes DeBarros, Anahit Flanagan, Norma V. Rosen-Mann, and Michael Lenz. Complaint *supra* note 1, at 4-6.

[4] Named defendants sued in their official capacities included Lewis H. (Harry) Spence, Administrator of the Massachusetts Trial Court and supervisor of the Office of Court Interpreter Services; Maria Fournier, Director of the Support Services Department of the Trial Court Office of Court Management and Coordinator of the Office of Court Interpreter Services; and Bruce Sawyer, Manager of the Fiscal Affairs Department of the Trial Court. *Id.* at 8-10.

[5] *Id.* at 2.

[6] *Id.* at 2. The denied benefits identified in the complaint include social security, vacation pay, state and federal tax deductions, and worker and unemployment compensation coverage. *Id.*

[7] Notice of Docket Entry, No. SJ-2015-0422 (Feb. 26, 2016).

[8] Mass. Ass'n of Ct. Interpreters, Inc. v. Spence, Civil Action No. 2016-0969 (Mass. Super. Ct., Mar. 23, 2016).

counts claiming violations of the federal Fair Labor Standards Act[9] and breach of contract,[10] among others.[11]

This legal action came against a backdrop of budgetary restrictions imposed on the Massachusetts judiciary[12] and burgeoning numbers of "limited English proficient" (LEP)[13] individuals in Massachusetts.[14] It also marked another chapter in the continuing struggle to clarify the distinction between employees and independent contractors as seen most recently in attempts to resolve the issue as it relates to Uber drivers in California, Texas, and elsewhere.[15] In defending against the suit, trial court administrators added a third element to this backdrop—governmental immunity. In their motion to dismiss MACI's amended complaint, the administrators argued that governmental immunity protected them from any liability flowing from the claim that the interpreters were misclassified.[16]

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[9] Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201, *et seq.* Amended Complaint, *supra* note 8, at 24-25.
[10] *Id*. at 25.
[11] *Id*. at 25-29. The other counts relate to: 29 C.F.R. § 785.35 (2016) (the federal regulation pursuant to FSLA); unjust enrichment, *quantum meruit*, and retaliation. *Id*.
[12] An overview of the state budget conducted by the Massachusetts judiciary highlighted the inadequacy of funding for the courts of the Commonwealth. For instance, the overview noted that for FY15, funding for the Trial Court accounted for only 2% of the overall State budget. It also noted that between FY08 and FY15, while funding for the non-judicial portion of the state budget rose by 37.3%, funding for the Trial Court rose by only 4.6%. These budgetary restrictions, the overview reported, resulted in a significant negative impact on Trial Court staffing resources. In fact, between FY08 and FY14, while non-judicial branch staffing levels rose by 4.9%, Trial Court staffing actually fell by 16.5%. JUSTICE IN THE BALANCE: BUDGET OVERVIEW FOR THE MASSACHUSETTS JUDICIARY (Mar. 25, 2015), http://www.mass.gov/courts/docs/budget/budget-overview-massachusetts-judiciary-032515.pdf.
[13] The federal Office for Civil Rights defines "limited English proficient" individuals as follows: "Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English may be LEP and may be eligible to receive language assistance with respect to the particular service, benefit, or encounter." *Definition of Limited English Proficient Individuals*, U.S. DEP'T HEALTH & HUMAN SERV., http://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/guidance-federal-financial-assistance-title-VI/index.html (last visited Apr. 14, 2017).
[14] *See infra* notes 24-25, and accompanying text.
[15] The employee-independent contractor issue raised in California has become a rather convoluted affair involving administrative and judicial hearings as well as an arbitration agreement, all of which is too complicated to explain here. At this point the 9th Circuit is considering an appeal from a district court order denying the Uber drivers' motion for preliminary approval of an arbitration agreement between the parties. O'Connor v. Uber Technologies, Inc., Case No. 15-cv-00262-EMC (N.D. Cal., Aug. 18, 2016), http://publications.cgdrblaw.com/wp-content/uploads/2016/09/Uber-Settlement-Denied.pdf.
[16] Defendants' Motion to Dismiss Plaintiffs' Amended Complaint at 5-9, Mass. Ass'n of Ct. Interpreters, Inc. v. Spence, No. 2016-0969 (Mass. Super. Ct., Mar. 23, 2016).

With the interpreters' suit as the pivot this paper reviews the discussion by the parties and the court regarding the employee-independent contractor divide and the implications for that divide posed by the concept of sovereign immunity. It also touches upon the issue of funding interpreter services generally and offers a glimpse at the funding issue in Massachusetts specifically, concluding that the matter of funding is one for the legislature to resolve.

II. The Amended Complaint

MACI's suit at base seeks to address what *per diem* interpreters in Massachusetts deem to be unequal and illegal treatment at the hands of state court administrators seeking to save money at their expense. The amended complaint identifies several practices of defendants, particularly those managing the Office of Court Interpreter Services (OCIS),[17] that violate the *Standards and Procedures of the Office of Court Interpreter Services* ("*Standards and Procedures*"),[18] which the complaint identifies as the contract of employment with OCIS for all Massachusetts interpreters.[19] These alleged violations include paying per diem interpreters, unlike staff interpreters, at an hourly rate rather than in half-day and whole day increments;[20] failing to provide timely reimbursements for expenses;[21] and failing to give *per diem* certified and

[17] The Office of Court Interpreter Services was established in 1986, with the enactment of MASS. GEN. LAWS ch. 221C (2016). As explained in the *Standards and Procedures of the Office of Court Interpreter Services* (*"Standards and Procedures"*), "The office administers the provision of all interpreter services to the Trial Court pursuant to G.L. c. 221C, § 7. It is responsible for the training, certification, assignment and supervision of spoken language court interpreters who provide interpretation services in court proceedings." STANDARDS AND PROCEDURES OF THE OFFICE OF COURT INTERPRETER SERVICES (2009) at § 2.14.

[18] A copy of OCIS *Standards and Procedures* can be found at http://www.mass.gov/courts/docs/ocis-standards-procedures.pdf.

[19] Amended Complaint, *supra* note 8, at 25.

[20] *Id.* at 2. The method for paying interpreters as identified in the *Standards and Procedures* requires that interpreters who arrive at court and interpret or are available to interpret for four hours be compensated on a half day rate of pay, and interpreters who interpret or are available to interpret for more than four hours be compensated on a full day rate of pay. There is no reference in these instances to pay being calculated on an hourly basis. STANDARDS AND PROCEDURES, *supra* note 17, at § 7.02

[21] Amended Complaint, *supra* note 8, at 19.

screened interpreters[22] priority in assignment over untrained interpreters and remote interpreter services as required by statute.[23]

In their complaint plaintiffs also emphasize the important role that they play in providing access to justice to the growing number of LEPs in Massachusetts. Plaintiffs point out that in 2012, the number of LEPs in Massachusetts was estimated to be approximately 559,000, having grown from 523,000 in the four years since 2008.[24] This increasingly large number of Massachusetts LEPs by 2014, had resulted by plaintiffs' count in approximately 87,000 in-court events that required the delivery of interpreter services.[25] As of the date of the complaint, to deliver these services OCIS employed only 27 staff interpreters as compared to approximately 180 *per diem* interpreters.[26] Yet, plaintiffs aver, of the $5.7 million budgeted in 2014 by OCIS for the provision of interpreter services, more than $1.9 million or one-third of the $5.7 million was allocated to the salaries of just the 24 staff interpreters employed at the time,[27] leading to the conclusion that the remainder of the allocation, $3.8 million, was paid for all other interpreter services provided by state courts including the salaries of all 180 *per diem* interpreters.[28]

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[22] *Id.* at 22. The *Standards and Procedures* clarifies the distinction among the various levels of interpreters. A Qualified interpreter is one who is qualified to interpret in the federal courts; a Certified interpreter is one who certified to interpret by the Massachusetts OCIS; and a Screened interpreter is one not certified, but who has met the minimum standards for interpreters and been screened by OCIS. STANDARDS AND PROCEDURES, *supra* note 17at § 2.00.

[23] The relevant statute states: "A non-English speaker, throughout a legal proceeding, shall have the right to the assistance of a qualified interpreter who shall be appointed by the judge, unless the judge finds that no qualified interpreter of the non-English speaker's language in reasonably available, in which event the non-English speaker shall have the right to a certified interpreter…." MASS. GEN. LAWS ch. 221C, *supra* note 17, at § 2.

[24] Amended Complaint, *supra* note 8, at 12. This growth in the number of LEPs in Massachusetts is reflective of the growth across the country. For instance, a study published by the Migration Policy Institute estimates that between 1990 and 2013, the LEP population in the United States grew from nearly 14 million to 25.1 million. Jie Zong and Jeanne Batalova, *The Limited English Proficient Population in the United States*, MIGRATION INFORMATION SOURCE (July 8, 2015), http://www.migrationpolicy.org/article/limited-english-proficientpopulation-united-states.

[25] Amended Complaint, *supra* note 8, at 12.

[26] *Id.* at 14.

[27] *Id.* at 21. The $1.9 million allocation provided staff interpreters on average with an annual salary of approximately $83,400. *Id.*

[28] Based on the figures provided by plaintiffs, the math would indicate that if *per diem* interpreters alone shared the remainder of the allocation, their average income would be slightly more than $21,000.

Buttressed by these statistics and the realities of their relationship with OCIS, plaintiffs argue that despite their classification as independent contractors, they are in fact employees entitled to the same levels of pay and benefits as are staff interpreters.

To demonstrate the importance of properly classifying workers and avoiding illegality, plaintiffs pointed to an Advisory issued by the Massachusetts Attorney General in 2008. The Advisory identified several underlying factors that require the proper classification of workers.[29] One factor speaks to the issue of fairness. The Advisory notes that "[e]ntities that misclassify individuals…deprive individuals of many of the protections and benefits, both public and private, that employees enjoy."[30] It identifies these as being unemployment insurance, workers' compensation, employer-provided health care, and fair wages.[31] Another factor references the state's loss of tax revenue from payroll taxes when employees are misclassified as independent contractors and the potential added costs to the state incurred for their health care.[32] A third cited by the Advisory maintains that misclassifying employees as independent contractors places employers who properly classify their workers at a competitive disadvantage against "those businesses who do not play by the rules."[33] Those rules are set out in the Massachusetts independent contractor statute.[34]

The statute specifies that for an individual to be classified as an independent contractor, he or she must meet all three criteria or prongs of the statute, i.e., 1) the individual must be free from control in performing the service rendered; 2) the service must be performed outside the usual

[29] ADV. ATT'Y GEN. FAIR LAB. DIV. 2008/1 (May 9, 2008), http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf
[30] *Id.* at 1.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] MASS. GEN. LAWS ch. 149, § 148B (2016).

course of the employer's business; and 3) the individual must perform his or her occupation independent of any single employer.[35] If any one prong is not met, the worker is an employee.[36] Arguably because *per diem* interpreters at a minimum seem to meet neither the first nor second prong, plaintiffs claim that the state's classification of them as independent contractors is illegal.[37]

The first prong of the independent contractor statute identifies "control" as a lead characteristic in the test to determine worker classification.[38] As noted by the Massachusetts Appeals Court in *Commonwealth v. Savage*, "Whether a person is an employee or an independent contractor involves, in the first instance, an inquiry into the right of the supposed employer to *control* the work activities of the employee (emphasis added)."[39] In assessing the

[35]The relevant subsection of §148B states: "(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." *Id.*

[36] In its interpretation of the independent contractor statute, the Massachusetts Supreme Judicial Court has stated: "M.G.L. c. 149 § 148B provides a standard for determining whether an individual performing services shall be deemed an employee or an independent contractor. The employer bears the burden of proof and, because the conditions are conjunctive, its failure to demonstrate any one of the criteria set forth…suffices to establish that the services in question constitute 'employment' within the meaning of the statute." Athol Daily News v. Bd. of Review of Employ't, 786 N.E.2d 365, 369-370 (Mass. 2003).

[37] Amended Complaint, *supra* note 8, at 22-24.

[38] The Attorney General's Advisory states, "The first prong of the test includes a determination of the employer's actual control and direction of the individual…. To be free from the employer's direction and control, a worker's activities and duties should actually be carried out with minimal instruction." ADV. ATT'Y GEN. FAIR LAB. DIV. 2008/1, *supra* note 29, at 3. Regarding the importance of control as a criterion in classifying the employer-worker relationship one commentator has observed, "The traditional common law test, which originated with the IRS, contains 20 different factors with primary emphasis on control." David Kistler, *Independent Contractor v. Employee: The Never Ending Battle*, 43 BUS. L. REV. 77, 80 (2010). Control is also a key element in the "economic reality" test. Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 184, 190 (2d Cir. 2003)(explaining that the economic reality test considers five factors that include the degree of control exercised by the employer over the worker, the worker's opportunity for profit or loss from the business, the degree of worker skill and independent initiative in carry out the work, the permanence and duration of the working relationship between employer and worked, and the extent to which the work is integral to the business of the employer).

[39] Commonwealth v. Savage, 31 Mass. App. 714, 717 (1991)(involving a claim by a real estate broker that she was an employee of a real estate company, but treated as an independent contractor for which her employer was

element of control the Appeals Court in *Savage* considered whether an employee made his or her own hours,[40] worked from a location separate from the employer's place of business,[41] was paid by commission,[42] and was unsupervised as to the manner of performing his or her task.[43] Arguing that OCIS maintained the requisite level of control to qualify *per diem* interpreters as employees, MACI's amended complaint avers that OCIS is the responsible state actor for scheduling and assigning court interpreters[44] and that OCIS exercises "control and direction" over *per diem* interpreters in their performance of their function.[45] Further the amended complaint asserts that *per diem* interpreters are considered "state employees under G.L. c. 268A, §1(q)" in that they are required to meet the same ethical standards as all other state employees.[46]

The amended complaint also alleges facts that seem to meet the second prong of the statute, i.e., that the services provided by *per diem* interpreters are not "outside the usual course of business"[47] of OCIS, but integral to it. For instance, the complaint specifies that "OCIS is specifically directed to provide interpreters for all criminal and civil matters coming before the

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criminally charged and convicted of violating the independent contractor statute; the conviction was overturned on appeal).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 718.

[44] Amended Complaint, *supra* note 8, at 20. For example, the *Standards and Procedures* in defining the role of OCIS states that OCIS "is responsible for training, certification, assignment, and supervision of spoken language interpreters who provide interpretation services in court proceedings." STANDARDS AND PROCEDURES, *supra* note 17, at § 2.14.

[45] Amended Complaint, *supra* note 8, at 23. For example, the *Standards and Procedures* in describing the duties of staff interpreters states: "Besides interpreting, the Staff Interpreter's duties include overseeing per diem court interpreters assigned to his or her court on a daily basis and directing such per diem court interpreters to other courts as needed." STANDARDS AND PROCEDURES, *supra* note 17, at § 2.21.

[46] Amended Complaint, *supra* note 8, at 14. M.G.L. Chapter 268A specifies the ethical obligations of state employees in the conduct of their responsibilities. The chapter, using a broad description, defines "employees" for ethical purposes as follows: "'State employee', a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council…." MASS. GEN. LAWS ch. 268A, § 1(q) (2016).

[47] MASS. GEN. LAWS ch. 149, § 148B, *supra* note 34, at § 148 (a)(2).

courts" whenever LEPs are involved,[48] that OCIS is "the sole accredited authority" for maintaining the list of interpreters that provide these interpreter services,[49] that OCIS relies on approximately 180 *per diem* interpreters because the 27 staff interpreters are "nowhere near what is needed by the court system it is charged to serve,"[50] and that "[a]t present *per diem* court interpreters are providing more than half of all the court interpreter workload…."[51] Assuming *arguendo* the accuracy of plaintiffs' numbers, it would be hard to claim that OCIS could function without employing *per diem* interpreters, and in view of the significant proportion of OCIS's workload carried by *per diem* interpreters, it is equally hard to argue that *per diem* interpreters provide a service that is outside the usual course of OCIS's business.

To assist in understanding the meaning and application of "outside the usual course of business," the Attorney General's Advisory provides the following examples as guidance:[52]

> A drywall company classifies an individual who is installing drywall as an independent contractor. This would be a violation of prong two because the individual installing drywall is performing an essential part of the employer's business.
>
> A company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor. This would be a violation of prong two because the appraiser is performing an essential part of the appraisal company's business.
>
> An accounting firm hires an individual to move office furniture. Prong two is not applicable (although prongs one and three may be) because the moving of furniture is incidental and not necessary to the accounting firm's business.

Applying this guidance to the interpreters' claim, it would seem difficult indeed to argue that *per diem* interpreters operate "outside the usual course of business" of OCIS, the office tasked with

[48] Amended Complaint, *supra* note 8, at 11.
[49] *Id.* at 12.
[50] *Id.* at 14.
[51] *Id.* at 19.
[52] ADV. ATT'Y GEN. FAIR LAB. DIV. 2008/1, *supra* note 29, at 6.

the responsibility of providing court interpreters, when they carry the bulk of court interpreter assignments.[53]

All of the foregoing presents a strong basis of support for MACI's argument that *per diem* interpreters are employees and not independent contractors. This argument was not lost on defendant administrators, however, in filing their motion to dismiss the amended complaint, for rather than attacking plaintiffs' claim that *per diem* interpreters are employees, they argued instead that the court lacked subject matter jurisdiction on the issue of interpreter classification.[54] They based this argument on the doctrine of sovereign immunity.[55]

III. The Motion to Dismiss

As applied, the doctrine of sovereign immunity protects both the legislative and executive branches from unwarranted incursions by the judiciary. The United States Supreme Court recognized as much when it wrote that the purpose of immunity is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy…."[56] And while it is likely that an overly comprehensive application of sovereign immunity would, as noted by the Massachusetts Supreme Judicial Court, be "unjust and

[53] Elaborating on the guidance, the Attorney General cited a decision by the Illinois Supreme Court and indicates that that court's analysis regarding the "usual course of business" is useful as to how the Attorney General will undertake enforcement in Massachusetts. To clarify its approach to the meaning of "usual course of business," the Illinois court provided the following example: "…when one is in the business of selling a product, sales calls made by sales representatives are in the usual course of business because sales calls are necessary. When one is in the business of dispatching limousines, the services of chauffeurs are provided in the usual course of business because the act of driving is necessary to the business." Carpetland U.S.A.,Inc. v. Illinois Dept. of Employment Security, 776 N.E.2d 166, 186 (Ill. 2002). *Accord Ansoumana*, 255 F. Supp., at 191-192 ("The…defendants concede that they are engaged primarily in the business of providing delivery services to retail establishments and that plaintiffs perform the actual delivery work. Thus, plaintiffs' services constitute an integral part of the…defendants' business. It is clear, from the 'economic reality' and the totality of circumstances, that the delivery workers depend upon the…defendants for the opportunity to sell their labor and are not in any real sense in business for themselves.").
[54] Defendant's Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 16, at 4.
[55] *Id.* at 5-9.
[56] United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)(discussing whether a decision by the federal Civil Aeronautics Agency—the predecessor to the FAA—was a discretionary function immune from suit).

indefensible as a matter of logic and sound public policy,"[57] that court also recognized the need to protect the discretionary functions of government officials from untoward interference and to shield public treasuries from unlimited liability that could result from litigation.[58]

Relying on this judicial inclination to limit open-ended governmental liability, defendant administrators filed their motion to dismiss MACI's amended complaint. They argued that for the state to be liable to plaintiff interpreters under the independent contractor statute, the statute itself would have had to have provided a waiver of the state's immunity.[59] Viewing the statute on its face, they argued, there was no language to indicate that the legislature intended it to do so.[60] In support, defendant administrators cited a 2015 Massachusetts Superior Court decision, *Jergensen v. Massachusetts Historical Commission*,[61] which ruled that the intent of the statute was to provide a right of action only against nongovernmental entities.[62] There is no expressed similar right, they argued, for state employees to proceed against the Commonwealth. Defendants argued further that any claim by the interpreters that they were entitled to relief

[57] Fernald Corp. v. The Governor, 31 N.E. 3d 47, 51 (Mass. 2015)(rejecting a claim of sovereign immunity in a matter involving a land dispute between a private charitable corporation and the Commonwealth).
[58] *Id.* These public policy considerations underlying governmental immunity have been recognized by other courts as well as Massachusetts. For instance, the Colorado Supreme Court has stated that immunity guards against the disruption of public services, shields the taxpayer from the excessive financial burdens that might result from innumerable tortuous claims against the state, and protects public employees so that they are not discouraged from providing the services expected of them in carrying out their public duties. Swieckowski v. City of Ft. Collins, 934 P.2d 1380, 1387 (Colo. 1997)(involving a suit brought against a governmental entity by a bicyclist injured of a public roadway).
[59] Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 16, at 5.
[60] *Id.* Further of note, citing Massachusetts precedent the motion argued that plaintiffs' suit against defendants in their official capacities is treated as a suit against the Commonwealth for the purposes of immunity. *Id.* O'Malley v. Sheriff of Worcester County, 612 N.E.2d 641, 648 (Mass. 1993)("Thus, the rule, properly stated, is that State officials may be held personally liable for damages because of actions taken in their official capacities only if they are sued in their individual capacities.")
[61] Jergensen v. Mass. Hist. Comm'n, 2015 WL 3422114 (Mass. Super. May 14,2015)(denying the Commonwealth's motion to dismiss on the grounds of sovereign immunity on the finding that immunity had been waived). Jergensen, although not an appellate decision, was relied upon as precedent because as noted by the MACI court, "…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…." Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint at 4, Mass. Ass'n of Ct. Interpreters, Inc. v. Spence, No. 2016-0969 (Mass. Super. Ct., Mar. 23, 2016),
[62] Jergensen, 2015 WL 3422114, *4.

under the Massachusetts Wage Act,[63] a companion to the independent contractor statute, should likewise fail. The Wage Act, which does provide a waiver of governmental immunity, specifies that the waiver applies to suits against the Commonwealth brought by its "mechanic[s], workm[e]n, and laborer[s]" and those employed in state "penal and charitable institution[s]."[64] Defendants asserted that because interpreters do not fit any of these categories, an assertion with which the interpreters themselves agreed,[65] their claims are barred by sovereign immunity.

IV. The Order

In ruling on the motion to dismiss as it related to plaintiffs' claim that they were employees, the court agreed with defendants that the claim was barred.[66] Confirming that the independent contractor statute did not waive immunity by express language, the court held that the statute also did not do so by implication.[67] It accepted defendants' argument that references to a private right of action against the state available to mechanics, workmen, and laborers, and those state employees at penal and charitable institutions under the Massachusetts Wage Act,[68] did not imply a similar right to interpreters under the independent contractor statute.[69] The court adopted the *Jergensen* court's assessment that the category of employees under § 148 (mechanics, workmen, laborers, and state employees at penal and charitable institutions) was a narrow one

[63] MASS. GEN. LAWS ch. 149, § 148 (2016).
[64] *Id.* "Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him…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…." *Id.*
[65] Plaintiffs' Response to Defendant Motion to Dismiss at 3, Mass. Ass'n of Ct. Interpreters, Inc. v. Spence, No. 2016-0969 (Mass. Super. Ct., Mar. 23, 2016).
[66] Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 61, at 3.
[67] *Id*. at 4.
[68] MASS. GEN. LAWS ch. 149, § 148, *supra* note 63.
[69] Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 61, at 3-7.

that did not admit to the inclusion of other types of state employees, and it extended that assessment to limit any private cause of action brought against the state by those claiming injury under § 148B, the independent contractor statute.[70] Further buttressing its order, the court noted that the decision by court administrators to classify certain workers as independent contractors "would seem to be a discretionary function of the court."[71] Under Massachusetts precedent, the exercise of discretion by governmental administrators would in itself provide them with immunity from suit.[72] The Court concluded, therefore, "As the court cannot waive sovereign immunity in this case, the plaintiffs' claim for violation of G.L. c. 149, § 148B cannot stand."[73]

Conversely, however, the court did not altogether reject plaintiffs' claims. It denied the motion to dismiss the contract claim that defendants had breached *Standards and Procedures* § 7.02, regarding the rate of pay.[74] Specifically, the interpreters alleged that OCIS underpaid wages and was tardy both when it did pay them and when it provided mandated reimbursements for expenses.[75] Their underpayment claim was based on an alleged reinterpretation by OCIS of § 7.02 of the *Standards and Procedures* that changed the calculation for interpreter pay. The

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[70] *Id.* at 4-5.
[71] *Id.* at 6. Courts in Massachusetts and other states have generally agreed on what constitutes the "discretionary" function of government. *See, e.g.,* Whitney v. Worcester, 366 N.E.2d 1210, 1216 (Mass. 1977) ("We think that the appropriate dividing line 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."); King v. City of Seattle, 525 P.2d 228, 233 (Wash. 1974) ("…to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."); Hanson v. Vigo Cty. Bd. of Comm'rs, 659 N.E.2d 1123, 1125-1126 (Ind. App. 1996) ("Planning functions are discretionary and are therefore shielded by immunity, while operational functions are not. Planning functions involve the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices.").
[72] Fernald, 31 N.E.3d at 51.
[73] Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 61, at 7. Along with dismissing this count, the Court also dismissed counts relating to the Fair Labor Standards Act and its related federal regulation 29 C.F.R. § 785.35. *Id.* at 7. Also dismissed was the count based on retaliation. *Id.*
[74] *Id.* at 8. Plaintiffs' unjust enrichment and quantum meruit claims also survived. *Id* at 9.
[75] Amended Complaint, *supra* note 8, at 2.

reinterpretation resulted in paying *per diem* interpreters on an hourly basis rather than on a half-day or full-day basis as stipulated in the *Standards and Procedures*.[76] In denying the motion to dismiss the contract claim, the court stated that "plaintiffs have sufficiently alleged a violation of the Standards and Procedures…."[77]

V. Conclusion

As of this writing MACI's suit against the trial court defendants is in discovery awaiting trial on the surviving counts. For plaintiffs that trial and any potential appeal will resolve the dispute over their salary. The court action, however, will not resolve the much larger issue of funding interpreter services generally, neither in Massachusetts nor anywhere else. Yet funding of such services remains the significant factor in the quest to provide access to justice for LEPs. And while MACI's suit is based on the underlying claim that Massachusetts is not providing adequate funding for interpreter services, in fairness to the Commonwealth it should be noted that according to the National Center for Access to Justice at Fordham University, Massachusetts ranks higher in the overall provision of interpreter services than most other states.[78] In fact, with the exception of Hawaii and New Mexico, Massachusetts ranks highest in providing a whole range of interpreter services.[79]

Considering the nation as a whole, however, there does exist a disposition toward inadequate funding of interpreter services. This inadequacy was highlighted by González, Vásquez, and

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[76] *See supra* note 20, and accompanying text.
[77] Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 61, at 8.
[78] The National Center for Access to Justice ranks Massachusetts third after Hawaii and New Mexico among the 50 states in providing resources and support for LEPs in the judicial process. THE JUSTICE INDEX 2016, NAT'L CTR. FOR ACCESS TO JUST., http://justiceindex.org/2016-findings/language-access/ .
[79] The Justice Index measures state performance on the basis of 39 best practices criteria. These include, *inter alia*, whether states require the use of certified court interpreters, whether certification requires an official process, whether judges are trained to work with interpreters, whether courts require interpreters at clerks' counters, and whether states charge for interpreter services. *Id*.

Mikkelson in 2012 in their seminal work on court interpretation[80] and corroborated by another study published in 2009 by the Brennan Center for Justice at New York University.[81] It is clear that the provision of adequate interpreter services, whether in a state like Massachusetts that supports a comparatively higher level of service or in others that do not, remains a matter of funding that state legislatures must resolve, for the fundamental right of access to justice is at stake. In the meantime, Massachusetts *per diem* interpreters continue to press the issue of funding in court.

[80] ROSEANN DUEÑAS GONZÁLEZ, FUNDAMENTALS OF COURT INTERPRETATION: THEORY AND PRACTICE 221-222 (2012). Discussing the impact on LEPs of inadequate state funding of interpreter services, the authors state: "States often appear to be meeting the letter of the law by qualifying the greatest number of interpreters at the least expense possible, as opposed to working to ensure that their court interpreters truly possess the proficiency required to enable equal access to justice." *Id.* at 237.

[81] The Brennan Center study on language access in state courts authored by Laura Abel concluded that a number of states were shirking their responsibilities to provide access. Surveying 35 states, the study found that 46% failed to provide interpreters in all civil cases, 80% failed to guarantee that they would pay for the interpreters they provide, and 37% failed to require the use of credentialed interpreters. Laura Abel, *Language Access in State Courts*, BRENNAN CTR. FOR JUST. 1 (2009), https://www.brennancenter.org/sites/default/files/legacy/Justice/LanguageAccessinStateCourts.pdf. In discussing a state's legal obligation to fund interpreter services, the study recommended: "Courts should address shortages of qualified interpreters by compensating interpreters at a level sufficient to attract them. Some states and counties pay entry-level interpreters less than $15 an hour, or as little as $300 a week. Given that certified federal court interpreters receive $384 a day and uncertified federal interpreters earn $185 per day, and that the private sector pays interpreters at high rates too, the low levels of compensation prevailing in some states often make it difficult to attract qualified interpreters." *Id.* at 25.