No. 04-2330

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

RIVENDELL WOODS, INC., d/b/a RIVENDELL WOODS and RIVENDELL WOODS FAMILY CARE; LANDRAW-I, LLC; ANDREA WELLS JAMES, Individually; and RODNEY JAMES, Individually,

Appellees-Defendants.

On Appeal from the United States District Court
for the Western District of North Carolina

REPLY BRIEF FOR THE SECRETARY OF LABOR

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REPLY BRIEF FOR THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") replies to the Defendants' response brief as follows.

1. Defendants take issue with the Secretary's complaint for tracking the language of the Fair Labor Standards Act ("FLSA" or "Act"), and argue that the complaint[1] "provides no notice to Defendants of the basis for Plaintiff's claims and no

[1] Unless otherwise indicated, all references to the complaint are to the amended complaint.

notice of the grounds upon which such claims rest." (Brief of Defendants-Appellees ("Def. br.") p. 14). To the contrary, the Secretary's complaint clearly provides the Defendants with the requisite notice pursuant to Rule 8(a) of the Federal Rules of Civil Procedure. Under the FLSA, allegations that are framed in the language of the statute itself (e.g., allegations relating to employer status, coverage, and recordkeeping and overtime violations) necessarily provide the basis of such allegations. The Secretary drafted the complaint at issue here using the applicable FLSA language as the complaint's basic outline to ensure that all the legal elements of the claim were pled, and then supplied additional facts.

In particular, the complaint identifies the specific corporations and individual corporate officers responsible for the alleged violations (APP-38-39). In this regard, the complaint specifically refers to the definition of employer at 29 U.S.C. 203(d) ("any person acting directly or indirectly in the interest of an employer in relation to an employee"), and then states that Defendants "employ[ed] employees designated as 'Supervisors in Charge,'" and that "Defendants provide residential care to clients in homes controlled by Defendants." (App-40) (emphasis added). Thus, this part of the Secretary's complaint clearly alerts Defendants as to who is being alleged as employers and on what basis such allegations are being made.

The complaint further describes the precise type of coverage at issue -- an enterprise under 29 U.S.C. 203(r) ("related activities performed (either through unified operation or common control) . . . for a common business purpose") that "operates an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution," within the meaning of 29 U.S.C. 203(s)(1)(B) (APP-39-40). Moreover, additional details about the enterprise are provided in the complaint -- "that [e]mployees designated by Defendants as 'Supervisors in Charge' execute a 'lease' for such a home with Defendant Landraw-I, LLC, which requires that the home be operated as a residential care facility for the aged and disabled." (App-40). Again, notice pleading pursuant to Federal Rule of Civil Procedure 8(a) has been accomplished in regard to the issue of enterprise coverage.

Additionally, the complaint provides specific facts about which employees were allegedly underpaid in violation of the Act -- employees designated by Defendants as "Supervisors in Charge" who execute a "lease" with Defendant Landraw-I, LLC, which requires that the home be operated as a residential care facility for the aged and disabled (App-40).[2] And, the complaint

[2] Defendants continue incorrectly to argue that the complaint is defective because it fails to identify specific employees as part of a section 17 complaint, 29 U.S.C. 217, although at one point in their brief they seem to acknowledge the absence of a

also identifies the precise nature of the underpayment alleged. In this regard, the complaint first paraphrases the overtime provisions of the FLSA -- "Defendants repeatedly violated the provisions of §§ 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215(a)(2), by employing employees designated as 'Supervisors in Charge' in an enterprise engaged in commerce or in the production of goods for commerce, for workweeks[3] longer than 40 hours without compensating such employees for their employment in excess of such hours at rates not less than one and one-half times the regular rates at which they were employed." (APP-40). The complaint then provides additional facts: "[e]mployees designated by Defendants as 'Supervisors in Charge' worked in the residential care facility in excess of forty hours in a workweek. Defendants compensated the employees designated as 'Supervisors in Charge' based on a formula created by Defendants which did not compensate such employees at rates not less than

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requirement to name individual employees under section 17. Compare Def. br. p. 7 ("Plaintiff fails to indicate who these 'Supervisors in Charge' were or how many there were") with Def. br. p. 20 n.2 ("Accepting Plaintiff's argument that the alleged employees need not be named in a § 17 complaint will not save her complaint from dismissal pursuant to Rule 12(b)(6), given the complaint's overall failure to allege sufficient factual support.") (emphasis added).

[3] Hence, Defendants incorrectly claim that "it appears that Plaintiff is referring to a single workweek in which more than one 'Supervisor in Charge' worked overtime and was not paid at overtime rates." (Def. br. p. 7) (emphasis added).

one and one-half their regular rate for hours worked in excess of forty hours in a workweek, as required by the Act." (APP-40).[4] Once more, the alleged violation -- failure to pay required overtime compensation under the FLSA -- and the identity of those workers who allegedly were not paid such overtime compensation -- the Supervisors in Charge -- could not be more clear from the face of the complaint.

Similarly, with respect to the recordkeeping violations, the complaint first paraphrases the statute at 29 U.S.C. 211(c) (regarding the making, keeping, and preserving of records of persons employed and of those employees' wages and hours), and then states that, with respect to the employees designated as "Supervisors in Charge," the Defendants failed to maintain the following specific records:

> (1) Regular hourly rate of pay for any workweek in which overtime compensation is due,

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[4] Defendants criticize the Secretary for "fail[ing] to state what the regular rate of pay was and what formula was used to arrive at that regular rate." (Def. br. p. 7). This information goes beyond the requirements of notice pleading. Additionally, providing this information in the complaint would compromise the Secretary's ability to adjust back wage computations after more information is revealed during discovery and the trial process, particularly in a case such as this where the requisite records were not maintained by the employer. See Young v. City of Mount Ranier, 238 F.3d 567, 576 (4th Cir. 2001) ("'[W]hile notice pleading does not demand that a complaint expound the facts, a plaintiff who does so is bound by such exposition'") (quoting Bender v. Suburban Hospital, Inc., 159 F. 3d 186, 192 (4th Cir. 1998)).

(2) Hours worked each workday and total hours worked each workweek,

(3) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek,

(4) Total premium pay for overtime hours,

(5) Total wages paid each pay period,

(6) Date of payment and the pay period covered by payment.

(APP-41). The Defendants were thus on full notice of the deficiencies alleged by the Secretary as to their recordkeeping.

Finally, the complaint also identifies the time period during which the overtime and recordkeeping violations occurred -- "[s]ince May 1, 2000" (APP-40-41), and specifically identifies the time period for which the Secretary seeks relief -- "for the period since June 11, 2001." (APP-42).[5]

In sum, the Secretary's complaint identifies a specific category of employees who were working under the control of the Defendants at the Defendants' residential care enterprise, and

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[5] As discussed in the Secretary's opening brief, phrasing the time period of the violation in terms of "since [a certain date]" has been held sufficient by this Court. Hodgson v. Virginia Baptist Hospital, Inc., 482 F.2d 821, 822-24 (4th Cir. 1973). See also Sheffield v. Orius Corp., 211 F.R.D. 411, 415 (D. Or. 2002) ("In a claim for underpayment of wages [under the FLSA] it is not necessary for a plaintiff to plead individual dates for which wages were not paid. Such specifics are determined through the discovery process.") (citations omitted); Wheeler v. United States Postal Service, 120 F.R.D. 487, 488 (M.D. Pa. 1987) (it was unnecessary to provide the exact dates of the violations, since the "general time period" was alleged; specific dates can be obtained through discovery and is, in any event, "within defendant's knowledge").

identifies and explains the two provisions of the FLSA that were violated with respect to these employees, as well as the time period during which the violations occurred. As stated by the Supreme Court in Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002), quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), "'[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Here, the Secretary clearly has set forth an overtime claim and a recordkeeping claim, and she should be afforded the opportunity to prove each of them.

2. Defendants question the Secretary's reliance on Virginia Baptist Hospital, 482 F.2d at 822, because at issue in that case was a Federal Rule of Civil Procedure 12(e) motion for a more definite statement, rather than a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, which is at issue in the instant case (Def. br. pp. 21-22). However, a fortiori, if a complaint is sufficient to withstand a motion for a more definite statement, it is certainly sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. Since the Secretary's complaint in Virginia Baptist Hospital was found sufficient to withstand a motion for a more definite statement, the Secretary's similar complaint in the instant case is surely sufficient to withstand a motion to dismiss.

Defendants also label Virginia Baptist Hospital "dubious precedent" because it pre-dates Swierkiewicz (Def. br. pp. 22-23). However, Virginia Baptist Hospital and Swierkiewicz are consistent because both recognize that Rule 8(a) contains a simplified notice pleading standard. Indeed, Virginia Baptist Hospital is a seminal notice pleading case that has been cited post-Swierkiewicz. See Hilska v. Jones, 217 F.R.D. 16, 20-21 (D.D.C. 2003) (relying on Virginia Baptist Hospital together with Swierkiewicz); see also Farrell v. Pike, 342 F. Supp.2d 433, 438 (M.D.N.C. 2004) ("A complaint is sufficient if it identifies the specific sections of the Act which are at issue, along with the nature of the violations and the time period involved, and the plaintiff alleges that there is more than one employee.") (citations omitted).

3. Defendants argue that the Secretary's complaint does not pass muster under Swierkiewicz and more recent Fourth Circuit precedent (Def. br. pp. 12-17, 22-23). Defendants attempt to distinguish Swierkiewicz because the complaint at issue in that case, which was found to be sufficient, "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." (Def. br. p. 13). However, an overtime and recordkeeping complaint under the FLSA necessarily provides

notice in a different manner than a discrimination complaint; as explained supra, the Secretary, both by utilizing the language of the FLSA and by setting out essential facts, clearly made Defendants aware of what was being alleged. Defendants were fully apprised of the grounds of the coverage and employer status alleged, and of the violations of the FLSA with which they were being charged.

On the other hand, recent cases of this Court finding complaints insufficient are distinguishable. Thus, Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002), cert. denied, 539 U.S. 953 (2003), involved a complaint filed pursuant to the Sherman Act, 15 U.S.C. 1, 2, alleging a conspiracy between Microsoft and Compaq Computers, and between Microsoft and Dell Computers. This Court concluded that, in order to state a sufficient claim that Compaq's or Dell's individual agreements with Microsoft were likely to result in an anticompetitive effect under section 1, or show a conspiracy to monopolize under section 2, the plaintiff must allege facts demonstrating Compaq's or Dell's market power or share in the personal computer market. See Dickson, 309 F.3d at 211. In other words, the plaintiff must allege facts "which, if proven true," would show that Compaq and Dell's agreements with Microsoft would have an anticompetitive effect. Id. (emphasis added). The plaintiff, however, made it clear that it had no intention of

providing evidence regarding Compaq's or Dell's market power or share in the personal computer market. Id. at 207-08, 212-13. In the instant case, the Secretary has made the requisite allegations of coverage, employer status, and violations under the FLSA, by reference both to the statute and to specific facts. The Secretary intends to prove the allegations she has made; she requests only that she be given the opportunity to do so.

Bass v. DuPont de Nemours & Co., 324 F.3d 761 (4th Cir.), cert. denied, 540 U.S. 940 (2003), is an employment discrimination case in which this Court upheld dismissal of certain claims pursuant to Rule 12(b)(6).[6] This Court concluded that plaintiff's allegations regarding a hostile work environment based on gender, race, and age "merely tell a story of a workplace dispute regarding her reassignment and some perhaps callous behavior by her superiors. They do not describe the type of severe or pervasive gender, race, or age based activity necessary to state a hostile work environment claim." Bass, 324 F.3d at 765. With respect to Bass's conspiracy claims filed pursuant to 42 U.S.C. 1985(3) and state conspiracy law, this Court concluded that the allegations did not describe an

[6] Bass's claims under the Age Discrimination in Employment Act, 29 U.S.C. 621, and Equal Pay Act, 29 U.S.C. 206(d), were not the subject of the Rule 12(b)(6) dismissal. Bass, 324 F.3d at 764, 766.

injury to a legally protected interest. Id. at 765-66. In the instant case, by contrast, the Secretary's complaint clearly describes the requisite elements of an FLSA overtime and recordkeeping claim and, accordingly, describe a specific injury to the Secretary's legally-protected interests. Again, if the Secretary's allegations are proved, violations of the Act will be established.

Migdal v. Rowe Price-Fleming International, Inc., 248 F.3d 321, 331 (4th Cir. 2001), which involves a complaint for breach of fiduciary duty under section 36(b) of the Investment Company Act of 1940 ("ICA"), 15 U.S.C. 80a-35(b), is similarly distinguishable from the instant case. Although the plaintiffs in Migdal alleged that the defendants violated the ICA "because the fees the investment advisers received from the fund were so disproportionately large that they bore no reasonable relationship to the services rendered," this Court upheld the district court's Rule 12(b)(6) dismissal because the complaint "did not address in any way the relationship between the fees that the advisers received and the services which they provided in return," and "plaintiffs have alleged nothing to suggest that the investment advisers' fees are excessive." 248 F.3d at 326-27, 328.[7] This Court observed that "'[t]he presence [] of a few

[7] Additionally, this Court noted that "[t]he district court provided plaintiffs with three opportunities to allege something

conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint' cannot support the legal conclusion." Id. at 326 (quoting Young v. City of Mount Ranier, 238 F.3d 567, 577 (4th Cir. 2001)).[8] And, "'[a]lthough the pleading requirements of Rule 8(a) are very liberal, more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant.'" Id. (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1357 at 318 (2d ed. 1990)).

In the instant case, the facts alleged in the Secretary's complaint clearly support the legal conclusion propounded. The complaint alleges that the Supervisors in Charge were employed

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about the particular services offered by the funds' investment advisers," and plaintiffs failed to do so. Migdal, 248 F.3d at 328. The funds had underperformed, and this Court was concerned that allowing discovery without sufficient allegations about the advisers' services "would make it possible for other plaintiffs to state a claim in limitless actions filed under Section 36(b)." Id.

[8] Young involved a Fourteenth Amendment claim against law enforcement officers brought by parents whose son had died following arrest. The "very high standard" of "deliberate indifference" was at issue, which requires a showing that "defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." 238 F.3d at 575-76. The complaint failed to allege any such knowledge on the part of the officers. Rather, the complaint merely used terms such as "deliberate indifference," "malicious," "outrageous," and "wanton." Id. at 577.

by Defendants in residential care homes for workweeks longer than 40 hours, and that they were paid less than time and a half for working overtime hours. These facts support the legal conclusion that the Defendants violated the overtime provision of the FLSA in regard to a certain class of employees. 29 U.S.C. 207. The complaint also alleges the various ways in which the Defendants failed to maintain specific records, as required by the FLSA and the applicable regulations, with respect to the Supervisors in Charge. These detailed factual allegations support the legal conclusion that the Defendants violated the recordkeeping provisions of the FLSA concerning a specific category of employees. See 29 U.S.C. 211(c); 29 C.F.R. Part 516.

4. Finally, Defendants accuse the Secretary of "improperly influenc[ing] this Court's decision by attempting to show that Defendants had knowledge of certain facts that were not alleged in the complaint." (Def. br. p.3). Yet, at the same time, they seek dismissal of the complaint because it purportedly does not inform them of enough facts. However, as the Supreme Court stated in Conley v. Gibson:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the

> purpose of pleading is to facilitate a proper decision on the merits.[9]

355 U.S. 41, 48 (1957). In this case, the Defendants were provided substantial information during the investigation and litigation phases of the case -- prior to the filing of the amended complaint.[10] Additionally, the Defendants have control over much of the information that they claim is absent from the complaint. In any event, the complaint itself alleges with specificity which particular employers are at issue, which type of coverage applies, which specific category of employees is in question, and the specific FLSA violations at issue. Defendants were clearly able to file a responsive pleading to the allegations contained in the Secretary's complaint. Nothing more is needed to meet the requirements of notice pleading.

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[9] As noted in the Secretary's opening brief, courts disfavor dismissal or amendment of the complaint when the requested information is in the defendants' possession. (Secretary's brief pp. 33-34). See also, 2 James Wm. Moore, et al., Moore's Federal Practice §12.36[3] (3d ed. 2004); Wheeler v. United States Postal Service, 120 F.R.D. at 488.

[10] Contrary to the Defendants' assertion (Def. br. p. 4), the Wage and Hour Division explained to Defendants the basis for concluding that the Supervisors in Charge are Defendants' employees, and also provided Defendants with Wage Hour Publication 1297, entitled "Employment Relationship Under the Fair Labor Standards Act."

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's dismissal of the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following with respect to the foregoing Reply Brief for the Secretary of Labor:

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) (15 pages) as well as with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,282 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, with 10.5 characters per inch and Courier New 12 point type style.

3/16/05
DATE

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Reply Brief for the Secretary of Labor have been served to the following by overnight mail, postage prepaid, this 16th day of March 2005:

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