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

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

Statutes and Regulations:

PAGE

Miscellaneous:

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the Fair Labor Standards Act of 1938, as amended ("FLSA" or "Act"), 29 U.S.C. 201 et seq. The district court had jurisdiction over this action pursuant to section 17 of the FLSA, 29 U.S.C. 217, which provides the district courts with jurisdiction to restrain violations of the Act, including restraining the withholding of back wages due for minimum wage or overtime violations. Jurisdiction also was based on 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1345 (jurisdiction over suits commenced by an agency or officer of the United States).

On August 19, 2004, the district court judge issued a Memorandum and Order of Dismissal, dismissing the complaint filed by the Secretary of Labor ("Secretary") for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On October 14, 2004, the Secretary filed with the district court a timely Notice of Appeal of the court's August 19th Dismissal Order.

This Court has jurisdiction of this appeal under 28 U.S.C. 1291, giving the courts of appeals jurisdiction of appeals from all final decisions of the district courts.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the Secretary's amended FLSA complaint when such complaint, despite not listing individual employees, contained a short and plain statement of the claim in conformance with the notice pleading requirement of Federal Rule of Civil Procedure 8(a).[1]

STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings

On June 11, 2003, the Secretary filed a complaint pursuant to section 17 of the FLSA, 29 U.S.C. 217, seeking to enjoin the Defendants from violating sections 7, 11(c), 15(a)(2), and 15(a)(5) of the FLSA (29 U.S.C. 207, 211(c), 215(a)(2),

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

215(a)(5)) (overtime and recordkeeping provisions), and to restrain the Defendants from withholding unpaid overtime compensation (Joint Appendix "APP"-9-12). On September 12, 2003, the Defendants answered the complaint and moved to dismiss it pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that the complaint did not contain sufficient factual support, such as the employees' identities (APP-13-18). The Secretary filed an opposition to the motion to dismiss, arguing that the complaint met the requirements for notice pleading under Federal Rule of Civil Procedure 8(a) (APP-22-25).

On December 19, 2003, Magistrate Judge Max O. Cogburn, Jr. issued a memorandum recommending that Defendants' motion to dismiss be denied (APP 26-29). The Defendants objected to the Magistrate's Memorandum and Recommendation (APP-30-34). On May 6, 2004, District Court Judge Lacy H. Thornburg issued a Memorandum and Order denying the Defendants' motion to dismiss without prejudice, and providing the Secretary 15 days to amend her complaint (APP-35-37).

The Secretary filed an amended complaint on May 21, 2004, setting out in greater detail the overtime and recordkeeping violations alleged (APP-38-43). On June 4, 2004, the Defendants renewed their motion to dismiss, reiterating that the complaint failed to provide sufficient facts (APP-44-50). The Secretary

filed an opposition to Defendants' motion and argued that the amended complaint meets the notice pleading requirement of Federal Rule of Civil Procedure 8(a) (APP-168-178).

On August 19, 2004, the district court issued a Memorandum and Order of Dismissal of the Secretary's case for failure to state a claim upon which relief can be granted (without prejudice), pursuant to Federal Rule of Civil Procedure 12(b)(6) (APP-189-195).

The Secretary filed a timely Notice of Appeal on October 14, 2004 (APP-196-198).

B. Statement Of Facts

1. The Secretary's original complaint, in essence, alleged as follows: the district court has jurisdiction pursuant to section 17 of the FLSA, 29 U.S.C. 217, and 28 U.S.C. 1345; Defendants Rivendell Woods, Inc. ("Rivendell Woods") and Landraw I, LLC ("Landraw") are corporations doing business in Buncombe County, North Carolina; Defendants Andrea and Rodney James acted directly or indirectly in the interest of the corporations in relation to their employees, and therefore are employers within the meaning of section 3(d) of the Act, 29 U.S.C. 203(d); Defendants engaged in related activities performed either through unified operation or common control for a common business purpose, and thus constitute an enterprise within the meaning of section 3(r) of the Act, 29 U.S.C. 203(r); such enterprise

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, and thus constitutes an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1)(B) of the Act, 29 U.S.C. 203(s)(1)(B) (APP-9-11).

In two separate allegations, the Secretary's complaint stated that "since May 1, 2000," Defendants repeatedly violated the provisions of sections 7 and 15(a)(2) (overtime), as well as of sections 11(c), 15(a)(5), and 29 C.F.R. Part 516 (recordkeeping), by employing employees for more than 40 hours per workweek without compensating them for those additional hours at a rate not less than one and one-half times the regular rates at which they were employed, and by failing to make, keep, and preserve adequate and accurate records of the persons employed and of their hours and wages (APP-11). The complaint sought to enjoin the Defendants from violating the overtime and recordkeeping provisions of the Act, to restrain the withholding of payment of back wages for a period of two years prior to the filing of the complaint,[2] and to recover other appropriate relief, including interest on the back wages (APP-11-12).

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[2] The Secretary did not allege that Defendants' violations of the Act were willful. See 29 U.S.C. 255(a) (providing for a three-year statute of limitations for willful violations, and two years otherwise).

2. The Defendants answered the complaint and admitted that the two corporate Defendants do business in Buncombe County, North Carolina, and that the two individual Defendants are shareholders and corporate officers of Rivendell Woods (APP-14).[3] They further admitted that Landraw leases property to "independent contractors" who operate family care homes, and that such homes are engaged in the care of physically or mentally disabled persons (APP-14-15). The Defendants raised eight affirmative defenses to the complaint, and moved to dismiss it pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that the complaint failed to set forth any facts concerning the identities of the employees or job categories, and also that the Secretary "has misidentified independent contractors as employees." (APP-13-17).

3. The Secretary's Amended Complaint specified that the Defendants violated the overtime provisions of the Act with respect to employees designated as "Supervisors in Charge." (APP-40). The Secretary also added the following paragraphs regarding overtime:

> Defendants provide residential care to clients in homes controlled by Defendants. Employees designated by

[3] Defendants also admitted in response to the Secretary's first set of interrogatories that Andrea and Rodney James are managing members of Landraw, and that they have a 50% ownership interest in Rivendell Woods and Landraw (APP-103-05).

> 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.
>
> Employees 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 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)

With respect to the recordkeeping violations, the Secretary added the following paragraph:

> Defendants failed to make, keep and preserve such records, for each employee designated by Defendants as "Supervisor in Charge," including:
>
> (1) Regular hourly rate of pay for any workweek in which overtime compensation is due,
>
> (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).

4. The Defendants answered the amended complaint and admitted that Landraw "owns properties particularly suited to be operated as family care homes," and that it "leases such properties to individual lessees who independently operate family

care homes." (APP-46).[4] Additionally, it was admitted by Defendants that "the Lease Agreements entered into between Defendant Landraw-I, LLC and the individual lessees provides that such properties shall be used as family care homes and not for other purposes without the permission of the lessor, Defendant Landraw-I, LLC." (APP-46).[5] The Defendants raised 11 affirmative defenses to the amended complaint, including a statute of limitations defense (APP-46-48). They also renewed their motion to dismiss, in which they reiterated the arguments made in their initial motion and stated that the complaint failed to state sufficient facts as to enterprise coverage; that the complaint did not set forth an employment relationship or identify specific employees; and that the complaint failed to allege workweeks for which back wages were claimed (APP-44-45).

5. During both the investigation and litigation stages of this proceeding, the Secretary provided the Defendants and their counsel with considerable information concerning the case.[6] Well

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[4] Defendants also had admitted in discovery that Rivendell Woods actually employed two "Supervisors in Charge." (APP-107,140-41,147,149-50).

[5] Defendants further admitted in the course of discovery that Rivendell Woods, under the terms of a contract, supplied transportation to clients of Landraw's "lessees," i.e., the residents of the residential care homes (APP-108-09).

[6] The Wage and Hour Division of the Department of Labor had conducted an investigation and found overtime and recordkeeping violations regarding individuals employed as "Supervisors in Charge" at the group homes. Back wages were computed for the

before the filing of the initial complaint, the Wage and Hour investigator and the investigator's supervisor held conferences with the Defendants in which the Defendants were advised of the Secretary's position that the individuals employed as Supervisors in Charge are employees under the FLSA (APP-59-60). The Secretary's counsel also discussed the investigation findings with Defendants' counsel prior to the filing of the initial complaint (APP-60,63). The Defendants were given Wage and Hour Form 56 ("Summary of Unpaid Wages"), which identifies the known employees, the workweeks during which violations occurred with respect to each employee, and the gross amount of back wages due each employee (APP-165, 184-85). To the extent that any names were not provided to the Defendants in Wage and Hour Form 56, it was because the Secretary did not have that information (APP-61, 162-63).

6. The parties also engaged in discovery well before the Defendants renewed their motion to dismiss (APP-5,44-167). The Secretary responded to Defendants' interrogatories and request for production of documents, explaining why she alleged overtime and recordkeeping violations.[7] The Defendants provided incomplete answers to the Secretary's discovery requests; the

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period of May 1, 2000 through May 6, 2002.

[7] The Secretary's responses, however, are not part of the record because they were not the subject of any dispute.

Secretary therefore filed a motion to compel discovery (APP-5,51-167).[8]

C. Decisions Below

1. The Magistrate's Decision

Magistrate Judge Cogburn, who had before him the Secretary's original complaint, recommended that Defendants' motion to dismiss be denied because Federal Rule of Civil Procedure 8 requires only notice pleading and complaints need not plead facts (APP 26-29). The magistrate judge stated that the Secretary's complaint identified the "time, place, and circumstances of the wrong, if not the precise employees to whom the wrong was done" (APP-28); thus, the allegations were "sufficient under Rule 8 to survive a motion to dismiss." Id.[9] To hold otherwise, the magistrate judge concluded, "would place too high a burden on Government agencies vested with the responsibility of enforcing our laws. That is, prior to bringing suit, the Government agency would not only have to identify the identity of the party

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[8] The Defendants objected and filed for a protective order (APP-6, 179-88).

[9] Magistrate Judge Cogburn specifically referred to Jackson v. Blue Dolphin Communications of N.C., 226 F. Supp.2d 785, 788-89 (W.D.N.C. 2002), where in the context of a Title VII and 42 U.S.C. 1981 case, Judge Thornburg stated that to survive a Rule 12(b)(6) motion "a complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if proven, will justify some form of relief." (Internal quotation marks omitted and emphases added.)

violating the laws, the specific violations occurring, and the general time and place of those violations, but without discovery, the agency would also have to know the identity of each and every person who suffered injury as a result of the alleged violations. Such specificity in pleading is not only not required by Rule 8, but would seriously hamper the Government's ability effectively to enforce its laws." (APP-28).

2. The District Court Decisions

a. On May 6, 2004, in its Memorandum and Order, the district court stated that the Secretary's original complaint "merely parrot[s] the legal standard" and "that after a five year investigation, the Secretary should be able to allege facts instead of conclusions." (APP-36-37) (internal quotation marks omitted). The court denied the Defendants' motion to dismiss, "without prejudice to renewal" if the Secretary "fails to cure the defective complaint" within 15 days (APP-37).

b. In its August 19, 2004 Memorandum and Order of Dismissal, which dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6) without prejudice, the district court criticized the Secretary for not filing a more detailed complaint (APP-189-195). The district court stated that "if anyone were able to do so, [the Secretary of Labor] should be able to properly draft a complaint alleging violations of the FLSA." (APP-193). The court found the "paucity of the allegations" even

more troubling since it had given the Secretary "an opportunity" to amend the complaint, and because the parties engaged in discovery for over a year (APP-193,195). In particular, the district court noted, the Secretary's motion to compel discovery included documents provided by Defendants disclosing the employees alleged not to have received overtime compensation, and these documents were provided three months prior to the filing of the amended complaint; yet, the complaint contained no reference to those individuals (APP-193-194). The court also stated that more specificity was needed because of the two-year statute of limitations -- "The Defendants, therefore, had a valid stake in obtaining greater specificity in the complaint." (APP-194).

The district court concluded that "it is virtually impossible for Defendants to prepare a defense" based on the current allegations (APP-194). Specifically, "[i]t is unclear whether the Plaintiff claims the various Defendants were related businesses, joint or common employers, a single enterprise, related enterprises, *etc.* These distinctions are important to a legal determination of whether, in fact, the FLSA even applies to the Defendants." (APP-194). The court cited cases involving leasing arrangements, and noted that in Hamilton v. Tulsa County Pub. Facilities, Auth., 85 F.3d 494 (10th Cir. 1996), the Tenth Circuit held that "the entity which leased its property to others did not operate a business by virtue of the lease arrangement."

(APP-194-195).

Finally, the district court concluded that the Secretary should have identified the "alleged 'Supervisors in Charge,' the dates of their employment, the extent of control held over these individuals by the Defendants, a copy of the actual lease agreements used, *etc.* The undersigned finds that the Plaintiff has been given every opportunity to make a case against the Defendants but has not done so." (APP-195) (emphasis added).

SUMMARY OF ARGUMENT

The Secretary's complaint should not have been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, because it meets the standard for notice pleading under Federal Rule of Civil Procedure 8(a) -- it contains "a short and plain statement of the grounds upon which the district court's jurisdiction depends," a "short and plain statement of the claim showing that the [Secretary] is entitled to relief," and "a demand for judgment for the relief" sought (APP-38-43). The Supreme Court recently reaffirmed that Rule 8(a) requires only "simplified notice pleading." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512-13 (2002). Such simplified notice pleading is appropriate because the parties may rely on "liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Id. at 512.

This Court interprets Swierkiewicz to mean that "a plaintiff is required to allege facts that support a claim for relief," see, e.g., Bass v. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir.), cert. denied, 540 U.S. 940 (2003). The Secretary's complaint in the instant case clearly alleges sufficient facts to withstand a Rule 12(b)(6) motion. Specifically, the Secretary, tracking the language of the FLSA, alleges both corporate and individual employer status as well as enterprise coverage, and specifies the overtime and recordkeeping violations. Furthermore, the complaint specifies the period for which the Secretary is actually seeking relief -- "for the period since June 11, 2001," which is two years prior to the date the complaint was filed, in accordance with 29 U.S.C. 255(a) (going back two years from the date of the complaint for nonwillful violations) (APP-40-42). Finally, although the individual employees are not named in the complaint, there is no requirement that employees be named in a section 17 FLSA complaint. Compare 29 U.S.C. 216(c) with 29 U.S.C. 217. See Equal Employment Opportunity Comm'n v. Gilbarco, Inc., 615 F.2d 985, 987 (4th Cir. 1980). Additionally, the complaint specifically identifies the employees in question as the Supervisors in Charge of the residential care facilities (APP-40-41). Defendants certainly knew, or should have known, precisely who these Supervisors in Charge were during the relevant period.

Significantly, this Court has applied flexible pleading standards to the filing of FLSA complaints alleging minimum wage, overtime, and recordkeeping violations. In the seminal case Hodgson v. Virginia Baptist Hospital, Inc., 482 F.2d 821 (4th Cir. 1973), which has been relied upon by various other courts, this Court vacated a district court's order requiring the Secretary to amend a complaint that was drafted in similar fashion to the complaint in this case. Specifically, this Court found the complaint sufficient because it "stated the jurisdictional grounds for the claim, identified the sections of the Act that the hospital allegedly violated, described the nature of the violations, specified the period of time in which they occurred, and notified the hospital of the relief the Secretary sought." Id. at 823-24. This Court also noted that since the amendment to the Federal Rules in 1948, most courts and leading commentators have agreed that "it is error to require the Secretary to augment his complaint by a more definite statement of the facts pertaining to the violations he has charged." Id. at 824.

In this case, the district court did not pay proper heed to the role of pleading under Rule 8(a), and thus improperly dismissed the case. The complaint clearly raises a cognizable claim under the FLSA that was "neither so vague nor so ambiguous," Virginia Baptist Hospital, 482 F.2d at 824, that

Defendants could not understand the claims against them.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE SECRETARY'S AMENDED COMPLAINT WHICH CONTAINS A SHORT AND PLAIN STATEMENT OF THE CLAIM ALLEGING OVERTIME AND RECORDKEEPING VIOLATIONS OF THE FLSA IN CONFORMANCE WITH THE NOTICE PLEADING REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE 8(a)

A. Standard Of Review

A dismissal by a district court pursuant to Federal Rule of Civil Procedure 12(b)(6) is subject to de novo review. See Franks v. Ross, 313 F.3d 184, 192 (4th Cir. 2002); Revene v. Charles County Commissioners, 882 F.2d 870, 872 (4th Cir. 1989). A complaint should not be dismissed pursuant to Rule 12(b)(6) "unless after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." De'Lonta v. Angelone, 330 F. 3d 630, 633 (4th Cir. 2003) (quoting Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)). See also Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (a 12(b)(6) motion to dismiss "tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses"), cert. denied sub nom. Hunt v. Republican Party of North Carolina, 510 U.S. 828 (1993). Thus, this Court should

review the district court's Rule 12(b)(6) dismissal in the instant case de novo, with the focus on the sufficiency of the complaint under Federal Rule of Civil Procedure 8(a).

B. The Secretary's Amended Complaint Meets The Notice Pleading Requirement Of Federal Rule Of Civil Procedure 8(a), And Therefore Should Have Survived Defendants' Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted.

1. Rule 8 of the Federal Rules of Civil Procedure sets forth the requirements for the drafting of a sufficient complaint:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a).

Recently, in Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), the Supreme Court reaffirmed that Rule 8 requires only "simplified notice pleading" for all civil actions, with limited exceptions such as complaints involving fraud or mistake. Id. at 512-13.[10] The Court explained that Rule 8(a) is the "starting

[10] Swierkiewicz involves the issue of whether an employment discrimination complaint filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., must contain specific facts establishing a prima facie case of discrimination in order to survive a motion to dismiss. The court concluded that it did not. Specifically, "Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to this termination, provided relevant dates, and included the ages and nationalities

point of a simplified pleading system," and quoted its holding in Conley v. Gibson, 355 U.S. 41, 47 (1957), that the complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Id. at 512, 514. The "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[11] Id. at 512. Moreover, "[t]he 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." Swierkiewicz, 534 U.S. at 514 (quoting Conley, 355 U.S. at 48).

This Court has interpreted Swierkiewicz to mean that,

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of at least some of the relevant persons involved with the termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. In addition, they state claims upon which relief could be granted under Title VII and the ADEA." Swierkiewicz, 534 U.S. at 514 (citations omitted).

[11] The Supreme Court also quoted 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990):

> The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.

Swierkiewicz, 534 U.S. at 513.

"[w]hile a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief." Bass v. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir.), cert. denied, 540 U.S. 940 (2003). Bass is an employment discrimination case (Title VII, Age Discrimination in Employment Act, and Equal Pay Act) in which the plaintiff alleged that she is "'an African American female who was consistently paid less than and consistently did not advance as fast as similarly situated white men,'" and that the employer engaged in various acts of harassment "'because of her race and sex,' and later 'age.'" 324 F.3d at 765 (citations omitted).

This Court found the complaint too conclusory to state a hostile work environment claim, because the plaintiff did not include facts to show that the harassment was based on her gender, race, or age, or that the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive atmosphere. Bass, 324 F.3d at 765. "Even viewed in the light most favorable to Bass, the facts she alleges 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 was required to plead facts in support

of her claim, and she had failed in that regard." Id. See also Dickson v. Microsoft Corp., 309 F.3d 193, 212-13 (4th Cir. 2002), cert. denied, 539 U.S. 953 (2003) (Sherman Act antitrust complaint dismissed because the plaintiff alleged that Microsoft's agreements with Compaq and Dell individually produced anticompetitive results, but did not allege any facts demonstrating that Compaq or Dell had a sufficient share of the personal computer market to affect competition); Iodice v. United States, 289 F.3d 270 (4th Cir. 2002) (third-party negligence claim dismissed because the plaintiffs failed to state facts supporting the requisite "tight nexus" between the health care provider's activities and the ultimate harm, although this Court also stated that that deficiency would have been rectified by an allegation that when the health care provider gave the patient narcotics, it knew or should have known that the patient was under the influence of alcohol or narcotics and would shortly thereafter drive an automobile). But see Cockerham v. Stokes County Board of Education, 302 F. Supp.2d 490, 495 (M.D.N.C. 2004) ("By continuing to apply a heightened pleading standard after Swierkiewicz, the Fourth Circuit is at odds with the Supreme Court's clear pronouncement that all elements of a prima facie case need not be supported with factual pleadings in order to survive a motion to dismiss."); Radbod v. Washington Suburban Sanitary Comm'n, No. Civ. JFM-03-309, 2003 WL 21805288, at *4 n.5

(D. Md. 2003) ("The Fourth Circuit's distinction between facts sufficient to prove a case as an evidentiary matter versus facts sufficient to support a claim for relief is unclear. While the Supreme Court suggested that courts should not consider the elements of a prima facie case, the Fourth Circuit seems to have done precisely that in affirming dismissal of a hostile work environment claim in Bass. Although it is unnecessary for me to reconcile this apparent discrepancy in order to resolve the current motion, there is an apparent tension between Bass and Swierkiewicz.").[12]

2. In this case, the Secretary's complaint meets the notice pleading requirements of Rule 8(a), as interpreted by the Supreme Court in Swierkiewicz, as well as by this Court in Bass and in other cases decided by this Court after Swierkiewicz. Unlike in a case involving causation, paraphrasing the language of the FLSA in the complaint filed in the present case (and the Secretary assuredly did more than that) essentially provides the requisite facts, i.e., those facts needed to provide necessary notice of the claim, short of proving one's entire case. Hence, it was unnecessary for the Secretary in the instant case to plead additional facts with regard to the allegations that Defendants are employers, that they constitute an enterprise, and that they

[12] Any unpublished decisions cited in the Secretary's brief will be included in an addendum to the brief. See Local Rules 36(c) and 28(b).

have violated the overtime and recordkeeping provisions of the Act.

Thus, the FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). The complaint, after specifically identifying the corporate defendants, uses almost this exact language in alleging individual employer status (APP-38-39). It further 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).[13] Requiring anything more to claim

[13] The district court found the complaint deficient, in part, because it did not explain the extent of control by Defendants over the Supervisors in Charge, nor did it include a copy of the lease agreements (APP-195). Whether there is an employment relationship under the Act is a largely fact-bound issue to be determined in substantial part by whether the individual is dependent on the business as matter of economic reality, which includes, importantly, the element of control; thus, rather than being fleshed out in the complaint, this analysis should form part of the trial or summary judgment papers. See Howard v. Malcolm, 852 F.2d 101, 104-05 (4th Cir. 1988) ("Under the . . . FLSA, a person is responsible as an employer of another where the work follows the usual path of the employee; and where, as a matter of economic reality, the employee is dependent upon that person for their livelihood.") (internal quotation marks omitted); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981-82 & n.5 (4th Cir. 1983) (economic reality test applicable to remedial statutes like the FLSA). Moreover, individuals working under a lease can be employees under the FLSA. See Donovan v. Williams Oil Co., 717 F.2d 503, 504-05 (10th Cir. 1983); Marshall v. Truman Arnold Distributing Co., Inc., 640 F.2d 906, 908-09 (8th Cir. 1981); Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1315 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

employer status goes beyond notice pleading.[14]

Similarly, the complaint, tracking the language of the FLSA at 29 U.S.C. 203(r), pleads alternatively as to why the Defendants form an "enterprise" -- they "engaged in related activities performed either through unified operation or common control for a common business purpose." (APP-39). Federal Rule of Civil Procedure Rule 8(e)(2) explicitly allows for alternative pleading. See United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 990-91 (4th Cir.), cert. denied, 454 U.S. 1054 (1981). The complaint also tracks the enterprise coverage provision of the FLSA at 29 U.S.C. 203(s)(1)(B) in regard to a named enterprise engaged in commerce, stating that "[s]uch enterprise 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." (APP-39-40).[15] Indeed, the

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[14] Cf. Fletcher v. Tidewater Builders Ass'n, Inc. 216 F.R.D. 584, 590-91 (E.D. Va. 2003) (plaintiff stated a claim under the Family and Medical Leave Act ("FMLA") by alleging that she is an "eligible employee" and that Defendant is an "employer" and "person" within the meaning of FMLA).

[15] Complaints setting forth much less in regard to coverage than that contained in the Secretary's complaint have been deemed sufficient. See Hoy v. Progress Pattern Co., 217 F.2d 701, 703 (6th Cir. 1954) (allegation that one was employed by the employer in the production of goods for interstate commerce deemed sufficient); Burton v. Zimmerman, 131 F.2d 377, 378-79 (4th Cir. 1942) (inappropriate to dismiss complaint on basis that the complaint alleged that individuals were "engaged in interstate commerce"); Farrell v. Pike, 342 F. Supp.2d 433, 439 (M.D.N.C. 2004) ("[B]are bones allegations are acceptable for 'enterprise' coverage."); Angulo v. The Levy Co., 568 F. Supp. 1209, 1215-16

complaint further specifies 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), thus again making clear that what was being alleged were violations committed by a named enterprise deemed by the Act to be an "'enterprise engaged in commerce or in the production of goods for commerce.'" 29 U.S.C. 203(s)(1) (quoting 29 U.S.C. 207(a)(1) (overtime provision)). The issue whether, ultimately, various entities form an enterprise under the Act is a complicated one that should be resolved through factfinding. See, e.g., Chao v. A-One Medical Services, Inc., 346 F.3d 908, 914-16 (9th Cir. 2003), cert. denied, 124 S. Ct. 2095 (2004); Reich v. Bay, Inc., BBI, Inc., 23 F.3d 110, 114-16 (5th Cir. 1994); Brock v. Hamad, 867 F.2d 804, 806-09 (4th Cir. 1989).

Also, the complaint is specific as to the violations alleged -- that Defendants, by employing employees designated as "Supervisors in Charge" in excess of 40 hours per workweek,

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(N.D. Ill. 1983) (allegation that employer "is involved in a business in interstate commerce," "while not as factually detailed as it might be, is sufficient to survive a motion to dismiss"), aff'd sub nom. Flores v. The Levy Co., 757 F.2d 806 (7th Cir. 1985). Cf. Dutton v. Cities Service Defense Corp., 197 F.2d 458, 459-60 (8th Cir. 1952) (sufficient to allege that plaintiffs were engaged in activities compensable under the Portal-to-Portal Act by virtue of a custom); Manosky v. Bethlehem-Hingham Shipyard, Inc., 177 F.2d 529, 533 (1st Cir. 1949) (unnecessary to allege express provision of contract or custom under Portal-to-Portal Act).

without paying them at a rate not less than time and one-half, violated the overtime requirements of the Act. The complaint identifies the provisions of the FLSA prohibiting such behavior -- 29 U.S.C. 207 and 215(a)(2) (APP-40). Additionally, the complaint sets out in detail a list of six legally required records that Defendants failed to keep. Again, the complaint specifies the recordkeeping provisions of the Act, as well as the relevant section of the regulations -- 29 U.S.C. 211(c), 215(a)(5), and 29 C.F.R. Part 516 (APP-41).

Furthermore, the language of the FLSA itself makes clear that individuals need not be named in a section 17 complaint. Compare 29 U.S.C. 216(c) ("In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action") with 29 U.S.C. 217 (allowing the Secretary to seek both prospective and restitutionary injunctions against the employer, with no requirement to name employees). See, e.g., Equal Employment Opportunity Commission v. Gilbarco, Inc., 615 F.2d 985, 987 (4th Cir. 1980) ("We believe that a

[section] 17 action is commenced for all purposes when the complaint is filed, regardless of whether the individuals are named in it."). See also cases cited infra, pp. 30-31. Of course, the Secretary made clear in her complaint that the employees in question were Supervisors in Charge; Defendants surely knew who these individuals were.

Finally, there was no lack of specificity in regard to the time period for which the Secretary was seeking back wages. The complaint alleges the existence of overtime and recordkeeping violations "[s]ince May 1, 2000." (APP-40,41). This phrasing was precisely the same used to allege violations in Hodgson v. Virginia Baptist Hospital, Inc., 482 F.2d 821, 822 (4th Cir. 1973), where this Court found the complaint to be sufficient. Moreover, the complaint here specifically seeks to enjoin Defendants from violating the overtime and recordkeeping provisions of the FLSA and from withholding back wages "for the period since June 11, 2001." (APP-41-42). The complaint was filed on June 11, 2003; thus, the Secretary is, in the absence of willful violations, appropriately going back two years from the date the complaint was filed. See 29 U.S.C. 255(a).[16] The complaint could not be any more specific on this point. Indeed,

[16] Each issuance of a pay check constitutes a new cause of action for statute of limitations purposes. See Knight v. Columbus, Ga., 19 F.3d 579, 581 (11th Cir.), cert. denied, 513 U.S. 929 (1994); Nealon v. Stone, 958 F.2d 584, 591 (4th Cir. 1992).

Defendants raised a statute of limitations defense, thereby indicating that they were aware of the period for which the Secretary was claiming back wages.

Therefore, the Secretary's amended complaint, in accordance with Federal Rule of Civil Procedure 8(a), clearly gave "fair notice" to Defendants of what was being claimed and what Defendants had to defend against. Swierkiewicz, 534 U.S. at 514.

3. This Court has permitted more flexible pleading in complaints filed under the FLSA, specifically in regard to claims alleging minimum wage, overtime, and recordkeeping violations. In Virginia Baptist Hospital, supra, a pre-Swierkiewicz case that was not cited by the district court below but has not been overturned, this Court vacated a district court's order requiring the Secretary to amend his complaint to include a more definite statement of the claim.[17] Significantly, the complaint was drafted in a similar fashion to the complaint in this case. It alleged that the hospital in question "had its place of business in the western district of Virginia"; "that it engaged in interstate commerce"; that the FLSA "conferred jurisdiction on the district court"; and that, "since September 15, 1968, the

[17] Federal Rule of Civil Procedure 12(e) allows a party to move for a more definite statement "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." The trial court has discretion in this matter. See Virginia Baptist Hospital, 482 F.2d at 824.

hospital had repeatedly violated the Act by failing to pay all its employees the minimum wage required by the Act, by paying wages that discriminated on the basis of the employee's sex, by employing persons for more than forty hours a week without paying them overtime rates, by failing to keep accurate records, and by employing oppressive child labor." The complaint "identified the sections of the Act that the hospital had allegedly violated, and it requested injunctive relief." Id. at 822.

The employer in Virginia Baptist Hospital had requested that the Secretary provide "the names of the employees paid less than the minimum wage" and, specifically, "the wages paid each of these employees; the jobs in which the hospital practiced sex discrimination, the employees in those jobs, and the wages paid to each employee; the names of the employees who did not receive overtime pay and the weeks in which these employees were entitled to overtime pay; the particular records that the hospital had failed to maintain as required by the Act; and the names of employees whose employment constituted oppressive child labor, the hours worked by each of these employees, and the particular manner in which their employment violated the Act." 482 F.2d at 822. The district court ordered the Secretary to provide the requested information. Id.

This Court, however, ruled that the district court "misconstrued the role of pleading under the Federal Rules of

Civil Procedure," and that the Secretary's complaint was sufficient under Rules 8 and 12(e). It stated that "[t]he complaint stated the jurisdictional grounds for the claim, identified the sections of the Act that the hospital had allegedly violated, described the nature of the violations, specified the period of time in which they occurred, and notified the hospital of the relief the Secretary sought." Virginia Baptist Hospital, 482 F.2d at 822, 823-24. This Court stated that the hospital in question was not without recourse; it could, pursuant to Rule 8(b), "plead that it lacked sufficient information to form a belief as to the truth of the allegations"; "establish by affidavit its compliance with the law and move for summary judgment under Rule 56"; or "use the discovery procedures" outlined in Federal Rules of Civil Procedure 26 to 37. Id. at 824.

Significantly, this Court in Virginia Baptist Hospital noted that, before the Federal Rules of Civil Procedure were amended in 1948, "district courts differed over whether defendants were entitled to have the Secretary's boiler plate Fair Labor Standards Act complaint amplified by allegations of the facts," but that since that time, most courts as well as leading commentators[18] have agreed that "it is error to require

[18] According to Wright and Miller, there are a number of factors that militate against requiring the government to amend a "blanket complaint." First, Rule 11 provides "some assurance of

the Secretary to augment his complaint by a more definite statement of the facts pertaining to the violations he has charged." 482 F.2d at 824. This Court concluded as follows:

> We do not hold that requiring a limited expansion of a complaint is never appropriate under Rule 12(e), for that is a matter generally left to the district court's discretion. But when the complaint conforms to Rule 8(a) and it is neither so vague nor so ambiguous that the defendant cannot reasonably be required to answer, the district court should deny a motion for a more definite statement and require the defendant to bring the case to issue by filing a response within the time provided by the rules. Prompt resort to discovery provides adequate means for ascertaining the facts without delay in maturing the case for trial.

Id.

Indeed, many courts have relied on Virginia Baptist Hospital to deny requests that the Secretary file a more detailed complaint. See, e.g., Marshall v. Quik-Trip Corp., 672 F.2d 801, 805 (10th Cir. 1982) (complaint need not name the employees for whom section 17 relief is sought); Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1204 (5th Cir. 1981) (same); Gilbarco, 615 F.2d at 999 n.21 (Murnaghan, J., concurring and dissenting in part) ("The adequacy of the [section 17] complaint under the

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the bona fides of the action." Second, "[t]he possibility of amendment coupled with the broad discovery procedures permitted by the federal rules create a strong incentive to gain access to the defendant's files to ascertain whether he or she should be charged with additional violations. Thus, the net result of granting a Rule 12(e) motion simply may be an increase in the time and effort expended by the litigants in refining the pleadings, with little accomplished in terms of circumscribing the scope of discovery or defining the issues." 5C C. Wright & A. Miller, Federal Practice & Procedure § 1376, pp. 316-19 (3d ed. 2004).

Federal Rules of Civil Procedure would not be brought into question by reason of failure to name the individual employees in the court papers."); Reich v. Great Lakes Collection Bureau, Inc., 176 F.R.D. 81, 84 (W.D. N.Y. 1997) (Secretary need not name employees in complaint brought pursuant to section 17); McLaughlin v. Racoon Mining Co., Inc., No. 2:87-0372, 1988 WL 156770, at *1, 2 (S.D. W.Va. 1988) (motion to dismiss boilerplate FLSA complaint denied); Donovan v. Abrams Bar B. Q. of Pinetops, Inc., No. 82-69-Civ-8, 1983 WL 2014, at *2 (E.D.N.C. 1983) (motion for a more definite statement regarding Secretary's boilerplate FLSA complaint denied); Donovan v. American Leader Newspapers, Inc., 524 F. Supp. 1144, 1146-47 (M.D. Fla. 1981) (same); Dunlop v. Oklahomans for Indian Opportunity, Inc., No. 75-0595-D, 1975 WL 275, at *1-2 (W.D. Okla. 1975) (same).[19]

[19] In Mitchell v. E-Z Way Towers, Inc. 269 F.2d 126, 129-33 (5th Cir. 1959), the Secretary refused to amend his complaint and the district court dismissed the case pursuant to Rule 12(b)(6). The Fifth Circuit reversed, concluding that it also was error to require the Secretary to amend the complaint for purposes of providing a more definite statement under Federal Rule of Civil Procedure 12(e). The employer had contended that the complaint failed to allege in "reasonable detail" the violations charged, and asked that the complaint be amended to include the specific weeks during which the violations occurred, employee names and the nature of their work, and in what respect recordkeeping was inadequate. In the words of the Fifth Circuit, "In view of the great liberality of F.R.Civ.P. 8, permitting notice pleading, it is clearly the policy of the Rules that Rule 12(e) should not be used to frustrate this policy by lightly requiring a plaintiff to amend his complaint which under Rule 8 is sufficient to withstand a motion to dismiss." E-Z Way Towers, 269 F.2d at 132. See also Shultz v. Clay Transfer Co., 50 F.R.D. 480, 481 (E.D.N.C. 1970) (relying on E-Z Way Towers, Inc., the district court stated that

4. In the instant case, the district court based its dismissal, in part, on Second Circuit precedent regarding the Equal Pay Act ("EPA"), 29 U.S.C. 206(d) (APP-191,195). For example, in Frasier v. General Electric Co., 930 F.2d 1004 (2d Cir. 1991), the court concluded that plaintiff's EPA claim was insufficient because she alleged only that she "was not receiving equal pay for equal work." Id. at 1007-08. See also Bass v. World Wrestling Federation Entertainment, Inc., 129 F. Supp.2d 491, 503 (E.D.N.Y. 2001) (plaintiff required to "elaborate facts" to support EPA claim); Rose v. Goldman, Sachs & Co., Inc., 163 F. Supp.2d 238, 242-44 (S.D.N.Y. 2001) (assertion that plaintiff and male employees of defendant received disparate wages for substantially equal jobs under similar working conditions found to be too conclusory).

However, these cases pre-date Swierkiewicz, and thus are dubious precedent in light of the fact that the Supreme Court in Swierkiewicz refused to uphold the dismissal of a discrimination complaint for lack of sufficient facts. And, as we have noted, an overtime claim is distinguishable from a claim of discrimination. For example, in Marshall v. ITT Continental

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"[a] complaint is sufficient to withstand a motion for a more definite statement if it gives notice sufficient to enable the parties to form a response. It is not to be used to assist in getting facts in preparation for trial as such; other rules relating to discovery, interrogatories and the like exist for such purposes").

Baking Co., Inc., No. 78 Civ. 3157-CSH, 1978 WL 1707 (S.D.N.Y. 1978), the district court denied a motion for a more definite statement regarding the Secretary's "standard form blanket [overtime] complaint." Id. at *1 (internal quotation marks omitted).[20] The court observed that, "[w]ere the complaint in this action to be viewed in isolation," it may have been inclined to grant the motion; the complaint did not provide specific information about the overtime violations (the defendant claimed that it had various complicated overtime pay arrangements in place), the defendant employed 29,000 people in at least 1500 different job classifications covered by 425 separate collective bargaining agreements, and payroll records were scattered at 682 locations throughout the country. Id. at *1. However, the Secretary's counsel submitted an affidavit stating that, prior to the filing of the complaint, the Secretary's representatives held discussions about the violations with the employer, and that after the complaint was filed, the Secretary's counsel spoke with employer's counsel and "reiterated the basis for the alleged [FLSA] violation." Id. at *2. Thus, "[d]efendant is fully appraised of the information it seeks to dislodge from plaintiff

[20] The court cited Virginia Baptist Hospital, 482 F.2d at 824, and stated that caselaw prior to the 1948 amendment of the Federal Rules of Civil Procedure generally disfavors the Secretary's blanket FLSA complaint, but that the majority of recent cases reach an opposite conclusion. See ITT Continental Baking Co., Inc., 1978 WL 1707, at *1 n.3.

on this motion [for a more definite statement]. If it did not know before, it now knows precisely which of its pay practices is at issue, the relevant collective bargaining agreement, the category of employees allegedly underpaid, and the locus of their employment. It is th[u]s in as good a position as any litigant to frame its responsive pleading." Id. In the instant case, the Secretary similarly provided the Defendants with information concerning the underlying claim, both prior to and after the filing of the complaint.[21]

[21] Indeed, courts disfavor dismissal or amendment when the requested information is in the defendants' possession. See, e.g., E-Z Way Towers, Inc., 269 F.2d at 132; DGM Investments, Inc. v. New York Futures Exchange, Inc., 265 F. Supp.2d 254, 264 (S.D.N.Y. 2003); Blizzard v. Dalton, 876 F. Supp. 95, 100 (E.D. Va. 1995); Shultz v. Manor House of Madison, Inc., 51 F.R.D. 16, 17-18 (W.D. Wis. 1970); Tobin v. David Witherspoon, Inc., 14 F.R.D. 148, 149 (E.D. Tenn. 1953).

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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STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests that oral argument be heard in this case which presents the question whether the Secretary's complaint under the FLSA was sufficient under Federal Rule of Civil Procedure 8(a) to withstand dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This issue is critical to the Secretary's ability to enforce the Act. Because of the importance of the issue, and the Secretary's unique knowledge of the enforcement process, the Secretary believes that oral argument would be helpful to this Court.

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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 Brief for the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,298 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.

1/18/05
DATE

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief for the Secretary of Labor has been served to the following by overnight mail, postage prepaid, this 18th day of January 2005:

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ADDENDUM

Westlaw.

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C
Only the Westlaw citation is currently available.

United States District Court,
D. Maryland.

Ebrahim RADBOD
v.
WASHINGTON SUBURBAN SANITARY COMMISSION

No. Civ. JFM-03-309.

July 14, 2003.

MEMORANDUM

MOTZ, J.

*1 Ebrahim Radbod has brought suit alleging that he suffered harassment and was denied promotions on the basis of his religion and/or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* Now pending before me is a motion for summary judgment on Count I and to dismiss Count II of Radbod's complaint. For the reasons stated below, I will grant in part and deny in part the motion.

I.

Radbod, who is of Iranian origin and is a practicing Muslim, was hired by Defendant Washington Suburban Sanitary Commission ("WSSC") on March 24, 1991 as a Facilities Inspector I. (Compl. ¶ 5.) In the summer of 1994, Radbod was promoted to the position of Facilities Inspector II. (*Id.* ¶ 7.) Radbod works as a facilities inspector within the Project Delivery Group. In November 2000, the Project Delivery Group leader, Dominic Tiburzi, requested and received authorization to fill two positions: Project Manager ("PM") and Associate Project Manager ("APM"). (*See* Def.'s Ex. 2, 3.)

At WSSC, vacancies are "posted" internally for one to two weeks so that they can be filled by current WSSC employees whenever possible. (*See* Glass Decl. ¶ 2, Def.'s Ex. 4.) The Human Resources Group is responsible for screening applicants to identify those who satisfy minimum eligibility criteria. Depending on how many interviews the hiring manager wishes to conduct, some or all of the eligible applicants are forwarded to the hiring manager for interviews. (*Id.* ¶ 4, 5.) The PM position was posted between November 6, 2000 and November 20, 2000. (*Id.* ¶ 7.) Radbod applied for the PM position. (Compl.¶ 10.) The APM job was posted between December 4, 2000 and December 18, 2000. (Glass Decl. ¶ 8, Def.'s Ex. 4.) Radbod, however, did not apply for the APM job. According to Radbod, he did not apply for the APM position because his supervisor, John Mitchell, advised him that it would hurt his chances of receiving the PM position. (Compl.¶ 10.)

In January 2001, interviews were conducted for the PM position, including an interview of Radbod. (Tiburzi Decl. ¶ 7, Def.'s Ex. 1 .) On January 19, 2001, John Maholtz was selected for the PM job. (*Id.* ¶ 11.) Radbod learned that he did not receive the promotion to PM on January 31, 2001. (Radbod Decl. ¶ 1.)

Interviews for the APM position were held in February 2001. (Tiburzi Decl. ¶ 12, Def.'s Ex. 1.) Radbod was not interviewed for the APM position because he did not apply for it. In March 2001, Alan Sauvageau was selected for the APM position effective April 1, 2001. (*Id.* ¶ 13, 14.) Another employee who interviewed for the APM position, Stan Dabeck, was considered highly qualified by the interviewers. Thus, Dabeck was also promoted to the position of APM effective April 1, 2001. (*Id.*) Radbod learned that he did not receive the APM position on March 8, 2001. (Radbod Decl. ¶ 2.)

Sometime in April or May of 2001, Radbod contacted William Kay, a Human Resources Group official at WSSC, and Sylvia Anderson, WSSC's Fair Practices Officer. (*Id.* ¶ 3.) Kay advised

Radbod that his office, along with Anderson's office, could address Radbod's discrimination complaints. (*Id.* ¶ 4.) In August 2001, Anderson sent Radbod a memorandum indicating that she determined he was not entitled to relief. (*Id.* ¶ 6.) Radbod sent Anderson an email objecting to her findings on August 31, 2001. (*Id.* ¶ 7.) On September 5, 2001, Anderson advised Radbod that she was investigating his claim. (*Id.* ¶ 8.) Radbod never heard from Anderson after September 5, 2001.

*2 According to Radbod, on or about December 1, 2001, he sent a charge to the Equal Employment Opportunity Commission ("EEOC"). (*Id.* ¶ 9.) On December 12, 2001 an EEOC supervisor sent Radbod a letter indicating that he needed to sign certain documents and return them to her office. (*Id.* ¶ 10.) Radbod signed the documents and returned them to the EEOC on December 21, 2001. (*Id.* ¶ 11.) Radbod was later informed that the EEOC did not work on his complaint until February 28, 2002 because the employee assigned to his case worked part-time from her home. (*Id.* ¶ 12 .)

Radbod allegedly also suffered incidents of harassment during his employment. According to Radbod, his supervisors repeatedly asked him to attend their church and to convert to their religion. (Compl.¶ 14B.) After the attacks on the World Trade Center and the Pentagon on September 11, 2001, Radbod was threatened by a WSSC contractor. (*Id.* ¶ 14D.) On another occasion, a WSSC contractor put Radbod in a dangerous position when he was not provided with adequate safety equipment. (*Id.* ¶ 14E.)

II.
A.

To assert a Title VII claim in federal court, a plaintiff must exhaust his administrative remedies by filing a timely charge with the EEOC. Under Title VII, a charging party must file an EEOC charge within either 180 or 300 days of the alleged unlawful employment practice, depending on whether the practice occurred in a "deferral state." 42 U.S.C. § 2000e-5(e)(1); *see Tinsley v. First Union Nat'l Bank,* 155 F.3d 435, 439 (4th Cir.1998) . A deferral state, such as Maryland, is one with "a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof." 42 U.S.C. § 2000e-5(e)(1); *see Tinsley,* 155 F.3d at 439. In a deferral state, the 300-day time period generally applies. *Tinsley,* 155 F.3d at 439.

Title VII, however, also requires a plaintiff in a deferral state to first file with the appropriate state or local agency and then wait 60 days before filing a charge with the EEOC. 42 U.S.C. § 2000e-5(c); *see Tinsley,* 155 F.3d at 439. Where a plaintiff in a deferral state fails to file a charge with the appropriate state or local agency, he is only entitled to the 180-day time period. *See Beall v. Abbott Labs.,* 130 F.3d 614, 620 & n. 5 (4th Cir.1997); *E.E.O.C. v. Techalloy Maryland, Inc.,* 894 F.2d 676, 677 (4th Cir.1990). It is undisputed that Radbod did not file a charge with a state or local agency. Accordingly, the 180-day time period applies to Radbod's claims.

Allegedly, Radbod sent an EEOC questionnaire to the EEOC on December 1, 2001. [FN1] Even assuming this date is accurate, [FN2] Radbod's failure to promote claims are untimely. The dates on which Radbod became aware that he was not promoted to the PM or APM positions, January 31, 2001 and March 8, 2001, are more than 180 days before he filed any papers with the EEOC--December 1, 2001. [FN3]

FN1. I am considering the motion one for summary judgment in regard to Count I even though discovery has not yet taken place. Defendant's motion was entitled "Defendant's motion for summary judgment on Count I and motion to dismiss Count II." Moreover, Plaintiff filed his own affidavit and exhibits with his opposition to defendants' motion.

FN2. A stamp on the questionnaire notes that it was "received" on February 28, 2002 at 5:34 P.M.

FN3. January 31, 2001 is more than 300 days before December 1, 2001. Thus, even if Radbod had filed his claim with the appropriate Maryland agency, his failure to promote claim in regard to the PM position would still be time-barred.

*3 Radbod argues that "the Defendant is estopped from raising the time limit" and that the time-period should be equitably tolled because defendant misled Radbod into believing that it was investigating his claims of discrimination and would act as his advocate. (Pl.'s Opp. at 2-3.) Courts strictly adhere to the time limits in Title VII and rarely allow equitable tolling of limitations periods. *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95-96 (1990) .

"Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." *C.M. English v. Pabst Brewing Co.,* 828 F .2d 1047, 1049 (4th Cir.1987). "To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." *Id.* Plaintiff has presented no evidence that Defendant concealed any information from him. Radbod possessed all of the facts necessary to file a charge with the EEOC relating to the failure of WSSC to promote him to the PM or APM positions. Accordingly, equitable tolling does not apply. *See, e.g., Talbot v. Mobil Corp.,* 46 F.Supp.2d 468, 472 (E.D.Va.1999).

"Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." *Id.* "The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." *Id.* Moreover, estoppel will not apply "absent some indication that the [employer's] promise was a quid-pro-quo for the employee's forbearance in filing a claim." *English v. Whitfield,* 858 F.2d 957, 963 (4th Cir.1988); *see also Talbot,* 46 F.Supp.2d at 473. Radbod has presented no evidence of intentional misconduct, let alone conduct that constituted a quid-pro-quo for Radbod's failure to file a timely charge. Accordingly, equitable estoppel also does not apply.

B.

Radbod's failure to promote to the APM position claim fails for an additional reason--he cannot establish a prima facie case of failure to promote. In order to establish a prima facie case of failure to promote, Radbod must show by a preponderance of the evidence that "(1) [he] is a member of a protected class; (2) there was an open position for which [he] applied or sought to apply; (3) [he] was qualified for the position; and (4)[he] was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans v. Techs. Applications Servs. Corp.,* 80 F.3d 954, 958 (4th Cir.1996). It is undisputed that Radbod did not apply for the APM position. Although Radbod argues, without providing any evidence, that he was advised by his supervisor that applying for the APM position would hurt his chances of receiving the PM position, such advice does not free Radbod from establishing the second element of a prima facie case. *See, e.g., Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 406 (5th Cir.1999). [FN4]

FN4. Radbod also argues that he did not have to apply for the second APM position given to Stan Dabeck because the position was not advertised. It is true that "where an employer maintains an informal promotion selection process in which promotion positions are not posted or announced, formal applications are not accepted, and department managers select an employee for promotion based on their skills, qualifications and current job responsibilities, it is unnecessary for Plaintiff to demonstrate that [he] applied for a specific promotion position in order to meet the second prong of her prima facie case." *Van Slyke v. Northrup Grumman Corp.,* 115 F.Supp.2d 587, 595 (D.Md.2000) (citing *Elguindy v. Commonwealth Edison Co.,* 903 F.Supp. 1260, 1267 (N.D.Ill.1995). In this instance, however, Dabeck, unlike Radbod, applied for the APM position. Moreover, there is no evidence that Radbod expressed any interest in the APM position to those selecting the new APM (unlike the plaintiffs in *Van Slyke* and *Elguindy*). Thus, even if Radbod could establish a prima facie case as to the second APM position, he would be unable

to establish pretext and his claim would fail.

III.

***4** Relying entirely on *Bass v. E.I. Dupont de Nemours & Co.,* 324 F.3d 761 (4th Cir.2003), WSSC argues that Radbod's harassment claim should be dismissed. In response, Radbod asserts that "[i]f necessary, Plaintiff can amend his complaint to allege the acts [of harassment] with more specificity." (Pl.'s Opp. at 4 n. 1.) Accordingly, I will grant Radbod leave to amend Count II of his complaint and state with more particularity "the repeated instances of discrimination and harassment" he was subjected to while working for WSSC. [FN5]

FN5. In *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506 (2002), the Court held that a plaintiff's complaint in an employment discrimination suit need not contain facts sufficient to establish a prima facie case. *Id.* at 511-12. Instead, an employment discrimination complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 512 (citing Fed.R.Civ.P. 8(a)(2)). In support of this holding, the Court noted that the prima facie case under *McDonnell Douglas* is an evidentiary standard, rather than a pleading requirement. *Id.* at 510. The Court also stated that requiring a plaintiff to state a prima facie case in his complaint would conflict with Fed.R.Civ.P. 8(a)(2) because Rule 8(a)(2) merely requires a short and plain statement that "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 512 (quoting *Conley v. Gibson,* 335 U.S. 41, 47 (1957)); *see also Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir.1998) (holding that the statement "I was turned down for a job because of my race" was sufficient to survive a motion to dismiss); *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1115 (D.C.Cir.2000) (agreeing with *Bennett).*

In *Bass,* the Fourth Circuit provided its interpretation of *Swierkiewicz* in the context of a hostile work environment claim:

In *Swierkiewicz v. Sorema,* the Court held that a complaint in an employment discrimination lawsuit need not allege specific facts establishing a prima facie case of discrimination. In other words, a plaintiff is not charged with "forecast[ing] evidence sufficient to prove an element" of her claim. Our circuit has not, however, interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim.... While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief. The words "hostile work environment" are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.

324 F.3d at 764-65 (emphasis in original). At apparent odds with *Swierkiewicz,* however, the Fourth Circuit proceeded to list the elements of a prima facie case and determine that the plaintiff had not "allege[d] facts sufficient to support at least the second and third elements of [a prima facie case of] her hostile work environment claim." *Id.* at 765.

The Fourth Circuit's distinction between facts sufficient to prove a case as an evidentiary matter versus facts sufficient to support a claim for relief is unclear. While the Supreme Court suggested that courts should not consider the elements of a prima facie case, the Fourth Circuit seems to have done precisely that in affirming dismissal of a hostile work environment claim in *Bass.* Although it is unnecessary for me to reconcile this apparent discrepancy in order to resolve the current motion, there is an apparent tension between *Bass* and *Swierkiewicz.* Therefore, it would be advisable for plaintiff to be as particular as reasonably possible when making his allegations in his amended complaint.

A separate order is being entered herewith.

ORDER

For the reasons stated in the accompanying memorandum, it is, this *14th* day of July 2003

ORDERED that

1. Defendant's motion for summary judgment on Count I and to dismiss Count II of the complaint is granted in part and denied in part;

2. Summary judgment is granted in favor of Defendant on Count I;

3. Count II is dismissed; and

4. Plaintiff is granted leave to amend Count II of his complaint and shall file such an amendment on or before July 29, 2003.

2003 WL 21805288 (D.Md.)

END OF DOCUMENT

1988 WL 156770
1988 WL 156770 (S.D.W.Va.), 111 Lab.Cas. P 35,174
(Cite as: 1988 WL 156770 (S.D.W.Va.))

United States District Court, S.D. West Virginia.

Ann McLAUGHLIN, Secretary of Labor, United States Department of Labor,
Plaintiff,
v.
RACOON MINING COMPANY, INC. et al.,
Defendants.

No. 2:87-0372.

Dec. 21, 1988.

[*Statement of Case*]

COPENHAVER, District Judge.

*1 This matter is before the court on the motion of the defendants, Danny Linville and Joseph Montgomery, to dismiss the civil action.

Plaintiff's predecessor as Secretary of Labor, William E. Brock, originally filed this action on April 15, 1987, to enjoin the defendants Racoon Mining Company, Inc., and its officers, co-owners Danny Linville, Harold Stacy, Sr., Harold Stacy, Jr., and Joseph Montgomery, from alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter, "FLSA"). Plaintiff alleged that defendants wrongfully withheld overtime compensation that was due and owing to several employees, in violation of §§ 7 and 15(a)(2) of FLSA, and demanded liquidated damages in the amount of back wages due, pursuant to § 16(c) of FLSA. On March 2, 1988, judgment by default was entered in favor of the plaintiff and against defendants Harold Stacy, Sr., Harold Stacy, Jr., and Racoon Mining Company. Danny Linville, president and original 25% owner of Racoon Mining, and Joseph Montgomery, secretary and original 25% owner of Racoon Mining, remain as defendants in the case at bar. The motion to dismiss of Linville and Montgomery (hereinafter, "defendants") was filed on June 18, 1987.

[*Factual Allegations*]

Defendants allege that plaintiff's complaint failed to comply with the procedure required by FLSA, 29 U.S.C. § 209, and Rule 8(a) of the Federal Rules of Civil Procedure. Defendants maintain that plaintiff's complaint fails to allege specific facts showing that the miners whose wages are the subject to this action were employees of Racoon Mining and that the defendants may for purposes of this action be regarded as their employers. In addition, defendants argue that plaintiff failed to specifically show the rate used in computing unpaid deficiencies of overtime compensation and when and to what extent the miners worked overtime.

Defendants' argument fails because they rely on cases adjudicated prior to the 1948 amendments to the Federal Rules of Civil Procedure. The Rules no longer require detailed facts in a complaint, but merely a short and plain statement of jurisdiction, a claim showing that plaintiff is entitled to relief, and a demand for judgment. Fed.R.Civ.P. 8(a). The Department of Labor's interpretation of this provision has consistently been upheld.

Before 1948, district courts differed over whether defendants were entitled to have the Secretary's boiler plate Fair Labor Standards Act complaint amplified by allegations of the facts. But since the amendment of Rule 12(e), this split of authority has largely disappeared. The only two courts of appeals that have considered the question have ruled that it is error to require the Secretary to augment his complaint by a more definite statement of the facts pertaining to the violations he has charged. The great majority of district courts have also accepted this interpretation of Rule 12(e), and the leading commentators agree that these decisions correctly implement the purpose of the rules.

*2 *Hodgson v. Virginia Baptist Hospital, Inc.*, [71 LC ¶ 32,919] 482 F.2d 821, 824 (4th Cir.1973) (footnotes omitted). In the case at bar, plaintiff's complaint properly cites federal jurisdiction, makes a claim where-upon they are entitled to relief, and

demands judgment. Clearly, plaintiff's complaint complies with the FLSA provisions as defined by the Federal Rules of Civil Procedure. As in *Hodgson,* the Secretary of Labor is not required to augment his complaint with further facts.

[*Employer Status*]

Defendants further allege that they were not employers, but were themselves employees and therefore they cannot be held liable for the miners' back wages. Defendants state that they neither employed the miners in their individual capacity, nor did they guarantee any debt which the company might owe to the miners.

However, § 3(d) of FLSA defines an employer as "any person acting directly or indirectly in the interests of an employer in relation to any employee." The United States Supreme Court has acknowledged FLSA's expansive sweep:

The term "employee" is defined in § 3(e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in § 13, and the term "employ" is defined in § 3(g) to include "to suffer or permit to work."

A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.

United States v. Rosenwasser, [9 LC ¶ 62,428] 323 U.S. 360, 362 (1944). The Court further noted that Congress had intentionally created a broad remedial statute; "Senator Black said on the floor of the Senate that the term 'employee' had been given 'the broadest definition that has ever been included in any one act.' " *Id.,* at 363, n. 3. In the same vein, the Supreme Court has recognized the broadness of the term "employer" within the statute:

[T]he statutory concept of "employer" is ... broad enough that there might be "several simultaneous 'employers.' " 444 F.2d, at 611-612. See also 324 F.Supp. 987, 992; *Wirtz v. Hebert,* 368 F.2d 139; *Mid-Continent Pipe Line Co. v. Hargrave,* 129 F.2d 655.

Brennan v. Arnheim & Neely, Inc., [70 LC ¶ 32,854] 410 U.S. 512, 520 n. 5. Thus, it was conceived under the Act that in a company such as Racoon Mining, there could be several individual employers as well as the corporate employer.

Furthermore, the Supreme Court has declared that management partnerships are employers under the terms of the Act:

In view of the expansiveness of the Act's definition of "employer" and the extent of D & F's managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition, an "employer" of the maintenance workers.

Folk v. Brennan, 414 U.S. 190, 195 (1973). In light of the Supreme Court's decision, federal courts have held that corporate officers with operational control over the corporation's enterprise can be held jointly and severally liable as employers under FLSA: "The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Donovan v. Agnew,* [98 LC ¶ 34,418] 712 F.2d 1508, 1511 (1st Cir.1983). Thus, for instance, the Eighth Circuit has held that a permanent injunction may be entered against an individual defendant where the defendant was:

***3** [N]ot merely the president and manager of Chambers Construction Company, "it is his creature an instrumentality by which he does business and operates in the contracting field. In reality, it is Mr. Chambers incorporated and, in practical effect, is subject to termination at his pleasure or option."

Chambers Construction Company v. Mitchell, [30 LC ¶ 70,017] 233 F.2d 717, 724 (8th Cir.1956). In that case, the court specifically held that the individual defendant was liable, based upon the lower court's findings that the individual:

[W]as engaged in the active management of the affairs of the corporation, although he was "shown not to have assumed any special obligation individually to pay the wages or salaries of Chambers Construction Company's employees and ... his dealings with those employees ... have been

conducted by him as president and general manager of the corporation and not personally."

Id. The record demonstrated nonetheless that "the supervisors and home office force were hired by him directly and the wages paid all employees were subject, in varying degrees, to his control." *Id.*

Moreover, federal courts have found corporate officers personally liable even where they lack any ownership interest in the corporation. For instance, the Fifth Circuit has held:

[W]e perceive the parameters of § 203(d) as sufficiently broad to encompass an individual who, though lacking a possessory interest in the "employer" corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees. Assuming *arguendo* that Alberding had no authority to direct Sabine's activities, he would remain accountable for violations of the FLSA if he independently exercised control over the work situation.

Donovan v. Sabine Irrigation Co., Inc., [96 LC ¶ 34,323] 695 F.2d 190, 194-95 (1983) (footnote omitted). The court concluded in *Donovan* that:

[N]either the Act nor jurisprudence designates stock ownership in a corporate employer as the *sine qua non* of employer status where other forms of control of the employment relationship have been proven. No one factor is dispositive; rather, it is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case.

Donovan, supra at 195.

The defendants each owned 25% of Racoon Mining Company and served as executive officers. [FN1] According to the complaint, both defendants "actively managed, supervised, and directed the business affairs and operations of said corporate defendant, and acted, directly and indirectly, in the interest of said corporate defendant in relation to its employees." Plaintiff's Complaint at pp 2-3. Defendants' motion to dismiss does not purport to deny these allegations but does acknowledge that Linville and Montgomery were corporate officers and shareholders. In defendants' accompanying brief, it is argued that they did not employ employees in their individual capacities. [FN2] Defendants' Memorandum in Support of Motion to Dismiss at 3. The mere fact that the miners were employed on behalf of the corporation rather than for and on behalf of the defendants individually is of no moment in determining whether the defendants are to be regarded as employers for FLSA purposes. The bare allegations of the complaint are sufficient for this purpose to defeat the motion to dismiss.

[*Sale of Shares*]

***4** Finally, defendants Linville and Montgomery argue that the sale of their shares of stock in the corporate defendant to their co-defendants Harold Stacy, Sr., and Harold Stacy, Jr., relieve them of back wage liability. From the language of these sales contracts, it is unclear at best whether the transfer of pre-existing liabilities was intended by the parties at the time of the sale, nor is there any evidence suggesting that the transfer of back wage liability was contemplated at the time of sale. Indeed, the contract of sale signed by defendants fails to reflect any agreement regarding the transfer of pre-existing liabilities in general, much less the transfer of back wage liabilities in particular. [FN3] Moreover, even if these sales contracts clearly manifested an intention to transfer back wage liability, the contract would appear to be void as contrary to public policy. In *Irby v. Davis,* [62 LC ¶ 32,315] 311 F.Supp. 577 (E.D.Ark.1970), for instance, the court concluded that an individual defendant, as well as the corporation he founded after plaintiffs left his employ, were jointly and severally liable. The court found that:

[T]he corporation assumed the assets and liabilities of defendant's sole proprietorship. In addition, the corporation and its predecessor are identical as a practical matter, as concrete finishing and related activities continue as the business of the corporation, and defendant continues to conduct the corporation's overall operations.

Id. at 583. It therefore concluded that "[u]nder these circumstances, defendant cannot avoid the consequences of his errors by the simple expedient

of creating another business structure." *Id.* As asserted by plaintiff here, the sale of fifty percent of the shares in a closely held corporation by two of the four owners to the other two owners is a somewhat analogous situation. Such a sale cannot be used to avoid liability. Defendants cannot avoid their pre-existing responsibilities under the applicable FLSA provisions by a private agreement.

FN1 Defendant Linville served as president and defendant Montgomery was secretary of Racoon Mining.

FN2 Defendants have not filed an answer to plaintiff's complaint.

FN3 Linville and Montgomery have acknowledged that they conducted negotiations with the Labor Department, whereby they orally agreed to repay back wages under an installment payment agreement. While this agreement was never formally executed, the first installment was paid by the individual defaulting co-defendants. While Linville and Montgomery argue that this proves that the Stacys assumed liability, defendants admit in their own affidavit that "[a]ll owners of Racoon Mining Company, Inc., were aware of this allegation, and acknowledged same by making a partial payment of the assessment to the United States Department of Labor." This payment was received by the Labor Department on July 21, 1986; Linville and Montgomery did not sell their Racoon Mining stock until September 18, 1986. Affidavit of Danny Linville at p. 1; Plaintiff's Response to Defendants' Supplement to Memorandum at pp. 4-5. Thus, there is no evidence to support the defendants' contention that the sale of their corporate ownership resulted in the transfer of liability.

1988 WL 156770 (S.D.W.Va.), 111 Lab.Cas. P 35,174

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1983 WL 2014
1983 WL 2014 (E.D.N.C.), 26 Wage & Hour Cas. (BNA) 283, 97 Lab.Cas. P 34,372
(Cite as: 1983 WL 2014 (E.D.N.C.))

C

United States District Court; E.D. North Carolina, Wilson Division.

Raymond J. Donovan, Secretary of Labor, United States Department of Labor, Plaintiff
v.
Abrams Bar B. Q. of Pinetops, Inc. et al., Defendants.

No. 82-69-CIV-8

April 29, 1983

FOX, D.J.

[*Statement of Case*]

*1 This is an action arising under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, (hereinafter, the Act). Plaintiff, the Secretary of Labor, seeks injunctive relief against defendants for alleged violations of the Act. 29 U.S.C. §§ 211 (a), 217. This case is before the court on defendants' motions to dismiss and for more definite statement to which plaintiff has responded, and on plaintiff's motion to strike demand for trial by jury to which defendants have not responded.

More specifically, plaintiff's complaint alleges that since July, 1979, defendants have repeatedly and willfully violated various provisions of the Act, in that: defendants have failed to pay certain employees wages at the minimum hourly rate, in violation of sections 6 and 15 (a)(2) of the Act, 29 U.S.C. §§ 206, 215 (a)(2); defendants have employed employees for work weeks longer than 40 hours without compensating such employees in the amount of the statutorily required overtime pay in violation of sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207, 215(a)(2); and defendants have failed to make, keep and preserve adequate and accurate records of the persons employed and of the wages, hours and other conditions and practices of employment maintained by them in violation of sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c), 215(a)(5), and the regulations at 29 C.F.R. 516.

I. Defendants' Motion to Dismiss

Defendants have moved to dismiss this action on two grounds: (1) it fails to state a claim, and (2) it is barred by the statute of limitations.

[*Adequacy of Claim*]

The court does not agree with the defendants' contention that plaintiff's complaint does not state a claim. A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. "*Conley v. Gibson,* [33 LC P 71,077] 355 U.S. 41, 45-46; 78 S.Ct. 99, 102; 2 L.Ed 2d 80 (1957). Plaintiff has alleged that defendants are subject to the Act and he has alleged violations of specific provisions thereof, proof of which would entitle plaintiff to relief. See *Mitchell v. E-Z Way Towers, Inc.,* [37 LC P 65,677] 269 F.2d 126, 130 (5th Cir. 1959).

[*Statute of Limitations*]

Further, this court does not agree that this action should be dismissed because it is barred by the statute of limitations. In cases arising under the Fair Labor Standards Act, the applicable statute of limitations is the Portal to Portal Act, 29 U.S.C. § 255. That section provides that a cause of action under the Act must be brought within two years after the cause of action accrued except that a "cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a).

Plaintiff's complaint seeks relief for *willful* violations of the Act occurring from July 1, 1979 to

present. Assuming that the alleged violations were willful, the Portal to Portal Act's three year statute of limitation is applicable. Furthermore, in response to defendants' motion to dismiss, plaintiff contends that on July 13, 1981, defendants executed a waiver of any and all rights which would be available to defendants by virtue of the applicable statute of limitation. Such a waiver by defendants and plaintiff's reliance thereon could estop defendants' statute of limitation defense. Cf. *Partlow v. Jewish Orphans' Home of Southern California, Inc.* ([91 LC P 34,014] 645 F.2d 757, 760 (9th Cir. 1981).

***2** It is not necessary to determine, however, the applicable statute of limitation or the validity of the alleged waiver of this defense, as the court finds that a dismissal of this case on grounds of the statute of limitations would be improper. The complaint alleges violations of the Act which began on July 1, 1979, and which have continued to occur at least through the date of the complaint. Because of the continuing nature of the violations alleged, any successful statute of limitation defense would not bar plaintiff's requested relief in its entirety; but would function only as a limitation on the remedy available. See *Hodgson v. Humphries* [67 LC P 32,627] 454 F.2d 1279, 1283-84 (10th Cir. 1972). *Mumbower v. Callicott,* [78 LC P 33,318] 526 F.2d 1183, 1187 n.5 (8th Cir. 1975).

For the above-stated reasons, defendants' motion to dismiss is denied.

II. Defendants' Motion for More Definite Statement

Under Rule 12(e) of the Federal Rules of Civil Procedure the court must determine whether the complaint is sufficient to require a response. If the court finds the complaint "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," the court must allow defendants' motion for more definite statement. However, the court does not find such vagueness or ambiguity in plaintiff's complaint. [FN*] The complaint states the jurisdictional grounds for the claim and it identifies specific sections of the Act that allegedly have been violated. It describes the nature of the violations, and it specifies the time period involved, and it requests specific relief. See *Hodgson v. Virginia Baptist Hospital,* [71 LC P 32,919] 482 F.2d 821, 823-24, (4th Cir. 1973). *Mitchell v. E-Z Way Towers,* 269 F.2d at 130. Discovery and other pretrial procedures established by the Rules of Civil Procedure will enable defendants to more precisely discern the basis of plaintiff's claim, and fashion their defense. See *Conley v. Gibson,* 355 U.S. at 47-48, 78 S.Ct. at 103. Therefore, defendants' motion for definite statement is DENIED.

FN* The court's judgment stands reinforced by defendants' having answered plaintiff's complaint.

III. Plaintiff's Motion to Strike Demand for Trial by Jury

Defendants have demanded a jury trial upon all triable issues in this case, and plaintiff has moved to strike this demand. Plaintiff's action pursuant to § 17 of the Act, 29 U.S.C. § 217, seeking to enjoin defendants from future violations of the Act and to compel defendants to disburse illegally-held back pay, is equitable in nature and, as such, does not entitle defendants to a jury trial. See *Paradise Valley Investigation and Patrol Services v. United States District Court, Arizona,* [77 LC P 33,286] 521 F. 2d 1342 (9th Cir. 1975); *Wirtz v. Jones,* [51 LC P 31,665] 340 F.2d 901 (5th Cir. 1965); *Marshall v. National Bank of Commerce,* [19 EPC P 9138] 465 F. Supp. 735 (S.D.W.Va. 1979). Therefore, plaintiff's motion to strike demand for trial by jury is allowed.

***3** So ordered.

1983 WL 2014 (E.D.N.C.), 26 Wage & Hour Cas. (BNA) 283, 97 Lab.Cas. P 34,372

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Westlaw.

Not Reported in F.Supp.
1978 WL 1707 (S.D.N.Y.), 23 Wage & Hour Cas. (BNA) 1163, 26 Fed.R.Serv.2d 887, 84 Lab.Cas. P 33,725
(Cite as: 1978 WL 1707 (S.D.N.Y.))

United States District Court; S.D. New York.

Ray Marshall, Secretary of Labor, Plaintiff,
v.
ITT Continental Baking Co., Inc., Defendant.

78 Civ. 3157-CSH

October 27, 1978

HAIGHT, D. J.

[*Statement of Case*]

*1 This motion for a more definite statement, brought by defendant under Fed.R.Civ.P. 12(e), raises the question whether the Secretary of Labor should be required to amplify the allegations of a standard form "blanket complaint" [FN1] in an injunctive proceeding to restrain violations of the overtime pay provisions of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. § 217.

> FN1 The term is borrowed from the Wright and Miller treatise on federal court practice, which describes a "blanket complaint" as one that "provide[[s] the absolute minimum of information necessary to state a claim within the pleading principles of Rule 8" of the Federal Rules of Civil Procedure. 5 Wright & Miller, *Federal Practice and Procedure: Civil § 1376* at 734 (1969). The term is perhaps best defined by illustration. *See* note 2, *infra.*

Defendant asserts that it employs some 29,000 persons, who are categorized by at least 1500 different job classifications and covered by 425 separate collective bargaining agreements fixing the terms and conditions of their employment. Payroll records for defendant's personnel assertedly are scattered throughout the country at some 682 locations. Given the size of its workforce and the complexity of its various overtime pay arrangements, defendant argues that the Secretary's complaint, the pertinent portion of which is set out in the margin, [FN2] is so vague that the defendant cannot reasonably frame a responsive pleading. Defendant seeks particularization of (1) the category of employees allegedly paid less than the statutory overtime rate, or alternatively, (2) the policies or practices of defendant which allegedly violate FLSA, so as to enable it to ascertain the substance of the Secretary's claim, identify its alleged misconduct, investigate the charge, and frame its answer.

> FN2 After reciting what are admittedly standard allegations as to subject matter and personal jurisdiction, the defendant's corporate capacity and business and FLSA applicability, the complaint states:
> VI
> Defendant repeatedly has violated, and is violating the provisions of sections 7 and 15 (a) (2) of the Act by employing many of their employees in an enterprise engaged in commerce for workweeks longer than forty (40) hours without compensating such employees for their employment in excess of forty (40) hours at rates not less than one and one-half times the regular rates at which they were employed.

Were the complaint in this action to be viewed in isolation, the Court, in the exercise of its discretion under these facts, might be inclined to rule in defendant's favor on this motion. [FN3] *Cf. Nagler v. Admiral Corp.,* 248 F.2d 319, 323 (2d Cir. 1957) (trial judge retains "some discretion . . . to require fuller disclosure in a particular case by more definite statement, F.R. 12(e) . . . ."). But such a course is unnecessary in view of the uncontested information supplied by plaintiff in response to this motion. [FN4]

> FN3 Rule 12(e) motions in response to FLSA "blanket complaints" are sufficiently commonplace to have merited separate

discussion in a leading treatise on federal court practice. *See* 5 Wright & Miller, *Federal Practice and Procedure: Civil § 1376* at 734-36. Early caselaw under the rule, as amended effective in 1948, provides some authority for the defendant's position, but the majority of recent cases disfavor granting a Rule 12(e) motion in the FLSA "blanket complaint" context. *Compare* cases granting the motion, *McComb v. Hardy,* [15 LC P 64,698] 8 F.R.D. 28 (E.D.Va. 1948); *McComb v. Solomon,* 16 CCH Labor Cases P 64,899 (E.D.N.Y. 1948); *cf. Cope v. Freyn Engineering Co.* (W.D. Pa. 1949) (FLSA suit brought by employees); *with* cases to the contrary, *e.g., Hodgson v. Virginia Baptist Hosp., Inc.,* [71 LC P 32,919] 482 F.2d 821 (4th Cir. 1973); *Mitchell v. E-Z Way Towers, Inc.,* [37 LC P 65,677] 269 F.2d 126 (5th Cir. 1959). Reported district court cases, the overwhelming majority of which have denied Rule 12(c) motions in FLSA suits, are collected at 2A Moore *Federal Practice* § 12.18 note 5 (1975 & Supp. 1977-78) and 5 Wright & Miller. *Federal Practice and Procedure Civil § 1376* note 35 (1969 & Supp. 1977). In what is apparently the only Second Circuit decision on point, the court, in an employees' FLSA suit, indicated that particularization of FLSA complaints should not be required. *Vecchia v. Fairchild Engine & Airplane Corp.,* [[15 LC P 64,886] 171 F.2d 610, 612 (2d Cir. 1948) (construing Rule 12(e) after amendment eliminating right to bill of particulars). It should be noted that none of the reported decisions appear to deal with a defendant whose employees are as numerous and complexly organized as are this defendant's. For the reasons discussed in text above, however, I need not buck the tide of recent judicial opinion and grant defendant's motion.

FN4 *See* Affidavit of John A. Hughes, attorney for plaintiff, submitted in opposition to defendant's motion for more definite statement.

[*Regular Rate Dispute*]

***2** It appears that a Department of Labor investigation at defendant's Jamaica, New York, plant revealed that during 1975 and 1976 defendant had failed to include certain $10 payments, made pursuant to a collective bargaining agreement, in its computation of the regular wages of employees covered by that agreement. Since statutory overtime compensation under FLSA is pegged to an employee's regular pay rate, *see* 29 U.S.C. § 207, the Secretary of Labor took the position that by reason of the non-inclusion defendant's payment of overtime wages to these employees was deficient and thus violative of FLSA. Discussions between representatives of plaintiff and defendant apparently explored the issue but failed to resolve the dispute over the proper computation of the regular pay rate for this discrete group of employees. The complaint at issue here was ultimately filed. In a subsequent telephone conversation with defendant's assistant general counsel, plaintiff's counsel reiterated the basis for the alleged FLSA violation that is the subject of this suit and apparently remineded defendant's counsel of the position the latter had taken in the earlier discussions: to wit, that the noninclusion of the $10 payments was proper.

As the foregoing makes clear, defendant is fully appraised of the information it seeks to dislodge from plaintiff on this motion. If it did not know before, it now knows precisely which of its pay practices is at issue, the relevant collective hargaining agreement, the category of employees allegedly underpaid, and the locus of their employment. It is this in as good a position as any litigant to frame its responsive pleading, or otherwise move, and is directed to do so forthwith. The motion is denied. [FN5]

FN5 The Secretary has successfully opposed this motion by specifying that precise conduct which underlies the claim. Equity requires that the Secretary be limited to such conduct at the trial. Accordingly, in the absence of any further notice or specification to defendant, the Secretary will be precluded at the trial from proving any alleged violations other than those referred to in the motion papers.

It is So Ordered.

1978 WL 1707 (S.D.N.Y.), 23 Wage & Hour Cas. (BNA) 1163, 26 Fed.R.Serv.2d 887, 84 Lab.Cas. P 33,725

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1975 WL 275 Page 1
1975 WL 275 (W.D.Okla.), 11 Fair Empl.Prac.Cas. (BNA) 1038, 22 Wage & Hour Cas. (BNA) 588, 10 Empl. Prac. Dec. P 10,575, 22 Fed.R.Serv.2d 777, 77 Lab.Cas. P 33,314
(Cite as: 1975 WL 275 (W.D.Okla.))

United States District Court; W.D. Oklahoma.

John T. Dunlop, Secretary of Labor, United States Department of Labor,
Plaintiff
v.
Oklahomans for Indian Opportunity, Inc. et al.,
Defendants

No. 75-0595-D

October 14, 1975

DAUGHERTY, D.J.

*1 This is a civil action for injunction brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act, 29 U.S.C. § 217. The Complaint charges Defendant with violations of Sections 6(d) and 15(a)(2) of the Fair Labor Standards Act, 29 U.S.C. § 206(d) and 215(a)(2), which prohibit sexual discrimination in the payment of wages. The Complaint further charges violations of Section 7 and 15(a)(2) of the Fair Labor Standards Act, 29 U.S.C. §§ 207 and 215(a)(2), which prohibits the employment of employees in an enterprise engaged in commerce, as is defined by the Act, for workweeks longer than forty hours without the payment of overtime compensation at rates not less than one and one-half times the rates at which they were employed. The Complaint also charges Defendant with violations of Sections 11(c) and 15(a)(5) of the Fair Labor Standards Act, 29 U.S.C. § 211(c) and 215(a)(5), in failing to make, keep, and preserve adequate and accurate records of the persons employed by it and of the wages, hours, and other conditions and practices of employment maintained by it. Plaintiff prays for a judgment enjoining the abovementioned violations of the Fair Labor Standards Act and an order restraining Defendant's withholding payment of minimum wages and overtime compensation found by the Court to be due and owing to any person as a result of any violations of the abovementioned acts by Defendant.

Defendants have filed a Motion for More Definite Statement and a Motion to Dismiss. Said Motions are supported by Briefs. Plaintiff has filed Responsive Briefs opposing said Motions. The Court rules on said Motions as follows:

Motion for More Definite Statement

Said Motion which is made pursuant to Rule 12(e), Federal Rules of Civil Procedure requests that Plaintiff be required to amend its Complaint to set forth the identity and sex of employees involved and the time, place and circumstances relating to the alleged violations.

Rule 12(e), *supra*, provides in part:

". . . If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading . . ."

Motion for More Definite Statement is to be granted only if the pleading is so vague that Plaintiff cannot be reasonably required to frame a responsive pleading, *Schaedler v. Reading Eagle Publication, Inc.*, 370 F.2d 795 (Third Cir. 1967); *Hodgson v. Orson E. Coe Pontiac, Inc.*, [67 LC P 32,592] 55 F.R.D. 133 (W.D. Mich. 1971). If the claim of Plaintiff in his Complaint is sufficiently definite to enable the Defendant to know what is charged, it is sufficiently definite to overcome the 12(e) Motion for the Defendant is reasonably able to respond, knowing whether or not it did the things charged. *Dennis v. Begley Drug Company of Tennessee, Inc.*, [69 LC P 32,802] 53 F.R.D. 608 (E.D. Tenn. 1971). The Motion may not be used as a substitute for the discovery and deposition procedures made available by the Federal Rules of Civil Procedure, *Mitchell v. E-Z Way Towers, Inc.*,

[37 LC P 65,677] 269 F.2d 126 (Fifth Cir. 1959); *Hodgson v. Orson E. Coe Pontiac, Inc., supra.* The "boiler plate" type of Fair Labors Standards Act Complaint filed by the Secretary of Labor in this case, has frequently been considered and upheld by the courts. See *Hodgson v. Virginia Baptist Hospital, Inc.,* [6 EPD P 8680] 482 F.2d 821 (Fourth Cir. 1973).

*2 The Court finds and concludes that the Complaint filed herein is sufficiently definite and certain to withstand Defendant's Motion for More Definite Statement. The type of information Defendant wants included in the Complaint is more appropriately developed in the discovery stages of litigation. Defendant may easily get the desired information by the use of simple interrogatories. The Motion should be overruled.

Motion to Dismiss

Defendants urge in said Motion that subject matter jurisdiction is not present and said Motion is made pursuant to rule 12(b)(1) and 12(b)(2), Federal Rules of Civil Procedure. The Court notes that Defendant is also attempting to urge lack of jurisdiction over the person. Defendants further urge that the Complaint fails to state a claim upon which relief can be granted and the Motion is urged pursuant to Rule 12(b)(6). The Statement in support of said Motion which is wholly void of legal authority fails to address itself to the alleged failure to state a claim. An examination of the Complaint reveals that same complies with Rule 8(a), Federal Rules of Civil Procedure and meets the standards set forth in *Conley v. Gibson* [1 EPD P 9656] 355 U.S. 41, 78 S.Ct. 99, 2 L. Ed. 2d 80 (1957) wherein the Court stated:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Complaint in the instant case alleges multiple violations of the Fair Labor Standards Act and if Plaintiff can present proof of said violations, it would be entitled to the relief requested. The complaint states a claim upon which relief could be granted and the Motion to Dismiss on said grounds should be overruled.

In support of the alleged lack of subject matter jurisdiction, Defendants argue that the Complaint fails to contain sufficient allegations to subject Defendants to the Fair Labor Standards Act. In this regard, this Court has subject matter jurisdiction of violations of said Act pursuant to 29 U.S.C. § 217 and the Motion should be denied on this basis. The objection raised is an attack on jurisdiction over the person of the Defendants. It appears Defendants contend the Complaint fails to allege they are subject to the provisions of the Fair Labor Standards Act. The Defendants present argument which is wholly lacking in legal authority that the Complaint fails to allege misuse of the mail or that items placed in the United States mail had any value. It is difficult for the Court to understand what Defendants' contention is in this regard for the reason that use of the mails is not the basis Plaintiff contends Defendants are subject to the Act.

An examination of the Complaint discloses Plaintiff alleges Defendant is subject to the Act by reason of engaging in the production of goods for commerce within the meaning of the Act. It alleges in particular that Defendant is engaged in the production of documents which were and are being shipped and transported in commerce to destinations outside the State of Oklahoma. The various provisions of the Act which are alleged to have been violated herein to include 29 U.S.C. §§ 206 and 207 cover employment involving production of goods for commerce. The allegations of the Complaint if ultimately proved are sufficient to establish Defendant is engaged in a covered employment under the Act. *White v. Wirtz,* 402 F.2d 145 (Tenth Cir. 1968). The Motion to Dismiss should be overruled on the basis the Court lacks jurisdiction over the Defendant.

*3 Both Motions are overruled this 14[th] day of October, 1975. The Defendants will file an Answer to the Complaint within fifteen (15) days from the date hereof.

1975 WL 275 (W.D.Okla.), 11 Fair Empl.Prac.Cas. (BNA) 1038, 22 Wage & Hour Cas.

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(Cite as: 1975 WL 275 (W.D.Okla.))

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