UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

LYNN WALTER, LYNN BROWN, KATHLENE ABSTON, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **BUFFETS, INC. d/b/a HOME TOWN BUFFETS, RYAN'S, OLD COUNTRY BUFFET, FIRE MOUNTAIN, COUNTRY BUFFET,** **Defendants.**	**6:13-CV-02995 (JMC)**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Defendant has moved to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted. Although Plaintiffs' original complaint was more than sufficient to state a claim, Plaintiffs have, out of an abundance of caution, filed an amended complaint that addresses the primary points raised by Defendant. For the reasons set forth below, the Amended Complaint states a claim and Defendant's motion should be denied.

I. MOTION TO DISMISS LEGAL STANDARD

The intent of Rule 12(b)(6) is to test the sufficiency of a complaint. *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999). A Rule 12(b)(6) motion "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* (quoting *Republican Party v. Martin,* 980 F.2d 943, 952 (4th Cir.1992)). Rather, the motion tests whether the allegations of the complaint viewed in the light most favorable to plaintiff, *see Ibarra v. United States,* 120 F.3d 472, 474 (4th Cir.1997), allege "enough facts to state a claim to relief that is plausible on its face." *Bell All. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). This plausibility requirement of *Twombly* "is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset. A "complaint need not 'make a case' against a defendant or '*forecast evidence* sufficient to *prove* an element' of the claim." *Robertson v. Sea Pines Real Estate Companies,* 679 F.3d 278, 291 (4th Cir. 2012) (emphasis in original) (citations omitted). It need only contain "[f]actual allegations ... [sufficient] to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555; *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) . A court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief. *Iqbal,* 556 U.S. at 679.

Defendant asserts that Plaintiffs have failed to meet this standard in two ways: (1) Defendant asserts that Plaintiffs' claim that they were entitled to be paid the full minimum wage for non-tip producing work fails as a matter of law to state a violation of the FLSA because the law with respect to payment for non-tip producing work is, allegedly, confused and contradictory; (2) Defendant argues that Plaintiffs' complaint fails to set forth sufficient factual detail to meet the *Twombly* "plausibility" standard. Plaintiffs will address each of these arguments in turn.

II. DEFENDANT'S ASSERTION THAT THERE IS CONFUSION AND CONFLICT IN THE LAW APPLICABLE TO TIP-CREDIT CLAIMS IS UNTRUE AND DOES NOT STATE A GROUNDS FOR DISMISSING PLAINTIFFS' AMENDED COMPLAINT

Defendant argues that the Department of Labor has given conflicting guidance as to when the assignment of non-tip generating work to a tipped employee requires payment of the full minimum wage. It argues that the case law is similarly confused and, on that basis, urges the Court to dismiss Plaintiffs' claim so the Fourth Circuit can decide the issue. Contrary to Defendant's assertions, however, even a cursory glance at the DOL opinions and relevant case law reveals little or no inconsistency. Rather the case law merely demonstrates that claims for non-tip producing work depend on the specific facts of each case and it would serve little purpose for the Fourth Circuit to opine on the question until the facts have been fully developed through discovery and trial.

A. DOL and the Courts Have Taken a Consistent Approach to Non-Tip Producing Work

Section 3(m) of the FLSA permits employers to pay "tipped employees" a cash wage of $2.13 per hour and claim a "tip credit" for the difference between that wage and the minimum wage. 29 U.S.C. §203(m). In 1967, a year after the tip-credit provisions were first added to the FLSA, DOL issued an interpretive regulation which provided:

> *Dual jobs:* In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. §531.56(e). This "dual jobs" regulation has been in effect since it was first published. While clarifying that full minimum wage must be paid for any time spent on duties *unrelated* to the tipped-employees occupation, it does not address what effect, if any, performing *related* non-tip producing duties on more than an "occasional" basis would have on an employer's right to claim a tip credit. To address that situation, DOL issued a series of opinions letters and administrative guidelines in 1980, 1985 and finally in 1988. That latter guidance, which was set forth in the DOL Field Operations Handbook, stated:

> Reg. 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though the duties are not themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example, a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

U.S. DOL, Wage Hour Division, Field Operations Handbook §30d00(3) (Dec. 9, 1988). In other words, even where a tipped employee's non-tip producing work is related or incidental to his or her tipped occupation, if that non-tip producing work exceeds 20% of the work week, the time must be compensated at the full minimum wage. This 20% limitation has been in effect continuously since 1988 with the exception of a few weeks' hiatus in 2009. The hiatus resulted from an opinion letter issued by the Bush Administration just days before President Obama was to take office. That letter, which was issued so hurriedly that it was apparently never mailed, eliminated the 20% limit on related non-tip producing work. WH Opinion Letter FLSA 2009-23 (Jan. 16, 2009).[1] Upon taking office, the Obama Administration immediately revoked the opinion stating, "Wage Hour Opinion Letter FLSA 2009-23 is withdrawn and may not be relied upon as a statement of agency policy." Letter of March 2, 2009 from John L. McKeon, Deputy Administrator for Enforcement, U.S. Dept. of Labor, Wage and Hour Division.

Thus, contrary to Defendants' assertions, DOL has for more than 25 years interpreted the FLSA as requiring an employer to pay the full minimum wage for the hours that tipped employees perform non-tip producing work if that work is either (i) unrelated to his tipped occupation or (ii) occupies more than 20% of the employee's time. This consistent DOL interpretation of the FLSA is entitled to controlling deference despite the brief and unsuccessful attempt of the Bush Administration to change the 20% limitation policy. This was made clear by the Eighth Circuit in *Fast v. Applebee's International, Inc.,* 638 F.3d 872, 879-881 (8th Cir. 2011), which specifically held that the dual jobs regulation, 20 C.F.R. §531.56(e), is reasonable and that the 20% limitation on non-tip producing work in the Handbook is a "reasonable interpretation" of that regulation and is entitled to controlling weight under the rule of *Auer v.*

[1] The letter revoking Opinion 2009-23 states "[i]t does not appear that this response was placed in the mail for delivery to you after it was signed."

Robbins, 519 U.S. 452, 461 (1997) (agency's interpretation of its own ambiguous regulation is entitled to controlling deference unless plainly erroneous or inconsistent with the regulation). Other courts have also relied upon the validity of the 20% limitation on non-tip producing work set forth in the Handbook. *See e.g. Chhab v. Darden Restaurants, Inc.,* 11cv8345, 2013 WL 5308004 at *2-4 (S.D.N.Y. Sept. 20, 2013) (certifying FLSA collective action for plaintiffs alleging violation of the 20% limitation); *Driver v. AppleIllinois, LLC,* 890 F.Supp.2d 1008, 1032-33 (N.D. Ill. 2012) (granting controlling deference to the 20% limitation); *Ash v. Sambodromo, LLC,* 676 F.Supp.2d 1360, 1366-1367 (S.D. Fla. 2009) (applying 20% limitation).

B. Defendant's Cases Do Not Show Confusion or Conflict with Respect to Non-Tip Producing Work

Despite the fact that courts have consistently relied on and deferred to the dual job and 20% limitation on related non-tip producing work, Defendant argues that the case law is confused and in conflict on the validity of those rules. Defendant bases this claim on dicta from *Pellon v. Business Representation Int'l., Inc.,* 528 F.Supp. 2d 1306 (S.D. Fla. 2007), *aff'd* 291 Fed. App'x 310 (11th Cir. 2008), in which airport skycaps alleged, *inter alia,* that they should have received full minimum wage for the non-tip producing duties they performed. However, the *Pellon* case is readily distinguishable. In the first place, the case was decided on cross motions for summary judgment after discovery. The court no where suggested that the application of DOL's rules regarding non-tip producing work could be decided on a motion to dismiss before a factual record has been developed – which is what Defendant urges this Court to do. To the contrary, the *Pellon* court's grant of summary judgment was based on its evaluation of the specific facts of the case and its conclusion that the duties at issue were "directed towards receiving tips or incidental to receiving tips." *Id.* That finding precluded application of the dual job regulation. As for the 20% limitation, the court noted that application of that provision

appeared to be "infeasible" under the facts presented on summary judgment where the plaintiffs attempted to categorize their work as tip-producing or non-tip producing on almost a minute-by-minute basis. However, the court ultimately concluded that it did not have to decide whether the 20% limitation was entitled to deference because "Plaintiffs have offered no evidence that their non-skycap duties even constitute more than 20% of the workday." *Id.* The 11th Circuit affirmed in an unpublished opinion based on the district court's opinion.[2] 291 Fed.Appx. 310 (11th Cir. 2008).

Defendant cites two other cases that it claims show "confusion in the case law" about the 20% limitation on non-tip producing work, but neither case supports Defendant's argument. In *Roberts v. Apple Sauce, Inc.,* 3:12-CV-830-TLS, 2013 WL 2083467 (N.D. Ind. May 13, 2013), the Court dismissed a restaurant server's complaint, not because it found the 20% limitation to be invalid, but because the plaintiff had not pled that she spent more than 20% of her time on non-tip producing work. Absent such an allegation, the defendants' failure to pay minimum wage for that work was not clearly illegal. Given that, the court properly granted the motion to dismiss and gave the plaintiffs leave to replead their claim with more specificity. Here, by contrast, Plaintiffs have clearly alleged that they spent more than 20% of their time on non-tip producing work and thus have alleged a clear violation of DOL's rules. See ECF No. 34, Amended Complaint, at ¶¶ 9, 17, 25.

Defendant's other case, *Townsend v. BG-Meridian, Inc.,* CIV-04-1162-F , 2005 WL 2978899 (W.D. Okla. Nov. 7, 2005), involved a waitress who claimed that she should have been paid minimum wage for the time during her waitress shift when she was called upon to operate the cash register and take telephone orders because those jobs were allegedly unrelated to

[2] Eleventh Circuit Rules provide that unpublished opinions are not binding precedent and generally does not cite them for that reason. Eleventh Circuit Rule 36-2.

waitressing and should have been paid at minimum wage under DOL's dual job regulation. The court rejected that claim, concluding that occasionally answering the telephone and working the cash register were not distinct jobs subject to the dual job regulation but were, instead, duties incidental to the job of waitressing. There was no allegation in the complaint that the cash register or telephone occupied more than 20% of the plaintiff's time so the court had no occasion to address the deference due to the 20% limitation. In contrast, Plaintiffs here clearly allege that their non-tip producing work included work unrelated to the occupation of server in violation of the dual jobs regulation and occupied more than 20% of their time in violation of the 20% limitation. *See* ECF No. 34, Amended Complaint, at ¶¶ 9, 17, 25. They also give clear examples of those unrelated jobs such as washing walls and cleaning blinds. *Id.* These allegations clearly distinguish this case from *Townsend.*

In sum, contrary to Defendants' assertions, neither DOL's interpretation of the FLSA nor the case law is confused. Rather, both DOL and the courts have shown remarkable consistency in applying the dual job regulation and 20% limitation to non-tip producing work. To be sure, both provisions turn on the specific facts of any given case and may result in different answers depending on those circumstances, but no court has rejected the validity of either the dual job regulation or 20% limitation as a matter of law. No facts have been yet been established in this case, but there can be no question that their complaint pleads a plausible claim for violations of both provisions.

III. PLAINTIFFS HAVE PROPERLY PLED THE ELEMENTS OF AN FLSA VIOLATION

Apart from its attack on the legal enforceability of the dual job regulation and 20% limitation on non-tipped work, Defendant argues that Plaintiffs have failed to plead with sufficient specificity to meet the *Twombly* plausibility standard. As set forth below, Defendant's

argument should be rejected because it is based on an erroneous view of the elements required to plead an FLSA claim in the Fourth Circuit. Moreover, Plaintiffs have filed an amended complaint which expands on the elements that Defendant claimed were insufficiently pled.

A. Legal Standard for Pleading an FLSA Claim in the Fourth Circuit.

In making their motion to dismiss, Defendant does not cite any authority from the Fourth Circuit as to how FLSA claims must be pled to meet the *Twombly* standard. Instead, Defendant relies entirely on cases from outside the Fourth Circuit to argue that Plaintiffs' complaint is insufficient because it does not allege (i) the precise amount of time spent on non-tip producing activities, (ii) the number of overtime hours claimed, or (iii) the amount of wages Plaintiffs claim to have been underpaid. Doc. 22-1 at 19. As set forth below, courts in the Fourth Circuit do not require plaintiffs to plead these matters with specificity; it is sufficient to allege that Plaintiffs worked uncompensated hours or were not paid properly for overtime hours worked.

For example, in *Chao v. Rivendale Woods, Inc*., 415 F.3d 342, 348 (4th Cir. 2005), the Fourth Circuit found that a complaint which alleged that the defendant "repeatedly failed" to pay workers overtime in compliance with the Act was sufficient to meet the pleading requirements of Rule 8(a) and cited with approval its decision in *Hodgson v. Virginia Baptist Hospital*, 482 F.2d 821, 822 (4th Cir. 1973) which "concluded that the complaint need not specify the names of aggrieved employees, their wages, the weeks in which the employees were entitled to overtime pay, or the particular records that the hospital failed to maintain." *Rivendale Woods* at 348. As the Court in *Rivendale Woods* noted, a "complaint need not 'make a case' against a defendant or '*forecast evidence* sufficient to *prove* an element' of the claim. It need only '*allege facts* sufficient to *state* elements' of the claim." *Id.* at 349 (emphasis in original).

Although both *Rivendale Woods* and *Virginia Baptist Hospital* both pre-date *Iqbal* and *Twombly,* courts throughout the Fourth Circuit have continued to rely upon them even after *Iqbal* and *Twombly. See Rankin v. Loew's Annapolis Hotel Corp*., CIV. L-11-2711, 2012 WL 1632792 at *2 (D. Md. May 7, 2012) (citing *Rivendale* and holding that plaintiff need not specify the amount of unpaid overtime to state an FLSA claim); *Butler v. DirectSat USA, LLC,* 800 F.Supp.2d 623, 667-68 (D. Md. 2011) (citing *Rivendale* and holding that pleading need not estimate the number of uncompensated overtime hours, but simply allege that the plaintiff worked some amount in excess of forty hours); *Speert v. Proficio Mortgage Ventures, LLC,* CIV.A. RDB 10-718, 2010 WL 4456047 (D.Md. Nov. 1, 2010) (denying motion to dismiss an FLSA claim and citing *Rivendale)*; *Sutherland v. SOSi Intl. Ltd.,* 107CV557 JCC/TCB, 2007 WL 2332412 (E.D.Va. August 10, 2007) (citing *Rivendale* and holding FLSA plaintiff is not required to plead that he was non-exempt). *See also Calle v. Chul Sun Kang Or*, CIV.A. DKC 11-0716, 2012 WL 163235, at *2 (D. Md. Jan. 18, 2012) ("Because, as a practical matter, the requirements to state such a claim 'are quite straightforward,' . . . courts have found that plaintiffs satisfy this standard merely by alleging that their employers did not provide them with overtime pay even though they worked in excess of forty hours during the workweek."); *Hawkins v. Proctor Auto Serv. Ctr.,* No RWT–09–1908, 2010 WL 1346416, at *1 (D.Md. Mar.30, 2010) (concluding that the plaintiff "clearly state[d] a[n FLSA] claim that is plausible on its face" when asserting that "he worked more than forty hours a week ... and that Defendants did not compensate him for the overtime"); *Lugo v. Otis Spunkmeyer Inc.,* 2012 WL 967939 (D.S.C. Feb. 29 2012) (denying motion to dismiss FLSA claim based on conclusion that plaintiff need only plead that he worked

overtime without compensation and that the defendant knew or should have known that he worked overtime).[3]

As these cases recognize, a complaint that alleges a plaintiff worked more than 20% of her time in non-tip producing work or worked uncompensated overtime hours is more than sufficient to state a plausible cause of action under the FLSA. There is no requirement in the Fourth Circuit to plead the precise number of hours that were improperly compensated, nor should there be as such details do little or nothing to make the complaint more plausible. Rather the plausibility of Plaintiffs' claim must be determined based on "judicial experience and common sense" applied to the factual allegations in a complaint taken as a whole. *Iqbal,* 556 U.S. at 679. Plaintiffs' complaint clearly meets that standard.

In addition to alleging that they were assigned non-tip producing duties that exceed 20% of their work time, the amended complaint states the average percentage of time that each Plaintiff devoted to these activities. ECF No. 34, Amended Complaint, ¶ 9 (Plaintiff Walter spent 40% or more); ¶ 17 (Plaintiff Brown spent 30% or more); ¶ 25 (Plaintiff Abston spent 50% or more). The amended complaint also alleges the average hours that Plaintiffs were scheduled each week. *Id.* ¶ 10 (Walter, 30-40); ¶ 18 (Brown, 30-40); ¶ 26 (Abston, 15-20, sometimes up to 40). The complaint gives examples of non-tip producing jobs, including such things as washing walls, light fixtures, and blinds, and scrubbing furniture, *id.* ¶¶ 9, 17, 25, which are plainly not part of a server's normal duties and which, therefore, should be paid at the full minimum wage pursuant

[3] The *Rivendell Woods* standard continues to be cited in non-FLSA cases as well. *See, e.g., Robertson v. Sea Pines Real Estate,* 679 F.3d 278, 291 (4th Cir. 2012) (quoting *Rivendale Woods* standard with approval in non-FLSA case); *Natural Product Solutions LLC v. Vitaquest Intl. LLC,* 2013 WL 3218094 (D.Md. June 24, 2013) (same); *Wells Fargo NA v. Triplett,* 5:12-CV-67-H, 2013 WL 5217847 (E.D.N.C. Sept. 17, 2013) (same).

to DOL's dual job regulation regardless of the amount of time they consume. Plaintiffs also allege that they were regularly required to work off-the-clock before and after their shifts. *Id.* ¶¶ 11, 19, 27. The amended complaint sets forth the average number of hours worked off-the-clock each week, which, when combined with their scheduled work time, clearly puts them into overtime hours. Id. ¶¶ 10-12, 19-20, 27-28. The amended complaint adds to the plausibility of these allegations by alleging details about the Defendant's corporate Matrix policy which strictly limited the labor costs that a restaurant could incur, causing Defendant's restaurants to greatly reduce their staff and forcing servers to perform non-tip producing jobs which had previously been performed by hourly paid workers. *Id.* ¶¶ 56-60. The amended complaint also alleges how the strict limits on labor costs imposed by the Matrix policy resulted in Servers regularly working off-the-clock in order to perform cleaning and preparation jobs necessary to the operation of the restaurant for which there were insufficient funds to pay on the clock. *Id.* ¶¶ 64-65. These facts, along with the fact that Defendant's corporate wide time-keeping system made it difficult if not impossible for employees to clock in before or after their scheduled shift, *id.* ¶¶ 67-71, tend to support the plausibility of Plaintiffs' off-the-clock claims.

These allegations, which must be taken as true, *Rivendell,* go far beyond mere abstract recitation of the elements of violations of DOL's dual jobs, 20% limitation, unpaid hours and overtime provisions. They provide more than sufficient plausibility for Plaintiffs claims to meet the *Twombly* standard.

Although the out-of-circuit pleading cases relied upon by Defendants are not binding on this Court, it is worth noting that those cases are easily distinguishable and do not support Defendant's motion. For example, in *Roberts,* the non-tip producing jobs alleged by plaintiffs were all related to the job of server yet the plaintiffs failed to allege how much time they spent

on those activities. Absent some allegation that the amount of time spent exceeded 20% (whether stated as a percentage or a number of hours), the complaint was just as consistent with lawful conduct as it was with unlawful conduct. In that circumstance the Court properly required more detailed pleading. Here, by contrast, Plaintiffs have alleged that they spent more than 20% of their time in non-tipped activities and have given specific examples of those activities, some of which are plainly so unrelated to the occupation of server as to fall within DOL's dual occupation regulation. Thus, contrary to Defendants' assertions, Plaintiffs' complaint is not consistent with lawful payment and clearly states a cause of action for unpaid wages.

Defendants also rely on a series of Second Circuit cases involving hospital workers all filed by the same law firm. *Lundy v. Catholic Health System of Long Island,* 711 F.3d 106, 114 (2d Cir. 2013); *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.,* 723 F.3d 192, 200 (2d Cir. 2013); *DeJesus v. HR Management Services LLC,* 726 F.3d 85 (2d Cir. 2013). In *Lundy*, the plaintiffs alleged unpaid overtime by virtue of working through their lunch breaks and other uncompensated time. However, as the Second Circuit noted the plaintiffs' allegations regarding the number of hours they were assigned suggested that even if they worked the extra hours claimed they still didn't work overtime. Based on that inconsistency, the Court required more detailed pleading indicating that the plaintiff worked 40 hours and some additional uncompensated hours in excess of 40. *Id.* at 114-115. *Nakahata* and *DeJesus,* which were filed by the same plaintiff's counsel and alleged the same violation, follow that same standard. Plaintiffs' amended complaint contains none of the inconsistencies of these Second Circuit cases and is a far cry from the abstract pleadings disapproved in those cases.

In sum, taken as a whole, Plaintiffs' amended complaint more than adequately pleads a plausible claim that Defendants violated the FLSA by (i) assigning Plaintiffs' duties unrelated to

their server duties and/or assigning non-tip producing duties that exceeded 20% of Plaintiffs' work time, (ii) working Plaintiffs off-the-clock, and (iii) by failing to pay overtime in compliance with the Act. Nothing more is required at this stage of the proceedings.

CONCLUSION

For all of the foregoing reasons, Defendants motion to dismiss should be denied.

Respectfully submitted,

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