IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

DAVID M. DRISCOLL,	)	
	)	
Plaintiff,	)	Case No. 1:12-cv-00690-ESH
	)	
v.	)	
	)	
THE GEORGE WASHINGTON UNIVERSITY,	)	
	)	
Defendant.	)	
	)	

REPLY IN FURTHER SUPPORT OF DEFENDANT'S
MOTION TO DISMISS AMENDED COMPLAINT

George Washington University (the "University"), by and through undersigned counsel, submits this Reply in Further Support of its Motion to Dismiss Plaintiff's First Amended Complaint.

I. INTRODUCTION

Plaintiff's First Amended Complaint alleges that the University failed to pay him overtime he was due. In his Opposition to the University's Motion to Dismiss, Plaintiff concedes that the District of Columbia Minimum Wage Act ("DCMWA") is the exclusive remedy for such claims, but nevertheless contends that he may bring his overtime claims under the District of Columbia Wage Payment and Collection Law ("DCWPCL"). Plaintiff's argument rests upon the unsupported assertion that the University concedes he is owed overtime and ignores the undisputed fact that, even if such a concession had been made, the amount of overtime allegedly owed is disputed. In short, Plaintiff cannot bring his overtime claims under the DCWPCL and his attempt to circumvent the DCMWA should be rejected.

Further, Plaintiff's Opposition fails to address or overcome the pleading deficiencies the University noted in its Motion to Dismiss regarding each of his claims, and his First Amended Complaint should therefore be dismissed.

II. PLAINTIFF CONCEDES THAT THE DCMWA IS THE EXCLUSIVE REMEDY FOR HIS OVERTIME CLAIMS

Plaintiff does not address the University's argument that the DCMWA is the exclusive remedy under D.C. law for a plaintiff alleging, like he does, the right to be paid overtime wages rather than regular wages. In failing to do so, he has conceded this argument. *Jones v. Air Line Pilots Ass'n*, 713 F. Supp.2d 29, 39 (D.D.C. 2010) (plaintiff waives claim by failing to respond to arguments in motion to dismiss); *see, e.g., Hopkins v. Women's Div., Bd. of Global Ministries*, 238 F. Supp.2d 174, 178 (D.D.C. 2002) (same).

Plaintiff's claim is that the University paid him regular wages rather than overtime wages. (Pl. First Am. Compl. ¶ 1; Mot. 2, 4.) As the University made clear in its Motion, the DCMWA is the exclusive statutory vehicle for a plaintiff claiming the right to be paid an overtime rate. (Mot. 4-13.) Plaintiff chose not to offer any rebuttal on this point, and therefore he has waived the issue.

Rather than rebutting the University's argument, Plaintiff ignores it and tangentially asserts the University concedes that he was entitled to overtime wages. (*See* Pl. Opp. 1, 9-10.) This assertion is false and irrelevant. The University has not conceded that Plaintiff had a right to be paid overtime wages. *See* Part III, *infra*.

Plaintiff's "concession" argument does not address (and has nothing to do with) the exclusivity of the DCMWA in resolving Plaintiff's overtime claims. In its Motion, the University explained the exclusivity of the DCMWA— the exclusive statute enacted by the D.C.

Council and approved by the U.S. Congress, for a plaintiff's overtime claims. Plaintiff does not refute this point, nor does he cite cases in which the DCMWA's exclusivity has been challenged.

In each of the cases relied upon by Plaintiff, the courts merely noted that the plaintiffs had brought claims under the DCMWA and the DCWPCL. The question of the correct or exclusive statutory vehicle for the claims brought was not raised by the parties and was never addressed—let alone decided—by the courts. *See Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139, 142 (D.D.C. 2011) (noting only that plaintiffs brought minimum wage claim under FLSA, MWA, and WPCL); *Morales v. Landis Const. Corp.*, 715 F. Supp. 2d 86, 89 (D.D.C. 2010) (noting only that there was agreement that overtime was owed); *Thompson v. Fathom Creative, Inc.*, 626 F. Supp. 2d 48 (D.D.C. 2009) (denying employee's motion for summary judgment on her wage claims as premature where it was filed prior to discovery).

Similarly, the cases from other jurisdictions cited by Plaintiff did not consider whether the respective state's minimum wage act was the exclusive remedy for claims alleging a right to be paid overtime. *See generally Dunn v. Dubuque Glass Co. Inc.*, --- F. Supp. 2d ---, 2012 WL 1564700 (N.D. Iowa 2012); *Jones v. Casey's Gen. Stores*, 551 F. Supp. 2d 848 (S.D. Iowa 2008); *White v. VNA Homecare, Inc*., 2012 WL 1435432 (S.D. Ill. 2012); *Goldman v. RadioShack Corp.*, 2005 WL 1155751 (E.D. Pa. 2005). In other words, none of the cases involved a scenario where the district court applied the state's wage collection law after the defendant argued that the minimum wage act was the plaintiff's sole remedy for overtime claims. Consequently, the courts never addressed the issue disputed in this case. Instead, the courts addressed other issues not relevant here. For example, *Goldman v. RadioShack Corp.* is a bifurcation decision. *See* 2005 WL 1155751, at *1. The court never considered whether overtime claims could be brought under Pennsylvania's wage payment law. *See id.* The court's

entire "discussion" of the wage issue consisted of the court's observation that plaintiff "claim[ed] he was denied overtime wages in violation of the Fair Labor Standards Act (FLSA); Pennsylvania's Minimum Wage Act (MWA); and Pennsylvania's Wage Payment and Collection Law (WPCL)." *Id.* (citations omitted). This case, like the others Plaintiff cites, is irrelevant. *See also Dunn*, 2012 WL 1564700, at *12 (denying motion to dismiss Iowa WPCL claim because plaintiffs demonstrated a genuine issue of material fact as to whether plaintiff received overtime wages); *Jones*, 551 F. Supp. 2d at 856-58 (holding that class-action limitation did not apply to Indiana Wage Payment Act and the Kansas Wage Payment Act did not exclude employers subject to FLSA); *White*, 2012 WL 1435432, at *1 (denying defendant's motion to dismiss because wage payment law did not require plaintiff to prove a contract).

Regardless, Plaintiff's argument and authority is of no consequence given that this Court has made clear that the DCWPCL does not apply to disputes over the amount of wages owed—of whatever kind—to an employee. *See Fudali v. Pivotal Corp*., 310 F. Supp. 2d 22, 27-29 (D.D.C. 2004) (DCWPCL does not apply to disputes over the amount of wages owed). As explained in Part III, because Plaintiff disputes the amount of overtime owed, he cannot bring his claims under the DCWPCL.

In sum, Plaintiff has conceded that the DCMWA is the exclusive remedy for his overtime claims and none of the cases offered by him, from the District of Columbia or elsewhere, dictate a contrary result. Plaintiff's claim that he is entitled to recover under the DCWPCL also fails because binding precedent prevents Plaintiff from bringing his claims for a disputed amount of overtime wages under the Act. Count IV of Plaintiff's Amended Complaint should therefore be dismissed.

III. THE DCWPCL DOES NOT APPLY TO CLAIMS FOR DISPUTED WAGES

In an effort to proceed under the DCWPCL and circumvent the DCMWA, Plaintiff now argues that the University has conceded overtime was owed, but failed to pay it. Plaintiff's attempt to "end run" the DCMWA must be rejected.[1] In fact, Plaintiff does not even make a "concession" allegation in his First Amended Complaint and, even if he did, he offers no factual support that would allow such an allegation to be considered "well plead." Indeed, Plaintiff's conclusory statement that the University "made payment for back overtime wages owed" cannot operate as a concession by the University that it "owed [Plaintiff] back overtime wages." (Pl. Opp. 14; *see also id*. at 10.). Any such argument rests on the faulty assumption that liability has already been established and that his position was found to have been improperly classified. Obviously, no adjudication has occurred and, of course, employers reclassify positions for a host of reasons—a reclassification decision, standing alone, cannot amount to a concession that overtime was owed prior to the date of employee reclassification.

Perhaps recognizing this fact, Plaintiff primarily relies on an unpublished and readily distinguishable case from the Southern District of Florida, involving a dispute about whether defendant was required to respond to certain interrogatories. *See Titre v. S.W. Bach & Co.*, 2005 WL 1692508 (S.D. Fla. July 20, 2005). In *Titre*, plaintiff moved to compel defendant to respond to plaintiff's interrogatory seeking information about compensation paid to similarly situated employees. *Id.* at *2. The court held that such information could lead to the discovery of admissible evidence. *Id.* It did not hold, as Plaintiff contends, that a plaintiff's allegation that

[1] Plaintiff's argument implicitly acknowledges that any dispute as to whether overtime was owed eliminates the possibility that he could proceed under the DCWPCL.

the defendant paid back overtime wages constitutes an admission by the defendant that plaintiff's claims are valid. Plaintiff's allegation is simply that – an allegation.

Further, and even if it could be argued that the University conceded that overtime was owed, the amount of monies allegedly owed to Plaintiff is unquestionably disputed. This dispute, alone, removes Plaintiff's claims from the DCWPCL. *Fudali*, 310 F. Supp. 2d at 27. In *Fudali,* the employer argued that, pursuant to § 32-1304, "when there is a dispute over the amount of wages owed, … an employer must pay an employee only the undisputed amount to comply with the Act [DCWPCL]." *Id*. at 27. The Court ruled that "a common sense reading of the statutory section confirms [the employer's] interpretation." *Id*. at 28. Plaintiff acknowledges this fact, but nevertheless argues that this dispute is not in "good faith."

Plaintiff's conclusory allegations on this point do not satisfy federal pleading standards. A conclusory allegation like Plaintiff's, that the defendant acted in "bad faith" is "so subjective that it fails to cross 'the line between the conclusory and the factual.'" *Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 9 (1st Cir. 2011) (quoting *Twombly* , 540 U.S. 544, 557 n.5 (2007)). A plaintiff must allege "factual content" sufficient to allow the court to reasonably conclude that the defendant acted in bad faith. *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 622 (5th Cir. 2012); *see also Brewer v. U.S. Fire Ins. Co.*, 446 Fed. Appx. 506, 510 (3d Cir. 2011) (holding that *Twombly* requires plaintiff to allege "enough factual matter" to raise "a reasonable expectation that discovery will reveal evidence of" bad faith) (quotation marks omitted); *Vaughn v. Airline Pilots Ass'n*, 604 F.3d 703, 710 (2d Cir. 2010) (affirming dismissal of bad-faith claim where plaintiff failed to allege facts making it "plausible" that the defendant's actions were "improperly motivated"); *Mazza v. Verizon Washington DC, Inc.*, --- F.Supp.2d ----, 2012 WL 1058214, at *7 (D.D.C. 2012) (dismissing claims that merely alleged "bad faith" for failure to allege "sufficient

factual basis to enable the Court to infer more than the mere possibility of misconduct") (quotation marks omitted). Because Plaintiff simply makes a bare-bones allegation of "bad faith" and does not allege facts explaining how the University's dispute of his claims is in bad faith, his claim fails. *See, e.g.*, *Artuso*, 637 F.3d at 9 (holding that "if the plaintiff had any basis beyond speculation for asserting a claim of bad faith, he would have described that basis in some detail in his complaint, or at the very least mentioned it in opposing the motion to dismiss").

Finally, in its opening brief, the University cited *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662 (D. Md. 2011), analogizing the DCWPCL to Maryland's Wage Payment & Collection Law (the "MDWPCL"), and referenced the court's published holding that, "where the parties' core dispute is whether plaintiffs were entitled to overtime wages at all," the plaintiff cannot proceed under the MDWPCL. 800 F. Supp. 2d at 670 (D. Md. 2011) (citing cases). In other words, in a situation like the instant case and involving similar laws, the U.S. District Court for the District of Maryland found that claims for unpaid overtime must proceed under Maryland's specific statutory vehicle for such claims, *i.e.*, the State's minimum wage law. A similar result should occur here.

In his Opposition, Plaintiff attempts to distinguish *Butler* by again arguing that the University somehow conceded that overtime was due and that there was no dispute that overtime wages were allegedly owed. As shown above, however, this argument is without merit. Plaintiff also argues that *Hoffman v. First Student, Inc.*, AMD 06--1882, 2009 WL 1783636 (D. Md. June 23, 2009), somehow compels this Court to permit him to bring his overtime claims under the DCWPCL. Plaintiff misunderstands *Hoffman.* In *Hoffman*, the Plaintiff brought two MDWPCL claims: one for failure to pay wages for straight time hours worked and one for failure to pay bonuses. *Id.* at 9. In the case, Judge Davis did not decide whether a claim seeking overtime

could be brought under the MDWPCL and *Hoffman* offers Plaintiff no assistance. In *Butler*, though, Judge Chasanow did find that overtime claims must be brought under Maryland's overtime law. *See* 800 F. Supp. 2d at 670-71. So too, should this Court find that Plaintiff's overtime claims must be brought under D.C.'s overtime law.[2]

The University has neither admitted nor conceded that Plaintiff was entitled to overtime. Accordingly, dismissal of Count IV is warranted because the DCWPCL does not apply to Plaintiff's disputed overtime claims.

IV. PLAINTIFF'S OVERTIME CLAIMS FAIL AS A MATTER OF LAW

Plaintiff's overtime claims must be dismissed because they are premised on conclusory allegations that fail to satisfy the pleading requirements set forth in *Twombly* and *Iqbal*. To satisfy *Twombly* and *Iqbal*, Plaintiff's complaint must allege specific facts to support his claims. Simply reciting "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" is not sufficient. *Lindsey v. District of Columbia*, 708 F. Supp. 2d 43, 46 (D.D.C. 2010). Among other things, the complaint must "at least approximately, allege the hours worked for which wages were not received." *Zhong v. August Corp*., 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007); *James v. Countrywide Financial Corp*., --- F. Supp. 2d. ---, 2012 WL 359922, at *21 (E.D.N.Y. 2012). Plaintiff does not dispute that he has failed to meet this standard, and, thus, his claim should be dismissed.

[2] Plaintiff's argument regarding *Shady Grove Orthopedics Assocs., P.A. v. Allstate Insurance Co*., 130 S. Ct. 1431 (2010), is similarly non-persuasive. The University compared the opt-in provisions of the DCMWA with the class-action provisions of the DCWPCL in order to show that D.C. intended the DCMWA to be the exclusive remedy under local law for overtime claims. Whether the Federal Rules of Civil Procedure preempt the DCMWA's opt-in requirements is irrelevant to whether overtime claims must be stated under the DCMWA and not the DCWPCL. In any event, and as the University will explain in its forthcoming Opposition to Plaintiff's Cross-Motion to Amend the First Amended Complaint, *Shady Grove* does not preempt the DCMWA's opt-in provisions.

Moreover, Plaintiff's First Amended Complaint fails to provide the level of factual detail deemed sufficient to survive dismissal in the cases cited in his Opposition. Plaintiff's First Amended Complaint does not detail the "types of work activities that occupied [Plaintiff's] alleged overtime hours." *Butler v. DirectSat USA, LLC,* 800 F. Supp. 2d 662, 668 (D. Md. 2011). Nor has Plaintiff submitted an affidavit which details the type of work allegedly performed in excess of 40 hours per week. *See Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 26 & n.8 (D. Mass 2011).

Plaintiff also has not alleged that he personally "worked overtime hours without compensation" and that the University "knew or should have known that he worked overtime but failed to compensate him for it." *Butler,* 800 F. Supp. 2d at 667; *see also Norceide,* 814 F. Supp. 2d at 25-26 (holding that plaintiff properly alleged that he worked more than 40 hours per week, that employer knew that he was working more than 40 hours per week, but that employer failed to compensate him for the overtime); *Hofmann v. Aspen Dental Mgmt., Inc.* 2011 WL 3902773, at *3 (S.D. Ind. 2011) (same). Plaintiff has merely alleged that the University "did not pay them [the putative class members] overtime wages for all hours worked over 40 in a week." (Compl. ¶ 40.)[3] Therefore, Plaintiff's First Amended Complaint fails to state a claim even under the cases that he cites in his Opposition.

Finally, Plaintiff cannot avoid his pleading obligations by arguing that the University has better access to information concerning hours worked or wages paid. Even where the facts "are peculiarly within the possession and control of the defendant," a plaintiff still must allege facts

[3] To survive a motion to dismiss, Plaintiff's allegations must state a claim for relief for himself; he cannot rely on allegations regarding other members of the purported class. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

sufficient to allow the court to conclude that the defendant is liable for the misconduct alleged. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); *see also Kvech v. Holder*, 2011 WL 4369452, at *3 (D.D.C. 2011) (same). Moreover, the facts relating to the hours Plaintiff worked, the rate he was paid, and the wages he is owed are not "peculiarly" within the University's possession. Plaintiff "should know approximately how many hours [he] worked per week and [his] hourly rate or weekly wages." *Pruell v. Caritas Christi*, 2010 WL 3789318, at *4 (D. Mass. 2010) (holding that employer may have "exact records necessary to ultimately prove the wage claims" but that plaintiff has enough facts to approximate his hours and wages). Plaintiff's argument improperly "confuses the burdens of proof at trial with the pleading requirements" of Rule 8(a). *HTC Corp. v. IPCom GmbH & Co., KG*, 671 F. Supp. 2d 146, 151 (D.D.C. 2009).

V. DISMISSAL OF PLAINTIFF's FLSA RETALIATION CLAIM IS ALSO WARRANTED

Plaintiff's retaliatory discharge claim under the FLSA should also be dismissed because he failed to allege facts showing that he put the University on notice that he was asserting his rights under the FLSA. A plaintiff alleging retaliation must allege facts showing that he specifically raised his rights under the FLSA by filing a complaint; expressing discontent about his wages is not sufficient. *See, e.g.*, *Cooke v. Rosenker*, 601 F. Supp. 2d 64, 75-76 (D.D.C. 2009); *Hicks v. Ass'n of Am. Med. Colleges*, 503 F. Supp. 2d 48, 51-54 (D.D.C. 2007).

Plaintiff does not dispute that his Complaint contains no allegations that he filed a complaint or asserted his rights under the FLSA. He admits that he has alleged only "that GWU discharged him because he questioned GWU as to whether it had paid all the back overtime wages due to him." (Pl. Opp. 6.) He asserts that this allegation of discontent is sufficient, but he does not cite any case law supporting this assertion. Nor does he address or even attempt to

distinguish the controlling authority to the contrary cited in the University's Motion. The only case Plaintiff cites involved employees who alleged that they had "file[d] complaints with the EEOC" and with "local and federal investigative authorities." *Saint-Jean v. District of Columbia*, --- F. Supp. 2d ----, 2012 WL 723715, at *7 (D.D.C. 2012). Plaintiff's allegations of general discontent do not meet this standard. Therefore, Plaintiff's claim must be dismissed.[4]

VI. THE COURT SHOULD DISREGARD THE ALLEGATIONS IN PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff has submitted a Second Amended Complaint ("SAC") as Exhibit A to his Memorandum in Opposition to Defendant's Motion to Dismiss First Amended Complaint. Significantly, Plaintiff did not obtain either the University's consent or the Court's leave prior to submitting the SAC. Plaintiff has filed a Cross-Motion to Amend the First Amended Complaint, attaching the SAC. The University's Opposition to that motion is not due until August 3, 2012. Because briefing is not complete on that motion and because the Court did not grant Plaintiff leave to file the SAC, the Court should consider only the allegations and claims in Plaintiff's First Amended Complaint when deciding the University's Motion to Dismiss. *See, e.g.*, *Saunders v. District of Columbia*, 711 F. Supp. 2d 42, 49 (D.D.C. 2010) (holding that where Plaintiff simply submitted a second amended complaint along with her Court-ordered supplemental briefing, plaintiff's first amended complaint remained the operative complaint); *Am. Postal Workers Union v. United States Postal Serv.*, 2007 U.S. Dist. LEXIS 48608 (D.D.C. July 6, 2007) (considering only allegations in plaintiff's complaint after the court denied plaintiff's motion for leave to file an amended complaint).

[4] Plaintiff implicitly acknowledges the insufficiency of his pleading by relying on the allegations of his proposed Second Amended Complaint to argue that he has stated a claim. (Pl. Opp. 7-8.) These allegations cannot be considered because the operative complaint is the First Amended Complaint. *See* Part VI, *infra*.

VI. CONCLUSION

For all of the above reasons, and those set forth in the University's original brief, the Court should dismiss Plaintiff's First Amended Complaint with prejudice.

Dated: July 27, 2012

Respectfully submitted,

THE GEORGE WASHINGTON UNIVERSITY

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