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

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

The George Washington University (the "University") respectfully submits this memorandum of points and authorities in support of the University's Fed. R. Civ. P. 12 (b)(6) motion to dismiss Plaintiff David M. Driscoll's First Amended Complaint for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiff is a former employee of the University. The University, although not obligated to do so, paid him overtime wages for hours over 40 that he allegedly worked. Plaintiff does not dispute that the University paid him for the "regular" hours he worked, and he admits that the University paid him overtime wages.

Nonetheless, Plaintiff appears to believe that the University should have paid him more in overtime wages. He does not allege, however, the rate at which he was paid, the overtime hours he worked, or the amount of overtime pay that is owed. He seeks overtime wages under the Fair

Labor Standards Act (the "FLSA") (Count I), the D.C. Minimum Wage Act (the "DCMWA" or the "Act") (Count III), and the D.C. Wage Payment & Collection Law (the "DCWPCL" or the "Law") (Count IV). These claims must be dismissed.

First, Plaintiff cannot state a claim for relief under the DCWPCL because the DCMWA provides the exclusive remedy for a plaintiff alleging a right to be paid overtime wages under D.C. law. The DCMWA governs what an employer must pay while the DCWPCL governs when an employer must pay. *See Fudali v. Pivotal Corp.*, 310 F. Supp. 2d 22, 25-29 (D.D.C. 2004). The core of Plaintiff's claim is that he was entitled to be paid overtime wages rather than regular wages for the hours that he worked in excess of 40 hours per week. Therefore, the DCMWA is Plaintiff's exclusive remedy under local law, and Count IV should be dismissed with prejudice.

Second, Plaintiff cannot state a claim for relief under the DCWPCL because the DCWPCL does not apply to disputes over the amount of wages owed. *See id.* Plaintiff admits that he was paid overtime, and he does not allege that the University failed to pay him undisputed wages. His dispute is about the amount of wages owed. Consequently, his claim cannot proceed under the DCWPCL and for this additional reason should be dismissed with prejudice.

Third, Plaintiff has failed to state a claim on any count because his allegations are inconsistent, insufficient, and conclusory. Counts I, III, and IV (collectively the "Overtime Claims") fail to state a claim because Plaintiff has not alleged his rate of pay, the hours he worked per week, and the amount of unpaid overtime he is owed. And, Count II fails to state a claim because Plaintiff has not alleged that he was terminated for filing a complaint under the FLSA. Accordingly, Plaintiff's Complaint must be dismissed.

STANDARD OF REVIEW

Plaintiff's First Amended Complaint cannot survive this motion to dismiss because the First Amended Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" for any of the claims alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court construes the complaint in Plaintiff's favor, the Court will not accept conclusory assertions or legal conclusions masquerading as factual allegations. *E.g.*, *Moonblatt v. District of Columbia*, 572 F. Supp. 2d 15, 21 (D.D.C. 2008). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. As explained below, Plaintiff's Overtime Claims and his retaliation claim are legally and factually insufficient and must be dismissed.

BACKGROUND[1]

The University employed Plaintiff as an Executive Coordinator from approximately April 2010 through February 2012. (Pl. First Amend. Compl. ¶ 38).[2] According to Plaintiff, at some unstated time in 2011, the University began to pay him overtime pay for hours worked in excess of 40. (*Id.* ¶ 41). The University also paid him for overtime hours he had allegedly worked since the start of his employment. (*Id.* ¶ 44).

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[1] The University accepts the truth of the facts as pled in Plaintiff's Complaint solely for purposes of this Motion.

[2] Plaintiff served his initial Complaint on May 14, 2012. [Dkt. No. 4]. Plaintiff then filed a First Amended Complaint on June 29, 2012. [Dkt. No. 8]. Plaintiff has therefore amended "once as a matter of course" and cannot simply file another amended pleading in response to GW's Motion to Dismiss. Fed. R. Civ. P. 15(a)(1)(2). The dismissal of his First Amended Complaint should be with prejudice.

Plaintiff now claims that he is entitled to additional overtime monies: he does not, however, state the amount to which he claims he is entitled, how many overtime hours he allegedly worked for which he was not paid, or the rate at which he was paid overtime. (*Id.* ¶¶ 41, 44, 45[3]). Plaintiff further claims that all executive aides, executive assistants, executive coordinators, executive support assistant and executive associates, regardless of what they did, for whom they worked, or in which department they worked, are entitled to additional overtime pay. (*See generally* Pl. First Amend. Compl. (failing to offer any description of job duties for any of these positions)). Plaintiff purports to bring his claims under the FLSA, the DCMWA, and the DCWPCL.

ARGUMENT

Plaintiff's Overtime Claims should be dismissed. Count IV should be dismissed because the DCMWA provides the exclusive remedy for local law claims alleging a right to overtime wages and because the DCWPCL does not apply to claims for disputed wages. In addition, all Overtime Claims should be dismissed because Plaintiff fails to allege facts sufficient to state a claim for overtime wages, and Count II should be dismissed because he fails to allege facts sufficient to state a claim for retaliation.

I. COUNT IV MUST BE DISMISSED BECAUSE THE DCMWA PROVIDES THE EXCLUSIVE REMEDY FOR A PLAINTIFF ALLEGING A RIGHT TO BE PAID OVERTIME WAGES UNDER D.C. LAW.

The core of Plaintiff's claim is that he has a right to overtime wages rather than regular wages for the hours he worked in excess of 40 hours per week. (Pl. First Amend. Compl. ¶ 1). Claims to a specific rate of pay are governed by the DCMWA but not the DCWPCL. *See*

[3] Plaintiff alleges in conclusory fashion only that GW "improperly used a "half time" method to calculate the back overtime wage payments…" (Pl. First Amend. Compl. at ¶ 45).

Fudali, 310 F. Supp. 2d 22, 25-29. Because Plaintiff's claim is about the rate of his pay rather than the timing of his pay, Plaintiff's Overtime Claims must be brought exclusively under the DCMWA.

A. The DCMWA Governs What Wages Must Be Paid.

The DCMWA created a comprehensive statutory scheme to ensure that all persons employed within the District are "paid at wages sufficient to provide adequate maintenance and to protect health." D.C. Code § 32-1001. The DCMWA requires that certain employees in the District be paid a minimum wage as well as an overtime wage for hours worked in excess of 40 hours per week. D.C. Code §§ 32-1003 to -1004. The overtime wage must be "not less than 1 1/2 times the regular rate at which the employee is employed." D.C. Code § 32-1003(c).

The DCMWA bestows sweeping authority to the Mayor to establish an extensive regulatory scheme for implementing the law and grants broad power to investigate and enforce compliance with its provisions. D.C. Code §§ 32-1005 to -1007. The DCMWA imposes elaborate record-keeping and notice-posting requirements for employers. D.C. Code §§ 32-1008 to -1009. The DCMWA provides civil and criminal penalties for an employer's failure to comply with it or its implementing regulations. D.C. Code §§32-1010 to -1011.

The DCMWA also establishes a detailed framework for civil liability for employers. The DCMWA further provides that an employer who pays any employee "less than the wage to which that employee is entitled under this subchapter" shall be liable for the unpaid damages and reasonable attorney's fees. D.C. Code § 32-1012(a), (c). The DCMWA further provides that the employer shall be liable for liquidated damages in an amount equal to the unpaid wages unless the employer acted "in good faith" and "had reasonable grounds" for its decision to pay "less"

than the wages required under its provisions. D.C. Code § 32-1012(a). In such cases, the court "may award no liquidated damages" or a lesser amount of liquidated damages. *Id.*

In addition, the DCMWA gives an employee the right to control his own claim by mandating that "[n]o employee shall be a party plaintiff to any action brought under this subchapter unless the employee gives written consent to become a party ...." D.C. Code § 32-1012(b). This mandate protects employees from having their rights litigated in a class action without their input and consent. The mandate also protects employers by giving them the right to be sued in an individual or collective action but not in a class action.

B. The DCWPCL Governs When Wages Must Be Paid.

In contrast to the DCMWA, which regulates what wages an employer must pay, the DCWPCL regulates when an employer must pay wages. *See Fudali*, 310 F. Supp. 2d at 27-29. The DCWPCL dictates that an employer "shall pay all wages earned to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer," provided that "not more than 10 working days may elapse" between the designated pay periods. D.C. Code § 32-1303. The DCWPCL also regulates when an employer must pay wages earned to an employee who resigns, is discharged, or is suspended as a result of a labor dispute. D.C. Code § 32-1303. It applies only to wages that the employer concedes are owed. D.C. Code § 32-1304; *see* Part II, *infra*.

Like the DCMWA, the DCWPCL provides a framework for civil liability and allows recovery of unpaid wages, liquidated damages, and attorney's fees and costs. D.C. Code §§ 32-1303(4), 32-1308. Unlike the DCMWA, the DCWPCL does not give employers a good-faith defense to liquidated damages, and the DCWPCL permits class actions. D.C. Code

§ 32-1308. An employee does not have to consent to be added as a plaintiff, and an employer may be sued in a class rather than collective action. *See id.*

C. The DCMWA Provides the Exclusive Remedy for Overtime Claims Brought Under D.C. Law.

Plaintiff must pursue his overtime claims under the DCMWA and not the DCWPCL. This result is compelled by: (1) basic principles of statutory construction; (2) this Court's analogous holdings regarding the FLSA and the DCWPCL; and (3) the jurisprudence of other jurisdictions finding that state minimum wage laws and not wage payment collection laws are the appropriate remedy for alleged overtime violations.

Statutory Construction. When an act creates its own remedy, "the statutory remedy is presumed to be exclusive." *Hicks v. Ass'n of Am. Med. Colleges*, 503 F. Supp. 2d 48, 55 (D.D.C. 2007). A plaintiff "may not avoid that scheme" by pursuing alternative relief. *Smith v. Police & Firemen's Retirement & Relief Bd.*, 460 A.2d 997, 1000 (D.C. 1983). Here, the D.C. Council clearly sought to and did include a specific remedy within the DCMWA and this Court may not proceed any further than that remedy to decide this issue.

Indeed, § 32-1012 of the DCMWA, enacted in 1992 with an effective date of March 25, 1993, was adopted long after the "class" procedures in § 32-1308 of the DCWPCL, which were enacted in 1955 with an effective date of August 3, 1956. By enacting the DCMWA amendments on the existing landscape of wage and overtime law in the District, the D.C. Council must have intended the more specific DCMWA procedures to control. *See Morton v. Mancari,* 417 U.S. 535, 549 (1985) (where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one).

Further, in interpreting a statute, a court must first look to its language, "if the words are clear and unambiguous, [the court] must give effect to its plain meaning." *J. Parreco & Son v. District of Columbia Rental Hous. Comm'n*, 567 A.2d 43, 45 (D.C. 1989) (citations omitted). "The words used [in the statute], even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing." *Id.* at 46 (*quoting Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (per Learned Hand, J.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945)). Nothing in the plain language of the DCMWA indicates that its restrictive provisions were intended only as options or as alternative remedies. Similarly, nothing in the plain language of the DCWPCL indicates that it was intended to be used as a vehicle to recover overtime wages or intended to permit circumvention of the procedural mechanisms in the DCMWA, including its collective action procedure. In fact, § 32-1012 of the DCMWA states, "**No employee shall** be a party plaintiff to an action brought [seeking overtime wages] unless the employee gives written consent to become a party and the written consent is filed in the court in which the action is brought." (emphasis added). The D.C. Council could hardly have issued a more clear and declarative statement. Plaintiff must use the DCMWA and its collective "opt in" procedures to seek redress for his Overtime Claims.

Moreover, in construing statutes, courts are to exercise "common sense" and "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. 576, 580, 587 n.10 (1981); *see, e.g.*, *Nepera Chem. Inc. v. Fed. Mar. Comm'n*, 662 F.2d 18, 21 (D.C. Cir. 1981) (law must be construed to avoid absurdity). Courts are "to construe statutes in a way which presumes that the legislature has acted logically and reasonably." *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 16 n.28 (D.C. 1991) (citing cases). Recognizing a right to enforce overtime claims under the DCWPCL would effectively render the DCMWA a nullity. An employer sued for overtime

wages under the DCWPCL would lose the good-faith defense granted by the DCMWA. Further, because the DCWPCL permits class actions, the employer would face class actions not permitted under the DCMWA and, similarly, employees would lose their right to decide whether to join the lawsuit. Contrary to the DCMWA, they would automatically be made members of any class action filed by a fellow employee without having the right to decide whether to consent to join a case seeking overtime pay. Such a construction and outcome is untenable: it is a "cardinal rule" that implied repeals are not favored. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936); *Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1329 (D.C. Cir. 1987).

Additionally, nothing in the legislative history indicates that the D.C. Council intended rights granted under the DCMWA to be enforceable under the DCWPCL rather than the DCMWA. It defies common sense to conclude that, by remaining silent on the matter, the legislature intended employers and employees to lose their rights under DCMWA.

In sum, basic statutory construction leads inexorably to the conclusion that actions to enforce rights granted by the DCMWA must be brought under the DCMWA—and not the DCWPCL—and must comply with the restrictions and procedures imposed by the DCMWA. To permit otherwise would be to frustrate the clear intent of the legislature and render the DCMWA meaningless. *See Lanphear v. Tognelli*, 157 Vt. 560, 563-64 (1991) (holding that overtime claims must be stated under the state wage-and-hour law because permitting such claims to be brought under the state wage-payment law would render the less-stringent wage-and-hour law "meaningless").

Analogous Holdings. This Court has found that the DCMWA and the FLSA should be similarly construed. *Calles v. BPA Eastern Us, Inc.*, No. 91-2298, 1991 WL 27468 (D.D.C. Dec. 6, 1991). Further, this Court has held that the FLSA is the exclusive remedy for enforcing rights

created by that statute. *See Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 22 (D.D.C. 2010) (citing cases); *Hicks*, 503 F. Supp. 2d at 51, 55 (holding that the FLSA and the "nearly identical" DCMWA "provide plaintiff's exclusive remedy" for alleged retaliation). Accordingly, this Court should also find that the DCMWA is the exclusive remedy for Plaintiff to seek redress for alleged local law overtime violations, including the "opt in" mechanism expressly provided for by the legislature for that effort.

Similarly, in *Ventura*, this Court held that the DCWPCL's remedies are exclusive. *See* 738 F. Supp. 2d at 22-23 (D.D.C. 2010). The Court reasoned that the DCWPCL used "restrictive language when disclosing its remedies" by stating what damages were recoverable. *Id.* at 23. In light of that language, the Court concluded that it was "apparent on the face of the DCWPCL ... that the remedies provided therein are exclusive." *Id.* Likewise, the DCMWA uses restrictive language in defining its remedies.

Like the FLSA and the DCWPCL then, the DCMWA is a comprehensive scheme that creates its own remedy. Thus, as with the FLSA and the DCWPCL, this Court should conclude that the DCMWA's remedies are the exclusive vehicle for a plaintiff seeking to enforce the overtime rights created by that Act.

Other Jurisdictions. Other jurisdictions to consider this issue agree that overtime claims cannot also be brought under the state's wage payment law. The courts in those jurisdictions have properly concluded that the wage-payment law governs the timing of payment and not the amount of payment. Thus, the courts have held that overtime claims must be brought under the state's wage-and-hour act rather than the state's wage-payment law.

In *Butler v. DirectSat USA, LLC*, the District Court for the District of Maryland held that, "where the parties' core dispute is whether plaintiffs were entitled to overtime wages at all," the

plaintiff cannot proceed under Maryland's Wage Payment & Collection Law (the "MDWPCL"). 800 F. Supp. 2d 662, 670 (D. Md. 2011) (citing cases). The court reasoned that the MDWPCL "does not specifically address payment of overtime wages or provide a cause of action directed at employer's failure to pay overtime."[4] *Id.* The court concluded that the plaintiffs "must look to the MWHL [Maryland's Wage and Hour Law]" because that act provides the right to overtime. *Id.*; *see, e.g.*, *Williams v. Md. Office Relocators*, 485 F. Supp. 2d 616, 621-22 (D. Md. 2007) (holding that plaintiff cannot state a claim under wage-payment law even though he alleges that defendant failed to timely pay overtime wages where plaintiff's "overtime claim turn[s] entirely upon the question of whether overtime pay was due"); *McLaughlin v. Murphy*, 372 F. Supp. 2d 465, 474-75 (D. Md. 2004) (holding that plaintiff cannot proceed under wage-payment law where his claims "are based on his entitlement to the wages themselves").

Similarly, in *Lanphear v. Tognelli*, the Supreme Court of Vermont held that the state's wage-payment law "applies only to violations of the timeliness and form of wage requirements, not the underpayment of wages." 157 Vt. 560, 563-64 (1991). The court reasoned that the state's wage-and-hour act is "a self-contained regulatory scheme distinct from" the wage-payment law. *Id.* at 64. The court noted that, if a violation of the wage-and-hour act were automatically a violation of the wage payment law, "different remedies and penalties would apply to the same conduct, rendering the less stringent sanctions of [the wage-and-hour act] meaningless." *Id.* Accordingly, the court held that a claim for overtime wages cannot be stated under the wage payment law. *See id.* at 63-64.

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[4] This is exactly the situation in the District of Columbia. The DCWPCL does not specifically address the payment of overtime wages nor provide a cause of action directed at an employer's failure to pay overtime. The D.C. Council added a cause of action for this type of claim in the DCMWA as amended, subsequent to the DCWPCL.

Likewise, in *Jara v. Strong Steel Door, Inc.*, the New York Supreme Court held that plaintiffs could not state a claim under the state's wage payment law where they alleged that the defendant failed to pay overtime wages for overtime hours. 2008 WL 3823769, at *14 (N.Y. Sup. Ct. 2008). The court reasoned that it was "not disputed that plaintiffs were timely paid on a regular basis." *Id.* For that reason, the court concluded that the "gravamen" of plaintiffs' complaint is that the defendant failed to pay "overtime compensation rates." *Id.* The court dismissed plaintiffs' wage payment claim, holding that the wage payment act "is an inappropriate vehicle" for a claim to overtime rates. *Id.*; *see also Freeman v. Centr. States Health & Life Co.*, 515 N.W.2d 131, 134-35 (Neb. Ct. App. 1994) (holding that plaintiffs could not enforce FLSA overtime rights under state's Wage Payment and Collection Act); *Mitchell v. C&S Wholesale Grocers, Inc.*, 2010 WL 2735655, at *5 (D.N.J. 2010) (holding that claims alleging a right to be paid overtime rates for overtime work must be brought under the state's Wage & Hour Law and not under the state's Wage Payment Act); *Freeman v. Centr. States Health & Life Co.*, 515 N.W.2d 131, 134-35 (Neb. Ct. App. 1994) (holding that plaintiffs could not enforce FLSA overtime rights under state's Wage Payment and Collection Act).

These courts recognized, as this Court should, that a plaintiff claiming a statutory right to be paid overtime rates for overtime work must proceed exclusively under the statute granting that right. The courts properly concluded, as this Court should regarding the DCMWA, that the wage payment and collection laws govern the frequency of payment not the amount of payment.

* * *

Plaintiff's claim is that he had a right to be paid overtime wages for overtime work. Plaintiff's right, if it exists—to the extent such a claim exists at all under D.C. law—was created

by the DCMWA and must be enforced under that law.[5] As explained, proper statutory construction, this Court's analogous holdings, and the jurisprudence of other states which have considered the issue, all dictate that an employee's claims may be enforced only under the DCMWA not the DCWPCL. Accordingly, this Court should dismiss Plaintiff's Count IV, alleging violations of the DCWPCL.

II. COUNT IV MUST BE DISMISSED BECAUSE THE DCWPCL DOES NOT APPLY TO CLAIMS FOR DISPUTED WAGES.

Count IV must also be dismissed because the DCWPCL does not apply to disputes over the amount of wages due to an employee. *See, e.g.*, *Fudali v. Pivotal Corp.*, 310 F. Supp. 2d 22, 27-29 (D.D.C. 2004). The DCWPCL applies only to wages that the employer concedes are due but failed to pay. *See id.* Section 32-1304, titled "Unconditional payment of wages conceded to be due" states that, within the time required, an employer must pay "the amount of wages which he concedes to be due." The section states that payment of the conceded wages "shall constitute payment for the purposes of complying with §§ 32-1302 and 32-1303" if there is a bona fide dispute about the amount of wages owed. D.C. Code § 32-1304. This Court has interpreted § 32-1304 to mean that, a defendant's timely payment of undisputed wages due "relieves [the employer] of liability" under the DCWPCL. *Fudali*, 310 F. Supp. 2d at 28.

In *Fudali*, an employee alleged that an employer had failed to pay commissions that she earned. *See id.* at 24. The employee did not dispute that her employer had paid her, but she alleged that her employer had not paid her enough. *See id.* The employer defended that the employee could not state a claim under the DCWPCL because the employer disputed that it owed any commissions. *See id.* at 27-29. The employer argued that, pursuant to § 32-1304,

[5] Alternatively, Plaintiff can seek to enforce the federal right to overtime by bringing an FLSA claim, which he has done.

"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." *Id.* at 27. The Court ruled that "a common sense reading of the statutory section confirms [the employer's] interpretation." *Id.* at 28.

The Court held that the effect of § 32-1304 is that the DCWPCL does not apply if the employer pays all undisputed wages. The Court reasoned that § 32-1304 provides that payment of the undisputed wages "shall constitute payment for the purpose of complying with" the DCWPCL timely-payment requirements. *Id.* The Court further reasoned that requiring employers to pay disputed wages would nullify § 32-1304. *See id.* The Court thus concluded that the DCWPCL requires a timely payment of "those wages that are conceded to be due" but does not require a timely payment of those wages that are disputed. *Id.*

Like the plaintiff in *Fudali*, Plaintiff does not dispute that the University paid his wages on a regular and timely basis, and does not allege that the University withheld wages that it conceded to be owing.[7] Instead, like the plaintiff in *Fudali*, Plaintiff alleges that the University should have paid him more, a claim that the University disputes. Plaintiff's dispute is over the amount, not the timing, of his wage payment.

At all times, the University timely paid Plaintiff the wages that the University conceded to be owed to him. Plaintiff does not allege that the University withheld any wages that were undisputedly owed to him. Because the University paid all conceded wages, the University falls within § 32-1304, and the DCWPCL does not apply to Plaintiff's claim. Accordingly, Count IV must be dismissed.

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[7] Plaintiff alleges a violation of § 32-1302, which requires regular payment of wages. He does not allege a violation of § 32-1303, which requires timely payment of wages following termination. Even if he had alleged a § 32-1303 violation, his claim would nonetheless fail because the University timely paid him all undisputed wages upon his termination, and he does not allege otherwise.

III. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE HIS ALLEGATIONS ARE INSUFFICIENT, INCONSISTENT, AND CONCLUSORY.

To survive a motion to dismiss, a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. It is not enough to merely create a mere suspicion of a legally cognizable right of action. *See id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 550 U.S. at 678. Even if there are well-pleaded facts, a complaint fails if the facts alleged do not permit the court to infer more than "a sheer possibility" that the defendant acted unlawfully. *Id.* No plausible claim is stated where a complaint pleads facts "that are 'merely consistent with' a defendant's liability." *Id.* (quoting *Twombly*, 550 U.S. at 557).

A court is not bound to accept as true any legal conclusions in the complaint. *Iqbal*, 555 U.S. at 678. The plaintiff must provide the factual grounds of his entitlement to relief. *Twombly*, 550 U.S. at 555. This standard "requires more than labels and conclusions." *Id.* "[A] formulaic recitation of the elements of a cause of action will not do," *id.*, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 555 U.S. at 678. Where, as here, the "facts" are inadequate and the complaint is laden with unsupported conclusions, Plaintiff has not demonstrated an entitlement to relief.

A. Counts I, III, and IV Must Be Dismissed Because Plaintiff Failed To Plead Facts Alleging the Hours He Worked and the Amount He Is Owed.

Plaintiff's Overtime Claims must be dismissed because he failed to allege the hours he worked, the rate he was paid, and the amount he is owed. Plaintiff's First Amended Complaint does not provide the Court with sufficient factual information to infer that he has stated a

plausible claim for unpaid overtime compensation, nor does the First Amended Complaint provide the University with adequate notice of his claims.

To state a claim for overtime wages, a plaintiff must allege, at least approximately, the hours worked for which wages were not received and the amount of wages he is owed. *See, e.g.*, *Pruell v. Caritas Christi,* No. 09-11466-GAO, 2010 WL 3789318 (Sept. 27, 2010 D. Mass) (stating only that plaintiff not paid for overtime work does not sufficiently allege FLSA violation) (relying on *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628-31 (S.D.N.Y. 2007)); *Jones v. Carsey's Gen. Stores*, 538 F. Supp. 2d 1094, 1102 (S.D. Iowa 2008) (dismissing complaint that failed to approximate hours worked); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628-31 (S.D.N.Y. 2007) (holding that claim must approximate the number of hours worked and the wages owed). Merely alleging that Plaintiff regularly "worked beyond 40 hours per week" and "w[as] not paid for overtime work" does not sufficiently allege a violation. *Zhong*, 498 F. Supp. 2d at 630.

For example, in *James v. Countrywide Financial Corp.*, the Eastern District of New York dismissed a plaintiff's FLSA and state wage claims where the plaintiff alleged that he was "forced to work in excess of forty (40) hours a week on a regular basis while he served in various job capacities including positions that do not fall under the 'exempt' from overtime category." --- F. Supp. 2d ----, 2012 WL 359922, at *21 (E.D.N.Y. 2012). The court held that the plaintiff's allegation constituted nothing more than "vague legal conclusions." *Id.* (quotation marks omitted). The court ruled that, at a minimum, the plaintiff must "must set forth the approximate number of unpaid overtime hours allegedly worked." *Id.* (quotation marks omitted); *see also Jones*, 538 F. Supp. 2d at 1102 (holding that allegation that "Plaintiffs …

regularly worked regular time and overtime each week but were not paid regular and overtime wages" was conclusory and insufficient).

Similarly, in *Harding v. Time Warner, Inc.*, the Southern District of California held that a plaintiff's allegations that his employer failed to "pay and properly calculate overtime," "keep accurate records of all hours worked by its employees," or "provide all wages in a compliant manner'" were "conclusory allegations as defined by *Twombly*, and will be assigned no weight." 2009 WL 2575898, *3 (S.D. Cal. 2009) (quotation marks omitted). Likewise, in *Villegas v. J.P. Morgan Chase & Co.*, the Northern District of California held that an employee's allegation that her overtime wages were not "properly computed" did not state an overtime claim "because it is not much more informative than an allegation that she was not paid for overtime work in general." 2009 WL 605833 (N.D. Cal. 2009); *see also Bailey v. Border Foods, Inc.*, 2009 WL 3248305 (D. Minn. 2009) (granting motion to dismiss where plaintiff failed to identify hourly pay rate or allege any fact that would permit Court to infer that plaintiff was improperly paid).

Like the complaints in *James*, *Harding*, and *Villegas*, Plaintiff's Complaint is devoid of details and relies on labels instead of well plead facts. Plaintiff alleges:

- That the University "made nominal back overtime payments ... that were not based on the overtime hours the individuals worked..." (Pl. First Amend. Compl. ¶ 1);
- That the University "did not pay them overtime wages for all hours worked over 40 in a week." (*Id.* ¶ 40);
- That the University "began to pay them overtime wages for all hours worked over 40 in a week." (*Id.* ¶ 41);
- That the University "made a payment to [Plaintiffs] for back wages owed from the period two years prior to the reclassification."" (*Id.* ¶ 44);
- That the "payments for back wages were not based on the overtime hours...worked" (*Id.* ¶ 47).

- That the University "failed to pay overtime wages due to Plaintiffs as required..." (*Id.* ¶ 53); and
- That the University "failed to pay overtime wages to Plaintiffs" (*Id.* ¶ 60).

These allegations fail to demonstrate a plausible claim for relief.

Plaintiff does not allege the number of hours he worked for which he supposedly did not receive overtime. He does not allege his hourly pay rate. He does not allege how much overtime he was paid. Assuming he alleges that such amounts were not accurate, he does not allege what he should have been paid or how his wages should have been calculated. Nor does he allege the period during which the overtime was improperly calculated.

Like the plaintiffs in *James*, *Harding*, and *Villegas*, Plaintiff—at best—has simply alleged that, at some time, he worked more than 40 hours per week and that his overtime pay for that work was improperly calculated. These formulaic allegations are insufficient to state a claim and the Court should reject his repeated use of legal conclusions "couched as factual allegation[s]." *Twombly*, 550 U.S. at 555.

B. Count II Must Be Dismissed Because Plaintiff Failed to Allege that He Complained that the University's Conduct Violated the FLSA.

Plaintiff has failed to make the necessary showing to state a plausible claim for retaliation under the FLSA. To state a claim for retaliation, Plaintiff must allege facts showing (1) that the University was aware that Plaintiff was engaged in statutorily protected activity; (2) that the University took adverse action against him; and (3) that there was a causal connection between Plaintiff's participation in the protected activity and the University's adverse action. *See Caryk v. Coupe,* 663 F. Supp. 1243, 1253 (D.D.C. 1987). The "threshold question" is whether the Plaintiff had engaged in protected activity—whether he had "filed any complaint"—when he sought additional overtime wages. *Hicks*, 503 F. Supp. 2d at 51. He must have put the

University on notice that he was asserting his rights under the FLSA. *Cooke v. Rosenker*, 601 F. Supp. 2d 64, 75-76 (D.D.C. 2009).

To have "filed a complaint," Plaintiff must have specifically and expressly asserted his rights under the FLSA. *See id.* at 53-54 (holding that cases in which a complaint was found involved the employee referencing the relevant statute or attaching a copy of the statute). Expressing discontent about his hours or wages is not sufficient. *See id.* at 52. Plaintiff must have "either file[d] (or threaten[ed] to file) an action adverse to the employer, actively assist[ed] other employees in asserting FLSA rights, or otherwise engage[d] in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." *Cooke,* 601 F. Supp. 2d at 75.

Plaintiff's allegations do not meet this standard. Plaintiff makes only two allegations related to his retaliation claim. First, he alleges that the University "discriminated against him in violation of the FLSA's anti-discrimination provisions ... by firing him for questioning [the University's] method of calculating the back wage payments it made pursuant to its reclassification." (Pl. First Amend. Compl. ¶ 4). This allegation is insufficient because Plaintiff merely alleges that he was fired for complaining about his wages. He does not allege that he mentioned the FLSA to the University. Second, Plaintiffs alleges that the University "discriminated against Plaintiff Driscoll by discharging him because he questioned its payment of back overtime wages in violation of the FLSA." (*Id.* ¶ 57). Similarly, this allegation does not assert that Plaintiff expressly raised the FLSA when he complained as alleged.

At best, all Plaintiff has alleged is that he complained about his wages and was subsequently fired. He has not alleged any facts showing that the University was aware that he

was asserting his rights under the FLSA. Accordingly, Count II fails to state a claim and must be dismissed. [8]

CONCLUSION

Plaintiff's Complaint must be dismissed because he has failed to state a claim upon which relief can be granted. Count IV must be dismissed with prejudice because the DCMWA provides the exclusive remedy for a plaintiff alleging a right to be paid overtime wages under D.C. law and because the DCWPCL does not apply to claims for disputed wages. Also, the Complaint a whole must be dismissed because Plaintiff has failed to allege sufficient facts to state a claim for relief under any count. Instead, Plaintiff has asserted conclusory and formulaic recitations of the law "couched as factual allegation[s]." *Twombly*, 550 U.S. at 555.

[8] In the only published decision from this District to decide the issue, Judge Urbina held that, to state a claim for retaliation, an employee must allege that he filed a formal complaint "in the context of formal legal actions." *Mansfield v. Billington*, 432 F. Supp. 2d 64, 74 (D.D.C. 2006). Informal complaints are not sufficient. *See id.* at 73-75. Although Judge Sullivan subsequently held in an unpublished decision that informal complaints were sufficient, *see Haile-Iyanu v. Centr. Parking Sys., Inc.*, 2007 WL 1954325, at *2-*4 (D.D.C. 2007), this Court need not decide the issue because Plaintiff's allegations do not rise to the level of an informal complaint, *see, e.g.*, *Hicks*, 503 F. Supp. 2d at 52-54. Plaintiff does not allege any conduct that would have put the University on notice that he was asserting his rights under the FLSA. *See, e.g.*, *Cooke*, 601 F. Supp. 2d at 75-76.

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Respectfully submitted,

GEORGE WASHINGTON UNIVERSITY

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