NO.

In the Supreme Court of the United States

RAMONA DEJESUS,

Petitioner,

v.

HF MANAGEMENT SERVICES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on an issue that has divided lower federal courts in almost every circuit, this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) requires dismissal of an employee's FLSA overtime claim for failure to approximate and to more precisely state her overtime hours and wages before the employee can exercise her right under this Court's seminal decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) to secure the production of the employer's records kept pursuant to the FLSA at 29 USC § 211(c) and 29 CFR § 516 which contain this very information.

2. Whether, on an issue that has divided the circuits, this Court's unanimous decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) which clarified the pleading requirements in employment burden-shifting cases, is still good law after this Court's split decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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The district court's unpublished order granting defendant's motion to dismiss for failure to state a claim, is reproduced at App. 16-22.

II. JURISDICTION

The court of appeals rendered its decision on August 5, 2013, and denied a timely petition for rehearing on September 12, 2013. App. 23-24. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS AND RULES

1. FLSA's Overtime Provision

The FLSA's overtime provision can be found at 29 USC § 207(a)(1) which reads in relevant part as follows:

> no employer shall employ any of his employees … for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. FLSA's Record-Keeping Provision

The FLSA's record-keeping provision can be found at 29 USC § 211(c) and reads as follows:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall

> make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

The regulations at 29 CFR § 516 expound upon the statutory record-keeping requirements, and the Supreme Court's seminal decision in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-688 (1946) interpreted these requirements.

3. FRCP Rule (8)(a)(2)

The pleading standard pursuant to which the overtime claim was dismissed can be found at Federal Rules of Civil Procedure ("FRCP") Rule 8(a)(2) which states in relevant part that:

> A pleading that states a claim for relief must contain … a short and plain statement of the claim showing that the pleader is entitled to relief.

The Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), interpreted these requirements.

IV. STATEMENT OF CASE

This case involves a claim for overtime pay under the federal Fair Labor Standards Act ("FLSA"). In general, the FLSA requires employers to

pay employees at least 1.5 times their regular rate of pay for each hour of work in excess of 40 hours a week. The FLSA also requires employers to keep weekly wage and time records to ensure compliance with the statute's overtime pay requirements. Here, plaintiff worked overtime but was not paid overtime wages by defendant for most of her approximately three year employment. After several lawsuits against defendant by other employees, defendant began paying plaintiff overtime wages for approximately the last six months of her employment but was still in violation for this period because it did not include commission payments in the calculation of overtime as required by the FLSA. Based on her personal knowledge, plaintiff in her complaint made factual allegations satisfying the very simple elements of an FLSA overtime claim. These allegations taken as true as they must be under *Iqbal*, stated an overtime claim, especially where as here, defendant does not dispute the overtime allegations. However, the Second Circuit and the district court faulted plaintiff for not approximating her weekly overtime hours – something she cannot do without first exercising her legal right under this Court's decision in *Anderson* to secure the production of the statutory wage and time records defendant was required to keep under the FLSA. The Second Circuit acknowledged that the issue of whether an employee must approximate overtime hours has divided the federal courts nationwide. The Second Circuit's decision also puts it in conflict with the First Circuit and relevant decisions of the Supreme Court.

1. The Underlying Facts

On a motion to dismiss for failure to state a claim, the factual allegations in the complaint (App. 25-33) must be taken as true and are set forth herein. Plaintiff Dejesus worked for defendant Health First at its offices at 93-14 Roosevelt Avenue, Queens, NY 11372. (App. 27:11). Defendant employed plaintiff to promote insurance programs to the public and to recruit members of the public to join those insurance programs. (App. 28:19). Plaintiff was employed by defendant for about three years ending on or about August 31, 2011. (App. 28:20). As part of her wage agreement with defendant, plaintiff and defendant agreed that plaintiff would be paid a commission for each person recruited to join the insurance programs promoted by defendant, in addition to a regular non-commission wage. (App. 28:21). Plaintiff was an hourly employee of defendant. (App. 28:22).

Throughout her employment with defendant, plaintiff worked more than forty (40) hours in a week for defendant in some or all weeks, but was not paid at a rate of at least 1.5 times her regular rate for each and all hours worked in excess of forty hours in a week. (App. 28:24). Defendant has a common policy of not paying the required overtime to a class of over a hundred other current and former employees who are similarly-situated to plaintiff. (App. 28:26). For a period of plaintiff's employment, defendant did not pay plaintiff any overtime and for another period, defendant failed to include the commission payments in the calculation of plaintiff's overtime pay. (App. 28:27).

In the case of *Willix v. Healthfirst, Inc.*, ECF Docket #: 304, 312, Civ. No. 07-1143 (E.D.N.Y.), the

court approved a settlement for about $7,675,000 on behalf of a class of defendant's employees who also promoted defendant's insurance programs to the public. Around the time of the *Willix v. Healthfirst* settlement, defendant, in April 2011 began paying plaintiff overtime wages.[1] Plaintiff is seeking to recover overtime wages for the period before defendant began paying overtime wages in April 2011. Plaintiff is also claiming some overtime wages for the period after April 2011 based on the failure by defendant, as alleged in the complaint (App. 29:27, 28:21, 28:23), to include commission payments in the calculation of overtime wages as is required by 29 CFR § 778.117.

2. The FLSA's Statutory Framework

The federal Fair Labor Standards Act ("FLSA") was enacted in 1938 by Congress and signed into law by President Franklin Roosevelt in response to the lack of labor protections for American workers. The two most famous provisions of the FLSA are those providing for a federal minimium wage and federal overtime wages. The FLSA's protections have been strenghtend many times over the years through amendment and today, the protections of the FLSA cover more than 130 million workers across the United States on a daily basis.[2]

Under the FLSA, there is a presumption that all employees are entitled to overtime and that an employee is entitled to at least 1.5 times her regular

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[1] In footnote 3, page 7 of its reply memorandum in the district court (ECF # 15, Civil No. 12-cv-1298 (EDNY)), defendant confirmed, "its decision to begin paying Medicare Sales Representatives overtime in April 2011."

[2] http://www.dol.gov/compliance/guide/minwage.htm

rate for all hours worked in excess of forty in a week, unless an exemption applies. See 29 U.S.C. § 207(a)(1); *Reich v. State of New York*, 3 F.3d 581, 587 (2d Cir. 1993). An employee must therefore plead two elements in order to state an FLSA overtime claim. First, she must plead that she worked more than 40 hours in a week. Second, she must plead that she was not paid at a rate of at least 1.5 times her regular rate for all hours over forty in the week. An employee can bring an FLSA overtime claim even for a single week. See 29 C.F.R. § 790.21(b). *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192, 198-199 (2d Cir. 2013).

Unlike the discrimination claim in *Iqbal* and the antitrust claim in *Twombly*, an FLSA overtime claim does not require proof of causation, conspiracy, agreement, malice, intent, or other state of mind. Also, whether by agreement or conduct, neither employer nor employee can waive the overtime requirements of the FLSA. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 944, 946 (2d Cir. 1959).

An employer can avoid payment of overtime wages by pleading and proving that the employee fits one of the exemptions enumerated in the FLSA. Whether an exemption applies to the FLSA is an affirmative defense on which the employer has the burden of proof. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). Exemptions to the Fair Labor Standards Act ("FLSA") as incorporated into NYLL are to be narrowly construed, with the employer bearing the burden of proving that employees fall

within exemption. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991). The employer must show that the employee fits "plainly and unmistakenly within [the exception's] terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960). As the Second Circuit stated, "consistent with the remedial purposes of the FLSA, we do not give FLSA exemptions generous application." *Reich v. State of N.Y.*, 3 F.3d 581 (2d Cir. 1993). If an employer fails to plead an exemption as an affirmative defense the exemption defense is waived. *Magana v. Com. of the Northern Mariana Islands*, 107 F.3d 1436 (9th Cir. 1997).

In order to make its overtime provisions meaningful and workable, the FLSA also requires employers to keep and maintain records of wages, hours and other information so that they can comply with the weekly overtime pay requirements and for use by the U.S. Departmet of Labor or employees like Dejesus in resolving overtime claims. See 29 USC § 211. 29 CFR § 516. Unlike the court of appeals here, Congress recognized the obvious fact that employees cannot be expected to remember their weekly hours without records and hence, Congress required employers to keep such records. In the seminal case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), the Supreme Court addressed the FLSA's record keeping requirements and stated in relevant part as follows:

> When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records.

Contrary to the Second Circuit here, the intent and purpose of the FLSA's record-keeping requirements and the Supreme Court's decision in *Anderson* dictate that an employee's FLSA overtime claim cannot be dismissed for failure to more precisely state hours and wages before she has a chance to secure the production of the employer's statutory records containing this very information.

3. The District Court Proceedings

Plaintiff Ramona Dejesus commenced the instant action on March 15, 2012, by filing of the complaint. (App. 25-33). The complaint contained claims for overtime wages under the FLSA and New York Labor Law ("NYLL") as well as a claim for unpaid commissions under NYLL. (App. 25-33). On or about May 7, 2012, defendant filed a pre-answer motion to dismiss the complaint. Defendant's primary argument was that plaintiff was exempt from the overtime protections of the FLSA under the Outside Salesperson Exemption. In the alternative, defendant argued that the allegations in the complaint were legally insufficient and did not state a plausible claim for relief. The district court decided the motion to dismiss on October 23, 2012. (App. 16-22). The district court rejected defendant's primary arguments based on the exemption affirmative defense. However, the district court granted defendant's alternative request and found that the FLSA overtime claim was not properly stated and it dismissed this claim. Because of its dismissal of the FLSA overtime claim the district court declined to exercise supplemental jurisdiction over the state claims – the claims for unpaid overtime and unpaid

commissions under NYLL. The dismissal of the FLSA claim was appealed to the Second Circuit.

4. The Court of Appeals Proceedings

On appeal, the Second Circuit addressed three central issues: 1) whether plaintiff was required to plead the exemption defense; 2) whether plaintiff sufficiently pleaded that she was an employee of defendant; and 3) whether plaintiff was required to estimate or approximate her overtime hours. The Second Circuit agreed with plaintiff on the exemption issue and stated that (App. 14, fn 7):

> We also agree with Dejesus that she was not required to plead facts at this stage of the proceedings to support her position that she was a non-exempt employee, that is, one who falls outside of the FLSA's exemptions. A claim of exemption under the FLSA is an affirmative defense, and the employer bears the burden of proof in making any such claim. See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991).

The Second Circuit also agreed with plaintiff that she sufficiently pleaded that she was employed by defendant when it stated that "we disagree with the district court's conclusion on the point." (App. 12). In agreeing with petitioner Dejesus on the exemption and employment status issues, the Second Circuit agreed that petitioner was not required to

plead almost all of the information the district court required her to plead. However, the Second Circuit nonetheless found that plaintiff failed to state an FLSA overtime claim because "She did not estimate her hours in any or all weeks." (App. 9). As the Second Circuit noted, "In arriving at its conclusions, the [district] court relied on other district court decisions requiring plaintiffs to approximate overtime hours allegedly worked." (App. 5). The Second Circuit here did discuss the split amongst the federal courts as to whether an approximation of overtime is required to state an FLSA overtime claim as opposed to the factual allegation that the plaintiff worked more than 40 hours a week – the overtime threshold. (App. 7). For the period after April 2011 when defendant began paying plaintiff overtime but did not include the commissions in the calculation of overtime pay as required by 29 CFR § 778.117, the Second Circuit also found no claim was stated because, "Dejesus alleges neither the number of weeks during which Healthfirst improperly calculated her overtime pay, nor which weeks they were." (App. 9, fn 4). In so holding the Second Circuit rejected the arguments that it is almost impossible on a human level and unnecessary under *Anderson* to provide this level of detail at the pleading stage before the employee can obtain the statutory records. The Second Circuit also rejected the arguments under *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-511 (2002), that it is improper to require a plaintiff in a burden-shifting employment case to plead more information than she would be required to prove at trial. The Second Circuit did reiterate the Supreme Court's reminder in *Iqbal* that the analysis should be "context-specific" and that courts should

apply "common sense." (App. 7). However, contrary to the Second Circuit's holding, it makes no sense in the context of an FLSA case, to require an employee to plead more specificity where the employer who is in possession of the statutory wage and time records, does not dispute the elements of the overtime claim, and instead relies on an affirmative defense which according to the Second Circuit itself, plaintiff does not have to plead. (App. 14, fn 7).

V. REASONS FOR GRANTING PETITION

Certiorari is warranted for three reasons. *First*, the Second Circuit's decision is in conflict with the First Circuit. The Second Circuit itself also noted the conflict among federal courts nationwide on the issue of FLSA pleading requirements. Second, the Second Circuit's decision is in serious conflict with the Supreme Court's decisions in *Anderson*, *Swierkiewizc*, and *Iqbal*. Third, the issue presented is an important one that has not been settled by this Court since the FLSA's enactment in 1938 but is one that arises in each of more than 7,000 FLSA cases filed every year in federal courts.

1. The Circuit Courts are in Conflict

This petition should be granted because it presents a situation where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." SCR 10(a). In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192, 196 (2d Cir. 2013), the Second Circuit stated in relevant part as follows:

> The four cases before us on appeal are but a few among many such actions brought by a single law firm,

> Thomas & Solomon LLP, and premised on a stock set of allegations concerning underpayment in the healthcare industry.

Consistent with the Second Circuit's observation, the law firm of Thomas & Solomon LLP, filed another action in the First Circuit, *Manning v. Boston Medical Center Corp.*, 725 F.3d 34 (1st Cir. 2013), premised on the same "stock set of allegations concerning underpayment in the healthcare industry." In both *Nakahata* and *Manning* there was no approximation of overtime hours like the Second Circuit here in *Dejesus* required. However, while *Manning* and *Nakahata* involved the same type of FLSA claim, overtime allegations, and even the same plaintiffs' law firm, the results were very different. The Second Circuit in *Nakahata* found that the FLSA claim was not plausibly stated while the First Circuit in *Manning* found that the FLSA claim was plausibly stated.

There is also a circuit conflict based on *Swierkiewicz*. Plaintiff argued below that requiring her to approximate overtime before she can secure production of the statutory wage and time records, not only violates *Anderson*, but *Swierkiewicz* as well. This is so because approximation of overtime is only required under *Anderson* when direct evidence in the form of statutory wage and time records required by 29 USC § 211(c) and 29 CFR § 516 were not kept by the employer - because plaintiff will be obtaining these records in discovery, the burden-shifting and the approximation required under it, may not apply at all as per this Court's unaminous holding in *Swierkiewicz*. However, defendant argues that, "the

continuing viability of *Swierkiewicz* has been called into question by *Iqbal."* (Def. Br. 26). We begin by noting that the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) specifically reaffirmed, at least in dicta, its unanimous ruling in *Swierkiewicz*. See *Twombly*, 550 U.S. at 547 ("This analysis does not run counter to *Swierkiewicz v. Sorema N. A.*"). Additionally, in *Iqbal* the Supreme Court merely applied "Twombly 's construction of Rule 8." See *Iqbal* 556 U.S. at 680-681. Moreover, the Supreme Court in *Iqbal* held that the plausibility analysis is "context-specific" – *Swierkiewicz* merely applied FRCP Rule 8 in the specific context of employment burden-shifting cases and as such, is perfectly consistent with *Iqbal*. Nonetheless, while *Swierkiewicz* is still good law, we agree with defendant that there are questions as to its continued viability and those questions have created a split and conflict amongst the courts of appeals. See *Schwab v. Smalls*, 425 Fed. App'x 37, 40 (2d Cir. 2011) ("Questions have been raised, however, as to *Swierkiewicz's* continued viability in light of *Twombly* and *Iqbal*."). *Fowler v. UPMC*, 578 F.3d 203, 211 (3d Cir. 2009) ("We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal,* so too has *Swierkiewicz*.").

On the other hand, the Sixth and Ninth Circuits have found that *Swierkiewicz* is still good law. See *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (finding "no basis for concluding that *Swierkiewicz* is no longer good law" after *Twombly*.). *Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009)

(finding that the *Twombly* Court "reaffirmed the holding of *Swierkiewicz*").

The Supreme Court should grant certiorari to resolve these circuit conflicts and confusion which are more profound because they are a reflection of a wider conflict among lower federal courts in several other circuits.

2. District Courts Nationwide are in Conflict

This petition should also be granted because the conflicts and confusion among the circuit courts are a reflection of what the state of affairs is among the federal district courts in almost every federal circuit as noted by different panels of the Second Circuit. See *Nakahata*, 723 F.3d at 200, ("the degree of specificity necessary to state an FLSA overtime claim [is] an issue that has divided courts around the country."). *Dejesus*, (App. 7) ("We noted that federal courts had diverged somewhat on the question,with some requiring an approximation of the total number of uncompensated hours in a given workweek, and others not requiring any estimate of overtime, but simply an allegation that the plaintiff worked some amount in excess of forty hours."). In addition, the Second Circuit in *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013), stated in relevant part as follows:

> We have not previously considered the degree of specificity needed to state an overtime claim under FLSA. Federal courts have diverged somewhat on the question. See *Butler v. DirectSat USA, LLC*, 800 F.Supp.2d 662, 667 (D.Md.2011)

> (recognizing that "courts across the country have expressed differing views as to the level of factual detail necessary to plead a claim for overtime compensation under FLSA"). Within this Circuit, some courts have required an approximation of the total uncompensated hours worked during a given workweek in excess of 40 hours. Courts elsewhere have done without an estimate of overtime, and deemed sufficient an allegation that plaintiff worked some amount in excess of 40 hours without compensation. See, e.g., *Butler*, 800 F.Supp.2d at 668 (collecting cases).

In this case, the Second Circuit faulted plaintiff because "she did not estimate her hours in any or all weeks." (App. 9). In *Butler v. DirectSat USA, LLC,* 800 F.Supp.2d 662, 667 -668 (D.Md.,2011), the court surveyed FLSA cases nationwide and concluded that, "In the wake of the *Iqbal* and *Twombly* decisions, courts across the country have expressed differing views as to the level of factual detail necessary to plead a claim for overtime compensation under FLSA." The Butler court found that some courts have required plaintiffs to allege approximately the number of hours worked for which overtime wages were not received. See *Anderson v. Blockbuster, Inc.*, No. 10–158, 2010 WL 1797249 *2–3 (E.D.Cal. May 4, 2010) (conclusory allegations that plaintiffs consistently worked in excess of forty hours a week insufficient); *Solis v.*

Time Warner Cable San Antonio, L.P., CA No. 10–231, 2010 WL 2756800 (W.D.Tex. July 13, 2010) (denying motion to dismiss where plaintiffs alleged approximate number of overtime hours worked per week); *Villegas v. J.P Morgan Chase & Co.*, CA No. 09–261, 2009 WL 605833 *4–5 (N.D.Cal. Mar. 9, 2009) (allegation that plaintiff "worked more than 40 hours in a work-week and more than 8 hours in a work day, thus entitling her to overtime pay" was insufficient); *Jones v. Casey's Gen. Stores*, 538 F.Supp.2d 1094, 1102 (S.D.Iowa 2008) (complaint alleging that assistant managers were not paid overtime, that the defendant "regularly and repeatedly" failed to pay plaintiff for all hours actually worked, and that the defendant failed to keep accurate time records to avoid paying plaintiffs overtime wages was "implausible on its face"); *Mell v. GNC Corp.*, No. 10–945, 2010 WL 4668966 *8 (W.D.Pa. Nov. 9, 2010) (plaintiffs' claim insufficient where they failed to even "estimate the time period in which they worked without proper overtime compensation").

The court in *Butler* also found that on the other hand, many courts have found the basic allegation that plaintiff worked overtime more than forty hours in a week and did not receive overtime compensation to be sufficient. See *Hawkins v. Proctor Auto*, 2010 WL 1346416 at *1); *Uribe v. Mainland Nursery, Inc.*, CA No. 07–0229, 2007 WL 4356609 *3 (E.D.Cal. Dec. 11, 2007) (plaintiffs who alleged they were nonexempt employees who had not been compensated at the appropriate overtime rates had satisfied *Twombly*); *Xavier v. Belfor USA Group, Inc.*, CA No. 06–491 et al., 2009 WL 411559 *5 (E.D.La.

Feb. 13, 2009) (plaintiffs' allegations they routinely worked more than forty hours per week, were not paid overtime compensation, and were covered employees were sufficient to state a claim); *Qureshi v. Panjwani*, No. 08–3154, 2009 WL 1631798 *3 (S.D.Tex. Jun. 9, 2009) (plaintiffs' allegations that "they were required to work in excess of a forty-hour week without overtime compensation, and that they were employed by the defendants" were sufficient to state a claim under the FLSA); see also *Pruell v. Caritas Christi*, CA No. 09–11466, 2010 WL 3789318 *3 (D.Mass. Sept. 27, 2010) (recognizing differing approaches and noting that court need not decide whether more stringent pleading was required because plaintiffs had not alleged they worked more than forty hours a week).

As laid out above, federal district courts in the First, Second, Third, Fourth, Fifth, Eighth, and Ninth circuits are in conflict on the issue of FLSA pleading standards. These conflicts are almost tantamount to circuit conflicts because the district courts are merely applying their circuit court's view of FRCP Rule 8 after *Iqbal* and *Twombly*. The Supreme Court should grant certiorari to resolve these conflicts.

3. The Second Circuit is in Conflict with Relevant Supreme Court Decisions

The petition should also be granted because it presents a situation where "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court." SCR 10(c). Spefically, the Second Circuit's published decision in this case is in serious conflict with the Supreme Court's decisions in: 1) *Anderson,*

which addressed the FLSA's record-keeping and burden of proof requirements; 2) *Swierkieweiz,* in which this Court held that the burden at the pleading stage is less than the burden of proof at trial; and 3) *Iqbal* and *Twombly,* which interpreted the pleading requirements under FRCP Rule 8.

(a) Conflict with *Anderson*

The Second Circuit in its opinion, noted the conflict and "tension" between its ruling based on *Iqbal* and *Twombly* and the FLSA's record-keeping requirements/burden of proof as addressed in this Court's decision in *Anderson*. In this regard, the Second Circuit, in referring to this case, *Dejesus*, 12 F3d 185, and its two other recent decisions on FLSA pleading standards, stated in relevant part as follows (App. 2):

> They each reflect a *tension* among, inter alia, (1) the frequent difficulty for plaintiffs in such cases to determine, without first having access to the defendant's records, the particulars of their hours and pay in any given time period … and (3) the modern rules of pleading established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The "access to the defendant's records" the Second Circuit referred to in the above excerpt is the access to wage and time records defendant was required by the FLSA at 29 USC § 211(c) and 29 CFR

§ 516 to keep for plaintiff's benefit and use in discharging her burden in an FLSA case as confirmed by the Supreme Court in *Anderson*. The tension and conflict with *Anderson* is that the Second Circuit's decision requires employees "to determine … the particulars of their hours and pay in any given time period" at the pleading stage "without first having access to defendant's records." By contrast, the Supreme Court in *Anderson*, 328 U.S. at 687-688, recognized the right of a plaintiff to secure the statutory records for use in her case and stated that, "When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records." The Second Circuit was correct to describe the burden it placed on plaintiff as a "difficulty" whereas the Supreme Court found the burden should be one the plaintiff can "easily discharge" – the difference between *difficult* and *easy* being absence or presence of statutory records. Even assuming, without obviously agreeing, that plaintiff was required to plead information about her approximate weekly overtime hours and wages, as the Second Circuit held, it was in contravention of *Anderson* and common sense to dismiss the complaint before plaintiff could provide this additional information by "securing the production of those records," that the FLSA required defendant to keep. By way of elaboration, the Supreme Court in *Anderson*, 328 U.S. at 687, also stated in relevant part as follows:

> Due regard must be given to the fact that it is the employer who has the duty under s 11(c) of the Act to keep proper records of wages, hours and

> other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed.

The need for such "due regard" is even greater at the pre-answer stage than at the trial stage because at the pre-answer stage not only are the wage records not yet produced but no other discovery has been conducted. However, contrary to the Supreme Court's instruction in the above excerpt, the Second Circuit here did not give "due regard" to the employer's record-keeping obligation.

The production of routine statutory wage and time records is not the type of discovery/litigation burden the Supreme Court was worried about in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). If plaintiff applies for a loan, defendant would provide copies of her wage and time records to the bank for the entire period of her employment without plaintiff having to pass a memory test. Yet, in an FLSA case where plaintiff has a legal right to the records, she is prevented from getting those records by the Second Circuit unless she can pass a memory test on a motion to dismiss. This is not consistent with the Supreme Court's ruling in *Anderson*, and there is nothing in *Iqbal* or *Twombly* that requires such an odd result. The FLSA requires employers to keep, maintain and produce wage and time records upon request with just three days of notice. See 29 CFR § 516.7. As such, for defendant to produce those records prior to moving to dismiss does not impose any burden greater than what already exists under

the FLSA. Second, because records are now kept by computer, records can be retrieved and produced within minutes – as opposed to the hundreds of hours spent litigating allegations on motions to dismiss in the absence of records. This Court can take judicial notice of the docket and filings in *Gonzalez v. HF Management Services*, LLC, Civ. No. 12-4826 (E.D.N.Y), in which I represented two co-workers of petitioner Dejesus, and defense counsels herein are representing defendant HF Management. The district court in *Gonzalez* directed defendant here to produce the wage and time records – the records were produced relatively quickly and were all contained on CD-ROM weighing a few ounces. Those records confirmed the overtime allegations and allowed the court to easily deny defendant's motion at oral arguments. Those records also compellingly support the plausibility of plaintiff's claim here that she worked overtime without proper overtime pay – it also means that defendant herein can produce plaintiff's wage and time records with minimal burden or no undue burden at all.

(b) Conflict with *Swierkiewicz*

The Second Circuit's requirement that plaintiff approximate her hours and provide greater specificity is in conflict with *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002), in which the Supreme Court stated in relevant part as follows:

> Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though

> discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

As in *Swierkiewicz*, the Second Circuit is once again requiring an employment plaintiff to make a heightened pleading of facts under a burden-shifting standard even though such a burden-shifting standard may never apply in the case. In other words, as in *Swierkiewicz*, the Second Circuit in this case is requiring plaintiff "to plead more facts than [she] may ultimately need to prove to succeed if direct evidence of [unpaid overtime] is discovered." As in *Swierkiewicz*, under the FLSA, the burden-shifting standard requiring approximation of hours etc., which this Court set forth in *Anderson*, does not apply when direct evidence in the form of statutory records exists. See *Anderson*, 328 U.S. at 687-688 ("When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records."). This case is a lot more compelling in petitioner's favor because unlike *Swierkiewicz*, direct evidence that would obviate the need for burden-shifting and the approximation of overtime that comes with it, must be kept by the employer pursuant to 29 USC § 211(c) and 29 CFR § 516. Even where the employer fails to keep records in violation of the statute, thereby triggering the burden-shifting standard under *Anderson*, and the need to approximate wages

and hours (damages), that is a standard that applies at trial after discovery and with the use of trial witnesses, documents and other fruits of discovery, and not at the pleading stage before discovery. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946). *Reich v. Southern New England Telecommunications Corp.,* 121 F.3d 58, 66 -67 (2d Cir. 1997). *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 31 (2d Cir. 2002).

In its opposing brief (Def. Br. 25)[3], defendant concedes that:

> The pleading standard adopted by the District Court here is identical to the minimum standard that a plaintiff must satisfy to prove an FLSA claim under the Supreme Court's decision in *Anderson.*

In reference to *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-511 (2002), defendant states in relevant part as follows (Def. Br. 26):

> In reversing the dismissal of these claims, the Supreme Court held that a complaint alleging unlawful employment discrimination did not have to satisfy a heightened pleading standard akin to the evidentiary standard required to prove a claim at trial.

As laid out in the above excerpts, defendant concedes that the district court applied the proof standard at trial to the pleading stage here, and defendant also concedes that under the unanimous

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[3] See 2d Cir. ECF Case #: 12-4565, Doc. #: 40, Filed 2/7/2013

Supreme Court decision in *Swierkiewicz*, it is legally incorrect to apply the standard of proof at trial to the pleading stage. However, defendant argues that, "the continuing viability of *Swierkiewicz* has been called into question by *Iqbal."* (Def. Br. 26). Defendant is wrong. First, the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), specifically reaffirmed its unanimous ruling in *Swierkiewicz*. See *Twombly*, 550 U.S. at 547 ("This analysis does not run counter to *Swierkiewicz v. Sorema N. A.*"). Additionally, in *Iqbal*, the Supreme Court merely applied "*Twombly's* construction of Rule 8." See *Iqbal,* 556 U.S. at 680-681. This Court should grant certiorari and clarify whether its unaminious decision in *Swierkiewicz* is still good law after its 5-4 decision in *Iqbal,* and it should resolve the conflict here with *Swierkiewicz*.

(c) Conflict with *Iqbal*

The Second Circuit's opinion is in violation of the Supreme Court's decision in *Iqbal* in two ways. First, the Second Circuit did not follow *Iqbal's* multi-step process. Second, the Second Circuit did not account for the fact that the elements of the overtime claim here are uncontested.

In *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court set forth a multi-step process for determining whether a claim is stated on a motion to dismiss pursuant to FRCP § 12(b)(6). The first step is to set forth the elements of the claim. The second step is to identify the well-pleaded allegations – identify those allegations that are factual and not legal conclusions. The third step is to determine whether the well-pleaded allegations, taken as true, state a claim for relief that is

plausible, while drawing all reasonable inferences in plaintiff's favor. The Court did not follow these steps as to the overtime allegations. Take for example the following allegation (App. 28:24):

> Throughout her employment with defendant, and at all times relevant herein, plaintiff worked more than forty (40) hours in a week for Defendant in some or all weeks, but was not paid at a rate of at least 1.5 times her regular rate for each and all hours worked in excess of forty hours in a week.

The Second Circuit recognized that some courts have found the above allegation sufficient to state an FLSA overtime claim, especially in situations like here, where the employer is in possession of statutory wage and time records. See App. 7 ("[some courts] not requiring any estimate of overtime, but simply an allegation that the plaintiff worked some amount in excess of forty hours."). Some courts have found the above allegation sufficient because it is clearly a factual allegation and not a legal conclusion. If the allegation concerns something that can be counted or measured, such as hours or wages, as opposed to intent or malice, and especially where as here, it is based on personal knowledge, it is factual and not a legal conclusion.

Under *Iqbal*, the Second Circuit was required to take the above factual allegation as true, and if it had done so, the overtime claim was not just plausible, but certain – the above allegation satisfied the elements of the overtime claim, especially where

as here, the defendant is in possession of the statutory wage and time records and does not dispute the elements of the overtime claim. However, the Second Circuit refused to take this factual allegation as true because it "tracked the statutory language of the FLSA," according to it. (App. 10). In so holding, the Second Circuit miscontrued the Supreme Court's ruling in *Iqbal*. In *Iqbal* the Supreme Court noted that the allegations in that case which repeated the legal elements of the claim were legal conclusions and not factual allegations, because, unlike the overtime claim here, elements of the discrimination claim in *Iqbal* and the anti-trust claim in *Twombly* were legal conclusions such as discrimination, knowledge, intent, agreement etc. However, the Supreme Court has never held in any case that a factual allegation will be magically transformed into a legal conclusion if it is similar to the statutory element that happens to be factual and not a legal conclusion. This Court should grant certiorari and provide guidelines for lower courts to use to distinguish between factual allegations and legal conclusions and to remind lower courts once again to adjust the analysis based on the context before them – that not every case is *Iqbal* or *Twombly* – that to achieve its remedial goals, Congress made certain claims simple, and simple allegations are enough to plead such claims like the overtime claim here.

The Second Circuit's decision is also in conflict with the Supreme Court's decision in *Iqbal* because the fact that the elements of a claim are not in dispute, as is the case here, is a critical factor which requires denial of a motion to dismiss for failure to

state a claim. In *Iqbal,* 556 U.S. at 686, the major division between the majority and minority involved an "uncontested" issue or assumption. The four Justices in the minority believed that because both sides in the case did not contest a certain form of supervisor liability, a plausible claim for relief existed. Significantly, the Justices in the majority also seem to agree that when an element of a claim is uncontested, it is established for purposes of stating a claim. However, the majority and minority in *Iqbal* disagreed because the majority concluded that the form of supervisory liability that was uncontested, would no longer exist as a matter of law after the *Iqbal* decision. Here, the uncontested elements (weekly hours over 40, failure to pay overtime at 1.5 times the regular rate) of the FLSA overtime claim in this case are undisputedly part of an FLSA overtime claim.

In the instant case, while arguing that plaintiff failed to plead certain information, defendant, in possession of the statutory wage and time records, does not contest or dispute that plaintiff worked overtime and was not paid overtime wages. Instead, defendant has taken the position that plaintiff's overtime claim should fail because plaintiff was covered by an FLSA exemption – the Second Circuit agreed with plaintiff that it is defendant and not her that must plead and prove the exemption affirmative defense. (App. 14, fn 7). Whether an element of a claim is in dispute is a critical part of the plausibility analysis. It is well established throughout litigation, that an issue not contested or disputed is deemed admitted or established – this is especially true at the motion to

dismiss stage where the central inquiry is merely whether the case should move forward and not whether defendant should be found liable, and with all reasonable inferences drawn in favor of plaintiff.

4. The Second Circuit Has Decided an Important and Recurring Issue of Federal Law That Has Not Been But Should Be Settled by The Supreme Court

In *Lundy,* 711 F.3d at 114 the Second Circuit noted that it was deciding an issue of first impression for it. Likewise, since the FLSA was enacted in 1938, the very important issue of FLSA pleading requirements has never been settled by the Supreme Court but should be. In *Pruell v. Caritas Christi*, 678 F.3d 10, 12 -13 (1st Cir. 2012), the First Circuit, in another FLSA case, stated in relevant part as follows:

> The need for pleading specificity in federal complaints has been somewhat unsettled since the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

In this case, the Second Circuit stated that (App. 9) "*Whatever* the precise level of specificity that was required of the complaint," as if to confirm it was not sure what the required level of specificity is. In addition, as laid out above, defendant invokes cases from two circuits to argue that this Court's unaminous decision in *Swierkiewicz* which conflicts with the Second Circuit here, is no longer good law

after *Iqbal*. See *Schwab v. Smalls*, 425 Fed. App'x 37, 40 (2d Cir. 2011) ("Questions have been raised, however, as to *Swierkiewicz*'s continued viability in light of *Twombly* and *Iqbal*."). See also *Fowler v. UPMC*, 578 F.3d 203, 211 (3d Cir. 2009). Moreover, the split and conflict among the federal courts as laid out above, further highlights the unsettled nature of the law governing FLSA pleading standards. Because, as the First Circuit noted, the pleading rules under the FLSA became unsettled since the Supreme Court's decisions in *Iqbal* and *Twombly*, only the Supreme Court can clarify its decisions and settle the issue of pleading specifity under the FLSA. Likewise, only this Court can settle any conflict between its decision in *Iqbal,* and its decisions in *Anderson* and *Swierkiewicz*.

The need for Supreme Court review is now. Based on statistics from the Federal Judicial Center[4], there were 1457 FLSA cased filed in federal court in 1993 and that number climbed to over 7,000 in 2012 – most of this increase has been in the last few years and the rate of increase continues to be rapid. Based on the FJC's statistics, more than 50,000 FLSA cases have been filed in federal court from 2002 to 2012. Each term that this Court delays action on this issue, more than 7,000 new cases and many more pending cases are affected in a significant and very expensive way. Notably, because of the FLSA's collective action procedure, a large number of FLSA cases are muti-party or collective/class action cases in which a single complaint filed may represent overtime claims for hundreds or thousand of indivudals. The effect on

[4] http://www.bna.com/flsa-lawsuits-hit-n12884911026/

these many cases is real and significant because in every case, whether a claim is properly stated, is a threshold issue, that must be considered when plaintiff's counsel accepts a client, when the complaint is drafted, and by defense counsel and the court when the answer to the complaint is drafted or when the motion to dismiss is filed. The elements of a claim also shape discovery, motion practice, trials and jury instructions.

The effect of the issues presented extend well beyond the courthouse. According to statistics from the United States Department of Labor, more than 130 million American workers are affected by the FLSA on a daily basis.[5] The impact of the FLSA on the national economy and the importance of the FLSA questions presented herein cannot be overstated and is precisely why the Supreme Court routinely grants certioriari in FLSA cases and has granted certioriari to review pleading standards under FRCP 8 in cases such as *Iqbal* and *Twombly*.

This Court should also grant certiorari because in *Iqbal* and *Twombly*, this Court did not address a critical aspect of pleading jurisprudence that now presents itself in this case – the situation where the defendant shares responsibility for providing notice and proof of the claim in terms of the FLSA's notice and record-keeping requirements under 29 USC § 211(c) and 29 CFR § 516.

5. This Case is an Ideal Vehicle for Review

This case is the ideal vehicle for the Supreme Court to address FLSA pleading requirements. First,

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[5] http://www.dol.gov/compliance/guide/minwage.htm

unlike this case, almost all of the other decisions involving FLSA pleading requirements are in collective/class action cases where the complaint not only pleads on behalf of unknown and unnamed persons, it has to also satisfy class pleading requirements in addition to FLSA pleading requirements – a messy factual and legal situation that makes the plausibility analysis convoluted and difficult – those other class of cases also represent only a minority of FLSA cases. Second, like in the majority of FLSA cases, only a simple FLSA claim is being made here and fact-intsenive elements such as conspiracy, fraud, and state of mind are not implicated. Finally, this case is staffed by experienced employment litigation/appellate counsel on both sides who understand the role of the Supreme Court and can provide the type of briefing, arguments and advocacy that this Court expects.

VI. CONCLUSION

Based on the foregoing, this Honorable Court should grant this petition for writ of certiorari.

Dated: Queens Village, New York
October 21, 2013

Respectfully submitted,

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12-4565
Dejesus v. HF Management Services, LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 30, 2013 Decided: August 5, 2013)
Docket No. 12-4565

RAMONA DEJESUS,
Plaintiff-Appellant,
-v-
HF MANAGEMENT SERVICES, LLC,
Defendant-Appelle.

Before: JACOBS, *Chief Judge*, SACK, *Circuit Judge*, and Rakoff, *District Judge*.*

The plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, Judge) dismissing her claims under the Fair Labor Standards Act and the New York Labor Law.

We agree with the district court that the plaintiff failed to allege adequately that she worked overtime without receiving the compensation mandated by the statutes.

Affirmed.

ABDUL K. HASSAN, Queens Village, New York, for Plaintiff- Appellant.

SETH L. LEVINE (Scott B. Klugman, *on the brief*), Levine Lee LLP, New York, New York; Andrew P. Marks, Littler Mendelson P.C., New York, New York, for *Defendant-Appelle*.

SACK, *Circuit Judge*:

This is the third in a series of recent decisions by this Court addressing the question of the adequacy of pleadings alleging that defendant health-care companies failed to pay their employees for overtime work as required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C.§ 207(a)(1). See *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, No. 11-0734, F.3d , 2013 WL 3743152, 2013 U.S. App. LEXIS 14128 (2d Cir. July 11, 2013); *Lundy v. Catholic Health Sys. of Long Island*, 711 F.3d 106 (2d Cir. 2013). They each reflect a tension among, *inter alia*, (1) the frequent difficulty for plaintiffs in such cases to determine, without first having access to the defendant's records, the particulars of their hours and pay in any given time period; (2) the possible use by lawyers representing plaintiffs in such cases of standardized, bare-bones complaints against any number of possible defendants about whom they have little or no evidence of FLSA violations for the purpose of identifying a few of them who might make suitable defendants -- which is to say, the ability to engage in "fishing expeditions"; and (3) the modern rules of

pleading established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

BACKGROUND

Ramona Dejesus was employed in the Borough of Queens, New York, by HF Management Services, LLC ("Healthfirst"), a company that provides support and administrative services to not-for-profit health-care organizations. Dejesus brought the action that is the subject of this appeal on March 15, 2012, in the United States District Court for the Eastern District of New York, claiming that Healthfirst failed to pay her overtime wages under the FLSA and the New York Labor Law ("NYLL").

Dejesus alleged that she was a wage-earning employee of Healthfirst for the three years preceding August 2011, during which time she promoted the insurance programs Healthfirst offered and recruited members of the public to sign up for Healthfirst's services. Compl. ¶¶ 19-20. As a part of her wage agreement, Dejesus was entitled to receive a commission for each person she recruited to join Healthfirst's programs, in addition to her non-commission wage. *Id.* ¶ 21.

Dejesus also alleged that she worked more than forty hours per week during "some or all weeks" of her employment and, in violation of the FLSA, through April 2011 was not paid at a rate of at least 1.5 times her regular wage for each hour in excess of forty hours.[1] *Id.* ¶ 24. She relied on the FLSA's provision stating that employers are not permitted to

[1] Dejesus did receive overtime wages for her work after April 2011, but allegedly not for the nearly three years prior.

"employ any . . . employees . . . for a workweek longer than forty hours unless such employee receives compensation for his [or her] employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he [or she] is employed." 29 U.S.C. § 207(a)(1).[2]

Dejesus also alleged that there were weeks in which she was paid for her overtime hours but in which Healthfirst "failed to include the commission payments in the calculation of [her] overtime pay." Compl. ¶ 27.

On May 7, 2012, Healthfirst filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Dejesus was exempt from the overtime protections of the FLSA because she was an outside salesperson and that her claim was not properly stated.

The district court (Edward R. Korman, *Judge*) granted the motion to dismiss. *Dejesus v. HF Management Services., LLC*, No. 12-cv-1298, 2012 WL 5289571, 2012 U.S. Dist. LEXIS 152263 (E.D.N.Y. Oct. 23, 2012). The court explained that to

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[2] Section 207(a)(1) reads in its entirety:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

properly state a claim, Dejesus was required to allege that: "(1) she was an employee eligible for overtime pay; and (2) that she actually worked overtime without proper compensation." *Id.* at *1, 2012 U.S. Dist. LEXIS 152263, at *3.

The district court concluded that Dejesus had satisfied neither requirement. She had "fail[ed] to set forth the precise position she held, any approximation of the number of unpaid overtime hours worked, her rate of pay, or any approximation of the amount of wages due." *Id.* at *2, 2012 U.S. Dist. LEXIS 152263, at *4. Listing her duties as a "promoter," Dejesus had not sufficiently alleged that she was an "employee" within the meaning of the FLSA; and adding a "sole allegation" that she worked more than forty hours "in some or all weeks," she had failed to make any approximation of her hours that would render her claim plausible rather than merely conceivable. *Id.* at *2, 2012 U.S. Dist. LEXIS 152263, at *4-*5. In arriving at its conclusions, the court relied on other district court decisions requiring plaintiffs to approximate overtime hours allegedly worked. *Id.* at *1, 2012 U.S. Dist. LEXIS 152263, at *4.

The district court dismissed Dejesus's claims without prejudice, providing her the opportunity to "replead to correct the complaint's defects." *Id.* at *2, 2012 U.S. Dist. LEXIS 152263, at *5. Dejesus chose not to replead, disclaimed any intent to amend her complaint, and, instead, on November 11, 2012, filed a notice of appeal. By disclaiming intent to amend, she rendered the district court's otherwise non-final order "final" and therefore immediately appealable. See *Slayton v. Am. Express Co.*, 460 F.3d 215, 224-25 (2d Cir. 2006).

DISCUSSION

I. Governing Legal Standards

"We review the District Court's dismissal of a complaint pursuant to Rule 12(b)(6) de novo, accepting all the factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Doe v. Guthrie Clinic, Ltd.*, 710 F.3d 492, 495 (2d Cir. 2013) (citation omitted). The "complaint must [nonetheless] contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A complaint must therefore contain more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration in original). Pleadings that contain "no more than conclusions . . .are not entitled to the assumption of truth" otherwise applicable to complaints in the context of motions to dismiss. *Id.* at 679.

II. Whether Dejesus Adequately Alleged Overtime

We agree with the district court that Dejesus did not plausibly allege that she worked overtime without proper compensation under the FLSA, and on that basis, affirm the judgment of the district court.

Section 207(a)(1) of the FLSA requires that "for a workweek longer than forty hours," an employee working "in excess of" forty hours shall be compensated for those excess hours "at a rate not

less than one and one-half times the regular rate at which [she or] he is employed." 29 U.S.C. § 207(a)(1).

In *Lundy v. Catholic Health System of Long Island*, 711 F.3d 106 (2d Cir. 2013), we considered "the degree of specificity" required to make a section 207(a)(1) FLSA overtime claim plausible. *Id.* at 114. We noted that federal courts had "diverged somewhat on the question," *id.*, with some requiring an approximation of the total number of uncompensated hours in a given workweek, see, e.g., *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 547 (S.D.N.Y. 2009), and others not requiring any estimate of overtime, but simply an allegation that the plaintiff worked some amount in excess of forty hours, see, e.g., *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662, 667-68 (D. Md. 2011).

Formulating our own standard, we concluded that "in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Lundy*, 711 F.3d at 114. We also observed that "[d]etermining whether a plausible claim has been pled is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (internal quotation marks omitted). We therefore declined to make an approximation of overtime hours a necessity in all cases. We remarked, however, that an approximation "may help draw a plaintiff's claim closer to plausibility."*Id.* at 114 n.7.

Applying that standard, we reasoned that the Lundy plaintiffs had failed to allege that they worked uncompensated overtime because, although the employees went to some lengths to approximate the

hours they typically worked, even setting out their typical breaks and shift lengths, the hours alleged did not add up to a claim that over forty hours had been worked in any particular week.[3] The allegations in Lundy thus failed because of arithmetic: tallying the plausible factual allegations, we could not get

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[3] For example, when discussing one plaintiff, we observed:

> Wolman was "typically" scheduled to work three shifts per week, totaling 37.5 hours. She "occasionally" worked an additional 12.5-hour shift or worked a slightly longer shift, but how occasionally or how long, she does not say; nor does she say that she was denied overtime pay in any such particular week. She alleges three types of uncompensated work: (1) 30-minute meal breaks which were "typically" missed or interrupted; (2) uncompensated time before and after her scheduled shifts, "typically" resulting in an additional 15 minutes per shift; and (3) trainings "such as" a monthly staff meeting, "typically" lasting 30 minutes, and [] training consisting of, "on average," 10 hours per year.
>
> She has not alleged that she ever *completely* missed *all three* meal breaks in a week, or that she also worked a full 15 minutes of uncompensated time around *every shift*; but even if she did, she would have alleged a total 39 hours and 45 minutes worked. A monthly 30-minute staff meeting . . . could theoretically put her over the 40-hour mark in one or another unspecified week . . . but her allegations supply nothing but low-octane fuel for speculation, not the plausible claim that is required.

Lundy, 711 F.3d at 114-15 (internal citations omitted) (emphases in original).

beyond forty hours in any given week, and therefore to a plausible claim for overtime.

Very recently, we had occasion to revisit this issue. *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, No. 11-0734, F.3d, 2013 WL 3743152, *4-*6, 2013 U.S. App. LEXIS 14128, *15-*21 (2d Cir. July 11, 2013). In *Nakahata*, the plaintiffs also had alleged uncompensated work during meal breaks, training sessions, and extra shift time as evidence of an overtime violation without demonstrating how these instances added up to forty or more hours in a given week. *Id.* at *5, 2013 U.S. App. LEXIS 14128, at *19. We therefore concluded that the allegations lacked the "specificity" required, because though they "raise[d] the possibility" of an overtime claim, "absent any allegation that Plaintiffs were scheduled to work forty hours in a given week," they did not state a plausible claim for relief. *Id.*, 2013 U.S. App. LEXIS 14128, at *19-*20.

Dejesus provided less factual specificity than did the plaintiffs in *Lundy* or *Nakahata*, although she made allegations of more widespread improper behavior by the defendant. She did not estimate her hours in any or all weeks or provide any other factual context or content. Indeed, her complaint was devoid of any numbers to consider beyond those plucked from the statute. She alleged only that in "some or all weeks" she worked more than "forty hours" a week without being paid "1.5" times her rate of compensation, Compl. ¶ 24, no more than rephrasing the FLSA's formulation specifically set forth in section 207(a)(1). Whatever the precise level of specificity that was required of the complaint,

Dejesus at least was required to do more than repeat the language of the statute.[4]

In this regard, Dejesus's claim is similar to one that the First Circuit recently confronted. There, the plaintiffs had alleged that they "regularly worked" more than forty hours a week and were not properly compensated. *Pruell v. Caritas Christi*, 678 F.3d 10, 12 (1st Cir. 2012). The court concluded that such a formulation was "one of those borderline phrases" that while not stating an "ultimate legal conclusion[]," was "nevertheless so threadbare or speculative that [it] fail[ed] to cross the line between the conclusory and the factual." *Id.* at 13 (internal quotation marks omitted). "Standing alone," the panel reasoned, the allegation was "little more than a paraphrase of the statute." *Id.* Like the allegations in *Iqbal*, the ones in *Pruell* were "too meager, vague, or conclusory" to survive a motion to dismiss. *Id.* (internal quotation marks omitted).

The First Circuit's reasoning is persuasive. Dejesus's complaint tracked the statutory language of the FLSA, lifting its numbers and rehashing its formulation, but alleging no particular facts sufficient to raise a plausible inference of an FLSA overtime violation. Her FLSA and NYLL[5] claims were therefore inadequate and properly dismissed.

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[4] Nor does Dejesus's allegation in paragraph 27 of her complaint regarding the calculation of overtime payments (in the weeks when she allegedly received them) contain sufficient factual specificity. Among other things, Dejesus alleges neither the number of weeks during which Healthfirst improperly calculated her overtime pay, nor which weeks they were.

[5] In light of the fact that "[t]he relevant portions of New York Labor Law do not diverge from the requirements of the FLSA," our conclusions below about the FLSA allegations "appl[y]

Lundy's requirement that plaintiffs must allege overtime without compensation in a "given" workweek, 711 F.3d at 114, was not an invitation to provide an all-purpose pleading template alleging overtime in "some or all workweeks." It was designed to require plaintiffs to provide some factual context that will "nudge" their claim "from conceivable to plausible." *Twombly*, 550 U.S. at 570. While this Court has not required plaintiffs to keep careful records and plead their hours with mathematical precision, we have recognized that it is employees' memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place. Our standard requires that plaintiffs draw on those resources in providing complaints with sufficiently developed factual allegations.

In reaching this conclusion, we would be less than candid if we did not register our concern about the failure of the plaintiff, through counsel, at least to attempt to amend her complaint to add specifics while the district court kept the door open for her to do so.[6] We would like to believe that the decision not to amend was made for some reason that benefitted Dejesus, rather than as an effort on counsel's part to obtain a judicial blessing for plaintiffs' counsel in

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equally to [the NYLL] state law claims." *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 329 n.2 (W.D.N.Y. 2008), rev'd on other grounds sub nom. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009).

[6] Cf. *Nakahata*, F.3d at , 2013 WL 3743152, at *3, 2013 U.S. App. LEXIS 14128, at *11 ("[W]e will not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought." (internal quotation marks omitted)).

these cases to employ this sort of bare-bones complaint.

III. Whether Dejesus Adequately Alleged Employment Status

We conclude that the judgment of the district court must be affirmed because, as the court held, Dejesus's pleading that she worked overtime without proper compensation under the FLSA was inadequate. We therefore need not decide whether the district court was also correct when it first concluded that Dejesus had not sufficiently alleged that she was an "employee" of Healthfirst within the meaning of the FLSA. We nonetheless offer our views on the issue as guidance for the district courts in light of the spate of similar litigation within this Circuit, the fact that the issue has been fully briefed and argued on appeal, and because we disagree with the district court's conclusion on the point.

Under the statute, an "employee" is "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," *id.* § 203(d). To "employ" means "to suffer or permit to work." *Id.* § 203(g).

In her complaint, Dejesus alleged that she "worked for defendant Health First," Compl. ¶ 11, and was "employed by defendant for about three years," *id.* ¶ 20, as "an hourly employee," *id.* ¶ 22. She also alleged that she was "employed by defendant within the meaning of the FLSA." *Id.* ¶ 29. She added that as such an employee, she worked "to promote insurance programs to the public and to recruit members of the public to join those insurance

programs." *Id.* ¶ 19. And she explained her wage structure ("a commission for each person recruited to join the insurance programs promoted by defendant, in addition to a regular non-commission wage"). *Id.* ¶ 21. Dejesus therefore alleged facts both about her employment status and duties in order to support the inference that she was an employee within the meaning of the FLSA.

The Supreme Court has referred to the "striking breadth" of the FLSA's definition of the persons who are considered to be employees. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." (internal quotation marks omitted)); accord *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993) (noting that in light of "the expansive nature of the FLSA's definitional scope and the remedial purpose underlying the legislation," courts, including the Supreme Court, have construed the statute to reach beyond the common law standard for determining employee status).

In light of this broad interpretation of "employee" under the statute, we have "treated employment for FLSA purposes as a flexible concept." *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008); see also *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 140 (4th Cir. 1999) (concluding that employment "is to be determined by its commonly understood meaning"). And, in the context of a motion to dismiss, district

courts in this Circuit have therefore found that complaints sufficiently allege employment when they state where the plaintiffs worked, outline their positions, and provide their dates of employment. See, e.g., *DeSilva v. North Shore-Long Island Jewish Health Sys.*, 770 F. Supp. 2d 497, 508 (E.D.N.Y. 2011); *Zhong v. August Corp.*, 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007) (where a plaintiff alleging that he "was an employee" in multiple places was found to have provided a reasonable inference that the relationship was one covered by the statute).

Here, Dejesus detailed where she worked, providing Healthfirst's address and its corporate purposes. Compl. ¶¶ 9-10, 18. She outlined what her position as a "promoter" generally entailed, describing her responsibilities and the pay structure. *Id.* ¶¶ 19-21. And she provided her dates of employment.*Id.* ¶¶ 11-13. In addition, she alleged that she was an hourly employee "within the meaning of the FLSA." *Id.* ¶ 29. She thus, in our view, adequately pled that she was an employee and Healthfirst was her employee under the FLSA, especially in light of the expansive scope of the definition employed in the statute.[7] Cf. *DeSilva*, 770

[7] We also agree with Dejesus that she was not required to plead facts at this stage of the proceedings to support her position that she was a non-exempt employee, that is, one who falls outside of the FLSA's exemptions. A claim of exemption under the FLSA is an affirmative defense, and the employer bears the burden of proof in making any such claim. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991). We think, contrary to Dejesus's position, however, that the district court properly recognized this when it observed that a "claim of exemption under the FLSA is an affirmative defense,

F. Supp. 2d at 508 (concluding similar allegations constituted adequate pleading of employee status).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

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on which the employer bears the burden of proof." Dejesus, 2012 WL 5289571, at *2, 2012 U.S. Dist. LEXIS 152263, at *6.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
RAMONA DEJESUS,

12-cv-1298
Plaintiff, (ERK)(RML)

-against-
HF MANAGEMENT SERVICE, LLC
A/K/A HEALTHFIRST

Defendant.
----------X

MEMORANDUM & ORDER
[Filed: 10/23/2012]

KORMAN, *J.*:

On March 15, 2012, plaintiff Ramona Dejesus filed the instant action against HF Management Services LLC a/k/a Healthfirst alleging four causes of action: (1) failure to pay overtime under the Fair Labor Standards Act ("FLSA"); (2) failure to pay overtime under the New York Labor Law ("NYLL"); (3) nonpayment of wages due under the NYLL; and (4) breach of contract. The defendant filed a motion to dismiss for failure to state a claim on May 7, 2012. Plaintiff filed her response on May 29, and the defendant filed a reply on June 6.

FACTS

Plaintiff is a Queens County resident and the defendant is a corporation organized under New York law. Compl. ¶¶ 8-9. Until her termination, plaintiff provided "support and administrative services to Health First Insurance and promote[d]

to the public, insurance programs offered by Health First." Compl. ¶ 18. She was employed as a promoter and recruiter for Health First's insurance programs for "about three years" ending on or about August 31, 2011. Compl. ¶ 20. Plaintiff does not mention her exact title, but, according to defendant, her title was "Medicare Marketing Representative." Def. Mot. to Dismiss at 5.

Plaintiff was paid sales commissions for each person she recruited to enroll in Health First's insurance programs, as well as non-commission wages. Compl. ¶ 21. Plaintiff alleges that she was not paid for commissions earned and owed to her at the time her employment ended and that she worked in excess of forty hours per week "[t]hroughout her employment with defendant" in "some or all weeks," without receiving payment at one and a half times her hourly rate. Compl. ¶ 23-24.

Plaintiff also alleges that defendant "breached the employment agreement/contract" between her and defendant by failing to pay the wages due, though she does not attach a copy of the purported contract between the parties or describe its material terms. Compl. ¶ 39.

The bare-bones complaint devotes only a few paragraphs to outlining the relevant facts, and many of those paragraphs are, in fact, legal conclusions. As such, it is in some places difficult to make out what exactly plaintiff is alleging and the complaint lacks the context necessary to understand her employment circumstances.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "[t]he court accepts all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

To properly state a claim under the FLSA, the plaintiff must allege that: (1) she was an employee eligible for overtime pay; and (2) that she actually worked overtime without proper compensation. *See DeSilva v. North Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 507 (E.D.N.Y. 2011); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628(S.D.N.Y. 2007). Both the FLSA and the NYLL require "'more than vague legal conclusion to survive a [Rule] 12(b)(6) motion.'" *James v. Countrywide Fin. Corp.*, 849 F. Supp. 2d 296, 321 (E.D.N.Y. 2012) (quoting *Nakahata v. New York-Presbyterian Healthcare Sys.*, 2011 WL 321186, at *4 (S.D.N.Y. Jan. 28, 2011)). "At a minimum, [the complaint] must set forth the approximate number of unpaid overtime hours allegedly worked." *Id.* (citations and quotations omitted); *see also Wolman v. Catholic Health Sys. of Long Island, Inc.*, 853 F. Supp. 2d 290, 304 (E.D.N.Y. 2012) ("To survive a motion to dismiss, the [Complaint] must also approximate the number of overtime hours worked per week in excess of forty for which the [] Plaintiffs did not receive overtime pay."). The plaintiff should also set forth the

"applicable rate of pay and the amount of . . . overtime wages due." *Zhong*, 498 F.Supp.2d at 629.

Taking the complaint on its face, plaintiff fails to set forth the precise position she held, any approximation of the number of unpaid overtime hours worked, her rate of pay, or any approximation of the amount of wages due. While it is true that plaintiffs are "not required to state every single instance of overtime worked or to state the exact amount of pay which they are owed," *DeSilva,* 770 F. Supp 2d at 509, plaintiff's sole allegation is that she worked more than forty hours per week and was denied overtime compensation in "some or all weeks" for the time that she worked for Healthfirst. *See id.* (dismissing FLSA claim where plaintiffs merely alleged they "regularly" worked more than forty hours per week). She also gives only a very vague description of her duties as a "promoter" for Healthfirst. As such, the complaint lacks the minimal allegations necessary to state a claim for unpaid overtime under the FLSA.

Nevertheless, plaintiff's claims will be dismissed without prejudice and she will be allowed to replead to correct the complaint's defects. While plaintiff is outside the time limit to amend the pleadings as a matter of right, *see* Fed. R. Civ. P. 15(a)(1)(B), the Second Circuit "strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6)." *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006). Nothing in the complaint or the papers suggests that there is no possibility that a valid claim could be stated, given more factual detail and contextual information.

Moreover, there is no prejudice to defendant if plaintiff is allowed to replead.

The parties devote substantial time to a discussion of whether plaintiff was properly categorized as exempt from the FLSA overtime requirements due to the "outside sales exemption," which exempts from employees employed "in the capacity of an outside salesman." 29 U.S.C. § 213(a)(1). If so, the claim would fail as a matter of law and amendment would be futile. However, the question cannot be resolved absent a much more detailed pleading or a motion for summary judgment. A claim of exemption under the FLSA is an affirmative defense, on which the employer bears the burden of proof. *See Schwind v. EW & Associates, Inc.*, 357 F. Supp. 2d 691, 697 (S.D.N.Y. 2005) (citing *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392 (1960); *Wright v. Aargo Sec. Services, Inc.*, 2001 WL 91705, at *2 (S.D.N.Y. Feb. 2, 2001)). In general, affirmative defenses are not properly available on a motion to dismiss for failure to state a claim, unless the "the defense appears on the face of the complaint." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998).

To take advantage of the FLSA's exemptions, the employer must offer proof of the "actual duties" of the employee, not just her job description, title, or the general duties of similarly situated employees. *Khan v. IBI Armored Services, Inc.*, 474 F. Supp. 2d 448, 456 (E.D.N.Y. 2007). As such, the claim of exemption is likely to be heavily fact-intensive and inappropriate for resolution at the motion to dismiss stage. The complaint does not detail plaintiff's actual duties in a thorough enough manner such that the "defense appears on the face of the complaint." *Pani*,

152 F.3d at 74. Though she does allege that she was paid a commission on sales, it is not apparent from the face of the complaint that the exemption is applicable because it is not clear where the sales took place or how much of her role involved making outside sales, among other issues.

In attempt to circumvent this limitation, defendant argues that plaintiff is bound by the allegations contained in the complaint in another case, *Alburquerque v. Healthfirst, Inc.,* Civ. No. 11-2634 (FB) (E.D.N.Y.), which contained more detailed descriptions of the duties of employees in her position. *See* Def. Br. at 5, 9. Defendant relies on *380544 Canada, Inc. v. Aspen Tech., Inc.*, 544 F. Supp. 2d 199 (S.D.N.Y. 2008), to argue that the complaint necessarily incorporates by reference the *Alburquerque* complaint and, therefore, that its factual allegations are attributable to plaintiff in the instant case. *380544 Canada* is distinguishable, however. In that case, the earlier complaint was "quoted extensively in the Complaint and [was] undisputably incorporated by reference." *380544 Canada, Inc.*, 544 F. Supp. 2d at 213-14 (S.D.N.Y. 2008). The district judge in that case also found it important that the allegations in the complaint were directly contradicted by the prior complaint, which necessarily raised the issue of which set of allegations controlled. *See id.* at 215.

Here, in contrast, the sole reference to any other Healthfirst employee is in paragraph twenty-six of the Complaint, where plaintiff alleges that the defendant has a "common policy" of not paying overtime to "a class of over a hundred other current and former employees who are similarly situated" to plaintiff. Compl. ¶ 26. Plaintiff does not quote or

otherwise cite to the earlier *Albuquerque* complaint, and, indeed, disclaims any knowledge of it prior to defendant raising it as an issue. Pl. Br. at 6. This is a far cry from *380544 Canada*, and the *Albuquerque* complaint is certainly not quoted or relied upon so extensively as to be "undisputably incorporated by reference" as it was in that case. Moreover, the allegations that defendant wishes to import from the prior case do not directly contradict anything in the complaint. Thus, the rationale of preventing a party from advancing contradictory positions does not apply here. Consequently, plaintiff's status as an exempt "outside salesperson" cannot be resolved as a matter of law at this stage.

CONCLUSION

Defendant's motion to dismiss the FLSA claim is granted without prejudice and with leave to replead within 30 days. Under these circumstances, I decline jurisdiction over the remaining state law claims at this juncture. *See, e.g., Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 262 (2d Cir. 2006) ("It is well settled that where . . . the federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims.").

SO ORDERED

Brooklyn, New York
October 23, 2012

s/ Edward R. Korman
Senior United States
District Judge

UNITED STATES COURT OF APPEAL
FOR THE
SECOND CIRCUIT

[Filed: 09/12/2013]

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of September, two thousand and thirteen,

Before: DENNIS JACOBS,
ROBERT D. SACK,
Circuit Judge,
JED S. RAKOFF,
District Judge.

----------x

Ramona Dejesus,

Plaintiff-Appellant,

v.

HF Management Services, LLC,
AKA Health First,

Defendant-Appellee.

----------x

ORDER
Dk. No. 12-4565

Appellant Ramona Dejesus having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
RAMONA DEJESUS,

12-cv-1298
Plaintiff, (ERK)(RML)

-against- Complaint
HF MANAGEMENT SERVICE, LLC
A/K/A HEALTHFIRST

Defendant.
----------X

[Filed: 03/15/2012]

Plaintiff Ramona Dejesus, ("plaintiff" or "Dejesus"), by Abdul K. Hassan, Esq., her attorney, complaining of the defendant, respectfully alleges as follows:

NATURE OF THE ACTION

1. Plaintiff alleges that she was employed by defendant and pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207, 216 (b), that she is: (i) entitled to unpaid wages from defendant for overtime work for which she did not receive overtime premium pay, and (ii) entitled to maximum liquidated damages and attorneys' fees pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. including § 216(b).

2. Plaintiff further complains, that she is: (i) entitled to unpaid wages from Defendant for overtime worked for which she did not receive any premium pay; and (ii) is entitled to liquidated damages and attorneys fees, pursuant to the New York Minimum Wage Act

("NYMWA"), N.Y. Lab. Law §§ 650 et seq., and the regulations thereunder including 12 NYCRR § 142-2.2.

3. Plaintiff also complains that defendant breached the employment and wage agreement it had with plaintiff and that as a result, plaintiff is entitled to recover the wages and damages she is owed as a result of such breach, plus prejudgment interest.

4. Plaintiff is also entitled to recover her unpaid wages under Article 6 of the New York Labor Law including Section 191 and is entitled to maximum liquidated damages/penalties and attorneys' fees pursuant to Section 198 of the New York Labor Law.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367. In addition, the Court has jurisdiction over plaintiff's claims under the Fair Labor Standards Act pursuant to 29 U.S.C. § 216 (b).

6. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) and/or 29 U.S.C. § 216 (b).

THE PARTIES

7. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202.

8. Plaintiff is an adult, over eighteen years old, who currently resides in Queens County, New York.

9. Upon information and belief, HF Management Services, LLC, ("defendant" or "Health First") is a domestic for-profit corporation organized and existing under the laws of the State of New York.

10. Upon information and belief, defendant Health

First operates places of business at 100 Church Street, 18th Floor, New York, NY 10004 and 93-14 Roosevelt Avenue Queens, NY 11372.

11. At all times relevant herein, plaintiff worked for defendant Health First at is offices at 93-14 Roosevelt Avenue, Queens, NY 11372.

12. All times applicable or relevant herein as to the FLSA overtime claim refers to at least the two-year and three-year period preceding the filing of this complaint but this period may be longer.

13. All times applicable or relevant herein as to the NYLL overtime claim refers to at least the six-year period preceding the filing of this complaint but this period may be longer.

14. Upon information and belief and at all times applicable herein, defendant did not display the required FLSA and NYLL posters and notices of employee wage and overtime rights as was required by the FSLA and NYLL and the regulations thereunder.

15. The relevant and applicable times will be refined as is necessary, including after discovery if necessary.

16. The "present" or the "present time" as used in this complaint refers to the date this complaint was signed.

STATEMENT OF FACTS

17. Upon information and belief, and at all times relevant herein, defendant is engaged in the business of providing support and administrative services to health care organizations.

18. Upon information and belief, and at all times relevant herein, defendant provided support and administrative services to Health First Insurance

and promoted to the public, insurance programs offered by Health First.

19. Upon information and belief, and at all times relevant herein, defendant employed plaintiff to promote insurance programs to the public and to recruit members of the public to join those insurance programs.

20. Plaintiff was employed by defendant for about three years ending on or about August 31, 2011.

21. As part of her wage agreement with defendant, plaintiff and defendant agreed that plaintiff would be paid a commission for each person recruited to join the insurance programs promoted by defendant, in addition to a regular non-commission wage.

22. At all times applicable herein, plaintiff was an hourly employee of defendant.

23. Plaintiff received the agreed to commissions on a regular basis but was not paid all the commission she earned and was owed – especially for the period immediately preceding her termination.

24. Throughout her employment with defendant, and at all times relevant herein, plaintiff worked more than forty (40) hours in a week for Defendant in some or all weeks, but was not paid at a rate of at least 1.5 times her regular rate for each and all hours worked in excess of forty hours in a week.

25. At all times relevant herein, defendant failed and willfully failed to pay plaintiff an overtime rate of 1.5 times her regular rate of pay for each and all hours worked in excess of forty hours a week.

26. Upon information, defendant has a common policy of not paying the required overtime to a class of over a hundred other current and former employees who are similarly-situated to plaintiff.

27. For a period of plaintiff's employment, defendant did not pay plaintiff any overtime and for another period, defendant failed to include the commission payments in the calculation of plaintiff's overtime pay.

AS AND FOR A FIRST CAUSE OF ACTION – Unpaid Overtime
FAIR LABOR STANDARDS ACT - 29 U.S.C 201 et Seq.

28. Plaintiff alleges and incorporates by reference the allegations in paragraphs 1 through 27 above as if set forth fully and at length herein.

29. At all times relevant herein, plaintiff was employed by defendant within the meaning of the FLSA - 29 U.S.C § 201 et Seq.

30. At all times relevant herein, plaintiff was engaged in commerce and/or in the production of goods for commerce and/or defendant constituted an enterprise(s) engaged in commerce within the meaning of the FLSA including 29 U.S.C. § 207(a).

31. At all times relevant herein, defendant, upon information and belief, transacted commerce and business in excess of $500,000.00 annually or had revenues or expenditures in excess of $500,000.00 annually.

32. At all times relevant herein, defendant failed and willfully failed to pay plaintiff overtime wages at rates of at least 1.5 times his regular rate of pay for each and all hours she worked in excess of forty hours in a work week, in violation of 29 U.S.C. § 207, 216(b).

Relief Demanded

33. Due to defendant's FLSA violations, plaintiff is entitled to recover from defendant her unpaid

overtime compensation, an additional equal amount as liquidated damages, attorneys' fees, and costs of the action, pursuant to 29 U.S.C. § 216(b).

AS AND FOR A SECOND CAUSE OF ACTION – Unpaid Overtime

NEW YORK MINIMUM WAGE ACT NYLL 650 et Seq.

34. Plaintiff alleges and incorporates by reference the allegations in paragraphs 1 through 33 above as if set forth fully and at length herein.

35. At all times relevant to this action, plaintiff was employed by defendant, within the meaning of the New York Labor Law, §§ 2 and 651 and the regulations thereunder including 12 NYCRR § 142.

36. At all times relevant to this action, defendant failed and willfully failed to pay plaintiff overtime wage at rates of at least 1.5 times his regular rate of pay for each and all hours she worked in excess of forty hours in a week, in violation of the New York Minimum Wage Act and its implementing regulations. N.Y. Lab. Law §§ 650 et seq.; 12 NYCRR § 142-2.2.

Relief Demanded

37. Due to defendant's New York Labor Law violations, plaintiff is entitled to recover from defendant, her unpaid overtime wages, maximum liquidated damages, reasonable attorneys' fees, and costs of the action, pursuant to N.Y. Labor L. § 663(1).

AS AND FOR A THIRD CAUSE OF ACTION – Breach of Contract

38. Plaintiff repeats and incorporates paragraphs 1 through 36 above as if set forth fully and at length herein.

39. Defendant breached the employment agreement/contract between it and plaintiff as laid out above, by failing to pay plaintiff all of the wages plaintiff was due including unpaid commissions.

40. Plaintiff fully performed her obligations under the employment agreement/contract, including any and all condition precedents.

41. In light of defendant's breach of the employment agreement, plaintiff is entitled to and seeks to recover in this action, the amount of the wages, including unpaid commissions, plus interest thereon.

AS AND FOR A FOURTH CAUSE OF ACTION
NEW YORK LABOR LAW § 190, 191 and 198

42. Plaintiff alleges and incorporates each and every allegation contained in paragraphs 1 through 41 with the same force and effect as if fully set forth at length herein.

43. At all times relevant to this action, plaintiff was employed by defendant within the meaning of the New York Labor law, §§ 190 et seq., including §§ 191 and 198 and the applicable regulations thereunder.

44. Defendant violated and willfully violated plaintiff's rights under NY Labor Law § 190 et seq. including NY Labor Law §§ 191 and 198 by failing to pay plaintiff all her wages (including his overtime wages, and unpaid commissions, as required by and within the time specified in NY Labor Law § 190 et seq. specifically including NY Labor Law §§ 191, 198.

Relief Demanded

45. Due to defendant's New York Labor Law Article 6 violations including violation of section 191, plaintiff is entitled to recover from defendant, her entire unpaid wages and compensation, plus maximum liquidated damages, reasonable attorneys' fees, and

costs of the action, pursuant to N.Y. Labor Law § 190 et seq. including § 198.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

46. Declare defendant (including its overtime and commission wage payment policy and practice) to be in violation of the rights of plaintiff, under the FLSA and New York Labor Law – 12 NYCRR § 142, and Article 6 of the NYLL – NYLL § 190 et Seq.

47. As to the First Cause of Action, award plaintiff, her unpaid overtime wages due under the FLSA, together with maximum liquidated damages, costs and attorney's fees pursuant to 29 USC § 216(b);

48. As to the Second Cause of Action, award plaintiff, her unpaid overtime wages due under the New York Minimum Wage Act and the Regulations thereunder including 12 NYCRR § 142-2.2, together with maximum liquidated damages, prejudgment interest, costs and attorney's fees pursuant to NYLL § 663;

49. As to the Third Cause of Action, award plaintiff, her unpaid commissions and prejudgment interest;

50. As to the Fourth Cause of Action, award plaintiff, any and all outstanding (additional) wages, including overtime wages, and unpaid commissions, plus prejudgment interest, costs, disbursements and attorney's fees pursuant to NYLL § 198.;

51. Award plaintiff, any relief requested or stated in the preceding paragraphs but which has not been requested in the WHEREFORE clause or "PRAYER FOR RELIEF", in addition to the relief requested in the wherefore clause/prayer for relief;

52. Award plaintiff and all those similarly situated such other, further and different relief as the Court

deems just and proper.

Dated: Queens Village, New York
March 13, 2012

Respectfully submitted,

s/ Abdul K. Hassan, Esq. (AH6510)
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