IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Respectfully Submitted,

/s/ Dan Charles Getman

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INTRODUCTION

The claims that Driscoll raises in his Complaint are straightforward and supported by sufficient allegations to make them plausible. In his Complaint Driscoll alleges that GWU did not pay its employees all the wages they earned. It did so by not paying for all the hours worked and by using a wage calculation that it was not entitled to use. He also alleges that GWU fired him because he complained that the University was not meeting its legal obligation to pay the wages he and others had earned. Driscoll's allegations raise a plausible claim, but to the extent that they do not, he moves the Court for permission to file a second amended complaint that addresses the concerns GWU raises in its motion to dismiss.

Driscoll's claims fall squarely within the D.C. Wage Payment and Collection Law ("WPCL"). GWU admits that it owed Driscoll back overtime wages. Driscoll's alleges that GWU did not pay him all the wages he had earned and that the University withheld the payment in bad faith. GWU's alleged actions violate the WPCL's requirement that "every employer shall pay all wages earned to the employee". GWU's motion to dismiss the WPCL claim is not based on the merit of the claims but an overt attempt to avoid a class action and thus avoid paying the back wages it owes to many of its employees. It asks the Court to limit claims to an opt-in class, knowing that class participation will be far less, due in large part to a fear of retaliation. But GWU's arguments are contrary to the policy behind wage-and-hour statutes that employees should be paid the wages they have earned. Driscoll's claims fall squarely within the letter and the spirit of the WPCL.

Accordingly, the Court should deny GWU's motion to dismiss.

ARGUMENT

I. Driscoll's Complaint Alleges Plausible Claims for Relief.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is "plausible on its face." When a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, then the claim has facial plausibility." *Del Villar v. Flynn Architectural Finishes*, 664 F. Supp. 2d 94, 95-96 (D.D.C. 2009), *citing Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973-74 (2007). In *Saint-Jean v. District of Columbia*, this court recognized that

> [t]he Federal Rules of Civil Procedure provide for "extremely liberal" pleading standards. Under Rule 8(a)(2), a complaint need only contain "'a short and plain statement of the claim'" giving "'the defendant fair notice of what the ... claim is and the grounds upon which it rests'" and "'showing that the pleader is entitled to relief.'" "[D]etailed factual allegations" are likewise unnecessary under Rule 12(b)(6)…

08–1769 (RWR), --- F. Supp. 2d ----, 2012 WL 723715, *2 (D.D.C. Mar. 7, 2012) (citations omitted). This Court also recognizes that the notice pleading rules are "not meant to impose a great burden on a plaintiff." *U.S. v. Retta*, --- F. Supp. 2d ----, 11–1280 (JEB), 2012 WL 65404, *2 (D.D.C. Jan. 10, 2012), *citing Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Alston v. District of Columbia*, 561 F. Supp. 2d 29, 35 (D.D.C. 2008), *citing Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

II. Driscoll's Allegations Are Sufficient to Support His Wage-and-Hour Claims.

In his complaint Driscoll alleges sufficient facts to meet the pleading standard for his wage-and-hour claims He brings his claims as a hybrid class and collective action under 29 U.S.C. § 216(b) and Fed. R. Civ. P. 23. In his complaint, Driscoll claims that

> The George Washington University ("GWU") reclassified the titles and began paying overtime pay in 2011. As part of the reclassification, GWU made nominal back overtime payments to the reclassified employees that were not based on the overtime hours the individuals worked and that did not include liquidated damages or interest payments. Prior to the reclassification, GWU failed to pay the reclassified employees all the wages they were due each pay period. These practices resulted in violations of the Fair Labor Standards Act ("FLSA") and the laws of the District of Columbia ("D.C. Code").

First Amended Complaint ("Complaint") at ¶ 1. He alleges that these actions violate the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*., the D.C. Minimum Wage Act ("MWA"), D.C. Code § 32-1001 *et seq*., and the D.C. Wage Payment & Collection Law ("WPCL"), D.C. Code § 32-1302. Complaint at ¶¶ 2, 3, 53, 60, 63.

In support of these claims, Driscoll alleges that he was employed by GWU from approximately April 12, 2010 to February 22, 2012, as an Executive Coordinator (Complaint ¶ 38) and that GWU employed others as Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants, and/or Executive Associates (Complaint ¶ 38). He defines the putative class as Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants, and Executive Associates who worked for GWU between the period commencing three years preceding the filing of this action. Complaint ¶¶ 21-22. He alleges that GWU classified him and other class members as exempt from the FLSA and D.C. Code overtime provisions and did not pay them overtime wages for all hours worked over 40 in a week. (Complaint ¶ 40). He further alleges that GWU reclassified the class members to a non-

exempt status in 2011 and began paying them overtime wages, (Complaint ¶ 38), and that GWU made a payment to the class members for back overtime wages owed for work over the two years prior to the reclassification. (Complaint ¶ 44). He alleges that the back payment was improper because (1) "GWU improperly used a "half-time" method to calculate the back overtime wage payments because it did not meet the prerequisites to using that method a "half-time" method" (Complaint ¶ 45); (2) "the use of the "half-time" method resulted in class members receiving only one-third or less of the back overtime wages due under the FLSA and D.C. Code" (Complaint ¶ 46); (3) the payments for back wages were not based on the overtime hours the class members actually worked (Complaint ¶ 47); and (4) the back wages did not include liquidated damages or interest (Complaint ¶¶ 48-49). He also alleges that GWU's acts were "intentional, willful, and in bad faith, and … caused significant damages to Class Members"; and that GWU was or should have been aware of its legal obligation to pay overtime wages for all the overtime hours worked (Complaint ¶¶ 50-51).

Driscoll's allegations allow the Court to draw a reasonable inference that GWU is liable for not paying Driscoll and the class members the back wages due for their overtime work during the period of misclassification. Based on these facts, Driscoll's claim is plausible because if GWU did not use the all hours worked as the basis for the calculation, improperly used a half-time calculation for the back wages, and/or failed to include liquidated damages and/or interest in the payment, GWU would be liable to Driscoll and the class for underpayment of the overtime wages due in violation of the FLSA, MWA, and WPCL. Accordingly, Driscoll has met his burden to survive GWU's motion to dismiss his complaint. *Del Villar*, 664 F. Supp. 2d at 95-96.

GWU's claim that Driscoll failed to plead how his wages should have been calculated or the period during which the overtime was improperly calculated is wrong. Driscoll alleged that

GWU improperly used a "half-time" basis for calculating his overtime in violation of the FLSA and the MWA. Both the FLSA, 29 U.S.C. § 207(a)(2), and the MWA, D.C. Code 32-1003(c), require GWU to pay overtime wages at a rate of time and one-half. Driscoll also alleged he was not paid any overtime wages from the time he began working until his position was reclassified. (Complaint ¶ 40-41). [1]

Driscoll is not required to plead the number of hours he worked and was not paid, his hourly rate of pay, or how much overtime he was paid. The information is simply not necessary to state a claim for relief that is plausible on its face in the wage-and-hour context. Courts around the country have held that a plaintiff is not required to plead such information in a wage-and-hour complaint. *See, e.g., Dobbins v. Scriptfleet, Inc.,* 8:11–cv–1923–T–24–AEP, 2012 WL 601145, *3-*4 (M.D. Fla. Feb. 23, 2012); *Hofmann v. Aspen Dental Management, Inc.*, 3:10–cv–37–SEB–WGH, 2011 WL 3902773, *3 (S.D. Ind. Sept. 6, 2011); *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662, 668 (D. Md. 2011). Courts have repeatedly upheld complaints pleading substantially the same information that Driscoll pled. *See, e.g., Dobbins*, 2012 WL 601145 at *3-*4; *Hofmann*, 2011 WL 3902773 at *3 ("Plaintiff's allegations regarding FLSA overtime violations are at this stage at least plausible and sufficient to provide adequate notice to Defendant of the claim. The Rule 8(a) and 12(b)(6) pleading standards require nothing more."); *Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 26 (D. Mass. 2011); *Butler*, 800 F. Supp. 2d at 668; *Buenaventura v. Champion Drywall, Inc.*, 803 F. Supp. 2d 1215, 1217-18 (D. Nev. 2011); *Xavier v. Belfor USA Group, Inc.*, CA No. 06–491 et al., 2009 WL 411559, *5 (E.D.

[1] Driscoll has moved the Court separately to amend the Complaint to include additional factual allegations. The proposed amended complaint, attached as Exhibit A, includes additional allegations that support Driscoll's claims. See Exhibit A, Proposed Second Amended Complaint at ¶¶ 39-63.

La. Feb. 13, 2009); *Uribe v. Mainland Nursery, Inc.*, CA No. 07–0229, 2007 WL 4356609, *3 (E.D. Cal. Dec. 11, 2007).

Furthermore, pleading specific hours of work, rates of pay, and wages paid is not required because the burden of maintaining such information lies squarely with GWU. 29 U.S.C. § 211(c); D.C. Code § 32-1008. Plaintiffs are not required nor expected to keep the information. Recognizing that "employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy", the Supreme Court directs that only if the employer has not kept the records are employees required to establish their rate of pay, hours of work, and the like. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). One can only assume that GWU complied with the law and has the information. If not, Driscoll and the class are only required to establish the records after discovery. *Id*. Requiring him to plead the information now shifts the burden of proof laid out by the Supreme Court. *See Norceide*, 814 F. Supp. 2d at 26, fn 9 ("As the Supreme Court made clear in *Anderson*, [a] lack of records encumbers the employer, not the employee... Extending *Anderson's* burden-shifting doctrine to the pleading stage, in the absence of records, a plaintiff need do no more than allege that she has worked in excess of 40 hours in a week in order to state a claim for an FLSA overtime violation.").

III. Driscoll's Retaliation Claim Should Be Allowed to Go Forward.

As explained in the previous section, Driscoll complains that GWU violated the FLSA by not paying him all the back overtime wages they had earned. In his complaint, Driscoll alleges that GWU discharged him because he questioned GWU as to whether it had paid all the back overtime wages due to him. Amended Complaint at 4, 57. Those allegations are sufficient to meet the "extremely liberal" pleading standards of the Federal Rules of Civil Procedure because

they give GWU fair notice of his claim and the grounds for it—that GWU fired him because he complained that it did not pay him all the overtime it owed him. *Saint-Jean*, 2012 WL 723715 at *2 ("Detailed factual allegations are likewise unnecessary under Rule 12(b)(6)") (citations omitted).

Nevertheless, Driscoll has moved the Court by separate motion to amend his complaint to include additional factual allegations to address GWU's concerns.[2] In the Proposed Second Amended Complaint, Driscoll alleges the following: From the very outset of GWU's reclassification, he complained about the back overtime payment the University offered him. He wrote a series of e-mails to GWU's Human Resources department questioning GWU's use of the FLSA half-time method of calculating overtime and the initial FLSA exempt classification of his position. He also challenged the overtime rate GWU used and asserted that he was not being paid for all the overtime hours he had worked. When he did not receive adequate answers, he continued his e-mail campaign asking Human Resources to explain the calculation of his back overtime pay and complaining that GWU failed to compensate him for all his overtime work. Eventually, he wrote a series of e-mails to the University's Director of Compensation. He directed Human Resources not to deposit the back overtime wage offer into his direct deposit account because he was challenging the University's wage calculation and the hours of work used in it. After GWU deposited his back overtime pay nonetheless, Driscoll spoke with the Director of Compensation, complaining that the amount of overtime GWU estimated was grossly inadequate and that he did intend to accept it. He complained that GWU had deposited the wages against his wishes. In February 2011, he wrote to the Human Resources representative and the Director of Communication presenting them with evidence that he had worked more

[2] A copy of the Proposed Second Amended Complaint is attached as Exhibit A.

overtime hours than GWU had included in his back overtime pay and challenged GWU's original exempt classification of his position. When neither Human Resources nor the Director of Communication responded to the evidence of his overtime hours, Driscoll persisted, refusing to accept the silence. Driscoll's last e-mail to the Human Resources representative and the Director of Communication was on February 21, 2012. He was terminated the next day. Proposed Second Amended Complaint at ¶¶ 57-63.

Driscoll's allegations in the Proposed Second Amended Complaint are more than sufficient to meet the 29 U.S.C. § 215 standard for "filing" a complaint, i.e., "a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). Taken as true, the allegations show that Driscoll put GWU on notice by leveling complaints directly to GWU's Human Resource department and Director of Communications, and he asserted his statutory rights by complaining that GWU was violating the FLSA by improperly using a halftime calculation and not paying all the overtime hours worked.

Should the Court find the allegations in Driscoll's First Amended Complaint insufficient to state a plausible wage-and-hour or retaliation claim, it should allow Driscoll to file the Proposed Second Amended Complaint rather than dismiss the claims as the amendment is in the interests of justice and judicial efficiency. At this early stage of the litigation there is no prejudice to GWU in allowing the amendment and Driscoll has not delayed or acted in bad faith. *Feinman v. F.B.I.*, 269 F.R.D. 44, 49 (D.D.C. 2010). GWU's request that the Court dismiss the claims with prejudice is unwarranted and contrary to the Federal Rules of Civil Procedure. *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996).

IV. Driscoll's Claims Can Be Brought Under the WPCL.

GWU's misconstrues Driscoll's claim under the WPCL. He does not deny that GWU did not pay him some OT wages. His claim is that GWU intentionally did not pay him and class members all the wages they were due upon reclassification. He brings his claims for the unpaid wages under the D.C. Wage Payment & Collection Law ("WPCL"). D.C. Code § 32-1301 *et seq*.

The WPCL provides that "every employer shall pay all wages earned to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer." D.C. Code § 32-1302 (emphasis added). The WPCL broadly defines "wages" as "monetary compensation after lawful deductions, owed by an employer for labor or services rendered, whether the amount is determined on a time, task, piece, commission, *or other basis of calculation*." *Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 20 (D.D.C. 2010) (emphasis in original). Thus, to the extent that plaintiffs can sufficiently prove late and outstanding payments, whether in the form of unpaid tips, wages, or salary, the Court may award those payments under the WPCL. *Id*. Accordingly, this Court has allowed plaintiffs to bring claims for any form of unpaid compensation, including minimum wage and overtime, under the WPCL. S*ee e.g.*, *Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139, 142 (D.D.C. 2011) (plaintiffs brought minimum wage claims under FLSA, MWA and WPCL); *Morales v. Landis Const. Corp.*, 715 F. Supp. 2d 86, 87 (D.D.C. 2010) (plaintiff brought overtime claims under FLSA, MWA and WPCL); *Thompson v. Fathom Creative, Inc.*, 626 F. Supp. 2d 48, 49 (D.D.C. 2009) (plaintiff brought overtime claims under FLSA, MWA and WPCL).

In the complaint Driscoll alleges that GWU failed to pay him and the class all the wages they had earned. GWU concedes that Driscoll is entitled to overtime compensation for the

period prior to the reclassification both by making back overtime payments, *see, e.g.*, *Titre v. S.W. Bach & Co.*, No. 05-80077-CIV, 2005 WL 1692508, *2 (S.D. Fla. July 20, 2005) ("If an employee performing the same job as Plaintiff previously had been paid overtime by Defendant, then Defendant (by virtue of those payments) would have implicitly admitted that such employees were not exempt from the overtime provisions of the FLSA."), and in its moving papers. *See* Doc. No. 9-1 at 14 ("At all times, the University paid plaintiff the wages that the University conceded to be owed to him"). Driscoll specifically alleges that GWU failed to pay him and other class members for all the hours they worked, failed to use the proper statute of limitations, used an improper formula for calculating back wages, and failed to include interest or liquidated damages in the payment. First Amended Complaint at ¶¶ 44-49. He further alleges that GWU's failure to pay the wages earned was "intentional, willful, and in bad faith". First Amended Complaint at ¶ 50. Thus, he alleges a claim under the WPCL.

Other states that have similar wage payment statutes that apply to "all wages" and that broadly define the term "wages" have also allowed claims for minimum and overtime wages under those statutes when such "wages" have been earned but not paid. For example, under the Iowa Wage Payment Collection Law, "an employer shall pay all *wages* due its employees… at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer." I.C.A. § 91A.3 (emphasis added). Wages are defined as "compensation owed by an employer" for, inter alia, "labor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation." I.C.A. § 91A.2. Similarly, under the Illinois Wage Payment and Collection Act, "every employer shall be required, at least semi-monthly, to pay every employee all wages earned during the semi-monthly pay period." 820 ILCS 115/3

(emphasis added). Wages are defined as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, *or* any other basis of calculation." 820 ILCS 115/2 (emphasis added). Likewise, under the Pennsylvania Wage Payment and Collection Law, "every employer shall pay all *wages*, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer." 43 P.S. § 260.3 (emphasis added). Wages include "all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation." 43 P.S. § 260.2a (emphasis added).

Accordingly, these states have regularly applied wage payment collection laws to earned overtime and minimum wages. *See e.g.*, *Dunn v. Dubuque Glass Co., Inc.*, --- F. Supp. 2d ----, 11–CV–1001–LRR, 2012 WL 1564700, *11-12 (N.D. Iowa May 01, 2012) (denying portion of defendant's motion seeking to dismiss plaintiff's overtime claims under the Iowa Wage Payment Collection Law); *White v. VNA Homecare, Inc.*, 11–971–GPM, 2012 WL 1435432, *3 (S.D. Ill. Apr. 25, 2012) (denying defendant's motion to dismiss plaintiff's overtime claims under the Illinois Wage Payment and Collection Act); *Goldman v. RadioShack Corp.*, Civ.A.03-0032, 2005 WL 1155751, *1, 10 Wage & Hour Cas.2d (BNA) 1237 (E.D. Pa. May 13, 2005) (plaintiff brought overtime claims under the FLSA, Pennsylvania Minimum Wage Act and Pennsylvania Wage Payment and Collection Law); *see also Jones v. Casey's General Stores*, 551 F. Supp. 2d 848, 857-58 (S.D. Iowa 2008) (allowing plaintiffs to bring unpaid and overtime wage claims under Indiana Wage Payment statutes and Kansas Wage Payment Act).

Butler v. DirectSat USA, LLC, cited by GWU, is inapposite because, as GWU points out in its motion, the plaintiffs could not proceed under Maryland's Wage Payment & Collection Law because "the parties' core dispute is *whether plaintiffs were entitled to overtime wages at*

all". 800 F. Supp. 2d 662, 670 (D. Md. 2011) (emphasis added). Here GWU concedes that Plaintiff was entitled to overtime wages. The parties' core dispute is whether all the overtime wages earned were in fact paid. Plaintiffs in *Butler* had to look to Maryland's Wage and Hour Law because that act provides the right to overtime, or put another way, the right to earn overtime. However, once that overtime is earned, the right to be paid all the wages earned falls under the WPCL. The other Maryland cases cited by GWU are also inapposite for the same reason that *Butler* is. *See Williams v. Md. Office Relocators*, 485 F. Supp. 2d 616, 621-22 (D. Md. 2007) (plaintiff's "overtime claim turn[s] entirely upon the question of whether overtime pay was due"); *McLaughlin v. Murphy*, 372 F. Supp. 2d 465, 474-75 (D. Md. 2004) (plaintiff's claims "are based on his entitlement to the wages themselves"). Here there is no dispute that Driscoll was entitled to overtime, and he is alleging that he was not paid for all of the overtime hours he is due. His claim falls squarely within the WPCL.

The Maryland case that is analogous to this one is *Hoffman v. First Student, Inc.*, AMD 06–1882, 2009 WL 1783536 (D. Md. June 23, 2009). In *Hoffman*, the parties' dispute was not about whether plaintiffs were entitled to overtime, but whether they were paid for all overtime worked:

> Plaintiffs' theory is simple. GWU compensated plaintiffs… for 15 minutes per day for performing various tasks before and after their bus runs… Plaintiffs allege, however, that these tasks took longer than the 15 minutes for which they were compensated; thus, plaintiffs contend, they are entitled to compensation for the time worked under § 3–501 of the MWPCL… and they have properly and timely filed their claims here under the statute… The dispute is whether defendant has "withheld" or "failed to pay timely" wages due to plaintiffs.

Id. at *9 - *10. Here, Driscoll's theory under the WPCL is simple. GWU has already compensated him for some of the overtime work that he performed. Thus, there is no dispute

that he is entitled to overtime pay. However, Driscoll contends that he is entitled to compensation for all the overtime hours that he worked and that GWU has withheld these wages due him.

Like *Butler*, the other cases cited by GWU are distinguishable. In *Lanphear v. Tognelli*, the plaintiff was not permitted to bring her claims under Vermont's wage payment law because her dispute was that her hourly wage was did not meet the minimum wage. 157 Vt. 560, 563-64 (1991). She did not, as Plaintiff does here, allege that she was not paid all the wages that she had earned. In *Jara v. Strong Steel Door*, the plaintiffs were not permitted to bring their claims under New York's wage payment claim law because their dispute was that they were not paid the agreed upon prevailing wages and so were required to exhaust administrative remedies before bringing such claims. 2008 NY Slip Op 51733U, 14 (N.Y. Sup. Ct. 2008). Again, plaintiffs in *Jara* did not, as Plaintiff does here, allege that they were not paid all the wages they earned.

In *Freeman v. Centr. States*, the dispute again was whether plaintiffs were entitled to overtime in the first place. 515 N.W.2d 131, 134 (Neb. Ct. App. 1994). Notably, the *Freeman* court pointed out that the Nebraska Wage Act defines wages as "compensation for labor or services rendered by an employee, including fringe benefits, *when previously agreed to*…" and thus found that overtime wages could be claimed under the act if those overtime wages were previously agreed to by the employer and the employee. *Id.* at 134-35 (emphasis in original). In other words, the court in *Freeman* recognized that when plaintiffs are entitled to such overtime compensation, a claim for such wages under the Wage Act is proper when they are unpaid. Here, GWU concedes that Driscoll is entitled to overtime compensation. Thus, Driscoll's claim for the unpaid balance is proper under the WPCL.

Finally, in *Mitchell v. C&S Wholesale Grocers, Inc.*, plaintiff's claim under N.J.'s Wage Payment Act was dismissed because the plaintiff did not allege sufficient facts to support a claim under the act. 10–2354 (JLL), 2010 WL 2735655, *5 (D.N.J. July 8, 2010). The court found that the plaintiff made only general allegations about defendant's failure to pay overtime and did not allege that the defendants conceded to plaintiff that they owed him back overtime wages. *Id.* Because there was a dispute about whether the plaintiff was actually entitled to overtime, the court characterized the plaintiff's claims as claims for failure to pay overtime, which it found must be brought under the state's wage and hour law. *Id.* Here, Driscoll has alleged in the complaint that GWU made a payment for back overtime wages owed for the period two years prior to the reclassification (Complaint at ¶¶ 1 & 44), and thus has alleged that GWU conceded that it owed him back overtime wages. Driscoll further alleges that this payment was not for all of the overtime hours actually worked (Complaint at ¶¶ 47). Therefore, he has alleged sufficient facts to support a claim under the WPCL.

GWU's reliance on the *Ventura* case is also misplaced. *Ventura* stands for the proposition that an employee cannot seek to recover the same damages twice. The *Ventura* court held that the plaintiffs in that case could not recover consequential damages and prejudgment interest because the FLSA's provisions are intended to compensate for those damages. *Ventura v. Bebo Foods*, 738 F. Supp. 2d 8, 22-23 (D.D.C. 2010); *see also, Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715 (1945) (holding that plaintiffs cannot recover prejudgment interest under § 216(b) because the FLSA's liquidated damages already serves to compensate them for damages arising from delayed payment). But neither the FLSA nor the MWA prohibits bringing the claims under multiple statutes. Courts in this District regularly allow wage and hour claims to be brought under multiple statutes. *See, e.g., Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3 (D.D.C.

2010); *McKinney v. United Stor-All Centers, Inc.*, 585 F. Supp. 2d 6 (D.D.C. 2008); *Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440 (D.D.C. 2007); *Cryer v. Intersolutions, Inc.*, Civ. A. No. 06–2032, 2007 WL 1053214 (D.D.C. Apr. 7, 2007). Many circuits, including the D.C. Circuit, allow state and federal wage-and-hour claims to be brought together in hybrid class/collective actions, bringing claims for the same actions under state and federal statutes. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249, 258 -259 (3d Cir. 2012) (noting that the Second, Seventh, Ninth, and D.C. Circuits allow hybrid actions); *see also*, *Lindsay v. Government Employees Ins. Co.*, 448 F.3d 416 (Ct. App. D.C. 2006) (allowing hybrid actions). The FLSA itself contemplates actions including claims under state statutes with more generous provisions. 29 U.S.C. § 218. Driscoll does not seek to recover the same damages twice, but he is not prohibited from bringing his claims under multiple statutes.

GWU also argues that claims under the WPCL will require it to face a class action not permitted under the MWA, but if the Driscoll's claims meet the requirements of Fed. R. Civ. P. 23, GWU will face class litigation in any case. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insur. Co.*, 130 S. Ct. 1431, 1437-38 (2010).[3] Similarly, GWU's argument that applying the WPCL will deny employees their right to decide whether to bring their claims in the lawsuit is a red herring because Rule 23(b)(3) provides that each class members receive notice of the action and the opportunity to decide whether to bring their claims in the case.

At bottom, GWU's argument is an attempt to avoid liability to all the workers it underpaid. If it can limit the action to an opt-in class, GWU can expect to avoid the majority of claims against it. Typical opt-in rates in FLSA actions are anywhere from 15 to 30% of the putative class. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for*

[3] See Driscoll's motion to amend the complaint to bring his DCMWA claims under Rule 23.

Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action, Lab. Law. Winter/Spring 2005 at 311, 313-14. Rates are low for various reasons, including the logistics of opting-in. It is also well-understood that current employees fear retaliation and even former employees do not wish to risk their career in an industry on uncertain litigation:

> The existence of a close business relationship between class members and the settling defendant—such as exists between manufacturer and distributors, or franchisor and franchises, or raw material suppliers and their industrial customers—will have a natural tendency to diminish the number of claims filed, in order not to jeopardize that ongoing business relationship.

Newberg on Class Actions, § 8:42. The risk that fear of retaliation will chill participation in an opt-in action is especially acute where, like here, the named plaintiff has alleged retaliation for raising claims.

Protecting an employer from liability for wage violations is contrary to the intent of wage and hour legislation. Such statutes are intended to protect all workers and society from the ill effects of low wages and long work weeks. *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.'") (citations omitted and emphasis added); D.C. Code § 32-1001 (the MWA is intended to protect the "health, efficiency, and well-being of persons so employed", prevent "unfair competition against other employers and their employees", avoid instability of industry, maintaining "the purchasing power of employees", and avoid the need for public or private relief payments to workers.")

GWU also argues that Driscoll's claims under the WPCL must be dismissed because they involve disputed wages, but it ignores the requirement that the dispute be bona fide, i.e., in good

faith. Although the WPCL exempts an employer that pays all wages it concedes due in compliance with § 32-1302 from liability under that section, the exemption applies "only if there exists a bona fide dispute concerning the amount of wages due." D.C. Code § 32-1304 (emphasis added). *Fudali v. Pivotal Corp.*, 310 F. Supp. 2d 22, 28-29 (D.D.C. 2004) (finding that the WPCL did not apply because there was a bona fide dispute about the wages). The bona fide requirement is vital part of the statute because without it any employer could avoid liability under the WPCL by simply disputing without basis that the wages are earned wages. Here, Driscoll has alleged that GWU's acts were "intentional, willful, and in bad faith, and … caused significant damages to Class Members"; and that GWU was or should have been aware of its legal obligation to pay overtime wages for all the overtime hours worked. Complaint at ¶¶ 50-51. Taking the allegations as true, GWU acted in bad faith and the "dispute" over wages would not be bona fide.

CONCLUSION

The Court should deny GWU's motion to dismiss Driscoll's claims because his complaint alleges sufficient facts to support plausible claims as required by the Federal Rules of Civil Procedure. Should the Court find the allegations fall short of the standard, it should grant Driscoll's motion to file a second amended complaint, which addresses the concerns that GWU raised. The Court should also deny GWU's motion to dismiss Driscoll's claim under the WPCL because his claim fits squarely within the statute and is consistent with its underlying policies.

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Respectfully Submitted,

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