IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CROSS MOTION TO AMEND THE CLASS ACTION COMPLAINT

Plaintiff Driscoll seeks to amend the First Amended Complaint in this action. Driscoll amended the original complaint on June 29, 2012. Doc. No. 8. GWU has not answered the amended complaint but moved to dismiss the complaint on July 3, 2012. Doc. No. 9. The purpose of this second amended is to address issues that The George Washington University ("GWU") raised in its motion to dismiss and to plead Driscoll's claims under D.C. Code § 32-1012 *et seq*. as a class action pursuant to Fed. R. Civ. P. 23. A copy of the proposed amended complaint is attached as Exhibit A.

A plaintiff may amend the complaint as a matter of right once. Because Driscoll has already amended his complaint once, he must seek the Court's leave or obtain the opposing party's written consent to file an amended complaint. Fed. R. Civ. P. 15(a). Driscoll sought GWU's written consent but consent was refused. Accordingly, Driscoll seeks the Court's permission to file an amended complaint.

"The decision to grant leave to amend a complaint is left to the court's discretion, but the court must heed Rule 15's mandate that leave is to be 'freely given when justice so requires.' It

is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as undue delay, bad faith or dilatory motive or futility of amendment." *Feinman v. F.B.I.*, 269 F.R.D. 44, 49 (D.D.C. 2010) (citations and quotations omitted).

GWU will not be prejudice by this amendment as it is early in the action before GWU has even responded. Driscoll has acted in good faith without undue delay or dilatory intent seeking to address issues that GWU raised in it motion to dismiss. The amendment does not add any substantive claims of which GWU was not aware. It only seeks to bring the claims under D.C. Code § 32-1012 *et seq*. as a class action pursuant to Fed. R. Civ. P. 23 rather than as a collective action as originally pled. The amendment is not futile as Driscoll's allegations are sufficient to meet the liberal pleading requirements under the Federal Rules of Civil Procedure. *Saint-Jean v. District of Columbia*, 08–1769 (RWR), --- F. Supp. 2d ----, 2012 WL 723715, *2 (D.D.C. Mar.7, 2012).

GWU may raise issue with treating the § 32-1012 claims as a class action pursuant to Rule 23, but the section undeniably provides for class treatment. While it provides a class mechanism that requires class members to opt into an action, the Supreme Court has made clear that in federal court a plaintiff has the discretion to claims that meet the requirements of Fed. R. Pro. Civ. 23 as a class action regardless of state procedural laws to the contrary. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insur. Co.*, 130 S. Ct. 1431, 1437-38 (2010). *See*, *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 91 (3d Cir. 2011) ("federal law regarding class actions would be applied in federal courts, not state law."); *Fields v. QSP*, CV 12–1238 CAS (PJWx), 2012 WL 2049528, *11-*14 (C.D. Cal. June 4, 2012) (finding that Rule 23 applies to state law claims in a wage-and-hour case even where state law provides a different rule); *Bates v. Smuggler's Enters.*, 2:10-cv-136-FtM-29DNF, 2010 WL 3293347, 11-12 (M.D. Fla. Aug. 19,

2010) ("The Court is inclined to agree with plaintiff that the requirement in the Florida constitutional provision providing that "[s]uch [12] actions may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure," Fla. Const. art. 10, §24(e), cannot preclude a federal class action under Fed. R. Civ. P. 23 where the state law claim is brought in or removed to federal court."). The D.C. Circuit recognizes the difference between the FLSA's opt-in provision, which is substantively the same as §32-1012's provision, and Rule 23's opt-out provision as "a mere *procedural* difference." *Lindsay v. Government Employees Ins. Co.*, 448 F.3d 416, 424 (D.C. Cir. 2006). Accordingly, Driscoll has the ability to bring his claims under D.C. Code § 32-1012 *et seq*. as a class action pursuant to Fed. R. Civ. P. 23. His amendment is not futile.

Because Driscoll's has a right to bring his claims as a class action and there is no undue prejudice, bad faith, or dilatory motive, the Court should grant him leave to amend the complaint. *Feinman*, 269 F.R.D. at 49.

Dated: July 17, 2012

Respectfully Submitted,

/s/ Dan Charles Getman

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