

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMY TOWNSEND and	:	
CESAR SERRANO ALVAREZ,	:	
	:	
Plaintiffs,	:	Civil Action
	:	
v.	:	
	:	
BC NATURAL CHICKEN LLC and	:	No. 06-4317
BC NATURAL FOODS, LLC,	:	
	:	
Defendants.	:	

**MEMORANDUM**

**Baylson, J.**

**February 2, 2007**

**I. Introduction**

Presently before the Court are Defendants’ motion to dismiss, and Plaintiffs’ motion to remand the action back to the Philadelphia Court of Common Pleas. The questions presented by the Defendants’ motion are whether Plaintiffs’ sole federal claim under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq., requires interpretation of the collective-bargaining agreement (“CBA”) between the parties, and is therefore subject to the agreement’s arbitration provision; and whether Plaintiffs’ state law claims also require interpretation of the CBA, and are therefore preempted by § 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185(a).<sup>1</sup> The question presented by Plaintiffs’ motion is whether Plaintiffs’ state law claims so

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<sup>1</sup> The LMRA provides, in relevant part:  
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.  
29 U.S.C. § 185(a).

predominate the claim under the FLSA as to require remand. For the reasons set for below, Plaintiffs' Motion to Remand will be denied, and Defendants' Motion to Dismiss will be granted.

## **II. Background**

### **A. Procedural History**

Plaintiffs Amy Townsend and Cesar Serrano Alvarez (hereinafter "Plaintiffs") commenced this action on August 18, 2006 in the Court of Common Pleas for Philadelphia County, First Judicial District of Pennsylvania. Defendants BC Natural Chicken, LLC and BC Natural Foods, LLC ("hereinafter "Defendants") removed the action to this Court (Doc. No. 1) on September 27, 2006, and filed a motion to dismiss (Doc. No. 3) on October 4, 2006. Plaintiffs response (Doc. No. 4) was filed on October 18, 2006, and Defendants submitted their reply (Doc. No. 10) on October 27, 2006. Additionally, Plaintiffs moved to remand this action back to the Philadelphia Court of Common Pleas (Doc. No. 6) on October 24, 2006, to which Defendants filed their opposition (Doc. No. 11) on November 7, 2006. Oral argument on both motions was heard January 12, 2007.

### **B. Allegations in the Complaint**

The Complaint is styled as a class action pursuant to the Pennsylvania Rules of Civil Procedure and a "representative action" pursuant to the FLSA, 29 U.S.C. § 216(b). Plaintiffs claim they, and similarly situated employees of Defendants, are entitled to unpaid wages, unpaid overtime wages, liquidated damages, costs, attorney's fees, and declaratory and injunctive relief for the time spent "donning" and "doffing" personal protective equipment. (Compl. ¶¶ 7-9.)

Based on these allegations, the Complaint includes five counts. Count I alleges violation of the Pennsylvania Minimum Wage Act of 1968 ("PMWA"), 43 P.S. § 333, et seq. (Compl. ¶¶

36-41.) Count II alleges violation of the Pennsylvania Wage Payment and Collection Law (“WPCL”), 43 P.S. § 260.1, et seq. (Id. ¶¶-p-42-49.) Count III claims breach of oral contract. (Id. ¶¶ 50-55.) Count IV claims violation of the FLSA, 29 U.S.C. § 201, et seq. (Id. ¶¶ 56-59.) Count V argues that these acts have led to the unjust enrichment of Defendants. (Id. ¶¶ 60-66.)

**C. Defendants’ Motion to Dismiss**

As to Plaintiffs’ sole federal claim (Count IV), Defendants maintain the arbitration provision included in the CBA requires this Court to dismiss the action for failure to state a claim, since Plaintiffs have failed to pursue arbitration in accord with the CBA. As to all the state law claims (Counts I, II, III and V), Defendants contend that since this Court would have to interpret the CBA, § 301 of the LMRA, 29 U.S.C. § 185(a), preempts those claims.

Plaintiffs challenge the first point, claiming the FLSA provides a separate, statutory cause of action for which employees need not first “exhaust” the arbitration requirement of an employment contract. As to the second point, Plaintiffs argue that the Court need not *interpret* the CBA, but merely may need to refer to the agreement for information, such as damage calculation. Moreover, Plaintiffs dispute the contention that the Court would have to rely on the terms of the CBA at all.

**D. Plaintiffs’ Motion to Remand**

Noting that the source of this Court’s jurisdiction arises from the federal question presented by their claim under the FLSA, Plaintiffs nevertheless claim the Court may not exercise supplemental jurisdiction over the state law claims, and therefore must remand this matter back to the Philadelphia Court of Common Pleas. Plaintiffs maintain that Counts I and II of the Complaint, which assert claims under the PMWA and WPCL, respectively, substantially

predominate over the FLSA claim in Count IV, requiring remand. Defendants dispute Plaintiffs' predominance theory. According to Defendants, since § 301 of the LMRA expressly preempts Plaintiffs' state law claims, all claims are actually within this Court's original jurisdiction.

### **III. Discussion**

#### **A. Legal Standard**

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).<sup>2</sup>

#### **B. FLSA Claim**

Plaintiffs rely on Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), for their contention that they need not have pursued arbitration under the CBA before bringing the instant action. In Barrentine, the Supreme Court discussed the tension between two aspects of national labor policy. On the one hand, "statutes governing relationships between employers and unions, encourage[] the negotiation of terms and conditions of employment through the collective-bargaining process." Id., 450 U.S. at 734. On the other, "statutes governing

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<sup>2</sup> As will be discussed below, Plaintiffs' state law claims are preempted by the LMRA. As such, this Court has original jurisdiction over all claims pursuant to 28 U.S.C. § 1331. Accordingly, Plaintiffs' motion to remand will be dismissed.

relationships between employers and their individual employees, guarantee[] covered employees specific substantive rights.” Id. The Court noted that the tension arises when a collective bargaining agreement requires an employee to submit to contractual dispute-resolution procedures when trying to enforce substantive statutory rights. Id. at 734-735. Thus, Barrentine holds:

Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee’s claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Id. at 737.

In that case, the workers in question were truck drivers subject to a collective-bargaining agreement. Pursuant to a dispute-resolution provision in the agreement, the truck drivers challenged, through arbitration, the scope of activities for which they were compensated. After their grievances were rejected in that forum, the truck drivers began the action at issue in Barrentine in federal district court, bringing a new claim under the FLSA. Id. at 730-733. Here, Plaintiffs have not filed grievances in accordance with the arbitration provision of the CBA. Instead Plaintiffs argue that since an adverse outcome at arbitration would lead them back to court, there is no need to require arbitration in the first place.

In a later opinion, the Supreme Court stated, “Congress intended that statutes at issue [in Barrentine] to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes,” McDonald v. City of West Branch, 466 U.S. 284, 289 (1984) (citing Barrentine, 450 U.S. at 740-746), making clear

that an arbitrator's adverse decision pursuant to a collective-bargaining agreement does not preclude an employee from pursuing relief pursuant to the FLSA under the same facts as were arbitrated. Thus, "the FLSA rights . . . are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." Id. at 745. While Plaintiffs' are free to pursue their FLSA claims notwithstanding an adverse arbitral decision, this fact has no bearing on the arbitrability of their claims in the first instance. The sole issue before the Court is whether the instant matter requires interpretation of the CBA.

The Third Circuit has held:

[W]hile claims resting on the language of section 7(a) [of the FLSA, 29 U.S.C. § 707(a)] are clearly cognizable under that section, we believe that claims which rest on interpretations of the underlying collective bargaining agreement must be resolved pursuant to the procedures contemplated under the LMRA, specifically grievance, arbitration, and, when permissible, suit in federal court under section 301.

Vadino v. A. Valey Eng'rs., 903 F.2d 253, 266 (3d Cir. 1990) (upholding the district court's grant of summary judgment for the defendants when the plaintiff's claim for back wages necessarily required interpretation of a collective-bargaining agreement).<sup>3</sup> In Vadino the plaintiff sought back wages at a higher hourly rate than he had been paid while working on the theory that his level of work experience entitled him to the higher hourly rate of a journeyman under the

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<sup>3</sup> Section 7(a) of the FLSA reads, in relevant part:

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.

29 U.S.C. 207(a)(1).

collective-bargaining agreement. See id. at 257. The Court found that, while the petitioner had a theoretically legitimate overtime claim under the FLSA, the issue of the hourly wage rate first had to be decided according to the requirements of § 301 of the LMRA. Id. at 266. (“Because we have concluded that section 7(a) does not provide a means for adjudicating disputes under the collective bargaining agreement, we hold that [the petitioner] cannot seek to establish under section 7(a) that he was entitled to the journeyman’s rate.”)

Here, Plaintiffs allege that certain activities, including the “donning and doffing” of personal protective equipment, is work for purposes of the FLSA, thus entitling them to compensation and liquidated damages pursuant to § 7(a). See 29 U.S.C. § 207(a). Defendants respond with reference to § 203(o) of the FLSA, which allows parties to exclude from working hours “time spent in changing clothes or washing” through the terms of a collective-bargaining agreement. Article XX, Section 12 of the CBA (attached to Defendant’s Motion to Dismiss as Rosenberger Decl., Ex. A), provides “twelve (12) minutes pay per week to provide for wash up time.” Thus, any decision this Court or any finder of fact may take regarding Plaintiffs’ claims under § 7(a) of the FLSA requires the Court to also interpret the CBA, and the intent of the parties thereto in formulating Art. XX, Sec. 12. Vadino requires the Court to interpret the CBA under the LMRA. Id. at 266. However, Plaintiffs have not made any allegations pursuant to the LMRA in their Complaint. As in Vadino, we will dismiss Plaintiffs’ FLSA claim.

**C. Preemption of Plaintiffs’ State Law Claims**

In the context of collective-bargaining agreements “state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements.” Allis-Chalmers Corp. v.

Leuck, 471 U.S. 202, 213 (1985). Furthermore, whether a contract confers implied rights, as well as explicit rights, is a question of federal contract interpretation. Id. at 215. Thus, “when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law.” Id. at 220 (internal citations omitted); see also Antol v. Esposito, 100 F.3d 1111, 1117 (3d Cir. 1996) (“In general, claims based squarely on a collective bargaining agreement or requiring analysis of its terms are preempted by section 301 and are removable to the federal courts.”)

State law is not preempted, however, when “resolution of the state-law claim does not require construing the collective-bargaining agreement.” Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988); Antol, 100 F.3d at 1117 (“Claims that are independent of a collective bargaining agreement, even if they are between employees and employers, are not removable.”) This is so “even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, so long as the state-law claim can be resolved without interpreting the agreement itself.” Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. at 409-410. Thus, a state law entitling workers to compensation for all unpaid wages immediately upon termination is not preempted by § 301 of the LMRA, despite the existence of a collective-bargaining agreement with an arbitration clause. Livadas v. Bradshaw, 512 U.S. 107 (1994). This is because interpretation of the collective-bargaining agreement is not necessary when a state law provides the right being asserted, and the only reason to look to the agreement is to find the wage rate to apply to the statute. See id. at 124-125 (“As the District Court aptly observed, the primary test

for deciding whether Livadas was entitled to a penalty was not the Food Store Contract, but a calendar.”)

**1. Count I: Violation of the PMWA, 43 P.S. § 333, et seq.**

Plaintiffs allege violation of the PMWA, which provides, in relevant part, “Employees shall be paid for overtime not less than one and one-half times the employee’s regular rate . . . .” 43 P.S. § 333.104(c). The PMWA provision is similar to the FLSA provision at issue discussed above. Accordingly, the parties’ arguments revolve around the same Art. XX, Sec. 12 of the CBA, which provides “twelve (12) minutes pay per week to provide for wash up time.”

This case is not analogous to Livadas, contrary to Plaintiffs’ urging. In their view, this Court need not interpret the CBA, but need only offset the twelve minutes per week for which Plaintiffs have been properly compensated against the total time spent donning and doffing. However, determining whether Plaintiffs’ claim that time spent “donning and doffing” represents hours worked is a matter of interpretation of the CBA, requiring the Court to find preemption in accord with Vadino, 903 F.2d 253. See also Penn. Fed’n of the Bhd. of Maint. of Way Aployees v. Nat’l R.R. Passenger Corp., 989 F.2d 112 (3d Cir. 1993) (finding that a claim by employees for overtime pay for time traveling to and from work sites aboard the defendant’s trains could only be determined by interpreting the collective-bargaining agreement).

**2. Count II: Violation of the WPCL, 43 P.S. § 260.1, et seq.**

Pennsylvania courts interpret WPCL as one which requires reference to the employment contract.

The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages. The WPCL does not

create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement.

Kafando v. Erie Ceramic Arts Co., 764 A.2d 59, 61 (Pa. Super. Ct. 2000) (citing Hartman v. Baker, 766 A.2d 347, 352 (Pa. Super. Ct. 2000)). The Third Circuit is in accord with this interpretation of the WPCL. Antol, 100 F.3d at 1117 (“[T]he Wage Act does not create a right to compensation . . . [r]ather, it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned.”)

In Local Union No. 98 Int'l Bhd. of Elec. Wrokers v. Morris, No. 04-1988, 2004 WL 1551673 (E.D. Pa. July 9, 2004), the court, relying on Antol, *supra*, exercised jurisdiction, finding that § 301 of the LMRA completely preempts the WPCL whenever a collective-bargaining agreement is at issue. Morris, at \*3. The instant case is similar in that the alleged obligations have been created by a collective-bargaining agreement. Therefore, the WPCL is completely preempted by § 301 of the LMRA.

### **3. Counts III & V: Breach of Oral Contract and Unjust Enrichment**

The remaining counts in the Complaint, for breach of oral contract and unjust enrichment, both derive directly from the CBA. In the first case, comparison of the CBA and the alleged oral contract would be unavoidable. While a claim for breach of oral contract in and of itself would not be preempted if there were not a collective-bargaining agreement, the specific claim in the instant case requires interpretation of the CBA in order to determine whether the this written contract addresses matters in the alleged oral contract. See Questar Corp. v. Specialized Software Systems, Inc., No. 88-6462, 1988 WL 136491 (E.D. Pa. Dec. 16, 1988) (allowing

arbitrators rather than the court to decide whether disputes under allegedly independent oral contracts are actually disputes arising under the written contract); Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 877 (D. Del. 1987) (construing an oral contract modification in light of the written contract between the parties). In the second instance, an allegation of unjust enrichment presupposes a situation in which no written contract exists. See Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. Ct. 1999). However, the CBA is a written contract between the parties that addresses, at least in part, compensable donning and doffing activities. Since these two counts also state claims that are “based squarely on the collective bargaining agreement,” they are therefore subject to complete preemption. See Antol, 100 F.3d at 1117; See also Int’l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987) (holding a common-law tort claim for union’s failure to fulfill its duties pursuant to a collective-bargaining agreement is preempted by the LMRA).

#### **IV. Conclusion**

Plaintiffs’ claims require interpretation of the CBA. As such, claims pursuant to state law (Counts I, II, III, and V) are preempted by § 301 of the LMRA, and the claim pursuant to the FLSA (Count IV) is subject to arbitration. Therefore, Counts I, II, III and V will be dismissed with prejudice, and Count IV will be dismissed without prejudice. An appropriate order follows.

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CESAR SERRANO ALVAREZ,	:	
	:	
Plaintiffs,	:	Civil Action
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v.	:	
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BC NATURAL CHICKEN LLC and	:	No. 06-4317
BC NATURAL FOODS, LLC,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 2nd day of February, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that Plaintiffs' motion to remand (Doc. No. 6) is denied. It is further ordered that as to Defendants' motion to dismiss (Doc. No. 3), Counts I, II, III, and V are dismissed with prejudice; Count IV is dismissed without prejudice.

BY THE COURT:

**/s/ Michael M. Baylson**

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Michael M. Baylson, U.S.D.J.