UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BRYAN PENNINGTON,	)	
	)	
on behalf of himself and all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 1:12-cv-5 SNLJ**
	)	
INTEGRITY COMMUNICATIONS, LLC, et al.	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs filed a seven-count complaint against defendants Integrity Communications, Inc., Integrity Communications, LLC, Holly Rehder, and Ray Rehder, seeking to recover unpaid wages, liquidated damages, attorney fees, and other relief from defendants for violations of the Fair Labor Standards Act, 29 U.S.C. §201, et seq. ("FLSA"), the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq. ("ERISA"), the Missouri Minimum Wage Law, §290.500 R.S.Mo. et seq. ("MMWL"), and Missouri common law. Plaintiffs seek to proceed on behalf of all similarly-situated individuals as a class action (*see* #43).

Defendants have moved to dismiss plaintiffs' complaint in its entirety (#38). The matter has been fully briefed and is now ripe for disposition.

I. Background

According to the Second Amended Complaint, which, for the purposes of this motion the Court takes at face value, plaintiffs Bryan Pennington and Stephen Pennington, Sr. install cable

components (cable and cable boxes) for the defendants. Although the defendants classified the plaintiffs as independent contractors and paid them "piece rate wages" (meaning they were paid by the job), plaintiffs state that they were misclassified and are instead employees of the defendants. Plaintiffs state that they were paid by the job, called "piece work," but that they were not paid for all the jobs completed. They complain that they were not paid overtime or for expenses related to travel, that their work hours were not recorded, and that defendants have failed to keep records for employees sufficient to determine employee wages and hours in violation of the FLSA. Plaintiffs state that they were required to work evenings and weekends without overtime compensation, and that they were required to wear shirts imprinted with defendants' logo and to present themselves as defendants' employees. Defendants supplied plaintiffs' tools, but plaintiffs were required to pay defendants for the tools (Bryan was required to return the tools to defendants but was not reimbursed for their return). Defendants directed and controlled when plaintiffs reported to scheduled jobs, where to report, when the workday ended, and how to perform necessary services. Defendants also required plaintiffs to attend mandatory training meetings for which they did not receive compensation.

Plaintiffs allege that, had they been properly classified as employees rather than independent contractors, they would have been permitted access to defendants' health, dental, and vacation pay plans. Plaintiffs allege that defendants gained excess profits by misclassifying plaintiffs as independent contractors. Further, plaintiffs state that Bryan was terminated as a result of his complaints regarding defendants' allegedly illegal wage and hour practices.

II. Legal Standard

Defendants seek dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal sufficiency of a complaint so as to eliminate those actions which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity. *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (quoting *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)). A complaint must be dismissed for failure to state a claim if it does not plead enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560 (2007) (abrogating the traditional "no set of facts" standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A petitioner need not provide specific facts to support his allegations, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam), but "must include sufficient factual information to provide the grounds on which the claim rests, and to raise a right to relief above a speculative level." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 222 (2008) (quoting *Twombly*, 550 U.S. at 555-56 & n.3).

In ruling on a motion to dismiss, a court must view the allegations of the complaint in the light most favorable to the petitioner. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir. 2003). Although a complaint challenged by a Rule 12(b)(6) motion does not need detailed factual allegations, a petitioner must still provide the grounds for relief, and neither "labels and conclusions" nor "a formulaic recitation of the elements of a cause of action" will suffice. *Twombly*, 550 U.S. at 555 (internal citations omitted). "To survive a motion to dismiss, a claim must be facially plausible, meaning that the

factual content . . . allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged." *Cole v. Homier Dist. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). When determining the facial plausibility of a claim, the Court must "accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Id.* (quoting *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005)). Finally, where a court can infer from those factual allegations no more than a "mere possibility of misconduct," the complaint must be dismissed. *Id*. (quoting *Iqbal*, 129 S.Ct. at 1950).

III. Discussion

Defendants seek dismissal of all plaintiffs' claims.

A. Counts I, II, and VII — Violations of FLSA

The FLSA provides minimum and overtime pay scales for covered employees. Defendants contend that plaintiffs' FLSA claims fail as a matter of law because, they assert, plaintiffs are not "employees" under the FLSA. The statute defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The test for determining whether an individual is an "employee" is one of "economic reality." *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 301 (1985). Defendants rely on *Dole v. Amerilink Corp.*, 729 F. Supp. 73 (E.D. Mo. 1990) to support their position. *Dole* held that certain cable installers were not "employees" under the FLSA. The court there was guided by six criteria:

> (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
>
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;
>
> (4) whether the service rendered requires a special skill;
>
> (5) the degree of permanency and duration of the working relationship;
>
> (6) the extent to which the service rendered is an integral part of the alleged employer's business.

729 F. Supp. at 76 (citing *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987)).

Defendants assert that the plaintiffs' situation in *Dole* was identical to the plaintiffs' situation here, and, as a result, their FLSA claims should be dismissed because the plaintiffs were not employees under *Dole*. Defendants are incorrect in their reliance on *Dole* in two important respects.

First, *Dole* was written following a bench trial. The judge made finding of facts and conclusions of law and determined that, based on the six factors of the "economic reality test," the *Dole* plaintiffs were not employees of the defendant cable company. Here, the parties are only at the preliminary litigation stages, and the Court must take the allegations in the complaint as true. *Dole* does not stand for the proposition that *all* cable installers are necessarily not employees under the FLSA.

Second, and underscoring the point above, the facts found in *Dole* and the facts alleged here are different in several important respects. In *Dole*, for example, the cable company did not exercise control over its workers' hours; the workers wore generic "cable television" shirts; the workers were completely in charge of hiring, firing, paying, and otherwise helping their helpers. Here, plaintiffs allege that defendants controls its workers' hours; the workers must wear shirts with the defendants' logo on them and hold themselves out as employees; and the workers cannot

hire their own helpers. The plaintiffs in *Dole*, then, were differently situated from the plaintiffs as alleged here.

Defendants make much of saying that the "plaintiffs are asking this Court to subject the parties to extensive discovery to at least the Summary Judgment stage," and suggest that doing so is a waste of resources where "there is no reasonable likelihood that Plaintiffs can construct a claim from the events alleged." The Court agrees that certain specificity in pleadings is required " to provide the grounds on which the claim rests, and to raise a right to relief above a speculative level." *Schaaf*, 517 F.3d at 549 (quoting *Twombly*, 550 U.S. at 555-56 & n.3). However, the plaintiffs have demonstrated that here. Plaintiffs' Counts I, II, and VII will not be dismissed.

B. Count III — ERISA Claims

Defendants' argument in support of dismissing plaintiffs' ERISA claims is the same: that plaintiffs were not "employees" under ERISA for the same reason they are not "employees" under FLSA. Defendants' argument thus fails here for the same reason it failed to support dismissal of Counts I, II, and VII. Plaintiffs' Count III will not be dismissed.

C. Counts IV, V, and VI — Plaintiffs' State Law Claims

Defendants' arguments for dismissal of the remaining state law claims similarly fail. Count IV alleges a violation fo the Missouri Minimum Wage Law, § 290.500, *et seq.* R.S.Mo. Defendants state that it is a state law analogous to the FLSA and is to be interpreted in accordance with the FLSA. § 290.505(4) R.S.Mo. Defendants thus make the same argument that plaintiffs were not employees of defendants and thus are not covered. That argument fails for the reasons explained above.

As for plaintiffs' state law claims of quantum merit (Count V) and unjust enrichment (Count VI), defendants state that those equitable remedies are not available if there is an adequate remedy at law, citing *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 591-92 (Mo. banc. 2007). Defendants contend that because remedies at law exist under the FLSA and MMWL, their mere existence (although, defendants argue, they are not available here), renders equitable remedies unavailable. Defendants cite no authority in support of that position, and the Court will not adopt it here. As the plaintiffs point out, they are permitted to plead alternative claims under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8(d).

The defendants' final argument is that this Court does not have supplemental jurisdiction over the state law claims because, they argue, plaintiffs' federal law claims fail to state a claim. Because this Court has held that plaintiffs have stated federal claims, however, defendants' argument fails.

IV. Conclusion

Defendants' motion to dismiss will be denied.

Accordingly,

IT IS HEREBY ORDERED that defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (#38) is **DENIED**.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss Plaintiffs' Complaint (#12) and Motion to Dismiss Plaintiffs' First Amended Complaint (#26) are **DENIED** as moot.

Dated this 17th day of August, 2012.

UNITED STATES DISTRICT JUDGE