Hand-Delivered

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

GREGORY G. ARMENTO,
Plaintiff, Pro Se,

vs.

ASHEVILLE BUNCOMBE COMMUNITY CHRISTIAN MINISTRY, INC., et al.
Defendants.

Civil Action No. 1:17-cv-150

PLAINTIFF'S
MEMORANDUM IN SUPPORT OF
INJUNCTIVE RELIEF

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The Pro Sc litigate is mindful that his standing with the Court may not be equivalent to that of an attorney, therefore, through substantive pleadings the Pro Se litigate endeavors to plead a case via the written record and exhibits; the Pro Se litigant begs the Court for latitude should his attempts stray from form.

In conjunction with of this **Plaintiff's Memorandum for Injunctive Relief**, the Plaintiff submits a **Plaintiff's Complaint** and **Plaintiff's Affidavit in Support of Complaint**[1]. The question of the Fair Labor Standards Acts (FLSA) applicability is raised under a test for a prima facie case in this Memorandum; to address the application of the FLSA, the Plaintiff has prepared a separate **Plaintiff's Memorandum in Support of FLSA Applicability** which is relied upon herein.

I. INTRODUCTION

Gregory G. Armento, ("Armento" or "Plaintiff") proceeding as a Pro Se litigant in the form of a pauper, and submits this memorandum in support of Plaintiff's Motion for Injunctive Relief.

The Plaintiff respectfully requests this Court, pursuant to Federal Rule of Civil Procedure 65, to issue a **Preliminary Injunction** enjoining Asheville Buncombe Community Christian Ministry, Inc. ("ABCCM" or "Defendant") as named in Plaintiff's Motion.

Specifically, the Plaintiff moves the Court to preserve the status quo by preventing his expulsion into homelessness until such time as the issues in controversy are fully adjudicated; if the Plaintiff be expelled into homelessness the Plaintiff will suffer immediate, permanent, and irreparable harm. The vulnerability of the Plaintiff is underscored by his dependency on the Defendant's federal obligations to render life-sustaining federal benefits to the Plaintiff.

At hearing for a **Preliminary Injunction**, the Plaintiff requests the Court to order the

[1] Producing representative testimony on a given pattern or practice is an acceptable method of trying an FLSA case. Donavon v. Bel-Loc Diner, Inc. 780 F.2d 1113, 1116 (4th Cir. 1985).

Defendant to place the Plaintiff in safekeeping or explain to the Court the specific action they will take to protect Plaintiff from further harm.

II. STATEMENT OF FACTS

A. Parties

The Plaintiff is presently 62 years old, an honorably discharged Veteran of the U.S. Army, and a sheltered resident of the Veterans Restoration Quarters (VRQ) a homeless shelter for Veterans ran by the Defendant **(Plaintiff's Affidavit in Support of Complaint, at 2, 4)**.

Asheville Buncombe Community Christian Ministry, Inc. ("Defendant" or "ABCCM") is a Charitable and Religious, non-profit corporation, incorporated under the laws of North Carolina, and is owned and operated by Christian congregations of Buncombe County (including their pastor affiliates) who are members of same organization **(Exhibit 28 - ABCCM ByLaws and Artilces; at Article I, Corporation Name & Ownership, Section 1, Section 2, Section 3)**, and under the direction of ABCCM Board of Directors, collectively referred to as "Defendant"; and at all times relevant was headquartered and doing business in Asheville, NC. **(Plaintiff's Complaint, 4-5)**

Additionally, the Defendant's business interests are multi-faceted, whereas several businesses are registered with the North Carolina Secretary of State, and share the entity name "Asheville Buncombe Community Christian Ministry" or "ABCCM"; and/or, has the same officer or Registered Agent name "Scott Rogers"; and/or, is identified by a business address that is known to be operating in the business interest of the Defendant. This action is without the benefit of pre-trial Discovery and it is unknown as to what extent same businesses have benefited from the actions in the Complaint **(Plaintiff's Complaint at 6)**.

B. Overview

The Defendant operates a homeless shelter with funding from seven government agencies in 2015 **(Exhibit 30 - ABCCM Consolidated Audit 2015; page 32)**, which provides either direct

or pass-through funding to the Defendant. The primary source of funding coming directly from the U.S. Department of Veteran Affairs (VA) 38 CFR Part 61, Homeless Providers Grant and Per Diem (GPD) Program[2].

The Defendant has been an authorized provider of the VA GPD program since 2003; as per Executive Director of ABCCM, Rev. Scott Rogers speaking to the U.S. Senate Committee on Veterans Affairs:

> ABCCM has had a U.S. Department of Veterans Affairs (VA) Grant and Per Diem (GPD) contract since 2003. We currently have four Grant and Per Diem programs which encompass 148 homeless men and 10 homeless women (mothers with children) for a total of 158 beds. This makes us the third-largest contractor of Grant and Per Diem services in the Nation.
>
> ABCCM Exec. Dir., Rev. Scott Rogers, March 14, 2012[3]

The VRQ is operated primarily to benefit Veterans of the U.S. Armed Forces, with federal funding from U.S. Department of Veterans Affairs, and, the U.S. Department of Labor.

> Under ABCCM's umbrella, we offer employment and training services through a U.S. Department of Labor (DOL) Homeless Veterans Reintegration Program (HVRP) grant.
>
> ABCCM Exec. Dir., Rev. Scott Rogers, March 14, 2012[4]

The Defendant is paid by the U.S. Department of Veterans Affairs for each night the Plaintiff is sheltered at the VRQ:

> "Operational costs, including salaries, may be funded by the Per Diem Component. For supportive housing, the maximum amount payable under the per diem is $45.79 per day per Veteran housed."
>
> VA website - http://www1.va.gov/HOMELESS/GPD.asp

The Plaintiff is a U.S. Army Veteran receiving homeless veteran benefits as provided and

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[2] U.S. Department of Veterans Affairs, Title 38 CFR Part 61, VA Homeless Providers Grant and Per Diem Program. https://www.gpo.gov/fdsys/pkg/CFR-2016-title38-vol2/pdf/CFR-2016-title38-vol2-part61.pdf

[3] Statements made by ABCCM Executive Director, Rev. Scott Rogers to the U.S. Senate Committee on Veterans Affairs, March 14, 2012. https://www.gpo.gov/fdsys/pkg/CHRG-112shrg73402/html/CHRG-112shrg73402.htm

[4] Ibid.

administered by the Defendant pursuant to VA Grant and Per Diem (GPD) program. The stated purpose of the VA GPD program is to "*promote the development and provision of supportive housing and/or supportive services with the goal of helping homeless Veterans achieve residential stability, increase their skill levels and/or income, and obtain greater self-determination.*"[5] The Plaintiff can resided up to 24 months[6] in the VA GPD supportive housing to achieve "greater self-determination"; each Veteran has three Per Diem episodes[7] of supportive housing services his life-time, the VA may waive this limitation and allow additional episodes.

The VA GPD program has two levels of funding: the Grant component and the Per Diem component. The Grant is limited to 65% and recipients must obtain the 35% share; Grants can only be used for capital expenses, grant monies may not be used for operational costs, including salaries.[8] The Per Diem component of the program requires monthly accounting of Veteran overnight stays, reporting and invoicing for services provided.[9]

In the Grant and Per Diem application process, it was necessary for the Defendant to design its own Grant and Per Diem Project Plan to achieve the goals of the VA GPD program.[10]

The Defendant promotes its brand of homeless services across state lines, and in doing so the Defendant, holds itself out as a provider of VA GPD program benefits to homeless veterans and their families for business purposes. The Plaintiff was homeless without the means to sustain

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[5] GPD goals as stated on VA website - http://www1.va.gov/HOMELESS/GPD.asp
same goals also forms the basis for "Project Plan" segment of VA GPD Application, see footnote 9; also as stated in published PDF: Federal Benefits for Veterans Dependents and Survivors. 2016 Edition, page 47
https://www.va.gov/opa/publications/benefits_book/2016_Federal_Benefits_for_Veterans.pdf
[6] VA GPD Program, 38 CFR Part 61, § 61.80 General operation requirements for supportive housing and service centers. Paragraph (d).
[7] VA GPD Program, 38 CFR Part 61, § 61.33 Payment of per diem. (g) Supportive housing limitation.
[8] VA GPD Program website, Grants: Limit - http://www1.va.gov/HOMELESS/GPD.asp
[9] Exhibit 31 - VA GPD Homeless Providers Per Diem Payment Voucher; (VA Form 10-0361D)
https://www.va.gov/HOMELESS/docs/GPD/GPD_Voucher_Form_10-0361d-fill.pdf
[10] VA GPD Application, VA FORM 10-0361-PDO, page 14,
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himself when he found the Defendant's homeless services for Veterans on ABCCM's website. During a phone conversation, the Defendant informed him about his VA GPD program benefit. The Plaintiff first arrived at the Veterans Restoration Quarters on September 2, 2015 **(Plaintiff's Affidavit in Support of Complaint, at 5-11).**

C. **Nature of Controversy**

First Impression

This may be a case of First Impression for the Court, given the unusual circumstances that frame the dispute between the parties, whereas:

i. the Defendant's status as a federally funded, faith-based, non-profit organization with regulatory obligations, fiduciary responsibilities, and benefactor duties that extend from governmental agencies to benefit the Plaintiff; and,

ii. the Defendant's authority and control over the homeless Plaintiff extending from said governmental agency contracts; and,

iii. the Defendant has access to highly confidential and sensitive records regarding the Plaintiff health and economic conditions; and,

iv. the Plaintiff's life-sustaining dependency on the Defendant as a provider of federal benefits to the Plaintiff.

The above conditions dominate all of the issues in controversy, including: two separate employer/employee relationships of the parties.

First Employer/Employee Relationship

By virtue of the Plaintiff being a sheltered resident at the Defendant's Veterans Restoration Quarters he is required to perform unpaid labor. The Defendant has established a "Service Hours" program which requires the Plaintiff to perform Duty Driver work activities without compensation.

The Defendant designed a VA GPD program that includes authority and control over the VA GPD Veterans.[11] Said authority and control includes policies and practices that are not typical to an employee and employer relationship, such as but not limited to: room assignment, roommate assignments, limiting available in-room amenities, approving overnight off-campus passes, setting every day off-campus curfew times; requiring attendance to a monthly meeting; in addition, the Plaintiff must immediately comply with room changes, number of roommates, drug and alcohol testing, room searches, luggage, and locker searches. **(Plaintiff's Affidavit in Support of Complaint, at 32, 96, 98; 104, 110, 149-144; and, collectively all editions of Resident Handbooks, Exhibit 20 (2014); Exhibit 21 (2015); Exhibit 22 (2016); and Exhibit 23 (2017)).**

The Defendant's authority and control also includes disciplining, expulsion into homelessness, and termination of the current Per Diem benefit the Plaintiff is presently enrolled. **(Plaintiff's Affidavit in Support of Complaint, at 21, 37, 98, 112).**

Additionally, the Defendant maintains records of a highly confidential nature regarding the Plaintiff, such as but not limited to: social security number, driver's license number, medical records, mental health evaluations, personal financial statements, criminal history, homeless history **(Id. at 13, 23, 99).**

The Defendant's uses its superior position of authority and control to gain compliance with a Service Hours program that disregards Federal or State employment laws as alleged in Count I of Plaintiff's Complaint.

Second Employer/Employee Relationship

The Defendant did employ the Plaintiff as a formal employee to perform work activities

[11] VA GPD Program, 38 CFR Part 61, § 61.2 Supportive services—general. (a) Recipients must design supportive services. Such services must provide appropriate assistance, or aid participants in obtaining appropriate assistance, to address the needs of homeless veterans.

consistent with a Front Desk Manager at the VRQ **(Exhibit 14 - Armento Direct Deposit Paychecks)**. In the course of same formal employment, the Defendant barred the Plaintiff from recording scheduled Front Desk work hours claiming said barred hours are "Service Hours", without regard to Federal or State employment laws, giving rise to Count II of Plaintiff's Complaint.

Count I, Count II, and Count III of the Plaintiff's Complaint arise from these two separate working relationships of the parties.

1. **Count I, Wage Theft by Service Hours, *et seq.***

Count I of the Plaintiff's Complaint alleges Wage Theft by Service Hours, Failure to Pay Minimum Wage and Overtime, Failure to Maintain Records, Misclassification of an Employee as a Volunteer.

The Defendant has designed and implemented a "Service Hours" program that requires sheltered residents, including the Plaintiff, to perform work activities necessary to the daily operation Defendants business interests **(Plaintiff's Affidavit in Support of Complaint, at 14, 17-19, 21-23, 32-37, 41, 43, 45a, 52-54, 61, 72-74, 103, 110)** as declared by the Defendant in the following exhibits:

- **Exhibit 01 - Service Hour Requirements;**
- **Exhibit 03 - Service Hours Intake Form;**
- **Exhibit 20 - ABCCM – VRQ Resident Handbook (2014), page 3 "Director's Welcome Letter"; page 4 "Veterans Transitional Housing Program"; page 5 "Intake Beds"; page 7 "Permanent Supportive Housing Program"; page 8 "Passes"; page 10 "Service Hours";**
- **Exhibit 21 - ABCCM – VRQ Resident Handbook (2015), page 3; page 6, paragraph**

D.; page 7 "Intake Beds"; page 13 "Permanent Supportive Housing"; page 16 "Passes"; page 20 "Service Hours"; page 30 in paragraph 4 of "Permanent Supportive Housing Agreement";

- **Exhibit 22 - ABCCM - Homeless Services Handbook (2016), pages 4-5; page 8 "Progress..."; pages 9-10 "Intake Beds"; page 15 "Permanent Supportive Housing"; page 20 "Passes"; page 22 "Service Hours;**
- **Exhibit 23 - ABCCM - Homeless Services Handbook (2017), page 15 "Intake Beds"; page 16 "Progress is measured"; page 22 "Permanent Supportive Housing"; page 30 "Passes"; page 34 "Service Hours"; page 34 Violations continued "Failure to do required service hours...".**

The Service Hours program is at the root of the controversy between the parties. Service Hours are required work hours that are "unpaid" **(Plaintiff's Complaint, at 45, 49, 63, 85, 88, 89, 92, 102-113, and, Plaintiff's Affidavit in Support of Complaint, at 14, 21, 48, 50, 61, 63, 69-75, 79, 89, 91, 96, 103, 111-112, 117, 157, 188, 193, 209)**. The Defendant re-classifies same unpaid work hours as "volunteer hours" and willfully represents said re-packaged work hours to the public as volunteer hours in its marketing materials **(Exhibit 26 - ABCCM Quick Facts 2015, and Exhibit 27 - ABCCM Quick Facts 2016; under "Veterans Restoration Quarters" column, see "Volunteer hours (resident)").**

Service Hours earn the sheltered residents "Reward Points" **(Exhibit 02 - Reward Points Program; Exhibit 23 - ABCCM - Homeless Services Handbook (2017), page 22-22 "ABCCM has several...; page 28 "Laundry detergent...")**, which are redeemable at a "Points Room" where a limited spectrum of new or used clothing, and toiletry articles are available **(Plaintiff's Affidavit in Support of Complaint, at 19-20).**

2. **Count II, Wage Theft of a Formal Employee, et seq.**

Count II of the Plaintiff's Complaint alleges Wage Theft of a Formal Employee, Failure to Pay Minimum Wage and Overtime, Failure to Maintain Records, Misclassification of a Formal Employee as a Manager.

Within a week of arriving at the VRQ, the Defendant offered formal employment to the Plaintiff to work as a paid VRQ Front Desk Manager **(Id., at 40-44)**. While formally employed by the Defendant, the Plaintiff was required to work unpaid Service Hours in before earning regular wages. **(Plaintiff's Affidavit in Support of Complaint, at 41, 45a, 72-73)**.

In addition to being formally employed by the Defendant and working unpaid Service Hours as a VRQ Front Desk Manager **(Count II of Complaint; Plaintiff's Affidavit in Support of Complaint, at 40-71)**, the Plaintiff was simultaneously required to perform additional unpaid Service Hour work activities in a separate capacity as a passenger van Duty Driver **(Count I of Complaint; Plaintiff's Affidavit in Support of Complaint, at 40-71).**

3. **Count III, Retaliation and Wrongful Termination**

Count III of the Plaintiff's Complaint alleges Retaliation and Wrongful Termination.

In November 2015, the Plaintiff discussed the subject of unpaid wages with the US Department of Labor; later on the same day, a similar discussion took place with ABCCM's Director of Homeless Services and VRQ staff **(Plaintiff's Affidavit in Support of Complaint, at 73)**; yet the Defendant continued to not pay hourly wages for all hours worked **(Id., at 74)**. In late November 2015, the Plaintiff began composing an email that detailed ABCCM's hourly wage activities **(Exhibit 11 - ABCCM Wage Hour and Service Hour Representations)**. In January 2015, the Plaintiff sent the same email to the U.S. Department of Labor (US DOL), the U.S. Department of Veteran Affairs, members of Congress, Civil Rights groups, Veterans groups, and

attorneys over the course of the year 2015 **(Plaintiff's Affidavit in Support of Complaint, at 77).**

A representative of U.S. Senator Thom Tillis's Constituent Advocacy, Mr. Chris Bullard did respond, and in March 2015 Mr. Bullard did confirm that his office had sent inquiries to the US DOL and VA **(Exhibit 09 - Emails Chris Bullard, on behalf of U.S. Senator Tillis; page 2).** The inquiry from U.S. Senator Thom Tillis's Constituent Advocacy Office reached the local VA Medical Center in Asheville who in turn contacted the Defendant **(Exhibit 18 - Letter from Senator Tillis May 10, 2016, enclosure VA BreyFogle).**

The Defendant responded by retaliating against the Plaintiff. The Defendant attempted to terminate his employment, twice in April 2016; on the grounds that he was enrolled in a 1000 hour work program and he completed his 1000 hours. The Plaintiff stayed both attempts to terminate his employment by demonstrating to VRQ Staff the total paid hours by the Defendant was substantially less than 1000 hours. **(Plaintiff's Affidavit in Support of Complaint, at 82-86).** Ultimately the Defendant terminated Plaintiff's employment on June 1, 2016 was the Plaintiff's last day of employment; on June 22, 2015 Defendant's stated its grounds for Plaintiff's termination was the completion of a 1000 hour program **(Exhibit 12 - ABCCM Employee Enrollment and Change Notice Form; and Plaintiff's Affidavit in Support of Complaint, at 90-92).**

4. **Count IV, Duress, Undue Influence, and Illegal Contracts**

Count IV of the Plaintiff's Complaint alleges Duress, Undue Influence, and Illegal Contracts.

The Plaintiff is dependent on the Defendant to provide life-sustaining federal benefits to which he is entitled **(Plaintiff's Affidavit in Support of Complaint, at 15-16, 93, 111, 114).** The Plaintiff lives under the authority and control of the Defendant, and non-compliance with the Defendant can result in disciplining or summary expulsion into homelessness, and loss of his

current Per Diem benefit and the Defendant has used its superior position of authority and control to gain compliance with contracts. **(Plaintiff's Complaint, at 20, 21, 56, 137, 138, 142, 146-147; and, Plaintiff's Affidavit in Support of Complaint, at 14, 21, 96, 97, 98, 116, 104-114).**

5. **Count V, Intentional Infliction of Emotional Distress**

Count V of the Plaintiff's Complaint alleges Intentional Infliction of Emotional Distress.

Since November 2015, the Defendant has continued subject the Plaintiff retaliatory and harassment tactics; deny room promotions, privileges, benefits, and rights; and increase his Service Hour requirements **(Plaintiff's Affidavit in Support of Complaint, at 115-207).**

6. **Count VI, Violations of U.S.C. Title 42 § 1983 and U.S.C. Title 42 § 1985**

Defendant and subordinates wrongfully conspired, retaliated and terminated the Plaintiff for pursuing his protected right to cause a Member of Congress to investigate by reasonable inquiry the Plaintiff's objections regarding unpaid wages **(Plaintiff's Affidavit in Support of Complaint, at 72-92; and Exhibit 09- Emails Chris Bullard, on behalf of U.S. Senator Tillis; and Exhibit 18 - Letter from Senator Tillis May 10, 2016, enclosure VA BreyFogle).** The Defendant has acted under color of law, using the threat and fear of homelessness and the weakened economic condition of Plaintiff to pressure and force the labor of the Plaintiff. **(Plaintiff's Affidavit in Support of Complaint, at 21, 37, 116, 134, 157)** Same labor was in liquidation of a debt or obligation wrongfully applied by the Defendant to the Plaintiff as a sheltered resident of the VRQ **(Id. 104-114).** The Defendant acted willfully.

The Plaintiff was terminated as a result of exercising his First Amendment right to free speech to petition a governmental official for redress of grievances, and in doing so the Defendant conspired to deprive the rights, privileges, immunities, and the Plaintiff's liberty interests in his employment as guaranteed by the Fourteenth Amendment.

Summary

The Plaintiff's Complaint raises allegations violations of Common Law, Tort Law, Public Policy, and other applicable laws, wherein Count I and Count II, Wage Theft, Failure to Pay Minimum Wage and Overtime, Failure to Maintain Records, Misclassification of an Employee; Count III, Retaliation and Wrongful Termination; Count IV, Undue Influence and Illegal Contracts; Count V, Intentional Infliction of Emotional Distress; Count VI, Violations of the Plaintiff's Constitutional Rights.

III. ARGUMENT

A. Authority to Grant Preliminary Injunction

The Court has the authority to grant the requested Preliminary Injunction. A Federal Court may issue a TRO, preliminary injunction, and permanent injunction upon notice to the adverse party Federal Rules of Civil Procedure 65, and FLSA U.S.C. 29 § 217 Injunction proceedings.

B. Standards for Granting a Preliminary Injunction

In Winter v. NRDC, Inc., 555 U.S. 7 (Supreme Court 2008) the Supreme Court considered four factors when deciding whether to issue a preliminary injunction:

> A plaintiff seeking a preliminary injunction must [1] establish that he is likely to succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of preliminary relief, that the [3] balance of equities tips in his favor, and that an [4] injunction is in the public interest.
>
> Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008)[12]

Prior to Winter v NRDC (2008), the 4th Circuit had adopted "the balance-of-hardship test," which, of course begins by balancing the hardships of the parties, as the 4th Circuit did in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir.1977).

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[12] Supreme Court of the United States; Bound Volumes of United States Reports, Volume 502 - Volume 564; Last viewed May 01, 2017, Version 2014.2 https://www.supremecourt.gov/opinions/boundvolumes/555bv.pdf

However, after Winter v. NRDC (2008), the 4th Circuit stated its Blackwelder standard stood in fatal tension with the Supreme Court's 2008 Winter decision, Real Truth About Obama, Inc. v. FEC, (4th Cir. 2009).

> Because of its differences with the Winter test, the Blackwelder balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in Winter governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.
>
> Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, pg. 347 (4th Cir. 2009).

The Supreme Court decision in Winter v. NRDC (2008) was a narrow 5-4 with Justice Ginsburg wrote a dissenting opinion, joined by Justice Souter.

> Flexibility is a hallmark of equity jurisdiction. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Weinberger v. Romero-Barcelo, 456 U. S. 305, 312 (1982) (quoting Hecht Co. v. Bowles, 321 U. S. 321, 329 (1944)). Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.3, p. 195 (2d ed. 1995). This Court has never rejected that formulation, and I do not believe it does so today.
>
> Winter v. NRDC, Inc., 555 U.S. 7, 51 (2008); Ginsburg, J., dissenting

In Winter v. NRDC, Inc., 555 U.S. 7, (2008), page 31, footnote 5, does not seem to undermine Justice Ginsburg's opinion that the "sliding scale" test remains good law after the Winter decision. The Supreme Court could have abolished the "sliding scale" test, but it did not express its intentions to do so. The Court has sufficient latitude in the present matter, if it should find it necessary, when considering the injunctive relief asked of the Court.

1. **Factor for Injunctive Relief. Likelihood of success on the merits.**

The Plaintiff presents a prima facie case regarding Count I and Count II Wage Theft by

Service Hours and Wage theft of a Formal Employee, and, Count III Retaliation and Wrongful Termination.

a. Prima Facie Tests on Count I and Count II, Wage Theft

While both Counts involve the same parties, the conditions of employment in both Counts I and II are separate but center on the controversial Service Hours program of the Defendant. An objective standard for proving a prima facie wage claim includes proof of the following four elements:

(First) *Employment. The employee must obviously prove the existence of an employment relationship.* Reich v. ConAgra, Inc., 987 F.2d 1357 (8th Cir. 1993).

(Second) *Knowledge. The employee must establish that the employer had actual or constructive knowledge of the alleged* [wage or] *overtime violation.* Davis v. Food Lion, 792 F.2d 1274, pg.1276 (4th Cir. 1986).

(Third) *Amount owed. The employee must state an amount of liability by a just and reasonable inference.* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)

(Fourth) *Applicability of FLSA.* The employee must establish either enterprise coverage or individual coverage. If the plaintiff proves that the employer qualifies for enterprise coverage, proof of individual coverage is not necessary.

The Fourth element is the subject of the **Plaintiff's Memorandum in Support FLSA Applicability,** wherein the Plaintiff establishes FLSA "enterprise coverage" is applicable and in the alternative, "individual coverage" is appropriate.

To establish a "likelihood of success on the merits", the Plaintiff adopts the above prima facie test. Each element of the Prima Facie test is presented below and within each element Count I and Count II are tested.

To establish a "likelihood of success on the merits", regarding Count III Retaliation and Wrongful Termination adopts a three part prima facie test used by the 4th Circuit Court of Appeals in Darveau v. Detecon, 515 F.3d 334, pg. 340 (4th Cir. 2008) and is argued after Count I and Count II prima facie examinations, below.

(First) *Element of Prima Facie Wage Claim. Employment.*

Employment. The employee must prove the existence of an employment relationship.

In re: **Count I, Wage Theft by Service Hours, et seq.**

Defendant has designed and implemented a "Service Hours" program that requires the Plaintiff to perform work activities necessary to the daily operation of the Defendant. The Plaintiff alleges when he performs Service Hours he is a dc facto employee **(Plaintiff's Complaint, at 54)**; wherein the Defendant requires, and suffers or permit to work the Plaintiff in various work activities identified as Service Hours. Primarily, the Plaintiff operates a passenger van transporting sheltered residents in the Defendant's care to various locations to fulfill his Service Hours requirement **(Plaintiff's Affidavit in Support of Complaint, at 22).** The Defendant retains control, oversight, and direction over the Plaintiff's Service Hours performance, and provides the method, manner, means to the Plaintiff for his Service Hour duties. Service Hours work activities can be identical to work perform by paid formal employees and performed at the same time. The Defendant set schedules, established timekeeping procedures, responsible for recordkeeping, disciplining, and other work related practices **(Plaintiff's Affidavit in Support of Complaint, at 28-37, 146-173)**. If the Plaintiff fails to meet his Service Hour requirements, the Plaintiff is subject to discipline by the Defendant. **(Exhibit 23 - ABCCM - Homeless Services Handbook (2017), "Violations" continued, page 40, bullet point 12)** The Defendant requires compliance with the Service Hours program, the Plaintiff is required to perform unpaid acts of labor for the Defendants

own benefit and gain **(Exhibit 01 - Service Hour Requirements)**. Plaintiff alleges Service Hours are unpaid in cash or a cash equivalent **(Plaintiff's Complaint, at 42-45, 59-63).**

Supreme Court has noted, definitions of "employer" and "employee" under federal law are often circular and "explain nothing." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, pg.323 (1992). Under an FLSA claim "employ" is defined as such: U.S.C. 29 § 203 (g) "Employ" includes to suffer or permit to work.

> The FLSA does define "employee" and "employ," but those definitions do little to advance the inquiry. The statute defines "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and "employ" as "to suffer or permit to work," id. at § 203(g). Courts construe the term "employee" broadly, but recognize that the term "does have its limits." Steelman v. Hirsch, 473 F.3d 124, 128 (4th Cir.2007) (internal quotation marks omitted).
>
> Harbourt v. PPE Casino Resorts Md., LLC, 820 F.3d 655 (4th Cir. 2016)

Under at N.C. State claim for N.C.G.S. § 95-25.3. Minimum wage, and N.C.G.S. § 95-25.4. Overtime, establishing a wage claim also requires proof of employment.

> In determining whether an individual is an employee under the Wage and Hour Act, courts consider factors such as: "(1) the degree of control the alleged employer exerted over the person, and (2) the permanency of the relationship between the person and the alleged employer."
>
> Horack v. Southern Real Estate Co. of Charlotte, Inc., 150 N.C. App. 305, 309, 563 S.E.2d 47, 51 (2002).

The 4th Circuit Court has applied a six factor economic reality test in cases to determine whether an individual contractor or an employee under the FLSA.

> The emphasis on economic reality has led courts to develop and apply a six-factor test to determine whether a worker is an employee or an independent contractor. The factors are (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. Herman v. Mid-Atlantic Installation Servs., Inc., 164 F.Supp.2d 667, 671 (D.Md.2000); see also Henderson, 41 F.3d at 570. (These factors are often called the "Silk factors"

> in reference to United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), the Supreme Court case from which they derive.) No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer. Henderson, 41 F.3d at 570. (1st Cir. 1998).
>
> Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, (4th. Cir. 2006)

Under this test: (1) *the degree of control favors the Defendant as an employer.* Vehicle keys are in the control of the Defendant **(Plaintiff's Affidavit in Support of Complaint at 29),** Defendant controls the policies and procedure for providing passenger van services **(Id. at 28)**. The Plaintiff cannot authorize other sheltered residents as Duty Drivers, the Defendant designates who are authorized to be a Duty Driver **(Id. at 23, 28)** and the disciplining of Duty Drivers **(Id. at 21, 37)**, Defendant establishes the recording method for each trip **(Id. at 29, 38)**. This first economic factor weighs heavily in favor of the Defendant being an employer.

(2) *The worker's opportunities for profit or loss dependent on his managerial skill*; the Defendant fails to compensate the Plaintiff **(Id. at 38)**, and there is no relevant commission to be earned. The Defendant creates the Drivers Schedule, and maintains a Drivers List of authorized and insured Duty Drivers **(Id. at 29).**

(3) *The worker's investment in equipment or material.* The Plaintiff pays for a cell phone **(Id. at 28, 31d)** and the Plaintiff does have a N.C. Driver's License for which he pays his own non-auto-owner's insurance in order to perform required Duty Driver Service Hours **(Id. at 25, 181)**. The Defendant provides and pays for the passenger vans, tags and insurance, gasoline and vehicle maintenance **(Id. at 29)**.

(4) *The degree of skill required for the work; having driving skills.* A safe driving record, and a driver's license are common traits of modern life, not a special skill. There are no special skill sets allowing an exemption such as, learned professional skills or creativity as set forth in 29 CFR Part 541.

(5) *The fifth factor is the degree of permanency of the working relationship.* The Plaintiff was required to provide a copy of his driver's license and he still performs unpaid Service Hours as of May 2017 **(Id. at 23-24, 39).**

(6) *The degree to which the services rendered are an integral part of the putative employer's business.* The passenger van service is essential to the daily operation of the Defendant's business, mostly because Veterans need to get to medical appointments, classes, ABCCM jobs, and emergency rooms **(Id. at 22).** As part of the VA GPD program, the Defendant is require to provide "supportive services" including transportation to Veterans under the provisions of the. 38 CFR § 61.2 Supportive services-general; (a) (8) "*Providing housing assistance, legal assistance, advocacy, transportation, and other services essential for achieving and maintaining independent living.*" Also, under 38 CFR § 61.18 Capital grants for vans. (a) General. "*A capital grant may be used to procure one or more vans, as stated in a NOFA, to provide transportation or outreach for the purpose of providing supportive services.*"

The Plaintiff's employee assertion also survives the Supreme Court's common-law test for employment in CCNV v. Reid (1989):

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." [footnotes omitted]

Community for Creative Non-Violence v. Reid, 490 US 730, at 751-752 (Supreme Court 1989); see also, Nationwide Mut. Ins. Co. v. Darden, 503 US 318, at 323-324 (Supreme Court 1992)

The facts are clear, the Defendant acts in a manner consistent with an employer directing

an employee in the performance of work activities necessary to the Defendant's business.

continued... (First) Element of Prima Facie

Employment. The employee must prove the existence of an employment relationship.

In re: **Count II, Wage Theft of a Formal Employee, et seq.**

The Defendant hired the Plaintiff as a formal employee to work as a VRQ Front Desk Manager; the Plaintiff began job training and performing the duties and bearing the responsibilities of a Front Desk Manager on September 8, 2015. **(Plaintiff's Affidavit in Support of Complaint at 42)**

The Plaintiff's formal employee status is further defined by wages being paid and taxes withheld from paychecks, and further defined by the Defendant requiring the Plaintiff to sign "employment forms" including but not limited to: Federal and State Tax Withholdings forms, ABCCM Conflict of Interest Policy form, ABCCM Drug and Alcohol Policy. **(Id. 65)**

The VRQ Front Desk operates twenty-four hours a day in three shifts, and is a principal work activity necessary to the daily operation of the Defendant. **(Id. 42, 52-56)**

While working in his capacity as a Front Desk Manager the Plaintiff was barred from recording certain work hours and activities, and, the Plaintiff was not excuse from Defendant's required Service Hours program in which the Plaintiff performed Front Desk Manager work activities while on schedule and off-schedule. **(Id. 45-46)**

(Second) Element of Prima Facie Wage Claim. Knowledge.

Knowledge. The employee must establish that the employer had actual or constructive knowledge of the alleged [wage or] overtime violation.

In re: **Count I, Wage Theft by Service Hours, et seq.**

The Defendant's retains control, oversight, and direction over the Plaintiff's Service Hours

performance, and provides the method, manner, means to the Plaintiff for his Service Hour duties.

Service hours are required work activities, **(herein at II. Statement of Facts, B. Overview, (Complaint Count I), pages 7-8).** Service Hours are scheduled by the Defendant **(Exhibit 04 - VRQ Driver Schedule)**. The Plaintiff was intentionally barred from recording Service Hours, whereas, he was not provided a timesheet **(Plaintiff's Affidavit in Support of Complaint, at 38).** Service hours a coerced - forced labor. The Defendant holds the threat of demotion, loss of privileges, earlier curfew hours, expulsion into homelessness and loss of VA GPD benefits over the Plaintiff for the purpose of obtaining compliance with its Service Hours program **(Plaintiff's Affidavit in Support of Complaint at 21, 37, 104-114).** Failure to perform Service Hour will result in discipline by the Defendant. **(Exhibit 23 - ABCCM - Homeless Services Handbook (2017), "Violations" page 39, continued on page 40, bullet 12)**

Actual knowledge and constructive knowledge by the Defendant of the Plaintiff's Service Hours performance is undeniable.

continued... (Second) Element of Prima Facie

Knowledge. The employee must establish that the employer had actual or constructive knowledge of the alleged [wage or] overtime violation.

In re: **Count II, Wage Theft of a Formal Employee, et seq.**

The Plaintiff as a formal employee was provided instructions regarding allowable entries when filling out timesheets, and pursuant to same instructions the Plaintiff was barred from recording all work week hours on his ABCCM Timesheet. **(Plaintiff's Affidavit in Support of Complaint, at 44-47; and, Exhibit 08 – ABCCM Timesheet).** ABCCM Pay Periods are two-weeks in length **(Exhibit 13 - ABCCM Pay Period Schedule)**.

The Plaintiff was required to show up earlier than his scheduled work times, and same early

arrival was to perform pre-shift work activities required by the Defendant. In addition, the Plaintiff was required to stay after his shift was ended when discrepancies occurred **(Plaintiff's Affidavit in Support of Complaint, at 48-50; and Exhibit 07 - ABCCM VRQ Front Desk Manager Policy, page 1, paragraph 2).**

The Plaintiff kept notes regarding his job training and work hours **(Plaintiff's Affidavit in Support of Complaint, at 42; and, Exhibit 16 - Armento Work Hour Notes)**, based on Plaintiff's notes, in the first two-week Pay Period of training as a Front Desk Manager, the Plaintiff worked 65.4 hours. In the last work week of the same Pay Period he worked 40 regular hours, plus 9 hours of overtime **(Plaintiff's Affidavit in Support of Complaint, at 62).**

Plaintiff did not receive a paycheck for any regular hours or overtime hours for the first two-week Pay Period, all 64.5 hours are unpaid; Plaintiff did not receive a statement or receipt for worked Service Hour performance or accrued Reward Points **(Id. 63).**

Again, based on the Plaintiff's Work Hour Notes **(Exhibit 16)**, in the second two-week Pay Period ending September 30, 2015, Plaintiff did receive a paycheck as a formal employee, but Defendant did not pay Plaintiff for all work week hours **(Plaintiff's Affidavit in Snpport of Complaint, at 64).**

On October 1, 2015, three weeks after the Plaintiff began training and performing the duties and bearing the responsibilities of a Front Desk Manager, the Defendant provided Federal and State Tax forms. Plaintiff's signature was required by the Defendant to receive a paycheck for the prior two week Pay Period that had just ended on September 30, 2015. **(Id. 65)**

(Third) Element of Prima Facie Wage Claim. Amount owed.

Amount owed. The employee must state an amount of liability by a just and reasonable inference.

In re: **Count I, Wage Theft by Service Hours, et seq.**

Calculating an amount owed for Service Hours (Count I) is without the benefit of pre-trial Discovery; the Plaintiff relies on the available records. The Plaintiff states he was required to perform Duty Driver Service Hours (1) while "on duty" as per the drivers' schedule; (2) while "waiting" on the VRQ campus by choice; and (3) while "on call" he was required to remain on property and can be called to drive **(Plaintiff's Complaint, at 55; and Plaintiff's Affidavit in Support of Complaint, at 30-36).**

Exhibit 35 is a summary prepared by the Plaintiff to establish a justifiable amount of liability by a calculated reasonable inference. **Exhibit 35 - Summary of Plaintiff's Work Hours as a Duty Driver, Count I,** uses milestones in the Plaintiff's VRQ sheltered residential history to create three calendar segments.[13] Each calendar segment is distinguish by marked changes in the Plaintiff's Duty Driver career while under the control of the Defendant. In **Exhibit 35** each calendar segment then uses three compensable Wage Periods: (1) "On Duty, Duty Driver"; (2) "Waiting Time Duty Driver"; (3) "On-Call, Duty Driver" to calculate wage liability. Using the methodology described within **Exhibit 35**, the Plaintiff has calculated 1,155 Service Hours are un-compensated and owed to the Plaintiff.

However, the Defendant has failed to maintain records regarding Count I, and in doing so, the Defendant has failed to state and record a wage rate for compensating the Plaintiff for his Duty Driver work activities **(Plaintiff's Affidavit in Support of Complaint, at 38)**. The U.S. Department of Labor (US DOL), Bureau of Labor Statistics maintains "mean wage estimates" Bus Drivers, School or Special Client (occupation 53-3022) which states the Asheville area wage is

[13] The third calendar segment in Exhibit 35 ends with the last day of the Plaintiff being on the weekly Driver's Schedule, he continues to drive, but in a Waiting-Time relief capacity; Exhibit 35 does NOT reflect driving times since January 11, 2017 since he is still driving for the Defendant.

payable at a rate of $13.07 ($27,110 annual).[14] Using the Grand Total of Service Hours calculated in **Exhibit 35** and the US DOL, Bureau of Labor Statistics occupational hourly wage rate, the cash liability of the Defendant is $15,095.85 for Count I.

The Defendant has designed and implemented a Reward Points program whereby the Plaintiff accrues Reward Points as a presumptive form of payment for performing Service Hours. However, the Reward Points payment scheme economically discriminates by restricting redemption of Reward Points to Veterans whose income is less than $800 (formerly $700) per month. Also, no more than 1000 points may be accrued at any given time, but Service Hours performance is not capped and unrestricted. Reward Points are redeemable at the "Points Room", an on campus collection of donated clothing articles and toiletries, the Points Room is currently open two days a week **(Plaintiff's Affidavit in Support of Complaint, at 20).** Defendant's Reward Points program is an illusory attempt at consideration and payment for Service Hours, and violates 29 CFR 531.34 - Payment in scrip or similar medium not authorized; and, 13 NCAC 12 .0309 Form of payment of wages.

continued... (Third) Element of Prima Facie

Amount owed. The employee must state an amount of liability by a just and reasonable inference.

In re: **Count II, Wage Theft of a Formal Employee, et seq.**

The plaintiff has prepared a spreadsheet to illustrate the method used in determining the amount of unpaid wages owed the Plaintiff as a Front Desk Manager **(Exhibit 36 - Summary of Plaintiff's Work Hours as Front Desk Mgr. for the 4th Pay Period, Count II).** To create **Exhibit**

[14] U.S. Department of Labor, Bureau of Labor Statistics: Occupational Employment and Wages, May 2016; occupation 53-3022 Bus Drivers, School or Special Client; Table titled, Employment of bus drivers, school or special client, **by area**, May 2016 - states an occupational wage for Asheville, NC area (revealed by moving mouse cursor over geographic region of Buncombe County).
https://www.bls.gov/oes/current/oes533022.htm

36 the Plaintiff primarily used **Exhibit 13 - ABCCM Pay Period Schedules, and Exhibit 14 - Armento Direct Deposit Paychecks, and Exhibit 15 - Front Desk Work Schedules** as input data points. The spreadsheet summary has been an ongoing tool in the Plaintiff's effort to understanding the wage loss issues since December 2015 **(Plaintiff's Affidavit in Support of Complaint at 69); Exhibit 36** demonstrates the methodology used to compute the amount of Defendant's liability.

All of the Plaintiff's "*Work Hours*" have been divided into three distinct categories in **Exhibit 36**: "Allowable Timesheet Work Hours", "Deducted Service Hours", and "Occluded Pre & Post Work Time". The first category, "Allowable Timesheet Work Hours" represents the *Work Hours* ABCCM allowed Plaintiff to record on a timesheet; and the next two categories "Deducted Service Hours", and "Occluded Pre & Post Work Time" represent the *Work Hours* Plaintiff was barred from recording on a timesheet. Plaintiff claims 30 minutes each day worked as *unpaid* pre-shift work time; also Plaintiff claims an hour on Monday, October 19, 2015 for required attendance to an unpaid Front Desk Managers Meeting **(Plaintiff's Affidavit in Support of Complaint at 48-51).** Both the "pre-shift" work time and Front Desk Managers' Meeting times are notated under the "Occluded Pre & Post Work Time" column. Take notice that the Plaintiff did not claim one hour for the Front Desk Managers Meeting on Monday, October 29, 2015 since the meeting occurred while the Plaintiff was on the 1st shift work schedule (M-F, 8am-4pm which the Defendant claims as Service Hour time), therefore, the time of same single meeting is claimed under "Deducted Service Hours".

To determine Plaintiff's unpaid overtime in **Exhibit 36**, all three *Work Hours* categories are added together, to equal "Gross Work Week Hours". When the "Gross Work Week Hours" exceeds forty hours in a work week, then forty hours is subtracted to determine Plaintiff's "Net

Unpaid Overtime Hours." To determine Plaintiff's unpaid regular hours, "Deducted Service Hours" and "Occluded Pre & Post Work Time" were added together to equal "Gross Unpaid Hours" **(Exhibit 36, page 2)**.

Using this methodology, Plaintiff worked 26 Total Unpaid Regular Hours, and 7 Total Unpaid Overtime Hours in the 4th Pay Period. Which breaks down into: 21 hours of unpaid regular Service Hours, 7 unpaid overtime hours, 4 hours of unpaid pre-shift work time, and 1 hour for an unpaid 9:00am Front Desk Manager's Meeting on Monday, October 19, 2015.

Exhibit 14 - Armento Direct Deposit Paychecks; page 03, check Number 19320, is Defendant's payment for the same 4th Pay Period, stating payment for 32 regular hours, and no overtime; which is at odds with Plaintiff's **Exhibit 36** "Gross Work Week Hours" in the Pay Period which shows 65 hours worked. In the second work week of the same Pay Period, the Plaintiff worked 44 scheduled hours, plus 3 hours of pre-shift work time, yielding 7 hours of overtime. Same **Direct Deposit Paycheck, Number 19320** was issued in full payment for the same 4th Pay Period, and does not state any overtime payment, or deductions for Service Hours.

Using the same data points and methodology the Plaintiff has calculated by a reasonable method of inference that he is owed 293.5 hours of regular time and 97.0 in unpaid overtime hours over the course of his formal employment as a Front Desk Manager. **Exhibit 14 - Armento Direct Deposit Paychecks** establishes the Plaintiff wage rate at $9.00 per hour; Plaintiff was never paid overtime, but a proper overtime rate of one and one half times his regular hourly rate would equal $13.50. The Defendant's cash liability by a reasonable inference is $2,641.50 regular hours owed and $1,309.50 overtime wages owed.

The spreadsheet summary **(Exhibit 36)** demonstrates the Defendant is true to the Timesheet instructions provided to the Plaintiff; 1st shift (8am-4pm) Monday through Friday, are

unpaid Service Hours regardless of whether the sheltered resident is a formal employee.

Under the provisions of 38 CFR § 61.1 Definitions, *Nonprofit organization,* paragraph (2), the Defendant is required to have a "*functioning accounting system that is operated in accordance with generally accepted accounting principles*"; and again under 38 CFR § 61.66 Financial management, the Defendant "*must use a financial management system that follows generally accepted accounting principles and meets the requirements set forth under 2 CFR part 200.*"

The Defendant has established a pattern of practice that willfully and repeatedly fails to pay the proper regular wage, a proper overtime wage and does not itemize deductions or credits on Plaintiff's Direct Deposit Paychecks.

(Fourth) Element of Prima Facie Wage Claim. Applicability of FLSA.

In re: **Count I, Wage Theft by Service Hours, et seq.,** and

In re: **Count II, Wage Theft of a Formal Employee, et seq.**

This last element has been a source of great consternation to the Plaintiff due to the US DOL and NC DOL lack of jurisdictional interest in the matter before the Court. The Plaintiff has meticulously researched the subject and submits a separate brief, **Plaintiff's Memorandum in Support FLSA Applicability.** In the memorandum the Plaintiff shows the applicability of the FLSA "Enterprise Coverage" under three separate conditions, and "Individual Coverage" due to his work activities. The Plaintiff has established a clear prima facie case in which the Defendant demonstrates its routine willingness to deprive the Plaintiff of wages as alleged in Counts I and II; thereby the Plaintiff is entitled to shifting the burden of proof to the Defendant.

b. Prima Facie Tests on Count III, Retaliation and Wrongful Termination

Count III of the Plaintiff's Complaint alleges Retaliation and Wrongful Termination brought under 29 U.S. Code § 215 - Prohibited acts; prima facie evidence (a) (3).

As explained by the Supreme Court, Congress intended the anti-retaliation provision to provide an incentive for workers to report wage and hour violations:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. [citation omitted]
>
> Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, pg. 292 (Supreme Court 1960)

The Court speaks bluntly to the "fear of economic retaliation" with its words, "*needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions*" (Mitchell v. Demario Jewelry, Supreme Court 1960). Economic retaliation may translate into loss of a job, demotion, or a reduction in pay in most work environments.[15]

It is well established that an employee who complains about discrimination need not be proven right, so long as the complaint was reasonable and made in good faith Judges and juries can find in favor of the employer on discrimination while finding for the employee on retaliation. U.S. Code § 215 - Prohibited acts; prima facie evidence.

> A plaintiff asserting a prima facie claim of retaliation under the FLSA must show that (1) he engaged in an activity protected by the FLSA; (2) he suffered adverse action by the employer subsequent to or contemporaneous

[15] *"needs no argument"* (Mitchell v. Demario Jewelry, pg. 292; 1960) Plaintiff begs to differ in regards to the present controversy, "economic retaliation" speaks to the heart and soul of every Veteran in the Defendant's VA GPD program. The ultimate kind of "economic retaliation" in the Defendant's VA GPD program design is *life threatening expulsion into homelessness*. The Plaintiff is not protected by any "renter's rights" or a "lease"; the Defendant has the authority to summarily expel the Plaintiff into homelessness, and end his current Per Diem benefit. Just the threat of "expulsion" can be used with retaliatory effect in the minds of destitute Veterans. The fear of life on the street is an ugly incentive; homelessness carries the threat of death, the risk of suffering street violence, lack of personal security while sleeping, decline of personal health, and starvation. The *"fear of homelessness"* is a hideously coercive tool. Veterans with any sense of reason, remain silent and endure substandard conditions. **(Plaintiff's Affidavit in Support of Complaint, at 215-218)**

with such protected activity; and (3) a causal connection exists between the employee's activity and the employer's adverse action. [citations below]

Darveau v. Detecon, 515 F.3d 334, pg. 340 (4th Cir. 2008)
(*See* Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342-43 (11th Cir. 2000);
and, Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir. 1997))

The **Plaintiff's Affidavit in Support of Complaint, at 72-92** offers detailed testimony supported by Exhibits.

(First) engaged in an activity protected by the FLSA;

The Plaintiff engaged in FLSA protected activities when he discussed the matter of unpaid wages with the US DOL in November 2015, unsatisfied by the Defendant's response and subsequent actions, **(Plaintiff's Affidavit in Support of Complaint, at 73**) the Plaintiff wrote a detail email account of his unpaid wages, **(Exhibit 11 - ABCCM Wage Hour and Service Hour Representations).** On February 01, 2016, the Plaintiff sent same email to U.S. Thom Tillis's office. **(Exhibit 09 - Emails Chris Bullard, on behalf of U.S. Senator Tillis; page 5).** Senator Tillis's office sent inquires to the VA and US DOL **(Id; page 2).** Ultimately a local VA Medical Center representative called Plaintiff on April 8, 2016 and the Defendant at a time, as per **(Exhibit 18 - Letter from Senator Tillis May 10, 2016, enclosure VA BreyFogle, page 2, paragraph 3).**

The Plaintiff engaged in protected speech under 29 U.S. Code § 215 (a) (3) and 42 U.S. Code § 1983 - Civil action for deprivation of rights, and the Frist Amendment of the U. S. Constitution since the Defendant acts under the color of law pursuant to federal contracts[16].

[16] West v. Atkins, 487 U.S. 42 (1988) – Unanimous Supreme Court decision, A physician under contract with the State providing medical services to inmates acts "under color of state law," within the meaning of 1983.

(Second) suffered adverse action by the employer subsequent to or contemporaneous with such protected activity;

Subsequent to the Senator's and the local VA representative inquiries the Defendant retaliated twice in the month of April 2016.

On April 18th, 2016 the VRQ FDS, Randy Gamble communicated to the Plaintiff that he was enrolled in a 1000 Hour Work Program and that he had 50 work hours left on payroll. In response the Plaintiff offered a printed bank deposit statement to VRQ OM, Marc Monacelli, showing Plaintiff's payroll direct deposits was near 727 paid work hours; the Plaintiff was allowed to continue his employment. **(Plaintiff's Affidavit in Support of Complaint, at 82-84)** Again, on April 29, 2016, the VRQ OM, Marc Monacelli and VRQ FDS, Randy Gamble told the Plaintiff that he was enrolled in a 1000 hour work program and his 1000 hours were completed; the Plaintiff was removed from the work schedule. Again, the Plaintiff offered a printed bank deposit statement to VRQ OM, Marc Monacelli, showing Plaintiff's payroll direct deposits was near 799 paid hours, and again, the Plaintiff was allowed to continue his employment. **(Id. at 85-86; and, Exhibit 15 - Front Desk Work Schedules, pages 34-35)**.

Finally, the Plaintiff was terminated on June 1, 2016, a time when the collective Defendant had learned to count to 1000 paid hours. However, on or about June 22, 2015, the Defendant provided the Plaintiff with a pre-filled form as per **Exhibit 12 - ABCCM Employee Enrollment and Change Notice Form**, stating the reason for his removal from payroll was the completion of 1000 hours; even though, the Plaintiff was not subject to any 1000 hour work agreement **(Id. at 90-92).**

(Third) a causal connection exists between the employee's activity and the employer's adverse action.

The temporal correlation of events as related above and the supporting documentation establishes the "*casual connection*" between U.S. Senator Tillis and the local VA representative's inquiry, and the Defendant's repeated firing attempts in the month of April and Plaintiff's ultimate termination.

The Plaintiff has demonstrate that he suffered an adverse employment action involving an ultimate employment decision related to discharge, promotion, or compensation and thereby a prima facie case on Count III. Plaintiff is entitled to shifting the burden of proof to the Defendant.

2. <u>Factor for Injunctive Relief. Likely to suffer irreparable harm.</u>

The Plaintiff will suffer imminent and irreparable injury if not afforded injunctive relief. The Plaintiff is a homeless Veteran beneficiary and participant in the VA GPD program provided by the Defendant.

Pursuant to VA GPD Program, 38 CFR § 61.80 *General operation requirements for supportive housing and service centers*, paragraph (d)[17]; the Plaintiff can reside up to 24 months (equaling one episode) in the VA GPD program with supportive housing to achieve "greater self-determination[18]".

Also, under VA GPD Program, 38 CFR § 61.33 *Payment of per diem*, paragraph (g) *Supportive housing limitation*; each Veteran has three Per Diem episodes (admission and discharge for each episode) of supportive housing services in his life-time, the VA may waive this limitation and allow additional episodes.

The Plaintiff's first Per Diem episode is due to expire at the beginning of September 2017, and at that time the Plaintiff will be discharged into homelessness; and presumably before the time

[17] (d) A homeless veteran may remain in supportive housing for which assistance is provided under this part for a period no longer than 24 months, except that a veteran may stay longer, if permanent housing for the veteran has not been located or if the veteran requires additional time to prepare for independent living.
[18] VA GPD goals as stated on VA website - http://www1.va.gov/HOMELESS/GPD.asp

of a trial on the merits. The Plaintiff's discharge is imminent.

> Plaintiffs' claims of immediate and irreparable injury are not speculative nor remote. If they are evicted they will suffer irreparable harm. (See Jiggetts v Perales, 202 AD2d 341, 342 [1d Dept 1994] [additional citations omitted] "The threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury." (McNeill v New York City Housing Authority, 719 F Supp 233, 254 [SD NY 1989]).
>
> Wright v. Lewis, 2008 NY Slip Op 52106 (U), (Supreme Court of the State of New York, 2008)

Also, in Wright v. Lewis, 2008, the New York Supreme Court followed the above citation with the "possibility that plaintiffs may lose their housing accommodations because they had the misfortune to have been solicited to reside at [address omitted] in a building owned and managed by defendants, who operate in disregard of the law, balances the equities in favor of granting injunctive relief to plaintiffs." (Wright v. Lewis, 2008; pg. 13).

In the present case, ABCCM publicly solicited the Veteran Plaintiff for business purposes, and did not provide a means to evaluate and compare the GPD requirements as administered by ABCCM **(Plaintiff's Complaint at 11; and Plaintiff's Affidavit in Support of Complaint, at 8-10, 15-16, 93-95).**

> Plaintiff established entitlement to preliminary injunctive relief pending determination of the underlying action by demonstrating the irreparable harm of a possible eviction if the relief sought was not granted (see, McNeill v New York City Hous. Auth., 719 F.Supp. 233, 254), a likelihood of success on the merits on the claim that the challenged shelter allowance schedule is inadequate to enable families to rent apartments in New York City (see, Jiggetts v Grinker, 75 N.Y.2d 411, 417, supra), and that the balance of equities is in her favor so as to maintain the status quo while awaiting a final determination of that claim (Grant Co. v Srogi, 52 N.Y.2d 496, 517).
>
> Jiggetts v. Perales 202 A.D.2d 341 (1994)

The Plaintiff will suffer irreparable injury and harm due to the dangers of homelessness **(Plaintiff's Motion for Injunctive Relief, at 24).** The Plaintiff's discharge is imminent, the Plaintiff has no income, no means of transportation, and no means of support; the Defendant has

contracted to provide these means of support to U.S. Armed Forces Veterans, and Congress sought to address the dangers of homelessness to Veterans by authorizing 38 CFR Part 61, VA Homeless Providers Grant and Per Diem Program. The Defendant is paid a Per Diem to provide for Veterans like the Plaintiff.

3. Factor for Injunctive Relief. Balance of equities tips in movants favor.

Plaintiffs' proposed injunctive relief is simple and not burdensome to the Defendant. The relief sought by the Plaintiff is administrative, the Defendant and Plaintiff need only complete the required forms so the Plaintiff can continue in the VA GPD program. The VA has previously waived conditions of the program and states its willingness to do so in 38 CFR § 61.80 (d). The Defendant will continue to receive Per Diem payments and will not suffer finaucial harm. As such, the relief requested will not injure the Defendant.

The Defendant offers six, four, three, two and one man occupancy rooms at the VRQ (**Plaintiff's Affidavit in Support of Complaint, at 52**), and at present, there are two rooms that have remain unoccupied for over twelve months. At the moment, the Plaintiff resides in a three-man hotel-size room with no desk or chair; the Plaintiff's only occupiable space is a twin size bed. The only privacy afforded him for privileged conversations is when his roommates are absent from the room, otherwise the Plaintiff must leave the room himself and weather the outdoors (**Plaintiff's Affidavit in Support of Complaint, at 213).** While the two parties exchange discovery the Plaintiff is subject to random room and locker searches by the Defendant. Placing the Plaintiff in a single occupancy room to safeguard his well-being, possessions, and the integrity of the matter before the Court is well within the Defendant's current VA GPD program structure.

4. Factor for Injunctive Relief. Injunction is in the public interest.

The Injunctive Relief proposed herein will not endanger the public interest, but rather, the

relief will serve to protect the public from further violations of federal law. Enjoining the Defendant from expelling the Plaintiff into homelessness will maintain the status quo and afford the Plaintiff the necessities of life while the claims within the Complaint are fully adjudged.

Should the Plaintiff prevail on the prima facie claims in Count I and Count II, then past, current, and future Veterans who are similarly situated in aspects of Counts I and II, will have binding precedent in the present jurisdiction arising out of the same set of facts that is relevant in all ways for the purposes of adjudication and Declaratory Judgment.

There are elements of Unfair and Deceptive Trade Practices within the claims of the Plaintiff's Complaint that would also benefit the public interest should the Plaintiff prevail. Whereas the Defendant uses the economically disadvantaged Veteran and civilian populations within its care as an unpaid labor force to further its business interests, and, the Defendant deceives the public by holding out said unpaid labor force as "volunteers" to solicit favors, grants, donations, services and thereby affects commerce and deceives the public. The Plaintiff's claims are in the public interest.

C. <u>The Bond Requirement Should Be Waived</u>

The amount of security is a matter for the discretion of the trial court, and the court may elect to require no security at all. Rule 65 of the Federal Rules of Civil Procedure requires that a party seeking preliminary injunctive relief provide security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Federal Rules of Civil Procedure 65(c) However, despite the literal language of Rule 65(c), the bond requirement of Rule 65(c) may be waived.

> Although the requirements of Rule 65(c) are phrased in mandatory terms, it is settled that the security requirement should not function to bar poor people from obtaining judicial redress. Requiring the plaintiffs to post a bond that would provide security to the Artery defendants would stifle the purpose of the

> Fair Housing Act since these plaintiffs would be precluded from obtaining judicial review of the Artery defendants' actions until after the irreparable injury would already have occurred, and the status quo could in all likelihood never be restored.
>
> Brown v. Artery Organization, Inc., 691 F. Supp. 1459 (D.D.C. 1987)
>
> See Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal.1982); Bartels v. Biernat, 405 F. Supp. 1012, 1019 (E.D.Wis.1975); Bass v. Richardson, 338 F. Supp. 478, 490 (S.D.N.Y. 1971); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.D.C. 1971), aff'd on other grounds, 458 F.2d 827 (D.C.Cir.1972); Bellsouth Telecomm., Inc. v. MCIMetro Access Transmission Servs,LLC, 425 F.3d 964, 971 (11th Cir. 2005); Baldree v. Cargill, Inc., 758 F. Supp. 704 (M.D. Fla. 1994), aff'd 925 F.2d 1474 (11th Cir. 1991)

Plaintiff is a homeless Veteran without adequate resources as attested by the Plaintiff's Application to Proceed in Forma Pauperis; indigence cannot be justification for not protecting the Plaintiff and his constitutional right to remedy at law. Defendants will suffer no financial harm. The Court should waive the bond requirement.

D. <u>Conclusions</u>

For the reasons stated herein, Plaintiff has established a strong likelihood of success on the merits; Plaintiff will be irreparably harmed if an injunction does not issue; the injunctive relief sought is administrative, will not substantially injure the Defendant, in fact the Defendant will profit from the Plaintiffs Per Diem; and the injunctive relief sought is in the public interest. Accordingly, Plaintiffs respectfully request the Court to grant their Application for Preliminary Injunction.

The foregoing Memorandum consisting of NA paragraphs, and 34 pages, and 2 Exhibits.

Respectfully submitted this day of JUN 12, 2017

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

GREGORY G. ARMENTO, Plaintiff, Pro Se vs. ASHEVILLE BUNCOMBE COMMUNITY CHRISTIAN MINISTRY, INC., et al. Defendant.	Civil Action No._____

PLAINTIFF'S
EXHIBITS ATTACHED TO
MEMORANDUM IN SUPPORT OF INJUNCTIVE RELIEF

Exhibit 35 - Summary of Plaintiff's Work Hours as a Duty Driver, Count I, 1 page

Exhibit 36 - Summary of Plaintiff's Work Hours as Front Desk Mgr. for the 4th Pay Period, Count II, 2 pages

Respectfully submitted this day of JUN 12 2017

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Summary of Plaintiff's Work Hours as a Duty Driver, Count I

(Input Data Sources: Duty Driver Schedules; Passenger Van Logs, Plaintiff's Resident History.)

The "Input Data" for this Summary (Count I) is without the benefit of pre-trial Discovery between the parties.

The Begin Date and End Dates below are based on milestones in Plaintiff's VRQ residential history. The date of November 12, 2015 is believed to be about when the Plaintiff started performing Service Hours as a Duty Driver while still employed by ABCCM as a Front Desk Manager; on June 2, 2016 the Plaintiff is no longer a Front Desk Manager and available to perform scheduled Duty Driver Service Hours; September 30, 2016 is when ABCCM begins to adopt terms of a US DOL Settlement Agreement that effectively doubles Plaintiff's scheduled Duty Driver hours.

Begin Date	End Date	Number of Days per Week Occurred	Number of Weeks Occurred	Number of Days Multiplied by Weeks Occurred	Payable Work Hours in Minutes	Total of Occurances Multiplied by Minutes	Total Service Hours
November 12, 2015 (from and including)	**June 2, 2016** (up to, but not including)	**203 days**	**29 weeks**				
Wage Periods							
On Duty, Duty Driver		0	0	0	0	0	0
Waiting Time, Duty Driver		2	15	30	30	900	15
On-Call, Duty Driver		2	8	16	360	5760	96
June 2, 2016 (from and including)	**September 29, 2016** (up to, but not including)	**119 days**	**17 weeks**				
Wage Periods							
On Duty, Duty Driver		3	12	36	660	23760	396
Waiting Time, Duty Driver		6	17	102	30	3060	51
On-Call, Duty Driver		2	4	8	360	2880	48
September 29, 2016 (from and including)	**January 12, 2017** (up to, but not including)	**105 days**	**15 weeks**				
Wage Periods							
On Duty, Duty Driver		3	15	45	660	29700	495
Waiting Time, Duty Driver		4	15	60	30	1800	30
On-Call, Duty Driver		1	4	4	360	1440	24
				Grand Total of Service Hours			**1155**

On Duty, Duty Driver: Required Service Hours as per Duty Drivers' Schedule, performs drivers duties from 7:00 am to 6:00 pm (660 minutes).
Waiting Time, Duty Driver: Plaintiff not on scheduled to drive, but if on campus he can be called on to perform driving duties (each run average 30 minutes).
On-Call, Duty Driver: May be called to perform driving duties, and required to remain on campus during hours of 12:00 pm and 6:00 am (360 minutes).

Summary of Plaintiff's Work Hours as a Front Desk Mgr. for the 4th Pay Period

(Input Data Sources: Exhibit 13 - ABCCM Pay Period Schedules, Exhibit 14 Direct Deposit Paychecks and, Exhibit 15 Front Desk Work Schedules.)

The "Input Data" for this Summary of Plaintff's 4th Pay Period is without the benefit of pre-trial Discovery between the parties.

Attendance to weekly Desk Manager Meetings is require of all Desk Managers unless otherwise excused, same meeting is unpaid because it occurs during the 1st shift (M-F, 8am-4pm; Service Hours). Same meetings typically last one hour; the date and time of each meeting is printed on the bottom of each Weekly Work Schedule. One hour has been added in this summary under "Occluded Pre & Post Work Time" to compensate for Plaintiff's meeting attendance, except for when the Plaintiff was working the Front Desk at the time of same meeting, the meeting time hour is already claimed under "Deducted Service Hours".

PAY PERIOD 1st WORK WEEK 2nd WORK WEEK	WORK WEEK	SCHEDULED START TIME	SCHEDULED END TIME	*WORK HOURS* ALLOWABLE TIMESHEET HOURS	DEDUCTED SERVICE HOURS	OCCLUDED PRE & POST WORK TIME	GROSS WORK WEEK HOURS	GROSS UNPAID HOURS	NET UNPAID OVERTIME HOURS	NET UNPAID REGULAR HOURS	**TOTAL PAYCHECK HOURS**	**GROSS PAYCHECK EARNINGS**
4th PAY PERIOD												
Thursday, October 15, 2015												
Friday, October 16, 2015												
Saturday, October 17, 2015												
Sunday, October 18, 2015		10:00 PM	6:00 AM	8.0		0.5						
Monday, October 19, 2015		10:00 PM	6:00 AM	8.0		1.5						
Tuesday, October 20, 2015												
Wednesday, October 21, 2015												
		Work Week Hourly Totals		**16.0**	**0.0**	**2.0**	**18.0**	**2.0**	**0.0**	**2.0**		
Thursday, October 22, 2015		8:00 AM	4:00 PM		8.0	0.5						
Friday, October 23, 2015		8:00 AM	12:00 PM		4.0	0.5						
Saturday, October 24, 2015		8:00 AM	4:00 PM	8.0		0.5						
Sunday, October 25, 2015		8:00 AM	4:00 PM	8.0		0.5						
Monday, October 26, 2015		8:00 AM	4:00 PM		8.0	0.5						
Tuesday, October 27, 2015		8:00 AM	4:00 PM		8.0	0.5						
Wednesday, October 28, 2015												
END PAY PERIOD		Work Week Hourly Totals		**16.0**	**28.0**	**3.0**	**47.0**	**31.0**	**7.0**	**24.0**		
		Pay Period Hourly Totals		**32.0**	**28.0**	**5.0**	**65.0**	**33.0**			**32.0**	**$288.00**
		Total Unpaid Overtime and Regular Hours in Pay Period							**7.0**	**26.0**		

NOTES: none

Summary of Plaintiff's Work Hours as a Front Desk Mgr. for the 4th Pay Period

(Input Data Sources: Exhibit 13 - ABCCM Pay Period Schedules, Exhibit 14 Direct Deposit Paychecks and, Exhibit 15 Front Desk Work Schedules.)

The "Input Data" for this Summary of Plaintff's 4th Pay Period is without the benefit of pre-trial Discovery between the parties.

Attendance to weekly Desk Manager Meetings is require of all Desk Managers unless otherwise excused, same meeting is unpaid because it occurs during the 1st shift (M-F, 8am-4pm; Service Hours). Same meetings typically last one hour; the date and time of each meeting is printed on the bottom of each Weekly Work Schedule. One hour has been added in this summary under "Occluded Pre & Post Work Time" to compensate for Plaintiff's meeting attendance, except for when the Plaintiff was working the Front Desk at the time of same meeting, the meeting time hour is already claimed under "Deducted Service Hours".

PAY PERIOD 1st WORK WEEK 2nd WORK WEEK	WORK WEEK	SCHEDULED START TIME	SCHEDULED END TIME	*WORK HOURS* ALLOWABLE TIMESHEET HOURS	DEDUCTED SERVICE HOURS	OCCLUDED PRE & POST WORK TIME	GROSS WORK WEEK HOURS	GROSS UNPAID HOURS	NET UNPAID OVERTIME HOURS	NET UNPAID REGULAR HOURS	**TOTAL PAYCHECK HOURS**	**GROSS PAYCHECK EARNINGS**
4th PAY PERIOD												
Thursday, October 15, 2015												
Friday, October 16, 2015												
Saturday, October 17, 2015												
Sunday, October 18, 2015		10:00 PM	6:00 AM	8.0		0.5						
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Tuesday, October 20, 2015												
Wednesday, October 21, 2015												
	Work Week Hourly Totals			**16.0**	**0.0**	**2.0**	**18.0**	**2.0**	**0.0**	**2.0**		
Thursday, October 22, 2015		8:00 AM	4:00 PM		8.0	0.5						
Friday, October 23, 2015		8:00 AM	12:00 PM		4.0	0.5						
Saturday, October 24, 2015		8:00 AM	4:00 PM	8.0		0.5						
Sunday, October 25, 2015		8:00 AM	4:00 PM	8.0		0.5						
Monday, October 26, 2015		8:00 AM	4:00 PM		8.0	0.5						
Tuesday, October 27, 2015		8:00 AM	4:00 PM		8.0	0.5						
Wednesday, October 28, 2015												
END PAY PERIOD	Work Week Hourly Totals			**16.0**	**28.0**	**3.0**	**47.0**	**31.0**	**7.0**	**24.0**		
	Pay Period Hourly Totals			**32.0**	**28.0**	**5.0**	**65.0**	**33.0**			**32.0**	**$288.00**
	Total Unpaid Overtime and Regular Hours in Pay Period								**7.0**	**26.0**		

NOTES: none