

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

**MARIA L. BROWN**

**PLAINTIFF**

**VS.**

**CIVIL ACTION NO. 3:07-CV-727-HTW-LRA**

**DAVID NUTT, P.A.;  
DAVID NUTT & ASSOCIATES, P.C.;  
NUTT & MCALISTER, PLLC;  
DAVID H. NUTT, INDIVIDUALLY;  
MARY E. MCALISTER, INDIVIDUALLY;  
ERNE COWARD, INDIVIDUALLY; AND  
WILLIAM S. JONES, INDIVIDUALLY**

**DEFENDANTS**

**PLAINTIFF'S RESPONSE TO DAVID NUTT'S MOTION TO DISMISS**

COMES NOW Plaintiff by and through counsel, and respectfully submits her response to Defendant David Nutt's Motion to Dismiss. In support thereof, Plaintiff would show unto the Court the following:

1. On December 27, 2007, Plaintiff filed her First Amended Complaint against Defendant David Nutt for violation of FLSA.
2. On March 12, 2008, the Plaintiff filed a Motion for Leave to File Her Second Amended Complaint, which would more define which claims were to be filed against Defendant, David Nutt, individually. Plaintiff's Second Amended Complaint also seeks to include claims for intentional infliction of emotional distress and defamation against Defendant David Nutt regarding statements to the media by his attorney Christopher Shapley.
3. Since the intentional infliction of emotional distress and defamation claims

are before the Court on the Plaintiff's motion to amend the Plaintiff will address those claims in its reply to the Defendants' response to that motion. As such, the only claim against David Nutt that is before the Court is the Plaintiff's claim for violation of the FLSA.

4. The FLSA defines the term "employer" broadly to include "any person acting directly or indirectly in the interest of an employer in relation to any employee." 29 U.S.C.A. §203(d). Furthermore, the term "person" is also broadly defined under the FLSA to include an "individual." 29 U.S.C.A. § 203(d). Thus, any individual who acts directly or indirectly in the interest of an employer in relation to an employee is subject to individual liability under the FLSA

5. The statutory definition of "employer" is sufficiently broad to permit a complainant to name a corporate officer, participating shareholder, supervisor, manager, or other employee as a defendant in an FLSA case where the individual exercises some supervisory authority over employees and is responsible in whole or in part for the alleged violation. *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1<sup>st</sup> Cir. 1983); *Sandom v. Travelers Mortgage Servs.*, 752 F. Supp. 1240, 1251 (D.N.J. 1990).

6. The courts have expansively interpreted the FLSA's definition of "employer" and have held that managerial responsibilities and substantial control of the terms and conditions of the employees' work create a statutory employer status under which an individual such as a corporate officer or manager may be liable. *Donovan v. Sabine Irrigation*, 695 F.2d 190, 194-95 (5<sup>th</sup> Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983). Such a corporate officer is jointly and severally liable along with the corporation for FLSA violations. *Agnew*, 712 F.2d at 1514.

7. For example, an individual who was the founder and president of five hotel corporations was liable as an employer under the FLSA because he actively controlled the spending of the corporation, guided corporate policy, authorized compliance with labor standards, personally selected managers of each hotel, and solved major corporate problems. *Donovan v. Grim Hotel*, 747 F.2d 966, 971-72 (5<sup>th</sup> Cir. 1984), *cert. denied*, 471 U.S. 1124 (1985).

8. In the current case, Plaintiff Maria Brown has claimed that she was jointly employed by David Nutt, P.A.; David Nutt & Associates, P.C.; and Nutt & McAlister, PLLC. For each one of these entities Defendant David Nutt is a founder and owner/co-owner. As an owner/co-owner Defendant David Nutt would have the authority to control spending, guide corporate policy, authorize compliance with labor standards, select management employees, and solve major corporate problems.

9. The Defendant David Nutt claims that the Plaintiff has failed to meet her pleading burden under Fed. R. Civ. Pro. 8(a)(2). This rule requires that a claimant give “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Id.* Under Rule 8(a)(2), a plaintiff’s complaint is not required to set out detailed facts about the claim; rather, it need only notify the defendant as to the nature of the claim against them and the grounds upon which it rests. *Charles E. Beard, Inc. v. Cameronic Technology Corp.*, 120 F.R.D. 40, 41 (E.D. Tex. 1988) *aff’d*, 932 F.2d 280 (5<sup>th</sup> Cir. 1991). Furthermore, a Rule 12(e) motion should be denied if the information that the defendant requests can be obtained through discovery. *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 130 (5<sup>th</sup> Cir. 1959); *Babcock & Wilcox Company v. McGriff, Seibels & Williams, Inc.*, 235 F.R.D. 632, 633 (E.D. La. 2006); *Davenport v. Rodriguez*, 147 F.

Supp. 2d 630, 640 (S.D. Tex. 2001).

10. In Plaintiff's First Amended Complaint it states,

Plaintiff was not paid time and a half her regular rate of pay for all hours worked in excess of 40 for each given work week, when work was done at home or when the day was a firm paid holiday. In addition, Defendant McAlister directed for Plaintiff to work off the clock to assist with running errands and performing tasks for Derek Wyatt when he was out town.

See Document No. 5 at p. 4-5. This paragraph clearly states how the Defendant David Nutt violated the FLSA, and provides enough information to Defendant David Nutt so that he can file a response to this allegation.

11. In addition, the information as to the control Defendant David Nutt possessed over each corporate Defendant in this case can be obtained through the discovery process, which is in its initial stages. As such, the Court should deny the Defendant's Motion to Dismiss at this time.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Defendant David Nutt's Motion to Dismiss be denied.

Respectfully submitted,

BY: /s Nick Norris  
NICK NORRIS MB #101574  
Attorney for Plaintiff

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**CERTIFICATE OF SERVICE**

I, NICK NORRIS, attorney for Plaintiff, do hereby certify that I have this day mailed, via ECF Notice, a true and correct copy of the above and foregoing document to the following:

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SO CERTIFIED, this the 27<sup>th</sup> day of March, 2008.

/s Nick Norris  
NICK NORRIS