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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK URIARTE,)	Civil No. 10cv498 L(AJB)
Plaintiff,)	
v.)	ORDER GRANTING
CITY OF CALEXICO,)	DEFENDANT’S MOTION TO
Defendant.)	DISMISS COMPLAINT [doc. #3];
)	and GRANTING MOTION FOR
)	LEAVE TO FILE A FIRST
)	AMENDED COMPLAINT [doc. #12]
)	
)	

On April 1, 2010, defendant filed a motion to dismiss the complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6). Plaintiff was required to file an opposition to defendant’s motion no later than May 10, 2010 but did not do so. On May 27, 2010, counsel for plaintiff, Michael McGill and Carolina Veronica Diaz, each filed a declaration stating they did not receive an email from the Court’s Electronic Filing system or from opposing counsel notifying them of the filing of defendant’s motion to dismiss. Mr. McGill’s declaration also states that “[u]nless the Court intervenes and orders otherwise, I will immediately prepare an opposition to Defendants [sic] Motion to Dismiss, and I will have it filed by Tuesday, June 1, 2010.” (McGill Declar. at ¶ 9.) Plaintiff did not file an opposition to the motion to dismiss on June 1, 2010, but instead attempted to file a hard-copy of a First Amended Complaint with the

1 Clerk of the Court on June 2, 2010.¹ The Court struck the FAC and instructed plaintiff that if he
2 would like to file an amended complaint, he must do so under Rule 15(a)(2) and in conformity
3 with the Civil Local Rules. Plaintiff has moved for leave to file a FAC. Defendant’s motion to
4 dismiss remains unopposed.

5 **1. Motion to Dismiss**

6 **A. Legal Standard for a Motion to Dismiss**

7 A complaint cannot survive a motion to dismiss unless it provides “sufficient factual
8 matter, . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal* 129 S. Ct
9 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “The
10 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
11 possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*,
12 550 U.S. at 556). A complaint must contain “more than labels of conclusions” or “a formulaic
13 recitation of the elements of a cause of action” *Twombly*, at 555. A plaintiff must allege
14 “enough facts” to “nudge[] [the] claim[s] across the line from conceivable to plausible. *Id.* at
15 570.

16 **B. Factual Background**

17 Plaintiff Frank Uriarte is a current police officer with the City of Calexico Police
18 Department. In January 2006, plaintiff was promoted from Senior Police Officer to Acting
19 Sergeant and placed on the Sergeants pay scale of Range 86 Step 3. The following January,
20 plaintiff was promoted from Range 86 Step 3 to Range 86 Step 4 on the pay scale. At the same
21 time, all sergeants were moved from Range 86 to Range 98 Step 1. Plaintiff contends that he has
22 been paid at an improper rate of pay since January 2007.

23 With his complaint, plaintiff seeks to recover unpaid overtime compensation, back pay,
24 equal pay, unpaid wages, liquidated damages, injunctive relief, interest, attorneys fees and cost
25 under the Fair Labor Standards Act (“FLSA”). No other causes of action are asserted.

26
27 ¹ Although case initiating documents must be filed in paper format at the Clerk’s
28 Office, all subsequent documents must be filed electronically. E-Filing Manual §§ 1(b) and 2(c).

1 **C. Discussion**

2 The FLSA was enacted “to protect all covered workers from substandard wages and
3 oppressive working hours.” *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739
4 (1981). The Act regulates minimum wage, overtime pay, equal pay, and child labor, and
5 prohibits employers from retaliating against employees who exercise their rights under the Act.
6 Section 207 of the FLSA provides that no employer “shall employ any of his employees who in
7 a workweek is engaged in commerce ... or is employed in an enterprise engaged in commerce ...
8 for a workweek longer than forty hours unless such employee receives compensation” for hours
9 worked beyond the forty hour floor “at a rate not less than one and one half times” the rate at
10 which he or she is regularly employed. 29 U.S.C. § 207(a)(1). The Supreme Court interprets
11 “regular rate” to mean “the hourly rate actually paid the employee for the normal, non-overtime
12 workweek for which he is employed.” *Walling v. Youngerman-Reynolds Hardwood Co, Inc.*,
13 325 U.S. 419, 424 (1945).

14 Plaintiff’s allegations of wrongdoing are that he was not paid at his proper rate of pay and
15 that he performed overtime without being paid at the proper rate of pay. In seeking dismissal of
16 the claim, defendant contends that plaintiff has failed to state a claim under FLSA, 29 U.S.C. §
17 207.

18 In his complaint, plaintiff alleges he “was not and has not been paid his proper wages for
19 the past three year period through the present date” (Compl. at 3, ¶ 13.) Under the FLSA,
20 employers and employees are generally “free to establish [the] regular [non-overtime] rate at any
21 point and in any manner they see fit,” “[a]s long as the minimum hourly rates established by
22 Section 6 [of the FLSA] are respected.” *Youngerman-Reynolds*, 325 U.S. at 424. Here, plaintiff
23 is not contending that he has not been paid at the minimum hourly rate under the FLSA but
24 instead that he is not receiving the same pay as other sergeants. There may be some other cause
25 of action that would cover plaintiff’s allegations but plaintiff has not stated a claim under FLSA
26 and it must be dismissed.

27 The second aspect of plaintiff’s claim is that he was not properly compensated for his
28 overtime work. As noted above, the FLSA requires overtime compensation for his employment

1 “at a rate not less than one and one-half times the regular rate at which he is employed.” 29
2 U.S.C. § 207(a)(1). Although not entirely clear, plaintiff appears to contend that he is not
3 receiving one and one-half times the amount of what other sergeants are being paid rather than
4 not receiving one and one-half times his regular, *i.e.*, his current rate of pay. If plaintiff is basing
5 his overtime claim on what he contends is his incorrect pay, then as discussed above, he has not
6 stated a claim under FLSA and it must be dismissed.

7 Defendant also seeks to dismiss the FLSA claim as untimely. The FLSA contains its own
8 statute of limitations for an action for unpaid minimum wages and for liquidated damages:

9 Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid
10 overtime, or liquidated damages . . . shall be forever barred unless commenced
11 within two years after the cause of action accrued, except that a cause of action
arising out of a willful violation may be commenced within three years.

12 29 U.S.C. § 255(a). FLSA claims are continuing claims and a separate cause of action
13 “accrues” every payday that overtime is not paid. *Biggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir.
14 1993)(citing *Beebe v. United States*, 640 F.2d 1283, 1293 (1981); *McIntyre v. Dir. of Youth Rehab.*,
15 795 F. Supp. 668, 674 (D.Del. 1992) (courts have adopted uniform approach under *Beebe* that
16 cause of action accrues each paycheck); *see also Cook v. United States*, 855 F.2d 848, 851 (Fed.
17 Cir.1988) (general rule is that FLSA claims accrue at the end of each pay period); *Mid-Continent*
18 *Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946) (accrues each payday)). Because
19 plaintiff’s FLSA claim is being dismissed, the Court will not determine at this point whether the
20 claim is also time barred.

21 Finally, even though a complaint need not provide detailed factual allegations, plaintiff
22 must state the grounds of his entitlement to relief which “requires more than labels and
23 conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S.
24 at 555. As currently pleaded, plaintiff’s complaint also fails to provide sufficient facts to meet
25 the *Twombly* standard and it must be dismissed on this basis as well.

26 As noted above, plaintiff moves to amend his complaint. The Court has reviewed the
27 proposed amended complaint and finds that it suffers from the same deficiencies discussed
28 above and therefore may not be filed. Nevertheless, under Federal Rule of Civil Procedure

1 15(a), leave to amend a pleading after a responsive pleading has been filed may be allowed by
2 leave of court and such leave "shall be freely given when justice so requires." FED. R. CIV. P.
3 15(a). Plaintiff will be given leave to file a first amended complaint in conformity with this
4 Order.

5 **2. Conclusion**

6 Based on the foregoing, **IT IS ORDERED** granting defendant's motion to dismiss the
7 complaint without prejudice. **IT IS FURTHER ORDERED** granting plaintiff's motion for
8 leave to file an amended complaint. If plaintiff intends to file a first amended complaint, he shall
9 do so within 10 days of the filing of this Order.

10 **IT IS SO ORDERED.**

11 DATED: January 3, 2011

12 
13 M. James Lorenz
United States District Court Judge

14 COPY TO:

15 HON. ANTHONY J. BATTAGLIA
16 UNITED STATES MAGISTRATE JUDGE

17 ALL PARTIES/COUNSEL
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