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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANK URIARTE,)	Civil No. 10cv498 L(WMc)
Plaintiff,)	ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT [doc. #17]
v.)	
CITY OF CALEXICO,)	
Defendant.)	
_____)	

The Court granted defendant's motion to dismiss the complaint and granted plaintiff leave to amend. On January 13, 2011, plaintiff filed his FAC which defendant moves to dismiss. Plaintiff filed an opposition to defendant's motion but defendant has not filed a reply memorandum. Having considered the arguments of the parties on the papers and without oral argument, the Court denies defendant's motion for the reasons set forth below.

1. Discussion

Plaintiff Frank Uriarte is a current police officer with the City of Calexico Police Department. With his amended complaint, plaintiff seeks to recover unpaid overtime compensation, back pay, equal pay, unpaid wages, liquidated damages, injunctive relief, interest, attorneys fees and cost under the Fair Labor Standards Act ("FLSA") based upon defendant's alleged failure to pay overtime for four years. No other causes of action are asserted.

Defendant contends that plaintiff has failed to provide sufficient facts in his FAC and the

1 allegations in the FAC do not relate back to the original filing of his complaint.

2 A complaint cannot survive a motion to dismiss unless it provides “sufficient factual
3 matter, . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal* 129 S. Ct
4 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “The
5 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
6 possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*,
7 550 U.S. at 556). A complaint must contain “more than labels of conclusions” or “a formulaic
8 recitation of the elements of a cause of action” *Twombly*, at 555. A plaintiff must allege
9 “enough facts” to “nudge[] [the] claim[s] across the line from conceivable to plausible. *Id.* at
10 570.

11 The FLSA Act regulates minimum wage, overtime pay, equal pay, and child labor, and
12 prohibits employers from retaliating against employees who exercise their rights under the Act.
13 Section 207 of the FLSA provides that no employer “shall employ any of his employees who in
14 a workweek is engaged in commerce ... or is employed in an enterprise engaged in commerce ...
15 for a workweek longer than forty hours unless such employee receives compensation” for hours
16 worked beyond the forty hour floor “at a rate not less than one and one half times” the rate at
17 which he is regularly employed. 29 U.S.C. § 207(a)(1).

18 As noted above, defendant argues that plaintiff’s allegation that he was not paid overtime
19 compensation are conclusory The Court disagrees. The complaint alleges that plaintiff was
20 employed by defendant, he worked overtime from January 2007 to the present date, is paid every
21 two weeks and has been denied his overtime pay for each and every single pay period. (FAC ¶¶
22 12, 13.) Plaintiff has stated sufficient facts to constitute a cause of action under FLSA against
23 defendant.

24 In its motion, defendant argues that section 7(k) of FLSA is applicable here because of
25 plaintiff’s status as a law enforcement officer. Section 7(k) provides a partial overtime
26 exemption:

27 No public agency shall be deemed to have violated subsection (a) of this section
28 with respect to the employment of any employee in fire protection activities or any
employee in law enforcement activities (including security personnel in

1 correctional institutions) if--

2 (1) in a work period of 28 consecutive days the employee receives for tours
3 of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the
4 average number of hours (as determined by the Secretary pursuant to
section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours
of duty of employees engaged in such activities in work periods of 28
consecutive days in calendar year 1975;

5 29 U.S.C. § 207(k)(1).

6 But as plaintiff correctly contends, plaintiff has not alleged that the City is entitled to the
7 7(k) exemption. Rather, the employer who claims an exemption from the FLSA has the burden
8 of showing that the exemption applies, not the employee. *Donovan v. Nekton, Inc.*,
9 703 F.2d 1148, 1151 (1983)(citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).
10 Because defendant has not made such a showing, plaintiff has stated a claim in alleging he is
11 paid every two weeks and has not been paid for the overtime hours he worked.

12 Defendant also argues that the complaint fails to allege sufficient facts to allege
13 willfulness. Under the FLSA, claims for unpaid compensation are typically subject to a two-year
14 statute of limitations. 29 U.S.C. § 255(a). But the limitations period may be extended to three
15 years for a cause of action “arising out of a willful violation” of the statute. *Id.* “A violation of
16 the FLSA is willful if the employer ‘knew or showed reckless disregard for the matter of
17 whether its conduct was prohibited by the [FLSA].’” *Chao v. A-1 Med. Servs., Inc.*, 346 F.3d
18 908, 918 (9th Cir. 2003) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).
19 “If an employer acts unreasonably, but not recklessly, in determining its legal obligation” under
20 the FLSA, its action is not willful. *McLaughlin*, 486 U.S. at 135 n. 13.

21 By pleading that he spoke on numerous occasions to the City Manager and the Chief of
22 Police about their failure to provide him with overtime pay, plaintiff has sufficiently alleged
23 willfulness.

24 Finally, defendant contends plaintiff’s FAC does not relate back to the filing of the
25 original complaint. In other words, plaintiff’s claim should be limited to the period of two (or 3
26 if the violation is willful) years prior to the filing of the FAC on January 13, 2011, rather than
27 the date of the filing of the complaint on March 9, 2010..

28 Federal Rule of Civil Procedure 15(c)(1) allows for an amendment to a pleading to relate

1 back to the date of the original pleading when: “ the amendment asserts a claim or defense that
2 arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the
3 original pleading.” FED. R. CIV. P. 15(c)(1)(B). Claims arise out of the same conduct,
4 transaction, or occurrence if they "share a common core of operative facts" such that the plaintiff
5 will rely on the same evidence to prove each claim. *Williams v. Boeing Co.*, 517 F.3d 1120, 1133
6 (9th Cir. 2008) (citing *Martell v. Trilogy, Ltd.*, 872 F.2d 322, 325–26 (9th Cir. 1989)).

7 Here, plaintiff's FAC claim relates back to the original complaint because the original
8 complaint and the FAC contain a claim based upon the same basic set of facts, *i.e.*, that plaintiff
9 was denied overtime compensation in violation of the FLSA. *See* FED. R. CIV. P. 15(c)(1)(B).

10 **2. Conclusion**

11 Based on the foregoing, **IT IS ORDERED** denying defendant’s motion to dismiss the
12 FAC. **IT IS FURTHER ORDERED** that defendant shall answer the FAC within the time
13 provided under the Federal Rules of Civil Procedure.

14 **IT IS SO ORDERED.**

15 DATED: May 23, 2011

16 
17 M. James Lorenz
18 United States District Court Judge

19 COPY TO:

20 HON. WILLIAM MCCURINE, JR.
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL
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