

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDRICK L. WINFIELD, ET AL.,

Plaintiffs,

10 Civ. 7304 (JGK)

- against -

MEMORANDUM OPINION
AND ORDER

CITIBANK, N.A.,

Defendant.

JOHN G. KOELTL, District Judge:

The defendant has moved to dismiss this case, which alleges claims under the Fair Labor Standards Act, ERISA, and various state laws. The plaintiffs have responded by arguing that the case should not be dismissed, but seek leave to amend if the Court is inclined to grant the motion to dismiss. In the course of their papers, the plaintiffs acknowledge a fundamental error in their complaint. The complaint alleges that the plaintiffs were treated as exempt employees under the Fair Labor Standards Act when in fact they were non-exempt employees, and the plaintiffs now allege, not that they were mis-classified, but that they were not paid overtime even though they worked overtime and should have been paid for that overtime work. At the very least, the plaintiffs seek leave to amend their complaint to correct the incorrect allegations. It is troubling that the complaint could have been based on such a fundamental misconception of the facts.

The plaintiffs' application to file an amended complaint is **granted**. However, the plaintiff is now on notice of the defects in the complaint as explained in the motion to dismiss. If any claims in the amended complaint are dismissed, the dismissal will be with prejudice. See, e.g., Abu Dhabi Commercial Bank v. Morgan Stanley & Co., No. 08 Civ. 7508, 2009 WL 3346674, at *2 & n.14 (S.D.N.Y. Oct. 15, 2009) ("[A] dismissal with prejudice is generally appropriate where a court puts a plaintiff on notice of a complaint's deficiencies and the plaintiff fails to correct those deficiencies after amendment.").

The plaintiffs' time to file an amended complaint is extended to **April 29, 2011**. The defendant's time to move or answer any amended complaint is **May 13, 2011**. The parties may submit an appropriate motion schedule.

The motion to dismiss is **denied without prejudice**. The Clerk is directed to close Docket No. 13.

SO ORDERED.

Dated: New York, New York
April 12, 2011

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John G. Koeltl
United States District Judge