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

MARIA L. BROWN **PLAINTIFF**

vs. **CIVIL ACTION NO. 3:07cv727HTW-LRA**

DAVID NUTT, P.A., et al. **DEFENDANTS**

MOTION OF DEFENDANT DAVID H. NUTT TO DISMISS

Defendant David H. Nutt ("Nutt"), pursuant to Fed. R. Civ. Pro. 12(b)(6), respectfully requests this Court to dismiss all of Plaintiff's claims against Nutt. Plaintiff's First Amended Complaint fails to plead any facts to support any of the ten causes of action that Plaintiff generically has asserted against Nutt. Accordingly, Plaintiff has failed to meet her pleading burden under Fed. R. Civ. Pro. 8(a)(2), and Plaintiff's claims against Nutt should be dismissed.

I. BACKGROUND FACTS

Plaintiff Maria Brown was employed as a paralegal by Defendant David Nutt & Associates, P.C., from July 2004 through March 31, 2007. She was employed by Defendant Nutt & McAlister, PLLC, from April 1, 2007 until her employment was terminated on July 27, 2007. On December 12, 2007, Brown filed a sex-based discrimination case against her former employers David Nutt & Associates, P.C., and Nutt & McAlister, PLLC. She also names as Defendants David Nutt, P.A., David H. Nutt, Mary E. McAlister, Ernie Coward and William S. Jones. On December 27, 2007, Plaintiff filed her First Amended Complaint. See Docket No. 5.

Paragraph 5 of Brown's First Amended Complaint states, in full: "The Defendant, David H. Nutt is an adult resident citizen of Madison County, Mississippi who resides at 290 Chapel Hill Road, Madison, Mississippi 39071. Defendant Nutt may be served with process at his residence or his place of employment." This singular reference to David H. Nutt is the only

direct reference to Nutt contained in the 73 paragraphs of Brown's First Amended Complaint. Brown fails to name David H. Nutt anywhere else in her First Amended Compliant, and raises no factual allegations implicating David H. Nutt.

Paragraph 9 of Brown's First Amended Complaint conclusively states: "The Defendants listed above were joint employers of Plaintiff." Brown fails to plead any facts to support this naked assertion that "Defendants", which presumably includes David H. Nutt, were her "joint employers".

II. ARGUMENT & AUTHORITY

A. The Rule 12(b)(6) Standard.

In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), the United States Supreme Court addressed the standard for evaluating a Motion to Dismiss under Fed. R. Civ. Pro. 12(b)(6):

> Federal Rule of Civil Procedure 8(a)(2) requires only 'a short plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' While a complaint attacked by a 12(b)(6) motion to dismiss does not need detailed factual allegations, **a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level** . . . .

Id. at 1964-65 (citations omitted) (emphasis added). The Court went on to reason that "[w]ithout factual allegations in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. at 1965, n. 3 (citations omitted). Accordingly, "once a claim has been stated adequately, it may be supported by **showing any set of facts** consistent with the allegations in the complaint." Id. at 1968 (emphasis added). In conclusion, the Court stated that in order to

survive a Rule 12(b)(6) motion to dismiss, a complaint must state "enough facts to state a claim to relief that is **plausible on its face**." Id. at 1974 (emphasis added). When the factual allegations contained in a complaint fail to "nudge [plaintiff's] claims across the line from conceivable to plausible, [plaintiff's] complaint must be dismissed." Id.

The Twombly standard was recognized by the Southern District in Taylor v. City of Jackson, 2007 WL 3407681, *1 (S.D. Miss. 2007): "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact).'" This statement of the Rule 12(b)(6) standard echoes the standard that the Court previously announced in Addison v. Allstate Ins. Co., 58 F.Supp.2d 729, 732 (S.D. Miss. 1999): "'Where the plaintiff's complaint is devoid of any factual allegations suggesting a basis for recovery against a particular defendant, there can be no ground for concluding that a claim has been stated.'" (citations omitted); see also Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992) ("[I]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. . . . and conclusory allegations and unwarranted deductions of fact are not admitted as true by a motion to dismiss.") (internal quotations and citations omitted).

B. Plaintiff's failure to plead any facts in support of her claims against Defendant David H. Nutt is fatal to the claims.

Brown has failed to meet her burden to plead in her First Amended Complaint enough facts to establish that her claims against David H. Nutt are plausible on their face. In fact, a review of Brown's First Amended Complaint readily reveals that Brown has failed to plead any facts in support of her claims against Nutt. In the absence of any facts to support Brown's claims against Nutt, Brown's First Amended Complaint fails to meet the requirement of Rule 8(a)(2) to

provide fair notice to Nutt of the grounds upon which her claims rest. See Twombly, 127 S.Ct. at 1965. Accordingly, Brown has failed to "nudge [her] claims across the line from conceivable to plausible," and her claims against David Nutt should be dismissed. Id. at 1974.

It is anticipated that Brown will attempt to defeat the instant Motion by arguing that her naked allegation in Paragraph 9 that "Defendants. . . were joint employers of Plaintiff" is sufficient to state an actionable claim against Nutt. The court in Bailey v. Baton Rouge Windustrial Co., 2006 WL 980677 (E.D. La. 2006), previously has considered this precise argument and concluded that an "unsupported allegation" that defendants were plaintiff's "joint employers" is not "capable of stating a claim upon which relief could be granted." Id. at *3.

In Bailey, the plaintiff, acting in her capacity as Executrix of the Estate of Herman Francois, submitted to the court a proposed amended complaint in which she alleged that three additional companies were "joint employers" of Francois. Id. at *1. The defendant opposed the amendment to the complaint, arguing that "the addition of the defendants as joint employers is not supported by any facts alleged in the proposed complaint." Id. The Court began its analysis by stating that "the test for determining whether a 'joint employer' exists 'depends on the control one employer exercises, or potentially exercises, over the labor relations policy of the other.'" Id. at *2 (citing North Am. Soccer League v. NLRB, 61 F.2d 1379, 1382 (5th Cir. 1980)). The Court next stated that the test for determining whether multiple entities constitute a "single employer" was delineated by the Fifth Circuit in Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983), and also requires, among multiple elements, a showing "that the purported co-employer exercised some degree of control over the employee." Id. at *2. After recognizing these tests, the court noted that while the plaintiff had "alleged that proposed defendants jointly employed Francois . . . both tests in this circuit require that the plaintiff show that the purported

co-employer exercise some degree of control over the employee . . . [and plaintiff] makes no such allegations against the proposed defendants." Accordingly, the court concluded that the plaintiff's unsupported assertion that the defendants were Francois' "joint employer" was insufficient to state an actionable claim:

> Indeed, the proposed amended complaint states nothing more than the names of the proposed defendants along with an unsupported allegation that the proposed defendants were the co-owners of the [current] defendant and a joint employer of Francois. Neither the original complaint nor proposed amended complaint contain an allegation of wrongdoing against the proposed defendants capable of stating a claim upon which relief could be granted.

Id. at * 3.

Nutt respectfully submits that for the same reasons supporting the court's ruling in Bailey, Brown's unsupported allegation in Paragraph 9 of her First Amended Complaint that "Defendants . . . were joint employers of Plaintiff" is insufficient to state an actionable claim against Nutt. Brown has failed to plead in her First Amended Complaint any facts that would establish that Nutt exercised any control over the labor relations policy of either David Nutt & Associates, P.C., or Nutt & McAlister, PLLC. Moreover, as the court noted in Bailey, any ownership interest that Nutt has in these entities is insufficient to meet the "joint employer" test. Id. at *3.

In short, because Brown has failed to plead in her First Amended Complaint enough facts to establish that her claims against David H. Nutt are plausible on their face, all of Brown's claims against Nutt should be dismissed.

III. CONCLUSION

For the reasons stated above, Defendant David H. Nutt respectfully requests that the Court enter an Order dismissing all of Plaintiff Maria Brown's claims against Nutt and dismiss David H. Nutt from this action. Nutt also requests such other relief as the Court deems appropriate.

This the 12th day of March, 2008.

Respectfully submitted,

DAVID H. NUTT,
Defendant

By: s/ Chris Shapley
One of His Attorneys

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CERTIFICATE OF SERVICE

I, Chris Shapley, hereby certify that I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: NONE.

This the 12th day of March, 2008.

s/ Chris Shapley