NO. 20-1100

In The
United States Court of Appeals
For The Fourth Circuit

GREGORY ARMENTO,
Appellant,
v.
ASHEVILLE BUNCOMBE COMMUNITY CHRISTIAN MINISTRY, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

Amicus Curiae Brief of The North Carolina Advocates for Justice in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1100 Caption: Armento v. Asheville Buncombe Community Christian Ministries, Inc.

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? YES **NO** ☑
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Kevin P. Murphy Date: April 27, 2020

Counsel for: North Carolina Advocates for Justice

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The North Carolina Advocates for Justice ("NCAJ") is a professional association of more than 2,250 North Carolina legal professionals. A primary purpose of NCAJ is the advancement and protection of the rights of those injured or damaged by the wrongful acts of others and the speedy and efficient administration of justice for all injured. In furtherance of this mission, NCAJ regularly participates in the legislative process, prepares resource materials, conducts continuing legal education seminars, and appears as amicus curiae before state and federal courts.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), NCAJ certifies that no counsel for a party authored this *amicus curiae* brief in whole or in part, and that no party, no party's counsel, and no person or entity other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

ARGUMENT[2]

I. APPELLANT MUST BE PAID FOR ALL TIME WORKING AT APPELLEE'S FRONT DESK

A. Federal Law Provides a Floor for Employee Rights in North Carolina

The District Court looked to federal law to interpret the requirements of the North Carolina Wage and Hour Act ("NCWHA") due to the relative dearth of state case law. *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 707 (E.D.N.C. 2009) ("In interpreting the NCWHA, North Carolina courts look to the FLSA for guidance.") But it is important to note at the outset that the North Carolina Wage and Hour Act was enacted to add additional rights for employees on top of federal protections. While Congress prescribed exclusive remedies in the Fair Labor Standards Act ("FLSA") for violations of its mandates, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007), it left room for the states to enact greater employee protections than those provided by the FLSA. *See* 29 U.S.C. § 218; *Martinez-Hernandez v. Butterball, LLC*, 578 F. Supp. 2d 816, 820 (E.D.N.C. 2008). Thus, the rights conferred by the

[2] Amici adopts the Statement Issues and Facts presented in Appellant's brief.

state act—particularly where they are more specific and afford more protections for employees than the FLSA—must be given effect.

When enacting the NCWHA, the General Assembly noted that "[t]he wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State." N.C. GEN. STAT. § 95-25.1.

> [T]he stated purpose of the NCWHA, which aims to address the 'wage levels of employees, hours of labor, [and] payment of earned wages' for the general welfare of the people, N.C. Gen. Stat. Ann. § 95–25.1, as well as the provisions therein requiring: 1) that the 'employer shall pay every employee all wages'; 2) that '[e]very employer shall pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week'; and 3) for other requirements mandating timely and adequate payment of workers, all clearly indicate that employers should not be permitted to contract around proper payment of their employees.

Rehberg v. Flowers Baking Co. of Jamestown, LLC, 162 F. Supp. 3d 490, 506 (W.D.N.C. 2016) (holding that the state act also prohibits employers from securing waivers of wage and hour rights) (citations omitted).

Where there are differences in the language of the NCWHA and the FLSA, federal decisions do not control the interpretation of the state law.

13 N.C. ADMIN. CODE 12.0103. The NCWHA provides greater protections than the FLSA in many areas. Unlike the FLSA, the NCWHA actually requires employers to pay employees their promised wages, vacation time, and bonuses (rather than just minimum wage and over time). N.C. GEN. STAT. § 95-25.6, 95-26.12; 13 N.C. ADMIN. CODE 12 .0307. The NCWHA also tightly regulates whether and how much an employer can deduct from an employee's earned wages. N.C. GEN. STAT. § 95-25.8. With respect to retaliation, North Carolina law provides even greater protection than the FLSA through the Retaliatory Employment Discrimination Act which allows for treble damages. N.C. GEN. STAT. § 95-240 *et seq*. Thus, where North Carolina law includes provisions that are more employee-friendly than federal law, this Circuit should be careful to respect and maintain that difference and enforce the greater protections provided by the state legislature.

B. **Well-Established Federal Precedent Makes Clear that Armento Should be Paid for All Work He Did at the Front Desk**

Federal case law provides the foundation for employee rights in North Carolina. Even this baseline floor of rights "should be broadly interpreted and applied to effectuate its goals." *Purdham v. Fairfax Cty.*

Sch. Bd., 637 F.3d 421, 427 (4th Cir. 2011). "The Act is 'remedial and humanitarian in purpose,' and is meant to protect 'the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.'" *Id.* (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944)).

"As several courts have recognized, the definition of 'employer' under the FLSA is to be interpreted more broadly than the term would be interpreted under common law in keeping with the remedial purposes of the Act." *Miller v. Colorcraft Printing Co.*, No. 3:03 CV 51-T, 2003 WL 22717592, at *3 (W.D.N.C. Oct. 16, 2003). Under federal law, "work constitutes employment when there is an expectation of in-kind benefits in exchange for services. *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 WL 1410025, at *5 (E.D. Wis. Apr. 23, 2012) (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301, 105 S.Ct. 1953, 1961, 85 L.Ed.2d 278 (1985)).

Under such a broad interpretation, Armento was an employee of Asheville Buncombe Community Christian Ministry, Inc. ("ABCCM"). Both parties have even stipulated as much. The parties agreed that

Armento would earn $9 per hour for his compensable time working at the front desk. Armento had an expectation that such benefits would be paid to him in exchange for his work. Thus, unless some exception exists, the law should treat Armento as an employee during the time he is working at the front desk.[3]

The Supreme Court itself has already distinguished *Portland Terminal* in the precise way that the District Court failed to do. "[T]he situation here is a far cry from that in *Portland Terminal*. Whereas in *Portland Terminal*, the training course lasted a little over a week, in this case the associates were entirely dependent upon the Foundation for long periods, in some cases several years." *Tony & Susan Alamo Found.*, 471 U.S. at 301, 105 S. Ct. at 1961, 85 L. Ed. 2d at 278. Courts should be careful not to rely too heavily on *Portland Terminal* to the detriment of workers. Here, Armento expected to be paid his promised wage of $9 per hour for all hours worked at the front desk. The NCWHA requires that those expectations be met.

The Supreme Court has defined a volunteer as "[a]n individual who, 'without promise or expectation of compensation, but solely for his

[3] And it should be noted that it was the employer's burden to establish any such exception.

personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.'" *Tony & Susan Alamo Found.*, 471 U.S. at 295, 105 S. Ct. at 1958, 85 L. Ed. 2d at 278 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152, 67 S.Ct. 639, 641, 91 L. Ed. 809 (1947)). Here, there was both a promise and expectation of compensation. Armento did not work for his personal pleasure or for altruistic support of the community's well-being. The parties agree that he worked as an employee who expected to be paid for all hours worked at the front desk. (J.A. 253 ¶14).

1. The Economic Realities of Armento's Employment Make Clear that He Was an Employee.

"For purposes of social welfare legislation, such as the FLSA, 'employees are those who as a matter of economic reality are dependent upon the business to which they render service.'" *Okoro*, 2012 WL 1410025, at *5 (quoting *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir.1987). The Supreme Court has also held that "[t]he test of employment under the Act is one of 'economic reality.' " *Tony & Susan Alamo Found.*,471 U.S. at 301, 105 S. Ct. at 1961, 85 L. Ed. 2d at 278. Armento was certainly dependent on ABCCM during the time he worked its front desk.

The FLSA includes narrow exemptions for volunteers, but only speaks directly to volunteers in aid of government and food banks. Additional caselaw-divined "volunteer" exemptions should be narrowly construed since they are divorced from both the statutory and regulatory language. Even "[t]he regulatory definition of volunteer should be applied 'in a common-sense manner, which takes into account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided.' " *Purdham,* 637 F.3d at 428 (quoting *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004)).

In *Purdham*, the Circuit noted the absence of any coercion or pressure for the plaintiff to participate in the putative "volunteer" activity and noted that "his employment as a security assistant is not dependent on his coaching; he is free to relinquish his role as coach at anytime without fear that doing so will have any impact on his full-time employment." *Purdham*, 637 F.3d at 428–29.

It would be untrue to say that about Armento's decision to work the front desk. His very housing was inextricably tied up with doing as

Appellee instructed. The District Court ignored the fact that Armento *had* to engage in "volunteer" work in order to keep a roof over his head.

The District Court also ignored the *Purdham* court's admonition that an "individual must be motivated by civic, charitable or humanitarian reasons" in order for him to be a "volunteer". *Id.* at 429. The *Purdham* court noted several times throughout its opinion that the plaintiff thoroughly enjoyed coaching and volunteered as a coach to pursue his love of golf. *Id.* ("Purdham is motivated by his long-standing love of golf and his dedication to his student athletes. He prefers coaching over obtaining a part-time job because it is a 'lifestyle choice' to coach; coaching young golfers provides him with 'satisfaction.'")

This is clearly distinguishable from Armento's front desk work. The record cannot support a conclusion that Armento had a long-standing love of clerical office work or that he made a "lifestyle choice" to pursue that passion while in the midst of a personal housing crisis. Armento negotiated for a $9 hourly rate and also wanted to ensure he did not get kicked out of Appellee's facility. In no way was he a "volunteer".

In truth, the District Court used the wrong test for deciding whether someone in Armento's position is an employee or a volunteer.

Instead of reviewing the totality of the circumstances to evaluate economic reality, the District Court's analysis myopically focused on the sole question of "whether the principal purpose of the seemingly employment relationship was to benefit the person in the employee status." (District Court's Memorandum of Decision and Order ("Order"), J.A. 793, at 19).

The District Court correctly recounted that N.C. GEN. STAT. § 95-25.14(a)(5) "pertains to the situation where there is an existing employment relationship, and the employee is then required to provide 'off the clock' work as a 'volunteer' as a condition (express or implied) of continued employment under that agreement." (Order at 28). But the court ignored that this is precisely what ABCCM did to Gregory Armento.

Armento worked as an employee at the front desk in exchange for $9 per hour. ABCCM then required him to provide additional volunteer hours doing that exact same work. Worse yet, ABCCM unilaterally decided which of Armento's work hours were compensable and which were altruistically donated to the organization. The District Court ignored this by deeming that:

> Plaintiff had one agreement with the Defendant regarding his receipt of VRQ services, which included the provision of Service Hours, and a separate agreement with the Defendant regarding his participation in the Transitional Employment Program. Those two agreements were funded from entirely separate sources and are distinct. This is far from a situation where someone applies for and is hired for a job and then is ordered to provide "off-the-clock" hours.

(Order at 27-28, J.A. 793). This is circular. An employer can always say that it had "separate agreements" for the "volunteer" and "employee" time it requires employees to perform in the same job. This is why the FLSA and NCWHA prohibit these types of arrangements.

2. Even Under a Primary Beneficiary Test, Armento was an Employee

Even if one ignores the parties' stipulation that Armento was an employee while working the front desk in exchange for $9 an hour and exclusively focuses on the "primary beneficiary" analysis instead of "the totality of the circumstances," the District Court still got it wrong. The court examined the primary beneficiary test by only evaluating ABCCM's intent and purpose. It completely ignored the actual primary beneficiary with respect to Armento's work. Armento did not need job training. As in

McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989),[4] the record here establishes that very limited and narrow kinds of learning took place, and requires a conclusion that the district court misapplied the controlling legal principle to the facts in evidence. This was front desk work, not nuclear physics. Armento already had the skills needed to perform this job before working for ABCCM. That is why ABCCM wanted Armento to do the work.

For Armento's first three weeks of work, he worked 40 or more hours at the front desk. ABCCM got around the fact that this should have been treated as full-time employment by re-classifying Armento's work in a way that maximized ABCCM's benefit under its policies. It simply deemed some arbitrary portion of his work time as "volunteer" time so that it did not have to pay him for this time or treat him as a full-time employee.[5]

ABCCM should have deemed Armento's employment full-time. This would have also removed the need for him to work service hours at all and would have reflected the reality of Armento's situation. The

[4] (holding that the employer received the primary benefit of the employees' work because loading, driving, and unloading trucks, restocking store shelves and vending machines, learning basic food vending machine maintenance, and performing simple kinds of paperwork establish "very limited and narrow kinds of learning . . . and requires a conclusion that the district court misapplied the controlling legal principle.")

[5] By doing so, the employer also avoided paying Armento overtime—required by both the NCWHA and FLSA.

District Court recites that these three weeks were the only ones where Armento worked 40 or more hours at the front desk as if that excuses the injustice. In reality, it was three weeks into Armento's employment when he complained about the violation of the law. (J.A. 655:19-23; 692:17-19). ABCCM even made "errors" in its own favor in order to depress the amount it paid Armento for his work. Yet, the District Court did not consider any of this in determining who the primary beneficiary of Armento's front desk work was.

The District Court's treatment of Armento as an incarcerated inmate is extremely problematic. Homeless men and women are vulnerable to exploitation by employers, especially by those employers who also provide housing. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1513 (11th Cir. 1993). Courts routinely recognize this power dynamic and the extreme vulnerability of the employee in migrant worker cases. *Id.* This fact should not be used to equate homeless workers with prisoners. Instead, it should inform the court's analysis in a way that ensures employees are safeguarded and are at least receiving the same protections as the rest of the workforce—not less. The District

Court's decision would lead to a very troubling world where employers can force the homeless to work for free.

The *Harker* decision itself illustrates why courts should not equate the homeless with incarcerated inmates. The *Harker* court reasoned that "inmates [] have not made the bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship. They do not deal at arms' length; the inmates enroll in SUI programs solely at the prerogative of the [Department of Corrections], which both initiates the programs and allows the inmates to participate. Because the inmates are involuntarily incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment." *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (internal quotations omitted).

This is not true of Armento. Elsewhere throughout its opinion, the District Court holds Armento's "agreement" against him in consenting to ABCCM's decision to pay him for some—but not all—of his work. As Armento's brief lays out, this is not the bargain he struck. There was no meeting of the minds that he would be volunteering at the front desk. He

expected to be paid for all hours worked, but was only paid for the hours that ABCCM unilaterally decided it would deem compensable.

C. Employees Cannot "Volunteer" Work in Their Same Role

Once the court properly treats Armento as an employee during his paid front desk hours, federal law makes clear that he must be paid for all hours worked in that role. North Carolina looks to such federal precedent where the FLSA and NCWHA are in agreement. Thus, Appellee should pay Armento for all hours worked at the front desk.

Time spent in volunteer work can only be unpaid under federal law if "***the services are not the same type of services as those for which the individual is employed by that organization***." OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA), 2008 WL 5483053, at *1 (citing 29 U.S.C. § 203(e)(4)(A) and 29 C.F.R. § 553.103(a) related to public entities and non-profit food banks). While the statute lays this out in black and white with respect to public employers and food banks, the Department of Labor has consistently made clear that the same principle applies with respect to all non-profit employers. U.S. DEP'T LABOR, FACT SHEET #14A: NON-PROFIT ORGANIZATIONS AND THE FAIR LABOR STANDARDS ACT (FLSA).

This provision "reflects the unmistakable intention of the Department of Labor (and no doubt of Congress) to prohibit 'any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to volunteer 'their services.' *Purdham*, 637 F.3d at 428 (quoting 29 C.F.R. § 553.101(b)). "[A]llowing paid employees of a nonprofit organization to perform the same type of services for their employer on an uncompensated, volunteer basis would in effect allow employees to waive their rights to compensation under the FLSA. The Supreme Court held that an employee may not waive his or her rights to compensation due under the FLSA." OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA), 2008 WL 5483053, at *2 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)).

Just like under federal law, the North Carolina Wage and Hour Act prohibits employers from requiring their employees to waive wage and hour claims. *Rehberg*, 162 F. Supp. 3d at 507. The District Court relied on *Rehberg*, but ignored this holding. If affirmed, the District Court's decision would represent dangerous precedent for all Fourth Circuit employees and must be reversed.

Just as the parties have stipulated, Armento was an employee during the times he was paid to staff ABCCM's front desk. Therefore, state and federal law prohibit Appellee from deeming any of Armento's front desk working hours as unpaid volunteer time.

D. Differences Between the NCWHA and the FLSA Establish That Armento Must be Paid for All Hours Worked

Intentional differences in the exemption language of the NCWHA and the FLSA make clear that Armento is entitled to be paid for all hours worked for ABCCM in any role. *See* 13 N.C. Admin. Code 12.0103. Federal law requires employers to pay their employees for "volunteer" hours if the services provided are the same type of services as those for which the individual is employed by that organization. OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA), 2008 WL 5483053, at *1 (citing 29 U.S.C. § 203(e)(4)(A) and 29 C.F.R. § 553.103(a) related to public entities and non-profit food banks); U.S. DEP'T LABOR, FACT SHEET #14A: NON-PROFIT ORGANIZATIONS AND THE FAIR LABOR STANDARDS ACT (FLSA).

State law goes further and prohibits any exemption from compensable work time for "volunteer" hours where an employer-employee relationship exists. N.C. GEN. STAT. § 95-25.14(a)(5). Thus, the

parties' stipulation that Armento was an employee during his paid work time at the front desk means that the NCWHA applies to all hours worked (in any role), whether at the front desk or elsewhere at the facility.

Under North Carolina law, employees cannot volunteer to work for their employers for free. Subsection (a)(5) is clear and unambiguous. North Carolina rightly anticipated the conflict of interest that arose in this case and included this language in the NCWHA in order to protect vulnerable employees from being pressured into these types of arrangements. State wage and hour law acts exist for this very purpose—to go further in protecting employees than the baseline protections provided by federal law.

The District Court's slippery slope concerns about Habitat for Humanity and other charities is misplaced. It is only where an organization establishes an employment relationship with someone that it loses its ability to accept unpaid work from that employee. Federal law allows employers to slice that nuance more finely by only prohibiting such employers from accepting free work from an employee in the form of their usual job duties.

North Carolina rightly believed such a rule favored employers too much and that employees would feel pressure to do other jobs for their employers outside their job descriptions for free for their employers. That concern was borne out here. Where—in addition to requiring free work from Armento in his primary job—the employer also required him to perform other job duties for ABCCM for free. While federal law only speaks to the problem of ABCCM requiring some of Armento's front desk work to be unpaid, North Carolina law protects him from having to do other work for his employer for free as well. This Court should respect that policy choice of the North Carolina legislature and enforce this provision preventing employers from requiring any volunteer time from workers with whom they have established employer-employee relationships.

CONCLUSION

Vulnerable employees like Armento deserve more protection than the law provides to those more freely able to bargain for their labor. The District Court did the opposite when it equated at-risk homeless workers with prisoners and deprived Armento of the protections of both state and federal wage and hour laws. Both the NCWHA and FLSA prohibit

employers from having their employees donate unpaid time to perform their usual job duties. North Carolina law goes further in requiring all hours worked by employees to be paid time. The District Court ignored that legislative judgment and its decision should be reversed.

Respectfully submitted,

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(s) Kevin P. Murphy

Attorney for North Carolina Advocates for Justice

Dated: April 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2020, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: North Carolina Advocates for Justice

_____ as the
(party name)

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