

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 07-CV-00753-MSK-BNB

ALEXANDER L. TRUJILLO,
DAVID HENRICHSEN,
GILBERT LUCERO,
ALAN ROMAN,
COLBY DOOLITTLE,
OTTO KNOLLHOFF, and
MATT MARTIN,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs respectfully submit the following Response to the Defendant's Motion to Dismiss [DOC 19] the Plaintiffs' Third, Fourth, Fifth and Sixth Claims for Relief pursuant to Fed. R. Civ. P. 12(b)(6).

THE ACTION

The Amended Complaint in this action is brought by seven (7) members of the Colorado Springs Police Department; five (5) patrol officers and two (2) patrol sergeants, on behalf of themselves and others similarly situated, for recovery of unpaid overtime wages and benefits under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et. seq., and under state law.

The First and Second Claims for relief are brought under the FLSA and are not challenged by the Defendant's Motion. The Defendant's Motion seeks the dismissal of the Third (Breach of Contract), Fourth (Promissory Estoppel), Fifth (Implied Contract), and Sixth (Unjust Enrichment) claims for relief.

There is a strong presumption against the dismissal of claims under Fed. R. Civ. P. 12(b)(6). *Cottrell Ltd. V. Biotrol Intern, Inc.* 191 F.3d 1248, 1251 (10th Cir. 1999). Only if a plaintiff can allege no set of facts in support of its claim is dismissal appropriate. *Jojoba v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995). Taken together, the factual allegations of the Amended Complaint are sufficient to allege the claims which have been asserted.

DEFENDANT'S MOTION TO DISMISS

Defendant ostensibly brings its motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. As this Court's published Practice Standards clearly instruct, a 12(b)(6) motion should demonstrate that Plaintiffs have failed to *allege* the necessary elements of the claims asserted. Mostly, if not entirely, Defendant's Motion fails to do so. Rather, the Motion argues that Plaintiffs "cannot establish", or "have not demonstrated" proof of the elements alleged. Inasmuch as this is not the standard for deciding motions under Fed. R. Civ. P. 12(b)(6), the Defendant's motion should be summarily denied. More to the point, Plaintiffs have alleged sufficient facts in the Amended Complaint to state claims for breach of contract, promissory estoppel, implied contract, and unjust enrichment.

1. Third Claim for Relief (Breach of Contract).

A. Burden of Proof: Plaintiffs concede that they bear the burden of production of a prima facie case.

B. Elements: Plaintiffs dispute the Defendant's recitation of the first element of the claim (i). Citing *Western Distributing Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992), Defendant states that a party seeking to recover on a claim for breach of contract against a municipal corporation must prove "(i) existence of a contract *whose terms are in conformity with the municipality's charter, code, and other municipal laws.*" (Motion at p. 2; italics added). *Western Distributing*, a case between two private parties, does not include the italicized language. Rather, *Western Distributing* states that the first element of a claim for breach of contract is "the existence of a contract." *Id.* at 1058. Nor does *Chellsen v. Pena*, 857 P.2d 472 (Colo. App. 1992) cited by Defendant, state such an element.

From this flawed, and inaccurate premise, Defendant recites a litany of City Charter and Code provisions, and challenges the claims of the Amended Complaint for failure to allege compliance with the municipal laws. (Motion at p. 4). No Colorado case has held that a plaintiff must allege, either generally or specifically, compliance with municipal laws in order to state a claim for breach of contract. Rather, failure to comply with a municipal code requirement, such as prior appropriations, debt limitations, or the like, has been recognized as a defense, to be raised and proved by the defendant. *City and County of Denver v. Bowen*, 67 Colo. 315, 317, 326, 184 P. 357 (1919) (It is not necessary to allege the authority of the [municipality] nor other matters of evidence requisite to a valid contract); *Hall v. Cook*, 359 Ill. 528, 540, 195 N.E. 54 (Ill. 1935) (want of a lawful appropriation is a defense and the burden was on the defendant to show). See also, McQuillan The Law of Municipal Corporations, § 49.36 Defenses. (Assertion of constitutional debt limit must be supported by affirmative proof; burden of proving illegality of contract because of prior appropriations is on city.)

C. The Amended Complaint Sufficiently Alleges the Elements of a Claim for Breach of Contract:

The Amended Complaint alleges that Plaintiffs are employed by the City as police officers (p. 3, ¶ 11-18), that the City has agreed to pay the police officers for all hours actually worked (p. 5, ¶ 25-27, p. 12 ¶ 71), that Plaintiffs have performed required work for which they have not been paid (p. 5, ¶ 31; p. 6-7, ¶ 36; p. 8, ¶ 42-45; p. 23, ¶ 72, 73), and that the Defendant's actions constitute a breach of the contract with Plaintiffs, to their damage (p. 12, ¶ 74). These factual allegations are sufficient to state a claim for breach of contract under Colorado law.

Defendant states that Plaintiffs make no allegations "that they had an express contract with the Defendant." (Motion, p. 5). This is incorrect. Plaintiffs clearly allege that the Defendant has "agreed" to pay Plaintiffs for all hours worked, including overtime. (Amended Complaint, p.5, ¶ 25-27). The Defendant's misperception may come from the wording of paragraph 70 of the Amended Complaint, which states that Plaintiffs were "offered employment on terms and conditions set forth in Defendant's Policies and Procedures and Standard Operating Procedures." The Amended Complaint does not state, and Plaintiffs do not allege, that the terms of employment are only set forth in the Policies and Standard Operating Procedures. Rather, Plaintiffs intend to prove the contract between the parties by these, and other written and oral statements of the Defendant. Perhaps Plaintiffs could have stated that the terms of their employment were also set forth in Defendant's Policies and Defendant's Standard Operating Procedures. In any event, Plaintiffs allege an express contract with the Defendant.

Plaintiffs allege sufficient facts to establish a contract between the parties based upon the parties' written or oral words. *Agitrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192

(Colo. 2001). To the extent that Plaintiffs rely on the language of Defendant's Personnel Policies and Procedures as a contract, Plaintiffs will have to prove that Defendant's actions manifested an intent to be bound. *Evenson v. Colorado Farm Bureau Mutual Insurance Co.*, 879 P.2d 402, 408, 409 (Colo.App. 1994). See below at p. 7.

2. Fourth Claim for Relief (Promissory Estoppel).

A. Burden of Proof: The Plaintiffs concede that they bear the burden of production of a prima facie case.

B. Elements: Plaintiffs agree with Defendant's identification of the elements of a prima facie case.

C. The Amended Complaint Sufficiently Alleges Elements i, iii, and iv:

At the outset, it should be noted that Defendant does not argue that Plaintiffs have failed to *allege* facts constituting a prima facie case. Rather, the Defendant asks the Court to conclude from the Amended Complaint alone, that the Defendant should prevail on the claim. To call this premature and without foundation is a significant understatement. Nonetheless, Plaintiffs will respond to the Motion following this Court's procedures for Motions to Dismiss.

element (i): The Amended Complaint alleges promises of the City to pay for all hours worked (p. 5, ¶ 25, p. 12, ¶ 70, 71), and to pay overtime for all hours worked over eighty (80) hours per two week period (pg 5, ¶ 26). The allegations are sufficient to allege promises by the Defendant. Defendant's motion suggests that the Policies and Procedures do not, as a matter of law, constitute a promise (no mention is made of the Standard Operating Procedures). At this stage of the pleadings and case, the Court has absolutely no context in which to consider this argument. It should be rejected out of hand.

element (iii): The Amended Complaint alleges that the Plaintiffs have reasonably relied and acted upon the agreement to pay for all hours worked, including overtime (p. 5, ¶ 27), and that the Plaintiffs and Class Members have relied upon the Defendant's Policies and Procedures, and Standard Operating Procedures, to their detriment (p. 12, ¶ 77). Plaintiffs allege that they have not been paid for all hours worked (p. 12, ¶ 72, 73). In short, Plaintiffs allege reasonable reliance and detriment (not being paid for their work).

Again, Defendant asks the Court to prejudge the case. Defendant adds that a disclaimer found in the City Code is dispositive. Again, no mention is made of the Standard Operating Procedures. Further, Defendant would have the Court ignore that Colorado Courts have enforced such provisions despite disclaimers, in proper circumstances. *Evenson, supra* at 409.

The factual allegations of the Amended Complaint should be the proper focus of the Motion, and they are sufficient to allege reasonable reliance to Plaintiffs' detriment.

element (iv): The Amended Complaint alleges that injustice can only be avoided by enforcement of the Defendant's commitment that its police officers be paid for all hours worked (p. 13, ¶ 78). This statement is supported by the factual allegations set forth above, i.e., that Defendant obtained the services of its police officers under promises that they would be paid for all of their work. The allegation is sufficient to create an inference that it would be unjust not to award them the promised pay.

3. Fifth Claim for Relief (Implied Contract)

A. Burden of Proof: Plaintiffs agree that they have the burden of proof of the claim.

B. Elements: Plaintiffs dispute the Defendant's recitation of the elements of the claim. Plaintiffs allege a contract implied-in-fact. See *Agritrack*, supra at 1190, 1192; CJI-Civ. 4th 30:31.

C. Elements of Contract Implied-in-Fact:

The Amended Complaint plainly alleges that Plaintiffs rendered services to the Defendant, with the reasonable expectation that they would be paid for their work (Amended Complaint at p. 5, ¶ 27; p. 13, ¶81). The Amended Complaint alleges facts that show that Defendant required Plaintiffs to perform services under circumstances that it knew or should have known that Plaintiffs expected to be paid for their work (Amended Complaint at p. 13, ¶82), making Defendant liable for the reasonable value thereof (Amended Complaint, p. 13, ¶83).

D. Elements of Implied Employment Contract Claims:

Defendant's Motion apparently refers to the enforcement of Defendant's personnel "handbook" as an implied employment contract, also addressed above at p. 4. Again, Defendant has added an element (ii), not found in Colorado law (that the implied contract is not contrary to charter, code or other municipal laws). Neither of the cases cited by Defendant sets forth such an element.

Plaintiffs have alleged plainly worded promises by Defendant to pay for all hours actually worked, and to pay overtime wages on specific terms. (Amended Complaint p. 12, ¶70, 71, 73). These allegations are sufficient to infer a "promissory intent" that could reasonably be considered a commitment by the Defendant. They allege statements which are sufficiently definite and specific to be enforced by the Court. *Soderlun v. Public Service of Colorado*, 944

P.2d 616, 621 (Colo. App. 1997). As such, the allegations are sufficient to establish the element necessary to enforcement of personnel policies as a contract. Moreover, if the evidence is conflicting or will admit of more than one inference, and one view would support the existence of a contract, the issue is one for the jury. *Soderlun*, at 621.

4. Sixth Claim for Relief (Unjust Enrichment).

A. Burden of Proof: Plaintiffs agree that they have the burden of the proof of the claim.

B. Elements: Plaintiff concurs with Defendant's statement of the elements of the claim.

C. Element iii is Supported by the Amended Complaint:

element (iii): The Amended Complaint alleges that Plaintiffs performed services required by and for the benefit of Defendant (Amended Complaint, p. 5, ¶31), for which they were not paid. The allegations are sufficient to state a claim for unjust enrichment under Colorado Law. Whether "conflicts with municipal charter and code" may defeat the claim cannot be determined at this stage of the proceedings. Defendant's argument that Plaintiffs "cannot establish any inequity", again, asks the Court to prejudge the case without any evidence. The claim should be allowed to stand.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Motion to Dismiss should be denied.

DATED this 18th day of July, 2007.

Respectfully submitted,

SPARKS WILLSON BORGES
BRANDT & JOHNSON, P.C.

By s/Scott W. Johnson
Scott W. Johnson
Paul W. Hurcomb
P.O. Box 1678 (80901)
24 South Weber, Suite 400
Colorado Springs, CO 80903
(719) 475-0097
Fax: (719) 633-8477
E-Mail: swjohns@sparkswillson.com
pwhurcomb@sparkswillson.com

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2007, I electronically filed the foregoing Plaintiffs' Response to Defendant's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Steven W. Moore
Attorney for Defendant
BAKER & HOSTETLER LLP
303 E. 17th Ave., Suite 1100
Denver, CO 80203
Email: smoore@bakerlaw.com

and

Stacy L. Gatto
Attorney for Defendant
Office of the City Attorney
P.O. Box 1575, Mail Code 510
30 South Nevada Avenue, Suite 501
Colorado Springs, CO 80903-1575
E-mail: sgatto@springsgov.com

s/Scott W. Johnson
Scott W. Johnson
Attorney for Plaintiffs
SPARKS WILLSON BORGES BRANDT
& JOHNSON, PC
P.O. Box 1678 (80901)
24 South Weber, Suite 400
Colorado Springs, CO 80903
(719) 475-0097
Fax: (719) 633-8477
E-Mail: swjohns@sparkswillson.com

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