UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Thomas Hale and Justin Schreckenstein, on behalf of themselves and those similarly situated, Plaintiffs, v. ABRA Auto Body & Glass, Inc., Defendant.	Civil No. 07-3367 PAM/JSM **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' ERISA CLAIMS AND TO STRIKE RULE 23 ALLEGATIONS AND PRAYER FOR RELIEF PERTAINING TO ERISA CLAIMS**

INTRODUCTION

Plaintiffs have sued Defendant ABRA Auto Body & Glass, Inc. ("ABRA") for its alleged improper classification of its Customer Service Representatives ("CSMs") as exempt, a claim they bring as a collective action under the Fair Labor Standards Act ("FLSA"). Plaintiffs then attempt to expand this alleged collective action into a hybrid collective/class action by pleading claims arising under the Employee Retirement Income Security Act ("ERISA"). ERISA class claims are adjudicated pursuant to Rule 23 of the Federal Rules of Civil Procedure and are therefore "opt-out" class actions. The motive to create an opt-out class action within an FLSA "opt-in" class action is obvious: cast the net as wide as possible with as little effort as possible.

Plaintiffs' creative pleading fails because Plaintiffs' ERISA claims are, quite simply, FLSA claims in disguise. This Court should "call a spade a spade" and dismiss Plaintiffs' ERISA allegations for failure to state a claim.

BACKGROUND

Defendant ABRA is a Minnesota-based national auto repair center that provides collision, auto glass, and dent removal services. (Pls.' Am. Compl. ¶¶ 11-12.) The named Plaintiffs are former employees of ABRA who worked as Customer Service Managers ("CSMs") at ABRA locations in Georgia. (Id. ¶¶ 8-9.) They contend that ABRA incorrectly classified its CSMs as exempt[1], resulting in a failure to pay overtime pay, a failure to properly record overtime worked, and a failure to credit overtime compensation earned for purposes of ABRA's 401(k) Savings Plan ("the Plan"). (Id. ¶¶ 26, 29, 31.) Based on these allegations, Plaintiffs commenced this lawsuit on behalf of all CSMs employed by ABRA within the past three to six years in twelve states. (Id. ¶ 3.) Plaintiffs allege violations of the FLSA, ERISA, and the common law. (Id. ¶ 1.)

Plaintiffs' First Cause of Action seeks compensation for unpaid overtime wages under the FLSA. (Id. ¶ 41.) Plaintiffs assert that the alleged FLSA violation also entitles them to relief under ERISA, based on the Plan that ABRA provides for the benefit of its employees. Plaintiffs contend that the benefits owed to employees under the Plan are related to the compensation paid to the employee. (Id. ¶¶ 19-20.) Plaintiffs' Second

[1] Plaintiffs also claim that ABRA incorrectly classified its Customer Service Representatives ("CSRs") as exempt. However, during the relevant period, ABRA's CSRs were treated as nonexempt and paid overtime. ABRA has advised Plaintiffs' counsel of these facts and expects Plaintiffs to voluntarily remove these allegations from the First Amended Complaint.

Cause of Action alleges that by not recording unpaid overtime hours, ABRA violated ERISA by failing to maintain sufficient records of the benefits owed to each employee under the Plan, since these benefits "are dependent, in part, on . . . employees' overtime wages." (Id. ¶¶ 45-46.) Plaintiffs' Third Cause of Action alleges that ABRA violated ERISA by breaching its fiduciary duties to the beneficiaries of the Plan by "failing to credit compensation due for overtime." (Id. ¶ 53.)

SUMMARY OF THE ARGUMENT

Plaintiffs' ERISA claims fail for a number of reasons. These claims ostensibly request injunctive relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). In reality, however, both claims are thinly-veiled attempts to obtain money damages, which may only be obtained, if at all, under ERISA § 502(a)(1)(B), and only after Plaintiffs exhaust their administrative remedies. Plaintiffs' Second Cause of Action is predicated on the record-keeping requirement of ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1), which permits no private cause of action. Plaintiffs' Third Cause of Action not only fails to allege a breach of any fiduciary duty under ERISA, but also fails to even allege a claim under ERISA's fiduciary breach provision, ERISA § 502(a)(2). Finally, Plaintiffs' ERISA claims are time barred. Plaintiff's ERISA claims should therefore be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). Likewise, the Rule 23 allegations, predicated on Plaintiffs' ERISA claims, and all portions of the Prayer For Relief referencing ERISA, should be stricken under Fed. R. Civ. P. 12(f).

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Even though a district court must accept the allegations contained in the complaint as true, Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986), a complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, --- U.S. ---, 127 S.Ct. 1955, 1964-65 (2007). In other words, a "plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . . , rather than facts that are merely consistent with such a right." Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007). A motion to strike may be granted to remove "any redundant [or] immaterial . . . matter" from the record. Fed. R. Civ. P. 12(f).

ARGUMENT

I. PLAINTIFFS' ERISA CLAIMS FAIL BECAUSE THEY HAVE NO CAUSE OF ACTION UNDER ERISA § 502(a)(3) AND HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES AS REQUIRED BY § 502(a)(1)(B).

A. Plaintiffs Do Not Seek "Equitable Relief" and Therefore May Not Pursue Claims Under ERISA § 502(a)(3).

Plaintiffs plead their ERISA claims disingenuously. Plaintiffs purport to ask this Court for equitable relief, bringing their claims under § 502***(a)(3)***, ERISA's "catch all" civil enforcement provision, which permits injunctive and other equitable relief to be granted "to enforce any provisions of this subchapter or the terms of the plan." ERISA §

502(a)(3), 29 U.S.C. § 1132(a)(3).[2] Yet, the direct effect of the injunctive relief sought is to enable Plaintiffs to recover ***money damages*** for benefits based upon the crediting of overtime hours and payment of back wages. Thus, Plaintiffs' alleged ERISA claims--however costumed--are to recover benefits. Therefore, they fall within the scope of a

ERISA-governed plan cannot be transformed into claims for injunctive or other equitable relief under ERISA's catch all provision.

In similar cases, the Circuit Courts of Appeal, including the Eighth Circuit, have been careful not to permit claims for money damages to be brought under ERISA § 502(a)(3), even if they arguably seek equitable relief. In Geissal v. Moore Med. Corp., the Eighth Circuit held that where a plaintiff is provided adequate relief under ERISA § 502(a)(1)(B), she may not seek the same remedy by pleading under ERISA § 502(a)(3). 338 F.3d 926, 933 (8th Cir. 2003). In Nechis v. Oxford Health Plans, Inc., the Second Circuit refused to issue an injunction to "correct [the defendant's] disclosures and to reform its claims resolution procedures" because the plaintiff "could have pursued an alternative and effective remedy under § 502(a)(1)(B) of ERISA to recover the value of benefits wrongly denied." 421 F.3d 96, 103 (2d Cir. 2005). In Callery v. U.S. Life Ins. Co., the Tenth Circuit refused to grant an injunction ordering insurance proceeds to be credited to the plan account, stating that "such relief is compensatory and not typically available in equity" and that ERISA § 502(a)(3) was not intended to serve as a "safety net" for claims not available elsewhere. 392 F.3d 401, 405-406 (10th Cir. 2004). Finally, the Third Circuit has emphasized that courts must apply the catch all equitable relief provision cautiously, especially where, like here, an individual plan participant still has the ability to seek redress from a functioning ERISA plan. Ream v. Frey, 107 F.3d 147, 152 (3d Cir. 1997). The Ream court noted that it permitted the plaintiff to assert an equitable claim under § 502(a)(3) only because of the specific facts alleged–the plaintiff sought restitution for money already paid into an ERISA plan that had become defunct.

107 F.3d at 147. The court would have denied the equitable claim had a functioning plan been in place. Id. at 152.

In addition to distinguishing between ERISA claims based upon the type of remedy sought--monetary versus equitable--the courts also draw a distinction based upon whether the claims require the court to interpret the ERISA statute itself, or to interpret the actual plan that is the subject of the claims. Where resolution of the claim rests upon an interpretation and application ***of the plan***, rather than upon an interpretation and application of ERISA, the claim is considered one for benefits under § 502(a)(1)(B). Smith v. Snydor, 184 F.3d 356, 362 (4th Cir. 1999). This is the case here, making Plaintiffs' claims doubly inappropriate under § 502(a)(3).

B. Premick v. Dick's Sporting Goods, Inc. Requires Dismissal.

The Western District of Pennsylvania recently dismissed ERISA claims nearly identical to the ones in this case, ruling that they were not cognizable under ERISA's § 502(a)(3) catch all provision. In Premick v. Dick's Sporting Goods, Inc., No. 02:06cv0530, 2007 WL 141913 (W.D. Pa. Jan. 18, 2007), the court recognized:

> Upon close examination of the Complaint, it is clear that in Count III Premick is asserting a claim for benefits he claims to be owed because his 401(k) account was allegedly shorted as a result of Dick's failure to pay him certain amounts of overtime to which he contends entitlement. In that vein, a claim for benefits from a functioning plan can only be brought under 29 U.S.C. § 1132***(a)(1)(B)*** and is not a claim for equitable relief, but rather one for damages.

Id. at *6 (emphasis added).

This case should be analyzed the same way.[3] Plaintiffs' ERISA claims clearly fall within the scope of ERISA's § 502(a)(1)(b) more specific enforcement provision. Each claim seeks money damages, benefits, or a right to future benefits. Plaintiffs' Second Cause of Action requests injunctive and other equitable relief to remedy ABRA's alleged failure maintain records sufficient "to determine ***the benefit accrual rights*** of 401(k) Plan participants." (Pls.' Am. Compl. ¶¶ 43, 46-47) (emphasis added). Similarly, Plaintiffs' Third Cause of Action alleges that ABRA "breached its fiduciary duty by ***failing to credit compensation*** due for overtime . . . as compensation under the 401(k) Plan." (Id. ¶ 53) (emphasis added). Further, Plaintiffs seek "an injunction requiring Defendant to ***credit all members of the ERISA class with compensation*** under the 401(k) Plan for . . . overtime work performed." (Id. ¶ 54) (emphasis added).

Simply put, Plaintiffs are asserting claims for benefits they feel they are owed because ABRA allegedly reduced their benefits by not paying overtime. They believe that if ABRA had paid them for overtime, the terms of the Plan would dictate a higher level of benefits. They further believe that ABRA's failure to award them overtime, and, consequently, reduction of their Plan benefits, constitutes a breach of fiduciary duty

[3] Indeed, it appears Plaintiffs' First Amended Complaint is modeled after the complaint in Premick. For example, Count III of the Premick complaint alleged that the defendant employer "failed to maintain required hourly time records as required by 29 U.S.C. § 1059(a)(1) and 29 U.S.C. § 1132(a)(3)." 2007 WL 141913, at *5. Likewise, Count IV of the Premick complaint alleged that Dick's "breached its fiduciary duties by failing to credit its salaried associates for wages due for the actual overtime worked." Id. at *7. The Premick plaintiffs sought "an injunction requiring Dick's to credit all members of the ERISA class with their base weekly wages . . . and overtime under the 401(k) plan." Id. The similarities with Plaintiffs' First Amended Complaint in this case are striking.

under ERISA. If cognizable at all,[4] these are precisely the claims for which ERISA § 502***(a)(1)(B)*** was designed. The only purpose of the injunctive and other equitable relief sought by Plaintiffs' ERISA claims is plainly to enforce rights and clarify benefits owed to Plaintiffs under the Plan. Claims for benefits, such as these, are claims for damages that may be brought only under ERISA § 502(a)(1)(B). See Premick, 2007 WL 141913, at *6; see also Varity Corp., 516 U.S. at 512 (holding § 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to . . . the payment of claims," and should have been invoked in this case).

Because Plaintiffs' ERISA claims--if ERISA claims at all--fall within the scope of § 502(a)(1)(B), they may not be brought under the "catch all" enforcement provision of § 502(a)(3). The claims are not properly before this Court and should be dismissed.[5]

C. Plaintiffs Fail to Plead Exhaustion of Administrative Remedies As Required By § 502(a)(1)(B).

Even if Plaintiffs had properly brought their claims under ERISA § 502(a)(1)(B), they would still be required to plead that they have exhausted the administrative remedies available to them under the Plan before bringing suit. Plaintiffs have not done so.

4 Plaintiffs' ERISA claims seeking overtime compensation and creditable hours are duplicative of their FLSA claims.

5 Plaintiffs will likely point to Rosenburg v. IBM Corp., No. C 06-0430, 2006 WL 1627108 (N.D. Cal. June 12, 2006), in support of their opposition to ABRA's Motion to Dismiss and Strike. Notably, the plaintiff in Premick presented the Rosenburg decision to the court as the only Exhibit to their brief, relying almost exclusively upon it to oppose Dick's motion. The Premick court considered and soundly rejected Rosenburg and its reasoning. This Court should do the same.

Indeed, avoiding this requirement seems to be either a goal of Plaintiffs' convoluted pleading or a grave oversight.

In nearly every circuit, plan participants are required to bring disputes concerning benefits before the plan administrator prior to bringing suit. See Fallick v. Nationwide Mut. Ins. Co., 162 F. 3d 410, 418 n. 4 (6th Cir. 1998) (listing cases). In the Eighth Circuit, this requirement was first recognized in Kinkead v. Sw. Bell Corp. Sickness & Accident Disability Benefit Plan, 111 F.3d 67 (8th Cir. 1997). Kinkead held that if a plan establishes a procedure for appealing a denial of benefits, pursuit of a remedy through that process is a prerequisite to suit under § 502(a)(1)(B). Id. at 68.

This requirement was revisited recently by the Eighth Circuit in Wert v. Liberty Life Assur. Co. of Boston, Inc., 447 F.3d 1060 (8th Cir. 2006). The court in Wert noted that "[c]ases since Kinkead have consistently imposed an exhaustion requirement where there is notice and where there is no showing that exhaustion would be futile." Id. at 1065. The requirement serves the purposes of "assembling a fact record that will assist the court if judicial review is necessary, minimizing the likelihood of frivolous lawsuits... giving claims administrators an opportunity to correct errors, promoting consistent treatment of claims, providing a non-adversarial dispute resolution process, [and] decreasing the cost and time of claims resolution." Id. at 1066 (internal citations omitted).

Other circuits faced with situations similar to the instant case have been blunt in their criticism of attempts to escape this requirement by pleading in equity. "Plaintiff cannot get around the exhaustion requirement by simply disguising his claim." Weiner v.

Klaus and Company, Inc., 108 F.3d 86, 91 (6th Cir 1997). "If we were to allow claimants to play this characterization game, then the exhaustion requirement would be rendered meaningless." Drinkwater v. Metro. Life Ins., 846 F.2d 821, 826 (1st Cir. 1988).

Plaintiffs plead nothing with respect to administrative remedies. Nothing. This is fatal to their already-flimsy ERISA claims.

II. PLAINTIFFS' SECOND CAUSE OF ACTION MUST BE DISMISSED BECAUSE ERISA RECORD-KEEPING REQUIREMENTS ARE ENFORCED EXCLUSIVELY BY THE DEPARTMENT OF LABOR.

Plaintiffs' Second Cause of Action alleges that because ABRA did not maintain records of overtime hours for employees it classified as exempt, it has therefore failed to maintain adequate records of the benefits owed under the Plan. (Pls'. Am. Comp. ¶ 46.) This claim must be dismissed because the record-keeping obligations imposed by ERISA may be enforced only by the Department of Labor.

ERISA obligates employers to "maintain records . . . sufficient to determine the benefits due or which may become due" under a savings plan. ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1). A violation of this provision results in a civil penalty, payable to the Secretary of Labor. ERISA § 209(b), 29 U.S.C. § 1059(b).[6] The authority addressing

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[6] ERISA § 209 provides in relevant part:

> (a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.
> (b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply

this issue has uniformly held that Congress intended to limit enforcement of ERISA § 209 to this civil penalty; no private right of enforcement exists. Premick, 2007 WL 141913 at *6; see also Colin v. Marconi Comm. Sys. Employees' Ret. Plan, 335 F. Supp. 2d 590, 606 (M.D.N.C. 2004); Lowe v. Telesat Cablevision, Inc., 837 F.Supp. 410, 412 (M.D. Fla. 1993). Because ERISA § 209 does not permit a private cause of action, Plaintiffs' Second Cause of Action fails as a matter of law.

III. PLAINTIFFS' THIRD CAUSE OF ACTION MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE A CONGNIZABLE BREACH OF ANY FIDUCIARY DUTY UNDER ERISA.

Plaintiffs' Third Cause of Action alleges that ABRA breached its fiduciary duty to the alleged class by "failing to credit compensation due for overtime." (Pls.' Am. Compl. ¶ 53.) This claim fails because ERISA does not govern an employer's decisions regarding its classification of employees as exempt or nonexempt for FLSA purposes.

Plaintiffs' claim asserting a breach of ERISA fiduciary duty is again an attempt to dress a relatively straightforward wage claim as an ERISA violation.[7] Plaintiffs, however, have no legal basis for doing so. Classification and compensation decisions

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> with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

29 U.S.C. § 1059.

[7] Notably, Plaintiffs did not even plead their breach of fiduciary duty claim pursuant to § 502***(a)(2)***, 29 U.S.C. § 1109, ERISA's ***specific fiduciary breach provision***, which makes an ERISA fiduciary personally liable for a duty breach. Rather, and in line with the rest of their inventive pleading, they plead it under ERISA's catch all provision, § 502(a)(3). This oversight--or intentional omission--highlights the weakness of Plaintiffs' breach of fiduciary duty claim.

made by an employer are entirely separate from a plan administrator's duty to faithfully manage the plan under ERISA and the terms of the plan itself. Placing the burden on plan administrators to oversee an employer's classification and compensation decisions would result in an unwieldy, complicated, and expensive system that would tend to discourage employers from offering such plans in the first place, contrary to the purpose of ERISA.

ERISA does not--and cannot--govern decisions about classifying an employee under the FLSA. ERISA fiduciary duties apply only to certain employer actions with respect to a benefit plan, not to its actions in its role as employer. The text of ERISA makes this limitation clear, providing that "a fiduciary shall discharge his duties ***with respect to a plan*** solely in the interest of the participants and beneficiaries." ERISA § 404, 29 U.S.C. § 1104 (emphasis added). Indeed, "[t]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets." Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986).

Courts in the Eighth Circuit have repeatedly recognized that ERISA's fiduciary duties do not extend to "a business decision or judgment made in connection with the on-going operation of a business." Ecklekamp v. Beste, 201 F. Supp. 2d 1012, 1023 (E.D. Mo. 2002), aff'd, 313 F.3d 863 (8th Cir. 2002). Similarly, ERISA does not require "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, [to] be performed solely in the interest of plan participants." Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988) (collecting cases). Rather, "[u]nder ERISA, an individual acts in a fiduciary capacity only to the extent that s/he exercises discretionary control or responsibility over plan administration or assets. The discretion required to invoke ERISA's fiduciary obligations ***must relate to fiduciary functions*** such as plan management or administration." Ecklekamp, 201 F. Supp. 2d at 1023 (emphasis added).

In Ecklecamp, the court determined that although decisions concerning compensation "ultimately affect a plan indirectly," these decisions did "not implicate fiduciary concerns regarding plan administration or assets," and therefore were outside the scope of ERISA. Id. In Hickman, the court emphasized that compensation and benefit decisions were insulated from liability as a matter of law as long as the administrator "strictly adheres to the lawful terms of an employee benefit plan." Hickman, 840 F.2d 566. Decisions concerning how to classify employees have, at most, only a "collateral effect on prospective, contingent employee benefits." Hickman, 840 F.2d at 566. The classification, though governed by the FLSA, is at heart a business judgment, no more related to managing a plan than any other decision about what wage to pay or how to structure an employee's wages. These determinations plainly are not ERISA fiduciary decisions.

Allowing breach of fiduciary duty claims as pled by Plaintiffs would create unmanageable chaos for plan administrators. An employer who served as a plan administrator would be required to make every classification and compensation decision twice–once as a self-interested employer (FLSA), and once as a fiduciary (ERISA). This duty would extend not only to employers who serve as plan administrators, but to third parties who manage ERISA funds. These third parties would be put in the untenable position of having to re-evaluate classification and compensation decisions of every employer with respect to every employee in order to avoid liability. The administrators could find themselves liable anytime an employee has a dispute with an employer over wages, hours, benefits, termination–any employer decision that might have a tangential effect on plan benefits. The cost of administration would be overwhelming in such an environment, and would lead to fewer employers--far fewer--being willing to offer such benefits in the first place. This would frustrate ERISA's very purpose: to encourage employers to create employee benefit plans in the first place. Aetna Health Inc. v. Davila, 542 U.S. 200, 215 (2004).

Plaintiffs' Third Cause of Action is nothing more than an FLSA claim awkwardly shoehorned into an ERISA claim. The case law in the Eighth Circuit makes clear classification and compensation decisions, having nothing to do with the administration of plan assets, do not implicate fiduciary obligations under ERISA. Because this claim fails to identify a cognizable breach, it should be dismissed.

IV. PLAINTIFFS' ERISA CLAIMS MUST BE DISMISSED BECAUSE THEY ARE TIME BARRED.

Finally, but not insignificantly, Plaintiffs' Second and Third Causes of Action are barred by the applicable two-year statute of limitations.

ERISA does not contain specific statute of limitation periods for actions under ERISA §§ 502(a)(1)(B) or 502(a)(3). Instead, courts use the most analogous state law

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statute of limitations to fill the gap. See Shaw v. McFarland Clinic, 363 F.3d 744, 747 (8th Cir. 2004). In Minnesota, the two-year statute of limitations governing contract actions to recover unpaid benefits applies to ERISA claims for benefits. Abdel v. U.S. Bancorp, 457 F.3d 877, 880 (8th Cir. 2006); Cavegn v. Twin City Pipe Trades Pension Plan, 223 F.3d 827, 829-30 (8th Cir. 2000) (regarding ERISA § 502(a)(1)(B) claims as contract actions, and holding that the most analogous Minnesota law is Minn. Stat. § 541.07(5), which provides a two-year statute of limitations in contract actions for unpaid benefits); Adamson v. Armco, Inc., 44 F.3d 650, 652 (8th Cir. 1995), cert. denied, 516 U.S. 823 (1995) (noting that Minnesota courts have applied the two-year statute of limitations period in Minn. Stat. § 541.07(5) broadly and have determined that it applies to "all damages arising out of the employment relationship"); see also Minn. Stat. § 541.07(5). Plaintiffs' Second and Third Causes of Action are claims for monetary damages that, to the extent they state ERISA claims, should have been brought under ERISA § 502(a)(1)(B). Furthermore, these claims clearly arise out of the employment relationship. Therefore, the two-year statute of limitations period provided by Minn. Stat. § 541.07(5) applies to Plaintiffs' S375(A250(c.)-371)-65(a15(i)27 m)58(s)13(6)] TJ0.00 Tc 388398 action accrues when he "discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." Id.

Plaintiffs' ERISA claims accrued more than two years before commencement of this lawsuit on July 17, 2007. Plaintiff Hale worked for ABRA as a CSM beginning in or about February 2005. (Pls.' Am. Compl. ¶ 8.) Plaintiff Schreckenstein began working for ABRA as a CSM in or about June 2004. (Id. ¶ 9.) Both Plaintiffs allegedly "consistently worked more than 50 hours per week while employed by ABRA." (Id. ¶¶ 8-9.) Plaintiffs further allege that ABRA had a "regular practice of requiring Plaintiffs . . . to work a minimum of 50-60 hours in any given work week." (Id. ¶ 38.)

Plaintiffs base their ERISA claims on ABRA's alleged failure to properly maintain accurate records and provide accurate wage statements, and alleged failure to credit all compensation that they were paid or entitled to be paid. (Id. ¶ 33.) Plaintiffs could have discovered--and with due diligence should have discovered--these alleged injuries upon receipt of their paychecks or wage statements from ABRA. If Plaintiffs' paychecks or wage statements did not reflect overtime pay, Plaintiffs should have discovered with very little due diligence that they had not been credited for such pay under the 401(k) Plan. Both named Plaintiffs began working for ABRA well over two years before commencement of this lawsuit. It is "[im]plausible on [the] face" of the First Amended Complaint that Plaintiffs could not have discovered that they did not receive credit for overtime until some time in the past two years. See Twombly, 127 S.Ct. at 1964-54. Consequently, Plaintiffs' ERISA claims are time barred under the applicable two-year statute of limitations and should be dismissed.

V. PLAINTIFFS' RULE 23 CLASS ALLEGATIONS, PREDICATED SOLELY ON ERISA, AND PLAINTIFFS' PRAYER FOR RELIEF RELATING TO ERISA AND RULE 23 SHOULD BE STRIKEN.

A motion to strike portions of a prayer for relief is properly brought under Rule 12(f) of the Federal Rules of Civil Procedure. Kalli v. Great American Ins. Co., 515 F. Supp. 1273 (D. Minn. 1981); Rosales v. Citibank, 133 F.Supp.2d 1177, 1180 (N.D. Cal. 2001). Likewise, a motion to strike Rule 23 class allegations is brought pursuant to Rule 12(f). Premick, 2007 WL 14913 at *7 (on defendant's motion to strike Rule 23 allegations the court held "there is no basis to support any of the Rule 23 allegations of the Complaint and these allegations, therefore, must be dismissed.")

When the Court grants ABRA's motion to dismiss all ERISA claims, then all allegations in Plaintiffs' Prayer for Relief relating to their ERISA claims must be stricken. Moreover, with all ERISA counts dismissed, there is no basis to support any of the Rule 23 allegations. Accordingly, ABRA requests this Court strike paragraphs 29-35 of Plaintiffs' First Amended Complaint and paragraphs C, H, I, J, and K of Plaintiffs' Prayer for Relief, all of which seek relief for Plaintiffs' purported ERISA claims.

CONCLUSION

For the foregoing reasons, the Court should dismiss, with prejudice, Plaintiffs' Second and Third Causes of Action for violations of ERISA, should strike Plaintiffs' Rule 23 allegations, and should strike those portions of the Prayer for Relief that pertain to Plaintiffs' ERISA claims.

Dated: March 3, 2008

s/Lindsay J. Zamzow

Joseph M. Sokolowski (#178366)
Lindsay J. Zamzow (#0314705)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000

Attorneys for Defendant ABRA Auto Body & Glass, Inc.