Case No. 20-1100

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Gregory G. Armento,
Plaintiff–Appellant,
v.
Asheville Buncombe Community Christian Ministry, Inc.
Defendant–Appellee.

Appeal from the United States District Court
for the Western District of North Carolina
Honorable J. Martin Reidinger
1:17-cv-00150-MR-DSC

PLAINTIFF–APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

ARGUMENT

Appellant Gregory G. Armento ("Armento") respectfully submits this Reply to Brief for Appellee, DE 43-1. Appellee Asheville Buncombe Community Christian Ministry, Inc. ("ABCCM") relies on the District Court's use of the wrong test to determine that Armento was not ABCCM's employee under the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. § 95-25.1, *et seq.*, misstates the District Court's holdings, misinterprets the statute and regulations, and proposes the wrong standard of review.

I. ABCCM proposes an incorrect standard of review.

ABCCM argues that this Court should apply a clear error standard to its Arguments §§ 3 (whether Armento was an employee under the NCWHA), 5 (whether the primary beneficiary test should apply to the relationship between Armento and ABCCM), 6 (whether the primary beneficiary test is objective or subjective), and 9 (whether the Supreme Court's test described in *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) applies). DE 43-1 at 35. These arguments involve conclusions of law and should be reviewed de novo.

II. The District Court erred by not following Supreme Court precedent.

A. Alamo Foundation is the proper test.

ABCCM claims that the District Court correctly applied the "circumstances of the whole activity" test set forth in *Steelman v. Hirsch* to determine whether Armento

was an employee. *See Steelman*, 473 F.3d 124 (4th Cir. 2007); DE 43-1, 28-32. That case presented the unusual question of whether the plaintiff was an employee of a sole proprietorship owned by her romantic partner. Because it dealt with such a unique situation, this Court specifically limited its holding:

> Our holding is limited, as befits an examination of an unorthodox financial relationship in an area not governed by bright-line rules. We certainly do not say that one member of a romantic couple can never be an employee of another. But when long-term partners perform many of the same duties in a small business and live off its proceeds, with each free to incur substantial personal expenses paid by the business, we do not confront the employer-employee relationship that the FLSA contemplates.

Id. at 132. The *Steelman* test should not be applied to the relationship between Armento and ABCCM, which involves how to distinguish between a volunteer and an employee under the NCWHA. That precise question has already been addressed in binding precedent by the Supreme Court in *Alamo Foundation*. In fact, this Court recognized in *Steelman* that such a relationship fits precisely within the ambit of what should be covered by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* The limits of the economic reality standard, this Court said, "calls for pragmatic construction of a concept—employment—that may have seemed at once too commonplace and too nuanced to define." 473 F.3d at 128. The Court then refers to the *Alamo Foundation* decision as one in which "the Supreme Court has applied the FLSA without regard to deviations from traditional employment paradigms that are largely technical." Only when "relationships have deviated from the traditional

understanding of employment in fundamental ways [has] the Supreme Court … refused to shoehorn them into the Act." *Id.* at 129. This recognition by the Supreme Court that the relationship between a rehabilitation program and its residents that perform work for it is an employment relationship covered by the FLSA directly contradicts ABCCM's suggestion that the relationship was one which "deviate[s] fundamentally from traditional employment relationships." DE 43-1 at 1. The District Court should have analyzed the relationship between Armento and ABCCM using *Alamo Foundation.*

B. Under Alamo Foundation, the Court should consider whether Armento worked in contemplation of compensation and whether he was coerced to volunteer his labor.

According to the Supreme Court, "[t]he test of employment under the [FLSA] is one of economic reality." *Alamo Found.,* 471 U.S. at 301. The two factors the Supreme Court focused on to determine whether the Foundation residents were workers or employees as a matter of economic reality were: 1) whether the individuals "work in contemplation of compensation" or whether they "neither received or expected any renumeration," and 2) whether they performed work for their own "purpose or pleasure" or whether they were motivated by other reasons. *Id.* at 295, 300 (*citing Walling v. Portland Terminal Co.*, 330 U.S. 148 at 150, 152 (1947)).

Regarding the first factor, the Supreme Court made it very clear that compensation includes food, shelter, clothing and transportation provided to residents of a rehabilitative program for free, which are simply "wages in another

form." *Alamo Found.*, 471 U.S. at 301. The Court also held that workers could be working in expectation of compensation even when they considered themselves volunteers and considered their work to be part of their ministry, because "a compensation agreement can be implied as well as express." *Id.* As for the second factor, the Court observed that when people are coerced through superior bargaining power to volunteer, they are likely not volunteering for their own purpose or pleasure. *Id. at 302* ("the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act").

Since *Alamo Foundation* was decided, this Court has examined on several occasions whether individuals are employees or volunteers under the FLSA in light of that holding. In *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 138 (4th Cir. 1999), this Court held that firefighters employed by the city were not employees when they volunteered for private rescue squads. In making this decision, this Court relied on the same factors as the *Alamo Foundation* Court. First, it considered whether the firefighters were coerced to volunteer or whether they did it for a charitable purpose. *Benshoff,* 180 F.3d at 142-43 ("we note that plaintiffs do not contend that the City or DEMS 'required' or otherwise exerted any 'control' to bring about their volunteer service in the first instance . . . Plaintiffs have explicitly disavowed that the City

coerced them to volunteer"); and at 145 ("Plaintiffs volunteered their services to the rescue squads for personal and charitable reasons"). The Court also considered whether plaintiffs worked for compensation and concluded that although the firefighters were provided workers' compensation and death benefits to their families, that was not enough to convert them to employees. *Id.* at 145. "In short, plaintiffs claim entitlement to compensation from the City for services volunteered to the rescue squads which the City did not request or demand, and for which the plaintiffs did not expect to be paid." *Id.* at 146.

In *Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421, 433 (4th Cir. 2011) this Court considered whether an exemption[1] under the FLSA for volunteers in public employment applied to a golf coach who was also an employee of the school where he coached. The Court analyzed the same factors as the Supreme Court did in *Alamo Foundation,* and its examination of those factors is instructive.[2] The *Purdham* Court focused on whether the plaintiff was coerced to volunteer, *see id.* at 428-29 ("Purdham

[1] 29 C.F.R. § 553.101(a) defines a volunteer for a public agency as someone who 1) performs the work for a "civic, charitable or humanitarian reason," 2) "without promise, expectation or receipt of compensation for services rendered."

[2] The *Purdham* Court was interpreting a FLSA volunteer exemption for public employees that does not have an exact corollary in the NCWHA; however, the regulatory definition of volunteer is based on the *Alamo Foundation* holding and therefore how this Court has applied that regulation is useful in understanding how this Court has interpreted those same factors from *Alamo Foundation*. *See Cleveland v. City of Elmendorf, Tex.*, 388 F.3d 522, 527 (5th Cir. 2004) (because the *Alamo Foundation* decision preceded the promulgation of 29 C.F.R. § 553.101(a), "it is useful in understanding the scope of the regulation").

was never coerced or pressured into becoming a coach and his employment as a security assistant is not dependent on his coaching; he is free to relinquish his role as coach at any time without fear that doing so will have any impact on his full-time employment"), as opposed to doing so for his own purpose. *Id.* at 429 ("this case presents a classic example of an individual who is motivated, in significant part, by humanitarian and charitable instincts. Purdham is motivated by his long-standing love of golf and his dedication to his student athletes"). This Court also applied the second *Alamo Foundation* factor, whether plaintiff worked in expectation of compensation. *Id.* at 430 (he coached for ten years without ever being paid, only receiving a stipend) and at 433 (the stipend was considered nominal under the regulatory definition because it was not tied to productivity).

In each of these cases, this Court followed Supreme Court precedent by examining the *Alamo Foundation* factors to determine whether the plaintiff was an employee under the FLSA: 1) whether the individual worked in expectation of compensation, and 2) whether the individual "volunteered" for his own purpose or pleasure or due to economic coercion. The Court should also do so in this case.

C. Whether Armento was engaged in commercial activity is irrelevant to the determination of his employee status under the NCWHA.

ABCCM describes the *Alamo Foundation* holding as limiting the definition of employee to workers who engage in commercial activity. DE 43-1 at 63 ("The Alamo Court specifically limited its decision, stating 'The Act reaches only the 'ordinary

commercial activities of religious organizations, 29 C.F.R. § 779.214[3], and only those who engage in those activities in expectation of compensation.'"). This is incorrect. Because *Alamo Foundation* is a FLSA case, not an NCWHA case, the Supreme Court had to determine not only whether the individuals were employees within the meaning of the act, but also whether the Foundation was "an enterprise engaged in commerce or in the production of goods for commerce." 471 U.S. at 290, 295. The Foundation claimed that as a religious organization, it was exempt from FLSA coverage because its activities were not performed for a "common business purpose." *Id.* at 296. Therefore, it was necessary for the Court to examine whether the Foundation "engaged in ordinary commercial activities" within the meaning of 29 C.F.R. § 779.214, and much of the decision is devoted to that analysis.

Alamo Foundation made two separate determinations as to the FLSA coverage prerequisites: first, "[t]he Foundation's commercial activities, undertaken with a common business purpose, are not beyond the reach of the [FLSA] because of the Foundation's religious character," and second, "its associates are employees within the meaning of the Act because they work in contemplation of compensation." 471 U.S. at 306. Because there is no requirement that ABCCM be engaged in commerce in order for the NCHWA to apply, it is only the second half of the *Alamo Foundation* holding – if you work in contemplation of compensation you are an employee not a

[3] ABCCM cited to 29 C.F.R.§ 778.214, but the *Alamo* opinion cited to 29 C.F.R. § 779.214.

volunteer - that is pertinent here. ABCCM's suggestion that the workers must be engaged in commercial activity to be considered employees under the NCWHA is wrong.[4]

D. The *Alamo Foundation* test is an economic realities test.

ABCCM argues that the "economic realities" referenced by the Supreme Court in *Alamo Foundation* for determining whether someone is an employee under the FLSA are different than the "economic realities" relied on by this Court in *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006) and subsequent decisions for determining whether someone is an employee or independent contractor, and that the Fourth Circuit's economic realities test is not appropriate in the present case. DE 43-1 at 47. However, the concept of "economic reality" referred to by the Supreme Court in *Alamo Foundation* and by the Fourth Circuit in *Schultz* both come from *United States v. Silk,* 331 U.S. 704 (1947) (distinguishing between employees and independent contractors under the Internal Revenue Code). In *Schultz,* this Court wrote, "[i]n determining whether a worker is an employee covered by the FLSA, a court considers the 'economic realities' of the relationship between the worker and the putative employer." 466 F.3d at 304. The Court then went on to describe and adopt the six-

[4] In fact, if ABCCM was engaged in the production of goods for commerce, Armento's work for them would be exempted from the NCWHA minimum wage and overtime provisions and instead be governed by the FLSA. *See* N.C. Gen. Stat. § 95-25.14(a)(1).

factor test based on factors identified in *Silk* to determine whether a worker is an employee or independent contractor as a matter of economic reality. *Id.* When the Supreme Court described this test of employment under the FLSA as one of "economic reality," 471 U.S. at 293-94, it cited to *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). *Goldberg* held that members of a cooperative were also the cooperative's employees under the FLSA because the cooperative gave them the opportunity to work and paid them to work, because the cooperative determined what they manufactured as well as what to sell it for and because they were not self-employed or independent, concluding "[i]n short, if the economic reality rather than technical concepts is the be the test of employment" then the individuals were employees, citing to *Silk* as the source of the test. *Id.*. Therefore the concept of economic reality is the same in both instances and the Supreme Court found it to be useful both to distinguish between employees and independent contractors and between employee and volunteers.

Several other circuit courts have addressed what the appropriate test and factors are for determining whether someone is an employee or volunteer, based on *Alamo Foundation*. Many describe the test as an economic reality test. *See, e.g., Rhea Lana, Inc., v. United States*, 925 F.3d 521, 526 (D.C. Cir 2019) (describing the test as "one of economic reality" and a "totality-of-the-circumstances approach" with appropriate factors being whether the workers had an expectation of compensation in exchange for services, the degree of control exercised by the employer and the extent

to which the workers' services were integral to the defendant's business); *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 766 (6th Cir. 2018) (when distinguishing between a volunteer and an employee covered by the FLSA, the threshold question is whether the purported volunteer expected to be compensated before assessing the economic realities of the working relationship).

Regardless of what they call the test, courts continue to focus on compensation and coercion. The Tenth Circuit focused on the role coercion plays when it analyzed what it means to work for you own purpose or pleasure in *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225 (10th Cir. 2018). The court held that children who picked pecans for their church were employees covered by the FLSA because they did so under pressure from the church and the threat that they would be kicked out of the community if they did not participate. *Id.* at 1231. Although some of them testified they were volunteers, there was also testimony that the work was mandatory. *Id.*

In *Cathedral Buffet* it was undisputed that the "volunteers were not economically dependent" upon the restaurant for which they supplied unpaid labor n any way; the parties stipulated as much before trial. They were not allowed to accept tips from customers. 887 F.3d at 767. The Sixth Circuit did not end the inquiry there, however, but acknowledged that even where volunteers do not expect compensation, if there is coercion involved they may still be protected by the FLSA as employees since "Congress's primary goal in enacting the FLSA was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" *Id.* (*citing Powell v. US*

Cartridge, Co., 39 US 497, 510 (1950)). Ultimately, the Court held that the volunteers were compelled to volunteer based on spiritual coercion, which is different and less concerning than the economic coercion involved in *Alamo Foundation*. *Id.* at 768. The D.C. Circuit concluded that the workers in *Rhea Lana* were employees because they did work in contemplation of compensation when they were asked to sign up for work shifts either in exchange for the opportunity to shop early or, when that didn't spur enough people to sign up, for $8 per hour. 925 F.3d at 526.

The focal point for determining whether a worker is an employee in both *Alamo Foundation* and *Schultz* and decades of FLSA jurisprudence is economic dependence. *See, e.g.*, *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service"). The factors relied on by *Schultz* are designed to determine "whether the worker is economically dependent on the business to which he renders service or is, as matter of economic reality, in business for himself." *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125,150 (4th Cir. 2015). The factors relied on by *Alamo Foundation* and its progeny emphasize two particular economic realities factors that are most relevant to determining "whether the worker is economically dependent on the business to which he renders service or is, as a matter of economic reality," a true volunteer outside the reach of the FLSA. The bottom line is that the District Court erred by failing to "consider[] the 'economic realities' of the relationship *between the worker and the putative employer*." *Id.*

E. Under *Alamo Foundation,* Armento was an employee, not a volunteer.

Despite ABCCM's suggestion to the contrary, DE 43-1 at 62-65, this case is very similar to *Alamo Foundation* (and very different than *Steelman).* ABCCM and the Alamo Foundation are both religious non-profits that take in residents who are struggling (with homelessness for ABCCM and with drug abuse and crime for Alamo) and purport to rehabilitate them. Alamo Foundation associates were "entirely dependent upon the Foundation for long periods, in some cases several years" and expected the "Foundation to provide them food, shelter, clothing, transportation and medical benefits." 471 U.S. at 293. The Veterans Restoration Quarters ("VRQ") residents are entirely dependent on ABCCM for long periods of time, to provide them food, shelter, transportation and other benefits. J.A. 250-1; 223 ¶ 28; 268.

ABCCM argues that because the service hours program was designed to reduce the dependence on ABCCM, the cases are different. DE 43-1 at 71. But while Armento was under an obligation to perform service hours, he was still a VRQ resident, entirely dependent on the VRQ for room, board, and other support. It does not matter if the service hours ultimately lead to a future in which Armento was not dependent on ABCCM, but rather whether he was dependent while performing the unpaid labor that is at the heart of this case. ABCCM also notes that those VRQ residents who do not perform service hours still receive free room and board from ABCCM. DE 43-1 at 8 and 71. However, if not exempt from ABCCM's service

hours requirement, residents like Armento do not receive free room and board and are not able to continue living at the VRQ unless they perform service hours. J.A. 492 ("Well, there's no financial compensation. You know, sometimes I'd rather not be doing [service hours] but the unspoken policy is it's, you now, pitching in your part to help and compensation for what you're getting, you know, a roof over your head and three meals a day, et cetera, et cetera"); *see also* J.A. 38, 251 ¶6; 252 ¶11, 267, 274, 361-62, 408, 419; 486:17-487:15, 727:11-21.

The Alamo Foundation associates staffed its operations just as the ABCCM residents like Armento staff ABCCM's operations. 471 U.S. at 292; J.A. 278 (overview of VRQ staffing including several service hours positions). In exchange, both entities require the residents to perform work without pay and punish those residents who do not comply. The Alamo Foundation residents did not consider themselves employees and even "vigorously protested the payment of wages, asserting that they considered themselves volunteers," *Alamo Found.,* 471 U.S. at 293, as did one of ABCCM's residents at trial. J.A. 727:22-728:1. In fact, there was no evidence in *Alamo Foundation* that any of the residents who performed work ever expected any kind of compensation. *Alamo Found,* 471 U.S. at 300-301.

No matter what test is applied, Armento was an employee when he worked for ABCCM and he should have been paid for every hour of work. He performed service hours for compensation in the form of food, shelter and other benefits. He also performed paid work for ABCCM as a front desk manager, clearly doing so in

contemplation of compensation. J.A. 253-54. He did not perform the service hours for his own charitable reasons, but rather because he felt pressure to comply with ABCCM's service hours requirement in order not to be kicked out of the VRQ. J.A. 408, 419. In short, he was entirely dependent on ABCCM as a matter of economic reality when he performed work for them. Therefore, pursuant to the Supreme Court's economic reality test for distinguishing between volunteers and employees, he was an employee. As has already been discussed, Armento was also an employee based on the economic realities factors in *Schultz* (see DE 19-1 IV.A.1 and 2) and Armento was an employee of ABCCM pursuant to the primary beneficiary analysis (see DE 19-1 IV. C. 4).

III. The trial court wrongly concluded that Armento was exempt from the NCWHA when he performed Service Hours.

ABCCM argues that "The District Court did not find that Armento was exempt from the NCWHA because of the 'volunteer' exception of N.C. Gen. Stat. § 95-25.14(a)(5)." *Id.* at 66-67. But that is precisely what the District Court did, and it was error to do so. The District Court's first conclusion of law includes a lengthy discussion of the issue of whether Armento was a volunteer, and ultimately concludes that, "[l]ooking at the totality of the circumstances, the Court finds and concludes that the structure and purpose of the Service Hours program were such that the Plaintiff was a volunteer rather than an employee when working those hours, and thus was outside the scope of the NCWHA." J.A. 819.

Not only is ABCCM incorrect about the trial court's reliance on the NCWHA's volunteer exemption, but it goes on to completely ignore the purpose of the limitations in the exemption, stating, "The NCWHA is not, however, intended to prevent employers from compensating bona fide volunteers for their time. If an organization already has a legitimate agreement with a volunteer to commit a certain amount of time to its cause, it should not be obligated to take that person on as an 'employee' if, at some point, it compensates him for some of his work." DE 43-1 at 68. But the NCWHA's carveout from the volunteer exemption for persons in an employer/employee relationship is there to protect employees, not volunteers. N.C. Gen. Stat. § 95-25.14(a)(5) (volunteer exemption only applicable where an employer-employee relationship does not exist). Courts have long insisted that an employee cannot waive his or her right to the minimum wage or overtime. *See, e.g., Rehberg v. Flowers Baking Co. of Jamestown, LLC*, 162 F. Supp. 3d 490, 506–07 (W.D.N.C. 2016) (employee cannot waive rights under the NCWHA); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-707 (1945); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981). It is for this reason that the NCWHA volunteer exemption expressly carves out situations where there is an employer/employee relationship. Because the statute clearly prohibits an employer from requiring or requesting its employee to volunteer for it, ABCCM's suggested solution that "the court would filter out this kind of abusive practice," DE 43-1 at 68, is not necessary.

IV. Work can be both rehabilitative and employment.

Throughout the litigation, ABCCM's characterization of the Service Hours program has varied. ABCCM has frequently referred to the service hours work performed by VRQ residents as chores and has inaccurately described the jobs performed as akin to making one's bed. *See, e.g.,* Testimony of ABCCM Executive Director Scott Rogers, J.A. 539:2-7 (We ask them to [perform service hours] because it's also a part of participating with the community in the daily living chores"); J.A. 569:8-13. ABCCM has also characterized the service hours as volunteer work. *See, e.g.*, ABCCM's Answer, J.A. 168 ¶64 ("it is admitted that ABCCM classifies Plaintiff as a volunteer in connection with his completion of Service Hours") and ¶65; J.A. 221 ¶18.

But now, ABCCM insists that "the voluntary nature of the Service Hour program is not its defining feature. Properly understood, the Service Hour program is a work rehabilitation program that is part of the larger goal of transitioning participants to independence." DE 43-1 at 65. It is certainly possible, however, to be both a rehabilitation program and an employer, as was the case in *Alamo Foundation.* In *Williams v. Strickland*, the Ninth Circuit considered whether a participant in a six-month rehabilitation program through the Salvation Army was an employee or volunteer when he performed work. 87 F.3d 1064 (9th Cir. 1996). The court held "that the presence of a rehabilitative element does not preclude an employment relationship," but concluded that Williams was not an employee, distinguishing the

case from *Alamo Foundation* because Williams' relationship with the Salvation Army "contemplated only rehabilitation" whereas *Alamo Foundation* had "*both* a rehabilitative element and an implied agreement for compensation." *Id.* at 1067-68. The relationship between ABCCM and Armento contemplated compensation because ABCCM required Armento and any other ABCCM resident not exempt from its service hours program to perform unpaid service hours in order to continue residing and eating at the VRQ.

V. Short-term employment is employment under the NCWHA.

There is no legal basis for ABCCM's argument that because its programs are designed to be time-limited, to push its residents into the competitive marketplace, participation in these programs cannot create an employer/employee relationship. DE 43-1 at 41-43. There is no temporal component to employment under the NCWHA. Rather, day laborers and workers hired through temporary staffing agencies who only work for an employer for one day at a time are considered employees under the NCWHA. *See, generally, Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 605 S.E.2d 254 (2004); *Whitehead v. Sparrow Enterprise, Inc.,* 167 N.C. App. 178, 605 S.E.2d 234 (2004); *Leverette v. Labor Works Intern., LLC*, 180 N.C. App. 102, 636 S.E.2d 258 (2006). Additionally, workers who enter the United States pursuant to temporary non-immigrant work visas of less than one year are considered employees under the NCHWA and entitled to its wage protections. *See, e.g., Garcia v. Frog Island Seafood, Inc.,* 644 F. Supp. 2d 696 (E.D.N.C. 2009) (H-2B visa workers are employees

under both he NCWHA and FLSA); *De Luna-Guerrero v. N.C. Grower's Ass'n, Inc.*, 338 F. Supp.2d 649 (E.D.N.C. 2004) (H-2A visa workers are employees under both the NCWHA and FLSA). To impose a time limit judicially would create confusion and motivate businesses to break up positions into discrete short-term tasks that could be performed by persons whom they would not have to pay, and would subvert the purpose of the NCWHA: "to protect all covered workers from substandard wages and oppressive working hours." *Rehberg*, 162 F. Supp. 3d at 504 (citing the similar purposes of the FLSA and the NCWHA).

VI. Whether ABCCM properly paid Armento must be analyzed on a workweek basis.

ABCCM asserts that "[t]here is … no authority that would bind the District Court to use a workweek by workweek calculation over a gross calculation" when determining whether any wages owed to Armento would be offset by the room and board he received. DE 43-1 at 76. This contradicts both the statute and the regulations. The NCWHA requires that an employer must pay an employee the minimum wage for each hour worked "in any workweek," N.C. Gen. Stat. § 95-25.3(a). Likewise, the NCWHA mandates payment of an employee at the overtime rate of one- and one-half times the regular rate of pay for each hour worked over forty "in any workweek." N.C. Gen. Stat. § 95-25.4. "Workweek" is defined as "any period of 168 consecutive hours." N.C. Gen. Stat. § 95-25.2(17).

Because compliance is determined on a workweek basis, employers are required by the Act to keep a record of hours worked in each workweek. 13 N.C.A.C. § 12.0801(a). *See Garcia v. Frog Island Seafood, Inc.,* 644 F. Supp. 2d 696, 709 (E.D.N.C. 2009) (FLSA compliance determined on a workweek basis), and 707 ("In interpreting the NCWHA, North Carolina courts look to the FLSA for guidance."). Failure to pay the minimum wage in a particular workweek because the employer has, for example, required an employee to bear expenses the employer should pay, is a violation of the NCWHA regardless of whether the employer has properly paid the employee over the entire employment relationship. *See Covarrubias v. Capt. Charlie's Seafood, Inc.,* No. 2:10-CV-10-F, 2011 WL 2690531, at *5 (E.D.N.C. July 6, 2011) (certifying a class alleging the employer's failure to reimburse expenses in the first workweek violated the NCWHA); *Gaxiola v. Williams Seafood of Arapahoe, Inc.,* 776 F. Supp. 2d 117, 125–26 (E.D.N.C. 2011) ("the FLSA requires that the plaintiffs be reimbursed for such costs to the extent necessary to ensure that the workers receive minimum wage for each workweek").

By regulation, to ensure compliance with the NCWHA, employers who intend to count room and board as part of wages paid to an employee must keep records of those costs:

> All other records required by statute or rule for the enforcement of any provision of the Wage and Hour Act must also be maintained by the employer. Such records include, but are not limited to, the following: tip credits; costs of meals, lodging or other facilities; start and end time for youth under age 18; youth employment certificates; wage deductions;

> vacation and sick leave policies; policies and procedures relating to promised wages; and records required to compute wages as defined by G.S. 95-25.2(16).

13 N.C.A.C. § 12.0801(b).

The statutory definition of wage in N.C. Gen. Stat. § 95-25.2(16) and referenced in the recordkeeping regulation, includes room and board: "'Wage' paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities." Read together, an employer must pay minimum wage and overtime wages as calculated on a workweek basis.

Though some courts have allowed an employer that did not maintain workweek by workweek records of the costs of room and board to nevertheless claim an offset, *see, e.g., Balbed v. Eden Park Guest House, LLC*, 881 F.3d 285, 291 (4th Cir. 2018), the offset should still be applied on an individual workweek basis. *See Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1020 (8th Cir. 1988) (wage credit only allowed during weeks in which compensable work was performed). In other words, if the reconstructed offset amount is not enough to overcome the minimum wage violation in a particular workweek, the employee is entitled to relief. Since ABCCM and Armento have stipulated to the weekly cost of room and board, should the Court allow an offset, that amount should be subtracted from wages owed to Armento each workweek. J.A. 257-58 ¶¶36-37.

If an employer maintains the proper records to include the reasonable cost of board and lodging as part of the wage paid to an employee, whether the resulting wage complies with the minimum wage and overtime requirements is determined on a workweek basis. Failure to examine compliance on a workweek basis would mean an employee still working for an employer could never bring a claim for a minimum wage violation, because of the possibility that greater pay later in their employment would erase the violation.

VII. There was no evidence presented at trial to support the finding of fact that ABCCM defined part-time employment as working thirty hours or less per week.

The District Court erroneously found as a fact that ABCCM defined part-time employment as working thirty hours or less per week. J.A. 798 ¶9; DE 19-1 at 53-55. Contrary to ABCCM's argument, Armento does not admit that "the District Court's finding of fact was based on the testimony at trial. Appellant's Br. 45." On page 45 of Armento's opening brief cited by ABCCM, Armento discussed two disputed findings of fact. The discussion of a dispute between documentary and testimonial evidence referred to the finding of fact in that the only exception to ABCCM's service hours requirement was for full-time employees or full-time students. J.A. 798 ¶9; Appellant's Br. 45 (D.E. 19-1 at 53). With respect to the definition of part-time work, Armento made it clear that nothing defined part-time as working thirty hours or less. DE 19-1 at 54 ("In the only document considered by the trial court that referred to a

service hours requirement for part-time workers, the definition of part-time was working less than 20 hours per week. J.A. 361"), 55 ("Nowhere in any of the evidence presented at trial was part-time defined as 30 hours per week or less"). There was simply no evidence presented to support the district court's finding of fact. The District Court's finding that part-time employment was defined by ABCCM as 30 hours per week or less was thus clear error.

VIII. Armento properly preserved the issue of whether failure to pay him for 15 minutes of pre-shift time at the front desk violated the NCWHA.

ABCCM contends that Armento did not properly raise at trial the issue of ABCCM's failure to pay him for 15 minutes of pre-shift time when he worked at the front desk. DE 43-1 at 68. This is not true. In their pre-trial stipulations, the parties stipulated that "Plaintiff was required to show up for front desk duty 15 minutes before his scheduled start time." J.A. 255 ¶23; 451. At trial, Armento testified that he was told to only write down eight hours on his timesheet for front desk duty, J.A. 611:7-8, and that he was instructed to arrive at least 15 minutes prior to each recorded shift. J.A. 606:25-607:4. The Front Desk Manual, which states, "Please make it a point to arrive 15 minutes before your shift begins so you can check the board for new admissions, room changes and discharges," was introduced as an exhibit. J.A. 395. Armento raised this issue at trial and introduced evidence on it, and it should be considered on appeal.

IX. ABCCM's concern about a chilling effect is misplaced.

ABCCM argues that if they have to pay Armento as an employee, it "would have a chilling effect on the motivation of other non-profits to provide similar work-related programs that primarily benefit the participants." DE 43-1 at 10-11. If there are other non-profits in the state that are using economic coercion to motivate residents to work without pay but with an express or implied promise to compensate them, then that behavior should be "chilled" because that was the purpose of the FLSA and NCWHA's minimum wage protections in the first place. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2015) ("the FLSA must not be interpreted or applied in a narrow grudging manner. Rather, because the Act is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals"). North Carolina's legislators defined employ, employer and employee very broadly under the NCWHA in order to include many types of employment relationships. N.C. Gen. Stat. §§ 95-25.2(3-5); *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (The definition of employment in the FLSA is the "broadest definition that has ever been included in any one act"). The NCWHA also includes several exceptions, however, which should be narrowly construed. N.C. Gen. Stat. § 95-25.14; *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959) FLSA exemptions are narrowly construed); *U.S. Dep't of Labor v. N. Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress

considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 369 F.3d 797, 799 (4th Cir. 2004).

Furthermore, the case law makes clear that there are still ways for a non-profit to operate and include true volunteerism that need not be paid as employment under the NCWHA. For example, entities like ABCCM could pay the residents for service hours free and clear and then ask the residents to pay for their room and board. *See Alamo Found.*, 471 U.S. at 304 ("there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily"). ABCCM can still accept volunteer labor from all its non-residents who presumably are motivated to volunteer for spiritual, humanitarian or charitable reasons. *See Cathedral Buffet*, 887 F.3d at 768 (distinguishing between spiritual coercion and economic coercion); *Purdham*, 637 F.3d at 429 (finding Purdham was not coerced but motivated by humanitarian and charitable instincts and his longstanding love of golf).

X. Conclusion

For the reasons stated herein and in Armento's principal brief, DE 19-1, this Court should reverse the lower court's order, direct the lower court to enter an order finding that ABCCM is liable to Armento for failure to pay for all his hours worked under the NCWHA, and remand for further proceedings as to damages.

Respectfully submitted, this the 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this document meets the type-volume limits of Rule 32(a)(7)(B) because, exclusive of the portions of the document exempted by Rule 32(f), this document contains 6,371 words.
2. Further, this document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in Microsoft Office 365ProPlus using fourteen-point *Garamond*, a proportional-width typeface.

/s/ Clermont F. Ripley
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2020, the foregoing Brief of Appellant was served on all counsel by the Court's electronic filing system.

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