No. _____

IN THE

Supreme Court of the United States

ANDREA HIRST, ET AL.,

Petitioners,

—v.—

SKYWEST, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY F. COLEMAN
Counsel of Record
LISA A. WHITE
ARTHUR STOCK
WILLIAM A. LADNIER
RYAN P. MCMILLAN
GREG COLEMAN LAW PC
800 South Gay Street, Suite 1100
Knoxville, Tennessee 37929
(865) 247-0080
greg@gregcolemanlaw.com
Attorneys for Petitioners

QUESTION PRESENTED

Must an employee protected by the Fair Labor Standards Act always allege wage violations averaged across a specific seven-day workweek, or may an employee plead a cause of action with alternative context-specific allegations to meet the plausibility requirements of Rule 8 and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)?

PARTIES TO PROCEEDINGS BELOW

Petitioners Andrea Hirst, Molly Stover, Emily Stroble Sze, Cheryl Tapp, Renee Sitavich, Sarah Hudson, Brandon Colson, and Brüno Lozano were plaintiffs-appellants below.

Respondents SkyWest, Inc. and SkyWest Airlines, Inc. were defendants-appellees below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at *Hirst v. SkyWest, Inc.*, 910 F.3d 961 (7th Cir. 2018) and reproduced at App. 1a–11a. The district court's opinion dismissing petitioners' claims with prejudice is reported at 283 F. Supp. 3d 684 and reproduced at App. 12a–48a. The district court's earlier opinion dismissing petitioners' FLSA claims without prejudice is unreported, but available at 2016 WL 2986978 and reproduced at App. 49a–89a. The court of appeals denied panel rehearing and rehearing *en banc* on January 11, 2019. App. 90a–91a.

JURISDICTION

The court of appeals affirmed in part and reversed in part the district court's judgment, then remanded the case on December 12, 2018. App. 1a. The court of appeals denied panel rehearing and rehearing *en banc* on January 11, 2019. App. 90a–91a. This Court has jurisdiction under 28 U.S.C. § 1254(1). On April 4, 2019, this Court entered an Order extending time to file a petition for certiorari until May 11, 2019.

STATUTORY PROVISIONS INVOLVED

Section 206(a) of the Fair Labor Standards Act, 29 U.S.C. § 206(a) states:

(a) Employees engaged in commerce; . . . Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise

engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than. . .

(C) $ 7.25 an hour .

Section 213(b)(3) of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(3), states:

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

. . .

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. § 181 et seq.];

. . . .

STATEMENT OF THE CASE

I. Factual Background

Respondent SkyWest is a commercial airline that flies commuter or regional routes for Delta, United, and other large carriers. SkyWest assigns each of its flight attendants to a specific base airport or "domicile." Every group of flights in a schedule, called a "pairing," for every flight attendant begins and ends at their home base. The pairings consist of a series of flights scheduled one to four days long. Plaintiffs alleged that SkyWest paid less than the federal minimum wage, $7.25 per hour, for compensable work performed by flight

attendants in the course of their work. C.A. App. 167, 173, 389, 396-97.

SkyWest pays its flight attendants using a "block-time" method for calculating wages, with their pay clocks running *only* when the aircraft's main cabin door is closed. Other compensable work is ignored by SkyWest's pay calculations despite being tracked minute-by-minute every day to meet the Federal Aviation Administration ("FAA") strict "duty time" regulations. *See* 14 C.F.R. 121.467. As a result, a flight attendant whose "wage rate" is shown on SkyWest's paychecks as $17.50 per block hour *never* receives pay close to $17.50 per hour in "straight time wages" (*i.e.*, earned hourly pay based on all compensable work). Instead, block wage rates by design are continuously falling by differing amounts for each work day and each pairing. In this system, a flight attendant's hourly wage rate can only be calculated retroactively by comparing bi-monthly paychecks to daily check-in times, actual flight times, turn times (*i.e.*, the time spent on the ground between flights), and release times, then adding in unrecorded work time that occurs virtually every work day. C.A. App. 156-58, 375-77. Much of this information, including actual check in times, is contemporaneously recorded by the airline, but inaccessible to both current and former employees. Other critical pieces of information, including daily schedules and payroll records, are stored on SkyWest's proprietary computer system, access to which is blocked immediately upon an employee's termination of employment. C.A. App. 155 n.7, 376 n.7. Neither duty time nor a sum of all compensable work hours ('straight time") appear on SkyWest flight attendants' paychecks.

As a result of this odd payroll scheme, SkyWest flight attendants are being paid on a piece-rate basis,

which would be an acceptable method for wage payment so long as straight time hourly wages never fall below required minimum wage rates. The "pieces" counted for flight attendant pay calculations differ from those of typical piece-rate workers. For example, in a manufacturing plant, workers may be paid 10 cents per widget they make on the production line. Here, the pieces are hours and minutes called "block time." Calculating flight attendants' straight time hourly wages to confirm minimum wage compliance under the Fair Labor Standards Act (FLSA) is similar to determining hourly wages for piece-rate workers. In their complaints, petitioners allege that under SkyWest's payroll system their straight time wages can, and actually do, fall below $7.25 per hour when their schedules include short flight times on long workdays.

Yet unlike most piece-rate workers, flight attendants' work schedules also change every day, pairing, week, and month with virtually no regularity. SkyWest issues its paychecks bimonthly, such that neither flight attendants' pairing schedules nor their pay periods ever align with a 7-day workweek. And to further complicate matters, SkyWest doggedly fights against providing employees with any records other than those it "voluntarily" chooses to provide, which invariably include critical gaps in information that is required to accurately to calculate straight time earnings, especially on a weekly basis.

SkyWest does not dispute that its flight attendants perform significantly more compensable work over and above flight time during every pairing or that their block time wages—the "pieces" counted in this byzantine payroll system—must be stretched like a rubber band to cover all compensable working hours of each pairing. Flight attendants work far longer than

just the time when the airplane's cabin door is closed. All flight attendants are required to arrive at the airport and check-in well before their first flights. They ready planes for passengers and spend hours each workday loading and unloading travelers. They straighten the plane cabins between flights, assist disabled passengers, and must wait out delays before or between flights, always in uniform and under the control and supervision of crew support. When a flight attendant works long days with short flights, far more than half of her "duty day" will fall outside of block time. Thus, although hard at work, their straight-time hourly wages are continuously falling.

The FAA requires that every airline track the exact length of duty days and turn times between flights. As a result, SkyWest records exactly how many minutes a flight attendant was on duty for every workday and at any given ground stop—including the periods when the cabin doors are open. But even "duty time" records do not include all the hours flight attendants perform compensable work and are under SkyWest's control. For example, flight attendants, like passengers, must deal with delays in clearing security for their first flights. If they check in early, they must begin following SkyWest's directions immediately, but these minutes or hours are not included in the duty day. C.A. App. 146, 365. Moreover, each duty day automatically ends 15 minutes after the cabin door is opened on the last flight. But if the plane takes longer to unload—for example, because of the sheer number of passengers, waiting for wheelchair assistance, or other factors beyond the flight attendants' control—that time is not recorded as part of the duty day despite being compensable work. C.A. App. 148, 367.

In their complaints, the flight attendant-plaintiffs pleaded details of SkyWest's payroll system, exact types and amounts of work performed "off the clock" each day, and the complex requirements for calculating straight time wages. *E.g.,* C.A. App. 153-57, 373-77. In addition, several low-seniority flight attendants pleaded that they were paid less than federal minimum wage during workweeks when they were scheduled for short flying times and long workdays. C.A. App. 170-73, 395-98. All plaintiffs pleaded wage claims based on state labor laws, which are not relevant to this petition.

Unlike those employed by other airlines, SkyWest flight attendants never receive pay based on their "duty day"—that is, the length of time between their "report time" (when they must be at the airport after clearing security) (C.A. App. 148, 151) and their "release time" (exactly fifteen minutes after the aircraft door is opened upon landing the last flight of the day) (C.A. App. 148). No mechanism is built into SkyWest's payroll system to verify minimum wage compliance, unlike certain easily calculable safeguards utilized by other airlines. C.A. App. 172, 397.

SkyWest does not dispute that it must pay at least the FLSA minimum wage rates for all compensable work, but it relies heavily on the FLSA's lack of a provision through which employees may request their own accurate payroll records, thereby allowing SkyWest to avoid accountability. In general, state labor laws provide reporting and access provisions that are lacking in the FLSA, yet for nearly a year, SkyWest refused to provide the flight attendants with their own pay and schedule records based on the requirements of state labor laws. *See* C.A. App. 77-129, 427-549. Until ordered to provide "limited discovery" by the district court, SkyWest only "voluntarily" provided partial

records to the former employees. C.A. App. 550. And even after ordered to respond, SkyWest's production was woefully incomplete for calculating straight time wage compliance under the FLSA for piece-time wage earners, especially when compared to the Wage and Hour Division's recordkeeping requirements.

The most rational way to measure whether a worker is being paid minimum wage depends on the job's scheduling and payroll nuances. In the case of flight attendants, it makes the most sense to average earnings across "pairings." Each pairing represents a single cohesive unit of labor that a flight attendant is required to work and is functionally equivalent to the workweek of other occupations. A given pairing, based on SkyWest's scheduling practices, generally spans three or four days, with multiple flights per day, but it may be as short as one or two duty days. Within each pairing, it is not unusual for individual flights to begin in one time zone and end in another, or for late night flights to begin on one calendar day and end on another (at times, seemingly going "backwards" in time). Thus, an attempt to calculate pay based on a "workweek" for minimum wage calculations, starting and stopping at the same time each week, fails. A traditional workweek measure frequently bisects pairings or even single flights, and calculations require time zone adjustments. In contrast, for every flight attendant, *every pairing* is a single cohesive schedule that begins and ends at the employee's base airport. C.A. App. 151, 370. For example, a flight attendant based at Chicago O'Hare Airport begins and ends every pairing at that airport.

Included in the records that SkyWest late-produced is an example that highlights the hazards of an employer impeding access to employee records to avoid accountability. From October 18, 2013 to October

20, 2013, plaintiff Sarah Hudson worked a total of 36 hours and 54 minutes of duty time and received 11 hours and 51 minutes of block time credit, at a rate of $17.50. That works out to $5.62/hour for a three-day pairing during which she worked longer than 8 hours each day. Thus, her total pay for that three-day pairing is far below the federal minimum wage rate of $7.25/hour.

SkyWest's system for calculating compensation at times underpays its employees even when straight time wages must be averaged weekly, which requires bisecting pairings and flights and adjusting for time zones. However, if flight attendants' pay were correctly calculated based on a more reasonable, industry-specific per-pairing wage averaging formula, SkyWest's actual hourly pay rates would be far more calculable for employees and employers alike, and its violations would be far more obvious, alarming, and frequent.

II. Proceedings Below

The District Court had jurisdiction over the instant action pursuant to 29 U.S.C. § 216(b), which confers jurisdiction to federal courts on claims arising under the Federal Labor Standards Act, and under 28 U.S.C. § 1331, as the principle claims raise questions of federal law. The District Court had supplemental jurisdiction over related state law claims alleged by all plaintiffs (which are not the subject of this petition) pursuant to 28 U.S.C. § 1367.

In 2015, two groups of former flight attendants—petitioners here—sued SkyWest alleging that SkyWest's average straight time wages and method of calculating pay violated federal, state and local labor

laws, including that the airline failed to *always* pay applicable federal minimum wage laws. One group consisted of flight attendants based out of SkyWest's hub in Chicago, who asserted violations of the FLSA and Illinois laws and ordinances. *Hirst, et al., v. SkyWest, Inc., et al.*, N.D. Ill. Case No. 1:15-cv-02036. The other group included flight attendants based in various cities in California, Arizona, and Washington, and likewise they asserted violations of the FLSA and of labor laws applicable to employees in the states and cities in which each flight attendant was based. *Tapp, et al., v. SkyWest, Inc., et al.*, N.D. Ill. Case No. 1:15-cv-11117. These actions were consolidated by stipulation in the Northern District of Illinois. C.A. App. 20.

Plaintiffs alleged that SkyWest's system for calculating and paying wages violated the FLSA minimum wage requirements, as well as a host of labor laws applicable to each plaintiff's base, and resulted in its flight attendants being underpaid. Each plaintiff asserted that SkyWest's payroll scheme, which pays only "block time" based on when an aircraft's main cabin door is closed, inadequately compensates flight attendants, especially on extremely long workdays with short flights. C.A. App 149, 368. They alleged that SkyWest actually paid flight attendants less than federal minimum wage, averaged weekly, during certain workweeks. C.A. App. 170-73, 395-98.

SkyWest responded by moving to dismiss, asserting that plaintiffs failed to identify a specific workweek in which they were not fully compensated under the FLSA. In addition, SkyWest argued that the flight attendants are unprotected by any state or local labor laws based on its hodgepodge of preemption theories, including the dormant commerce clause. *See*

Supreme Court Case No. 18-1097. Specifically, SkyWest argues that flight attendants are not covered by *any* state and local wage laws, whether related to minimum wage rates, overtime, access to records, or paycheck requirements. The preemption theories and state labor protections are irrelevant to this petition.

In its May 24, 2016, Memorandum Opinion and Order, the district court acknowledged that '[a]lthough the Seventh Circuit has not expressly addressed this issue, every circuit court that has considered the issue has utilized the workweek averaging approach to determine whether a FLSA violation occurred." App. 61a. It then opined, without citation, "[t]o state a FLSA claim under the workweek averaging approach, then, the plaintiffs must plausibly allege at least one workweek for which the compensation they received, divided by their total compensable time, failed to meet the FLSA minimum wage of $7.25 per hour. They have not done so." App. 64a. The district court then described a scenario under which the flight attendants would be underpaid for "one or more series of lengthy duty days." "That such a scenario could possibly occur under SkyWest's compensation scheme, however, is insufficient to state a plausible claim; the plaintiffs have not provided a single instance where SkyWest failed to pay [a flight attendant] minimum wage as mandated under federal law over the course of a workweek." App. 66a-67a. The district initially dismissed the FLSA claims without prejudice. App. 67a.

Given the novel pleading hurdle ordered by the district court, the flight attendants requested their own payroll and schedule records from SkyWest pursuant to requirements of state labor laws. In response, SkyWest engaged in an unrelenting effort to conceal certain parts

of the records, claiming *all* state labor laws are inapplicable to all flight attendants. C.A. App. 110. The records it did provide "voluntarily" were incomplete, jumbled, or improperly summarized, including charts which ludicrously claimed plaintiffs made hundreds of dollars per hour at times.

On December 20, 2016, Plaintiffs concurrently filed a Second Amended Complaint in *Hirst* (C.A. App. 136), an Amended Complaint in *Tapp* (C.A. App. 353), and an opposed motion for limited discovery (C.A. App. 427). The parties litigated the limited discovery related issues for months, during which SkyWest filed a consolidated motion to dismiss on March 1, 2017.

Just eight days prior to filing its consolidated motion to dismiss, SkyWest again "voluntarily" produced some of the scheduling and payroll documents that it spent the better part of a year fighting to hide. Then, in its motion to dismiss, SkyWest referred to these newly produced documents claiming they were "'central' to the plaintiff[s'] claim." (R. 15-cv-02036, 95: 7 n.4).

On November 30, 2017, the district court issued its memorandum opinion and a final judgment dismissing all claims of the plaintiffs, including their FLSA minimum wage claims. App. 48a. The district court opined that "numerous courts have held that under the workweek averaging standard, 'the plaintiffs must plausibly allege at least one workweek for which the compensation they received, divided by their total compensable time, failed to meet the FLSA minimum wage of $7.25 per hour.'" App. 24a-25a. It also dismissed all state statutory claims on its dormant commerce clause theory. App. 48a. Plaintiffs appealed the district court's decision.

On appeal, the Seventh Circuit reversed in part, holding the dormant commerce clause does not preclude the application of state labor laws to flight attendants. However, the Seventh Circuit affirmed the dismissal of Plaintiffs' FLSA minimum wage claims after acknowledging that the "text of 29 U.S.C. § 206 does not state what measure should be used to determine compliance with the minimum wage, nor do any of the surrounding provisions provide guidance." App. 6a. The Seventh Circuit found that without pleading at least one specific workweek that was underpaid, the flight attendants had not plausibly alleged a violation of FLSA. App. 7a. As discussed below, in this ruling the Seventh Circuit rejected the approach taken by the First, Third, Fourth, and Eleventh Circuits.

SkyWest filed a petition for certiorari in this Court on February 15, 2019, arguing that airlines have a constitutional right to ignore all state and local labor laws including basic minimum wage requirements for flight attendants. The flight attendants opposed that petition. *See SkyWest, Inc., et al. v. Hirst, et al.,* Supreme Court Case No. 18-1097.

Flight attendants now file this petition for certiorari, questioning whether an employee protected by the Fair Labor Standards Act must allege wage violations during a specific workweek, even where the employer holds the data necessary for the calculations, or whether other detailed allegations may meet the plausibility requirements of Rule 8 and *Ashcroft v. Iqbal*, 556 U.S. at 662.

[Remainder of page intentionally left blank. Petition continues on next page.]

ARGUMENT:
REASONS FOR GRANTING CERTIORARI

The issue before the Court is whether employees must plead a specific workweek in which they were underpaid to survive a motion to dismiss on the pleadings. The petitioners assert that such a pleading requirement ignores industry-specific complexities and *Iqbal*'s demand to consider the context of the claims, and, most importantly, is inconsistent with the requirements of Federal Rule of Civil Procedure 8(a).

I. Post-*Twombly* and *Iqbal*, the circuits are split regarding the FLSA pleading requirements.

Virtually every circuit that has considered wage claims under the FLSA has struggled with the "new" pleading requirements since *Twombly* and *Iqbal.* "Although the circuit courts are in harmony on what is not required by *Twombly* and *Iqbal*, there is no consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*." *Landers v. Quality Communs., Inc.*, 771 F.3d 638, 642 (9th Cir. 2015). This Court should grant certiorari to resolve these differences as a matter of a nationwide need for uniformity to benefit both employees and employers alike.

Since 2012, at least eight different circuits have considered wage pleading requirements under the FLSA, with four (First, Third, Fourth, and Eleventh Circuits) establishing a context-specific pleading requirement that closely follows the requirements of

Iqbal.[1] The D.C. District Court similarly relied on well-established pleading requirements of *Twombly* and *Iqbal*. In direct contrast, four circuits (the Second, Sixth, Seventh, and Ninth Circuits) hold that an employee must allege *a specific workweek* during which they were underpaid to survive a Rule 12 motion to dismiss.[2]

A. Four circuits weigh plausibility according to *Iqbal*'s context-specific analysis.

The following circuits have applied *Iqbal*, 556 U.S. at 679, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense":

First Circuit

> Nevertheless, we think the motion to amend should be allowed. The precedents on pleading specificity are in a period of transition, and precise rules will always be elusive because of the great range and

[1] *Pruell v. Caritas Christi*, 678 F.3d 10, 15 (1st Cir. 2012); *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 242-43 (3d Cir. 2014); *Hall v. DIRECTV, LLC*, 846 F.3d 757, 777-79 (4th Cir. 2017), cert. denied, 138 S. Ct. 635 (2018); *Cooley v. HMR of Ala., Inc.*, 747 F. App'x 805, 807-08 (11th Cir. 2018).

[2] *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2d Cir. 2013); *Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc.)*, 905 F.3d 387, 405-06 (6th Cir. 2018); *Hirst*, 910 F.3d at 966 (7th Cir. 2018), App. 8a; *Landers v. Quality Communs., Inc.*, 771 F.3d 638, 645 (9th Cir. 2015).

> variations in causes of action, fact-patterns and attendant circumstances (*e.g.*, warnings, good faith of counsel). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, [556 U.S. at 679].
>
> While specifics as to the named plaintiffs here are lacking, some of the information needed may be in the control of defendants. Plaintiffs certainly know what sort of work they performed and presumably know how much they were paid as wages; but precisely how their pay was computed and based upon what specific number of hours for particular time periods may depend on records they do not have. Complaints cannot be based on generalities, but some latitude has to be allowed where a claim looks plausible based on what is known.

Pruell v. Caritas Christi, 678 F.3d at 15 (1st Cir. 2012) (remanding to allow amendment, pleading cannot be based on "generalities").

Third Circuit

> None of the named plaintiffs has alleged a single workweek in which he or she worked at least forty hours and also worked uncompensated time in excess of forty hours. Of the four named plaintiffs who allege that they "typically" worked at least forty hours per week, in addition to extra hours

> "frequently" worked during meal breaks or outside of their scheduled shifts . . . none indicates that she in fact worked extra hours *during* a typical (that is, a forty-hour) week. Their allegations are therefore insufficient.
>
> . . . .
>
> In reaching this conclusion, we do not hold that a plaintiff must identify the exact dates and times that she worked overtime. For instance, a plaintiff's claim that she "typically" worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one or more of *those* forty-hour weeks, would suffice. But no such allegation is present in this case.

Davis v. Abington Mem'l Hosp., 765 F.3d at 242-43 (3d Cir. 2014) (affirming district court's dismissal).

Fourth Circuit

> As compared to a more traditional overtime claim based on an employee's standard hourly wage, Defendants' alleged piece-rate compensation system presents certain additional complexity under the FLSA. *See* 29 U.S.C. § 207(g) (setting out various methods by which an employer may comply with the statute's overtime provisions under a piece-rate compensation scheme). At this stage of the litigation, however, we need not wade into these murky waters.
>
> . . . .

> In this case, in addition to their common allegations regarding the nature and structure of the DIRECTV Provider Network, Plaintiffs each describe in some detail their regular work schedules, rates of pay, and uncompensated work time. Specifically, each Plaintiff provides an approximation of his general workweek, with each Plaintiff alleging that he typically worked in excess (and, in some cases, well in excess) of forty hours per week. Supplementing these initial allegations, each Plaintiff further estimates the number of hours he worked in any given week, including a breakdown of the number of compensable and noncompensable hours he typically worked, as well as his average weekly pay and the amount by which this weekly compensation was typically reduced through DIRECTV-imposed penalties and unreimbursed business expenses.
>
> This final level of granularity, coupled with Plaintiffs' common allegations regarding the types of work DIRECTV designated as compensable and noncompensable, ultimately nudges Plaintiffs' claims against Defendants from the merely conceivable to the plausible. At this initial stage, that is all that is required to overcome Defendants' motion to dismiss.

Hall v. DIRECTV, LLC, 846 F.3d at 777-79 (4th Cir. 2017) (reversing and remanding dismissal), cert. denied, 138 S. Ct. 635 (2018).

> [Remainder of page intentionally left blank. Petition continues on next page.]

Eleventh Circuit

> In their amended complaint, the employees allege that they routinely worked more than 40 hours per week without full compensation because HMR deducted meal breaks from their pay even when they were not "completely relieved from duty." They state that during meal breaks they were required to "care for patient needs" and "tend[] to patients," and they provide each employee's specific job title and list the weeks each employee claims to have worked more than 40 hours. Those allegations "plausibly suggest" that they are entitled to relief under the FLSA. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); *see also Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 45-46 (1st Cir. 2013) (concluding that plaintiffs successfully pleaded FLSA claims where they alleged that they spent meal periods "complet[ing] their regular working activities," including "charting, performing administrative tasks, monitoring patients, and providing treatment").
>
> . . . .
>
> [A] detailed description of the exact acts each plaintiff performed during meal times is not required. *See* [*Twombly*, 550 U.S.] at 555, ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations."); *Manning*, 725 F.3d at 46 ("The fact that this assertion is not accompanied by a detailed list of each and every activity the plaintiffs and their fellows

> performed without compensation does not mandate the complaint's dismissal."). The allegation that each employee was "car[ing] for patient needs" and "tending to patients," when combined with each employee's specific job title, is more than "a formulaic recitation of the elements" of an FLSA claim and is enough to "give the defendant fair notice" of the employees' claims and the "grounds upon which [they] rest." *Twombly*, 550 U.S. at 555 (quotation marks omitted).
>
> Because the amended complaint states plausible claims under the FLSA, the district court erred by dismissing with prejudice the FLSA count.

Cooley v. HMR of Ala., Inc., 747 F. App'x at 807-08 (11th Cir. 2018) (unreported opinion) (additional reporter citations omitted).

D.C. District Court

In the circuits that have not weighed in on the pleading requirements, district courts are grappling with the same issue and are similarly divided. As the D.C. District court explained:

> In the Court's view, there is no reason to treat an FLSA claim in a manner different from any garden-variety claim. Plaintiffs' complaint must therefore "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47), allege sufficient facts to establish that the

claim is at least plausible, *id.* at 570, and avoid undue reliance on "labels and conclusions," *id.* This does not mean, however, that a complaint must contain "detailed factual allegations," *id.*, of the type [defendant] would require—and that some courts have required, *see, e.g.*, *Mell* [*v. Gnc Corp.*, No. 10-945,] 2010 U.S. Dist. LEXIS 118938, 2010 WL 4668966 [(W.D. Pa. Nov. 9, 2010)], at *5-*9. Nothing in Rule 8(a) or in any Supreme Court or D.C. Circuit precedent imposes special pleading requirements in FLSA cases. Neither Rule 8(a) nor any controlling precedent demands, as [defendant] posits, that an FLSA plaintiff allege *who* told her about her employer's policy regarding overtime hours, *when* she was told that she was required to work without recording overtime hours, *how* her employer's policy was imposed, or approximately *how many* overtime hours she worked each week without compensation. *Cf.* Dkt. 8-1 at 6 (quoting *Mell*, 2010 U.S. Dist. LEXIS 118938, 2010 WL 4668966, at *9). That type of particularity is required to plead fraud under Federal Rule of Civil Procedure 9(b), *see, e.g.*, *Stevens v. InPhonic, Inc.*, 662 F. Supp. 2d 105, 114 (D.D.C. 2009) (explaining that a complaint alleging fraud or mistake must "provide a defendant with notice of the 'who, what, when, where, and how' with respect to the circumstances of the fraud" to satisfy Rule 9(b)'s heightened pleading standard (internal quotation marks omitted)), but not to plead a FLSA claim under Rule 8.

Galloway v. Chugach Gov't Servs., 199 F. Supp. 3d 145, 150 (D.D.C. 2016).

Like the D.C. District Court in *Galloway*, other district courts are striving to uniformly apply competing FLSA pleading requirements, with nearly identical cases (at times against the same employer) being dismissed in one court while surviving dismissal on the pleadings in another.

B. Four circuits require identifying a specific workweek that was underpaid to avoid dismissal on the pleadings.

By contrast, the following courts have adopted a rule that any employee who cannot establish particular weeks in which they were underpaid prior to discovery cannot plausibly state a cause of action, regardless of whether or not necessary schedule and payroll information has been withheld by an employer.

Second Circuit

> We conclude that in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours. *See* 29 U.S.C. § 207(a)(1) (requiring that, "for a workweek longer than forty hours," an employee who works 'in excess of' forty hours shall be compensated time and a half for the excess hours).

> Determining whether a plausible claim has been pled is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Reviewing Plaintiffs' allegations, as the district court thoroughly did, we find no plausible claim that FLSA was violated, because Plaintiffs have not alleged a single workweek in which they worked at least 40 hours and also worked uncompensated time in excess of 40 hours.

Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106, 114 (2d Cir. 2013) (requiring pleading a specific workweek for plausible FLSA overtime claims).

Sixth Circuit

> "The FLSA mandates that '[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce' a statutory minimum hourly wage." *Stein v. HHGREGG, Inc.*, 873 F.3d 523, 530 (6th Cir. 2017) (citing 29 U.S.C. § 206(a)). "In addition, if an employee works in excess of forty hours a week, the employee must 'receive[] compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.'" *Id.* at 536 (quoting 29 U.S.C. § 207(a)). "The 'regular rate' is 'the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed,' and is 'computed for the particular

> workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate.'" *Id.* at 536-37 (quoting 29 C.F.R. § 779.419). "Assuming a week-long pay period, the minimum wage requirement is generally met when an employee's total compensation for the week divided by the total number of hours worked equals or exceeds the required hourly minimum wage, and the overtime requirements are met where total compensation for hours worked in excess of the first forty hours equals or exceeds one and one-half times the minimum wage." *Id.* at 537 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.16; *United States v. Klinghoffer Bros.*, 285 F.2d 487, 490 (2d Cir. 1960)).
>
> Thus, under federal law, Plaintiffs would be required to identify a particular workweek in which, taking the average rate, they received less than the minimum wage per hour.

Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc.), 905 F.3d 387, 405-06 (6th Cir. 2018) (additional reporter citations omitted).

Seventh Circuit

> In order to comply with the requirements of *Twombly, Iqbal*, and FED. R. CIV. P. 8(a)(2), a plaintiff alleging a federal minimum wage violation must provide sufficient factual context to raise a plausible inference there

> was at least one workweek in which he or she was underpaid. Here, as demonstrated by the district court's thorough and detailed analysis, *see Hirst v. SkyWest, Inc.*, 283 F. Supp. 3d 684, 688-89 (N.D. Ill. 2017) [App. 32a-35a], no plaintiff did so, even after the district court permitted the Flight Attendants to conduct limited discovery. Claiming they worked many hours and citing several weeks in which they *were* paid the minimum wage is not enough to render their claims plausible. We affirm the dismissal of the Flight Attendants' FLSA claims.

Hirst v. SkyWest, Inc., 910 F.3d 961, 966 (7th Cir. 2018). App. 8a.

Ninth Circuit

> We further agree with our sister circuits that, at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week. *See Pruell*, 678 F.3d at 13; *see also Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 242-43. Applying that standard to the pleadings in this case, Landers failed to state a claim for unpaid minimum wages and overtime wages. The complaint did not allege facts showing that there was a given week in which he was entitled to but denied minimum wages or overtime wages.

Landers v. Quality Communs., Inc., 771 F.3d at 645 (9th Cir. 2015).

Thus, in 2018 alone, four circuits entered opinions on the pleading requirements of claims under the FLSA. Two, including the Seventh Circuit's decision in *Hirst* and the Sixth Circuit's decision in *Busk*, 905 F.3d at 405-06, would require pleading a specific deficient workweek to survive dismissal. And in the same year, decisions in the Fourth and Eleventh Circuits fell on the *Iqbal* context-specific side. *See Hall*, 846 F.3d at 777-79 (4th Cir. 2017) (reversing and remanding dismissal), cert. denied, 138 S. Ct. 635 (2018) *and Cooley*, 747 F. App'x at 807-08. The divide between the circuits is becoming more entrenched and highlights the need for resolution by this Court.

The likelihood of surviving a pre-discovery motion to dismiss in a FLSA case now depends less on the facts of the case and more on the circuit in which the case was brought and the transparency of the employers' payroll system. This Court's review and clarification of the pleading requirements of claims brought under the FLSA is of exceptional nationwide importance. A clear and uniform rule would protect both employees who must seek redress from the courts for wages due under the FLSA and would offer employers the ability to comply with the law on a uniform basis.

[Remainder of page intentionally left blank. Petition continues on next page.]

II. Circuits that require pleading based on a specific workweek truncate long-standing administrative agency guidance.

The Wage and Hour Division's "workweek averaging" to measure compliance with the FLSA is frequently cited but rarely consulted. The legislative history of the Act makes clear that that "the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of "overwork" as well as "underpay."'" *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942), quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)) (emphasis in original). As this Court recognizes, the FLSA grants employees "broad access to the courts" with "no exhaustion requirement or other procedural barriers." *Id.*

Section 206(a) of the Fair Labor Standards Act requires that an employer "shall pay to each of his [non-exempt] employees who in any workweek is engaged in commerce . . . not less than . . . $ 7.25 an hour." 29 U.S.C. § 206(a). Although the "workweek" and "an hour" terminology have been interpreted in various ways by district and circuit courts, most accept the Wage and Hour Division's 1940 administrative policy suggesting that averaging hourly wages across a workweek is reasonable and permissible. "The workweek measuring rod has never been promulgated as an agency regulation; however, the Wage and Hour Division

continues to adhere to it, and the courts have agreed that the workweek standard *generally represents an entirely reasonable reading of the statute*." *Dove v. Coupe*, 759 F.2d 167, 172 (D.D.C. 1985) (Ginsburg, J.) (citing *Blankenship v. Thurston Motor Lines*, 415 F.2d 1193, 1197-98 (4th Cir. 1969)) (emphasis added); *Klinghoffer*, 285 F.2d at 490; *McDowell v. Purolator Courier Corp.*, 25 Wage & Hour Cas. (BNA) 503, 505-06 (E.D. Ky. 1982); *Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294, 301-03 (N.D.N.Y. 1978); *Travis v. Ray*, 41 F. Supp. 6, 9 (W.D. Ky. 1941). *But cf. United States v. Universal C.I.T. Credit Corp.*, 102 F. Supp. 179, 183 (W.D. Mo.) (dictum in criminal case), *aff'd*, 344 U.S. 218 (1952)). Since *Dove*, no circuit court has held that weekly averaging *cannot* be used to measure minimum wage compliance. Like other circuits, the Seventh Circuit "adopt[ed] the per-workweek measure for determining compliance with 29 U.S.C. § 206, without industry-specific carveouts." App. 7a.

However, "[t]he precedents on pleading specificity are in a period of transition, and precise rules will always be elusive because of the great range and variations in causes of action, fact-patterns and attendant circumstances (*e.g.*, warnings, good faith of counsel). 'Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that re quires the reviewing court to draw on its judicial experience and common sense.'" *Pruell*, 678 F.3d at 15 (quoting *Iqbal*, 446 U.S. at 663-64).

[Remainder of page intentionally left blank. Petition continues on next page.]

A. Wage averaging requires specific information and records according to the Wage and Hour Division's long-standing directives.

Returning to the original language of the Wage and Hour Division's 1940 opinion, the nuances of the issue in this petition—whether employees *must* plead that they were underpaid during one specific workweek to survive dismissal—come into focus.

On February 5, 1940 the Wage and Hour Division's general counsel wrote:

> In our opinion the *longest* period of time over which wages may be averaged to determine whether the employer has paid wages at the rate of [the applicable FLSA minimum wage] an hour is a workweek and there may be no averaging of wages over two or more workweeks.
>
> . . . .
>
> There is no objection, of course, to a biweekly, semi-monthly or monthly pay period, but a single workweek is the *longest period* which may be taken as the standard for the purpose of computing the amount of compensation due at each pay period.
>
> The next question is whether the workweek will be taken as the standard period of time over which wages may be averaged or whether a period less than a workweek will be taken to determine compliance with section 6. *For enforcement purposes*, the Wage and Hour Division is at present adopting the workweek as the

> standard period of time over which wages may be averaged . . . .
>
> It must be remembered, however, that this opinion is not binding upon the courts and will not protect an employer in a civil suit brought by his employees under the provisions of section 16(b) of the act. [Examples given about situations where courts may differ from the Division's opinion.] *There may be other cases where the courts might take a period of less than a workweek as the standard* under section 6, but, as stated above, the Division will take the workweek as the standard for determining whether there has been compliance with the law.

Portal-To-Portal Wages: Hearing Before the Subcomm. On S. 70 of the S. Comm. On the Judiciary, 80th Cong. 329 (1947) (statement of Lee Pressman, General Counsel, Wage and Hour Division, United States Dep't of Labor) (emphasis added).

By September 1941, difficulties enforcing the FLSA's minimum wage were becoming apparent. The Wage and Hour Administrator, under Section 11(c), was authorized to require every employer subject to any provision of the Act "to make, keep, and preserve," but the information and data necessary for calculations varied from section to section of the FLSA as well as by the payroll structure of employers. *Bureau of Nat'l Affairs, Wage-Hour Records; What Records to Keep and How to Keep Them* 11 (1941) (*reprinted from* Wage Hour Reporter, 4 WHR 492, Explanatory Bulletin 4 (September 15, 1941)). The Wage and Hour Division promulgated a series of record-keeping requirements,

forewarning employers that relief from preserving records would be granted "[o]nly where the preservation of certain records are found unnecessary for determining or securing compliance with any provisions of the Act or Regulations, other than Recordkeeping Regulations." *Id.* at 10. The Wage and Hour Division's September 15, 1941 recordkeeping requirements are virtually identical to those required now. Compare *id.* at 12-14 *to* C.A. App. 182-83, 422-23 (U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet, last revised July 2008). These requirements are particularly important when translating piece-rate wages into actual hourly wages, as in this case.

As detailed on Wage and Hour Division Fact Sheet #21, revised July 2008, every employer must maintain these basic records:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex[3] and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (*e.g.*, "$9 per hour," "$440 a week," "piecework").
9. Regular hourly pay rate.

[3] The inclusion of recordkeeping of each employee's sex is the lone change in requirements since 1941.

10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

C.A. App. 182.

B. The Wage and Hour Division intended the workweek to be the *longest* period of wage averaging, not the only acceptable period.

Unlike the Seventh Circuit (and district court) in this matter, even in the early 1940s the Wage and Hour Division recognized that certain identifiable facts are necessary to calculate straight time hourly wages for employees with piece-rate earnings or more than one rate of pay—even if averaged based on a workweek. "The hourly rate for all [variable wage rate] employees . . . depends on *the total hours worked* in any workweek divided into the *total straight time earnings*, wages or salary of that workweek. It is necessary, therefore, for the employer to indicate in his pay-roll records the period covered by each employee's workweek. . . ." *Bureau of Nat'l Affairs, Wage-Hour Records* 13 (1941). "The employer may select any time desirable to begin and end the employee's workweek, as for instance, midnight Saturday or high noon Wednesday. . . . *A*

workweek, however, must be established and it may not then be varied for purposes of evasion of either the minimum wage or overtime provisions Act." *Id.* (emphasis added). "In order to determine compliance with the Act, it is *necessary for the employer to maintain records which will establish either daily or weekly straight-time earnings*. This can be done by showing straight-time earnings or wages by the day or by keeping the total earnings or wages for the individual work-week." *Id.* (emphases added).

SkyWest, in the district court proceedings, acknowledged that it does not track the "total hours" any flight attendant works in any given workweek. C.A. App. 114, 120, 443-44, 515-17. Nor has it selected a specific and unvarying time to begin and end their workweek. C.A. App. 129, 518. And there is no indication that SkyWest regularly calculates, or is even aware of, any flight attendants' straight time earnings. C.A. App. 91 n.1.

Some employers, unlike SkyWest, include mechanisms to assure FLSA compliance on a "workweek" basis. *See, e.g.*, *Douglas v. Xerox Bus. Servs., Ltd. Liab. Co.,* 875 F.3d 884, 885 (9th Cir. 2017) (unpublished) ("Under Xerox's mind-numbingly complex payment plan, employees earn different rates depending on the task and the time spent on that task. . . . If the resulting hourly wage equals or exceeds minimum wage, Xerox does not pay the employee anything more. However, if the ratio falls below minimum wage [averaged weekly], Xerox gives the employee subsidy pay to bump the average hourly wage up to minimum wage."). Meanwhile, other employers like SkyWest, can (and certainly do) concoct unwieldy payroll schemes that lack mechanisms to assure "workweek" compliance to hedge accountability. Where

that is the case, a context-specific pleading standard, like the pairing-measure suggested here, is consistent with both the Wage and Hour Division's "no longer than a workweek" guidance and *Iqbal*'s context-specific pleading.

III. Workweek averaging is inappropriate in the context of SkyWest's scheduling and payroll systems.

A. Pairing-based averaging is the appropriate context-specific pleading given SkyWest's complex payroll system.

The Seventh Circuit—and the district court before it—erred when each held that to plead a viable Fair Labor Standards Act claim, employees *must* point to a single specific week in which they were underpaid. This specious pleading standard is contrary to the plain language and legislative intent of the FLSA and would have a destructive consequence of encouraging employers to devise payroll systems as complex and opaque as possible rather than paying employees as required.

In so holding, the Seventh Circuit truncated the very administrative agency directives it cites. *See supra* Section II. And instead of being consistent with the holdings of the circuits as it claims, it creates a wider split between the circuits such that an underpaid employee's access to relief under the FLSA is dependent upon where she works in the country. *See supra* Section I. Finally, and most critically, this rigid standard ignores *Ashcroft v. Iqbal*'s admonition that a plausible

claim for relief will "be *a context-specific task* that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 679 (emphasis added). The rigidity of the "single workweek" pleading standard ignores the complexity of certain payroll schemes, and if permitted to stand, slams the doors of the courts to low wage earners in the Seventh and other "specific workweek" circuits whose employers, like SkyWest, devise unnecessarily complex pay structures.

Take, for example, a common scheduling practice of certain manufacturing plants in which employees work four days, then have four days off, often working on a piece-rate pay system. A rigid 7-day workweek pleading standard splits the employees' schedule irregularly. With the current circuit split, half of the circuits that have weighed in on the FLSA pleading standard would allow four-day averaging, while the other half of the circuits are likely to require seven-day averaging. This Court's holding in *Iqbal*, in the petitioners' view, would permit four-day averaging.

For the purpose of pleading underpayment of wages in this case, and consistent with both *Iqbal* and the Wage and Hour Division's administrative opinions, *see supra* Section II, it makes the most sense to require the flight attendant plaintiffs to plead their earnings averaged across "pairings." Pairings are the functional equivalent of the workweek of other occupations, because each pairing represents a single cohesive unit of labor as scheduled by the airline. Each pairing consists of a series of flights beginning and ending at the employee's base airport, and one to four days in length. Thus, each pairing stands alone for scheduling purposes, often marked by at least twenty-four hours off

before and after the pairing to meet FAA rest time requirements.

Figure 1, Ca. App. 144, is an example of an actual pairing worked by petitioner Hirst. It is a relatively simple four-day pairing that the petitioners in their complaints included for explanatory purposes. It does not demonstrate a FLSA violation, but it demonstrates the level of complexity of SkyWest's scheduling system and the pieces of time that are (and are not) included in pay calculations.

Ignoring the complexity of SkyWest's payroll and scheduling, the Seventh Circuit erred when it opined that "[t]he same principles for pleading overtime pay violations apply to minimum wage violations." This assertion ignores the complexity of minimum wage calculations in a piece-rate system. Through its over-reliance on the district court's analysis, the Seventh Circuit created a barrier that impedes access to the courts for employees paid according to complex and irregular piece-rate pay schemes that result in variable hourly wages. In holding that to survive a motion to dismiss, flight attendants must plead "at least one workweek in which he or she was underpaid," the Seventh Circuit's result directly defeats the purpose of the FLSA. App. 8a; *see Dove*, 759 F.2d at 171 (quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945) ("The purpose of the minimum wage provisions is 'to protect certain groups of the population from sub-standard wages . . . due to . . . unequal bargaining power.'").

Here, the flight attendants pleaded far more than "a formulaic recitation of the elements" and certainly gave the defendant fair notice of their claims and the grounds for those claims. *Twombly*, 550 U.S. at 555. Yet, the specious pleading requirements of the Seventh

Circuit and the other "specific workweek" circuits, discussed *supra,* would prefer to strip away vital protections promised to low-wage employees through the FLSA than to permit that the case be decided on the merits. These circuits threaten to leave these employees, including the flight attendants in *Hirst,* with little or no legal recourse when their wages fall below the already-paltry federal minimum wage rate, especially when an employer can (and does) simply refuse to provide its employees access to their own records so they may accurately calculate straight-time earnings.

B. For SkyWest flight attendants, the specific workweek pleading requirement is especially detrimental.

The Seventh Circuit's pleading requirement has an even more catastrophic impact on flight attendants in light of SkyWest's claim that it—and other airlines—have a constitutional right to ignore all state and local labor laws.[4] If the Court were to constrict the protections of the FLSA *and* extinguish those offered by state and local labor laws for flight attendants, these employees—who must pass some of the strictest background checks in any industry and are trained to protect airline passengers in emergencies—would be at the mercy of the airlines' goodwill. Yet SkyWest and other airlines[5] apparently see no reason to ensure that

---

[4] *See SkyWest, Inc., et al. v. Andrea Hirst, et al.,* U.S. Supreme Court Case No. 18-1097, Petition for a Writ of Certiorari.

[5] *See SkyWest, Inc., et al. v. Andrea Hirst, et al.,* U.S. Supreme Court Case No. 18-1097, Brief amicus curiae of Airlines for America.

every flight attendant, regardless of seniority, receives "a fair day's pay for a fair day's work."

CONCLUSION

The Court should grant certiorari to reign in the circuits' varying pleading requirements under the FLSA, maintaining consistency with the Wage and Hour Division's opinion that the "longest period" (not "only period") of wage averaging is a workweek, with the requirements of *Twombly* and *Iqbal*, and especially with the plain language of Federal Rule of Civil Procedure 8(a).

Respectfully submitted,

/s/ Gregory F. Coleman
Gregory F. Coleman
Counsel of Record
Lisa A. White
Arthur Stock
William A. Ladnier
Ryan P. McMillan
GREG COLEMAN LAW PC
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
T: (865) 247-0080
greg@gregcolemanlaw.com

Attorneys for Petitioners

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-3643 & 17-3660

ANDREA HIRST, *et al.*,

Plaintiffs-Appellants,

v.

SKYWEST, INC., *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 1:15-cv-02036 & 1:15-cv-11117 —
John J. Tharp, Jr., *Judge*.

ARGUED SEPTEMBER 7, 2018 —
DECIDED DECEMBER 12, 2018

Before WOOD, *Chief Judge*, ROVNER, and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. In this case, a number of current and former flight attendants challenge an airline's compensation policy of paying for their work

in the air but not on the ground. Plaintiffs-appellants ("the Flight Attendants") all work or worked for defendant-appellee SkyWest Airlines, Inc., an airline owned by co-defendant-appellee SkyWest, Inc. (collectively "SkyWest"). The Flight Attendants filed suit alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and various state and local wage laws, seeking to certify a class of similarly situated SkyWest employees. The district court dismissed the complaint in its entirety, finding that the Flight Attendants had failed to allege a FLSA violation, and that the dormant Commerce Clause barred the state and local claims.

The Flight Attendants plausibly allege they were not paid for certain hours of work. We agree with other federal circuits, however, that under the FLSA the relevant unit for determining a pay violation is not wages per hour, but the average hourly wage across a workweek. Because the Flight Attendants failed to allege even a single workweek in which one of them received less than the federal minimum wage of $7.25 per hour, we affirm the dismissal of those claims.

We do not agree, though, with the application of the dormant Commerce Clause in this case. States possess authority to regulate the labor of their own citizens and companies, so we apply that doctrine sparingly to wage regulations. The dormant Commerce Clause does not preclude state regulation of flight attendant wages in this case, particularly when the FLSA itself reserves that authority to states and localities. Accordingly, we reverse the dismissal of the state and local wage claims and remand for further proceedings.

I. Background

This appeal is from a dismissal on the pleadings, so we recount the facts as alleged in the complaint, resolving all reasonable inferences in favor of the Flight Attendants. *Sloan v. Am. Brain Tumor Ass'n,* 901 F.3d 891, 893 (7th Cir. 2018).

SkyWest, an airline headquartered in St. George, Utah, charters planes for other airlines. SkyWest employs over 2,600 people as cabin crew, and either currently employs or formerly employed the eight plaintiffs-appellants in this case.[1] SkyWest flight attendants are based out of airports in ten different states, including these Flight Attendants' home states of Arizona, California, Illinois, and Washington. A new flight attendant at SkyWest earns $17.50 per hour, and wages increase with experience.

A flight attendant's typical workday is long and varied, including time onboard the aircraft as well as in airports before, between, and after flights. SkyWest Flight attendants are paid only for their time in the air, known in the industry as "block time."[2] The amount of block time worked in a given day is much

---

[1] This consolidated suit was brought by plaintiffs-appellants Andrea Hirst, Molly Stover, Emily Stroble Sze, Cheryl Tapp, Renee Sitavich, Sarah Hudson, Brandon Colson, and Bruno Lozano.

[2] As defined by the Flight Attendants, "block time" is the time between "block out" (when a flight attendant closes the main cabin door for the aircraft to leave the gate) and "block in" (when an aircraft arrives at the destination jet bridge and a flight attendant opens the main cabin door).

shorter than the "duty day."[3] The eight Flight Attendants each pleaded, with varying specificity, times during which they were not paid for portions of their duty days. For example, plaintiff-appellant Stover alleged a two-week period in October 2012 during which she was paid $656.25 for 86.07 hours of duty time, resulting in an average hourly wage of $7.62 per hour. In contrast, plaintiff-appellant Lozano alleged only that he worked many hours of duty time and included no wage-specific information. The common thread underlying the various Flight Attendants' allegations, though, is that none of them alleged a single workweek in which they were paid, on average, less than $7.25 per hour, the federal minimum wage under FLSA, 29 U.S.C. § 206(a)(1)(C).

Plaintiffs-appellants Hirst, Stover, and Stroble Sze sued in March 2015 in the Northern District of Illinois alleging that SkyWest violated the FLSA and the Illinois Minimum Wage Law by failing to pay minimum wage. Several months later, plaintiffs-appellants Tapp, Sitavich, Hudson, Colson, and Lozano filed a similar action in the Northern District of California under the FLSA and state and local minimum wage laws and ordinances in California, Arizona, and Washington. Both complaints sought class certification of nationwide, state, and local classes. The two cases were consolidated in the Northern District of Illinois.

---

[3] As defined by the Flight Attendants, the "duty day" is the difference between report time (the time at which a flight attendant must have cleared security at the airport) and release time (fifteen minutes after the cabin door opens at the day's final destination).

After allowing multiple amended complaints and limited discovery, the district court dismissed all of the Flight Attendants' claims with prejudice. The court determined that, in assessing violations of the federal minimum wage, an employee's wage is calculated as the average hourly wage across the workweek. Because none of the Flight Attendants pleaded a single workweek in which they were paid an average wage of less than $7.25 per hour, the court concluded they had not properly pleaded a FLSA violation. The district court also held that their state and local wage claims were preempted by the dormant Commerce Clause. Applying the approach the Supreme Court delineated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the district court ruled that requiring SkyWest to comply with state and local wage laws would impose too great of an administrative burden. The court reasoned that, with flight attendants flying to and from different states and cities all day, as well as flying over many more, the burden on SkyWest would be "clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142; *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (same). The Flight Attendants timely appealed.

II. FLSA Claims

First, the Flight Attendants challenge the dismissal of their FLSA claims. We review an appeal from a motion to dismiss de novo. *Adams v. City of Indianapolis*, 742 F.3d 720, 727 (7th Cir. 2014).

FLSA 29 U.S.C. § 206 reads: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce ... not less than—$7.25 an hour." The Flight Attendants argue compliance with this

provision should be measured differently depending on the wage practices of a given industry. They contend compliance for flight attendants should be measured by "pairing," or work trip out and back from their base airport, instead of by workweek. SkyWest points out that every other federal circuit to reach this issue has applied the workweek measure to *all* industries, and FLSA compliance should therefore be determined from the average hourly pay over a given workweek.

The text of 29 U.S.C. § 206 does not state what measure should be used to determine compliance with the minimum wage, nor do any of the surrounding provisions provide guidance. In light of this, we turn to the interpretation of the Department of Labor, the administrative agency charged with overseeing the FLSA. "When Congress leaves an administrative agency with discretion to resolve a statutory ambiguity, judicial review is deferential." *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*, 467 U.S. 837 (1984)). In 1940, less than two years after the FLSA was enacted, the Department of Labor issued a policy statement adopting the workweek as "the standard period of time over which wages may be averaged to determine whether the employer has paid [the minimum wage]." Wage & Hour Release No. R-609 (Feb. 5, 1940), *reprinted in* 1942 WAGE AND HOUR MANUAL (BNA) 185. While this policy statement has never been codified into an official regulation, to our knowledge and per the parties' arguments, neither has the Department of Labor ever deviated from this understanding. Further, in the eighty years since the

FLSA was passed, Congress has never seen fit to amend the law to change this understanding.

Other circuits have uniformly adopted the Department's per-workweek measure. *See, e.g.*, *Douglas v. Xerox Business Services, LLC,* 875 F.3d 884, 887–88 (9th Cir. 2017); *Hall v. DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017); *U.S. Dep't of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 780 (6th Cir. 1995); *Hensley v. MacMillan Bloedel Containers, Inc.,* 786 F.2d 353, 357 (8th Cir. 1986); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1576 (11th Cir. 1985), *modified on other grounds,* 776 F.2d 265 (11th Cir. 1985); *Dove v. Coupe*, 759 F.2d 167, 171–72 (D.C. Cir. 1985); *Blankenship v. Thurston Motor Lines,* 415 F.2d 1193, 1198 (4th Cir. 1969); *United States v. Klinghoffer Bros. Realty Corp.,* 285 F.2d 487, 490 (2d Cir. 1960). We see no reason to deviate from the Department's interpretation or the consensus of other federal appellate courts. Therefore, we adopt the per-workweek measure for determining compliance with 29 U.S.C. § 206, without industry-specific carveouts.

We now apply the per-workweek measure to the pleadings before us. To survive a motion to dismiss for failure to state a claim, the Flight Attendants needed to allege sufficient facts to plead a claim for relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Several federal circuits have analyzed the minimum pleading requirements tor FLSA claims under a similarly constructed provision governing overtime pay, 29 U.S.C. § 207(a)(1). For example, the Second and Ninth Circuits have held that for overtime claims, plaintiffs must "allege facts demonstrating there was *at least one* workweek in

which they worked in excess of forty hours and were not paid overtime wages." *Landers v. Quality Comm., Inc.,* 771 F.3d 638, 646 (9th Cir. 2014) (emphasis added) (citing *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 90 (2nd Cir. 2013)). Though plaintiffs need not necessarily plead specific dates and times that they worked undercompensated hours, they must "provide some factual context that will nudge their claim from conceivable to plausible." *Hall*, 846 F.3d at 777 (emphasis in original) (quoting *Dejesus,* 726 F.3d at 90).

The same principles for pleading overtime pay violations apply to minimum wage violations. In order to comply with the requirements of *Twombly, Iqbal*, and FED. R. CIV. P. 8(a)(2), a plaintiff alleging a federal minimum wage violation must provide sufficient factual context to raise a plausible inference there was at least one workweek in which he or she was underpaid. Here, as demonstrated by the district court's thorough and detailed analysis, *see Hirst v. SkyWest, Inc.,* 283 F. Supp. 3d 684, 688–89 (N.D. Ill. 2017), no plaintiff did so, even after the district court permitted the Flight Attendants to conduct limited discovery. Claiming they worked many hours and citing several weeks in which they *were* paid the minimum wage is not enough to render their claims plausible. We affirm the dismissal of the Flight Attendants' FLSA claims.

III. State and Local Claims

The Flight Attendants next argue their state and local wage claims should be reinstated. They contend the dormant Commerce Clause does not apply to this case. Even if it does apply, the Flight Attendants aver

the district court did not properly analyze the benefits to state and local governments, and that the FLSA expressly permits the application of state and local wage laws to employers. SkyWest responds that under *Pike* the dormant Commerce Clause does apply to this case, and that the district court accurately assessed the burdens on SkyWest to comply with state and local wage laws.

The Commerce Clause grants Congress the authority "[t]o regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has inferred a "dormant" aspect of the Commerce Clause "that limits states' abilities to restrict interstate commerce." *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1058 (7th Cir. 2018) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).[4] Under the dormant Commerce Clause, we invalidate a state law only where there is a clear showing of discrimination against interstate commerce, "either expressly or in practical effect." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017).

The dormant Commerce Clause serves as a bulwark against local protectionism. As such, "if the state law affects commerce without any reallocation among jurisdictions and does not give local firms any competitive advantage over those located elsewhere,

---

[4] Given its lack of a textual anchor, the continued validity of the dormant Commerce Clause has been questioned, *see, e.g.*, *South Dakota v. Wayfair,* 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring), *id.* at 2100 (Gorsuch, J., concurring), but it remains valid law absent a Supreme Court directive to the contrary.

we apply the normal rational basis standard." *Minerva Dairy, Inc.*, 905 F.3d at 1053 (internal quotation marks and citations omitted); *see also id.* at 1058–59. Sky- West is subject to many minimum wage laws that impose serious compliance costs. But the existence of a great regulatory burden on an employer does not necessarily mean minimum wage laws have a discriminatory effect on interstate commerce. State and local wage laws can burden companies within their own localities just as much, if not more, than out-of-state ones. All airlines—indeed all employers—are subject to these laws, regardless of state citizenship. *"Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application." *Park Pet Shop*, 872 F.3d at 502 (emphases in original). SkyWest has failed to allege any discrimination against interstate commerce. This failing precludes the application of the dormant Commerce Clause to the Flight Attendants' state and local claims.

Even if minimum wage laws did discriminate against interstate commerce, the dormant Commerce Clause does not apply to state and local laws expressly authorized by Congress. *See, e.g., Northeast Bancorp, Inc. v. Bd. of Gov'rs of Fed. Res. Sys.,* 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991) ("If Congress wants, it can authorize states to engage in activities that but for the authorization would violate the dormant commerce clause."). The FLSA contains such an express authorization. Section 218(a) of the FLSA reads: "No

provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter ... ." Because Congress expressly authorized states and localities to legislate in this realm, the application of multiple minimum wage laws to an employer cannot violate the dormant Commerce Clause.

For the foregoing reasons, we AFFIRM the dismissal of the FLSA claims, and REVERSE and REMAND for further proceedings on the state and local claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ANDREA HIRST, et al., Plaintiffs,	)	
v.	)	No. 15-CV-02036
SKYWEST, INC., et al. Defendants.	)	Judge John J. Tharp, Jr.

CHERYL TAPP, et al., Plaintiffs,	)	
v.	)	No. 15-CV-11117
SKYWEST, INC., et al. Defendants.	)	Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

Surely, you might think, flight attendants—who hold coveted positions that require substantial training in a variety of subjects and are entrusted with helping to ensure the safety of the flying public—earn

substantially more than the federal minimum wage of $7.25 per hour. But do they? The plaintiffs in these two cases say no. They are current and former flight attendants ("FAs") for SkyWest Airlines who bring this action on behalf of themselves and all others similarly situated, alleging that SkyWest paid them less than teenagers make flipping burgers at a fast-food joint. The plaintiffs maintain that SkyWest violated a patchwork of federal, state, and local wage and wage statement laws by failing to compensate them for much of the work they perform and for providing them with inadequate information about their pay. The complaints allege that SkyWest's compensation scheme—under which the plaintiffs were paid not based on total hours worked, but only for the amount of "block time" they worked (basically, the time spent in the airplane with the cabin door closed)—violates the federal minimum wage law[1] and a host of other state and local laws regulating employee compensation.[2] The court dismissed an earlier iteration of this complaint because the plaintiffs could not "provide[] a single instance where

---

[1] Part of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206.

[2] Specifically: California Wage Order No. 9, California Labor Code §§ 201, 202, 203, 204, 226, 1182.12, 1194, and 1194.2, the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*., the San Francisco Minimum Wage Ordinance, San Francisco Admin. Code § 12R, Los Angeles' Living Wage Ordinance, Los Angeles Admin. Code § 10.37 *et seq*., the Arizona Wage Act, A.R.S. § 23-350, *et seq*., the Arizona Minimum Wage Act, A.R.S. § 23363, *et seq*., the Washington Minimum Wage Act, R.C.W. §§ 49.46.020, 49.46.130, and the Illinois Minimum Wage Law ("IMWL"), § 820 ILCS 105/1 *et seq*.

SkyWest failed to pay an FA the minimum wage as mandated under federal law over the course of a workweek." *Hirst v. SkyWest, Inc.*, No. 15 C 02036, 2016 WL 2986978, at *5 (N.D. Ill. May 24, 2016) ("*Hirst I*"). SkyWest now moves to dismiss the plaintiffs' amended complaints, which, they maintain, again fail to state a claim for relief. Because not one of the plaintiffs has alleged facts that plausibly show that she or he was ***ever*** paid less than the federal minimum wage over the course of a work week—and, indeed, the plaintiffs concede their inability to do so—their minimum wage claims cannot get off the ground. And because the state and local laws on which they rely would pose a substantial (impossible, really) compliance burden on SkyWest, they unduly interfere with Congress's regulation of interstate commerce and therefore violate the Dormant Commerce Clause. Accordingly, SkyWest's motion to dismiss the plaintiffs' complaints is granted and these cases are dismissed with prejudice.

I. Background[3]

The two complaints in this case are substantially the same, save the specific allegations pertaining to the individual plaintiffs. To simplify, this opinion will not distinguish between the two, and will cite only to the Hirst's second amended complaint (ECF No. 85 in 15 CV 2036; "*Hirst* Compl.") unless citing to an allegation or statement that is unique to the Tapp

[3] As this is a motion to dismiss, the Court accepts all well-pleaded facts as true and construes all inferences in favor of the plaintiff. *Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632, 634 (7th Cir. 2012).

amended complaint (ECF No. 73 in 15 CV 11117; "*Tapp* Compl.").

A. Flight Attendant Duties, Schedules, and Compensation

The complaints allege that SkyWest uses a computerized scheduling and pay record system called SkedPlus+, which informs FAs of their schedules for the upcoming month just before the month begins. Each monthly schedule includes multiple "pairings," or a one-to-four day series of flights that an FA is assigned to work. FAs are only eligible for time-and-a-half overtime pay if they are "junior manned," which occurs when an FA voluntarily agrees to work an additional pairing that is not on her monthly schedule.

Each FA is based at a particular airport, where their pairings begin and end. SkyWest compensates its FAs using an hourly rate that varies based on the FA's experience. The schedules of SkyWest FAs are recorded down to the minute in the SkedPlus+ system in each shift's "pairing details." *Hirst* Compl. 30 Fig. 1. The pairing details identify the FA by her employee number and name, and list her base airport, level of training, and position. The details list the FA's "report time"—the time at which she must have arrived at the airport in uniform with all of her mandatory items for duty, cleared security, and checked in electronically on SkyWest's computer system. *Hirst* Compl. 34. If an FA reports earlier than the start time listed on the pairing details, the required time rather than the actual report time is recorded. Once an FA checks in with SkyWest, she can be rerouted so the airline can avoid delays.

FAs are not paid their hourly rate for each hour worked between their initial arrival at their base airport and their departure at the end of a pairing. Instead, SkyWest pays FAs their hourly rate only for the greater of "block time"—that is, the actual time between when each flight in a pairing leaves a gate and when the main cabin door opens at its destination gate—or "credit time," the amount of time SkyWest estimates it will take to go from gate-to-gate.[4] *Hirst* Compl. 40–41. SkyWest nonetheless tracks—and SkedPlus+ records show—each FA's "duty day," or the period each day between the time an FA is required to be present at an airport in the morning and fifteen minutes after the main cabin door opens on her final flight of the day. *Hirst* Compl. 40–41. Portions of an FA's duty day—such as layover time—are, therefore, not included in an FA's compensated block time.

An FA's duties also include a number of tasks that are not included in the duty day, including reviewing training materials, deplaning passengers over fifteen minutes after the final flight of the day has arrived at the gate, waiting during delays related to gate-checked baggage, international customs requirements, and mechanical issues after the final flight of the day, writing reports concerning irregular operations, and complying with mandatory drug screenings. Moreover, FAs must clear airport security

---

[4] SkyWest also pays FAs a small, untaxed hourly *per diem* of $1.80 for their "Time Away from Base," which includes all time that an FA is working or on layover. *Hirst* Compl. 65. The plaintiffs insist that this payment should not be included in the calculation of their wages and SkyWest does not contend otherwise, so the *per diem* payments do not factor into the court's analysis.

each morning prior to the beginning of their shift. Since January 2014, FAs have also been required to check in with gate agents prior to their scheduled departure, which may require additional uncompensated time, based on the size and configuration of the airport. The amount of time spent on these activities ranges from minutes to hours per day. SkyWest has no system in place to ensure that the wages it pays comply with federal, state, and local minimum wage laws.

SkyWest compensates FAs for certain training activities at half of an FA's typical hourly rate. FAs are not compensated, however, for the actual amount of time that it takes them to complete the training; instead, they are paid half-wages for an amount of time that SkyWest preordains for each training session. For example, if SkyWest sets a particular training session at eight hours, but an FA takes ten hours to complete the training, the FA is still only compensated for eight hours. Moreover, instead of indicating that FAs are paid half-wages for time spent training, the wage statements SkyWest provides to FAs indicate that FAs trained for half the time allotted by SkyWest. For example, if an FA with a wage rate of $20 per hour completes an eight hour training session, her pay statement indicates that she trained for four hours at a rate of $20 per hour; in reality, the FA trained for eight hours at a rate of $10 per hour.

SkyWest employees have access to their SkedPlus+ records, which detail the total amount of duty time as well as the total time for which they are paid their hourly wage for each day of a shift. The SkedPlus+ records do not total the amount of duty time an FA worked during a pairing, so to deduce her total duty

time, an FA must add the duty time listed for each day of the pairing as well as any hours she worked outside of her duty time. The SkedPlus+ records do note the total "Time Away From Base" for a pairing, that is, the total amount of time working or on layover during a multi-day shift. *Hirst* Compl. 30 Fig. 1. When an employee leaves SkyWest, she loses access to her SkedPlus+ records, and as a matter of course, SkyWest declines to provide SkedPlus+ records to former employees who request them. In contrast to SkedPlus+ records, the wage statements provided to SkyWest FAs list only block hours—the time for which an FA is paid their hourly wage. The wage statements do not include the total duty time an FA has worked during a pay period, nor do they include an accounting of the time an FA has worked outside her block duty hours.

B. Plaintiff Specific Facts

The complaints set forth specific facts as to each plaintiff's experience with SkyWest, presumably intended to demonstrate that there were periods when each of them was not compensated at or above the federal minimum wage.

1. Andrea Hirst

Andrea Hirst worked as an FA for SkyWest for over five years (though she does not tell us over what specific period, an omission that obscures her block-time wage rate for some portions of her employment). For almost all of that time, she was based at Chicago O'Hare International Airport. During a pairing in December 2014, due to an incoming aircraft arrival delay, Hirst's block time did not begin until approximately 6.5 hours after her report time. On

that day, she received her hourly block-time wage (at that time, $22.49) for only 7 hours and 48 minutes, although her duty day was 14 hours and 49 minutes. Aside from holiday pay, Hirst only received time-and-a-half wages once, when she was "junior manned." Hirst regularly worked hours that were not part of her duty day preparing irregular operations reports, reading training materials, and arriving early at the airport due to the unpredictability of security at O'Hare. Hirst also regularly took more than the allotted time to complete compensated online training sessions, but was only compensated for the time allotted by SkyWest.

2. Molly Stover

Molly Stover worked as an FA for SkyWest for over two years and was exclusively based out of O'Hare. On multiple pairings, Stover's flights were delayed and she was not compensated (aside from the small per diem) for the extra time she spent working as a result. Stover never received time-and-a-half pay. Stover regularly worked hours that were not part of her duty day preparing irregular operations reports, reading training materials, and arriving early at the airport due to the unpredictability of security at O'Hare. For the pay period lasting from October 1 to October 15, 2012, Stover was paid $656.25 for 86.07 hours of duty time. Her actual hourly rate of pay for this period was $7.62 per hour. At least once, Stover took more than the allotted time to complete compensated online training sessions, but was only compensated for the time allotted by SkyWest.

3. Emily Stroble Sze

Emily Stroble Sze worked as an FA for SkyWest for over two years and was based out of O'Hare for all but three months of her tenure. Sze regularly worked hours that were not part of her duty day preparing irregular operations reports, reading training materials, and arriving early at the airport due to the unpredictability of security at O'Hare.

4. Cheryl Tapp

Cheryl Tapp is the only plaintiff who continues to be employed by SkyWest. Tapp has been an FA for SkyWest for more than five years and has been based in San Francisco and Los Angeles in that time. Tapp received time-and-a-half pay 11 times, when she was junior manned. During the week of January 7–13, 2013, Tapp worked 62.65 duty hours and was paid at an effective rate of $15.47 per hour, not factoring in any hours she may have worked outside her duty days. During the week of April 9–14, 2013, Tapp worked 51.13 hours at an effective rate of $13.49 per hour, again not factoring in hours worked outside duty days.

5. Renee Sitavich

Renee Sitavich worked as an FA for SkyWest for over eight years, initially based at O'Hare before she transferred to San Francisco. On September 9, 2013, Sitavich had a duty day of 11 hours and 1 minute but was paid for only seven block hours. On September 10, 2013, her duty day was 2 hours and 32 minutes, but she was paid for only 1 hour and 5 minutes. Sitavich received junior man pay once. For the week of April 8–14, 2013, Sitavich was paid an effective rate of $20.45 per hour based on her duty time, not including any work performed outside of her duty

days. Sitavich regularly worked hours that were not part of her duty day preparing irregular operations reports, reading training materials, and arriving early at the airport due to the unpredictability of security at O'Hare.

6. Sarah Hudson

Sarah Hudson worked as an FA for SkyWest for just under two years, based at Fresno Yosemite International Airport. On October 4, 2013, Hudson received only two hours of block pay for a duty day of 4 hours and 37 minutes. On October 5, 2013, she was paid for 3 hours and 34 minutes of block time for a duty day of 8 hours and 31 minutes. During the 15 day period between January 31 and February 15, 2014, Hudson was paid $514.89 for a total of 65.73 duty hours, averaging to $7.83 per hour, not accounting for work outside of her duty days.

7. Brandon Colson

Brandon Colson worked as an FA for SkyWest for two years, exclusively based at Phoenix Sky Harbor International Airport. Flights in and out of Phoenix were regularly delayed due to high temperatures. One flight Colson was working was diverted to Tucson, where the plane pulled up to a jet bridge and the main cabin door was opened, ending Colson's "block time." Colson was nonetheless required to continue working, addressing passenger needs for two hours until they were able to resume their flight. Colson received junior man pay during only once. Every week or every other week, Colson had to spend time outside of his duty day preparing irregular operations reports, and he regularly had to work for more than fifteen minutes

after the main cabin door opened on the final flight of a day.

8. Brüno Lozano

Brüno Lozano worked as a SkyWest FA for over two years, during which he was based in Los Angeles, San Francisco, and Seattle. Lozano never received time-and-a-half pay. Lozano worked extremely long duty days, and worked additional hours outside of his duty days.

C. Procedural History

The *Hirst* suit (plaintiffs Hirst, Stover, and Sze) was filed in March 2015, while the *Tapp* suit (plaintiffs Tapp, Sitavich, Hudson, Colson, and Lozano) was filed in November 2015. The first amended complaint in *Hirst* alleged that SkyWest violated the Fair Labor Standards Act and the Illinois Minimum Wage Law ("IMWL") by failing to pay the plaintiffs the minimum wage for their compensable hours. The complaint indicated that the suit was brought as a collective action under the FLSA, 29 U.S.C. § 216(b),[5] and the plaintiffs also sought to represent a class of Illinois-based FAs under Federal Rule of Civil Procedure 23 as to the IMWL claim. On SkyWest's motion, the court initially dismissed the *Hirst* plaintiffs' FLSA claims

[5] The viability of FLSA claims asserted on behalf of other SkyWest FA's appears questionable at this juncture, in light of the fact that "the claims of potential members of an FLSA collective action are not tolled until they file opt-in notices." *Hollins v. Regency Corp.*, 867 F.3d 830, 834 (7th Cir. 2017). *See also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) (other similarly situated employees "become parties to a collective action only by filing written consent with the court"). No opt-in notices have been filed in either case.

without prejudice and dismissed their IMWL claims with prejudice. On the plaintiffs' motion to reconsider, the court converted its dismissal with prejudice of the plaintiffs' IMWA claims to a dismissal without prejudice.

The *Hirst* plaintiffs subsequently filed a second amended complaint and the *Tapp* plaintiffs filed a first amended complaint; those complaints are the subject of the instant motions to dismiss. The *Hirst* second amended complaint again alleges, based on the foregoing facts, that SkyWest violated the Fair Labor Standards Act and the Illinois Minimum Wage Law. The Tapp amended complaint alleges violations of FLSA, California Wage Order 9-2001, California Labor Code Sections 201, 202, 203, 204, 226, 1182.12, 1194, and 1194.2, California Business and Professional Code Section 17200, San Francisco Administrative Code Section 12R, the Los Angeles Living Wage Ordinance, the Arizona Wage Act, the Arizona Minimum Wage Act, and the Washington Minimum Wage Act.

II. DISCUSSION

The motion to dismiss presents two principal issues: Have the plaintiffs plausibly alleged that they were ever paid less than the federal minimum wage? And is SkyWest required to comply with state and local wage laws concerning the compensation paid to its FAs?

A. FLSA Claims

The FLSA requires that "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce...not less than—$7.25 an hour."

29 U.S.C. § 206(a)(1)(C).[6] In its previous opinion, the court grappled with the appropriate way to determine whether an employer met this obligation. Over what period of time must an employee's wages be measured under the FLSA? Must an employee's rate of pay equal or exceed the minimum wage over the course of each hour the employee works? Or can an employee's hourly rate dip below the minimum wage for some limited periods so long as the employee's wage exceeds $7.25 per hour over the course of a day, or a week, or a month?

The court determined that "courts uniformly calculate the hourly wage over the course of a workweek—*i.e.*, dividing the total compensation an employee received in a workweek by the compensable hours worked." *Hirst v. SkyWest, Inc.*, No. 15 C 02036, 2016 WL 2986978, at *5 (N.D. Ill. May 24, 2016) ("*Hirst I*").[7] Consistent with this requirement,

---

[6] The federal minimum wage of $7.25 per hour went into effect on July 24, 2009 and has not been increased since. Accordingly, it was the relevant wage rate for the entire period of the plaintiffs' claims, which extend back three years at most from the filing of the complaints in 2015.

[7] As noted, although the Seventh Circuit has never addressed this question, every Circuit Court of Appeals that has done so has concluded that the workweek is the appropriate unit of measure to apply to FLSA minimum wage claims. *See Douglas v. Xerox Business Services, LLC,* --- F.3d ---, 2017 WL 5474213, *5 (9th Cir. Nov. 15, 2017) (affirming dismissal of claims where plaintiffs could not establish that non-compensated time reduced their effective wage rate below the federal minimum over the course of any workweek); *U.S. Dep't of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 780 (6th Cir. 1995) ("[A]n employer meets the minimum wage requirements if the total weekly wage paid is equal to or greater than the number of hours worked in the week multiplied

numerous courts have held that under the workweek averaging standard, "the plaintiffs must plausibly allege at least one workweek for which the compensation they received, divided by their total compensable time, failed to meet the FLSA minimum wage of $7.25 per hour." *Hirst I*, 2016 WL 2986978, at *6. *See, e.g., Hughes v. Scarlett's G.P., Inc.*, 2016 WL 4179153, *2 (N.D. Ill. Aug. 8, 2016) (following *Hirst I*); *Pruell v. Caritas Christi*, 678 F.3d 10, 13–15 (1st Cir. 2012); *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013) ("we find no plausible claim that FLSA was violated, because Plaintiffs have not alleged a single workweek in which they worked at least 40 hours and also worked uncompensated time in excess of 40 hours"); *Davis v. Abington Mem. Hosp.*, 765 F.3d 236, 241–42 (3d Cir. 2014) (agreeing with Second Circuit's analysis in *Lundy*); *Landers v. Quality Communications, Inc.*, 771

---

by the statutory minimum hourly rate."); *Hensley v. MacMillan Bloedel Containers, Inc.,* 786 F.2d 353, 357 (8th Cir. 1986) ("no [FLSA] violation occurs 'so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirement being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement.'" (quoting *United States v. Klinghoffer Bros. Realty Corp.,* 285 F.2d 487, 490 (2d Cir. 1960)); *Dove v. Coupe*, 759 F.2d 167, 171–72 (D.C. Cir. 1985) ("While the minimum wage laws logically could be construed as requiring hour-by-hour compliance, [ ] both administrative and judicial decisions established the workweek as the measuring rod for compliance"); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1576–77 (11th Cir.), *modified on other grounds*, 776 F.2d 265 (11th Cir. 1985) (applying weekly averaging approach to example compensation scheme); *Blankenship v. Thurston Motor Lines,* 415 F.2d 1193, 1197–98 (4th Cir. 1969) (applying the weekly averaging approach).

F.3d 638, 644–45 (9th Cir. 2014) (expressly adopting rationale of *Pruell*, *Lundy*, and *Davis*); *Hall v. DirectTV LLC*, 846 F.3d 757 (4th Cir. 2017) (following *Lundy*, *Davis*, and *Landers*). Because the plaintiffs failed to allege facts that would satisfy this pleading standard by plausibly suggesting that their compensation dipped below the federal minimum wage even once over the course of a workweek, the court dismissed the prior iteration of the plaintiffs' FLSA claim. *Hirst I,* 2016 WL 2986978 at *7. The prior complaint failed to allege the plaintiffs' hourly wages, the total compensation they received for any workweek, and for two of the three plaintiffs, the total number of hours worked in any given week. Although the complaint contained some pairing information for plaintiff Hirst, a calculation based on that information revealed that Hirst was paid well over minimum wage over the course of the example pairings. *Id.*

Notwithstanding this precedent and the court's dismissal of the prior complaint, the plaintiffs' current complaints have not remedied the fatal defect: they still fail to allege that there was even one workweek in which any of the plaintiffs did not receive at least the federal minimum wage for compensable work performed over the course of a workweek. To be sure, this time around the plaintiffs provide more detail, but the deficiency remains. For virtually all of the plaintiffs, the complaints contain the total number of "duty" hours the plaintiff worked during certain specific flight pairings. And some plaintiffs have pled their rate of pay at certain points in time. But no plaintiff has pled information sufficient to infer that they were paid below $7.25 per hour over the course of a given work week. Simple arithmetic tells us that an

FA's average hourly wage over the course of a workweek may be ascertained by dividing the total amount the FA was paid that week by the number of compensable hours the FA worked over the same period. Not one plaintiff, however, has provided that information for even a single workweek. Nor has any plaintiff alleged even in more general terms that she or he was paid less than $7.25 per hour over the course of any workweek.

And indeed, *the plaintiffs concede that they cannot do so*. In their complaints, they acknowledge that "flight attendants cannot reasonably calculate their actual hourly rate of pay for any given workweek." *Hirst* Compl. 73; *Tapp* Compl. 77; *see also, e.g., Tapp* Compl. 98 ("Ms. Hudson's hourly rate of pay for a given workweek cannot be accurately determined, nor are the records necessary to determine this information accessible from any source."). A plaintiff's concession that she cannot determine her hourly wage over the course of any workweek is a concession that she cannot state a FLSA minimum wage claim. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); quotation marks and citation omitted). Failing to allege facts that plausibly support an inference that the average weekly wage paid by SkyWest to the plaintiffs fell below the federal minimum wage, the amended

complaints do not sufficiently allege a FLSA violation.[8]

Given the plaintiffs' conceded inability to determine their hourly wages, it is no surprise to see that the amended complaints do not actually plead that any of the plaintiffs were not paid the minimum wage over the course of even one week. Despite the plaintiffs' seeming acknowledgment that the workweek standard is the appropriate unit of measure for a FLSA claim—see *Hirst* Compl. 121—what the amended complaints continue to allege, instead, is that "on certain workdays," *Hirst* Compl. 125, the "block time" wages they received did not meet the minimum wage over the course of that day. But that, again, is the wrong measure. *Hirst I*, 2016 WL 2986978, at *5. By clinging to that erroneous workday standard the plaintiffs only further confirm that they don't have the goods to allege plausible FLSA violations based on the appropriate standard, namely the workweek.[9]

---

[8] Although the complaints make sparse references to SkyWest's alleged violations of an FLSA record-keeping provision, 29 U.S.C. § 211(c), plaintiffs do not appear to pursue independent claims based on those alleged violations, and do not mention § 211(c) in their briefs. Rather, plaintiffs attempt to use SkyWest's purported record-keeping violations to bolster their claim that SkyWest paid them below the federal minimum wage.

[9] The plaintiffs do allege that during particular weeks they worked in excess of 40 hours without receiving time-and-a-half compensation, but that fact has no relevance in the context of a FLSA claim because the FLSA exempts airlines from paying overtime wages. *See* 29 U.S.C. 213(b)(3). The plaintiffs, acknowledging this, do not assert a claim based on non-payment of overtime compensation. And to the extent that the complaints acknowledge that notwithstanding this overtime exemption,

Far from increasing the plausibility of the plaintiffs' claims, the new data set forth in the amended complaints confirm what the plaintiffs' have now expressly acknowledged. Where the plaintiffs *have* pled both their total pay (or information sufficient to establish their total pay) and their total number of duty hours over a given multi-day period (other than a workweek, which, again, no one has pled), the data reveal that the plaintiffs were paid in excess of the federal minimum wage. Plaintiff Hirst again uses her December 21–24, 2014 pairing as an example, but, as the court previously concluded, her average hourly pay during that pairing was $14.82, more than double the $7.25 minimum wage. *Hirst I*, 2016 WL 2986978, at *6. Plaintiffs Stover and Hudson allege that there were single bi-monthly periods—periods of slightly over two weeks— where their total wages divided by their number of duty hours were $7.62 and $7.83, respectively. These totals, of course, exceed the federal minimum wage. None of the pairing data provided in the amended complaints shows any multi-day period, much less a week, during which a plaintiff received less than minimum wage.

The plaintiffs attempt to make up the deficit of uncompensated duty day hours by pointing to "off-the-clock" work they performed before reporting in for their duty day and after their release. This "preliminary and postliminary" uncompensated work,

---

SkyWest paid time-and-a-half in certain circumstances, it further undermines the minimum wage claim because in paying-time-and-a-half, the company increased, rather than decreased, the effective wage rate, making it less plausible, not more, that the FAs received less than the minimum wage over the course of a workweek.

they allege, includes time spent at the airport clearing security, reading communications from SkyWest ("Know Before You Go" emails), debarking passengers for more than 15 minutes after the last flight of a pairing, writing "irregular operations reports" as needed, and complying with mandatory drug screening before or after flights. See *Hirst* Compl. 61. Even assuming that these activities are compensable,[10] the allegations offered fall short of plausibly establishing that the performance of these duties has ever caused any of the plaintiffs to work so many hours that their average hourly rate for the week dipped below the federal minimum wage. They allege only that the amount of time spent on such tasks "ranges from minutes per working day up to several hours per working day," *Hirst* Compl. 62, and that uncompensated time not included in the duty day "often include[s] several hours of unpaid time per workweek." *Hirst* Compl. 122. Apart from the fact that the plaintiff's candid assessment of the time required by these tasks is relatively modest,[11] the plaintiffs do

---

[10] The defendants do not argue that these tasks should not be treated as compensable work, so for purposes of this motion the court assumes, without deciding, that they are.

[11] The amended complaints provide little basis to infer that these extra-duty hour tasks required a great deal of time. The complaints make much ado, for example, about "irregular operations reports," but according to Plaintiff Colson, such reports were needed only once every 1–2 weeks (Tapp 108) and the complaints provide no estimate of how long it typically takes to prepare such report. So too with "Know Before You Go" communications. And over the course of a multi-day pairing, even an FA based at O'Hare might only have to clear security at O'Hare once, so there seems little reason to infer that the need to arrive early at O'Hare would requires significant off-the-clock

not identify any particular week or weeks when such tasks, added to their duty day hours, reduced their effective wage rate to below $7.25 per hour. As noted above, the complaints stop short of alleging that there was ever an occasion when such tasks combined with duty hours to drive their wage rates below minimum wage.

The sheer possibility that FAs worked a few minutes, or even several hours, of "off-the- clock" work that were not counted as part of their duty days is insufficient to give rise to a plausible claim for relief. Adding "several" hours (we'll assume that means about three hours, as common parlance would suggest) of weekly non-compensated off-the-clock time, as alleged by the complaints, to Hirst's December 21–24, 2014 pairing, for example, would reduce her effective rate of pay over that period from $13.12 to $12.27, still far above the minimum wage rate; over the course of that pairing, Hirst would have had to work some ***35*** additional noncompensated hours beyond her duty hours to drive her wage rate below minimum wage—that is, five hours a day. Nothing in the complaints suggests that pre- and post-duty hour work required anywhere near that amount of time. Plainly, these facts do nothing to make Hirst's claim more plausible.[12]

---

time. Nor do the complaints include any allegations about how often it took more than 15 minutes to debark passengers or by how much that benchmark was typically exceeded.

[12] Based on the data set forth in the amended complaints, effective wage rates for Tapp and Sitavich may also be calculated, and those rates (for Tapp, $15.47 and $13.49 for two different pairings, and for Sitavich $20.45) are even higher than Hirst's. No data sufficient to make an effective wage calculation for

Let's consider, though, the claims of plaintiffs Stover and Hudson. As noted above, the amended complaints include data for each of these plaintiffs; calculating their average wage rate over a 15-day period based on their duty hours shows that their wage rates for those periods were $7.62 and $7.83, respectively—above the minimum wage, but not by a lot. Even so, for those rates to be reduced to $7.25 per hour, Stover and Hudson would have to have worked an additional 4.48 and 5.29 hours of "off-the-clock" time, respectively, over that 15-day period, an amount of time that is consistent with the allegation that FAs often preformed several hours of uncompensated time beyond their duty hours over the course of a workweek. The problem for these plaintiffs, though, is that even if it is plausible to infer that, in some weeks, Stover and Hudson worked this much off-the-clock time, whether they worked that many uncompensated hours during these particular periods is anybody's guess; the complaint contains no allegations whatsoever about the number of off-duty hours plaintiffs Stover and Hudson worked during the identified 15-day periods. Instead, they posit that it is possible that they did so. And so it is, but as *Twombly* and *Iqbal* make plain, federal pleading requires the assertion of facts sufficient to distinguish the plausible from the merely possible. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550

---

plaintiffs Sze, Colson, or Luzano is provided. The calculations as to plaintiffs Stover and Hudson are discussed below.

U.S. at 557; quotation marks and citations omitted). *See also, e.g., Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014) ("To survive a motion to dismiss under Rule 12(b)(6), the complaint must provide enough factual information to . . . raise a right to relief above the speculative level." (internal quotation marks omitted).

In lieu of affirmative allegations that their hourly rates ever dipped below the federal minimum wage, the plaintiffs essentially contend that, given the variability of off-the-clock hours work and uncompensated duty hours work, there must have been some coincidental occasions when the number of those hours combined to reduce their average hourly rate over that week below the minimum wage. But that is utter speculation, not plausible allegation, and the former does not suffice to state a claim. That is why courts of appeal that have addressed the pleading requirements for FLSA claims have consistently held that allegations to the effect that employees frequently or typically performed uncompensated work do not suffice to allege a plausible FLSA claim. *See, e.g., Lundy*, 711 F.3d at 114–15 (rejecting allegations that plaintiffs "occasionally," or "typically," or "often" worked additional or longer shifts or performed other uncompensated work as insufficient to plausibly allege that there was ever a week in which plaintiffs worked uncompensated overtime hours); *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013) ("allegations . . . that Plaintiffs were not compensated for work performed during meal breaks, before and after shifts, or during required trainings—raise the possibility that Plaintiffs were undercompensated in violation of the FLSA [but] . . .

do not state a plausible claim for such relief. To plead a plausible FLSA overtime claim, Plaintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week."); *Davis*, 765 F.3d at 242 (rejecting as implausible allegations that plaintiffs "typically worked full time, or very close to it" and "also worked several hours of unpaid work each week" because the combination of those allegations fell short of alleging that any of the four plaintiffs had ever actually performed more than forty hours of compensable work in a week).

As these cases illustrate, it is one thing to allege affirmatively that plaintiffs regularly worked *X* number of hours a week and received less than $7.25*X* in compensation during one or more of those weeks; it is another thing to allege, as the plaintiffs do here, that they sometimes worked "several" uncompensated off-the-clock hours in a week and that they may have done so in a week in which they worked so many uncompensated duty hours that they averaged less than $7.25 for the week. *Twombly* and *Iqbal* do not require mathematical precision, but they do require courts to distinguish between allegations that a defendant *might* be liable and allegations that support a reasonable inference that a defendant ***is*** liable. *Iqbal,* 556 U.S. at 678. None of this is to say that it is not possible that one or more of the plaintiffs ever worked for less than minimum wage over the course of a week. But here the facts do not permit a plausible inference, as distinguished from a guess, that any of these plaintiffs ever did so. At best, the plaintiffs allege nothing more than the possibility that, during

some unknown week or weeks, they worked enough off-duty hours to drive their effective wages below $7.25 hour. Where the plaintiffs themselves acknowledge that they cannot identify even a single instance when this occurred, however, there simply is not an adequate basis to infer that the "possible" ever actually occurred. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal,* 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In their response brief, the plaintiffs devote only two pages to defending the sufficiency of their pleadings with respect to their FLSA claims, making two arguments. First, they argue that it is impossible for them to allege that their average wages over the course of a workweek were below minimum wage because SkyWest controls—and will not provide to them—the documents necessary to conduct a weekly calculation. This argument is unavailing for several reasons. First, as a general matter, a plausible claim must precede, not follow, discovery. A plaintiff "armed with nothing more than conclusions" does not "unlock the doors of discovery." *Iqbal*, 556 U.S. at 678–79. It is no answer to say that discovery *might* provide factual support for conclusory allegations that the plaintiffs were paid under minimum wage over the course a workweek; the factual allegations must be sufficient "to raise a reasonable expectation that discovery ***will*** reveal evidence" of the claimed misconduct. *Twombly,* 550 U.S. at 556 (emphasis added). Second, although "plaintiffs' pleading burden should be commensurate with the amount of information available to them,"

Olson v. Champaign County, Ill., 784 F.3d 1093, 1100 (7th Cir. 2015), it bears noting here that SkyWest produced some, if not all, of their Sked+ and payroll records to the plaintiffs and that these records were available to the plaintiffs in drafting their amended complaints. SkyWest *Hirst* Br. at 6 n.4, ECF No. 95. Third, the court *granted* the plaintiffs limited pretrial discovery, *see Hirst* ECF Nos. 96 and 101; that followed filing of the amended complaints and briefs on the motion to dismiss, but the plaintiffs have not sought further leave to amend their briefs or to supplement their pleadings based on any new information they obtained from SkyWest.

And finally on this point, the plaintiff's premise that they cannot calculate their average hourly rate over the course of a workweek because "all" of the necessary records "are in the possession and control of SkyWest" is simply not accurate. For starters, some of the information about "off-the-clock" work that the plaintiffs say should be included in the calculation would seemingly be within the possession of the plaintiffs, not SkyWest. A number of the plaintiffs allege, for example, that they regularly arrived early at O'Hare to avoid the unpredictability of security lines, but the plaintiffs do not explain why SkyWest would have records reflecting how early individual FAs opted to show up at the airport. Similarly, it is not at all clear how SkyWest, rather than the FAs, would have information about how much time, if any, they spent reviewing "Know Before You Go" information each day before reporting for duty or preparing "irregular operations" reports after duty.

Moreover, much of the information plaintiffs claim they do not have could easily have been ascertained

with due diligence. The plaintiffs could have kept track of the amount of time, or consulted records that would have provided more data on which to base their allegations. The amount that the plaintiffs were paid in each period, for example, should be readily available to them via their wage statements and bank account records. Records of contemporaneous communications, both as to their substance and as evidence of when the plaintiffs were working and when they were not, could have been consulted. So too things like calendars, credit card receipts, cell phone bills, and tax records. Doubtless some records within the plaintiffs' control disappeared over the years, but the poverty of information these plaintiffs claim is nearly absolute. Hirst, for example, claims not even to know when she moved from Minneapolis-St. Paul to Chicago, a fact that surely could be reconstructed from information in her possession. The claim that not one of these plaintiffs could access enough information to come up with a reasonable estimate of their hourly rates were for even a single workweek is not at all persuasive and is indicative of either a lack of diligence or a lack of helpful data.

It bears noting as well that although FLSA plaintiffs are not required to establish their wage rates with mathematical precision, courts "have recognized that it is employees' memory and experience that lead them to claim in federal court that they have been [compensated] in violation of the FLSA in the first place," and they must "draw on those resources in providing complaints with sufficiently developed factual allegations." *Dejesus v. HF Management Services, LLC*, 726 F.3d 85, 90 (2d Cir. 2013); *Hughes v. Scarlett's G.P., Inc.*, No. 15-cv-5546, 2016 WL

4179153, at *4 (N.D. Ill. Aug. 8, 2016) ("[T]he law requires FLSA plaintiffs to draw upon memory and experience in providing complaints with sufficiently developed factual allegations." (alteration omitted)). Nevertheless, none of the plaintiffs has been willing to make even an *estimate* about the average amount of off-the-clock time they spent during any particular week. Rather, they have only been willing to plead that in some weeks, the aggregate off-the- clock time totaled "several hours." That allegation, even accepting it as true for purposes of this motion, does nothing to allege the effect of those hours on the average hourly wage over the course of any given workweek. The plaintiffs still fail to plead a single week, or even a single pay period, in which they were paid below $7.25 per hour.

The plaintiffs' second argument to excuse their pleading deficiency confuses evidentiary burdens and pleading burdens. Citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016), the plaintiffs argue that they have no burden to plead that their workweek wages were below $7.25 as long as they plead that they performed some uncompensated work. In *Tyson Foods*, the Supreme Court established a burden shifting framework in FLSA cases, noting that an employee carries his initial evidentiary burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 136 S. Ct. at 1047. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn

from the employee's evidence." *Id*. According to the plaintiffs, *Tyson Foods* permits them to survive a motion to dismiss by pleading that that they engaged in uncompensated work. But the *Tyson Foods* framework is an evidentiary standard, and "does not address pleading standards." *Hughes*, 2016 WL 4179153, at *4. "[I]ts language regarding 'evidentiary gaps' and 'burden-shifting' does not apply to the present motions." *Id*. Moreover, even if the *Tyson Foods* framework were applicable at the pleadings stage, it requires plaintiffs to "show the amount and extent" of their uncompensated work—which, as the court previously noted, plaintiffs have failed to do.

The bottom line with respect to the plaintiffs' FLSA claims is this: in these complaints, we encounter eight plaintiffs who, at the time the amended complaints were filed, had worked an aggregate of some 1500 weeks (more than 28 years) for SkyWest,[13] yet could not allege that in even one of those weeks one of them had not been paid at least the federal minimum wage. Failing to clear that very low bar, the FLSA claims they assert fail and, because the plaintiffs have had the opportunity to replead in an effort to cure this deficiency, the FLSA claims are dismissed with prejudice.

II. State Law Claims

In its previous opinion, the court dismissed the *Hirst* plaintiffs' Illinois Minimum Wage Law claims with prejudice, concluding that the IMWL was

[13] Hirst (>260 weeks) + Stover (>104 weeks) + Sze (>104 weeks) + Tapp (>260 weeks) +Sitavich (>416 weeks) + Hudson (<104 weeks) + Colson (104 weeks) + Luzano (>104 weeks) = 1500 weeks.

preempted by the Dormant Commerce Clause. On the plaintiffs' motion for reconsideration, the court converted the dismissal to be without prejudice, giving the plaintiffs an opportunity to plead facts indicating that SkyWest's burden of compliance with state and local wage laws would be insubstantial. Under the Dormant Commerce Clause, a regulation that is neutral on its face or only has indirect effects on interstate commerce "will be upheld 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Previously, the court explained:

> [T]he IMWL provisions would only apply to FAs based in Illinois and only to the hours they worked in Illinois. To calculate the time plaintiffs worked to which the IMWL would apply, SkyWest would have to track each minute pre- or post-flight in Illinois and the amount of turn time between flights that FAs spent in Illinois. Moreover, if the IMWL were applicable to SkyWest FAs, then every state's comparable laws would also apply, subjecting SkyWest to 50 or more regulations depending on where each FA was physically located at a particular moment in time. Requiring compliance with the IMWL would not be a simple matter of setting an FA's minimum wage at the statutory amount in the state in which she is based; it would impose a labyrinth of potentially conflicting wage laws upon FAs based out of different states and cities, working on the same flights, literally moving through interstate commerce on a daily basis.

> This is precisely the type of burden on interstate commerce that the Commerce Clause prohibits.

Hirst I, 2016 WL 2986978, at *10 (citations and footnotes omitted).

In their amended complaints and their briefs, the plaintiffs say little about the burdens SkyWest would face if forced to comply with each state and local wage law. Instead, the plaintiffs argue that compliance would not be cumbersome because only the wage laws of the state and locality where an FA is based would apply to her. Would that it were so simple. Neither the plaintiffs nor SkyWest can determine by fiat when and where state laws apply. Some wage ordinances, for example, may apply to all hours worked by an employee who is employed within a state, even if some hours are worked out of state; others apply only to employees who work predominantly in one state for hours they work in that state, while still others apply to all hours worked by an employee in a state, even if the employee predominantly works or is employed elsewhere. *Compare Miller v. Farmer Bros. Co.*, 150 P.3d 598, 606 (Wash. Ct. App. 2007) (noting that Washington's overtime law "does not make any exception for overtime hours worked outside Washington State" if the employee engaged in "employment within the state of Washington"), *with Wooley v. Bridgeview Bank Mortgage Co., LLC*, No. 14 C 5757, 2015 WL 327357, at *2–3 (N.D. Ill. Jan 23, 2015) (holding that the Illinois Minimum Wage Law applies only to Illinois employees for conduct occurring in Illinois), *and Sullivan v. Oracle Corp.*, 254 P.3d 237, 242–44 (Cal. 2011) (holding that California's overtime laws apply to certain work performed in California by out of state employees). Further complicating matters

is the fact that different states use different measures for calculating minimum wage; while some, like Illinois, follow the federal model of averaging hourly rates over a workweek, others, like California, require that at least minimum wage be paid for every hour work, even if some hours are compensated at a rate higher than minimum wage.

The burdens that would be imposed on airlines were they required to comply with state and local wage laws concerning flight attendants,[14] then, is more substantial than merely complying with the wage laws of the state where each FA is *based*.[15] Instead, SkyWest would be forced to contend with the wage

---

[14] This opinion is based on facts alleged with respect to flight attendants only; no suggestion that the Dormant Commerce Clause exempts other airline employees from state and local wage regulation is intended.

[15] Even that burden could be substantial. As SkyWest notes, bases change frequently. Further, as the plethora of statutes on which plaintiffs rely for their non-FLSA claims confirm, it will often be the case that more than one jurisdiction can lay claim to being the location where an FA is "based." The California "based" plaintiffs, for example (plaintiffs Tapp, Sitavich, and Lozano), assert claims based not only on California law, but also on ordinances enacted by Los Angeles and San Francisco. And although the plaintiffs do not invoke it because it was enacted after the period of their claims, the City of Chicago, where plaintiffs Hirst, Stover, and Sze were "based," has also adopted its own minimum wage law. As of November 15, 2017, some 39 cities and counties have adopted their own minimum wage laws; SkyWest flies to many of them. *See* Inventory of Local Minimum Wage Ordinances (Cities and Counties), U.C. Berkeley Center for Labor Research and Education, available at http://laborcenter.berkeley.edu/minimum-wage- living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/ (last visited Nov. 29, 2017).

laws of each state in which an FA *works*. And because FAs routinely work in multiple states (and cities) on any given day, and in different combinations of states and cities for any given route assignment, the compliance burdens that would be imposed on SkyWest to pay its FAs in accordance with the applicable laws of all of the states and cities in which they performed work would be monumental. In order to do so, SkyWest would have to (1) measure each increment that each FA spends on the ground in each of the 43 states in which it operates, (2) determine the precise extent to which each wage law in the states and localities in which it operates applies and/or applies extraterritorially, and then (3) ensure compliance with a different set of wage laws and ordinances for each FA based on the amount of time they spent in each state and locality. Because an FA's pairings often shift from week to week, and involve multiple jurisdictions each day, SkyWest would have to comply with a different patchwork of wage laws for the same employee virtually every day. And even if it could do so, SkyWest would still be forced to contend with the result of applying this patchwork of local wage and hour laws—namely, that FAs doing precisely the same work, on the same routes, would be subject to different wage requirements based on where they were domiciled, or based, or worked the most. As the court noted in its earlier opinion, this is precisely the kind of onerous burden on interstate commerce that the Commerce Clause prohibits, even in the face of weighty state interests in protecting workers and providing a living wage. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (stressing "the

need for national uniformity in the regulations for interstate travel").

Although the plaintiffs principally engage with Dormant Commerce Clause theories not at issue here,[16] they rely heavily on *Bernstein v. Virgin America, Inc.*, 227 F. Supp. 3d 1049 (N.D. Cal. 2017) in which a district court rejected an airline's Dormant Commerce Clause challenge to California wage laws. In *Bernstein*, the court first determined that California uses a multi-factor test to determine when its wage laws apply to work conducted elsewhere, considering the employee's residency, where the employee received her pay, the employee's principal job situs, the employer's residency, and the extent to which the employee worked outside the state. *Id*. at 1060. Based on this premise, the court ruled that because both the airline and the plaintiff employees had deep ties to California, California's labor laws would apply to the plaintiffs wherever they might work, inside the state or outside. The court rejected the airline's premise that if it was forced to comply with California labor law, "it [would] necessarily have to comply with other states' wage and hour laws, too." *Id*. at 1065. The court reasoned that in the absence of evidence that other states had equally deep ties to the airline and its flight attendants, there was no basis to conclude that other states would require the airline to abide by their wage and hour laws. *Id*. at 1066. And because only

[16] For example, plaintiffs extensively discuss a Dormant Commerce theory concerning the extraterritorial effect of state statutes, as opposed to the operative issue here, which is the Dormant Commerce clause's prohibition on statutes that excessively burden interstate commerce.

California law would apply, in the *Bernstein* court's view, there was only a minimal administrative burden on the defendant, who only had to comply with California law.

Respectfully, this court does not find *Bernstein*'s analysis persuasive and the case is distinguishable in any event. The problem with *Bernstein* is that the court assumed that only California law would apply to flight attendants who are based in California, when in reality, each state and locality defines the parameters of its own wage laws. That California asserts, for whatever reason, that its labor law applies to an FA does not, of course, preclude another state from similarly claiming that its labor laws apply to that FA. Nor does it explain why any state would not, at a minimum, take the position that its labor laws apply to its residents performing work within its borders. SkyWest cannot assume that the wage laws of 42 other states do not apply merely because it complies with the laws of the state in which its FAs are based. For example, as the *Bernstein* court acknowledges with no sense of irony, "'California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents.'" *Id.* at 1067 (quoting *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2007)). So do many other states. Why, then, if FAs are subject to state and local wage and hour laws, is it unreasonable to posit that those states and cities, too, would seek to enforce their laws on California-based FAs working within their borders? It isn't. Indeed, it can be assumed that if California, or any other state, were permitted to enforce its labor laws against interstate airlines, every other state would also be permitted to

enforce their labor laws to the extent applicable. *See Legato Vapors, LLC v. Cook*, 847 F.3d 825, 834 (7th Cir. 2017) (holding that "the threat of inconsistent regulation, not inconsistent regulation in fact, is enough" to implicate the Dormant Commerce Clause). In assuming that only California law would apply to the plaintiffs, then, the *Bernstein* court substantially underestimated the extent of the administrative burden it imposed on the defendant in requiring it to comply with state and local wage laws.

Bernstein is in any event distinguishable; there Virgin Atlantic was based in California, formulated its wage policies in California, operated primarily in California, and the employees at issue were all California residents. *Bernstein*, 227 F. Supp. 3d at 1066. Here, SkyWest is not based in any of plaintiff's states and plaintiffs' premise is not that the law of any one of their states applies to all of them. *Bernstein*'s understanding that only California law would apply to the FAs in question is decidedly ***not*** the premise of the plaintiffs here. Rather, the plaintiffs assert that multiple state (and local) laws apply to FAs, depending solely on where they are based. But if *Bernstein* stands for anything, it is that application of state wage law may turn on more than the single factor of where someone is based. *Bernstein* really proves SkyWest's point: many states (or plaintiffs seeking the benefit of a state's wage laws) may take very aggressive positions about application of their laws to FAs who live, or are based, or work temporarily within, their borders, creating a massive compliance burden. Indeed, if state and local wage laws could apply to SkyWest FAs, SkyWest would be forced to determine which state and local wage laws apply based on the

precise amount of time each FA spends in each locale, and then comply with a different set of wage laws on a weekly, daily, or even hourly basis. This isn't a logistical conundrum; it's a logistical nightmare.

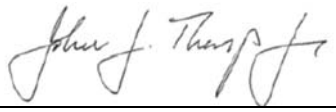
In short, the plaintiffs have done nothing to persuade the court to change its earlier ruling with regard to the Dormant Commerce Clause. Application of state wage and wage statement laws to SkyWest's FAs would impose a substantial burden on SkyWest that the Commerce Clause does not abide. *See, e.g., Ward v. United Airlines, Inc.*, No. C 15-02309, 2016 WL 3906077, at *5 (N.D. Cal. July 19, 2016) (holding that the local benefits of California's wage statement laws were "outweighed and even undermined by the burden that would result from application of [the law] and comparable laws in other states to this class of pilots");[17] *FitzGerald v. Skywest Airlines, Inc.*, No. 01129514, 2005 WL 3118764, at *1–2 (Cal. Sup. Ct. Oct. 13, 2005), *aff'd*, 65 Cal. Rptr. 3d 913 (Ct. App.

[17] The *Bernstein* court criticized *Ward*'s conclusions with regard to the Dormant Commerce Clause as "entirely dependent on its erroneous conclusion that California law only applies to individuals who work principally or exclusively in California." *Bernstein*, 227 F. Supp. 3d at 1066. In the *Bernstein* court's view, airlines would not have to "monitor the pilot's precise hours spent working in each state and determine which state's laws applied" because "principal job situs is *not* dispositive of whether California law applies to the Plaintiffs." But this criticism is again based on the faulty assumption that California law is the *only* applicable law. Moreover, *Bernstein*'s assertion that airlines would not have to keep track of the times a pilot or flight attendant worked in each state is questionable given that it cites job situs as a factor—albeit non-dispositive—in determining whether California law applies. *See id.* at 1060.

2007). The court therefore dismisses plaintiffs' state law claims with prejudice.[18]

* * *

For a second time, the plaintiffs have failed to adequately plead that they were ever paid under the federal minimum wage over the course of a workweek, foreclosing their Fair Labor Standards Act claims. Their remaining claims rely on various state and local wage laws, but the application of these laws is foreclosed by the Dormant Commerce Clause. The plaintiffs' complaints are therefore dismissed with prejudice.



Dated:
November 30, 2017

John J. Tharp, Jr.
United States District Judge

[18] In view of this ruling, it is not necessary to consider SkyWest's arguments against the applicability of each of the state and local wage laws on which various plaintiffs have asserted claims.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ANDREA HIRST, MOLLY STOVER, and EMILY STROBLE SZE, on behalf of themselves individually and all others similarly situated, Plaintiffs,	)	No. 15 C 02036 Judge John J. Tharp, Jr.
v.	)	
SKYWEST, INC. and SKYWEST AIRLINES, INC., Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs, Andrea Hirst, Molly Stover, and Emily Stroble Sze, are former flight attendants ("FAs") with SkyWest Airlines, Inc. They bring this action on behalf of themselves and all other similarly situated FAs who were paid hourly wages by SkyWest, Inc. and SkyWest Airlines, Inc. (collectively, "SkyWest") within the three years prior to the filing of this suit. The plaintiffs allege that SkyWest's compensation scheme—under which they were not

paid based upon the total hours they worked in a given duty day but only for the number of block time hours they worked when the aircraft's main cabin door was closed—violates the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206, 216(b), and the Illinois Minimum Wage Law ("IMWL"), 820 Ill. Comp. Stat. 105/1–15. The defendants move to dismiss the Amended Complaint under Rule 12(b)(6) for failure to state a claim and move to dismiss the IMWL claim under Rule 12(b)(1) for lack of subject matter jurisdiction. Mt. Dismiss, ECF No. 35. As will be explained, the characterization of some of SkyWest's arguments as jurisdictional is mistaken, but the error is of no consequence. For the following reasons, the motion to dismiss is granted.

BACKGROUND[1]

I. Flight Attendant Duties, Schedules, and Compensation

Defendant SkyWest, Inc. is the parent company of defendant SkyWest Airlines, Inc. and another airline (ExpressJet Airlines, Inc.) that is not involved in this litigation. Am. Compl. ¶ 42, ECF No. 22. The plaintiffs state, "upon information and belief," that SkyWest currently employs approximately 2,663 FAs, with 389 based out of Chicago O'Hare International Airport. Am. Compl. ¶ 44.

The plaintiffs are former FAs with SkyWest: Andrea Hirst was employed from April 20, 2010 until May 10,

[1] As this is a motion to dismiss, the Court accepts all well-pleaded facts as true and construes all inferences in favor of the plaintiff. *Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632, 634 (7th Cir. 2012).

2015 and was based out of O'Hare Airport for the majority of her tenure with SkyWest (the Amended Complaint does not indicate where else Hirst was based or for what period of time). Am. Compl. ¶ 35. Molly Stover was employed from August 9, 2012 until November 2014 and was based out of O'Hare the entirety of her tenure with SkyWest. Am. Compl. ¶ 36. Emily Stroble Sze was employed from June 2010 until September 2012 and was based out of O'Hare the majority of her tenure with SkyWest (again, the Amended Complaint does not indicate where else Sze was based or for what period of time). Am. Compl. ¶ 37.[2]

The schedules of SkyWest FAs are recorded down to the minute in the SkedPlus+ system. Am. Compl. ¶ 9. The minute-by-minute schedule for an FA's series of work trips (a "pairing") is recorded in the "paring details." Am. Compl. ¶ 11, Fig. 1. The pairing details reflect the actual circumstances of the pairing as flown and are available for each employee for the past several years on the SkedPlus+ system. Am. Compl. ¶ 12. The pairing details identify the FA by her employee number and name, list her domicile, level of training, and position. Am. Compl. ¶ 13. The details list the FA's "report time"—the time at which she must have arrived at the airport in uniform with all of her mandatory items for duty, cleared security, and checked in electronically on SkyWest's computer system. Am. Compl. ¶¶ 14, 54–60. If an FA reports earlier than is listed on the pairing details, the

[2] Because all of the named plaintiffs are women, this opinion uses female pronouns.

required time rather than the actual report time is recorded. *Id*.

Each flight has a "block time," which is the actual length of time that it took to fly between the two destinations on the specific day; block time begins with "block out," when the main cabin door is closed and the aircraft moves away from the jet bridge, and ends with "block in," when the aircraft arrives at the destination jet bridge and the main cabin door is opened. Am. Compl. ¶ 18. Block time is closely related to "credit time," which is the time a flight (called a "leg") is estimated to take. Am. Compl. ¶¶ 22, 25. FAs are entitled to hourly compensation based on the greater of the two time periods: When block time is less than credit time (*i.e.*, the flight landed early), FAs are compensated based on the estimated credit time. Am. Compl. ¶ 25. When block time exceeds credit time, FAs are entitled to additional compensation based on the block time and must submit a payroll correction form to receive the increased compensation. Am. Compl. ¶¶ 26, 80.

Some of the duties of a SkyWest FA are: "to ensure the safety of the passengers through required inspections of the aircraft prior to and after each flight, to assist passengers while the passengers are boarding or are onboard the aircraft, to provide customer service such as serving meals and drinks, and to assist passengers and the flight crew until all passengers have departed from the aircraft." Am. Compl. ¶ 50. Once on board but prior to closing the cabin door, FAs must perform a number of duties mandated by the Federal Aviation Administration ("FAA"), including but not limited to: conducting a preflight and pre-boarding safety check, participating in a pre-flight

briefing with other crew members, and verifying that the commissary supply is sufficient. *See* Am. Compl. ¶ 61. After the aircraft blocks in and all passengers have deplaned, FAs must perform additional duties required by the FAA: they must, for example, check all emergency and safety equipment to verify that nothing has been tampered with during the flight, remove all trash, straighten and cross seatbelts, fold blankets, and clean the cabin (except on the final flight of the day), and verify that the aircraft is stocked and ready for subsequent flights, among other things. Am. Compl. ¶ 68.

The time between scheduled legs on a duty day is recorded as "turn time": if turn time is fewer than 45 minutes, FAs are generally not permitted leave the airplane (and are strictly prohibited from leaving the aircraft while any passenger remains on board). Am. Compl. ¶¶ 19, 67. If the turn time lasts more than an hour, FAs may leave the plane but are required to remain in the airport and in full uniform. Am. Compl. ¶ 20. Any unanticipated delays (*e.g.*, mechanical problems or weather delays) are recorded as turn times; FAs are not compensated during either scheduled or unanticipated turn times. Am. Compl. ¶¶ 21, 64. Nor do SkyWest FAs receive any "holding pay" for circumstances where passengers are onboard but the plane is held at the gate. Am. Compl. ¶ 64.

The "release time," marking the end of an FA's daily shift, is automatically set at 15 minutes after the cabin door is opened on the last flight of the day. Am. Compl. ¶ 15. The time between an FA's report time and release time is her "duty day," during which time FAs are required to be in uniform and are under SkyWest's direction. Am. Compl. ¶ 16. The maximum length of

an FA's duty day is regulated by the FAA. Am. Compl. ¶ 17; *see* 14 CFR 121.467(b) (setting an FA's maximum duty day at 14 hours, with limited exceptions). FAs work between one and seven or more legs in any given duty day and are guaranteed a minimum of four hours of block time for every duty day. Am. Compl. ¶¶ 53, 74.

The pairing details include a "trip summary," which lists the first report time and the last release time of the entire pairing, the total length of the pairing ("time away from base"), and the cumulative block time and credit time for the entire pairing. Am. Compl. ¶ 27. In addition to the hourly compensation based on the credit and block time, FAs receive a non-taxable per diem of $1.80 per hour for every hour of time away from base. Am Compl. ¶ 28. If an FA volunteers to be "junior manned" (*i.e.*, work overtime), she is paid at one and one half times her regular hourly rate. Am. Compl. ¶ 80(C) and n.6.

II. The Plaintiffs' Experiences as SkyWest FAs

The Amended Complaint describes two of Andrea Hirst's SkedPlus+ pairings: in the first, a four-day trip from October 30, 2012 through November 2, 2012, Hirst was compensated for a total of 19 hours and 10 minutes (her credit time, which exceeded her block time of 18 hours and 19 minutes). Am. Compl. ¶ 29. The Amended Complaint alleges that Hirst should have been compensated for all of her duty time in those four days, a total of 33 hours and 44 minutes. Am. Compl. ¶ 29. In the second example, the Amended Complaint focuses on a single day, December 22, 2014, during which Hirst's first leg was delayed by

approximately six hours (which, as it was not block time, was uncompensated) due to late arrival of the aircraft: on that day, Hirst's duty day totaled 14 hours and 49 minutes, but she was compensated for a total of 7 hours and 48 minutes. Am. Compl. ¶¶ 99–101. In total during the four-day pairing from December 21, 2014 through December 24, 2014 (including December 22), Hirst's duty time totaled 37 hours and 48 minutes and credit time (because credit time again exceeded block time) totaled 24 hours and 55 minutes. *See* Am. Compl. Fig. 3. The Amended Complaint does not include Hirst's hourly rate for either of these examples or the amount she received as compensation for either pairing. The Policy Manual, however, includes a chart of FAs' hourly rates (to which the plaintiffs refer, *see* Am. Compl. ¶ 80(A) and n.5) based on an FA's years of service with SkyWest. *See* Am. Compl. Ex. 2 § 2327. Hirst began work as an FA with SkyWest in 2010 and had served two years at the time of the first example pairing in late 2012, so it appears that her hourly rate would have been $22.49. *Id.* There is no information as to Hirst's hourly rate in 2014 (the chart only extends through 2012), which likely increased due to her additional experience. (The hourly rate in 2012 for an FA with four years of experience was $24.73.) *Id.*

As to Molly Stover, the Amended Complaint does not include any pairing details or any specific examples of the hours she worked or the compensation she received. Rather, the Amended Complaint generally describes two experiences in which Stover experienced flight delays, once in February or March of 2014, where she had an unscheduled stay overnight and returned to her base in Chicago the following day, and once in the summer of 2014, when she was delayed

for five hours. Am. Compl. ¶¶ 102–104. In both instances, Stover did not receive "additional wage compensation" for her extended duty day. *Id.*

The factual allegations with respect to Sze are even more limited: Sze asserts that she was not informed that her block pay would be averaged across her workday but, instead, was told that the per diem reimbursement was how she would be compensated for all other hours. Am. Compl. ¶ 108. She received one and one half times her regular rate only when she was "junior manned" (*i.e.*, voluntarily accepted an overtime pairing, *see* Am. Compl. ¶ 80(C) n.6) and worked on a scheduled day-off. Am. Compl. ¶ 109. As with Stover, there are no allegations regarding the hours Sze worked, her hourly wage, or the amount of compensation she received.

Generally, the Amended Complaint asserts that because SkyWest's compensation scheme does not adjust to unexpected delays and longer than scheduled duty days, "the FAs are at risk of and do actually receive less than the Federal minimum wage [and the Illinois minimum wage] on certain workdays, even if this Court were to adopt a weekly averaging of wage compensation." Am. Compl. ¶¶ 133, 146. Additionally, the plaintiffs assert that "SkyWest FAs are not paid at a higher rate of pay for hours worked over 40 per week. At most, flight attendants receive a $3.00 per hour increase for working over 87 'block hours' in a month." Am. Compl. ¶ 148. The plaintiffs allege that SkyWest does not verify compliance with minimum wage laws "for every FA for every week" and that due to the "unnecessary complexity of SkyWest's pay stubs. . . FAs are unlikely to be able to accurately determine their true hourly compensation if and when

they have reason to believe they are being under compensated." Am. Compl. ¶ 92.

III. Flight Attendant Representation

SkyWest FAs are not represented by a union, but SkyWest InFlight Association ("SIA"), an organization of FAs, negotiates FAs' work responsibilities and benefits with SkyWest management on behalf of all FAs. Am. Compl. ¶¶ 3–4; Ex. 2 § 2303 (letter of agreement between SkyWest and SIA). The policies and benefits negotiated between SIA and SkyWest are memorialized in the Flight Attendant Policy Manual. Am. Compl. ¶ 4 and Ex. 2.

The plaintiffs allege "upon information and belief" that SkyWest refers to the Policy Manual as a collective bargaining agreement ("CBA"), although the Policy Manual does not include "any compulsory mediation requirements, an arbitration clause, discussion of any 'cooling off period' or 'self-help' provisions or restrictions." Am. Compl. ¶¶ 5–6, 82–83. They also assert that SkyWest's employment policy (Am. Compl. Ex. 6) does not refer to its negotiations with SIA or the Policy Manual as a collective bargaining agreement and merely describes SIA's "input" in management decisions. Am. Compl. ¶ 82. The plaintiffs allege that SIA and the comparable pilots' association have no bargaining power with respect to uncompensated work hours because SkyWest management "is and has been completely unwilling to discuss or listen to employee input . . . about paying hourly compensation for any time other than block time." Am. Compl. ¶ 85.

The Amended Complaint asserts that employee grievances are unilaterally decided by SkyWest

management, rather than through a mutually chosen arbitrator or mediator. *See* Am. Compl. ¶ 83. The Policy Manual includes a procedure for FAs to file formal grievances when they have a disagreement "concerning the interpretation of any terms" in the Policy Manual: the FA submits the grievance to SIA; if SIA determines the grievance is justified, it meets with the "appropriate Company personnel for corrective action or a satisfactory resolution." Am. Compl. Ex. 2 § 2325.3. It appears FAs can appeal the decision on their grievance, although the Manual is not clear to whom they appeal or how the appeal is decided. *See id*. § 2325.4(C)–(D) ("Whenever two or more employees have a common or similar complaint, the flight attendant selects one or more of them to represent the group. The final decision on the appeal is binding on all members of the group.").

Two of the plaintiffs, Hirst and Stover, filed a Complaint on behalf of themselves and all other similarly situated FAs against the defendants, alleging that the failure to compensate FAs for every hour they worked violates the FLSA and the IMWL and that failure to compensate FAs at a higher rate for hours worked in excess of 40 hours per week violates the IMWL. *See* Compl., ECF No. 1. Shortly thereafter, the plaintiffs filed the Amended Complaint, adding Sze as an additional plaintiff. *See* Am. Compl. ¶¶ 37, 107–110. In addition to monetary damages for unpaid wages, the Amended Complaint seeks a declaration requiring that SkyWest explain various aspects of its compensation scheme to current and former FAs and an injunction barring SkyWest from referring to the per diem payment as "per diem pay" or "per diem wages." Am. Compl. ¶¶ 157–63. The plaintiffs filed a

"placeholder" motion for class certification, *see* ECF No. 23, which this Court denied after the Supreme Court issued its opinion in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). *See* Min. Orders, ECF Nos. 60–61. The plaintiffs also filed a motion to proceed as a collective action, for tolling of the statute of limitations, for court- authorized notice, and for disclosure of the contact information of the potential opt-in plaintiffs. *See* Pl. Misc. Mt., ECF No. 24. The defendants have moved to dismiss the Amended Complaint for failure to state a claim and for lack of subject matter jurisdiction. Because the jurisdictional challenge pertains only to a subset of the plaintiffs' claims (the state law IMWL claims), and is not actually a challenge to this Court's jurisdiction, and because the discussion of the plaintiffs' FLSA claims will inform discussion of the state law claims that are the subject of that aspect of the defendants' motion, the FLSA claims will be addressed first.

DISCUSSION

"To survive a motion to dismiss under Rule 12(b)(6), a complaint must 'state a claim to relief that is plausible on its face.'" *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Adams*, 742 F.3d at 728 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although notice pleading under Rule 8 is a more lenient standard than the code pleading that preceded it, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*,

556 U.S. at 678–79. A court must accept all of the plaintiff's factual allegations as true when reviewing the complaint, but conclusory allegations merely restating the elements of a cause of action do not receive this presumption: "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679; *see also Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions").

I. FLSA Claim

The FLSA requires that "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce. . . not less than—$7.25 an hour." 29 U.S.C. § 206(a)(1)(C). But how is it determined whether an employee has received that hourly rate? The rate may vary depending on the methodology used. Consider, for example, an employee (we'll call him Joe) who is paid a flat rate of $60 per work day and works no more than 40 hours a week but on a varied schedule, some days working up to 12 hours per day and others working as few as 4 hours. If Joe's hourly rate is computed on a daily basis, on a 12-hour day his rate of pay would be $5 per hour ($60/12 hours), below the required minimum wage. But if his schedule is computed on a weekly basis, and he works 40 hours during the week, Joe's hourly rate of pay would be $7.50 ($300/40 hours), 25 cents per hour above the required minimum wage.

A consistent methodology for determining the wage paid is therefore required. In determining whether an employer has violated the minimum wage provision of the FLSA, courts uniformly calculate the hourly wage over the course of a workweek—*i.e.*, dividing the total compensation an employee received in a workweek by the compensable hours worked. Although the Seventh Circuit has not expressly addressed this issue, every circuit court that has considered the issue has utilized the workweek averaging approach to determine whether a FLSA violation occurred. *See, e.g.*, *Adair v. City of Kirkland*, 185 F.3d 1055, 1063 (9th Cir. 1999) ("The district court properly rejected any minimum wage claim the officers might have brought by finding their salary, when averaged across their total time worked, still paid them above the minimum wage."); *U.S. Dep't of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 780 (6th Cir. 1995) ("[A]n employer meets the minimum wage requirements if the total weekly wage paid is equal to or greater than the number of hours worked in the week multiplied by the statutory minimum hourly rate."); *Hensley v. MacMillan Bloedel Containers, Inc.,* 786 F.2d 353, 357 (8th Cir. 1986) ("no [FLSA] violation occurs 'so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirement being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement.'" (quoting *United States v. Klinghoffer Bros. Realty Corp.,* 285 F.2d 487, 490 (2d Cir. 1960)); *Dove v. Coupe*, 759 F.2d 167, 171-72 (D.C. Cir. 1985) ("While the minimum wage laws logically could be construed as requiring hour-by-hour compliance, [ ] both administrative and judicial

decisions established the workweek as the measuring rod for compliance. . . ."); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1576–77 (11th Cir.), *modified on other grounds*, 776 F.2d 265 (11th Cir. 1985) (applying weekly averaging approach to example compensation scheme); *Blankenship v. Thurston Motor Lines,* 415 F.2d 1193, 1197–98 (4th Cir. 1969) (applying the weekly averaging approach). The U.S. Department of Labor endorses the weekly averaging approach as well. *See, e.g.*, 29 C.F.R. §§ 776.4 ("The workweek is to be taken as the standard in determining the applicability of the [FLSA]."); 776.5 (requirement that minimum wages shall be paid "at a rate not less than a specified rate 'an hour' . . . means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate"); 778.105 ("For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established . . . .").

The plaintiffs nevertheless argue for the adoption of a daily minimum wage determination. They assert that "SkyWest's wage compensation plan does not sufficiently adapt . . . such that *every hour of every FAs' workday* is compensated at no less than the applicable minimum wage. Therefore, upon information and belief, the FAs are at risk of and do actually receive less than the Federal [and Illinois] minimum wage ***on certain workdays***." and Am. Compl. ¶¶ 133, 146 (emphasis added). They don't offer any legal authority for this novel daily compliance determination, asserting only that "the possibility [of such an approach] has not been precluded in the district courts

[in the Seventh Circuit]." Resp. 11, ECF No. 51 (citing *Dominguez v. Quigley's Ir. Pub, Inc.*, 790 F. Supp. 2d 803, 816 (N.D. Ill. 2011); *Solis v. Saraphino's, Inc.*, No. 09-CV-954, 2011 WL 1532543, at *4 (E.D. Wis. Apr. 22, 2011)). The Court is persuaded by the overwhelming authority applying the workweek averaging approach, and the lack of authority endorsing the daily compliance approach, that the workweek averaging approach is the appropriate method for determining a FLSA violation.

The plaintiffs repeatedly assert that SkyWest violated the FLSA by failing to compensate them for every hour they worked in the performance of "integral and indispensable activities." *See, e.g.*, Am. Compl. ¶¶ 53, 68, 78, 86, 128, 131–32, 145; Resp. 14–15. Any activity that is integral and indispensable to an employee's principle activity—*i.e.*, "it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities"—is compensable under the FLSA. *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014). The plaintiffs, however, misunderstand the term "compensable" as used in reference to the FLSA. Even assuming that every hour of an FA's duty day is spent performing "integral and indispensable activities," and thus, is compensable, that does not mean the plaintiffs must be paid an hourly wage for that specific hour; it means that such an hour must be included in the calculation of the total hours worked in that workweek for minimum wage and overtime determinations. *Cf. Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 592 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014) (noting that hours worked under FLSA—*i.e.*, compensable time—is "the time during which an

employee is entitled to be compensated at the minimum hourly wage").[3]

To state a FLSA claim under the workweek averaging approach, then, the plaintiffs must plausibly allege at least one workweek for which the compensation they received, divided by their total compensable time, failed to meet the FLSA minimum wage of $7.25 per hour. They have not done so. As an initial matter, the Amended Complaint does not even include any of the named plaintiffs' hourly wages or any examples of the total compensation they received for any workweek. As to Stover and Sze, the Amended Complaint also lacks any allegations concerning the number of hours worked in any given week. Without such information, it is impossible to determine whether their compensation violated the minimum wage provision of the FLSA. Although the Amended Complaint asserts that Stover and Sze did not receive compensation for all the hours they work, as already explained, that is insufficient to state a FLSA violation. Stover and Sze have, thus, failed to plead facts showing that SkyWest failed to compensate them in accordance with the FLSA minimum wage provisions; the motion to dismiss is granted without prejudice as to these claims.

With respect to Hirst, based on the hourly wage chart in the Policy Manual attached to the Amended Complaint and the two examples of pairing details, the

---

[3] SkyWest is not, as the plaintiffs argue, making a *de minimus* argument regarding all time FAs work other than block time. *See* Resp. 13–14. SkyWest includes every hour of Hirst's example duty days as compensable time in their calculations of her average weekly wage. *See* Mem. in Supp. 7 and n.3.

defendants piece together Hirst's likely compensation for the two example pairings (assuming, as the plaintiffs assert, that each hour of the duty day was "compensable"):

Example 1: October 30, 2012 – November 2, 2012:

Credit Time:[4]	19 hours, 10 minutes
x Hourly Rate:	$22.49
Total Compensation:	$431.06
÷ Total Duty Time:[5]	33 hours, 44 minutes
Hourly Compensation:	**$12.78**

Example 2: December 21, 2014 – December 24, 2014:[6]

[4] In both examples, Hirst would have been paid for credit time rather than block time (assuming she submitted the payroll correction forms), as it was the longer of the two periods. *See* Am. Compl. ¶¶ 25–26; Figs. 1, 3.

[5] The four duty days in this pairing lasted: (1) 6 hours and 24 minutes; (2) 8 hours and 34 minutes; (3) 11 hours and 57 minutes; and (4) 6 hours and 49 minutes, for a total of 33 hours and 44 minutes. *See* Am. Compl. Fig. 1.

[6] The Court's calculations differ from the defendants' in the second example. The Court used credit time, which exceeded block time, to calculate Hirst's total compensation. Additionally, the Court's calculation of Hirst's total duty time is 37.8 hours (duty day totals: (1) 9 hours and 23 minutes; (2) 14 hours and 49 minutes, (3) 5 hours and 1 minute; and (4) 8 hours and 35 minutes, for a total of 37 hours and 48 minutes), rather than 37.865 hours. *See* Mem. in Supp. 7 n.3; Am. Compl. Fig. 3. The defendants' calculations result in an average weekly wage of $13.74 per hour, still far above the federal minimum wage of $7.25. *See* Mem. in Supp. 7 n.3.

Credit Time:	24 hours, 55 minutes
x Hourly Rate:[7]	$22.49
Total Compensation:	$560.38
÷ Total Duty Time:	37 hours, 48 minutes
Hourly Compensation:	**$14.82**

See Am. Compl. Figs. 1, 3.[8]

Applying the workweek averaging approach to each example pairing, Hirst received average hourly wages of $12.78 and $14.82, respectively, well over the federal minimum wage of $7.25 per hour. While it is possible that over the course of their tenure with SkyWest the plaintiffs worked one or more series of lengthy duty days due, not to long flights (for which time they would have been compensated) but to delay and or/mechanical issues (for which time they would not have been compensated) and, as a result, received only the minimum guaranteed four hours of block time pay each day—resulting in a workweek average below the federal minimum wage. That such a scenario could possibly occur under SkyWest's compensation scheme, however, is insufficient to state a plausible claim; the plaintiffs have not provided a single instance where SkyWest failed to pay an FA the

[7] SkyWest applied Hirst's hourly rate as of 2012, which likely would have increased by 2014 as she had an additional two years of experience and as the hourly wage chart in the Policy Manual included a 1% increase in rate per year for 2010–2012. *See* Mem. in Supp. 7 n.3; Ex. 2 2327.

[8] The defendants note that they did not include the $1.80 hourly per diem in their calculation of Hirst's compensation. *See* Mem. in Supp. 7 n.2.

minimum wage as mandated under federal law over the course of a workweek. As such, Hirst's FLSA claim, like those of Stover and Sze, is dismissed without prejudice.[9]

II. IMWL Claims

The plaintiffs also assert wage and overtime pay claims under the IMWL. These claims suffer from the same failure to plead inadequate compensation over the course of a workweek. Beyond that shortcoming, which in theory can be corrected, the plaintiffs' IMWL claims suffer from several other defects that cannot be remedied.

A. Pleading Deficiencies

The IMWL promises Illinois workers a higher minimum wage than does federal law. The IMWL requires that "every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than $8.25 per hour." 820 Ill. Comp. Stat. 105/4(a)(1). When interpreting the IMWL, courts look to the FLSA for guidance. *See Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 846 (7th Cir. 2014) (citing *Lewis v. Giordano's Enterprises, Inc.,* 921 N.E.2d 740, 745–46 (Ill. App. Ct. 2009); *Bernardi v. Village of North Pekin,* 482 N.E.2d 101, 102 (Ill. App. Ct. 1985)); *see also* 56 Ill. Admin. Code § 210.120 (referring to the FLSA for guidance interpreting the IMWL). For the same reasons their

[9] The plaintiffs do not dispute the hourly wage SkyWest attributed to Hirst or the calculated total compensation for the example workweeks based on that hourly wage; in fact, the plaintiffs do not respond at all to the specific mathematical calculations of Hirst's average hourly wage or SkyWest's arguments for dismissal based thereon.

FLSA minimum wage claims are dismissed—failure to plead any facts indicating they received less than minimum wage in any given workweek—Stover and Sze's IMWL minimum wage claims must be dismissed. Applying the workweek averaging approach to Hirst, her average hourly wages of $12.78 and $14.82 exceed the Illinois minimum wage of $8.25; accordingly, her IMWL minimum wage claim fails. *See Gatto v. Mortgage Specialists of Illinois, Inc.*, 442 F. Supp. 2d 529, 537 n.5 (N.D. Ill. 2006) (applying workweek averaging approach to determine compliance with the FLSA and the IMWL); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2004 WL 1882449, at *5 (N.D. Ill. Aug. 18, 2004) (same).

The IMWL overtime claims fail for the same reason:[10] the plaintiffs have failed to plead any facts showing that they worked over 40 hours in one week and were not compensated at one and one half times their hourly rate for the additional hours. *See* 820 Ill. Comp. Stat. 105/4a(1). There are no allegations that Stover worked overtime. *See* Am. Compl. ¶¶ 102–106. Although the Amended Complaint includes allegations that Sze worked overtime, it also states that she was paid "one and one-half times her regular pay" for that overtime work. Am Compl. ¶ 109. The general allegation regarding overtime— "SkyWest FAs are not paid a higher rate of pay for hours worked over 40 hours per week," Am. Compl. ¶ 148—is inconsistent with the statement that FAs are paid time and a half whenever they are junior manned,

[10] The plaintiffs only bring an overtime claim under the IMWL, as FAs are exempt from the overtime provision of the FLSA. *See* 29 USC § 213(b)(3).

which the Amended Complaint defines as having voluntarily accepted an overtime shift. *See* Am. Compl. ¶ 80(C) and n.6. The Policy Manual further explains that when SkyWest assigns an FA a pairing on a scheduled day off or requires that an FA is junior manned, she is compensated at time and a half. *See* Am. Compl. Ex. 2 §§ 2305, 2308.20. That Sze only received one and one-half times her regular pay when she was junior manned—*i.e.*, worked overtime—does not state a violation of the IMWL overtime provision; rather, it acknowledges that she was paid time and a half when she worked overtime.

With respect to Hirst, and extrapolating from the pairing details she provides, the plaintiffs argue, "Depending on the start and finish day of the workweek, [Hirst] is likely to have . . . exceeded the 40 hours required under the IMWL." Resp. 17 n.15. That there is a possibility that Hirst had a workweek exceeding 40 hours (and that she was not paid time and a half for the additional hours) is insufficient to satisfy Rule 8 and the plausibility standard of *Twombly* and *Iqbal*. *See Iqbal,* 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for *more than a sheer possibility* that a defendant has acted unlawfully." (emphasis added)). Hirst has access to at least some of her pairing details;[11] if there is a workweek in which

---

[11] The Amended Complaint notes that, although pairing details are available for at least five years on the SkedPlus+ system, the information is only accessible to employees of the airline. Am. Compl. ¶ 12. Nonetheless, the plaintiffs have at least two of Hirst's pairing details, which they include in the Amended Complaint. There is no explanation of how they were

she worked over 40 hours and was not compensated accordingly, she is able to identify those facts. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 528 (7th Cir. 2015) ("[P]laintiffs' 'pleading burden should be commensurate with the amount of information available to them.'"). Because none of the plaintiffs has alleged a single workweek in which she worked any overtime hours that were not compensated at a time-and-a-half rate, they have failed to state a plausible IMWL overtime claim.

The plaintiffs' attempt to invoke the IMWL, moreover, cannot be cured simply by pleading that the plaintiffs worked so much that they were paid less than minimum wage or qualified for overtime. A claim based on the IMWL must be based on work performed in Illinois. "Because the IMWL is designed to protect employees within the State of Illinois only, it does not apply extraterritorially," meaning it only protects employees located within Illinois and only applies to conduct occurring in Illinois. *Wooley v. Bridgeview Bank Mortgage Co., LLC*, No. 14 C 5757, 2015 WL 327357, at *2, *3 (N.D. Ill. Jan. 23, 2015). State laws—federal laws, too, for that matter—presumptively lack extraterritorial reach. "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 852 (Ill. 2005) ("the long-standing rule of construction in Illinois" is "that a statute is without extraterritorial effect unless a clear intent in

---

able to access these two pairing details and whether they have access to additional examples.

this respect appears from the express provisions of the statute") (internal quotation omitted). Thus, to state a claim under the IMWL, the plaintiffs must not only allege that they were not adequately compensated for hours worked in a given workweek but also must allege that the plaintiffs worked those hours in Illinois. *Cf. Glass v. Kemper Corp.*, 133 F.3d 999, 1000 (7th Cir. 1998) (holding that Illinois Wage Payment and Collection Act did not apply where the plaintiff's work was outside the state).[12] The plaintiffs' Amended Complaint fails to do so, and likely cannot because there is no identified basis by which the work of FAs performed within the territorial jurisdiction of the state of Illinois (or any other state) was measured.[13]

B. SkyWest's "Jurisdictional" Arguments

In addition to its arguments based on the plaintiffs' failure to allege facts sufficient to plausibly establish violations of the IMWL, SkyWest also asserts that the

---

[12] The Illinois Department of Labor has similarly construed the IWPC to apply only to work performed within Illinois. *See https://www.illinois.gov/idol/FAQs/Pages/wage-payment-faq.aspx* ("The work has to be performed in Illinois for an employee to make a claim under the Act. For example, a truck driver that lives in Illinois but travels throughout the United States to perform their work is likely not covered by the Act.") (last visited May 23, 2016).

[13] To track hours worked within a particular state, moreover, another problem would have to be addressed. On what basis would work at 35,000 feet constitute work within the state of Illinois? The state has no sovereignty over the skies above it. There is no "State of Illinois" airspace, only national airspace. *See* 49 U.S.C. § 40103(a) ("The United States Government has exclusive sovereignty of airspace of the United States."). Arguably, then, virtually none of the flight time worked by the plaintiffs can be said to have occurred within Illinois.

IMWL claims must be dismissed pursuant to Rule 12(b)(1) because the Court lacks jurisdiction over those claims. SkyWest maintains that the IMWL claims are barred by the dormant Commerce Clause and are preempted by Congress's occupation of the field of regulation relating to air travel, by its enactment of the Aviation Deregulation Act ("ADA"), and by the Railway Labor Act ("RLA"). Whatever the substantive merit of these arguments (considered below), neither the Commerce Clause nor any of the preemptive acts asserted by SkyWest deprive the court of jurisdiction to adjudicate the plaintiffs' state law claims.

As used in Rule 12(b)(1), "jurisdiction" refers to a court's authority to adjudicate a claim. Here, SkyWest is not really arguing that the Court cannot adjudicate the IMWL claim. Its argument is that the claim must fail in this or any other court based on the substantive content and effect of federal law (specifically, the Commerce Clause, the Federal Aviation Act, the ADA, and the RLA). To do what SkyWest urges here—to apply federal law, whether constitutional or statutory, to defeat a state law claim—is to exercise, not abdicate, judicial authority. A party's assertion of the dormant Commerce Clause does not deprive the court of jurisdiction; it asks the court to apply federal law to defeat the claim that the party is liable under state law. The long line of cases in which the Supreme Court has held the dormant Commerce Clause to invalidate applications of state law would not exist if federal courts had no "jurisdiction" over cases in which defendants invoke that constitutional provision. *See, e.g., Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1799 (2015) ("Legion are the cases in

which we have considered and even upheld dormant Commerce Clause challenges brought by residents to taxes that the State had the jurisdictional power to impose."); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 575–76 (1997) (invalidating higher state tax on charities conducted principally for the benefit of non-residents as a violation of the Commerce Clause). So, too, with preemption doctrine; the assertion that federal law preempts state law does not mean that the court has no jurisdiction over the state law claim; it means that the state law claim must fail on the merits. *See, e.g.*, *Healy v. Metro. Pier & Exposition Auth.*, 804 F.3d 836, 840–41 (7th Cir. 2015) ("we deem a dismissal of preempted state law claims a 12(b)(6) dismissal for failure to state a claim, a dismissal on the merits"); *Turek v. Gen'l Mills, Inc.,* 662 F.3d 423, 425 (7th Cir. 2011) ("the fact that a defendant has a good [preemption] defense to a state law claim does not mean that the complaint does not invoke federal jurisdiction").

It would be ironic, indeed, if the assertion of a constitutional or statutory provision, or an argument that an act of Congress has preemptive effect—both essentially assertions of the Supremacy Clause of the Federal Constitution—divested federal courts of subject matter jurisdiction over state law claims that were otherwise properly before the court. This Court has supplemental jurisdiction—the authority to adjudicate—over the plaintiffs' IMWL claims pursuant to 28 U.S.C. § 1367 because they are joined with the plaintiffs' federal FLSA claim. SkyWest's assertion of defenses founded on federal law, constitutional and statutory, are properly before the

Court. For the reasons already noted, and those that follow, those state law claims must be dismissed, but not because this Court lacks jurisdiction to adjudicate them.

C. Commerce Clause

SkyWest argues that requiring a national airline to comply with the IMWL is a substantial burden that violates its right to engage in interstate commerce. The Commerce Clause both affirmatively grants power to Congress to regulate interstate commerce but also implies a negative converse— "a substantive 'restriction on permissible state regulation' of interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 447 (1991) (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 326 (1979)); *see also S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("[T]he Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."). This negative implication—that states may not take actions that unduly interfere with the affirmative power of the federal government to regulate interstate commerce—is generally known as the "dormant Commerce Clause." *See, e.g.*, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) ("The principal objects of dormant Commerce Clause scrutiny are statues that discriminate against interstate commerce.").

In considering whether a state regulation violates the Commerce Clause, a court first determines if the regulation directly discriminates against interstate commerce or has the effect of favoring in-state economic interests; if so, the state regulation is

generally struck down. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986); *see also Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995). If the state regulation is neutral on its face or only has indirect effects on interstate commerce, the regulation "will be upheld 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Nat'l Solid Wastes*, 63 F.3d at 657 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)).

For example, in *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), an Illinois statute required truckers to use a specific mudguard while operating on Illinois highways—a mudguard not in common use and that, if used on other states' highways, would violate their mudguard statutes. *Id.* at 522–23. Although Illinois had a significant interest in regulating safety on its highways, the Supreme Court held that the Illinois statute placed an undue burden on interstate commerce. *Id.* at 529. The Court expressed the importance of national uniformity in certain fields—"this regulation of mudguards is not one of those matters 'admitting of diversity of treatment, according to the special requirements of local conditions' . . . ." *Id.* (quoting *Sproles v. Binford*, 286 U.S. 374, 390 (1932)).

The same principle of national uniformity is applicable to the airline industry. *See United Air Lines, Inc. v. Indus. Welfare Comm'n*, 28 Cal. Rptr. 238, 248 (Dist. Ct. App. 1963) *disapproved of on other grounds by Indus. Welfare Com. v. Superior Court*, 613 P.2d 579 (Cal. 1980); *see also Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co.*, 522 F.3d 776, 779 (7th Cir. 2008) (a goal of the Warsaw Convention was to

create "uniformity in the aviation industry"); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995) (noting the Airline Deregulation Act preemption provision promotes national uniformity); *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011) (same); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 904 (Wash. Ct. App. 2000) (same).

Here, the IMWL provisions would only apply to FAs based in Illinois and only to the hours they worked in Illinois. *See Wooley*, 2015 WL 327357, at *2, *3. To calculate the time the plaintiffs worked to which the IMWL would apply, SkyWest would have to track each minute pre- or post-flight in Illinois and the amount of turn time between flights that FAs spent in Illinois.[14] Moreover, if the IMWL were applicable to SkyWest FAs, then every state's comparable laws would also apply, subjecting SkyWest to 50 or more regulations depending where each FA was physically located at a particular moment in time.[15] Requiring compliance

---

[14] As noted *infra*, it might be argued that the IMWL does not apply to any portion of the time FAs spend in flight over the state of Illinois because that airspace is not within the state's sovereignty. But if it does, the complexity and burdens that would attend its application to FAs would only strengthen the argument for applying the Commerce Clause to bar its application. To include flight time over the state, SkyWest would be required to determine the precise minute each flight crossed into and out of Illinois airspace and whether any FA on that particular flight was based in Illinois. If changing a mudguard at the state line is a substantial burden on interstate commerce, then so, too, is tracking the minute-by-minute location of each FA on each operating SkyWest flight to determine the precise moment she enters and exits Illinois airspace.

[15] SkyWest highlights the plaintiffs' reference to pending minimum wage legislation in the City of Chicago, alluding to the

with the IMWL would not be a simple matter of setting an FA's minimum wage at the statutory amount in the state in which she is based; it would impose a labyrinth of potentially conflicting wage laws upon FAs based out of different states and cities, working on the same flights, literally moving through interstate commerce on a daily basis. This is precisely the type of burden on interstate commerce that the Commerce Clause prohibits. *See Fitz-Gerald v. Skywest Airlines, Inc.*, No. 01129514, 2005 WL 3118764, at *1–2 (Cal. Sup. Ct. Oct. 13, 2005), *aff'd*, 65 Cal. Rptr. 3d 913 (Ct. App. 2007);[16] *cf. Mitchell v. Abercrombie & Fitch*, No. C2-04-306, 2005 WL 1159412, at *4 (S.D. Ohio May 17, 2005) (Commerce Clause prevented application of Ohio minimum wage law to Ohio-based employer for all employees throughout the country).

The plaintiffs' only response to the Commerce Clause argument (relegated to a footnote in their response) notes that wage regulation is a "historic police power[ ] of the States," not the federal government. Resp. 19 n.16. SkyWest's invocation of the Commerce Clause, however, is not in the context of whether an action is a permissible federal regulation but rather references the Clause's "implicit

---

potential for SkyWest to be subject to the minimum wage laws of every city through which SkyWest flies. Mem. in Supp. 15 n.8; *see also* Am. Compl. ¶ 147.

[16] The plaintiffs object to SkyWest's reliance on *Fitzgerald*, which the California Supreme Court disapproved of in certain respects in *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 187–89 (Cal. 2014). The portion of the opinion addressing the Commerce Clause arguments, however, remains good law.

restraint on state authority." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Moreover, the state mudguard regulation in *Bibb* was also passed under Illinois's police power; nonetheless, the Supreme Court held it an undue burden on interstate commerce. *See id.* 359 U.S. at 529–30. The same is true here.

Imposing the IMWL on SkyWest would be an undue burden on interstate commerce and would upend the uniform treatment of FAs across states (and across the airline industry). Repleading, moreover, will not change this fact. Accordingly, the plaintiffs' IMWL claims are dismissed with prejudice.

B. Preemption Arguments

SkyWest makes three additional arguments, asserting that a myriad of federal laws preempt the application of the IMWL to the airline industry. None of these arguments—field preemption, enactment of the ADA or the RLA—preempt the application of the IMWL, a generally applicable state law governing the conditions of the workplace, to SkyWest.

1. Field Preemption

SkyWest asserts that because Congress has so heavily regulated the airline industry, federal law preempts the entire field of aviation, preventing states from supplementing with their own wage regulations. "Issues of express or field preemption are generally purely legal questions, where the matter can be resolved solely on the basis of the state and federal statutes at issue." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008). There is a presumption against preemption in areas of law

traditionally occupied by the states—such as wage regulation—unless federal preemption was "the clear and manifest purpose" of Congress. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 330 (1997) (wage regulation a field traditionally occupied by the states). The defendants focus on *Wisconsin Central, Ltd. v. Shannon*, in which the Seventh Circuit held overtime claims under the IMWL preempted due to comprehensive federal legislation over the railway industry. 539 F.3d at 765. SkyWest asks this Court to extend the holding of *Wisconsin Central* to the airline industry.

To reach its conclusion that federal law preempted the IMWL overtime provision for railroad employees, the Seventh Circuit reviewed the breadth of federal regulation over railways, noting that it has "touched on nearly every aspect of the railway industry, including property rights, shipping, labor relations, hours of work, safety, security, retirement, unemployment, and preserving the railroads during financial difficulties." *Id.* at 762. With respect to wage laws, however, the court observed the lack of comparable federal regulation but noted, "'[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.'" *Id.* at 764 (quoting *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 503 (1988)). The action predating congressional inaction in the railway industry was the Adamson Act, which, to head off an impending national strike, permanently established an eight-hour workday for

determining the compensation of railroad employees and temporarily froze wages. *Wisconsin Central*, 539 F.3d at 764 (citing the Adamson Act of 1916, 39 Stat. 721 (codified as amended at 49 U.S.C. § 28301)). The Seventh Circuit concluded that the congressional intent to keep railroad wage negotiations free from regulations preempted state attempts to impose such wage regulations. *Wisconsin Central*, 539 F.3d at 765.

Here, too, Congress has enacted regulations touching on numerous aspects of the airline industry, including labor relations (45 U.S.C. §§ 181–188), maximum work hours and employee rest requirements (14 CFR Parts 1–199), safety and security (49 U.S.C. §§ 44101, *et seq*.; 49 C.F.R. Parts 1500–1699), design standards (49 U.S.C. § 44701), marketing and pricing (49 U.S.C. § 41701, *et seq*.), among many others. *See* Reply 10 n.6. Where the comparison between the railway and airline industries diverges, however, is the congressional expression of clear and manifest intent to preempt state wage regulations. Unlike *Wisconsin Central*, where the court identified congressional intent to foster wage negotiations free from regulation, with respect to the airline industry, there is simply a lack of federal regulation: "the mere absence of federal legislation with respect to [minimum and] overtime wages is not enough to find a congressional intent to preempt this field, since '[t]here is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it.'" 539 U.S. at 764 (quoting *Isla Petroleum Corp.,* 485 U.S. at 503). Without congressional intent to preempt state wage laws—a regulatory area traditionally occupied by the states—either through

action or inaction, the presumption against preemption applies.

2. Airline Deregulation Act

In 1978, Congress, "determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality. . . of air transportation services,' enacted the Airline Deregulation Act." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. §§ 1302(a)(4), 1302(a)(9)) (brackets and ellipses in original). To ensure that states did not attempt to regulate the airline industry, undoing the effects of the ADA, the Act includes a preemption provision "prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier." *Morales*, 504 U.S. at 378–79 (quoting § 1305(a)(1)).[17] The Supreme Court broadly interprets this preemption provision, but has noted that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Morales*, 504 F.3d at 390.

The Seventh Circuit has articulated two requirements for a state law to be expressly preempted by the ADA: "(1) A state must 'enact or enforce' a law that (2) 'relates to' airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them." *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996) (ADA preempted

[17] The ADA was revised in 1994 and renumbered in the United States Code: the preemption provision is now 49 U.S.C. § 41713. *See* Act of July 5, 1994, Pub. L. No. 103–272, 108 Stat 745.

intentional tort claims stemming from a method of ticketing but not breach of contract, slander, or defamation claims). To make the preemption determination, the court must consider the particular facts of the case and determine whether the claims "relate to" airline rates, routes, or services. *Id.* at 1433.

Here, the IMWL claims are for violations of the Illinois minimum wage and overtime provisions. SkyWest asserts that the ADA preempts these claims because, "[t]o comply, SkyWest would have to redesign the crew compliments, routes and stage lengths (impacting routes and services), which impermissibly impacts the rates charged to the public." Mem. in Supp. 15. The plaintiffs argue that if the ADA preempts Illinois wage laws "'because they might indirectly impact [the Defendants'] prices and rates [that] is tantamount to arguing immunity from all state economic regulation.'" Resp. 19 (quoting *Costello v. BeavEx Inc.*, 303 F.R.D. 295, 303 (N.D. Ill. 2014), *partially aff'd, vacated and remanded on other grounds*, 810 F.3d 1045 (7th Cir. 2016)).

Like the bribery and racketeering claims at issue in *S.C. Johnson & Son, Inc. v. Transport Corp. of America*, 697 F.3d 544 (7th Cir. 2012), however, Illinois's wage laws are "state laws of general application that provide the backdrop for private ordering." *Id.* at 558. These laws have incidental effect on "transportation companies (whether air or surface carriers) only in their capacity as members of the public." *Id.* (citing *Rowe*, 552 U.S. at 375). The Seventh Circuit noted that "no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws, [such as minimum wage laws],

because their effect on price is too 'remote.'" *S.C. Johnson*, 697 F.3d at 558 (citing *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1189 (9th Cir. 1998) (FAAAA does not preempt minimum wage laws)).

The IMWL is not "related to" airline rates, routes, or services; any effect on SkyWest is incidental and no different than on any other employer. *See Costello*, 810 F.3d at 1055–56 (FAAAA did not preempt Illinois wage deduction law); *Valencia v. SCIS Air Sec. Corp.*, 193 Cal. Rptr. 3d 775, 779–82 (Ct. App. 2015) (ADA did not preempt state labor laws on meals, rest breaks, and wages); *see also DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011) ("We do not endorse American's view that state regulation is preempted wherever it imposes costs on airlines and therefore affects fares . . . This would effectively exempt airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation. . . ."). Thus, the ADA does not preempt the plaintiffs' IMWL claims.

3. Railway Labor Act

SkyWest also contends that the RLA preempts both the FLSA and IMWL claims. Congress passed the Railway Labor Act, which it extended to cover the airline industry in 1936, *see* Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; 45 U.S.C. §§ 181–188, to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also* 45 U.S.C. § 151a. The RLA includes a mandatory dispute resolution mechanism for two types of disputes: (1) "major" disputes concerning "rates of pay, rules, or working conditions,"

45 U.S.C. § 151a, which relate to "'the formation of collective [bargaining] agreements or efforts to secure them,'" *Hawaiian Airlines*, 512 U.S. at 252 (quoting *Consolidated Rail Corporation (Conrail), v. Railway Labor Executives' Assn.,* 491 U.S. 299, 302 (1989)) (brackets in original); and (2) "minor" disputes that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a, which involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 253 (quoting *Trainmen v. Chicago R. & I.R. Co.,* 353 U.S. 30, 33 (1957)). The Supreme Court has described the difference between the two: "'major disputes seek to create contractual rights, minor disputes to enforce them.'" *Hawaiian Airlines*, 512 U.S. at 253 (quoting *Conrail,* 491 U.S. 302).

The RLA preempts a state claim or precludes a federal claim when ""the success of the claim is dependent upon an interpretation of the collective bargaining agreement's terms." *Wisconsin Central*, 539 F.3d at 757 (quoting *Miller v. Am. Airlines, Inc.,* 525 F.3d 520, 524 (7th Cir. 2008)); *see also In re Bentz Metal Prods. Co.,* 253 F.3d 283, 285 (7th Cir. 2001) (holding, with respect to the parallel preemption provision in § 301 of the Labor Management Relations Act, "that a state law claim is not preempted if it does not require interpretation of the CBA even if it may require reference to the CBA"). Accordingly, there are a number of situations that may involve a CBA that do not result in preemption/preclusion, such as where the interpretation of the contractual provision at issue is not disputed or where reference to the CBA is only

necessary to compute damages. *See Wisconsin Central*, 539 F.3d at 758 (collecting cases).

The parties spend a great deal of time debating whether SIA "represents" the FAs, whether the Policy Manual qualifies as a CBA, and, if so, whether any interpretation is necessary to resolve the plaintiffs' claims. *See* Mem. in Supp. 15–18; Resp. 22–23; Reply 13–15. The Supreme Court, however, has held that "substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA." *Hawaiian Airlines*, 512 U.S. at 257; *see also Terminal R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 7 (1943) ("We hold that the enactment by Congress of the Railway Labor Act was not a pre-emption of the field of regulating working conditions themselves."). The claims based on compliance with the FLSA and the IMWL are not disputes seeking to create a contractual right or disputes to enforce a contractual right. Minimum wage and overtime laws are substantive protections the plaintiffs are entitled to, completely independent of a CBA. *See Hawaiian Airlines*, 512 U.S. at (state wrongful discharge law an obligation "[w]holly apart from any provision of the CBA" and not preempted); *Terminal R. Ass'n*, 318 U.S. at 3–4, 6–7 (state law requiring cabooses on all trains for switchman safety not preempted).

Moreover, even assuming the Policy Manual qualifies as a CBA (which the plaintiffs dispute), the defendants have not established that any interpretation would be necessary to resolve the minimum wage and overtime claims. Resolving the FLSA and IMWL claims would "require only the purely factual inquiry into" the hours the plaintiffs

worked and the amount they were compensated. *Hawaiian Airlines,* 512 U.S. at 266; *see also In re Bentz*, 253 F.3d 283, 289 ("[T]he overriding principle is that for preemption to apply, *interpretation* of the CBA and not simply a reference to it is required." (emphasis in original)).

Because the plaintiffs' rights under the FLSA and the IMWL are completely independent of the Policy Manual, and the defendants have not established that any interpretation of the Policy Manual is required to resolve the claims, the RLA does not preempt the plaintiffs' claims.

III. Declaratory and Injunctive Relief

The plaintiffs seek declaratory and injunctive relief on behalf of all similarly situated current and former SkyWest FAs. Since all of the plaintiffs' claims are being dismissed, however, the request for such relief is moot. Because the plaintiffs may replead their FLSA claims, however, the court will address the availability of injunctive relief. It is clear that, as former employees, the plaintiffs lack standing to pursue equitable relief. When "seeking injunctive and declaratory relief, a plaintiff must establish that he is in immediate danger of sustaining some direct injury." *Feit v. Ward,* 886 F.2d 848, 857 (7th Cir. 1989). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974); *see also Robinson v. City of Chicago*, 868 F.2d 959, 966 n.5 (7th Cir. 1989) (same standard applies to injunctive and declaratory relief).

The plaintiffs argue that, in an employment context, it is "well established" that former employees have standing to represent a class of both former and current employees seeking injunctive and declaratory relief. Resp. 23–24 (citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1975); *In re FedEx Ground Package Sys., Empl. Practices Litig.*, 273 F.R.D. 424, 438 (N.D. Ind. 2008); *Walker v. Bankers Life & Cas. Co.*, No.: 06 C 6906, 2007 WL 2903180, at *7 (N.D. Ill. Oct. 1, 2007); *Resnick v. American Dental Ass'n*, 90 F.R.D. 530, 540 (N.D. Ill. 1981); *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 238 (C.D. Cal 2007)). The cases the plaintiffs cite, however, all address the issue on a class certification motion, not on a motion to dismiss. As no class has been certified, at this point the plaintiffs are arguing their individual claims on the motion to dismiss, not the claims of the proposed class members. For that reason, the Seventh Circuit's holding in *Feit* is controlling.

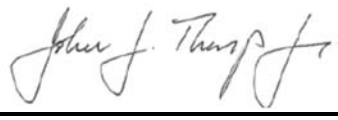
Even if it were not, notwithstanding that some courts have held to the contrary, the Court is not persuaded that the plaintiffs have standing to seek equitable relief even where there is a putative class that includes current employees. As the Supreme Court has instructed, "[t]hat a suit may be a class action . . . adds nothing to the question of standing . . . ." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 40 n.20 (1976)). Thus—and contrary to the plaintiffs' contention—courts in this district regularly dismiss putative class actions on standing grounds where the named plaintiffs were former employees seeking to obtain injunctive and equitable relief on behalf of current employees. *See*

e.g., *Sawyer v. Vivint, Inc.*, 2015 WL 3420615, at *3 (N.D. Ill. May 28, 2015) (former service technician lacked standing to pursue injunctive relief on behalf of himself and putative class of current and former employees); *Ruffin v. Exel Direct, Inc.*, No. 09 C 1735, 2009 WL 3147589, at *3 (N.D. Ill. Sept. 29, 2009) (former contractors, suing on behalf of current and former contractors, did not have standing to seek the declaratory and injunctive relief); *Brown v. Cty. of Cook*, 549 F. Supp. 2d 1026, 1031 (N.D. Ill. 2008) (same); *Hawkins v. Groot Indus., Inc.*, No. 01 C 1731, 2003 WL 22057238, at *2 (N.D. Ill. Sept. 2, 2003) (the "fundamental reason" why court could not certify a Rule 23(b)(2) [injunctive] class of present and former black employees was that neither of the named African-American plaintiffs was a current employee). In this Court's view, even if *Feit* does not dictate the answer, the better view is that an individual named plaintiff who is not a current employee has no standing to assert claims for prospective injunctive and equitable relief on behalf of current employees.

* * *

The motion to dismiss is granted with prejudice as to the IMWL claims and the claims for injunctive and declaratory relief; the motion is granted without prejudice as to the FLSA claims. The plaintiffs' motion to proceed as a collective action, for tolling of the statute of limitations, for court-authorized notice, and for disclosure of the contact information of the potential opt-in plaintiffs is denied as moot. To the extent that the plaintiffs can attempt, in good faith, to cure the deficiencies in their FLSA claims, they may file a Second Amended Complaint within 21 days of this order. In the absence of a timely filed Second

Amended Complaint, the FLSA claims, and the case, will be dismissed with prejudice.



Dated: May 24, 2016

John J. Tharp, Jr.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

January 11, 2019

Before

DIANE P. WOOD, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

Nos. 17-3643 & 17-3660

ANDREA HIRST, et al., *Plaintiffs-Appellants* *v.* SKYWEST, INC., et al., *Defendants-Appellees.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 1:15-cv-02036 & 1:15-cv-11117 John J. Tharp, Jr., *Judge*.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc* filed by appellees on December 26, 2018, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing and for rehearing en banc is **DENIED**.

* Judge Flaum did not participate in the consideration of this petition.