IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

MARVIN JONES,	)	**Civil Action No. 4:10CV-011-P-S**
Plaintiff	)	
v.	)	
TYSON FOODS, INC.; HALEY BARBOUR, in his official capacity of Governor of the State of Mississippi; CHRISTOPHER EPPS, in his individual and official capacities as Commission of the Mississippi Department of Corrections; LEE McTEER, in his official capacity as Community Correctional Director for Region I and in his individual capacity; and JONATHAN BRADLEY, in his official capacity as Correctional Supervisor of Leflore County Restitution Center and in his individual capacities	)	
Defendants.		

MEMORANDUM BRIEF IN OPPOSITION OF DEFENDANT TYSON FOODS, INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

COMES NOW the Plaintiff, MARVIN JONES, by and through counsel, and files this his brief in opposition to the Defendant Tyson Foods, Inc.'s, (hereinafter "Tyson"), Motion to Dismiss, and would show unto the Court the following:

INTRODUCTION

"We call it in English prouerbe, the cart before the horse, the Greeks call it Histeron proteron, we name it the Preposterous," so explained the late English author George Puttenham. In

filing its Rule 12(b)(6) motion to dismiss Plaintiff's First Amended Complaint (hereinafter "FAC"), Defendant Tyson is trying to accomplish the preposterous or, put simply, put the cart before the horse.

Defendant Tyson contends Plaintiff's complaint should be dismissed because it is (i) barred by the Mississippi Worker's Compensation Act and (ii) "contains nothing more than conclusory, speculative allegations and totally irrelevant assertions which do not provide any possible – much less plausible – claim for relief." In making such a charge, Defendant Tyson ignores the legitimate health concerns that surround the poultry industry, asks the Court to just take its word – before the light of discovery is pointed in its direction – that its Carthage, Mississippi plant is not "unsanitary and unhealthy," and brushes off a letter from Mississippi Department of Health warning Plaintiff of exposure to Mycobacterium tuberculosis (hereinafter "TB") while at Defendant Tyson. These allegations, according to Defendant Tyson, are "speculative allegations and totally irrelevant." And as for Defendant Tyson's relationship with illegal immigrants; such a topic is quietly ignored. The facts, as detailed *infra*, will show Plaintiff easily satisfies his pleading requirements.

Defendant Tyson also, invoking the principle that repetition will build a bridge to reality, sinks its teeth into the argument Plaintiff was an employee. Never fully explaining how an individual under court order is a free-willing employee – and failing to produce a shred of evidence to support such a contention – Defendant Tyson asks this Court to blindly accept its position.

In sum, Defendant Tyson expects Plaintiff to know the outcome of discovery before an answer to his complaint is even filed. This is preposterous.

FACTUAL BACKGROUND

Plaintiff is a former inmate/resident of the Leflore County Restitution Center (hereinafter "LCRC") whose life was forever changed when he received a letter from the Mississippi Department of Health. (First Amended Complaint ("FAC") ¶20, **Doc. 12**).

"During your employment at Tyson you may have been exposed to an individual who has been diagnosed with Mycobacterium tuberculosis (TB)," the letter from Rebecca James, MD stated. (FAC ¶ 42, **Doc. 12**). "The chance of others in the work area developing TB is small, but possible." *Id.* For Plaintiff, the chance was not as small as the Department of Health had hoped. *Id.*

After receiving the aforementioned letter Plaintiff went for his tuberculin skin test and his results were positive. (FAC ¶ 42, **Doc. 12**). As the Department of Health stated in its letter, Plaintiff was exposed to an individual diagnosed with TB while fulfilling his restitution at Defendant Tyson and was diagnosed with the same, life-threatening, disease. *Id.*

Plaintiff Assigned to Defendant Tyson to Fulfill Restitution

Plaintiff was sent to the Leflore County Restitution Center (hereinafter "LCRC") as a condition of his sentence for embezzlement. *Id.* Plaintiff's sentence, however, was the least of his concerns.

After arriving at the LCRC Plaintiff was immediately assigned to fulfill his restitution at Defendant Tyson's Carthage, Mississippi plant to work as a chicken hanger. (FAC ¶ 21, **Doc. 12**). The chicken hanging process is unpleasant, as chickens are collected, crammed into a cage, left without water or food and transported to the chicken plant. *Id.*

Once inside the chicken plant, Plaintiff was responsible for hanging the chickens. (FAC ¶ 22, **Doc. 12**). To fulfill his state-ordered duties, Plaintiff had to hang the chickens upside down, by their feet, while they were still alive. *Id.* Because of the nature of such methods, many chickens continually released feces and such feces would cover Plaintiff. (FAC ¶ 24, **Doc. 12**). Working in a plant in which employees, including Plaintiff are forced to work while covered in feces constitutes an unsanitary and unhealthy work environment. *Id.*

While fulfilling his restitution at Defendant Tyson', Plaintiff's health quickly deteriorated. His neck, face and hands began to swell and when he approached a Tyson supervisor about these ailments, the supervisor refused to let Plaintiff see a company nurse. (FAC ¶ 32, **Doc. 12**).

Eventually Plaintiff's health temporarily prevented him from fulfilling his restitution at Defendant Tyson's plant. (FAC ¶ 33, **Doc. 12**). Plaintiff was forced to return to LCRC where he waited for his next assignment. (FAC ¶ 34, **Doc. 12**). During this time he ***was not*** free to seek employment on his own. *Id.*

Plaintiff, rather, waited until Defendant Bradley assigned him to the Greenwood County Club; a place where Plaintiff excelled. (FAC ¶ 36, **Doc. 12**). But Plaintiff's time at Greenwood was short lived as Defendant Jonathan Bradley reassigned Plaintiff to Defendant Tyson fulfill the remainder of his restitution. (FAC ¶ 37, **Doc. 12**). Plaintiff never had a choice in where he was, or was not, assigned to fulfill his restitution. *Id.*

Because of his assignment to Defendant Tyson and because Defendant Tyson intentionally took risks that exposed Plaintiff to a deadly disease, Plaintiff now suffers from TB. Since his diagnosis a deluge of agonizing symptoms has befallen Plaintiff. He currently suffers from muscle spasms, acute fevers, night sweats, loss of appetite, weight loss and a host of dire effects from the medications he must take. (FAC ¶ 43, **Doc. 12**). This has left him unable to work. *Id.*

Dangers of Chicken Processing Widely Recognized

Recent developments across the nation highlight the inherent health and safety dangers inherent in chicken processing.

In 2008 U.S. lawmakers recognized the dangerous conditions created by the harsh demands of poultry employers. The late U.S. Sen. Ted Kennedy, D-Mass., admitted the dangers poultry workers face when he explained, "Poultry workers' health and safety is threatened every day in a variety of ways. Their hands are crippled by hours of an assembly line that moves too fast. They are

forced to work when they are sick and seriously hurt." (FAC ¶ 29, **Doc. 12**). The same was true of Plaintiff, as evidenced by his hand troubles and Defendant Tyson's refusal to let Plaintiff seek medical help. (FAC ¶ 32, **Doc. 12**).

The unhealthy aspect of chicken processing is further exasperated when one takes into account the national trend to hire illegal immigrants to work in the chicken plants. Defendant Tyson was accused of such behavior by the Bush Justice Department. (FAC ¶ 31, **Doc. 12**). The area from which a vast majority of illegal immigrants stem, Latin America, still suffers from TB outbreaks. *Id.*

PROCEDURAL HISTORY

Plaintiff filed his Complaint on February 8, 2010 (**Doc. 1**). Defendant Tyson filed its motion to dismiss on March 9, 2010. (**Doc. 7**). Plaintiff, in turn, filed his FAC on March 11, 2009. (**Doc. 11**). Plaintiff also filed his response to Defendant Tyson's motion to dismiss on March 19, 2010. (**Doc. 14**). Shortly thereafter, Defendant Tyson filed a motion to withdraw its previous motion to dismiss (**Doc. 20**) and filed a new motion to dismiss Plaintiff's FAC (**Doc. 18**).

STANDARD OF REVIEW

A Rule 12(b)(6) motion is disfavored and is rarely granted. *Sosa v. Coleman*, F.2d 991, 993 (5th Cir. 1981). In *Cook v. Nichol, Inc. v. Plimsoll Club*, 451 F2d. 505, 506 (5th Cir. 1971), the Fifth Circuit clearly stated, "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any set of facts which could be provided to support his claim." Thus, the issue presented by a motion to dismiss is "not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Dismissal, therefore, "is never warranted because the plaintiff is unlikely to prevail on the merits." *In re: Catfish Litigation*, 826 F.Supp. 1019, 1024 (N.D. Miss. 1993).

Even if it appears, to an almost certainty, that the facts alleged cannot be proven to support the claim, the complaint cannot be dismissed so long as it states a claim. *Clark v. Amoco Production Co.*, 794 F.2d 967, 970 (5th Cir. 1986). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." *Id.* at 970; *See also Mahone v. Addicks Utility District of Harris County, et al.*, 836 F.2d 921, 926 (5th Cir. 1988); *U.S. v. Uvalde Consol. Independent School Dist.*, 625 F.2d 547, 549 (5th Cir. 1980).

In ruling on a motion to dismiss, this Court must accept the facts alleged in the complaint as true and view the material allegations "as admitted" along with such reasonable inferences that might be drawn in the plaintiff's favor. *Garguil v. Tompkins*, 704 F.2d 661, 663 (2nd Cir. 1983) Dismissal is appropriate only when the Court accepts as true all the well-pled allegations of fact and "it appears beyond doubt that the [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See also Hishon v. King & Spaulding*, 467 U.S, 69, 73 (1984); *McLean v. International Harvester Co.*, 817 F.2d 1214, 1217 n. 3 (5th Cir. 1987); *Jones v. U.S.*, 729 F.2d 326, 330 (5th Cir. 1984). "If it is possible to hypothesize a set of facts consistent with the complaint that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate." *Veazey v. Communication and Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).

Finally, even if Plaintiff's Complaint is deficient, Plaintiff should be granted leave to amend her Complaint or it is reversible error:

> Unless we have searched every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that "even the most sympathetic reading of plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability," we must remand to permit plaintiff to amend his claim if he can do so.

Brown v. Texas A & M Univ., 804 F.2d 327, 334 (5th Cir. 1986).

Further, in regard to Defendants' numerous assertions that Plaintiff has failed to plead sufficiently particular facts to support his claims, Defendant is simply wrong. The United States Supreme Court has emphasized the limited role to be given the complaint in federal practice. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), the lower Court affirmed a dismissal of a case on grounds that the plaintiff did not plead specific facts demonstrating a prima facie case of discrimination. The United States Supreme Court reversed, emphasizing the limited role of the complaint, and holding that discovery rules and summary judgment motions are used to set forth the exact claims. "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues, and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 47-48. (*citations omitted*).

Further, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168-69 (1993) states: 'The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.'" 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1202, (2d Ed. 1990)." *Id.*, at 512-13.

ARGUMENT

I. PLAINTIFFS CLAIMS AGAINST DEFENDANT TYSON ARE NOT BARRED BY THE MISSISSIPPI WORKERS' COMEPNSATION ACT BECAUSE HE WAS NOT A VOLUNTARY EMPLOYEE AND DEFENDANT'S ACTIONS WERE INTENTIONAL.

The worker's compensation statute does not apply because Plaintiff was fulfilling a court-ordered activity and was not an employee in the traditional sense. According to the statute, an employee must be one who is "in the service of an employer under any contract of hire...." MISS CODE ANN. § 71-3-3(d). By his virtue of as an inmate/resident of LCRC, Plaintiff was not free to enter into any contract of employment with an employer and, therefore, cannot be deemed an

employee under Mississippi's workers compensation statute. *See Order of James Kitchens,* attached as Exhibit "A" to Plaintiff's Response to Defendant Tyson's Motion to Dismiss.

Defendant Tyson, however, has not produced one shred of evidence to show Plaintiff was an employee. Apart from its bare, naked assertions, there is zero evidence to suggest Plaintiff was an employee of Defendant Tyson. Instead, Defendant Tyson has engaged in the tactic of repetition and is hoping its repeated, glaringly naked, classification of Plaintiff as an "employee" will be enough to win the day. And while Plaintiff is not accusing or insinuating Defendant Tyson is lying to this Court, President Franklin D. Roosevelt's words shed light onto this situation: "Repetition does not transform a lie into a truth"

On the other hand, Plaintiff has produced sufficient evidence to show he was an individual, under court order, to complete a restitution program. While such a scenario might satisfy the definition of "employee" in Castro's Cuba, it falls painstakingly short in Carthage, Mississippi.

In the alternative, if this Court finds Plaintiff is an employee as defined by the worker's compensation statute, his claims against Defendant Tyson are not barred. To avoid the exclusivity of the Mississippi Worker's Compensation Act, a Plaintiff must show: (i) the injury was caused by the willful act of the employer or another employee acting in the course of employment and in the furtherance of the employer's business and (ii) the injury is not compensable under the act. *Griffin v. Futorian Corp.*, 533 So.2d 461, 463 (Miss.1988) (*citations omitted*). Plaintiff satisfies the test.

Plaintiff further submits that despite having full knowledge of a TB infection at its plant and Plaintiff's subsequent diagnosis of TB as a result of his "employment," Defendant Tyson never offered Plaintiff workers compensation benefits of any sort. Defendant, thus, cannot have its chicken pot pie and eat it, too; for Defendant argues Plaintiff's injury falls within the scope of the worker's compensation statute, but the statute begs to differ.

A. Plaintiff was not an Employee within the Meaning of the Workers' Compensation Statute.

Under the workers' compensation statute an employee is defined as follows:

> any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors and especially any individual performing service in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by the individual at a fixed price, the individual's compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to the individual, whether or not the individual is guaranteed a minimum amount of compensation for such service or is entitled to be credited with the unsold newspapers or magazines returned. A student of an educational institution who, as a part of such educational institution's curriculum, is receiving practical training at any facility, who is under the active and direct supervision of the personnel of the facility and/or an instructor of the educational institution, and who is not receiving wages as a consequence of participation in such practical training shall not be considered an employee of such facility on account of participation in such practical training.

MISS CODE ANN. § 71-3-3(d) (Revised 2000).

A key question presented by Plaintiff's case is a simple one – how does the workers' compensation statute classify an individual who was ordered to work at a company against his free will?

Common sense dictates a prisoner or an individual assigned to a restitution center is not an employee within the meaning of MISS. CODE ANN. § 71-3-3(d). Under the statute, an employee has to be an individual "[I]n the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied." *Id.*

A number of jurisdictions have held a prisoner (or person compelled by court order to work) cannot be deemed an employee for purposes of workers' compensation. *See* 60 Am.Jur.2d, Penal & Correctional Institutions 28; *Keeney v. Industrial Comm.*, 535 P.2d 31 (Ariz. App. 1975); *Frederick v.*

Men's Reformatory, 203 N.W.2d 797 (Iowa 1973); *Tackett v. Lagrange Penitentiary*, 524 S.W.2d 468 (Ky. 1975); *Reid v. N.Y. State Dept. of Correctional Services*, 387 N.Y.S.2d 589 (N.Y. App. Div. 1976); *City of Clinton v. White Crow*, 488 P.2d 1232 (Okl. 1971); *Abrams v. Madison County Highway Department*, 495 S.W.2d 539 (Tenn. 1973).

Furthermore, in *Tackett*, the Court of Appeals of Kentucky found, "Prison labor is the very antithesis of voluntary employment. Prisoners do not enter prison for the purpose of seeking employment, and providing employment for them is not the primary purpose of their incarceration by the state." *Tackett*, 524 S.W.2d. at 469.[1]

As stated *surpa.*, most states that have addressed worker's compensation for those working as a condition of a prison sentence have concluded such workers "cannot … enter into a true contract of hire with the authorities by whom he is confined." *Id.* "The inducements which might be held out to him in the form of extra food or even money are in no sense consideration for an enforceable contract of hire." *Id. See also* 1A Larson's Workmen's Compensation Law, Section 47.31.

The Kentucky court went on to conclude, "We do not construe the use of the word 'employment' to mean that prisoners are thereby constituted 'employees' as that word is commonly understood. It is simply a direction that the department shall make work available to occupy the time of prisoners rather than to allow them to remain idle." *Id.*

In determining whether a Plaintiff was an employee as defined by the statute, courts look to the relationship he had with the employer. Such a "relationship is evidenced by the 'contract of hire or apprenticeship, oral or written, express or implied.'" *Walls v. North Mississippi Medical Center & U.S. Fidelity & Guar. Co.*, 568 So.2d 712, 715 (Miss. 1990).

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[1] The Mississippi Supreme Court cited *Tackett* when deciding *Walls*. Specifically, the Court acknowledged "[o]ur statute is similar in this regard to several other jurisdictions. *See, e.g.*... *Tackett v. LaGrange Penitentiary*...." *Walls*, 568 So.2d. at 715, n. 2. Thus, the reasoning utilized by the Kentucky Appellate Courts is relevant to Plaintiff's case.

Thus, "The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the service rendered, and (3) control by the employer over the employee." *Id.*

1. Mutual Consent Absent

"[T]he term 'assent' is interchangeable with 'consent.'" *Mathis v. Jackson County Bd. Of Supervisors*, 916 So. 2d. 564, 569 (Miss. Ct. App. 2005) (*citing* Black's Law Dictionary, 6th ed. 1991). "The term 'mutual assent' means a 'meeting of the minds of both . . . parties to a contract; the fact that each agrees to all the terms and conditions, in the same sense and with the same meaning as the others.'" *Id.*

Plaintiff, pursuant to his criminal conviction, was ordered to the first available restitution center. That restitution center happened to by LCRC. Once there, Plaintiff had to follow the instructions of LCRC officials. He did not have a choice in where he worked; he just went where he was told. He was not an employee as much as he was a servant. Further, Plaintiff could be removed from Defendant Tyson or assigned to Defendant Tyson any time Defendant Bradley saw fit.

In his FAC Plaintiff provides evidence of this relationship. When he first arrived at LCRC, Defendant Bradley assigned him to Defendant Tyson's Carthage, Mississippi plant. (FAC ¶ 32, **Doc. 12**). Because of medical ailments, Plaintiff could not continue his service at Defendant Tyson and it was Defendant Bradley, not Defendant Tyson, who removed him from Carthage. (FAC ¶ 33, **Doc. 12**). After Defendant Bradley removed him from Defendant Tyson, Plaintiff had to wait for Defendant Bradley to assign him to a work location since he was not free to seek his own employment. *Id.* Plaintiff never had a choice in his assignments.

Defendant Bradley re-assigned Plaintiff to the Greenwood Country Club. (FAC ¶ 36, **Doc. 12**). Plaintiff excelled in this position, but, against his will, Defendant Bradley re-assigned him to Defendant Tyson for a second time. (FAC ¶ 37, **Doc. 12**).

Plaintiff, due his confinement in the restitution program, could not consent to his employment. Thus, at no time was Plaintiff under an "employment contract." Rather, he was performing a court ordered duty to fulfill restitution in an amount determined by the court.

Assuming arguendo there is doubt as to Plaintiff's employment status, it is wholly premature to dismiss his case without first conducting discovery. If Defendant Tyson purports Plaintiff was an employee, it should first have to provide, through discovery, all employment records, payroll records and attendance records to prove such a fact. One defendant's word is not enough to warrant a granting of a motion to dismiss. Plaintiff's employment status is a crucial factual question and Plaintiff is entitled to conduct discovery.

2. Question of Wages Moot or Premature

"Consideration is defined as '(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise.'" *Marshall Durbin Food Corp. v. Baker*, 909 So.2d 1267, 1273 (Miss. Ct. App. 2005). "The fact that a worker does not receive a direct monetary wage from the employing body is of 'little or no consequence.'"

Consequently, the fact Plaintiff may have received some monetary compensation from Defendant Tyson is also not determinative. *See Tackett*, 524 S.W.2d. at 469 ("The inducements which might be held out to him in the form of extra food or even money are in no sense consideration for an enforceable contract of hire").

If Defendant Tyson purports Plaintiff is was an employee, it should first have to provide, through discovery, all employment records, payroll records and attendance records to prove such a fact. Until then, all facts must be viewed in a light most favorable to Plaintiff.

3. LCRC, not Defendant Tyson, Controlled Plaintiff

"The right of control, rather than the fact that an employer exercises that control, determines the status of parties as employer and employee for compensation purposes." *Mathis*, 916 So. 2d. at 569 (*citing Wade v. Traxler*, 100 So.2d 103 (Miss. Sup. Ct. 1958). "One may establish the right of control by demonstrating that a potential employer provided equipment and had the right to fire a potential employee. *Id.* (*citing Boyd v. Crosby Lumber & Mfg. Co.* 166 So.2d 106 (Miss. Sup. Ct. 1964).

The facts, as stated *supra.* and viewed in Plaintiff's favor, show LCRC, specifically Defendant Bradley, controlled Plaintiff's work while he was fulfilling his restitution. Because LCRC ultimately controlled Plaintiff, Defendant Tyson cannot be deemed his employer. *See Sutton v. Ward,* 92 N.C.App. 215, 374 S.E.2d 277, 279-80 (1988) ("The right to control the worker determines who is the employer").[2]

Furthermore, Defendant Tyson, while taking a great deal of time to ridicule Plaintiff's complaint for being deficient, has demonstrated it has not even taking the time to truly read the Amended Complaint. Defendant, in trying to make a straw man argument that Plaintiff was an employee, argues Plaintiff admitted talking to ***his*** supervisor about his medical aliments and cites ¶ 32 of the Amended Complaint. (**Doc. 19**, p. 7.) This is just plain wrong.

The paragraph to which Defendant Tyson cites reads as follows: "As a result of being forced to fulfill his criminal sanctions in this environment, Mr. Jones's face, neck, and hands began to swell soon after his time at Defendant Tyson began. Mr. Jones spoke with ***a*** supervisor at Tyson about these medical ailments, and requested to see the company's nurse. The supervisor refused to allow him to go to the nurse's station." (**Doc. 12,** ¶ 32) (***emphasis added***). Thus, it is clear Defendant

[2] *Sutton* is another case cited by the *Walls* court when construing Mississippi's worker's compensation statute.

Tyson is reading Plaintiff's Amended Complaint through rose color glasses and has failed to see the complaint for the factual allegations it contains.

Even further, Defendant Tyson proceeds to distort the relationship Plaintiff had with Defendant LCRC. Defendant Tyson argues that Plaintiff did not have the ability to control his job, so therefore Defendant Tyson was the authority figure. This is inaccurate.

Rather, Defendant LCRC, as detailed both *supra* and *infra* had the authority to move and control Plaintiff at will. Plaintiff was under court order to fulfill requirements of his restitution. Defendant LCRC could remove Plaintiff from Defendant Tyson any time it saw fit and Defendant Tyson could not complain. Plaintiff was performing his duties at Defendant Tyson for the benefit of the State. Plaintiff was under the care and control of the State, not Defendant Tyson and this pierces any employee-employer relationship Defendant Tyson may have conceived to avoid the realities of this litigation.

B. Plaintiff's Complaint is Sufficient to Show his Injury was Caused by the Willful Act of his Employer or Another Employee.

In filing its motion to dismiss, Defendant Tyson contends Plaintiff's intentional tort claims of battery and intentional infliction of emotional distress are time barred or, in the alternative, have not be sufficiently pled. Defendant Tyson is incorrect on both accounts.

1. Plaintiff's Claims are not Time-Barred.

Mississippi law states, "All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-35 (Rev. 2003). Included within the scope of § 15-1-35 is the intentional tort of intentional infliction of emotional distress. *See Jones v. Fluor Daniel Services Corporation*, 2008-CA-00456-SCT (Miss. 2010) ([A] cause of

action for intentional infliction of emotional distress is "fairly embodied" in the causes of action included in Mississippi Code Section 15-1-35).

"It is well established that the statute of limitations does not run against one who has neither actual nor constructive notice of the facts that would entitle him to bring an action." *Williams v. Kilgore*, 618 So.2d 51, 55 (Miss.1992). "In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury." MISS. CODE ANN. § 15-1-49 (2) Rev. 1995).

Additionally, "[T]he Legislature adopted the discovery rule because it is illogical to bar an action before its existence is known. *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss. 1999) (*citing Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 708 (Miss.1990)). Such a rule has applied in cases involving bodily injury. *See Williams*, 618 So.2d at 55.

The discovery rule has also applied in the following settings: legal malpractice *(Smith v. Sneed*, 638 So.2d 1252 (Miss.1994) (statute of limitations in legal malpractice begins to run on date client learns or should have learned of lawyer's negligence)); defamation (*Staheli v. Smith*, 548 So.2d 1299 (Miss.1989) (discovery rule applies to time of accrual of defamation action under Miss. Code Ann. § 15-1-35)); and in worker's compensation cases (*Benoist Elevator Co. v. Mitchell*, 485 So.2d 1068 (Miss.1986) (application of discovery rule to Miss. Code Ann. § 71-3-35(1) for worker's compensation benefits for latent injuries)).

In order for the discovery rule to apply a latent injury must be present. Mississippi courts have defined a latent injury "as one where the plaintiff is precluded from discovery of the harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question, or when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 50 (Miss.2005) (*citations omitted*).

In his FAC Plaintiff alleges that he was subjected to tuberculosis while fulfilling his restitution at Defendant Tyson's chicken plant. (**Doc. 12,** ¶ 42). TB is a deadly infectious disease and it requires medical testing before one can be diagnosed with the disease. Plaintiff, by his very nature of being a non-doctor, would be a layman and it would be unrealistic to expect him to diagnosis the injury at the time of the intentional tort.

Unlike other examples of intentional torts where the victim is aware of the harm, Plaintiff's case represents a unique situation where he is not capable of self-diagnosis and indentifying where the infection took place. Rather, it was only after the Mississippi Department of Public Health informed Plaintiff he was likely exposed to TB at Defendant Tyson's plant that Plaintiff was aware of the source of his exposure. It would be impossible, if not wholly unrealistic, too expect Plaintiff to be able to recognize his injury when TB is an infectious disease that is not similar to other forms of battery, such as an unwanted physical touching.[3] Furthermore, Plaintiff has no way of knowing he was exposed to TB at Defendant Tyson's plant until he received the letter notifying him of that fact.

"The cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease." *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704 (Miss. 1990). It is, therefore, the presence of a latent injury that makes the discovery rule applicable to Plaintiff's case. *Donald*, 735 So.2d at 16. *See also PPG Architectural Finishes, Inc.*, 909 So.2d at 50.

In order to invoke benefit of the discovery rule, Plaintiff must be reasonably diligent in investigating the circumstances surrounding the injury. *Wayne General Hosp. v. Hayes*, 868 So.2d 997, 1001(¶ 15) (Miss.2004). "The focus is on the time that the patient discovers, or should have

[3] In *Doe v. Roman Catholic Diocese of Jackson*, 947 So.2d 983 (Miss.App. 2006) the Mississippi Appeals Court refused to apply the discovery rule because the Plaintiff could not show a latent injury. This case present a plaintiff who was sexually abused by a priest and it was the nature of the tort that determined the validity of the discovery rule. Thus, according to the Court, "Given the nature of the physical acts Doe alleges she endured from Boyce and Broussard, and her age at the time of the abuse, Doe was certainly aware of the abuse at the time of its occurrence." This is fact pattern is clearly distinguishable from the case at bar.

discovered by the exercise of reasonable diligence, that he [or she] probably has an actionable injury." *Smith v. Sanders*, 485 So.2d 1051, 1052 (Miss.1986).

In this case Plaintiff received the letter from the Mississippi Department of Health on February 13, 2009. From this point Plaintiff was reasonably diligent in determining he had an actionable injury and filed his complaint within the time period prescribed.

2. Workers' Compensation Statute does not bar Plaintiff's Claims Against Defendant Tyson Because Plaintiff has Properly Pled the Intentional Torts of Battery and Intentional Infliction of Emotion Distress.

To avoid the exclusivity clause of the worker's compensation statute, Mississippi Courts have held, "[T]he employer's action must be done 'with an actual intent to injure the employee,' and that 'an intentional tort is an act of intentional behavior designed to bring about the injury.'" *Peaster v. David New Drilling Co., Inc.*, 642 So.2d 344 (Miss. 1994).

"The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee... on account of such injury...." MISS. CODE ANN. § 71-3-9 (Rev. 2000). The Mississippi Worker's Compensation Act defines "injury" as "accidental injury... arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results." MISS. CODE ANN. § 71-3-3(b).

Because an injury is defined as 'accidental," Mississippi Courts have long held intentional acts by an employer which causes injury are not barred by the Mississippi Worker's Compensation Act. *See Royal Oil Co., Inc. v.* Wells, 500 So.2d 439, 441 (Miss. 1986).

"It was never the intention of the Workmen's Compensation Act to bar an employee from pursuing a common law remedy for an injury that is the result of a willful and malicious act." *Miller*

v. McRae's, Inc., 444 So.2d 368, 371 (Miss.1984).[4] "Where exclusivity of remedy is involved one must ask not only whether the injury arose out of and in the course of employment, but also, whether the injury is compensable under the Workmen's Compensation Act. Obviously, if the injury is not compensable under the Act, the Act does not provide the exclusive remedy." *Miller*, 444 So.2d. at 372.

"This limitation on the Act's exclusivity reflects the public policy that certain courses of conduct (intentional torts) are so shockingly outrageous and beyond the bounds of civilized conduct that the person responsible should not be rewarded with tort immunity." *Franklin Corp. v. Tedford*, 18 So.3d 215 (Miss. 2009) (*citing* Bradley & Thompson, Mississippi Workers' Compensation at § 11:8).

In addition, courts have found instances in which an intentional tort nullifies the exclusivity of the Mississippi Workers' Compensation Act. *See Royal Oil Co., Inc. v. Wells*, 500 So.2d 439 (Miss.1986) (common law claims of alleged intentional torts allowed based on malicious prosecution, false imprisonment, false arrest and slander of a convenience store cashier on embezzlement charges which were "no billed" by the grand jury) and *Miller v. McRae's, Inc.*, 444 So.2d 368 (Miss.1984) (intentional tort claim allowed for claim of false imprisonment where employer used threats of force to detain a cashier to question her about missing funds).

Thus, when a Plaintiff alleges an intentional tort – a cause of action not covered by the Mississippi Worker's Compensation Act – it is inappropriate to bar such a claim by invoking the exclusive remedy provision. *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288, 290 (Miss.1985)

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[4] In explaining its decision, the Court relied upon *Moore v. Federal Dept. Stores, Inc.*, 33 Mich.App. 556, 190 N.W.2d 262, 46 A.L.R.3d 1275 (1971). In *Moore* the Michigan Court of Appeals held that the type of injuries a plaintiff sustains as the result of a false imprisonment (humiliation, embarrassment and deprivation of personal liberty) were not compensable under the Michigan Worker's Compensation Act. The Court then held that in order to prevent the suffering of a wrong without a remedy, it must allow a common law tort action. The same would apply in the case at bar, as Plaintiff suffered the intentional torts of battery and intentional infliction of emotion distress; neither of which are covered by the Mississippi Worker's Compensation Act.

In filing his lawsuit, Plaintiff has alleged the intentional torts of battery and intentional infliction of emotional distress. (FAC ¶¶ 95-102, **Doc. 12**). Plaintiff alleges his "injury was intentionally inflicted upon him by Defendant Tyson." (FAC ¶ 51, **Doc. 12**). Plaintiff's complaint also details how Defendant Tyson, as well as the poultry industry, as a whole, has come under fire for questionable activities such as maintaining unsanitary health conditions by permitting employees to urinate close to the production lines at its plants and hiring illegal immigrants. (FAC ¶¶ 26, 31). Thus, Defendant Tyson's knowledge and intent – two elements traditionally unearthed during discovery – are very much in play.

A key aspect of Plaintiff's complaint against Defendant Tyson concerns whether Tyson knowingly took risks that caused Plaintiff's injury by hiring illegal immigrants and/or forcing employees to work while covered in chicken feces. Plaintiff has set forth a factual basis which suggests, when taken as true for the purposes of Defendant's motion, Tyson had the opportunity to weigh the costs and benefits of its actions and then consciously chose to jeopardize Plaintiff's health. Such a fact pattern would not result in the worker's compensation statute from barring Plaintiff's tort action against Defendant Tyson.

In examining the exclusivity requirement of the Mississippi Workers' Compensation Act, the Mississippi Supreme Court recognized some of the reasoning espoused in *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir.1989).[5] The *Gulden* plaintiff's sued their employer after being forced to scrub floors without the necessary protective clothing. *Id.* at 197.

In rendering its ruling the 9th Circuit opined, "a jury could conclude that the intent to injure ... was deliberate where the employer had an opportunity to weigh the consequence and to make a

[5] The Mississippi Supreme Court discussed *Gulden* in *Peaster*. Though the Court held the exclusivity requirement of the workers' compensation statute applied in *Peaster*, the facts before this Court are markedly different. In *Peaster* discovery was permitted to take place prior to the Court granting the employer's summary judgment on grounds of worker's compensation exclusivity requirement. In this case, Defendant Tyson has moved for a motion to dismiss before giving Plaintiff an opportunity to conduct discovery. Thus, even though the *Peaster* found against the employee-plaintiff, it did not rule that the *Gulden* reasoning was unsound.

conscious choice among possible courses of action." *Id.* at 196-197. The 9th Circuit was respectful of the narrow nature of the exclusivity exception of the worker's compensation statute but argued the bar would not apply where "the evidence is sufficient to support an inference the employer deliberately instructed an employee to injure himself." *Id.* at 197.

Additionally, Plaintiff's complaint details how his time at Defendant's Tyson's plant was defined by unsanitary conditions. Covered in chicken feces and denied a request to see Defendant Tyson's medical staff, Plaintiff was intentionally denied a safe and clean work environment. (FAC, ¶¶ 24, 32, **Doc. 12**). But the straw that broke the camel's back occurred when Plaintiff was knowingly exposed to TB.

Defendant Tyson has already come under fire from the Bush Justice Department in allegedly hiring illegal aliens. Because such workers come from the Third World – a notoriously breeding ground for TB – Plaintiff alleges Defendant Tyson's desire for cheap labor knowingly put his health at risk. The letter from the Mississippi Department of Health confirms this suspicion.

Plaintiff has the right to explore the hiring practices of Defendant Tyson, especially the practices in place at the Carthage, Mississippi plant, to determine if illegal aliens were hired and employed by the company despite the known health-risk associated with such individuals.

Plaintiff has the legal right to explore these options and further prove his case. It is wholly premature to dismiss this case today just because Defendant Tyson seeks to avoid the judicial spotlight. Plaintiff has TB and any discomfort suffered by Defendant Tyson as a result of this lawsuit pales in comparison.

The central point concerning Plaintiff's lawsuit, however, is Defendant Tyson intentionally put his health at risk. To answer such a question Plaintiff is entitled to conduct discovery to prove his case.

As detailed *infra* and *supra*, Plaintiff has alleged specific facts to defeat a Rule 12(b)(6) motion to dismiss. Plaintiff has provided evidence of the unsanitary employment conditions he suffered while fulfilling his restitution at Defendant Tyson, i.e. chicken feces. He stated how he was denied a visit to the Defendant Tyson's medical staff. And he has stated how illegal immigrants at Defendant Tyson's plant are believed to have infected him with TB.

Even further, the letter Plaintiff received from the Mississippi Department of Health indicated a person at Defendant Tyson's plant had TB. Specifically, the letter stated, "During your employment at Tyson you may have been exposed to an individual who has been diagnosed with *Mycobacterium tuberculosis* (TB)."

There can be no doubt that the Department of Health would not dispatch such a letter if it had not been concluded a person at Defendant Tyson was carrying TB. This much is fact. Defendant Tyson, in filing its motion, seeks to slam the discovery door on Plaintiff's fingers.

Plaintiff has provided the letter from the Department of Health, thus he has pled a specific fact. He is entitled to discovery to further explore Defendant Tyson's liability. During discovery Plaintiff will be able to question Defendant Tyson and receive records that will either show or not show a willful intent to put his health at risk. If, at that time, Plaintiff cannot connect the legal dots, Defendant's Tyson motion for summary judgment would be well taken. Today, however, such a motion is premature.

To date, Plaintiff has provided this Court with sufficient facts to suggest liability on part of Defendant Tyson. Because Plaintiff has established a factual basis suggesting intentional conduct on part of Defendant Tyson his claims has been sufficiently pled.

II. PLAINTIFF'S CLAIMS ARE NOT SPECULATIVE CONCLUSIONS AND, THEREFORE, STATE A FACIALLY PLAUSIBLE CLAIM FOR RELIEF.

As explained *supra.*, Plaintiff has pled facts sufficient to avoid Rule 12(b)(6) motion to dismiss. Plaintiff was forced to work in an environment in which he was regularly covered in chicken

feces and denied medical treatment. (FAC ¶¶ 32-33, **Doc. 12**). He has shown, through other examples in his complaint, a pattern of conduct undertaken by Defendant Tyson that exhibits a knowing and willful disregard of Plaintiff's health and the health of others. Such examples include nagging questions about the relationship illegal immigrants have with Defendant Tyson.

Most importantly, the Mississippi Department of Health warned Plaintiff of his exposure to TB while at Defendant Tyson and encouraged him to get tested. (FAC ¶ 42, **Doc. 12**). Plaintiff heeded that advice, was tested and finally informed he had TB.

Defendant Tyson seeks to dismiss Plaintiff's claim by arguing in its motion, "it is just as plausible that Plaintiff's disease was contracted in jail or somewhere else." This concession, by its very nature, demonstrates the need for discovery and recognizes Plaintiff has concrete facts well beyond the reach of speculation. But even more telling, the Department of Health did not send Plaintiff a letter urging him to be tested because he was at LCRC; it sent him a letter because he was at Defendant Tyson. Such a fact defendant Tyson cannot explain away in a R. 12(b)(6) motion to dismiss.

This is damning enough alone, but when viewed with the fact the Bush Department of Justice hammered Defendant Tyson for hiring illegal immigrants, the plot thickens. Illegal immigrants from the Third World – an area still plague by TB – raise a serious question this lawsuit is poised to answer.

Plaintiff's claim is a simple one – the Department of Health said he was exposed to TB at Defendant Tyson, Defendant Tyson's relationship with illegal immigrants is documented and illegal immigrants carry TB. Plaintiff's claims, therefore, are not wild or detached from reality. Instead, they are rooted in plausible facts.

Plaintiff has a letter from the Department of Health, TB and a company suspected of hiring illegal immigrants. He also has a company charged with maintaining unhealthy work environments. Defendant Tyson, on the other hand, just has its word of honor.

Plaintiff, therefore, has a right to prove his case that the person working at Defendant Tyson who infected him was an illegal immigrant and/or the unsanitary work conditions caused his disease.

III. PLAINTIFF HAS SUFFICIENLT PLED A 42 U.S.C. § 1985 CLAIM AGAINST DEFENDANT TYSON.[6]

It is a well established principle of law that "[a]n action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any statement of the facts, which could be proved in support of their claims." *Escalera v. New York City Housing Authority*, 425 F.2d 853, 857 (2nd Cir. 1970) (citing *Holmes v. New York City Housing Authority*, 398 F2d 262 (2nd Cir. 1968); *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967); *York v. Story*, 324 F2d 450, 453(9th Cir. 1963), cert denied, 376 U.S. 939, 4 S.Ct. 794, 11 L.ed.2d 659 (1964); 2A Moore, Federal practice P12.08, at 2271-74 (1968)).

While it is true that "mere conclusory allegations are insufficient to meet the requirement of particularized fact pleading in civil rights cases," it is equally as true, much to the chagrin of Defendants, that such a scenario "does not necessarily compel dismissal of the complaint." *Durkin v. Bristol Tp.*, 88 F.R.D, 613 (E.D.Pa. 1980). Thus, understanding that the pleading stage is just the tip of the iceberg, many a jurist has paid homage to the wisdom that "the lesson so often brought home to us that as this day and time a dismissal of a claim - land based, waterborne, amphibious, equitable, legal maritime or an ambiguous, amphibious mixture of them all ... on the basis of barebone

[6] Defendant Tyson incorrectly claims the only causes of action against it are Plaintiff's Sixth, Seventh, Eighth and Ninth claims. (**Doc. 19**, p. 4 n. 2). Plaintiff, however, has successfully pled a 42 U.S.C. 1985 claim against Defendant Tyson. (**Doc 12**, ¶¶ 35, 37, 54, 79-82). Even if this Court were to rule Plaintiff has not clearly pled a claim against Defendant Tyson, a motion to dismiss is not justified. Rather, the proper recourse is for Defendant Tyson to move for a more definite statement. *See* FRCP 12(e).

pleadings is a precarious one with a high mortality rate." *Barber v. Motor Vessel "Blue Cat,"* 372 F.2d 626, 627 (5th Cir. 1967).

In other words, any court that dismisses a civil rights action prior to the commencement of discovery may be found to have jumped the judicial gun.

A conspiracy claim based upon Sec. 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals. *Robinson v. McCorkle*, 462 F.2d 11, 113 (3rd Cir.), cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972). *See also Daly v. Pedersen*, 278 F.Supp. 88 (D.Minn.1967); *Weise v. Reisner*, 318 F.Supp. 580, 583 (E.D.Wis.1970).

At this stage of the proceedings, Plaintiff satisfies the pleading requirement for establishing the existence of a conspiracy by pleading at least the minimal factual support of the existence of a conspiracy. *Goussis v. Kimball*, 813 F.Supp. 352, 359 (E.D.Pa. 1993). (*citing Robinson*, 462 F.2d at 113). Plaintiff submits his FAC more than satisfies this requirement.

Upon information and belief, Defendant Tyson utilizes a number of individuals who are under the threat of criminal sanction to complete their restitution. Plaintiff was one of these individuals.

In his FAC Plaintiff states how he was first assigned to Defendant Tyson by Defendant Bradley. (FAC ¶ 32, **Doc. 12**). Plaintiff, however, suffered health problems and Defendant Bradley had to reassign him to another location. (FAC ¶ 33, **Doc. 12**). Plaintiff was excelling in his new location, but Defendant Bradley arbitrarily reassigned Plaintiff back to Defendant Tyson. (FAC ¶ 37, **Doc. 12**).

Plaintiff is entitled to conduct discovery into the reasoning of why Defendant Bradley abruptly reassigned him back to Defendant Tyson; a location where Plaintiff had suffered severe health issues. Plaintiff, in good faith, believes Defendant Bradley and Defendant Tyson conspired to deprive him of his civil rights. He is entitled to explore such a claim through discovery.

VI. PLAINTIFF HAS SUFFICIENTLY PLED 42 U.S.C. § 1983 CLAIMS AGAINST DEFENDANT TYSON.[7]

It is a well established principle of law that "[a]n action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any statement of the facts, which could be proved in support of their claims." *Escalera v. New York City Housing Authority*, 425 F.2d 853, 857 (2nd Cir. 1970) (citing *Holmes v. New York City Housing Authority*, 398 F2d 262 (2nd Cir. 1968); *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967); York v. Story, 324 F2d 450, 453(9th Cir. 1963), cert denied, 376 U.S. 939, 4 S.Ct. 794, 11 L.ed.2d 659 (1964); 2A Moore, Federal practice P12.08, at 2271-74 (1968)). While it is true that "mere conclusory allegations are insufficient to meet the requirement of particularized fact pleading in civil rights cases," it is equally as true, much to the chagrin of Defendants, that such a scenario "does not necessarily compel dismissal of the complaint." *Durkin v. Bristol Tp.*, 88 F.R.D, 613 (E.D.pa.) 1980).

Thus, understanding that the pleading stage is just the tip of the iceberg, many a jurist has paid homage to the wisdom that "the lesson so often brought home to us that as this day and time a dismissal of a claim - land based, waterborne, amphibious, equitable, legal maritime or an ambiguous, amphibious mixture of them all ... on the basis of barebone pleadings is a precarious one with a high mortality rate." *Barber v. Motor Vessel "Blue Cat,"* 372 F.2d 626, 627 (5th Cir. 1967). In other words, any court that dismisses a civil rights action prior to the commencement of discovery may be found to have jumped the judicial gun.

Plaintiffs, in order to state a claim under Section 1983, must "(1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Leffall v. Dallas Independent*

[7] Defendant Tyson did not address Plaintiff's 42 U.S.C. 1983 claims in filing its motion.

School Dist., 28 F.3d 521, 525 (5th Cir. 1994). Further, as to Defendant TCSD, Plaintiffs must demonstrate that there is county policy or custom which caused the constitutional violation. *See Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658 (1978).

In filing his Complaint, Plaintiff has alleged violations of the Eighth, Thirteenth and Fourteenth Amendments. Because Defendant Tyson is alleged to have acted together with or . . . obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State" it remains liable for Plaintiff under 42 U.S.C. § 1983.

A. Plaintiff Suffered a Constitutional Deprivation.

Plaintiff has clearly established constitutional rights that protect him from: (i) cruel and unusual punishment created by unsafe "working" conditions, *see Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (holding unsafe working conditions in the Texas prison system constitute cruel and unusual punishment as proscribed by the Eighth Amendment); (ii) involuntary servitude, *see Butler v. Perry*, 240 U.S. 328 (1916) (holding the term involuntary servitude, as used in the Thirteenth Amendment, was intended to cover those forms of compulsory labor akin to African slavery); (iii) violations of procedural due process, *see Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); and (iv) substantive due process, *see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and *Shillingford v. Holmes*, 643 F. 2d 263, 265 (5th. Cir. 1981) (*holding* "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process").

Plaintiff has pled facts sufficient to justify his causes of actions. The facts pled include, but are not limited to: (i) working in an environment where one remains covered in chicken feces constituting cruel and unusual punishment; (ii) the relationship between all Defendants that prevented Plaintiff from fulfilling his court ordered service and increased the time he was confined, thus transforming him into an indentured servant; (iii) Defendant Bradley's refusal to assign Plaintiff a new assignment, coupled with the fact Plaintiff was arbitrarily and capriciously reassigned to

Defendant Tyson deprived him of liberty; and (iv) by contracting TB Plaintiff's right to bodily integrity was violated.

B. Defendant Tyson Acted Under the Color of State Law

In determining whether a private actor has acted under the color of state law for purposes of 42 U.S.C. § 1983 litigation the Court must: (i) determine if the deprivation was caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible and (ii) find the private party "acted together with or . . . obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State."[8] *Wyatt v. Cole*, 504 U.S. 158, 162 (1992)

In order to determine whether Defendant Tyson actions created 1983 liability the Court has created a number of tests that may or may not apply. Such tests include the "public function" test, *see Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); [102 S.Ct. 2755] the "state compulsion" test, *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970); the "nexus" test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978).

"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Adickes*, 398 U.S. at 150 (*internal citations omitted*).

In the case at bar, Plaintiff has alleged a relationship between the State Defendants and Defendant Tyson. This relationship consists of inmates – considered wards of the State and under

[8] The Thirteenth Amendment, by its very nature, is self-executing and automatically reaches private individuals, such as slave owners.

court order – are assigned by the State to fulfill their restitution at Defendant Tyson's chicken plant. (FAC ¶¶ 20, 35, **Doc. 12**).

Plaintiff further alleged, upon information and belief, a relationship existed between Defendant Tyson and the State Defendants. (FAC ¶¶ 35-37, **Doc. 12**). Evidence of such relationship can be found in the fact that Plaintiff was initially removed from Defendant Tyson's plant by Defendant Bradley due to medical ailments. *Id.* Rather than find Plaintiff a new assignment, Defendant Bradley kept Plaintiff in limbo for at least two (2) months. *Id.* When he did find him a new job at the Greenwood Country, such a job was short-lived because Plaintiff was reassigned to Defendant's Tyson plant by Defendant Bradley. *Id.*

At this juncture, discovery has not commenced and Defendants have yet to even file an answer to Plaintiff's complaint. Plaintiff is entitled to conduct discovery for the purposes of further proving Defendant Tyson acted under the color of state law and a dismissal before such discovery can take place is traditionally held to be premature. *Barber*," 372 F.2d. at 627.

V. ASSUMING PLAINTIFF HAS NOT PLED HIS CLAIM SUFFICIENTLY, THIS COURT SHOULD GRANT HIM LEAVE TO FILE AN AMENDED COMPLAINT.

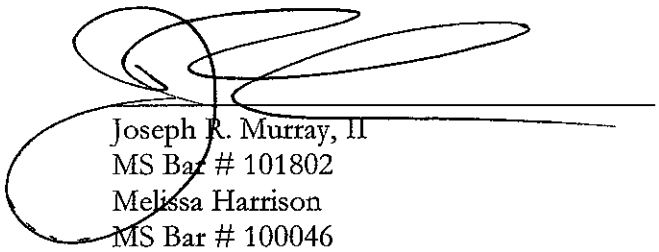
The Fifth Circuit stated, "Unless we have searched every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of the plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability,' we must remand and permit plaintiff to amend [her] claim." *Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

If this Court finds Plaintiff's complaint is deficient, he should be first given an opportunity to remedy the deficiency before having his case dismissed.

CONCLUSION

For all the reasons stated herein, Plaintiff requests the Court deny Defendant's Motion to Dismiss on all counts, deny Defendants' request for other relief sought.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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