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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Ana Armendarez,  
Plaintiff,

vs.

Glendale Youth Center, Inc.; Duane  
Fischer and Ronda Lee Fischer; Maria T.  
Pendleton; Ralph Figueroa; Luis Angel  
Viniegra; Sylvia De La Huerta,  
Defendants.

No. CV-99-1379-PHX-ROS

**ORDER**

This action arose from a dispute between Plaintiff Ana Armendarez, a former employee of the Glendale Youth Center, Inc. ("GYCI") and the GYCI Board of Directors ("Board"). Plaintiff filed a Complaint against both the GYCI and the individual members of the Board claiming unpaid wages under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 201. Board members assert protection from suit for economic damages by the Volunteer Protection Act of 1997 ("VPA" or "Act"), 42 U.S.C. § 14501, and move through GYCI's counsel to dismiss the action. For the reasons stated above, the Court will grant Defendant's motion.

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1 **I. BACKGROUND**

2 **A. Facts**

3 In March 1990, Defendant GYCI hired Plaintiff as its President and Chief Executive  
4 Officer. GYCI's Board ran the center, including policy development and direction. The  
5 Board also controlled Plaintiff's salary. The Board, as Plaintiff's employer, possessed the  
6 power to hire and fire her. (Def. Memo. ¶ 1) (Doc. #71).

7 Historically, grants of money funded GYCI. However, GYCI received no grants in  
8 1997, but continued operating from earlier pledged grants. This money dwindled down after  
9 GYCI entered into serious debt in early 1996. (Def. Memo. ¶ 2) (Doc. #71).

10 In January of 1996, GYCI received notice from the I.R.S. concerning a year and a half  
11 of unpaid payroll taxes. The total debt to the I.R.S., including penalties and interest, totaled  
12 about \$70,000. As a result of the debt the I.R.S. placed a lien on the agency. This lien made  
13 it even more difficult for GYCI to obtain grants and further funding. (Def. Memo ¶ 3) (Doc.  
14 #71).

15 By September or October of 1996, GYCI ran out of money from its earlier grants.  
16 GYCI's substantial debts were incurred under Plaintiff's leadership. Plaintiff made a decision  
17 to leave GYCI, but decided to get the organization out of debt before leaving. In late 1996  
18 to early 1997, Plaintiff realized that GYCI would not be able to pay her a salary because  
19 GYCI possessed no income, grant money, nor donations. GYCI contends that Plaintiff made  
20 the decision to stay on board *without a salary*, in order to get control of GYCI's major debts.  
21 (Def. Memo ¶ 4) (Doc. #71). Plaintiff argues that the Board promised to *pay her unpaid*  
22 *wages*. (Compl. ¶ 7) (Doc. #1).

23 **B. Procedural History**

24 On July 30, 1999, Plaintiff filed a Complaint (Doc. #1) alleging unpaid wages under the  
25 FLSA. Plaintiff named as Defendants both GYCI and the individual members of the Board.  
26 GYCI, represented by counsel, filed an Answer on September 9, 1999 (Doc. #5). The  
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1 individual Defendants remained *pro se* and filed separate Answers between the dates of  
2 October 22, 1999 & June 15, 2000 (Doc #11, 13, 32, 33, & 41).

3 On February 15, 2002, the Court issued a scheduling order for a status hearing and held  
4 it on March 22, 2002 (Doc. #66, 68). Plaintiff's counsel and GYCI's counsel attended.  
5 According to the record and the report of counsel for GYCI, individual members of the  
6 Board neither obtained counsel nor attended. At the hearing it was undisputed that Plaintiff's  
7 recovery would only come from the individuals because GYCI was not solvent. Counsel for  
8 GYCI then raised the Volunteer Protection Act issue on behalf of the individual Defendants  
9 which was followed by a joint request for an "advisory opinion" from the Court regarding  
10 whether the Act absolved the individuals from liability. The Court agreed to allow GYCI  
11 counsel to move for dismissal on this issue on behalf of *pro se* individual Defendants.<sup>1</sup> The  
12 Court construes Defense counsel's Memorandum as a Motion to Dismiss under FED R. CIV  
13 P. 12(b)(6).<sup>2</sup>

14 On April 8, 2002, the Court ordered both parties to submit a Memorandum of Points  
15 and Authorities addressing their position pursuant to the VPA. Defense counsel filed a  
16 Memorandum on April 29, 2002 (Doc. #71) and Plaintiff filed a Memorandum on May 1,  
17 2002 (Doc. #72).

## 18 **II. DISCUSSION**

19 The Court has original jurisdiction over this Federal question pursuant to 28 U.S.C. §  
20 1331, as Plaintiff sues under 29 U.S.C. § 201.

### 21 **A. Legal Standard for Rule 12(b)(6) Motion to Dismiss**

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24 <sup>1</sup>The court perceived no conflict in counsel's dual representation of GYCI and the  
25 individual member Defendants because counsel was requesting the Court to rule for the  
26 individual Defendants, which would leave only an insolvent GYCI as the sole Defendant  
responsible for the verdict.

27 <sup>2</sup>The failure of the Defendant to file a Reply does not preclude this Court from  
28 deciding the Motion.

1 A court may not dismiss a complaint for failure to state a claim “unless it appears  
2 beyond doubt that the plaintiff can prove no set of facts in support of his claims which would  
3 entitle him to relief.” Barnett v. Centoni, 31 F.3d 813, 813 (9th Cir. 1994) (citing Buckley v.  
4 Los Angeles, 957 F.2d 652, 654 (9th Cir. 1992)); see Conley v. Gibson, 355 U.S. 41, 47  
5 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995);  
6 W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).<sup>3</sup> “The federal rules require  
7 only a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’”  
8 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997) (quoting Fed. R. Civ. P.  
9 8(a)). “The Rule 8 standard contains a powerful presumption against rejecting pleadings for  
10 failure to state a claim.” Id. at 249 (quotation marks omitted). “All that is required are  
11 sufficient allegations to put defendants fairly on notice of the claims against them.”  
12 McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (citing Conley, 355 U.S. at 47; 5 C.  
13 Wright & A. Miller, Federal Practice & Procedure § 1202 (2d ed. 1990)). Indeed, though “it  
14 may appear on the face of the pleadings that a recovery is very remote and unlikely[,] . . . that  
15 is not the test.” Gilligan, 108 F.3d at 249 (quoting Scheur v. Rhodes, 416 U.S. 232, 236  
16 (1974)). “The issue is not whether the plaintiff will ultimately prevail but whether the  
17 claimant is entitled to offer evidence to support the claims.” Id.

18 When analyzing a complaint for failure to state a claim, “[a]ll allegations of material  
19 fact are taken as true and construed in the light most favorable to the non-moving party.”  
20 Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996); see Miree v. DeKalb County, 433 U.S.  
21 25, 27 n.2 (1977). In addition, the district court must assume that all general allegations  
22 “embrace whatever specific facts might be necessary to support them.” Peloza v. Capistrano  
23 Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995)  
24 (citations omitted). The district court need not assume, however, that the plaintiff can prove  
25 facts different from those alleged in the complaint. See Associated Gen. Contractors of  
26 Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Similarly, legal  
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1 conclusions couched as factual allegations are not given a presumption of truthfulness and  
2 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a  
3 motion to dismiss.” Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); see Jones v. Cmty.  
4 Redev. Agency, 733 F.2d 646, 649-50 (9th Cir. 1984); W. Mining Council, 643 F.2d at 624.

5 “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
6 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dept.,  
7 901 F.2d 696, 699 (9th Cir. 1988); see William W. Schwarzer et al., Federal Civil Procedure  
8 Before Trial § 9:187, at 9-46 (2002). Alternatively, dismissal may be appropriate when the  
9 plaintiff has included sufficient allegations disclosing some absolute defense or bar to  
10 recovery. See Weisbuch v. County of L.A., 119 F.3d 778, 783, n.1 (9th Cir. 1997) (“If the  
11 pleadings establish facts compelling a decision one way, that is as good as if depositions and  
12 other . . . evidence on summary judgment establishes the identical facts.”); see also Federal  
13 Civil Procedure Before Trial § 9:193, at 9-47.

#### 14 **B. Analysis**

15 The VPA protects volunteers of non-profit organizations from both federal and state  
16 claims. Plaintiff contends the VPA preempts only state law. Defendant argues the VPA also  
17 precludes federal claims such as those arising under the FLSA. The Court concludes (1) the  
18 VPA preempts state law and precludes recovery from the volunteers under the FLSA, and  
19 (2) the VPA applies to the members of the Board.

#### 20 **1. The VPA Preempts State Law & Precludes the FLSA**

21 The VPA provides:

22 [N]o volunteer of a nonprofit organization or governmental entity shall be liable for  
23 harm caused by an act or omission of the volunteer on behalf of the organization or  
entity if—

24 (1) the volunteer was acting within the scope of the volunteer's  
responsibilities in the nonprofit organization or governmental entity at  
25 the time of the act or omission;

26 (2) if appropriate or required, the volunteer was properly licensed,  
certified or authorized by the appropriate authorities for the activities or  
27 practice in the State in which the harm occurred, where the activities were  
or practice was undertaken within the scope of the volunteer's responsibilities  
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1 in the non-profit organization or governmental entity;

2 (3) the harm was not caused by willful or criminal misconduct, gross  
3 negligence, reckless misconduct, or a conscious, flagrant indifference to  
4 the rights of safety of the individual harmed by the volunteer; and

4 (4) the harm was not caused by the volunteer operating a motor vehicle,  
5 vessel, aircraft, or other vehicle for which the State requires the operator  
6 or the owner of the vehicle, craft, or vessel to possess an operator's license  
7 or maintain insurance.

6 42 U.S.C. § 14503(a)(1)-(4).<sup>3</sup>

7 This Act applies to *any* claim for harm caused by an act or omission of a volunteer. 42  
8 U.S.C. § 14501 Hist. and Stat. Notes (b) (emphasis added).

9 Plaintiff argues that the VPA only preempts state law, quoting the following language  
10 from the VPA: "This chapter preempts the laws of any State to the extent that such laws are  
11 inconsistent with this chapter...." 42 U.S.C. § 14502(a).

12 The Court has found no applicable case law discussing preclusion of federal law.  
13 However, the plain language of the statute, along with the legislative history, satisfies the  
14 Court that the VPA preempts state law and precludes the federal law at issue, the FLSA.<sup>4</sup>  
15 The text of § 14502(a) cannot be interpreted to prevent the application of the VPA to federal  
16 law, though its central focus is preemption of state law. In H.R. REP No. 105-101(I) at 6  
17 (1997), the Committee stated:

18 It is not enough to leave it to the States to solve this problem. Volunteerism is a  
19 national activity and the decline in volunteerism is a national concern....Although  
20 every state now has a law pertaining specifically to legal liability of at least  
21 some types of volunteers, many volunteers remain fully liable for some actions.  
Only about half of the states protect volunteers other than officers and

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22 <sup>3</sup>Plaintiff's Complaint only demands economic relief. Volunteers may be liable for  
23 noneconomic loss under the VPA. 42 U.S.C. § 14504.

24 <sup>4</sup>The Court found other federal statutes similar to the Volunteer Protection Act.  
25 However, an exhaustive search in Lexis and Westlaw generated no case law or legislative  
26 history discussing whether these statutes pertained to the preemption of state law and the  
27 preclusion of federal law. See, e.g., No Child Left Behind Act of 2001, H.R. CONF. REP.  
28 107-334, § 2365, at 249 (2001); Community Solutions Act of 2001, H.R. REP. 107-138(II),  
§ 103, at 7 (2001); Small Business Liability Reform Act of 2000, H.R. REP. 106-494, § 106,  
at 4 (2000).

1 directors. Moreover, every volunteer protection statute has exceptions. As a  
2 result, state volunteer protection statutes are patchwork and inconsistent....  
3 This inconsistency hinders national organizations from accurately advising  
4 their local chapters on volunteer liability and risk management guidelines.

5 The report also emphasizes, "H.R. 911, as amended, immunizes a volunteer *from liability* for  
6 harm caused by ordinary negligence...." No. 105-101(I) at 153 (emphasis added). This  
7 portion is noteworthy because it does not distinguish federal liability from state liability.  
8 Concomitantly, the Senate, in accord with the House, stated "[T]he Volunteer Protection  
9 Act...covers *all* civil lawsuits except those involving certain types of egregious misconduct."  
10 145 CONG. REC. S6286 (daily ed. May 27, 1999) (statement of Sen. Abraham) (emphasis  
11 added). In addition, a thoughtful article on the issue from the Harvard Journal on Legislation  
12 states, "The Volunteer Protection Act *immunizes* those who voluntarily provide services...."  
13 "The heart of the legislation involves a *bar to liability* for individual volunteers." Again, the  
14 author does not distinguish between federal and state liability. See Andrew F. Popper, *A*  
15 *One-Term Tort Reform Tale: Victimizing The Vulnerable*, 35 HARV J. ON LEGIS. 123, 130-32  
16 (1998) (emphasis added) (discussing the VPA as applying to both state and federal suits).<sup>5</sup>

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18 <sup>5</sup>The legislative history tends to establish that the VPA was intended to protect all  
19 volunteers from tort liability, whether state or federal. See H.R. Rep No. 105-101(I) at 7  
20 (1997). The Court, however, has not found legislative history or case law establishing that  
21 volunteers are not protected from contract liability, but the broad, plain language of the VPA  
22 indicates it covers all liability whether rooted in tort or contract. See 42 U.S.C. § 14503(a).  
23 In addition, the historical and statutory notes following the VPA state, "[t]his Act applies to  
24 *any* claim for harm caused by an act or omission of a volunteer." 42 U.S.C. § 14501 Hist.  
25 and Stat. Notes (b) (emphasis added). Furthermore, even if the VPA's sole purpose is to  
26 eliminate tort liability, Plaintiff has brought suit under the FLSA asking for liquidated  
27 damages. (Comp. ¶10) (Doc. #1). The FLSA encompasses tort liability when the Plaintiff  
28 requests liquidated damages. See *C.I.R. v. Schleier*, 515 U.S. 323, 325-26, 331 (1995)  
(stating in dicta that FLSA provisions that permit the recovery of wages lost and an  
additional equal amount as liquidated damages are broad remedial mechanisms,  
distinguishing the non-tort based liquidated damages provisions of the ADEA as a significant  
departure from those in the FLSA). Therefore, the Court need not decide whether the VPA  
eliminates liability under both tort and contract claims because Plaintiff has failed to argue  
this issue and appears to have brought a claim rooted in tort.

1 Furthermore, the VPA contains several specific limitations on liability. These  
2 limitations on the liability of a volunteer under the VPA include *both* state and federal laws.  
3 For example, the limitations on liability shall not apply to misconduct that: (1) constitutes a  
4 crime of violence as defined in section 16 of Title 18 or an act of terrorism as defined in  
5 section 2331 of Title 18;<sup>6</sup> or (2) "involves misconduct for which the defendant has been  
6 found to have violated a federal or state civil rights law." See 42 U.S.C. § 14503(f)(1)(A),  
7 (D).

8 Moreover, another section of the VPA indicates that limitations on punitive damages  
9 do not preempt or supercede any federal or state law. In general, punitive damages may not  
10 be awarded against a volunteer acting within the scope of his or her responsibilities unless  
11 the claimant establishes by clear and convincing evidence that the harm was proximately  
12 caused by an action which constitutes willful or criminal misconduct, or a conscious, flagrant  
13 indifference to the rights or safety of the individual harmed. Congress added that this general  
14 rule does not preempt or supercede any federal or state law. See 42 U.S.C. § 14503(e)(1),  
15 (2).

16 Congress clearly demonstrated an intent for the VPA's liability protection to generally  
17 cover both state and federal law, as evidenced by Congress expressly listing exceptions to  
18 the VPA's liability protection several federal laws. Dispositive to the resolution of this  
19 Motion is that those federal laws listed as exceptions do *not* include the FLSA. Because  
20 Congress purposely failed to list the FLSA as an exception, the Court cannot imply that the  
21 FLSA is an exception to the VPA's limitations on liability. See generally Lehman v.  
22 Nakshian, 453 U.S. 156, 166-69 (1981) (holding that federal employees suing under section  
23 15 of the ADEA are not entitled to a jury trial on their claims because Congress did not grant  
24 that right by statute as they did in section 7(a)).

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27 <sup>6</sup>These claims may be brought in state and federal court. Federal right of action exists  
28 for crimes of violence under 42 U.S.C. § 13981, for acts of terrorism under 28 U.S.C. § 2338.

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**2. The VPA Applies to Individual Members of the Board**

Having determined the VPA applies to Plaintiff's FLSA claim, the Court now turns to whether the individual members of the board enjoy protection by the VPA. As stated above, volunteers are protected if: (1) acting within the scope of their duties as Board Members; (2) properly authorized to serve as Board Members; (3) the harm was not caused by willful or criminal misconduct, gross negligence, or reckless misconduct; (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, or aircraft. See 42 U.S.C. § 14503(a)(1)-(4). In addition, volunteers lose liability protection if convicted of a federal crime of violence, an act of international terrorism, a state law sexual offense, misconduct violative of federal or state civil rights law, or if the volunteer was under the influence of alcohol determined by applicable state law. See 42 U.S.C. § 14503(f)(1)(A)-(E). In Defendant's Memorandum it is argued that the individual Defendants are volunteers, that they acted within the parameters of the VPA, and thus are immune from suit pursuant to the VPA. Plaintiff's Memorandum stipulates that the individuals are volunteers within the meaning of the VPA, it fails to discuss either the § 14503(a) elements for protection or the § 14503(f) exceptions. Pursuant to Local Rule 1.10(i), Plaintiff's failure to respond may, in the discretion of the Court, be deemed a consent.

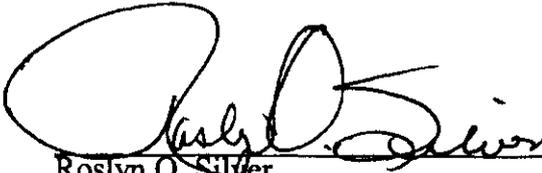
Accordingly,

**IT IS THEREFORE ORDERED** that the Motion to Dismiss (Doc. #71) filed by Defendant is **GRANTED**, and all claims against the individual Defendant's are **DISMISSED**.

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**IT IS FURTHER ORDERED** that a Status Hearing is set for Friday, June 6, 2003 at 11:30 a.m.

DATED this 19 day of May, 2003.

  
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Roslyn O. Silver  
United States District Judge