IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Tiga Logistics, LLC, Plaintiff,	)	
v.	)	Civil Action No. 4:14-cv-00480
Thomas E. Perez, Secretary of Labor, United States Department of Labor, Defendant.	)	

FEDERAL DEFENDANT'S MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT

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Federal Defendant, Thomas E. Perez, Secretary of Labor, United States Department of Labor, moves this Court to Dismiss Plaintiff's Complaint for lack of ripeness, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction. In support of this Motion, Federal Defendant provides the following discussion and memorandum of law.

INTRODUCTION

Plaintiff Tiga Logistics, LLC (Tiga) requests a declaratory judgment that its truck drivers are properly classified as independent contractors and not employees. The Wage and Hour Division (WHD) of the Department of Labor ("Department" or "DOL") conducted an investigation to determine whether Tiga was in compliance with the FLSA. Compl. ¶ 28. Prior to completion of any agency decision-making process, the Wage and Hour Investigator (Investigator), Dante Wilson, told Tiga's representatives that its truck drivers were exempt from the overtime provisions of the FLSA and that no back wages were owed. He also explained that because the truck drivers were employees, Tiga should keep records for them. Compl. ¶ 32; see 29 U.S.C. § 213(b)(1); 29 C.F.R. § 516.12 (requiring employers to keep limited records for overtime-exempt employees). The investigator also informed Tiga's representatives that the case could be referred to DOL's district management, and after that could be referred to the Solicitor's Office. Compl. ¶ 33. Tiga filed this lawsuit against the Secretary on February 26,

2014 requesting that this Court, instead of WHD management, determine whether Tiga's truck drivers are employees or independent contractors. Compl. at 1.

The complaint asserts jurisdiction under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA), the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. (DJA), and the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (APA), and 28 U.S.C. § 1331 claiming final agency action under the APA and that there is an actual case or controversy within the meaning of the Declaratory Judgment Act.

As a threshold matter, Tiga must demonstrate that this action is ripe for review. Shields v. Norton, 289 F.3d 832, 835 (5th Cir. 2002). Tiga fails on all four factors that courts assess when making a determination of ripeness in an APA action: the issues are not purely legal; there was no final agency decision; there was no direct and immediate impact on Tiga; and a decision by this Court will not foster effective enforcement of the FLSA. See Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 919 (5th Cir. 1993). Even if this action were ripe for review, Tiga must further demonstrate that this Court has jurisdiction under the APA, which authorizes judicial review over "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Many of the factors courts consider in determining ripeness are also relevant in determining whether a court has jurisdiction under the APA. See Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807 (2003); Am. Airlines, Inc.

v. Herman, 176 F.3d 283, 289 (5th Cir. 1999); In re Cont'l Airlines Corp., 50 B.R. 342, 362 (S.D. Tex. 1985), aff'd, 790 F.2d 35 (5th Cir. 1986). For agency action to be final, it must be the "consummation" of the agency's decision-making process, and it must determine legal rights or obligations or create legal consequences. Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Gate Guard Servs. L.P. v. Solis, No. CIV.A. V-10-91, 2011 WL 2784447, at *4 (S.D. Tex. July 12, 2011). Because WHD did not finish its decision-making process and has determined no rights or obligations and imposed no legal consequences, Plaintiffs fail to demonstrate finality and thus jurisdiction. And because there has been no final agency action and Tiga alleges no facts demonstrating otherwise, it states no claim for relief. Accordingly, the Court should dismiss the Complaint for lack of ripeness, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction.

BACKGROUND

In late 2013, WHD began an investigation to determine whether Tiga was in compliance with the FLSA. Compl. ¶ 28. Tiga is a privately held transportation company founded in January 2011, and it transports crude oil for oil and gas companies from oil patches to various distribution points. Compl. ¶¶ 6, 7. Tiga now has 63 truck drivers, 55 of whom were hired beginning in 2012 as

"independent contractors" and the remaining eight of whom Tiga considered employees until July of 2013. Compl. ¶ 10.

Investigator Wilson conducted his investigation of Tiga and then met with Tiga's owner and attorney in a final conference on February 20, 2014 to discuss his findings. Compl. ¶¶ 28-30. During the final conference, Investigator Wilson told Tiga that its truck drivers were exempt from the overtime provisions of the FLSA and that no back wages were owed. He also explained that because the truck drivers were employees, Tiga should keep records for them. Compl. ¶ 32; see 29 U.S.C. § 213(b)(1); 29 C.F.R. § 516.12. He then explained Tiga's options: it could agree to reclassify the truck drivers as employees, or it could disagree and have the matter referred to WHD's district management. Compl. ¶ 33. Then, the WHD district management could decide whether to refer the matter to the Solicitor's office for enforcement. Id.

Where, as here, the employer does not agree with the findings or recommendations made by the investigator the case file is reviewed by the investigator's supervisor, the Assistant District Director (ADD). Declaration of Rebecca Hanks (Dec.) ¶¶ 8, 9;[1] see WHD Field Operations Handbook (FOH) §

[1] When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may evaluate "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Barrera–Montenegro v. United States, 74 F.3d 657, 659 (5th Cir.1996); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981); Turner Indus. Grp., LLC v. Int'l Union of Operating Eng'rs, Local 450, No. CIV.A. H-13-0456, 2014 WL 1315668, at *3 (S.D. Tex.

53d00 (2002) (attached).[2] If the ADD agrees with the investigator's findings he or she will attempt to arrange a second-level conference with the employer. Dec. ¶ 9. If the second-level conference does not resolve the case the ADD will discuss the matter with an attorney in the Solicitor's Office. Dec. ¶ 10. Following that discussion the case may be referred to the Solicitor's Office for review and evaluation. Upon review the Solicitor's Office may decide to litigate the matter, conduct further negotiations with the employer, return the file to the ADD for additional development, close the case without further action, or take other appropriate action. Id. At the time this lawsuit was filed the ADD had not yet reviewed the investigator's case file, much less approved it. Dec. ¶ 11.

STANDARD OF REVIEW

Under Rule 12(b)(1), plaintiffs seeking to invoke the jurisdiction of a federal court bear the burden of establishing that the court has jurisdiction to hear their claims. United States v. Hays, 515 U.S. 737, 743 (1995); Sawyer v. Wright, 471 F. App'x 260, 261 (5th Cir.), cert. denied, 133 S. Ct. 615 (2012). Because the

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Mar. 27, 2014). The third approach allows the court to use a defendant's supporting affidavits or other testimony to evaluate a factual challenge to jurisdiction. Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981); Turner Indus. Grp., LLC, 2014 WL 1315668, at *4.

[2] "The Field Operations Handbook (FOH) is an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. The FOH was developed by the WHD under the general authority to administer laws that the agency is charged with enforcing." Barrera v. MTC, Inc., No. SA-10-CA-665 XR, 2011 WL 3273196, at *3 n.12 (W.D. Tex. July 29, 2011) (quoting U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, available at http://www.dol.gov/whd/FOH/index.pdf (last visited May 21, 2014)).

elements necessary to establish jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof; *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

Under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (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." Id. Thus, a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim. Id. (quoting Twombly, 550 U.S. at 555). A claim under the Administrative Procedure Act is implausible, and must be dismissed, if it does not challenge final agency action. See McDonald v. United States, No. CIV. H-04-1845, 2005 WL 1571215, at *2 (S.D. Tex. June 30, 2005).

ISSUES PRESENTED

1. Whether a lawsuit against the government for statements made by a Wage Hour Investigator, prior to acceptance by management, is ripe for review.

2. Whether a conclusory statement that an agency action was final is sufficient to state a claim under Fed. R. Civ. P. 12(b)(6).
3. Whether the FLSA provides jurisdiction for a lawsuit by an employer against the government.
4. Whether a final conference between an employer and a Wage Hour Investigator during which no back wages or penalties are assessed is a final agency action with no other adequate remedy in court subject to APA review.
5. Whether a final conference creates an actual case or controversy such that this Court may exercise jurisdiction under the Declaratory Judgment Act.

ARGUMENT

I. Federal courts are courts of limited jurisdiction and Plaintiff's claim is not justiciable because it is not ripe for review.

Federal courts may only have jurisdiction over a case that is ripe for review, and Tiga's claim is not ripe. Article III of the Constitution limits federal court jurisdiction to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2. To give meaning to this requirement, the courts have developed a series of justiciability doctrines, including ripeness. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807 (2003); United Transp. Union v. Foster, 205 F.3d 851, 857 (5th Cir. 2000). The Fifth Circuit has deemed ripeness a "constitutional

prerequisite to the exercise of jurisdiction." Shields v. Norton, 289 F.3d 832, 835 (5th Cir. 2002); accord United Transp. Union, 205 F.3d at 857.

The ripeness doctrine prevents courts from becoming prematurely entangled in disputes about administrative procedures and interfering in decisions that would be best left to administrative agencies. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). The doctrine requires courts to evaluate both the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149; Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 919 (5th Cir. 1993). The Fifth Circuit applies a four-part test when determining ripeness in a case brought under the APA:

> (1) whether the issues presented are purely legal; (2) whether the challenged agency action constitutes 'final agency action' within the meaning of the APA; (3) whether the challenged action has or will have a direct and immediate impact on the petitioner; and (4) whether resolution of the issues will foster effective enforcement and administration by the agency.

Gate Guard Servs. L.P. v. Solis, No. CIV.A. V-10-91, 2011 WL 2784447, at *9 (S.D. Tex. July 12, 2011); accord Merchs. Fast Motor Lines, Inc., 5 F.3d at 919. None of these four factors favor review of Tiga's claim.

First, the issues presented in this case are not purely legal. See Merchs. Fast Motor Lines, Inc., 5 F.3d at 919; Gate Guard, 2011 WL 2784447, at *10. Whether the truck drivers are employees or independent contractors is a mixed question of fact and law. See Newcomb v. N. E. Ins. Co., 721 F.2d 1016, 1019 (5th Cir.

1983); Pitts v. Shell Oil Co., 463 F.2d 331, 334 (5th Cir. 1972); Gate Guard, 2011 WL 2784447, at *10. To determine if a worker is an employee or independent contractor, courts look at "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008). In this circuit, this determination is based on five factors: "(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship." Id. (citation omitted); Gate Guard, 2011 WL 2784447, at *10. The determination of employee status is highly fact-specific. Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 305 (5th Cir. 1998) ("The determination of employee status is very fact intensive, and as with most employee-status cases, there are facts pointing in both directions.") (internal quotation marks and citation omitted); Thibault v. Bellsouth Telecomms. Inc., 612 F.3d 843, 848 (5th Cir. 2010) ("The determination of whether an individual is an employee or independent contractor is highly dependent on the particular situation presented"). Because the Secretary has not brought an enforcement action against Tiga, there is no factual record on which this Court could rely in making this highly fact-specific

determination. Cf. Gate Guard, 2011 WL 2784447, at *10 (finding ripeness even though questions of fact remained because the declaratory judgment action was consolidated with an FLSA enforcement action, giving the court a full record on which to decide factual issues). Thus, factual issues remain that are best decided by the Department in the first instance.

Second, as discussed in more detail below in Part IV, the final conference with the Investigator was not a final agency action within the meaning of the APA, as numerous determinations had not yet been made by the agency. Although Investigator Wilson informed Tiga that he would refer the matter to district management, who may then refer the matter to the Solicitor's office, Tiga decided to file this action for a declaratory judgment "[i]nstead of waiting to be sued." Compl. at 1.

Third, the final conference has no direct or immediate impact on Tiga. This factor overlaps significantly with the requirement that a final agency action determine rights or obligations or create legal consequences, discussed below in Part III.A. See Pennzoil Co. v. Fed. Energy Regulatory Comm'n, 645 F.2d 394, 399 (5th Cir. 1981); Exxon Chems. Am. v. Chao, 298 F.3d 464, 467 (5th Cir. 2002). The Fifth Circuit requires an action to be definitive and have "some substantial effect on the parties which cannot be altered by subsequent administrative action" in order to have an "immediate impact." Pennzoil Co., 645

F.2d 399 (internal quotation marks and citation omitted) (finding no direct or immediate impact where only impact would be delay in judicial review). Here, Investigator Wilson merely explained that Tiga was likely required to keep records of basic information for its truck drivers. His conclusion that Tiga's truck drivers were employees could have been altered by the WHD Assistant District Director or District Director if they disagreed with his analysis. WHD FOH § 53d00; Dec. ¶ 9. It also could have been altered later in the process based on Solicitor's Office review. Dec. ¶ 10; Compl. ¶ 33. No writing of any kind was provided and even a written opinion by the Administrator setting out the FLSA recordkeeping requirement would have had no immediate impact on Tiga. See Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 955 (5th Cir. 1991) (finding no direct and immediate impact on the employers under the FLSA because they were free to continue treating their employees in the way they believed was correct despite opinion letters); State of Tex. v. U.S. Dep't of Energy, 764 F.2d 278, 284 (5th Cir. 1985) (finding no direct or immediate impact where petitioners could have voiced their concerns to the agency through public hearings before final decision was made).

And finally, allowing suits such as Tiga's interferes with the enforcement of the FLSA because it interrupts the WHD's enforcement procedure. In WHD investigations, the ADD reviews the Investigator's analysis and has the opportunity

to direct further action in the investigation before final acceptance of the Investigator's report. WHD FOH § 53d00; Compl. ¶ 33; Dec. ¶ 9. The district management could then decide whether to refer the matter to the Solicitor's office, which would then decide whether to pursue an enforcement action in court. See, e.g., Taylor-Callahan-Coleman, 948 F.2d at 955; Wirtz v. Atl. States Const. Co., 357 F.2d 442, 446 (5th Cir. 1966); Gate Guard, 2011 WL 2784447, at *1; Compl. ¶ 33. Even a court action against Tiga would not be final agency action. See FCC v. Standard Oil Co., 449 U.S. 232, 242 (1980). Here, Tiga is asking this Court to prematurely decide the issue of whether its truck drivers are independent contractors instead of waiting until the issue is properly before a court. As such, Tiga's claim is not ripe and should be dismissed.

II. A conclusory statement that an agency action was final is insufficient to state a claim under Fed. R. Civ. P. 12(b)(6).

This Court should dismiss Tiga's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. A claim under the Administrative Procedure Act is implausible, and must be dismissed, if it does not allege there was a final agency action. See McDonald v. United States, CIV. H-04-1845, 2005 WL 1571215, at *2 (S.D. Tex. June 30, 2005). A "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause

of action'" is insufficient to state a claim. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555).

Tiga's complaint states that "DOL's decision that Tiga's owner-operators should be classified as employees is a final agency action." Compl. ¶ 39. The facts Tiga alleges, however, do not support this conclusory statement. Tiga describes the WHD investigation and the final conference between Investigator Wilson and Tiga. Compl. ¶¶ 28-30. Tiga concedes that Investigator Wilson explained that a referral to management would be the next step if Tiga disagreed with the investigative findings. Compl. ¶ 33. Tiga also apparently understood that any enforcement action was speculative at the time it filed this complaint because if Tiga did not agree with Investigator Wilson's findings, the matter would be referred to district management, who would then evaluate the case and decide whether to refer the matter to the Solicitor's office, who would then evaluate the case and decide whether to pursue an enforcement action. Id. This Court should dismiss Tiga's complaint for failure to state a claim because its conclusory statement that a "final agency action" occurred is unsupported by the facts pled in the Complaint.

III. This Court lacks jurisdiction over this lawsuit under the APA.

The Department is entitled to sovereign immunity unless that immunity is waived. Taylor-Callahan-Coleman, 948 F.2d at 956; Gate Guard, 2011 WL

2784447, at *3. The APA waives that sovereign immunity under limited circumstances. Under the APA, judicial review of agency actions is limited to an "action made reviewable by statute" or a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Because the FLSA only creates rights of action for employees and the Secretary of Labor, Tiga has no claim against the Secretary for an action "made reviewable by statute." When the statute does not provide for judicial review, the APA authorizes judicial review only for a "final agency action." Am. Airlines, Inc. v. Herman, 176 F.3d 283, 287 (5th Cir. 1999). Thus, this Court only has jurisdiction over Tiga's suit if Tiga can establish that the Investigator's statement in the final conference was a final agency action and that Tiga has no other adequate remedy in a court. See Gate Guard, 2011 WL 2784447, at *3; see also United States v. Hays, 515 U.S. 737, 743 (1995) (noting that the party seeking the exercise of jurisdiction in its favor has the burden of establishing jurisdiction); Sawyer v. Wright, 471 F. App'x 260, 261 (5th Cir.), cert. denied 133 S. Ct. 615 (2012) ("The party seeking relief bears the burden of establishing subject-matter jurisdiction").

A. There has been no final agency action by the Department of Labor.

Tiga mistakenly contends that the final conference with the Investigator was a "final agency action" within the meaning of the APA. Compl. ¶ 4. Agency action is final only when two conditions are satisfied: first, the action must be the

"consummation" of the agency's decision-making process and not tentative or interlocutory; and second, the agency decision must determine rights or obligations, or create legal consequences that flow from the decision. Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Gate Guard, 2011 WL 2784447, at *4.

1. Consummation of agency decision-making

For an action to be the consummation of the agency's decision-making process, it must be a "'deliberative determination of the agency's position at the highest available level on a question of importance'" and not merely a threshold determination. Taylor-Callahan-Coleman, 948 F.2d at 958 (quoting Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971)); accord Franklin v. Massachusetts, 505 U.S. 788, 797 (1992).

Here, the Investigator specifically told Tiga that WHD management and the Solicitor's office would have to review the case. If the ADD agreed with the investigator's findings the employer would have another opportunity to present its case in a second-level conference. If any issues remained contested there would be discussions between the ADD and the Solicitor's Office as well as review by the Solicitor's Office, which would make a decision with regard to the need for litigation, negotiation, additional evidence or closure of the case. Dec. at ¶ 10; Compl. ¶ 33; see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 811 (D.C. Cir. 2006) (finding no legal consequences in voluntary

compliance with agency guidelines in order to avoid risk of agency initiating enforcement action). WHD never issued a written statement of any kind to Tiga. The Investigator's determination thus could have been altered by subsequent administrative action if the WHD District Director decided not to accept the Investigator's analysis or if the Solicitor's office did not agree to pursue enforcement. See Exxon Chems. Am., 298 F.3d at 467; WHD FOH § 53d00; see also Taylor-Callahan-Coleman, 948 F.2d at 955; Atl. States Constr. Co., 357 F.2d at 446. In short, the only activity that has occurred in this matter is a discussion in which the investigator informed the employer of the investigator's unreviewed findings, including a determination that no back wages were due.

In Gate Guard, by contrast, the Court found final agency action when the investigator issued a written statement of findings to the employer assessing over $6 million in back wages. The WHD District Director then met with the employer and a representative from the Solicitor's office and told Gate Guard that the agency had completed its decision-making process, that the employer must immediately comply, and that a lawsuit was imminent. Gate Guard, 2011 WL 2784447, at *1. This Court focused on the fact that WHD had officially completed its decision-making process, as evidenced by the facts that the District Director and representative from the Solicitor's office were in the final meeting and the

Department initiated a lawsuit against the employer soon after the employer filed its declaratory judgment complaint. See id. at *4, Franklin, 505 U.S. at 797.

2. Legal consequences

For an action to determine rights or obligations or create legal consequences, it must have "some substantial effect on the parties which cannot be altered by subsequent administrative action." See Exxon Chems. Am., 298 F.3d at 467; Am. Airlines, Inc., 176 F.3d at 292; Pennzoil Co., 645 F.2d 399. The mere possibility of future enforcement does not create obligations or legal consequences that establish a final agency action. See Am. Airlines, Inc., 176 F.3d at 288; Ctr. for Auto Safety, 452 F.3d at 811; see also Rochester Tel. Corp., 307 U.S. at 130 (pre-APA case holding that "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. … [and] resort to the courts in these situations is either premature or wholly beyond their province").

Tiga raises the specter of criminal sanctions if it were convicted of willful violations based upon the investigator's remarks at the final conference. Compl. ¶ 32. The Fifth Circuit rejected a similar argument in Taylor-Callahan-Coleman.[3]

[3] "The Department of Justice, upon the recommendation of the Secretary of Labor, has the authority to prosecute those individuals who willfully violate the FLSA, but criminal prosecutions for FLSA violations are rare." United States v. Shafer, 199 F.3d 826, 831 n.2 (6th Cir. 1999) (citations omitted). Further, there are no reported cases where WHD pursued criminal penalties solely for recordkeeping violations. Criminal referral, even for overtime and minimum wage violations, is an extraordinary measure; the last reported case the Department was able to

There a county probation district sought a declaratory judgment that an opinion letter by the Wage and Hour Administrator stating that certain probation officers were not exempt under the FLSA was in error. The court explained that the Supreme Court held in FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980) that even an administrative complaint was not final agency action because it "was merely a threshold determination and did not carry the force of law." Taylor-Callahan-Coleman, 948 F.2d at 958 (internal quotation marks and citation omitted). Given this precedent, the court held that the opinion letter was only a "threshold determination" without binding effect and could not constitute final agency action. Id. at 959. The court explained that the probation district could defend against a claim of violation in any subsequent enforcement action under the FLSA and the possibility that a violation could be construed as willful was not sufficient to require declaratory relief. Id. ("The District also asserts that if it ceases to pay overtime to its probation officers and an enforcement action ensues which it defends without success, the violation would be construed as willful because it is aware of the DOL's position regarding the District's probation officers . . . [The court will] issue no advisory opinion on any question of willfulness which may later arise …."). Here, the investigator's verbal explanation

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find involving a referral for criminal prosecution under the FLSA was in 1964. Home News Publ'g. Co. v. United States, 329 F.2d 191 (5th Cir. 1964).

of his view of the case, prior to higher level approval, is, if anything, far less binding than the Administrator's opinion in Taylor-Callahan-Coleman.

Other courts are in agreement that an agency's description of the law, absent legal consequence, is not final agency action. See, e.g., Ctr. for Auto Safety, 452 F.3d at 808. As is particularly relevant here, this principle applies even when the agency is evaluating a specific party's compliance with the law. See, e.g., Holistic Candlers & Consumers Ass'n v. FDA, 664 F.3d 940, 941, 944-45 (D.C. Cir. 2012) (warning letters sent by FDA "to several of the appellant manufacturers, advising that the agency considered their candles to be adulterated and misbranded medical devices" are not final agency action), cert. denied, 133 S. Ct. 497 (2012); Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004) ("We have held that we lacked authority to review claims where 'an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party.'" (quoting AT&T Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001))); Ariz. Mining Ass'n v. Jackson, 708 F. Supp. 2d 33, 42 (D.D.C. 2010) (similar).

The court's decision in AT&T is particularly instructive. It involved a "Letter of Determination" issued by the Equal Employment Opportunity Commission "stating that in its view AT&T had unlawfully discriminated against" employees. AT&T, 270 F.3d at 974. The EEOC also "sent letters to AT&T urging it to conciliate with the two women and informing the Company that if conciliation

failed, then the Commission would refer the matter to its legal department." Id. at 974-75. The D.C. Circuit nonetheless found no final agency action, rejecting the argument that "the Commission takes final agency action when it embraces one view of the law and rejects another." Id. at 975. "The Commission has not inflicted any injury upon AT&T by expressing its view of the law — a view that has force only to the extent the agency can persuade a court to the same conclusion." Id. at 976. As in other cases rejecting a finding of final agency action, here it is dispositive that WHD has neither issued an order that legally binds the plaintiff nor requested such an order from a court. See Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003) ("No legal consequences flow from the agency's conduct to date, for there has been no order compelling Reliable to do anything.").

Tiga nevertheless provides a long list of consequences that it alleges could result from following the investigator's advice. Compl. ¶¶ 36-38. Under precedent construing the APA's final agency action requirement, however, such consequences, should they exist, do not create final agency action. See, e.g., Reliable Automatic Sprinkler, 324 F.3d at 732 ("To be sure, there may be practical consequences, namely the choice Reliable faces between voluntary compliance with the agency's request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue

enforcement. But the request for voluntary compliance clearly has no legally binding effect.") (citation omitted); Ctr. for Auto Safety, 452 F.3d at 811 ("[*D*]*e facto* compliance is not enough to establish that the guidelines have had *legal* consequences."). Ultimately, "if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005).

Similarly, because the Department of Labor has not made a determination as to what action, if any, to take to resolve its investigation, Tiga could face legal consequences under the FLSA only if it was sued in the future by the Department of Labor. The Complaint pleads no facts suggesting this contingency will occur. See, e.g., DRG Funding Corp. v. Sec'y of Housing & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996) (no final agency action where order "'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action'" (quoting Rochester Tel. Corp., 307 U.S. at 130)); Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 173 F. Supp. 2d 41, 48 (D.D.C. 2001) ("[B]efore the CPSC can compel any action from Reliable, the company will have the opportunity to challenge the agency's findings in an administrative hearing, with a right of appeal. The rather distant prospect of injury to Reliable does not justify judicial intervention at this

unusually early stage."), aff'd, 324 F.3d 726 (D.C. Cir. 2003). Instead, if Plaintiff is sued under the FLSA in the future, it will be able to defend itself at that time. See, e.g., Taylor-Callahan-Coleman, 948 F.2d at 959; Reliable Automatic Sprinkler, 324 F.3d at 732; Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979) (similar).

3. Pragmatic and flexible analysis.

In addition to satisfying the two conditions set forth above, courts must analyze the finality of an agency action in a pragmatic and flexible way. Standard Oil Co., 449 U.S. at 239; Abbott Labs., 387 U.S. at 149 (abrogated on other grounds); Am. Airlines, Inc., 176 F.3d at 289; Taylor-Callahan-Coleman, 948 F.2d at 957. In Abbott Laboratories, for example, the Court found that pre-enforcement challenges to labeling requirements would actually help speed up enforcement of the relevant law, so it decided that the publication of certain regulations was a final agency action. 387 U.S. at 153. In Standard Oil Co., on the other hand, the Court found that a declaratory judgment in response to an agency complaint would deny the agency the opportunity to apply its expertise through its own administrative process and burden the courts unnecessarily. 449 U.S. at 242. There, the Federal Trade Commission issued a complaint against gas companies, saying it had "reason to believe" the companies violated the Federal Trade Commission Act. The complaint served to notify the companies that further inquiry was needed to

determine the ultimate issue of whether the companies actually did violate the Act, and the only practical effect of the complaint was creating "the burden of responding to the charges made against it." Id. at 239, 242. The Court found this to be different in legal effect from those burdens that had previously been found to justify classifying an agency action as final for the purpose of review. Id. (citing Abbott Labs., 387 U.S. at 153).

Here, as in Standard Oil Co., a declaratory judgment would not serve the enforcement of the FLSA and would be an unnecessary burden on the courts. The Department already has a process for resolving the issue of whether Tiga's truck drivers are properly classified as independent contractors. After the Investigator makes his initial determination, the Assistant District Director decides whether to accept that investigative report. WHD FOH § 53d00; Compl. ¶ 33. The Solicitor's office then decides whether enforcement proceedings are appropriate. Compl. ¶ 33. If the Solicitor's office decides to file a complaint against the employer, the employer has the opportunity to respond and present evidence. See Taylor-Callahan-Coleman, 948 F.2d at 959; Ariz. Mining Ass'n, 708 F. Supp. 2d at 43 (noting that if agency "ultimately decided to initiate an enforcement action," employer "would certainly have the opportunity to present its arguments to the agency.").

B. Tiga has another adequate remedy in court.

In addition to a final agency action, APA review requires that a plaintiff have "no other adequate remedy in a court." 5 U.S.C. § 704. This provision ensures APA review does not duplicate the judicial review allowed by specific agency procedures. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988); id. at 922 (Scalia, J., dissenting). The FLSA gives the Secretary the authority to investigate potential violations and determine whether to take further enforcement action when violations are found. Wohl Shoe Co. v. Wirtz, 246 F. Supp. 821, 822 (E.D. Mo. 1965); see Taylor-Callahan-Coleman, 948 F.2d at 959. Here, the Secretary was never afforded that opportunity because Tiga sued the Secretary before the Investigator's determination could be evaluated by the agency. See WHD FOH § 53d00; Dec. ¶ 11. If the Secretary had made a decision that Tiga's truck drivers were employees and chose to enforce that action in district court by seeking an injunction under the FLSA, Tiga could defend against that hypothetical lawsuit in its responsive pleadings.[4] See 29 U.S.C. § 217; Fed. R. Civ. P. 12; Taylor-Callahan-Coleman, 948 F.2d at 959; Ariz. Mining Ass'n, 708 F. Supp. 2d at 43. Because the Investigator's statement created no real burden on Tiga, Tiga's right to respond in that hypothetical district court action is an adequate remedy.

[4] The statutory scheme of the FLSA also provides employers with a remedy in court if they want to contest the Department's assessment of penalties, but no penalties were assessed for the workers at issue in this case. 29 C.F.R. § 580.6.

The Investigator's statement was thus not a final agency action under Supreme Court and Fifth Circuit precedent, and judicial review would be an unnecessary expenditure of judicial resources and is improper at this time.

IV. This is not a case of actual controversy so the Declaratory Judgment Act requires dismissal.

The Declaratory Judgment Act (DJA) is not an independent source of jurisdiction, so it cannot supply a basis for review in the absence of jurisdiction under the APA. Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc., 666 F.3d 932, 938 (5th Cir. 2012); Sherwin-Williams Co. v. Holmes Cnty., 343 F.3d 383, 389 (5th Cir. 2003). The DJA only provides for the discretionary remedy of a declaratory judgment only when a court has jurisdiction on another basis. Volvo Trucks N. Am., 666 F.3d at 938; Sherwin-Williams, 343 F.3d at 389. Because this Court has no jurisdiction over this matter under the APA, Tiga cannot rely on the DJA as an alternate basis for jurisdiction.

CONCLUSION

For the foregoing reasons, Tiga's claim against the Secretary of Labor should be dismissed for lack of ripeness, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by the electronic filing system on May 27, 2014 to:

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