# APPENDIX

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**[ENTERED JANUARY 5, 2022]**

**PUBLISHED**

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**No. 19-2012**

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SARA B. CONNER, individually and on behalf of all others similarly situated,

Plaintiff - Appellant,

v.

CLEVELAND COUNTY, NORTH CAROLINA a/k/a Cleveland County Emergency Medical Services,

Defendant - Appellee.

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Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:18-cv-00002-MR-WCM)

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Argued: September 22, 2021

Decided: January 5, 2022

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Before WILKINSON and WYNN, Circuit Judges, and FLOYD, Senior Circuit Judge.

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Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Wilkinson and Senior Judge Floyd joined.

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**ARGUED:** Philip J. Gibbons, Jr., GIBBONS LAW GROUP, PLLC, Charlotte, North Carolina, for Appellant. Christopher S. Edwards, WARD AND SMITH, PA, Wilmington, North Carolina, for Appellee. **ON BRIEF:** Craig L. Leis, GIBBONS LEIS, PLLC, Charlotte, North Carolina, for Appellant. Alexander C. Dale, Grant B. Osborne, WARD AND SMITH, PA, Wilmington, North Carolina, for Appellee.

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WYNN, Circuit Judge:

Plaintiff Sara Conner appeals from the district court's order granting judgment on the pleadings to her employer, the Cleveland County Emergency Medical Services ("Cleveland Emergency Services"), which is a department of Defendant Cleveland County, North Carolina. Conner's complaint alleged that Cleveland County underpaid her for straight (i.e., non-overtime) hours worked during weeks in which she also worked overtime.

At issue is whether this alleged underpayment is a violation of the overtime provision of the Fair Labor Standards Act, under the theory of "overtime gap time." After careful review, we hold that the district court dismissed the suit based on a misreading of our opinion in *Monahan v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996). Under the correct standard articulated hereinafter, Conner adequately alleged a Fair Labor Standards Act claim. Accordingly, we vacate and remand for further proceedings.

## I.

We apply the same standard for Federal Rule of Civil Procedure 12(c) motions for judgment on the pleadings as for motions made pursuant to Rule 12(b)(6). *See Butler v. United States*, 702 F.3d 749, 751–52 (4th Cir. 2012) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). As such, we recount the facts as alleged by Plaintiff, accepting them as true and drawing all reasonable inferences in Plaintiff's favor. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011).

### A.

For at least three years preceding the filing of her complaint in 2018, Conner worked as an emergency medical services ("EMS") employee for Cleveland Emergency Services. Pursuant to its Standard Operating Guideline, Cleveland Emergency Services assigns EMS personnel such as Conner to a 21-day repeating schedule in which each employee works a 24-hour shift followed by 48 hours off (the "24

on/48 off schedule"). The Standard Operating Guideline refers to personnel who work this schedule as "full-time EMS personnel." J.A. 9.[1] Individuals working the 24 on/48 off schedule will always work more than 40 hours per week, since they will have at least two (and sometimes three) 24-hour shifts each week. *See* Reply Br. at 20 n.9 (providing an example of the 24 on/48 off 21-day schedule).

For the three-year period preceding the complaint, Cleveland County paid Conner under two pay plans. The first is the pay plan for county personnel administered by the county manager set forth in the Cleveland County Code of Ordinances (the "Ordinances"). The Ordinances establish salary "grades" for all full-time county employees and lay out "steps" within each grade. J.A. 10. All Cleveland Emergency Services full-time EMS personnel, like Conner, are paid on a semimonthly basis pursuant to the Ordinances. Each payment constitutes 1/24 of an employee's annual salary as specified by that employee's grade and step. Conner alleges the Ordinances constitute the valid employment agreement between herself and Cleveland County.

In addition to the Ordinances, EMS personnel are subject to "policies and procedures for . . . payment of wages and overtime" administered by Cleveland Emergency Services as set forth in its Standard Operating Guideline "Section 14-Pay Plan" (the "Plan"). J.A. 12. As the "pay plan for overtime," the Plan provides the calculation method for determining

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[1] Citations to the "J.A." or "Supp. J.A." refer, respectively, to the Joint Appendix and Supplemental Joint Appendix filed by the parties in this appeal.

the overtime rate for 24 on/48 off EMS personnel. Supp. J.A. 1. First, the employee's regular hourly pay rate is determined by dividing the employee's annual salary by 2,928 hours (the number of hours actually worked per year based on the 24 on/48 off schedule). Supp. J.A. 1 ¶ a(iii). Then, to determine the overtime rate, Cleveland Emergency Services multiplies the resultant hourly rate by 1.5. *Id.* Conner does not take issue with this aspect of the Plan.

In addition to the overtime rate, however, the Plan provides a "revised semi-monthly rate" for regular wages.[2] *Id.* ¶ (a)(iv). The semimonthly pay is determined by multiplying the hourly rate that was used to calculate overtime by 2,080 (representing 40 non-overtime hours per week worked for 52 weeks), and then dividing this number by 24. *Id.* The resulting number is paid to the employee each pay period. When an employee has worked overtime during a particular pay period, Cleveland Emergency Services will take the amount to be paid for overtime hours (calculated as described above) and add it to the revised semimonthly wages to be paid for that pay period. *Id.* ¶ (b).

Conner alleges that this "revised semi-monthly rate" unlawfully pays her regular wages using overtime compensation, resulting in overall lower pay. According to Conner, her annual salary established under the Ordinances represents her compensation for regular wages. Thus, she claims that for each semimonthly pay period, she should be

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[2] The terms "regular" or "straight time" wages or compensation refer to wages for non-overtime hours. The terms are used interchangeably throughout this opinion.

paid regular wages—calculated as her salary established by the Ordinances divided by 24—plus any overtime as calculated under the Plan.

It is helpful to consider an example of how Conner would calculate her compensation due under the Ordinances and the Plan. Federal law mandates that employers pay employees a premium hourly rate for each hour worked in excess of forty hours per week, which works out to 2,080 hours per year (40 x 52). 29 U.S.C. § 207(a)(1). The Plan notes that the actual number of hours worked annually in a 24 on/48 off schedule is 2,928 hours. That means that employees on the 24 on/48 off schedule work 848 hours overtime in a given year. Using the calculation method provided in the Plan, Conner's hourly rate in 2017 was $12.60 (an annual salary of $36,900 divided by 2,928 hours). Accordingly, the hourly rate for overtime was $18.90 ($12.60 x 1.5). Multiplying 848 overtime hours by the overtime rate of $18.90 an hour should therefore have resulted in an additional $16,027.20 in compensation for Conner in 2017, which, combined with her regular wages of $36,900, would have meant her total compensation was to be $52,927.20.

Yet Conner alleges that she did not receive this amount of compensation under the Plan's "revised semi-monthly rate." She alleges that instead the Plan cut her annual salary for regular wages from $36,900 (the amount established in the Ordinances) to $26,208 (the hourly rate, $12.60, multiplied by the annual hours for a 40-hour workweek, 2,080). As such, Conner alleges that Cleveland County unlawfully used her overtime wages to fill the "gap" between her

straight-time compensation under the Plan—$26,208—and her full salary—$36,900.

In this example, Conner's total 2017 salary as calculated under the Plan would be reduced to $42,235.20 ($26,208 for regular time plus $16,027.20 for the 848 hours of overtime we assume for purposes of this example).[3] Because Conner alleges her actual total salary should be $52,927.20 (assuming 848 hours of overtime), she claims she is missing out on at least $10,692 of compensation in a given year.

At some point afterwards, Cleveland County changed its policy, effective January 1, 2018, to "beg[i]n paying [Cleveland Emergency Services] full-time EMS personnel regular wages in an amount equal to 1/24 of their annual salaries as designated by their corresponding salary grade and step" in the Ordinances. J.A. 14. Conner alleges, however, that Cleveland County should have paid EMS personnel in the same manner for the three years prior to January 1, 2018.

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[3] We note an oddity created by Cleveland County's interpretation: $36,900 is not, in fact, the *annual* salary—because, with overtime, EMS workers on the 24 on/48 off schedule will receive *greater* than that amount in wages over the course of the year—but rather is just a number used to calculate the applicable hourly wage for both straight time and overtime. Of course, the parties can contract to calculate wages in this way, subject to minimum wage provisions. Whether they have done so here is, as discussed below, a question for the district court to consider in the first instance on remand.

B.

In June 2018, Conner filed an amended complaint bringing a putative class action. She alleged that Cleveland County violated the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, by underpaying straight time wages. She claimed that, under the FLSA, an employer cannot classify wages as overtime without first paying *all* straight time wages due to an employee. Conner also asserted that Cleveland County breached its contract with its EMS personnel under North Carolina law by failing to pay them their full annual salaries as designated by their respective grades and steps.

Conner sought to first bring her claim as a collective action under the FLSA, defining the class as "[a]ll current and former full-time EMS personnel who were employed during the period [of] January 2, 2015 through January 1, 2018," which she estimated to be between 50 and 75 people. J.A. 14–15. Conner sought to bring her breach-of-contract action as a class action under Federal Rule of Civil Procedure 23, defining the class as "[a]ll current and former full-time EMS personnel who were employed during the period [of] January 2, 2016[4] through January 1, 2018." J.A. 15–18.

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[4] The amended complaint begins the class period at 2015 for the FLSA claim but at 2016 for the contract claim. However, the complaint also makes multiple references to the "three-year period preceding" its filing, and the original complaint was filed on January 2, 2018. J.A. 6, 7. As such, it is possible the reference to 2016 is a typographical error. In any event, that detail is of no moment to this appeal, and we leave it for the parties and the district court to clarify on remand as needed.

Cleveland County moved to dismiss Conner's complaint under Rule 12(b)(6) or, alternatively, for judgment on the pleadings under Rule 12(c). Cleveland County argued that Conner failed to affirmatively plead that she worked more than 40 hours in a given workweek such that she was entitled to overtime pay under the FLSA. Cleveland County also argued that Conner's breach-of-contract claim should be dismissed because Conner failed to plead that Cleveland County had waived its governmental immunity from suit, and that Conner also failed to plead the existence of a valid contract to state a breach-of- contract claim.

Conner's claims were first adjudicated by a magistrate judge, who provided a report and recommendation. *Conner v. Cleveland Cnty.*, No. 1:18 CV 2, 2019 WL 5294418, at *1 (W.D.N.C. June 27, 2019), *report and recommendation accepted*, No. 1:18-CV-00002- MR-WCM, 2019 WL 3948365 (W.D.N.C. Aug. 21, 2019). Construing Cleveland County's motion as one for judgment on the pleadings under Rule 12(c), the magistrate judge recommended that the district court grant Cleveland County's motion and dismiss the complaint. *Id.* at *6. The magistrate judge first found that Conner adequately pleaded that she worked more than 40 hours in a workweek. *Id.* at *3.

The magistrate judge concluded, however, that Conner did not adequately plead how Cleveland County failed to pay the requisite overtime wages she was due. *Id.* at *4. The magistrate judge thus recommended that the district court dismiss Conner's FLSA claim and decline to exercise supplemental jurisdiction over Conner's North Carolina breach-of-

contract claim. *Id.* at *6. In the alternative, if the district court decided not to dismiss Conner's FLSA claim, the magistrate judge recommended denying Cleveland County's Rule 12(c) motion as to the breach-of-contract claim. *Id.*

In considering the magistrate judge's recommendation and the parties' objections thereto, the district court analyzed Conner's claim under this Court's decision in *Monahan*, 95 F.3d 1263. *Conner v. Cleveland Cnty.*, No. 1:18-CV-00002-MR-WCM, 2019 WL 3948365, at *2–3 (W.D.N.C. Aug. 21, 2019). The court concluded that if the terms of Conner's employment agreement did not violate the minimum wage and overtime provisions of the FLSA and provided compensation for straight time worked up to the overtime threshold, then there could be "no viable claim for [pure] gap time under the FLSA" as long as overtime wages were properly paid. *Id.* at *1–2 (quoting *Monahan*, 95 F.3d at 1273). It noted that Conner had "concede[d]" that all her overtime hours were "properly accounted for and appropriately compensated." *Id.* at *2.

In short, the district court found Conner had not alleged a violation of the FLSA's overtime provisions because she "merely assert[ed] that she and other employees were shorted on their straight time pay pursuant to their contract." *Id.* And because the court found that this amounted to a state-law contract claim, rather than an FLSA claim, the court dismissed Conner's FLSA claim, declined to exercise supplemental jurisdiction over Conner's breach-of-contract claim, and granted Cleveland County's

motion for judgment on the pleadings. *Id.* at *2–3. Conner timely appealed.

II.

We review de novo a district court's order granting a motion for judgment on the pleadings under Rule 12(c), applying the same standard as for motions made pursuant to Rule 12(b)(6). *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002). In so doing, the Court "must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Pa. Nat'l Mut. Cas. Ins. Co. v. Beach Mart, Inc.*, 932 F.3d 268, 274 (4th Cir. 2019) (quoting *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761, 764 (3d Cir. 2015)). To survive a motion for judgment on the pleadings, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Pledger v. Lynch*, 5 F.4th 511, 520 (4th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility" when it shows "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). To be plausible, the complaint "need only give the defendant fair notice of what the claim is and the grounds on which it rests." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017) (quoting *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015)).

## III.

Conner asserts that the district court made two key errors in dismissing her FLSA claim.[5] She argues the district court misinterpreted and misapplied (1) Department of Labor official interpretation 29 C.F.R. § 778.315 and (2) this Court's holding in *Monahan*. Because we conclude that an overtime gap time claim is cognizable under the FLSA, we agree.

### A.

We begin with a review of the purposes of the FLSA and the concept of "gap time."

Congress enacted the FLSA "to protect all covered workers from substandard wages and oppressive working hours." *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442, 446 (4th Cir. 2015) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)). To accomplish these goals, the FLSA requires employers "to pay their employees both a minimum wage and overtime pay." *Hall*, 846 F.3d at 761.

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[5] Conner also argues that the district court committed reversible error by sua sponte raising an affirmative defense under 29 U.S.C. § 207(k) and relying on that affirmative defense in part to dismiss her FLSA claim. Section 207(k) creates an exemption to the FLSA's overtime laws that increases the number of hours firefighters and other public service employees must work before they are entitled to overtime pay. The parties agree § 207(k) is not applicable here, and we note that the district court did not base its decision to dismiss Conner's FLSA claim solely on § 207(k), *see Conner*, 2019 WL 3948365, at *1–3 (conducting a *Monahan* analysis that would have been unnecessary had the district court dismissed Plaintiff's claim based on § 207(k)). Therefore, we do not address this issue further.

Specifically, the FLSA requires employers to pay their employees at least the federal minimum wage. 29 U.S.C. § 206(a)(1). And it requires employers to pay not less than time and a half for each hour worked over forty hours during a workweek. *Id.* § 207(a)(1). The FLSA's overtime requirement "was intended 'to spread employment by placing financial pressure on the employer' and 'to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.'" *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 121 (4th Cir. 2015) (quoting *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944)).

There are situations, however, that fall between these two provisions of the FLSA. "In addition to seeking unpaid overtime compensation, employees may seek to recover wages for uncompensated hours worked that 'fall between the minimum wage and the overtime provisions of the FLSA,' otherwise known as 'gap time.'" *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 243 (3d Cir. 2014) (quoting *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 (9th Cir. 1999)). Gap time "refers to time that is not [directly] covered by the [FLSA's] overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the [FLSA's] minimum wage provisions because . . . the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked." *Id.* at 243-44 (quoting *Adair*, 185 F.3d at 1062 n.6).

There are two types of gap time—pure gap time and overtime gap time. In pure gap time claims, the employee seeks to recover for unpaid straight time in a week in which they worked no overtime. In overtime gap time claims, the employee seeks to recover unpaid straight time for a week in which they *did* work overtime. *See Monahan*, 95 F.3d at 1266.

While direct minimum wage and overtime violations can clearly be addressed by the FLSA, 29 U.S.C. §§ 206–207, no provision of the FLSA explicitly governs employee claims to recover for unpaid gap time. And we have agreed with other courts that "there is no cause of action under the FLSA for *pure* gap time when there is no evidence of a minimum wage or maximum hour violation by the employer." *Monahan*, 95 F.3d at 1280 (emphasis added); *see also Davis*, 765 F.3d at 244 ("Courts widely agree that there is no cause of action under the FLSA for 'pure' gap time wages—that is, wages for unpaid work during pay periods without overtime."). Rather, a "claim to [pure] gap time compensation is enforceable only under" state law related to the parties' employment agreement. *Monahan*, 95 F.3d at 1283.

To be sure, courts may be united in rejecting pure gap time claims under the FLSA but they are divided on whether an employee can bring an overtime gap time claim for unpaid straight time worked in an overtime week. The FLSA does not include language about overtime gap time, but that does not end our inquiry.

B.

Indeed, our inquiry continues because given the FLSA's silence regarding overtime gap time, we turn as a "resort for guidance" to the "interpretations and opinions of the [Department of Labor] under [the Fair Labor Standards] Act." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Although "[w]e recognize that there is a difference between 'regulations' . . . and official 'interpretations' of the Department of Labor, such as those" at issue here, and that such interpretations and opinions are "not controlling upon the courts by reason of their authority," we nevertheless give "considerable deference" to "the interpretation of a statute by the agency charged with its enforcement." *Monahan*, 95 F.3d at 1272 n.10 (quoting *Watkins v. Cantrell*, 736 F.2d 933, 943 (4th Cir. 1984)).

The Department of Labor provides an official interpretation of the FLSA overtime provisions in part 778 of the Code of Federal Regulations, title 29. *See* 29 C.F.R. § 778.1(a) (explaining the intended purpose of the interpretations in part 778 is for use by "courts to understand employers' obligations and employees' rights under the [FLSA]"). Here, we consider the Department's interpretative guidance provided in 29 C.F.R. § 778.315, titled "Payment for all hours worked in overtime workweek is required," which states in full:

> In determining the number of hours for which overtime compensation is due, all hours worked by an employee for an employer in a particular workweek must

> be counted. Overtime compensation, at a rate not less than one and one- half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. *This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid*.

29 C.F.R. § 778.315 (emphasis added). It is evident from this interpretation that "one must first look to the employment agreement to determine whether the employer has first paid all straight time due under the agreement." *Monahan*, 95 F.3d at 1273. Accordingly, an employee must be compensated at the agreed-upon or regular straight-time rate (rather than the statutory minimum wage rate) before any computation for overtime.

We give "considerable deference" to the "body of experience and informed judgment" of the Department represented in § 778.315. *Id.* at 1272 n.10 (quoting *Skidmore*, 323 U.S. at 140). In considering "the weight of [this] judgment," we look to "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140.

The Section 778.315 interpretation was released by the Department in 1968 and has remained

unchanged for the past fifty-three years. *Compare* 29 C.F.R. § 778.315 (2021), *with* Overtime Compensation, 33 Fed. Reg. 986, 1003 (Jan. 26, 1968) (to be codified at 29 C.F.R. pt. 778). It is referenced, directly or indirectly, in four other Department interpretations, *see* 29 C.F.R. §§ 778.317, 778.322, 778.403, and 794.142, and the Department has released several administrative decisions adjudicating § 778.315, thereby confirming the continued validity and relevance of this interpretation for the agency, *see, e.g.*, *In the Matter of: Hong Kong Ent. (overseas) Invs., Ltd.*, ARB No. 13-028, 2014 WL 6850013, at *8 (U.S. Dep't of Lab. Nov. 25, 2014) (noting the Department's administrative law judge properly calculated back wages owed by employer pursuant to § 778.315). Further, this interpretation makes sense as it reflects the policy objective of the FLSA overtime provision by ensuring employers do not mitigate or skirt the financial pressures of working their employees above the forty-hour threshold. *See Donovan v. Crisostomo*, 689 F.2d 869, 872, 876 (9th Cir. 1982) (finding a violation of the FLSA's overtime provisions and frustration of its objectives when an employer, in a scheme similar in effect to overtime gap time violations, required its employees to pay a cash "kickback" to the employer during overtime weeks, resulting in a reduction in the employees' regular rate of pay compared to the employment agreement).

For example, assume an employee's salary is $1,500 each work week for straight- time wages, and in a given work week, the employee earns $750 in overtime pay.[6] Instead of issuing the employee a

[6] *See* Opening Br. at 22–23 n.10 (providing a similar example).

paycheck for $2,250, the employer issues a paycheck in the amount of $1,750. The paystub designates a payment of $1,000 as "salary" and $750 as "overtime compensation." In this scenario, there is a violation of the overtime provisions of the FLSA according to § 778.315 because it is improper to designate $750 as "overtime pay" without first having paid all straight-time wages. Effectively, the employer has only paid the employee $250 in overtime pay out of the $750 owed.

As the example illustrates, § 778.315 clarifies that employers may not invent "creative payment schemes" to shirk their responsibilities under the FLSA. *U.S. Dep't of Lab. v. Fire & Safety Investigation Consulting Servs., LLC*, 915 F.3d 277, 286 (4th Cir. 2019). Without such guidance, an employer can engage in wage theft (e.g., stealing $500 of overtime wages in the example above) while claiming to abide by the letter of the FLSA overtime provision. Such a scheme is contrary to congressional intent, which "was to protect employees from detrimental labor conditions" including "excessive work hours and substandard wages." *Monahan*, 95 F.3d at 1267 (citing *Barrentine*, 450 U.S. at 739).

Section 778.315 is part of a large body of official interpretative guidance from the Department on the FLSA's overtime provisions. For instance, § 778.310 specifies that lump sum payments for overtime work do not qualify as an overtime premium under the FLSA in some instances, noting that "[i]f the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard

could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked," which would "defeat[]" the congressional intent "to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work." 29 C.F.R. § 778.310. Section 778.317 disallows agreements for improper overtime compensation. 29 C.F.R. § 778.317. Further, § 778.322 indirectly references § 778.315 to provide guidance for calculating overtime when an employee's work week is reduced. 29 C.F.R. § 778.322.

Like § 778.315, these sections are long-standing interpretations—they were issued thirty years ago. And this Court has employed, and continues to employ, them as guides for adjudication. *See Monahan*, 95 F.3d at 1270, 1273 (1996) (referencing §§ 778.315, 778.317, and 778.322); *Balducci v. Chesterfield Cnty.*, No. 98-2136, 1999 WL 604040, at *5 (4th Cir. 1999) (unpublished table decision) (referencing § 778.322); *Fire & Safety Investigation Consulting Servs.*, 915 F.3d at 286 (2019) (referencing § 778.310). Rather than acting as a standalone interpretation, § 778.315 is but one piece in the armor of the FLSA as a "remedial statute" to "provide for the general well-being of workers." *Monahan*, 95 F.3d at 1267 (first quoting *Kelley v. Alamo*, 964 F.2d 747, 749–50 (8th Cir. 1992); then citing *Lyon v. Whisman*, 45 F.3d 758, 763 (3d Cir. 1995)).

We conclude that the Department's guidance in § 778.315 has significant "power to persuade." *Skidmore*, 323 U.S. at 140. Accordingly, we will follow the Department's guidance and will look to its interpretation of the overtime provision to analyze overtime gap time claims.

C.

Using the guidance of § 778.315, we acknowledged the viability of overtime gap time claims in *Monahan*, though we found the claim in that case to fail. *See Monahan*, 95 F.3d at 1272–73, 1284. We disagree with Cleveland County that the discussion of overtime gap time claims in *Monahan* was dicta.[7] But to the extent any doubt remains after *Monahan* that overtime gap time claims are cognizable under the FLSA overtime provision, today we explicitly conclude that they are.

In *Monahan*, twelve police officers sued their county for straight time compensation under the FLSA, conceding that the county did not owe them overtime pay and had not paid them less than the minimum wage. *Id.* at 1265–66. The officers sought to recover back pay for hours worked "in the gap," that is, for hours when they "worked more than the regularly scheduled 135 hours, but did not exceed the 147 hour overtime threshold." *Id.* at 1266. They brought two claims, one for "pure gap time" pay for

[7] Contrary to Cleveland County's argument, the recognition of overtime gap time claims was not peripheral to our resolution of the officers' overtime gap time claim—it was central to it. Our holding was the culmination of extensive analysis and was critical to reversing the district court's grant of summary judgment to the plaintiff.

those weeks without overtime, and one for "overtime gap time" pay for uncompensated straight time hours worked during weeks when there was overtime. *Id.* The district court granted summary judgment for the plaintiffs on both theories. *Id.*

We reversed, granting summary judgment to the defendants. Regarding the pure gap time claim, we held there was no remedy under the FLSA absent a minimum wage violation or overtime violation. *Id.* at 1280. But regarding the officers' overtime gap time claim, we focused on § 778.315 and asked whether "all straight time compensation due to the employee for nonovertime hours under the express or implied employment agreement or applicable statute ha[d] been paid" for the week when overtime hours were worked. *Id.* at 1273. In other words, an overtime gap time violation is a species of overtime violation: an employee who has not been paid all the straight time she is owed has not been properly paid her overtime.

Reviewing the evidence in the summary-judgment record in *Monahan*, we rejected the officers' overtime gap time claim after determining that the officers' salaries were "intended to compensate them for all hours worked up to the overtime threshold" of 147 hours, such that they had no "gap" of uncompensated labor for hours worked between 135 and 147 hours. *Id.* at 1273. Considering the guidance of § 778.315, then, we concluded that because the officers had been paid their regular wages in accordance with the terms of the employment agreement, their overtime could be considered properly paid, and there was no violation of the FLSA. *Id.* at 1273, 1279. That is, we rejected the officers'

overtime gap time claim because it suffered from insufficient *factual*, rather than legal, support. *See Balducci*, 1999 WL 604040, at *3, *7 (applying our holding in *Monahan* to reject the "identical issue" of police officers' overtime gap time claim based on the terms of the employment agreement).

Notably, in *Monahan*, the plaintiffs claimed there was nonpayment of all straight- time wages for a specified period of time—to wit, the gap between hours worked beyond the normally scheduled 135-hour 24-day cycle but shy of the 147-hour overtime threshold. 95 F.3d at 1266. However, this is not the only type of gap possible in an overtime gap time claim. There can also be a gap between what is promised to be paid as an employee's regular salary and what is actually paid. Nothing in § 778.315 or *Monahan* suggests a difference between *under*payment and *non*payment of straight time wages.[8] Simply put, *all* means all.

In a previous example, we assumed an employer owed their employee $1,500 in straight-time wages and $750 in overtime wages; however, the employer only paid a total of $1,750, designating $1,000 as straight-time wages and $750 as overtime. In this example, there is not a direct lack of payment for a period of *time*, so the gap is not precisely the same as the one alleged in *Monahan*. Instead, the "gap" is the $500 owed for straight- time wages, effectively meaning the employee has been paid for only 2/3 of

[8] Cleveland County argues Conner did not allege any gap hours for which she was *un*compensated but instead alleged only that she was *under*compensated for straight time. We conclude that this is a distinction without a difference.

their straight time worked ($1,000 out of $1,500). Because overtime "cannot be said to have been paid . . . unless all the straight time" is paid, 29 C.F.R. § 778.315, we would deem the first $500 of the overtime payment to be straight-time wages in order to fill that gap. That would, in turn, create an underpayment of overtime and, thus, an overtime violation under the FLSA.

As this example shows, allowing any amount other than the full amount of straight- time wages to count as compliance would frustrate the purposes of the FLSA just as surely as would nonpayment for specified hours. *See Fire & Safety Investigation Consulting Servs.*, 915 F3d at 286 (holding that allowing an employer to "merely label" components of employee's salary as "non-overtime" and "overtime" "would permit employers to invent [creative] payment schemes that . . . [are a] post-hoc attempt to reverse-engineer compliance with the FLSA" (quoting 29 U.S.C. § 778.310) (internal quotation marks removed)). If we did not mandate that *all* straight wages should be paid, we might encourage employers to simply shift wages to the "overtime" bucket and reduce the wages for straight time promised by the employment agreement (as shown in the example above). *See Barrentine*, 450 U.S. at 739 (noting "the FLSA was designed to . . . ensure that *each* employee . . . would be protected from 'the evil of overwork as well as *underpay*'" (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)) (second emphasis added) (internal quotation marks omitted)). Such action by employers would "defeat[]" the "Congressional purpose" to "plac[e] a penalty upon the performance of excessive overtime work." *Fire*

*& Safety Investigation Consulting Servs.*, 915 F.3d at 286 (quoting 29 U.S.C. § 778.310).

Accordingly, our decision in *Monahan* recognized there is a cause of action under the FLSA for overtime gap time claims. Although many courts acknowledge our holding, *see, e.g.*, *Davis*, 765 F.3d at 244 (3d Cir.) (citing *Monahan* as an example of courts recognizing as "viable" overtime gap time claims), some have declined to follow our reasoning and have rejected overtime gap time as a cognizable violation of the FLSA, *see Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 116 (2d Cir. 2013). The only other circuit to squarely consider § 778.315 and a claim for overtime gap time is the Second Circuit, which rejected the plaintiffs' gap-time claims. *Id.* at 116–17. Applying *Skidmore*, the Second Circuit summarily concluded that § 778.315 was owed no deference after finding it unpersuasive because the Department "provide[d] no statutory support or reasoned explanation for" § 778.315. *Id.* We respectfully disagree with the Second Circuit's decision in *Lundy*.

For the reasons previously noted, we afford "considerable deference" to the Department's interpretation of § 778.315. *See Monahan*, 95 F.3d at 1272 n.10. In *Monahan*, we "weighed the evidence . . . in the light of the [Department's § 778.315 guidance] and reached a result consistent" with such interpretation.[9] *Skidmore*, 323 U.S. at 140 (reversing

[9] While Cleveland County argues that *Monahan* was wrongly decided, it acknowledges that this panel "cannot depart from *Monahan*" at this stage of the proceedings, and "makes this argument only to preserve it for potential en banc review."

the district court's judgment for the defendant because its interpretation of the FLSA overtime provision was contrary to the guidance provided by the Wage and Hour Administrator's interpretive bulletin).

Accordingly, we hold that overtime gap time claims are cognizable under the FLSA.

D.

Consistent with § 778.315 and *Monahan*, we now lay out the standard for determining whether a plaintiff has pled sufficient factual allegations of an FLSA overtime gap time violation to overcome a Rule 12(b)(6) motion to dismiss. To do so, the facts in the complaint must support a reasonable inference that: (1) the employee worked overtime in at least one week; and (2) the employee was not paid all straight-time wages due under the employment agreement or applicable statute. *Cf. Hall*, 846 F.3d at 777 (articulating a similar test for a typical overtime claim).

We begin our analysis by looking to our prior case law regarding overtime claims since overtime gap time violations fall under the larger umbrella of overtime violations. In *Hall*, we held that "a plausible overtime claim" could be sustained when the

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Response Br. at 47; *see United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993))).

employee "worked more than forty hours in at least one workweek," and the "employer failed to pay the requisite overtime premium for those overtime hours." *Id.* at 776–77 (discussing and adopting a lenient pleading approach). For the first part—at least one week of overtime work—a reasonable inference can be supported by "sufficient detail about the length and frequency of [the employee's] unpaid work." *Id.* at 777 (quoting *Nakahata v. N.Y-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013). This standard "does not require plaintiffs to identify a *particular* week in which they worked uncompensated overtime hours." *Id.* Rather, they must "provide some factual context that will 'nudge' their claim 'from conceivable to plausible.'" *Id.* (quoting *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 90 (2d Cir. 2013)).

The second part of the standard in *Hall*—uncompensated overtime wages— provides a useful model for an overtime gap time claim. In an overtime gap time claim, we ask whether "*all* the straight time compensation" has been paid pursuant to the relevant employment agreement "(express or implied)" or "under any applicable statute," such that the employee can actually be said to have been compensated for their overtime. 29 C.F.R. § 778.315 (emphasis added).

To analyze straight-time compensation on the merits, the court needs to gain "a foundational understanding of the terms of the employment agreement" or applicable statute governing the work and compensation arrangement between the employer and the employee. *Monahan*, 95 F.3d at

1273. For purposes of FLSA claims, there does not "need[] to be any written contract, state law, regulation or statute, [or] collective bargaining agreement" if the terms of the agreement are "obvious" from the "employment policies, practices, and procedures" of the employer or "the parties' conduct." *Id.* at 1275. Such conduct includes, among others, the employer hiring and paying the employee's salary; the employer telling the employee the expected hours for straight work and overtime, and the employee working those hours; and the employee accepting a paycheck on a regular basis. *See id.* Once the terms of the employment agreement are understood, the court must ask whether "all" straight-time wages have been paid under the terms of the agreement.

For purposes of a motion-to-dismiss analysis, therefore, we ask whether Conner has adequately alleged that, under the terms of the employment agreement or statute, she did not receive the full amount of compensation due for straight-time wages.

To summarize, we apply a two-prong test for determining an overtime gap time violation under the FLSA. To overcome a Rule 12(b)(6) motion, a plaintiff must provide sufficient factual allegations that supports a reasonable inference that: (1) the employee worked overtime in at least one week; and (2) the employee was not paid all straight-time wages due under the employment agreement or applicable statute.

## IV.

Having provided the foundation for analyzing overtime gap time claims, we now turn to the matter before us. For the reasons stated below, we hold that Conner has sufficiently pleaded allegations of an overtime gap time violation under the FLSA. We vacate and remand accordingly.

### A.

Conner alleges that she worked overtime hours and that Cleveland County undercompensated her and similarly situated EMS personnel for their straight time worked. To sustain this case, Conner must provide sufficient factual allegations to support a plausible overtime gap time claim according to our two-prong test set forth above—(1) the employee worked overtime in at least one week; and (2) the employee was not paid all straight-time wages due under the employment agreement or applicable statute. We address each prong in turn.

#### 1.

First, Cleveland County contends that Conner's complaint does not plausibly allege that she ever *worked* more than 40 hours a week because her amended complaint only states that full-time EMS personnel like Conner "are *scheduled* pursuant to a 21-day repeating schedule" to work more than 40 hours a week. J.A. 9 (emphasis added). Further, Cleveland County argues that Conner only provides a "conclusory statement that she 'regularly worked in excess of forty hours per week without receiving

overtime pay'" and that the FLSA requires more. Response Br. at 27 (quoting *Hall*, 846 F.3d at 777). These arguments are without merit.

In the Consent to Become a Party Conner attached to her amended complaint as an exhibit, Conner states she "worked the 24 hours on-48 hours off schedule during one or more work weeks of [her] employment." J.A. 21; *see Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (in evaluating motion to dismiss, we may consider "documents that are explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits" (citations omitted)). By its nature, the 24 on/48 off schedule dictates an employee will work more than 40 hours in any given week, as they will work either 48 hours or 72 hours each week. *See* Reply Br. at 20 n.9; *see also Conner*, 2019 WL 5294418, at *3 (magistrate judge noting the 21-day 24 on/48 off schedule means Conner worked overtime every single week). Cleveland County admits as much. Further, Cleveland County admits Conner was employed by the County as EMS personnel during the class period and she was scheduled to work the 24 on/48 off schedule.

Taken together and by Cleveland County's own admission, Conner sufficiently alleges she actually worked more than forty hours in at least one work week. Conner need not "identify a *particular* week" when she worked overtime, *Hall*, 846 F.3d at 777, but must merely provide enough "factual context" to "'nudge' [her] claim 'from conceivable to plausible,'" *id.* (quoting *Dejesus*, 726 F.3d at 90). We are satisfied that Conner has done that by alleging she worked a 21-

day, 24 on/48 off schedule. Thus, she satisfies the first prong.

2.

Conner also sufficiently alleges that the terms of her employment agreement were violated when Cleveland County failed to pay all of her straight-time wages, satisfying the second prong.

Conner contends the Ordinances are the employment agreement, and that they establish the salary that provides Conner's regular wages. *See* J.A. 10 (alleging the employment relationship is "one of contract," and Conner "and all other similarly situated employees have contractual rights to wages previously earned based on the . . . Ordinances"). She claims that the Plan is only relevant insofar as she is "subject to the same policies and procedures" for the payment of overtime set forth in the Plan. J.A. 12.

Conner alleges that, from 2015 to 2018, Cleveland County disregarded her employment agreement under the Ordinances and paid her regular wages under a different calculation provided in the Plan, resulting in lower pay than she would otherwise receive under the Ordinances. Conner points to Cleveland County's decision to change its method for compensating EMS personnel in 2018, when it began calculating "regular wages" by dividing the annual salary designated by the corresponding salary grade and step by 24. J.A. 14. She alleges that Cleveland County should have paid EMS personnel in

the same manner for the three years prior to January 1, 2018.

We leave it to the district court in the first instance to gain "a foundational understanding" of these pay plans in order to determine the terms of the employment agreement at issue in this case and to determine the merits of Conner's claims. *Monahan*, 95 F.3d at 1273–74 (considering, at the summary judgment stage, local ordinances, the employer's policies and procedures, classified advertisements for the specific position, and the conduct of the parties in order to determine "the terms of the employment agreement"). For present purposes, we conclude that Conner has sufficiently averred (1) there was an employment agreement between the parties that governed the work and compensation arrangement between them, and (2) her straight-time wages have not been paid according to that arrangement.

It is enough to demonstrate Conner has raised sufficient allegations to "give [Cleveland County] fair notice of what the claim is and the grounds on which it rests." *Hall*, 846 F.3d at 765 (quoting *Wright*, 787 F.3d at 263). Conner has "state[d] a claim [for] relief" for underpayment of her straight time wages that "is plausible on its face." *Pledger*, 5 F.4th at 520 (quoting *Iqbal*, 556 U.S. at 678. Thus, Conner satisfies the two-prong test to plead sufficient factual allegations of an FLSA overtime gap time violation to overcome a Rule 12(b)(6) motion to dismiss.

B.

Finally, regarding *Monahan*, the district court did not reject the validity of *Monahan* nor conclude that *Monahan* does not recognize overtime gap time claims. Rather, it found that Conner had not pleaded a valid overtime gap time claim under *Monahan*. *See Conner*, 2019 WL 3948365, at *2–3. In so concluding, the district court seized on *Monahan*'s holding that

> if the mutually agreed upon terms of an employment agreement do not violate the FLSA's minimum wage/maximum hour mandates and provide compensation for all nonovertime hours up to the overtime threshold, there can be no viable claim for *straight gap time* under the FLSA if all hours worked above the threshold have been properly compensated at a proper overtime rate.

*Id*. at *3 (quoting *Monahan*, 95 F.3d at 1273) (emphasis added). The district court believed that because Conner had been paid the appropriate rate for her overtime hours, she needed to "assert plausible factual allegations that her 'straight time' compensation *agreement* either violate[d] the minimum wage or maximum hour mandates of the FLSA.*"* *Id*. at *2. Because Conner "made no such allegation[]," the district court concluded that her FLSA claim failed. *Id*. at *2–3.

The district court misconstrued our holding in *Monahan* regarding the importance of the

employment agreement when analyzing an overtime gap time claim. The test is not whether the underlying employment agreement facially violates either the minimum wage or maximum hour requirements. In such a case, an overtime gap time claim would be unnecessary—the claim would instead be a normal minimum wage or overtime claim. Instead, to determine whether there is an overtime gap time claim, we look to whether the straight time wages have been paid pursuant to the terms of the employment agreement. If the straight time wages have not been paid as such, and an employee works overtime that week, then there could be an overtime gap time claim.

## V.

In sum, we hold that an overtime gap time claim is cognizable under the FLSA. The FLSA ensures employees are adequately paid for all overtime hours. To do this, courts must ensure employees are paid all of their straight time wages first under the relevant employment agreement, before overtime is counted.

For the foregoing reasons, the district court erred in granting Cleveland County's motion for judgment on the pleadings. Accordingly, we vacate its opinion and remand for a determination on the merits of Conner's overtime gap time claim under the FLSA.[10]

*VACATED AND REMANDED*

[10] The district court declined to exercise supplemental jurisdiction over Conner's state breach-of-contract claim and dismissed it without prejudice. Because we vacate and remand Conner's FLSA claim, we also vacate and remand the district court's decision on Conner's breach-of-contract claim.

**[ENTERED JANUARY 5, 2022]**

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-2012
(1:18-cv-00002-MR-WCM)

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SARA B. CONNER, individually and on behalf of all others similarly situated

Plaintiff – Appellant

v.

CLEVELAND COUNTY, NORTH CAROLINA a/k/a Cleveland County Emergency Medical Services

Defendant – Appellee

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**JUDGMENT**

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In accordance with the decision of this court, the judgment of the district court is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

**[ENTERED AUGUST 21, 2019]**

**THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION CIVIL CASE NO. 1:18-cv-00002-MR-WCM**

| | |
|---|---|
| **SARAH B. CONNER, individually and on behalf of all others similarly situated,** | ) |
| **Plaintiff,** | ) MEMORA-NDUM OF DECISION AND ORDER |
| **CLEVELAND COUNTY, NORTH CAROLINA, also known as Cleveland County Emergency Medical Services** | ) |
| **Defendant.** | ) |

**THIS MATTER** is before the Court on the Plaintiff's Motion for Collective and Class Certification [Doc. 35]; the Defendant's Motion to Dismiss [Doc. 40]; the Magistrate Judge's Memorandum and Recommendation [Doc. 52] regarding the disposition of the Motion to Dismiss; and the parties' Objections to the Memorandum and Recommendation [Docs. 54, 55].

## I. BACKGROUND

Pursuant to 28 U.S.C. § 636(b) and the standing Orders of Designation of this Court, the Honorable W. Carleton Metcalf, United States Magistrate. Judge, was designated to consider the Defendant's Motion to Dismiss and to submit a recommendation for its disposition.

On June 27, 2019, the Magistrate Judge filed a Memorandum and Recommendation in this case containing conclusions of law in support of a recommendation regarding the Motion to Dismiss. [Doc. 52]. The parties were advised that any objections to the Magistrate Judge's Memorandum and Recommendation were to be filed in writing within fourteen (14) days of service. The parties filed their respective Objections on July 18, 2019. [Docs. 54, 55].

## II. DISCUSSION

The purpose of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, is to ensure three things: (1) the payment of the federal hourly minimum wage; (2) the limitation of work to the federal maximum number of hours; and (3) the payment of time-and-a-half for all overtime. See generally Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (discussing history of FLSA). The FLSA has a special provision pertaining to police officers and certain other public service employees that allows for the payment of a set salary for all hours up to a set "overtime threshold." 29 U.S.C. § 207(k). Any hours worked

over that threshold number of hours must be compensated as overtime. Id. The Plaintiff in this matter, and the class she proposes to represent, are all EMS personnel who fall within the purview of § 207(k).

The Plaintiff's federal claim, as set forth in the Amended Complaint, is on its face contradictory. In Count I (the only federal claim), the Plaintiff asserts that the Defendant has "violated the FLSA by failing to pay the Plaintiff . . . an overtime premium rate of pay . . . for all hours worked in excess of forty in a workweek." [Doc. 22 at 13 ¶ 75]. In light of the application of § 207(k) to the type of position held by the Plaintiff, this would not appear to state a claim, as the standard "forty-hour workweek" rule does not apply. This, however, does not end the analysis of the Plaintiff's claim. The Amended Complaint contains five pages and forty paragraphs of "Factual Allegations," which set forth the basis of her claim, notwithstanding the erroneous, one-sentence summary of paragraph 75. In short, the Plaintiff asserts that she and other EMS personnel employed by the Defendant should be paid a salary up to the § 207(k) overtime threshold pursuant to a particular County ordinance, but instead are paid a lower salary pursuant to a "CCEMS Section 14-Pay Plan." [Id. at 5-7]. The Plaintiff then proceeds to set forth the conclusory allegation that the "Defendant evaded the overtime provisions of the FLSA by failing to correctly calculate and pay all overtime earned by all CCEMS full-time EMS personnel and by failing to pay all straight time [below overtime threshold] compensation due for nonovertime hours under their contract." [Id. at 8 ¶ 47]. The first part

of that conclusory allegation, however, is unsupported by any factual allegations pertaining to an entitlement to overtime compensation. All the allegations pertain to the dispute regarding what salary the Plaintiff and others similarly situated are purportedly owed pursuant to this contract for "straight time," i.e., for the work hours below the § 207(k) overtime threshold. The Plaintiff tries to bridge this gap with another unexplained conclusory allegation that the overtime compensation paid "cannot be treated as 'overtime compensation' because Defendant failed to pay Plaintiff and other similarly situated employees all straight time compensation due for nonovertime hours due and earned under their contract with Defendant." [Id. at 8 ¶ 50].

The Plaintiff has presented no factual allegations to support a claim that she or any other similarly situated employees have been insufficiently compensated for hours they worked over the § 207(k) overtime threshold. In fact, the Plaintiff appears to concede this point in her Objections to the Memorandum and Recommendation, stating: "There is no dispute regarding the number of overtime hours worked, the amount of overtime owed, or the rate at which overtime should be paid. The FLSA violation arises solely from the Defendant's failure to pay all straight time wages each pay period prior to paying 'overtime compensation.'" [Doc. 55 at 5-6]. In short, the entire claim the Plaintiff presents pertains to what amount is owed for straight time – not overtime – pursuant to the contract between the EMS employees and the Defendant.

In making this "straight time" claim, the Plaintiff does not allege that she and others similarly situated worked straight time hours for which they were not compensated. Rather, she contends that she and other EMS employees should have received straight time pay calculated in accordance with a particular County ordinance, instead of pursuant to the CCEMS Section 14-Pay Plan. [See Doc. 22 at 8 ¶ 49 ("Defendant … calculated compensation based on the computation set forth in the CCEMS 'Section 14-Pay Plan,' thus resulting in the failure to pay for all straight time hours worked; i.e. an amount less than the salaries established by Cleveland County Code of Ordinances.")].

The Court in Monahan v. County of Chesterfield, 95 F.3d 1263 (4th Cir. 1996), addressed precisely the issue presented here. "[I]f the mutually agreed upon terms of an employment agreement do not violate the FLSA's minimum wage/maximum hour mandates and provide compensation for all nonovertime hours up to the overtime threshold, there can be no viable claim for straight gap time under the FLSA if all hours worked above the threshold have been properly compensated at a proper overtime rate." Monahan, 95 F.3d at 1273. The Plaintiff concedes that all overtime hours over the overtime threshold have been properly accounted for and appropriately compensated. Therefore, in order to make out a viable FLSA claim, the Plaintiff must assert plausible factual allegations that her "straight time" compensation agreement either violates the minimum wage or maximum hour mandates of the FLSA. The Plaintiff has made no

such allegations on behalf of herself or any other similarly situated employees. Rather, she merely asserts that she and other employees were shorted on their straight time pay pursuant to their contract. That is not a violation of the FLSA. That is a state law contract claim.

In arguing that such a purely contractual claim still falls within the FLSA, the Plaintiff relies on the official interpretation promulgated by the Department of Labor as set forth in 29 C.F.R. § 778.315. This interpretative provision "expressly requires that in order to determine overtime compensation, one must first look to the employment agreement to determine whether the employer has first paid all straight time due under the agreement." Monahan, 95 F.3d at 1273. [1] Section 778.315 provides as follows:

> *In determining the number of hours for which overtime compensation is due, all hours worked . . . by an employee for an employer in a particular workweek must be counted.* Overtime compensation, at a rate not less than one and one- half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. *This extra compensation for the excess hours of overtime work under the Act cannot be*

[1] The Fourth Circuit noted in Monahan that while such "official interpretations" are not controlling authority, they are nevertheless entitled to "considerable deference." 95 F.3d at 1272 n.10 (citation omitted).

> *said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.*

29 C.F.R. § 778.315 (emphasis added). The Court of Appeals in Monahan, however, held that "if the mutually agreed upon terms of an employment agreement do not violate the FLSA's minimum wage/maximum hour mandates and provide compensation for all nonovertime hours up to the overtime threshold, there can be no viable claim for straight gap time under the FLSA if all hours worked above the threshold have been properly compensated at a proper overtime rate." 95 F.3d at 1273.

For these reasons, the Plaintiff's FLSA claim (Count I) must be dismissed for failure to state a claim. The only remaining claim is a state law contract claim, which does not give rise to any federal subject matter jurisdiction, other than discretionary supplemental jurisdiction. See 28 U.S.C. § 1367(a). With the dismissal of the sole federal claim, and given the early stage of these proceedings, the Court in its discretion declines to exercise such supplemental jurisdiction in this case. See 28 U.S.C. § 1367(c)(3). Accordingly, the Court will dismiss the Plaintiff's breach of contract claim (Count II) without prejudice so as to allow such claim to be litigated in a proper forum.

## III. CONCLUSION

After careful consideration of the Memorandum and Recommendation and the parties' Objections thereto, the Court finds that the Magistrate Judge's proposed conclusions of law are correct and consistent with current case law. Accordingly, the Court hereby accepts the Magistrate Judge's recommendation that the Motion to Dismiss should be granted. In light of the dismissal of the Plaintiff's claims, the Plaintiff's Motion for Collective and Class Certification will be denied as moot.

**O R D E R**

**IT IS, THEREFORE, ORDERED** that the parties' Objections to the Memorandum and Recommendation [Docs. 54, 55] are **OVERRULED**; the Memorandum and Recommendation [Doc. 52] is **ACCEPTED**; and the Defendant's Motion to Dismiss [Doc. 40] is **GRANTED** as follows:

(1) The Plaintiff's FLSA claim is **DISMISSED WITH PREJUDICE**; and

(2) The Court declines to exercise supplemental jurisdiction over the Plaintiff's breach of contract claim, and such claim is therefore **DISMISSED WITHOUT PREJUDICE**.

**IT IS FURTHER ORDERED** that, in light of the dismissal of the Plaintiff's claims, the Plaintiff's Motion for Collective and Class Certification [Doc. 35] is **DENIED AS MOOT**.

The Clerk of Court is respectfully directed to close this case.

**IT IS SO ORDERED.**

Signed: August 21, 2019

/s/ Martin Reidinger
Martin Reidinger
United States
District Judge

**[ENTERED AUGUST 21, 2019]**

United States District Court
Western District of North Carolina
Asheville Division

| | | |
|---|---|---|
| SARAH B. CONNER, Individually and on behalf of all others similarly situated, | ) | JUDGMENT IN CASE |
| Plaintiffs, | ) | 1:18-cv-0002-MR-WCM |
| vs. | ) | |
| CLEVELAD COUNTY, NORTH CAROLINA, also known as Cleveland County Emergency Medical Services, | ) | |
| Defendant. | ) | |

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's August 21, 2019 Memorandum of Decision and Order.

August 21, 2019

/s/ Frank G. Johns
Frank G. Johns, Clerk
United States
District Court

**[ENTERED JUNE 27, 2019]**

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION 1:18 CV 2**

| | | |
|---|---|---|
| **SARAH B. CONNER,** individually and on behalf of all others similarly situated, | ) | |
| **Plaintiff**, | ) | |
| v. | ) | MEMORANDUM AND |
| **CLEVELAND COUNTY, NORTH** CAROLINA **also known as** Cleveland County Emergency Medical Services, | ) | RECOMMEND-ATION |
| **Defendant.** | ) | |

This matter is before the Court on Defendant's Motion to Dismiss (Doc. 40) [1], which has been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B). Following a review of the Motion, the parties' submissions, and applicable authorities, and for the reasons discussed below, the undersigned respectfully recommends that the Motion be granted.

[1] As discussed below, the Motion should be deemed a motion for judgment on the pleadings.

## I. Relevant Procedural Background

Plaintiff Sarah B. Conner ("Conner") filed this action on January 2, 2018, naming Cleveland County Emergency Medical Services as the sole defendant. (Doc. 1). Plaintiff's original Complaint contained claims for violations of the Fair Labor Standards Act ("FLSA") and the North Carolina Wage and Hour Act.

On January 30, 2018, Cleveland County ("County") filed its Answer and Affirmative Defenses (Doc. 3).[2]

An Initial Scheduling Order was entered by the District Court on March 2, 2018 (Doc. 9).

On March 14, 2018, Conner filed a motion seeking leave to amend her Complaint. The motion was denied as being in violation of the Local Rules. (Docs. 11, 12).

On April 2, 2018, the parties stipulated to the dismissal of Conner's North Carolina Wage and Hour Act claim. (Doc. 14)

On May 1, 2018, Conner filed a renewed motion for leave to amend along with a supporting memorandum. (Docs. 15, 16). Specifically, Conner sought to amend her original Complaint to name the County as the correct defendant and to add a claim for breach of contract under North Carolina law. The County responded (Doc. 19), and Conner replied

[2] The County answered as Cleveland County Emergency Medical Services was not a distinct legal entity.

(Doc. 20). Conner's motion was allowed by Order filed on June 1, 2018 (Doc. 21).

On June 5, 2018, Conner filed her First Amended Class/Collective Action Complaint ("Amended Complaint") (Doc. 22).

The County answered (Doc. 27) on July 2, 2018.

On July 27, 2018, the District Court entered an Amended Pretrial Order and Case Management Plan (Doc. 30). On October 10, 2018, on the parties' joint motion, certain pre-trial deadlines were extended. See (Doc. 34).

On December 21, 2018, the County filed the instant Motion to Dismiss (Doc. 40), along with a supporting memorandum (Doc. 41). Conner responded (Docs. 43, 44), and the County replied (Doc. 47).

## II. Relevant Factual Background

Conner's Amended Complaint alleges as follows:

Cleveland County Emergency Medical Services ("CCEMS") is a branch of Cleveland County local government and provides emergency and nonemergency services to sick and injured persons. Amended Complaint ¶¶ 16, 20 – 21.

Full-time EMS personnel work on a 21-day repeating schedule that consists of 24-hour shifts followed by 48-hours off. The workweek begins at 7

AM each Thursday and ends the following Thursday at 6:59 AM. Id. ¶¶ 22 – 25.

The County has adopted a "pay plan" that establishes salary grades, and steps within grades, for full-time county personnel, including EMS personnel ("County Pay Plan"). Id. ¶¶ 28 – 29.

Prior to January 1, 2018, the County did not pay full-time EMS personnel regular wages during each semi-monthly pay cycle that were equal to 1/24 of their annual salaries in accordance with the County Pay Plan. Id. ¶ 45.

Instead, full-time EMS personnel were paid pursuant to a separate pay plan appearing in the CCEMS Standard Operating Guidelines entitled the "Section 14 – Pay Plan". Id. ¶ 44.

## III. Legal Standard

The County answered Conner's Amended Complaint in July 2018 and subsequently filed the instant Motion in December 2018. Consequently, and as the County acknowledges, the Motion should be considered as being a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. See Memorandum of Law in Support of County's Motion to Dismiss (Doc. 41) at 7. The standards for analyzing such motions are the same as those used for motions made under Rule 12(b)(6). See Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999).

The central issue in a motion to dismiss made pursuant to Rule 12(b)(6) is whether the complaint states a plausible claim for relief. See Francis v. Giacomelli, 588 F.3d 186, 189 (4th Cir. 2009). "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." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); accord Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009). That is, while "detailed factual allegations" are not required, a claim must contain sufficient factual allegations to support the required elements of a cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); see Consumeraffairs.com, 591 F.3d at 256. The mere possibility that a defendant acted unlawfully is not sufficient for a claim to survive a motion to dismiss. Consumeraffairs.com, 591 F.3d at 256; Giacomelli, 588 F.3d at 193.

In conducting this analysis, the court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. Consumeraffairs.com, 591 F.3d at 253; Giacomelli, 588 F.3d at 192. The court, however, is not required to accept as true "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." Consumeraffairs.com, 591 F.3d at 255; see Giacomelli, 588 F.3d at 192. Rule 8 of the Rules of Civil Procedure "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678.

## IV. Discussion

### A. Effect of Conner's Prior Motion to Amend

An initial question is whether the allowance of Conner's previous motion to amend determines the fate of the County's current Motion. In particular, Conner contends that the arguments now raised by the County were made previously in response to Conner's motion to amend and rejected by the Court.[3] Consequently, Conner reasons, those issues have been decided in her favor such that the County's Motion is tantamount to "an improper motion for reconsideration." Pl.'s Oppos. (Doc. 43) at 2 – 4. The County argues to the contrary that the Court's previous allowance of Conner's motion to amend pursuant to Rule 15 does not preclude the Court from considering the County's current Motion. Def.'s Reply (Doc. 47) at 2 – 6.

A district court is justified in denying a motion to amend on futility grounds where the proposed amendment cannot withstand a motion to dismiss. Perkins v. United States, 55 F.3d 910, 917 (4th Cir. 1995); see also Equal Rights Ctr. v. Niles Bolton Assocs., 602 F.3d 597, 603 (4th Cir. 2010) (court "may deny" a motion to amend due to prejudice, bad faith, or futility). However, it does not necessarily follow that a court's decision to allow a

[3] The County argued that Conner should not be allowed to assert a claim for breach of contract as such a claim would be futile. The County made a similar argument with respect to Conner's FLSA claim, though the County had not previously challenged that claim by way of a motion to dismiss.

motion to amend prohibits consideration of a motion to dismiss that may later be filed, particularly as it is the Fourth Circuit's "policy to liberally allow amendment in keeping with the spirit of Federal Rule of Civil Procedure 15(a)." Galustian v. Peter, 591 F.3d 724, 729 (4th Cir. 2010).

Therefore, the undersigned is not persuaded that the previous ruling on Conner's motion to amend forecloses consideration of the County's Motion.

### B. Fair Labor Standards Act Claim

The pleading requirements established by the Fourth Circuit for FLSA claims are set forth in Hall v. DIRECTV, LLC, 846 F.3d 757 (4th Cir. 2017). There, the court discussed varying standards that had developed, noting that some courts had required plaintiffs "to provide an approximation of the number of hours for which they were inadequately compensated to state a plausible overtime claim," while others required plaintiffs only to "sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." Id. at 776.

The Fourth Circuit adopted the latter, which it called "a more lenient approach," and held as follows:

> Thus, to make out a plausible overtime claim, a plaintiff must provide sufficient factual allegations to support a reasonable inference that he or she worked
>
> more than forty hours in at least one workweek and that his or her employer failed to pay the requisite overtime premium for those overtime hours.
>
> Id. at 777.

The court went on to explain that while plaintiffs must "do more than merely allege that they regularly worked in excess of forty hours per week without receiving overtime pay," plaintiffs are not required "to identify a *particular* week in which they worked uncompensated overtime hours." Id. (emphasis in original). Instead, plaintiffs should "provide some factual context that will 'nudge' their claim 'from conceivable to plausible.'" Id. A plaintiff can meet this standard "by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, *or any other facts* that will permit the court to find plausibility." Id. (emphasis in original).

In the instant case, the parties vigorously dispute how this standard should be applied to Conner's Amended Complaint. The County argues that Conner has failed to plead affirmatively that she worked more than 40 hours in a given week and to provide information regarding the overtime

payments she alleges she should have received, while Conner argues that she has adequately pled an overtime claim.

Conner's Amended Complaint alleges that full-time EMS personnel work a 21-day repeating schedule comprised of a 24-hour shift followed by 48 hours off (¶ 24). Conner alleges that she and other similarly-situated current and former full-time EMS personnel worked this schedule. (¶ 59); Consent to Become Party Plaintiff ("I worked the 24 hours on – 48 hours off schedule during one or more work weeks of my employment.") Am. Compl. (Doc. 22) at 16.

Though Conner's allegations regarding the number of hours she worked are sparse, they are sufficient. Conner is not required to identify a particular week she worked in excess of 40 hours, but rather to "provide sufficient factual allegations to support a reasonable inference that . . . she worked more than forty hours in at least one workweek." Hall, 846 F.3d at 777. Her description of the 21-day schedule and her allegation that she and others worked according to it by definition indicate that Conner worked more than 40 hours per week every week.

However, the Hall standard also requires a plaintiff to provide sufficient factual allegations to support a reasonable inference that her employer failed to pay the requisite overtime premium for her overtime hours. Id. Conner's claim is lacking in this regard.

Conner acknowledges that she "does not allege the usual claim for unpaid and paid overtime where employees seek overtime pay for work performed 'off the clock.'" Pl.'s Oppos. (Doc. 43) at 12. Rather, Conner contends that she had a contractual right to be paid pursuant to the County Pay Plan but instead was paid pursuant to the Section 14 – Pay Plan, and that this practice resulted in two problems—a breach of the County's contract with Conner and, simultaneously, a violation of the FLSA.

Specifically as to the first, Conner argues that the County stopped paying her straight time before she had received all of the straight time due to her; she alleges that she earned $1537.50 in straight time per pay cycle but only received $1092.00 of straight time each pay cycle. Am. Compl. (Doc. 22) ¶ 46.

As to the alleged FLSA violation, Conner argues that the next payments to her (following the partial straight time) were improperly classified as "overtime," though they could not be "overtime" since she had not yet received all of her straight time. See Pl.'s Oppos. (Doc. 43) at 14 ("Conner alleges that Defendant violated the FLSA by improperly designating compensation paid to Conner . . . for hours worked in excess of 40 as 'overtime pay,' without first paying all straight – time wages.").

Missing, however, is a description of how, through this misclassification, the County "failed to pay the requisite overtime premium for those overtime hours." Hall, 846 F.3d at 777. While the Amended Complaint contains conclusory statements to this effect, supporting factual allegations are not

provided. In addition, Conner's overall theory is at odds with those conclusory statements.

The example appearing in Conner's Opposition illustrates the point.

> By way of example, assume that under the Cleveland County Code of Ordinances Conner's salary is $1,500 each workweek (i.e., straight-time wages), plus overtime. Assume further that in a given workweek, Conner earned $750 in overtime pay. Finally, assume Defendant then issues Conner a paycheck in the amount of $1,750, with a paystub that designates payment of $1,000 as "salary" and $750 as "overtime compensation." In this scenario, there is both a breach of contract and a violation of the FLSA. The breach of contract is the failure to pay all of Conner's wages, including her full salary. The FLSA violation is the improper designation of $750 as "overtime pay," without first having paid all straight-time wages.
>
> Pl.'s Oppos. (Doc. 43) at 14-15.

The overtime payment of $750 was made in its entirety; the unpaid funds represent the alleged remainder of her straight time, not additional overtime. As Conner says, "[t]he FLSA violation arises solely from Defendant's failure to pay all straight time wages each pay period, prior to paying 'overtime compensation.'" Id. at 15.

Conner's FLSA claim is brought pursuant to 29 U.S.C. § 216(b), which states that "[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." However, Conner's Amended Complaint does not include factual allegations sufficient to support an inference that the County has failed to pay Conner the appropriate amount of overtime. The undersigned will therefore recommend dismissal of Conner's FLSA claim.

### C. Breach of Contract Claim

Pursuant to 28 U.S.C. § 1367(c), a district court "may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction."

In the instant case, Conner's FLSA claim creates the basis for federal jurisdiction over this action. If this claim is dismissed as recommended, that basis will be gone, leaving only Conner's contract claim under North Carolina law. Consequently, the undersigned will recommend that the District Court decline to exercise supplemental jurisdiction over Conner's remaining claim for breach of contract and that such claim be dismissed without prejudice.

In the alternative, if Conner's FLSA claim is not dismissed and original federal question jurisdiction remains in place, the undersigned will recommend that the County's Motion be denied as to Conner's breach of contract claim.

The County first argues that dismissal of Conner's contract claim is in order because the Amended Complaint does not include an affirmative allegation that the County has waived its sovereign immunity. Def.'s Mem. (Doc. 41) at 18-21. To overcome the defense of sovereign immunity, a plaintiff's complaint must include an affirmative allegation that immunity has been waived. Fabrikant v. Currituck Cty., 621 S.E.2d 19, 25 (N.C. Ct. App. 2005) (quoting Paquette v. Cty. of Durham, 573 S.E.2d 715, 717 (N.C. Ct. App. 2002) (internal citations omitted)). However, North Carolina appellate courts have held that where, as here, a plaintiff's claim sounds in contract, an affirmative waiver allegation is not needed, since sovereign immunity is not available as a defense against contract claims. Wray v. City of Greensboro, 802 S.E.2d 894, 899 (N.C. 2017) (citations omitted).

The County also argues that Conner has not sufficiently alleged the existence of a valid contract between herself and the County. Def.'s Mem. (Doc. 41) at 21-25. Though Conner's allegations are not detailed, Conner has nonetheless provided information about the County Pay Plan, the County's alleged breach of it, the Section 14-Pay Plan[4], and the unpaid wages she claims to be owed.

[4] The County argues that a copy of the Section 14-Pay Plan, which Conner attached to her opposition to the Motion and her

Such a claim is recognized by North Carolina law. See Archer v. Rockingham Cty., 548 S.E.2d 788, 792-93 (N.C. Ct. App. 2001) (agreeing with assertion by former and current emergency medical technicians that their employment arrangement with county was contractual in nature, although the contract was implied); Paquette, 573 S.E.2d at 718 ("The relationship of employer and employee is essentially contractual in its nature, and should be determined by the rules governing the establishment of contracts, express or implied."); Stellar Ins. Grp., Inc. v. Cent. Companies, LLC, No. 2:06CV11, 2006 WL 2862218, at *7 (W.D.N.C. Sept. 12, 2006), report and recommendation adopted, 2006 WL 2862214 (Oct. 3, 2006) ("The North Carolina courts have specifically held that even where an employee was 'at will,' a "[p]laintiff's claim for unpaid wages is contractual, rather than tortious, in nature.") (citations omitted).

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counsel represents was produced by the County, should not be considered. While matters beyond the pleadings are generally not considered in the context of a Rule 12(b)(6) motion, documents attached to the complaint or the motion to dismiss may be considered "if they are integral to the complaint and authentic." Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (citation omitted). Similarly, "[d]ocuments that plaintiffs attach to their response to a defendant's motion to dismiss are not considered when those documents were not explicitly relied upon or referenced in the complaint." Aloi v. Moroso Inv. Partners, LLC, No. CIV.A. DKC 11-2591, 2012 WL 4341741, at *5 (D. Md. Sept. 20, 2012) (citing Braun v. Maynard, 652 F.3d 557, 559 n. 1 (4th Cir. 2011)). Here, the Section 14-Pay Plan is integral to Conner's claims. Further, though the County argues the document is not a public record, the County has not objected to the document's authenticity or Plaintiff counsel's representation that it was produced by the County.

## V. Recommendation

Based on the foregoing, the undersigned respectfully RECOMMENDS:

1. That Defendant's Motion to Dismiss (construed as a Motion for Judgment on the Pleadings) (Doc. 40) be GRANTED;

2. That Plaintiff's FLSA claim be DISMISSED; and

3. That the District Court decline to exercise supplemental jurisdiction over Plaintiff's breach of contract claim and that such claim be DISMISSED WITHOUT PREJUDICE.

In the alternative, if Plaintiff's FLSA claim is not dismissed, the undersigned recommends that Defendant's Motion as to Plaintiff's breach of contract claim be DENIED.

Signed: June 27, 2019

/s/ W. Carleton Metcalf
W. Carleton Metcalf
United States
Magistrate Judge

**Time for Objections**

The parties are hereby advised that, pursuant to Title 28, United States Code, Section 636(b)(1)(C), and Federal Rule of Civil Procedure 72(b)(2), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within **fourteen** (**14**) days of service of same. **Responses to the objections must be filed within fourteen (14) days of service of the objections.** Failure to file objections to this Memorandum and Recommendation with the presiding District Judge will preclude the parties from raising such objections on appeal. See Thomas v. Arn, 474 U.S. 140, 140 (1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

29 C.F.R. § 778.315

## § 778.315 Payment for all hours worked in overtime workweek is required.

Currentness

In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

SOURCE: 33 FR 986, Jan. 26, 1968; 56 FR 61101, Nov. 29, 1991; 76 FR 18857, April 5, 2011, unless otherwise noted.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq. Section 778.200 also issued under Pub.L. 106–202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

29 U.S.C.A. § 207

§ 207. Maximum hours

Effective: March 23, 2010 Currentness

**(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions**

**(1)** Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**(2)** No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

**(A)** for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

**(B)** for a workweek longer than forty-two hours during the second year from such date, or

**(C)** for a workweek longer than forty hours after the expiration of the second year from such date,unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products**

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

**(1)** in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

**(2)** in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

**(3)** by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

**(A)** the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

**(B)** more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

**(C)** not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

**(c), (d)** Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

**(e) "Regular rate" defined**

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

**(1)** sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

**(2)** payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**(3)** Sums[1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the

employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

**(4)** contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**(5)** extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

**(6)** extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

**(7)** extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a),[2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

**(8)** any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

**(A)** grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

**(B)** in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

**(C)** exercise of any grant or right is voluntary; and

**(D)** any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

**(i)** made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

**(ii)** made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

**(f) Employment necessitating irregular hours of work**

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such

maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(g) Employment at piece rates**

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

**(1)** in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

**(2)** in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

**(3)** is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

**(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate**

**(1)** Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection

(e) shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

**(2)** Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

**(i) Employment by retail or service establishment**

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

**(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill**

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee

before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**(k) Employment by public agency engaged in fire protection or law enforcement activities**

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

**(1)** in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

**(2)** in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work

period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**(l) Employment in domestic service in one or more households**

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

**(m) Employment in tobacco industry**

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee--

**(1)** is employed by such employer--

**(A)** to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying,

handling, stemming, redrying, packing, and storing of such tobacco,

**(B)** in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

**(C)** in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

**(2)** receives for--

**(A)** such employment by such employer which is in excess of ten hours in any workday, and

**(B)**such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

**(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier**

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

**(o) Compensatory time**

**(1)** Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

**(2)** A public agency may provide compensatory time under paragraph (1) only--

**(A)** pursuant to--

**(i)** applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

**(ii)** in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

**(B)** if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

**(3)(A)** If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

**(B)** If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

**(4)** An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

> **(A)** the average regular rate received by such employee during the last 3 years of the employee's employment, or
>
> **(B)** the final regular rate received by such employee,
>
> whichever is higher[3]

**(5)** An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

**(A)** who has accrued compensatory time off authorized to be provided under paragraph (1), and

**(B)** who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

**(6)** The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if--

**(A)** such employee is paid at a per-page rate which is not less than--

**(i)** the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

**(ii)** the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

**(iii)** the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

**(B)** the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

**(7)** For purposes of this subsection--

**(A)** the term "overtime compensation" means the compensation required by subsection (a), and

**(B)** the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

**(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution**

**(1)** If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

**(A)** requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

**(B)** facilitates the employment of such employees by a separate and independent employer, or

**(C)** otherwise affects the condition of employment of such employees by a separate and independent employer.

**(2)** If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an

occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

**(3)** If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

**(q) Maximum hour exemption for employees receiving remedial education**

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

**(1)** provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

**(2)** designed to provide reading and other basic skills at an eighth grade level or below; and

**(3)** does not include job specific training.

**(r) Reasonable break time for nursing mothers**

**(1)** An employer shall provide—

**(A)** a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

**(B)**a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

**(2)** An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

**(3)** An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

**(4)** Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

Footnotes

1 So in original. Probably should not be capitalized.

2 So in original. Probably should have closed parenthesis.

3 So in original. Probably should be followed by a period.