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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

RODNEY WILLIAMS, Plaintiff, v. ROTO-ROOTER SERVICES COMPANY, Defendant.	)	CIVIL ACTION NO. 2:18-cv-01856-JEO

MEMORANDUM OPINION AND ORDER

In this action, Plaintiff Rodney Williams has sued his former employer, Defendant Roto-Rooter Services Company, bringing claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., and Alabama state law. (Doc.[1] 1 ("Complaint" or "Compl."). The cause now comes to be heard on Defendant's motion to dismiss certain claims for a failure to state a claim, filed pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 7). The court[2] will grant the motion in part and deny it in part.

[1] Citations to "Doc. __" is the to the document number of the pleadings, motions, and other materials in the court file, as compiled and designated on the docket sheet by the Clerk of the Court. Unless otherwise noted, pinpoint citations are to the page of the electronically filed document in the court's CM/ECF system, which may not correspond to pagination of the original "hard copy" of the document presented for filing.

[2] The action was assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and the court's general order of reference dated January 2, 2015. The parties

I.

Rule 12(b)(6), Fed. R. Civ. P., authorizes a motion to dismiss all or some of the claims in a complaint on the ground that the allegations fail to state a claim upon which relief can be granted. On such a motion, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Little v. City of North Miami*, 805 F.2d 962, 965 (11th Cir. 1986) (quoting *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974)). The court assumes the factual allegations in the complaint are true and gives the plaintiff the benefit of all reasonable factual inferences. *Hazewood v. Foundation Financial Group, LLC*, 551 F.3d 1223, 1224 (11th Cir. 2008) (per curiam).

Rule 12(b)(6) is read in light of Rule 8(a)(2), Fed. R. Civ. P., which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of

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have since consented to an exercise of plenary jurisdiction by a magistrate judge pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. (Doc. 13).

the elements of a cause of action will not do." *Id.* (citations, brackets, and internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level …." *Id.* Thus, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *i.e.*, its "factual content … 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) (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 557).

II.

A.[3]

Plaintiff alleges that he and Defendant entered into a written contract of employment, pursuant to which Plaintiff was hired in November or December 2016 to work at Defendant's branch in Pelham, Alabama. (¶¶ 4, 6, 7, 59). Pursuant to his contract, Plaintiff says, Defendant agreed to pay him 6% commission until he reached 40 hours worked each week, after which he would earn overtime pay in addition to such commission. (¶ 8). In March 2017, Plaintiff attended a water technician certification training program in Atlanta. (¶ 9).

[3] The facts in this background section are taken from Plaintiff's Complaint and are assumed to be true, consistent with the applicable standard of review. As such, they represent the material facts for purposes of the instant motion to dismiss only, although they may not be the actual facts. Citations herein to "¶ ___" are to the paragraph of the Complaint, Doc. 1.

Plaintiff completed that week-long program and received his certification on or about March 16, 2017. (¶ 10). According to Plaintiff, pursuant to his employment agreement, Defendant was required upon such certification to increase his commission rate to 8%. (¶ 10). Defendant did not do so, however. (¶ 12). Plaintiff also alleges that he was not "fully compensated" for all hours worked. (¶ 11). In this vein, Plaintiff complains that, although he "sometimes" worked in excess of 40 hours a week, Defendant would cut the number of hours Plaintiff reported to prevent him from receiving overtime pay. (¶ 13).

On or about March 22, 2017, Plaintiff confronted the branch general manager, Josephus Morrow, about Defendant's failure to increase Plaintiff's commission rate from 6% to 8% following his certification training and the "lack of compensation for work completed." (¶ 14). During that discussion, Plaintiff asked for information about overdue payroll payments and reimbursement of expenses from his Atlanta training trip. (*Id.*). Morrow responded by yelling at Plaintiff for inquiring about pay. (*Id.*). That same day, Morrow issued a "written violation falsely accusing Plaintiff of reporting unauthorized hours." (¶ 15). On or about May 4, 2017, Plaintiff again complained to Morrow "about the many thousands of dollars owed to him for missing pay." (¶ 19). Morrow became irate and told Plaintiff he was fired. (*Id.*).

B.

On November 8, 2018, Plaintiff filed this action against Defendant. In his eight-count Complaint, Plaintiff raises claims under the FLSA and Alabama state law. As to the former, Plaintiff contends that Defendant is liable under the FLSA for failing to pay minimum wage (Count Two), failing to pay overtime compensation (Count Three), and for writing him up and terminating his employment in retaliation for his having complained to Morrow about pay (Count Four). Plaintiff also brings another FLSA claim in Count One, captioned, "Failure to Accurately Compensate for Work Performed." On that claim, Plaintiff alleges that Defendant breached its duty under the FLSA "to keep and preserve accurate records of all hours worked" (¶ 24) and that, as a result, Defendant "failed to compensate Plaintiff for his entitled pay for hours worked [in] any given work week." (¶ 25). On his state-law claims, Plaintiff alleges that Defendant is liable for breach of contract (Count Five), fraudulent misrepresentation (Counts Six and Seven), and negligent or wanton hiring, training, and supervision (Count Eight). The court has original jurisdiction over the FLSA claims pursuant to 28 U.S.C. §§ 1331 and 1337(a) and supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

Defendant now moves to dismiss part of Plaintiff's Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. In so doing, Defendant does not challenge Counts Two, Three, or Four, alleging violations of the FLSA's minimum wage, overtime, and retaliation provisions, respectively. Rather, the only FLSA claim Defendant attacks is Count One. In particular, Defendant contends that Count One is duplicative of Counts Two and Three to the extent it seeks to recover for an alleged failure to pay minimum wage or overtime compensation and that it amounts to an improper attempt to privately enforce the employer's FLSA duty to keep accurate time records. Turning to Plaintiff's state-law theories, Defendant maintains that the breach-of-contract and fraud claims in Counts Five, Six, and Seven are all preempted by the FLSA to the extent they are based on an alleged failure to pay minimum wage or overtime compensation as required by the FLSA. Defendant also moves to dismiss Plaintiff's claims for fraud and misrepresentation in Counts Six and Seven on the additional ground that they are founded upon the same promises or representations that underlie his breach-of-contract claim. Finally, Defendant moves to dismiss the negligent and wanton hiring, training, and supervision claims in Count Eight, on the ground that they are dependent on the viability of the fraud claims in Count Six and Seven that Defendant insists are themselves due to be dismissed for reasons previously stated. Plaintiff opposes

Defendant's motion to dismiss and argues that it is due to be denied in its entirety. (Doc. 12). Plaintiff has filed a reply in support of dismissal. (Doc. 16).

III.

A. The FLSA Claim in Count One Alleging Failure to Keep Accurate Time Records

The FLSA requires employers to pay non-exempt employees a minimum wage of $7.25 per hour, 29 U.S.C. § 206(a)(1)(C), as well as at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. 29 U.S.C. § 207(a)(1). The FLSA creates a private right of action in favor of an employee to obtain relief against an employer who violates those minimum-wage or overtime provisions. 29 U.S.C. § 216(b). In such actions, the "FLSA places on the employee-plaintiff 'the burden of proving that he performed work for which he was not properly compensated.' " *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1315 (11th Cir. 2013) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)).

The FLSA also requires employers to "make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." 28 U.S.C. § 211(c). The FLSA does not, however, create a private right of action allowing an employee to enforce the employer's record-keeping obligation; rather, the right to bring such an action is vested exclusively in the Secretary of Labor. *See Powell v. Florida*,

132 F.3d 677, 678 (11th Cir. 1998); *Ramlochan v. Secretary, U.S. Dep't of Commerce*, 549 F. App'x 869, 870 (11th Cir. 2013)[4]; *Jackson v. Haynes & Haynes, P.C.*, 2017 WL 3173302, at *5 (N.D. Ala. July 26, 2017).

That being said, when an employee brings a suit under § 216(b) to recover minimum wages or overtime pay allegedly due under §§ 206 or 207, where the employer's records are inaccurate or inadequate, an employee's burden of proving hours worked without proper compensation is "relaxed." *Lamonica*, 711 F.3d at 1315. Specifically, in that circumstance

> an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. (quoting *Anderson*, 328 U.S. at 687-88).

In Counts Two and Three, Plaintiff has unambiguously raised claims demanding unpaid minimum wages under § 206 and overtime pay under § 207, respectively, and other relief available under § 216(b). Insofar as Count One seeks that same relief, the court agrees with Defendant that Count One is duplicative of

[4] Unpublished opinions of the Eleventh Circuit Court of Appeals are not considered binding precedent; however, they may be cited as persuasive authority. 11th Cir. R. 36-2.

Counts Two and Three. The court also agrees with Defendant that, even if Defendant failed to keep proper time and pay records as required by § 211(c), that would not in itself entitle Plaintiff to any relief whatever, whether equitable or monetary. Only the Secretary of Labor might bring an action to redress such a failure. Rather, Defendant's alleged failure to keep time and pay records might only relax Plaintiff's burden of proof as it relates to establishing the hours he worked, in the service of his claims that Defendant failed to pay minimum wages and overtime compensation required under the FLSA. To the extent it might be necessary for a plaintiff to plead the employer's failure to keep proper records to take advantage of the relaxed burden of proof under the Supreme Court's decision in *Anderson*, Plaintiff's allegations in Count One adequately put Defendant on notice of that theory. However, Count One's allegation that Defendant failed to keep proper records does not state an independent claim for relief under the FLSA that is separate and distinct from his claims in Counts Two and Three for unpaid minimum wages and overtime compensation. Accordingly, Count One will be dismissed.

B. State-Law Claims

1. FLSA Preemption

In Count Five, Plaintiff claims that Defendant is liable under Alabama state law for breach of his employment contract, based on Defendant's failure to pay

him "the required amounts of the agreed overtime and commission rate, even when minimum wages were paid." (Compl. ¶ 60). In Counts Six and Seven, Plaintiff claims that Defendant is liable in tort under state law for fraud based on those same alleged statements. (*Id.* ¶¶ 64, 66, 71). Defendant argues that, to the extent that these contract and fraud claims are premised on an alleged failure to pay minimum wages or overtime compensation required by the FLSA, they are preempted by the FLSA.

By its terms, the FLSA does not preempt state laws establishing a higher minimum wage than that set forth in § 206 or a lower number of hours triggering overtime pay than under § 207. 29 U.S.C. § 218(a); *see also Calderone v. Scott*, 838 F.3d 1101 (11th Cir. 2016). The FLSA likewise does not preempt state-law claims alleging that an employment contract afforded employee rights to pay and overtime compensation beyond those mandated by the FLSA.[5] *Freeman v. City of Mobile, Ala.*, 146 F.3d 1292, 1298 (11th Cir. 1998); *Avery v. City of Talladega*, 24 F.3d 1337, 1347-48 (11th Cir. 1994); *Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 806 (11th Cir. 1991) ("*APFU*"). However, many federal courts, though not the Supreme Court or the Eleventh Circuit, have recognized that a civil action under § 216(b) is the exclusive private remedy for

[5] The FLSA does, of course, preclude contractual arrangements by which non-exempt employees purport to agree to be paid less than minimum wage or surrender the rights to be overtime compensation required by § 207. *See Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985).

vindicating rights to minimum wages and overtime pay created by the FLSA, and that, as such, the FLSA preempts claims by which a plaintiff-employee effectively seeks broader remedies under state law for what amounts to a violation of rights arising under the FLSA. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) (citing cases); *Roman v. Maietta Const., Inc.*, 147 F.3d 71, 76 (1st Cir. 1998). Indeed, decisions by other members of this court have long recognized this principle.[6] *See Tombrello v. USX Corp.*, 763 F. Supp. 541, 544 (N.D. Ala. 1991) (Guin, J.); *Alexander v. Vesta Ins. Grp., Inc.*, 147 F. Supp. 2d 1223, 1240–41 (N.D. Ala. 2001) (Buttram, J.); *Wigginton v. Coffee Health Grp.*, 2008 WL 11422091, at *3 (N.D. Ala. May 6, 2008) (Smith, J.); *Edwards v. Prime, Inc.*, 2009 WL 9084932, at *5 (N.D. Ala. Mar. 4, 2009) (Acker, J.), *aff'd in part, rev'd in part on other grounds, dismissed in part*, 602 F.3d 1276 (11th Cir. 2010); *Witherspoon v. Birmingham Bd. of Educ.*, 2010 WL 11565353, at *3 (N.D. Ala. June 21, 2010) (Armstrong, M.J.); *Bujalski v. Kozy's Rest., Inc.*, 2017 WL 57344, at *5 (N.D. Ala. Jan. 5, 2017) (Haikala, J.).

Citing Judge Haikala's decision in *Bujalski*, Defendant argues that Plaintiff's state-law contract and fraud claims are preempted by the FLSA to the extent they are based upon Defendant's alleged failure to pay Plaintiff minimum wage or overtime compensation under the FLSA. In response, Plaintiff refers the court to

[6] Of course, the undersigned is not bound by prior district court decisions, even ones from this court. *Fox v. Acadia State Bank*, 937 F. 2d 1566, 1570 (11th Cir. 1991).

Avery, an Eleventh Circuit case not cited in *Bujalski*. The plaintiffs in *Avery* were a group of firefighters who sued their municipal employer for overtime pay under the FLSA and for breach of contract under Alabama state law. 24 F.3d at 1347-48. In support of both claims, the plaintiffs contended that, under the terms of an employee handbook, the defendant city had contractually agreed to count certain activities as part of hours worked for purposes of calculating overtime. *Id*. The district court granted summary judgment to the city on the contract claim on the ground that the number of "hours worked" was a matter "within the scope of the FLSA" and that the FLSA provided the "exclusive remedy" such that it preempted the contract claim. *Id*. at 1348. On appeal, the Eleventh Circuit reversed. At the outset, the court recognized that, under *APFU*, "an employer may contractually agree to compensate employees for time that is not mandatorily compensable under the FLSA." *Id.* (citing *APFU*, 920 F.2d at 806 & n. 7). "Thus," the *Avery* court reasoned, "the district court erred in holding that the FLSA pre-empts a state law contractual claim that seeks to recover wages for time that is compensable under the contract though not under the FLSA." *Id.* That particular principle did not itself save the plaintiff's contract claim, however. That was so, the court determined, because the employee handbook upon which the plaintiffs' claims relied upon did not, in fact, "provide wage terms different from those provided by the FLSA, which [the handbook] expressly incorporates." *Id.* Nevertheless, the

Eleventh Circuit reinstated the contract claim, allowing it to proceed alongside the FLSA overtime claim, explaining: "If a violation of the FLSA has occurred, then a violation of the contract, which incorporates the FLSA, will have occurred as well. … Of course, the plaintiffs may not recover twice for the same violation; the breach of contract claim survives merely as an alternative legal theory to redress any wrong that may have been done them." *Id.*

Defendant acknowledges that, under the *Avery* line of cases that includes *APFU* and *Freeman*, *supra*, Plaintiff's state-law claims are not preempted insofar as they are founded upon Defendant's alleged failure to compensate Plaintiff *beyond* the requirements of the FLSA. Defendant maintains, however, that to the extent Plaintiff's claims depend on proof of an FLSA violation, they are preempted. Plaintiff, on the other hand, insists that, under *Avery*, his state-law contract and fraud claims are not due to be dismissed at this stage even insofar as they might relate to, or even overlap in some respects with, his FLSA claims. The court agrees with Plaintiff.

As the Fourth Circuit has recognized, *Avery* "allow[ed a] claim for breach of contract [that was] coterminous with [an] FLSA claim" as an alternative remedy. *Anderson*, 508 F.3d at 185; *see also Roberts v. TJX Companies, Inc.*, No. 3:14-CV-746-J-39MCR, 2015 WL 1064765, at *2 (M.D. Fla. Mar. 11, 2015) (stating that, under *Avery*, "a plaintiff may assert a contract claim that is modeled

after the same standards as those found in the FLSA, even where the FLSA applies."). Defendant contends that *Avery* is distinguishable, casting it as a "different case" than this one, "with a narrow holding." (Doc. 16 at 4). Specifically, Defendant posits that the *Avery* court reinstated the contract claim only "because the contract explicitly incorporated the requirements of the FLSA by name." (*Id.*). Defendant emphasizes that Plaintiff has not pled that his employment contract expressly agrees to compliance with the FLSA by name, so, according to Defendant, *Avery* is inapplicable. However, *Avery* does not require an employee to plead that his alleged employment contract expressly incorporates or references the FLSA in order to pursue a parallel contract claim. For starters, *Avery*, like *Bujalski*, was decided at summary judgment, not on a Rule 12(b)(6) motion to dismiss, so the court of appeals was not addressing the sufficiency of a pleading.

More to the point, it is not at all clear why, as a substantive matter, an explicit reference to the FLSA in the employment contract should be dispositive of anything. The FLSA is legislation unambiguously calculated to benefit workers, protecting them from substandard wages and excessive hours. As a result, the court does not view Congress as having intended the FLSA to strip those same workers of their traditional right to sue employers under state law based on a failure to pay compensation *actually promised by the employer* for work done. As

such, the court interprets *Avery* as standing on that broader principle, recognizing that a state-law contract claim is not preempted by the FLSA insofar as the claim is founded on an *express promise* or otherwise *actual* terms of an employment agreement between the parties, whether or not the agreement references the FLSA by name. Indeed, where a written employment contract expressly incorporates the FLSA by name, as in *Avery*, it might be more easily contended that the parties were not memorializing any particular agreement or promises of their own design regarding overtime pay but were instead doing no more than acknowledging that whatever rights employees might enjoy to overtime pay will spring solely from the FLSA. In such a case, the contention that the right to overtime actually arises under § 207 of the FLSA, and not a distinct, contractually enforceable promise of the employer, is arguably of even greater force, counseling that the FLSA provides an exclusive remedy and preempts state-law claims. So under this court's reading of *Avery*, the plaintiffs there might have pursued both a claim for FLSA overtime and a parallel state-law contract claim even if the employment agreement did not mention the FLSA but had instead expressly promised, for instance, that the plaintiffs would be paid one and one-half times their regular rate of pay for hours worked over 40 in a workweek, effectively mirroring the basic overtime requirement of § 207. *See Roberts*, 2015 WL 1064765, at *3 (concluding that, under *Avery*, the plaintiff could bring state-law causes of action and was not

limited to an FLSA overtime claim where she alleged that she and the defendant had entered into an employment contract limiting her work hours to forty per week and that the defendant had failed to compensate her for additional hours worked); *Chinea v. United Drywall Grp.*, 2010 WL 11506033, at *1 (S.D. Fla. Feb. 17, 2010) (interpreting *Avery* as reinstating the contract claim because "the contract created a separate basis for the *Avery* plaintiffs' legal rights, even though those rights happened to be the same as under the FLSA").

Likewise, the court would allow an employee to bring an FLSA claim and a parallel contract claim based on allegations that his employer breached an agreement to pay him $7.25 per hour, notwithstanding that the employee's claimed pay rate happens to coincide with the federal minimum wage under § 206. Nor should it matter whether the parties ever mentioned the FLSA in an employment contract. In the end, it makes no sense to say that an employee seeking to enforce a promise to pay him $7.25 per hour should be limited to an FLSA claim under §§ 206 and 216(b) while another employee alleging breach of an agreement to be paid an hourly wage of $8.00, or $7.26, for that matter, might bring both an FLSA claim for a failure to pay the minimum wage and further take advantage of whatever contract or other remedies might be available under state law, even if he could recover his actual lost wages only one time.

Nevertheless, the court has also sympathy for the position of many courts that Congress did not intend to allow employees to enforce rights *existing only by virtue of the FLSA itself* by way of parallel state-law claims affording broader remedies than does § 216(b). In particular, the court would hesitate to allow state-law claims founded on the premise that the FLSA's mandates, although not actually made part of the parties' agreement, are enforceable under state-law under the theory that they become *implied* terms existing in the background of every employment relationship. Thus, the court would not extend *Avery* to authorize contract or other state-law claims based on a failure to pay overtime as required by the FLSA, if, for example, the parties agreed to treat the plaintiff as exempt from overtime requirements or they simply failed to discuss overtime at all. In such circumstances, any right to overtime pay would arise under § 207 of the FLSA, not from a promise in the employment agreement, so an FLSA claim under § 216(b) would be the exclusive remedy. *See, e.g.*, *Johnson v. WellPoint, Inc.*, 2009 WL 8753325, at *22 (N.D. Ga. Mar. 30, 2009) (distinguishing *Avery* on the basis that it involved "the violation of an express provision of a contract" whereas the plaintiffs' claims in *Johnson* rested on allegations that that the employer "violated the FLSA in violation of an 'implied contract' … whereby Plaintiffs would work only 40 hours per week for their salary."); *Bule v. Garda CL Se., Inc.*, 2014 WL 3501546, at *2 (S.D. Fla. July 14, 2014) ("Expressing the claims against Defendant

in terms of breach of implied agreement, quantum meruit, or unjust enrichment fails to render these state law claims materially distinct from the FLSA claim").

Considering foregoing principles, the court reads Plaintiff's Complaint as founding his state-law claims for breach of contract and fraud upon specific promises and statements that Defendant purportedly made to him respecting the calculation and amount of his compensation, including his commission rate and overtime, embodied in his employment agreement. Thus, it does not appear that Plaintiff is seeking to recover under Alabama law based on rights that arise purely under the FLSA. Finally, because it cannot be determined just from the face of the Complaint whether and to what extent Plaintiff's FLSA claims will actually overlap with his state-law contract and fraud claims, the court finds that dismissal of the state-law claims under Rule 12(b)(6) would also be premature. *See Fernandez v. City of Fruitland Park*, 2016 WL 8329400, at *7 (M.D. Fla. Dec. 6, 2016), report and recommendation adopted, 2017 WL 735390 (M.D. Fla. Feb. 24, 2017). Plaintiff's contract and fraud claims are not subject to dismissal as preempted by the FLSA.[7]

[7] The *Bujalski* opinion does not discuss in detail the precise contours of the state-law claims in that case in relation to the FLSA claims. As such, it is not clear to the undersigned that the holding in *Bujalski* is actually inconsistent with the preemption analysis or the result reached by the court here. However, to the extent that *Bujalski* does so conflict, the undersigned declines to follow it.

2. Fraud Claims Based on Contractual Promises

Defendant next contends that Plaintiff's fraud claims, set forth in Count Six and Seven, are also due to be dismissed on the separate ground that they are based on the same representations or promises that form the basis of Plaintiff's breach-of-contract claim in Count Five. In support, Defendant contends that, "under established Alabama law, a claim of fraud or misrepresentation (or any other tort) must be 'based on representations independent from the promises in the contract and must independently satisfy the elements of fraud [or misrepresentation]' because 'a mere failure to perform a contract obligation is not a tort and it furnishes no foundation for an action on the case.'" (Doc. 7 at 7 (quoting *Tobin v. Auto Club Family Ins. Co.*, 2013 WL 12138874, at *2 (N.D. Ala. Nov. 22, 2013) (Kallon, J.)). Defendant highlights that the alleged misrepresentations underlying Plaintiff's fraud claims, to the effect that Defendant said it would pay Plaintiff 6% commission, later increasing to 8%, plus overtime where he worked over 40 hours, are also the promises Defendant allegedly failed to keep so as to breach Plaintiff's employment contract. "For this reason alone," Defendant posits, Counts [Six] and [Seven] must be dismissed." (Doc. 7 at 12). The court disagrees.

Outside of the insurance context, Alabama law does not authorize claims for fraud or otherwise in tort based upon the fact of a party's breach of contractual obligation, even if done knowingly and willfully. *See Ex parte Hugine*, 256 So. 3d

30, 59 (Ala. 2017); *Grant v. Butler*, 590 So. 2d 254, 256 (Ala. 1991). However, Alabama courts do recognize claims for "promissory fraud" based on a breach of a promise where it is further shown that, at the time the promise was made, the defendant harbored the present intent not to perform and to deceive the plaintiff. *See Heize v. Galt Indust., Inc.*, 93 So. 3d 918, 925 (Ala. 2012). It is true that the defendant's breach of the contract cannot itself give rise to an inference that the defendant had a present intent not perform; were it otherwise, "then every breach of contract would be tantamount to fraud." *Heize v. Galt Indust., Inc.*, 93 So. 3d 918, 925 (Ala. 2012) (quoting *Gadsden Paper & Supply Co. v. Washburn*, 554 So. 2d 983, 987 (Ala. 1989) (internal quotation marks and further citation omitted). Rather, something more must be shown. *Heize*, 93 So. 3d at 925-26. Even so, contrary to Defendant's suggestion, a contract claim and a fraud claim may both arise from the same promise, provided the defendant is shown to have had a present intent not to perform. *See Ahmed v. Board of Trustees of Ala. A&M Univ.*, 2015 WL 13743584, at *4 (N.D. Ala. July 13, 2015), report and recommendation adopted, 2016 WL 791727 (N.D. Ala. Mar. 1, 2016); *Muncher v. NCR Corp.*, 2017 WL 2774805, at *13-17 (N.D. Ala. June 27, 2017); *Madison Cty. v. Evanston Ins. Co.*, 340 F. Supp. 3d 1232, 1283 n. 16 (N.D. Ala. 2018); *Norfolk S. Ry. Co. v. Boatright R.R. Prod., Inc.*, 2018 WL 2299249, at *11 (N.D. Ala. May 21, 2018). Ultimately, while the court does not here dispute Defendant's assertion that the

same alleged promises underlie Plaintiff's claims for breach of contract and fraud, that circumstance alone does not entitle Defendant to dismissal of the latter. Defendant's motion to dismiss will therefore be denied as it relates to the fraud claims.[8]

3. Negligent or Wanton Hiring, Training, and Supervision

Finally, Defendant moves to dismiss Plaintiff's claims in Count Eight, for negligent or wanton hiring, training, and supervision. Defendant argues that these claims fail because they require Plaintiff to plead sufficient facts establishing that an employee of Defendant committed an underlying tort under Alabama state law, which, according to Defendant, Plaintiff has failed to do. It is true that, for an employer to be liable under Alabama law for the negligent hiring, training, or supervision of its employee, the plaintiff must establish "wrongful conduct" on the part of the employee. *Jones Exp., Inc. v. Jackson*, 86 So. 3d 298, 304 (Ala. 2010);

[8] The court notes that Plaintiff's fraud claims include conclusory allegations that Defendant's representations regarding Plaintiff's commission and overtime "were made willfully to deceive" (Compl. ¶ 66) and that "Defendant had no intention of fully performing." (Id. ¶ 72). It is questionable, however, whether the Amended Complaint includes well-pled factual allegations to support such inferences. Even so, Defendant has not moved to dismiss the fraud claims on that specific ground (*see* Doc. 7 at 6-8), so the court will not further consider it. *See Benjamin v. American Airlines, Inc.*, 32 F. Supp. 3d 1309, 1320 n. 10 (S.D. Ga. 2014); Fed. R. Civ. P. 7(b)(1)(B). It is also arguable that Plaintiff has not pled the circumstances constituting fraud with particularity, as required by Fed. R. Civ. P. 9(b), at least to the extent Plaintiff may look to base his fraud claims on alleged false promises or statements not contained within his written employment agreement. And while Defendant has raised a Rule 9(b) argument as a basis for dismissing Plaintiff's fraud claims, Defendant does so for the first time only in its reply brief. (*See* Doc. 16 at 6 n. 3). The argument thus comes too late and also will not be considered. *See Hanover Ins. Co. v. Hudak & Dawson Const.*, 946 F. Supp. 2d 1208, 1213 n. 8 (N.D. Ala. 2013); *U.S. Commodity Futures Trading Comm'n v. Atha*, 420 F. Supp. 2d 1373, 1381 (N.D. Ga. 2006).

Shuler v. Ingram & Assoc., 441 F. App'x 712, 720-21 (11th Cir. 2011). Defendant highlights that the only Alabama tort claims in the Complaint are those alleging promissory fraud, in Counts Six and Seven, based on misrepresentations ostensibly made to Plaintiff in his employment agreement vis-à-vis his commission rate and overtime pay. Defendant contends that those fraud claims are due to be dismissed under Rule 12(b)(6), thus dooming these hiring, training, and supervision claims as well. However, for reasons previously stated, the court has rejected Defendant's arguments seeking dismissal of Counts Six and Seven. Accordingly, those fraud claims might also constitute underlying employee misconduct for purposes of the hiring, training, and supervision claims.[9] Defendant's motion to dismiss Count Eight will be denied.[10]

[9] Defendant does argue in its motion that "even if [the fraud claims in Counts Six and Seven] were not due to be dismissed, Plaintiff has failed to plead an actionable negligent hiring, training or supervision claim under Alabama law." (Doc. 7 at 9). However, all of the points that Defendant seeks to make thereafter ultimately return simply to an argument that Plaintiff has not alleged an underlying tortious act by an employee. (*See id*. at 7-8 ("[A]ny claim that Defendant is liable for its agents' misrepresentations must be dismissed because Plaintiff has pointed to no misrepresentations made by any of Defendant's agents (beyond the alleged employment agreement"); *id.* at 8 ("[A]t no point does Plaintiff provide what the additional egregious act[s] are"); *id.* ("Plaintiff has not alleged how any of these alleged actions constitute an Alabama tort").

[10] The court observes that, to establish a claim for negligent hiring, training, or supervision, a plaintiff must prove not only that an employee of the defendant committed a tort under Alabama law but also (1) that the employee was incompetent and (2) that the employer knew or reasonably shown have known of the employee's incompetence. *See Gilmer v. Crestview Mem'l Funeral Home, Inc.*, 35 So. 3d 585, 596 (Ala. 2009); *Southland Bank v. A & A Drywall Supply Co.*, 21 So. 3d 1196, 1214-16 (Ala. 2008). It is questionable whether the Complaint includes well-pled factual allegations raising an inference that Morrow or any other employee of Defendant was incompetent or that Defendant was aware of such incompetence. But, again,

IV.

Based on the foregoing, Defendant's Rule 12(b)(6) motion to dismiss (Doc. 7) is **GRANTED IN PART AND DENIED IN PART**. Specifically, it is **GRANTED** to the extent that it seeks dismissal of Count One, based on allegations that Defendant failed to keep employee pay or time records as required under the FLSA. Count One of the Complaint is therefore **DISMISSED**. Defendant's motion is otherwise **DENIED**.

So **ORDERED**, this 8th day of March, 2019.

JOHN E. OTT
Chief United States Magistrate Judge

Defendant has not moved for dismissal on that particular basis, so the court will not further consider it.