[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-10954

DAVID THOMPSON,

Plaintiff-Appellant,

versus

REGIONS SECURITY SERVICES, INC.,
a Florida corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:20-cv-62152-WPD

Before WILSON and ROSENBAUM, Circuit Judges, and CONWAY,* District Judge.

ROSENBAUM, Circuit Judge:

The Fair Labor Standards Act prohibits an employer from scheduling an employee "for a workweek longer than forty hours" without paying that employee overtime compensation. 29 U.S.C. § 207(a)(1). To enforce that command, the FLSA requires an employer to pay two different compensation rates: (1) an employee's regular rate, which describes the non-overtime hourly rate that he regularly earns; and (2) an employee's overtime rate, which must be at least "one-and-one-half times the regular rate at which he is employed." *Id.*

In this case, Plaintiff-Appellant David Thompson, a security guard, alleged that his employer set two different "regular rates" and that one of those rates was an artificial one that his employer designed to avoid complying with the FLSA's overtime-compensation requirement. When Thompson became a security guard for Defendant-Appellee Regional Security Services, Inc., his established regular rate was $13.00, and he typically worked a forty-hour week. But seven months after Regional Security first started scheduling Thompson to work overtime, it reduced his rate to $11.15 per hour. About a year later, Regional Security stopped scheduling

* The Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

Thompson to work overtime hours and at the same time restored his non-overtime pay rate to $13.00 per hour.

This case requires us to decide whether Thompson's "regular rate" was $13.00 per hour or $11.15 per hour during the year or so that he worked overtime hours and earned $11.15 per hour. Thompson's allegations support his theory that Regional Security set an artificial $11.15 rate during the year that it scheduled him to work significant overtime hours so that it could avoid paying him $19.50 (one-and-a-half times his $13.00 rate) for his overtime hours. Indeed, during the year that Thompson worked significant overtime hours, his reduced $11.15 rate caused him to earn on average $13.00 per hour for all sixty hours in a sixty-hour workweek. *See infra* n.4. Plus, Regional Security immediately reverted to paying Thompson's $13.00 rate when it stopped scheduling him to work overtime hours.

Because these allegations plausibly support Thompson's claim that Regional Security reduced Thompson's regular rate to avoid paying him overtime compensation, we conclude that Regional Security's motion for judgment on the pleadings was required to be denied. We therefore vacate the district court's order granting that motion and remand for further proceedings.

I.

David Thompson worked as a security guard for Regional Security Services, Inc.[1] He typically worked forty hours per week, and Regional Security paid him $13.00 per hour. But in January 2019, Regional Security began scheduling Thompson for an additional twenty or so hours per week, raising his weekly total to about sixty hours. For the next seven months, Thompson continued to earn his established hourly rate of $13.00 per hour for the first forty hours he worked in a week. And for each hour he worked beyond that, he earned an overtime rate of $19.50 per hour (time-and-a-half).

Then, on July 22, 2019, Regional Security reduced Thompson's rate to $11.15 per hour for the first forty hours. Correspondingly, Regional Security lowered Thompson's overtime rate to $16.73 per hour (again, time-and-a-half). For the next eleven-some-odd months, Thompson worked between fifty-five and seventy-five hours per week.

After scheduling Thompson to work overtime and paying him a reduced rate for nearly a year, Regional Security made an

[1] Because we are reviewing the district court's order entering judgment on the pleadings, our description of the facts accepts the allegations in Thompson's complaint as true. *See, e.g.*, *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (citation omitted). The actual facts may or may not be as alleged.

abrupt turn. All at once, it cut Thompson's workweek to forty hours and restored his non-overtime hourly rate to $13.00.

Based on these facts, Thompson sued Regional Security, alleging that it reduced his hourly rate "to an artificially low rate to avoid" the FLSA's overtime provisions during the year that it paid him a non-overtime hourly rate of $11.15. In other words, Thompson asserted that Regional Security diminished his hourly rate to $11.15 from $13.00 so that it could schedule him for significant overtime hours without having to pay him $19.50 (one-and-a-half times his $13.00 hourly rate) for those overtime hours.

Regional Security moved for judgment on the pleadings, and the district court granted that motion. Thompson now appeals.

II.

We use the *de novo* standard to review a district court's order granting judgment on the pleadings. *Perez*, 774 F.3d at 1335 (citation omitted). Granting judgment on the pleadings is appropriate when "there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Id*. (quoting *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)). When determining whether judgment on the pleadings should be granted, "we accept as true all material facts alleged in the non-moving party's pleading, and we view those facts in the light most favorable to the non-moving party." *Id*. (citation omitted).

III.

Under the FLSA, if an employee's "workweek [is] longer than forty hours," the employer must pay that employee overtime compensation. 29 U.S.C. § 207(a)(1). And the rate at which the FLSA requires a covered employer to compensate its employee for each hour beyond forty in that employee's workweek is "not less than one-and-one-half times the regular rate at which he is employed." *Id.*

This appeal turns on the meaning of the statutory phrase "regular rate." As the Supreme Court has explained, an employee's "regular rate" is the "keystone" of the FLSA's overtime provisions. *Walling v. Youngerman-Reynolds Hardwood Co. ("Youngerman-Reynolds")*, 325 U.S. 419, 424 (1945). Because an employee's overtime rate must equal at least one-and-a-half times his regular rate, an employee's overtime rate depends on his regular rate. "The proper determination of that rate is therefore of prime importance." *Id.* Significantly, the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact." *Id.*

In construing the term "regular rate," we begin with the statutory text. *Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text.").

The FLSA generally defines the "'regular rate' . . . to include all renumeration for employment paid to" the employee. 29 U.S.C. § 207(e). But the term excludes from its parameters certain sums, payments, and compensation. *See id.* As relevant here, "regular rate" excludes an employee's compensation for overtime hours

worked. *See id.* at § 207(e)(5), (7); *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) ("Congress intended to exclude overtime premium payments from the computation of the regular rate of pay."). As a result, "the regular rate refers to the hourly rate actually paid to the employee for the normal, non-overtime workweek for which he is employed." *Youngerman-Reynolds*, 325 U.S. at 424 (citation omitted). That is, an employee's regular rate is his total weekly non-overtime wages divided by his total weekly non-overtime hours. *See Aaron*, 334 U.S. at 461 ("Wage divided by hours equals regular rate.").

Thompson had two different non-overtime hourly rates, so we must decide which of those two rates was his "regular rate" for purposes of the FLSA during the year or so that he worked significant overtime hours. Regional Security urges that Thompson's $11.15 hourly rate—the non-overtime hourly rate that it paid him over that year—was Thompson's "regular rate" during that period. Thompson, on the other hand, contends that his regular rate was $13.00—the rate that he earned both before he started and after he finished working overtime.

The statutory definition of "regular rate," in and of itself, does not resolve this dispute. So we delve further.

Because the statute does not further define "regular," we give the term its "ordinary public meaning." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). To discern that meaning, we consult dictionaries in use when Congress enacted the FLSA in 1938. *See, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566

(2012); *United States v. Dominguez*, 997 F.3d 1121, 1124 (11th Cir. 2021) (citation omitted).

Those dictionaries define the word "regular" to mean "[s]teady or uniform in course, practice, or occurrence." Webster's New International Dictionary 2099 (2d ed. 1934); *see also* Black's Law Dictionary 1518 (3d ed. 1933) (noting that regular "implies uniformity, continuity, consistency, and method"). A regular rate therefore refers to a rate that is "selected . . . in conformity with established or prescribed usages, rules," or principles. Webster's New International Dictionary, *supra*, at 2099; Black's Law Dictionary, *supra*, at 1518 (describing regular as "[a]ccording to rule; as opposed to that which constitutes an exception to the rule").

We do not think that definition unambiguously answers the question of whether, on these facts, Thompson's regular rate was $13.00 or $11.15.

To be sure, Thompson alleged that his "established" non-overtime hourly rate was $13.00, based on his first several months of employment with Regional Security. This argument has a certain amount of appeal. After all, right up until July 22, 2019, $13.00 was the only non-overtime hourly rate Regional Security ever paid Thompson. And as soon as Regional Security stopped scheduling Thompson to work overtime hours following the period when it paid him a non-overtime rate of $11.15, it immediately reverted to paying Thompson's $13.00 rate. In this sense, Thompson's "established or prescribed" rate might fairly be characterized as $13.00.

On the other hand, under § 207, an employer can lawfully reduce an employee's non-overtime rate in some situations. Indeed, the Supreme Court has said that "[t]he Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected." *Walling v. Helmerich & Payne*, 323 U.S. 37, 42 (1944). So "[a]s long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish [the] regular rate at any point and in any manner they see fit." *Youngerman-Reynolds*, 325 U.S. at 424. The sole limitation on "this freedom of contract" is that it "does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes" of the FLSA. *Helmerich & Payne*, 323 U.S. at 42.

In *Parth v. Pomona Valley Hospital Medical Center*, 630 F.3d 794 (9th Cir. 2010), for instance, the Ninth Circuit, relying in part on *Youngerman-Reynolds*, held that an "employer may reduce" its employees' regular rates to accommodate their scheduling desires "so long as the rate reduction was not designed to circumvent the provisions (including overtime) of the [FLSA]." *Id*. at 797.

Here, Regional Security paid Thompson $11.15 for nearly a year, and Regional Security's answer to Thompson's complaint alleges that it did so to accommodate Thompson's "requested scheduling modifications." Still, though, we must view the pleadings in the light most favorable to Thompson, and in doing that, we can't tell based on the pleadings alone whether the parties permissibly

contracted for the $11.15 rate. So we can't say that the statutory language unambiguously answers the question of whether Thompson's "regular rate" was $13.00 or $11.15.

On top of that, the Supreme Court has acknowledged the ambiguous nature of the term "regular rate." More generally, in *Bay Ridge Operating Co. v. Aaron*, the Court explained that in the FLSA, "Congress necessarily had to rely upon judicial or administrative application of its standards in applying sanctions to individual situations. These standards had to be expressed in words of generality." 334 U.S. at 461–62. And as for the phrase "regular rate" in particular, the Supreme Court characterized *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942), as having "refrained from rigidly defining 'regular rate' in a guaranteed weekly wage contract that met the statutory requirements of § 7(a) for minimum compensation." *Aaron*, 334 U.S. at 462 (citing *A.H. Belo Corp.*, 316 U.S. at 634).

In sum, then, the statutory language is inconclusive about whether $11.15 or $13.00 is "the regular rate at which [Thompson] is employed." Perhaps for that reason, the parties' dispute centers on the Department of Labor's (the "Department") interpretations of the FLSA's overtime provisions. Those interpretations reside in Part 778 of Title 29 of the Code of Federal Regulations. *See* 29 C.F.R. § 778.1.

Before we dive into that part of the Code of Federal Regulations, though, we pause to consider the weight that we accord to the interpretations in Part 788. To determine the answer to that question, we begin with Part 788's origins. Before the Department

promulgated Part 788, the agency's interpretations of the FLSA's overtime requirements appeared "in an interpretative bulletin and in informal rulings." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Faced with a question involving one of these interpretive bulletins, the Supreme Court acknowledged that the Department's informal interpretations are "not controlling upon the courts by reason of their authority," *id.* at 140; *see also Overnight Motor Transp. Co. v. Misel*, 316 U.S. 572, 580 n.17 (1942), *superseded by statute*, Port-to-Portal Pay Act of 1947, 61 Stat. 84, *as recognized in Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.29 (1985); *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653, 659 (5th Cir. 1967) ("We are, of course, not bound by interpretative bulletins or administrative opinions.").[2]

The Department replaced those interpretive bulletins with Part 788, which it published to the Code of Federal Regulations "to make available in one place the" agency's interpretations of the FLSA's overtime requirements. *See* Overtime Compensation, 33 Fed. Reg. 986, 987–88 (Jan. 26, 1968) (codified as amended at 29 C.F.R. pt. 788). In so doing, the Department invoked the Administrative Procedure Act's exception for interpretive rules to the

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[2] The decisions of the former Fifth Circuit handed down before October 1, 1981, are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

notice-and-comment requirements.[3] 33 Fed. Reg. at 986; *see also* 5 U.S.C. § 553(b)(A) (excepting "interpretative rules" from notice and comment). Still, we continued to acknowledge that the bulletins in Part 788 "provide us with guidance simply because they reflect the position of those most experienced with the application of the

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[3] When an agency promulgates an interpretation of an ambiguous statute using notice-and-comment procedures, the resulting interpretation is generally entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), meaning it receives "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute," *id.* at 844. *See, e.g.*, *U.S. v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (describing "notice-and-comment" procedures "as significant . . . in pointing to *Chevron* authority"). On the other hand, an agency interpretation that was not promulgated through notice-and-comment procedures generally does not receive *Chevron*-style deference. *See, e.g.*, *Miccosukee Tribe of Indians v. U.S.*, 566 F.3d 1257, 1272–73 (11th Cir. 2009) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Instead, interpretations promulgated through less formal procedures—as Part 778 was—generally receive *Skidmore* deference. *Rodriquez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1268 n.5 (11th Cir. 2008). In contrast to *Chevron* deference, *Skidmore* deference is deference to an agency's interpretation that corresponds to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The level of deference that may apply—*Chevron* or *Skidmore*—is not always apparent. *See, e.g.*, *Durr v. Shinseki*, 638 F.3d 1342, 1348 (11th Cir. 2011) (noting that we have "applied *Chevron* level deference to an agency handbook when Congress has authorized an agency to 'issue regulations that have the force of law' and the agency's handbook has been subject to notice-and-comment rulemaking," but deciding not to determine whether *Chevron* or *Skidmore* deference applies to certain regulations in VA Handbook 5021/6 (citation omitted)).

[FLSA]." *Brennan v. Great Am. Disc. & Credit Co.*, 477 F.2d 292, 296–97 (5th Cir. 1973) (citing *Wirtz*, 381 F.2d at 659).

In sum, then, we have consistently accorded *Skidmore* deference to the interpretative bulletins that now reside in Part 778. *See Wirtz*, 381 F.2d at 659 (citing *Skidmore*, 323 U.S. at 140). So we will do so here as well. That means we will accord Part 788 "deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Rafferty v. Denny's, Inc.*, 13 F.4th 1166, 1179 (11th Cir. 2021) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012)); *see also Skidmore*, 323 U.S. at 140.

In his complaint, Thompson cites 29 C.F.R. § 778.500 to support his claim that his regular rate was $13.00 per hour during the year or so that he worked significant overtime. Under that rule, an employee's regular rate cannot "vary from week to week inversely with the length of the workweek." *Id.* § 778.500(b). Citing this rule, the Ninth Circuit has observed that an "agreement, practice, or device that lowers the hourly rate during statutory overtime hours or weeks when statutory overtime is worked is expressly prohibited under" the Department's interpretive regulations. *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 997 (9th Cir. 2017); *see also* Les A. Schneider & Larry J. Stine, *Wage and Hour Law: Compliance and Practice* § 9:1 (2023) ("The FLSA regulations expressly prohibit any agreement, practice, or device that provides for a lower hourly rate to be paid during . . . weeks when overtime is worked.").

That prohibition on lowering an employee's regular rate and increasing the hours in his workweek prevents an employer from circumventing the FLSA's overtime requirements. As 29 C.F.R. § 778.327 demonstrates, this non-circumvention rule prevents an employer from playing with an employee's hours and rates to effectively avoid paying time-and-a-half for an employee's overtime hours. Otherwise, an employer could use "simple arithmetic" to lower an employee's rate and increase his hours so that he could never earn time-and-a-half pay—"no matter how many hours he worked." *Id*. § 778.327(a).

Consider an example: our hypothetical employee has earned a $7 non-overtime hourly rate while working forty-hour workweeks for ten weeks. At the start of week eleven, our hypothetical employer reduces the employee's non-overtime hourly rate to $6 and schedules him to work sixty hours that week. If we treat that new non-overtime hourly rate as the employee's regular rate for his sixty-hour workweek, the employee will gross $420 for that sixty-hour workweek. (The employee's $6 non-overtime hourly rate times forty hours equals $240. The employee's overtime rate of $9 (time-and-a-half, based on a $6 non-overtime hourly rate) times twenty hours equals $180. The sum of $180 and $240 is $420.) But the employee would have earned the same amount if the employer simply paid him $7 per hour—the established non-overtime hourly rate he earned during his first ten non-overtime workweeks—for all sixty hours of work ($7 times sixty hours equals $420). So by reducing the employee's non-overtime hourly rate to $6 at the start of week eleven, the employer effectively

escapes its obligation to pay the employee overtime compensation. That kind of arithmetic "is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with law." *Id*. And this an employer cannot do. Rather, the employee's regular rate of pay "for overtime purposes is, obviously, the rate that he earns in the normal non[-]overtime week—in this case, $[7] per hour." *Id*.

We find that this interpretation has the "power to persuade," *Skidmore*, 323 U.S. at 140, because it preserves what the Supreme Court has said is "the Congressional purpose" behind the FLSA's overtime provisions. *Helmerich & Payne*, 323 U.S. at 40. As the Court has explained, Congress enacted the FLSA's overtime provisions "to spread employment by placing financial pressure on the employer through the overtime pay requirement" and "to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Id*. (citation omitted).

The Department's interpretation of the regular rate serves that purpose by prohibiting an employer from using "simple arithmetic" to ensure that an employee earns no more than his non-overtime hourly rate—"no matter how many hours he work[s]." 29 C.F.R. § 778.327(a). Without that prohibition, the FLSA would neither (1) place "financial pressure" on employers to hire additional workers instead of scheduling their existing employees to work overtime, nor (2) ensure that employees receive additional compensation "for the burden of a workweek in excess of the hours fixed in the Act." *Helmerich & Payne*, 323 U.S. at 40 (citation

omitted). In sum, then, 29 C.F.R. § 778.327 interprets the term "regular rate" in a way that prevents employers from nullifying the FLSA's overtime provisions. For that reason, we find that the regulation persuasively interprets the term.

Applying that interpretation to the allegations in Thompson's complaint and viewing those allegations in the light most favorable to him, we conclude that Thompson plausibly alleged that Regional Security used prohibited arithmetic here. Thompson initially earned a $13.00 non-overtime hourly rate and worked a forty-hour workweek. But soon after Regional Security started scheduling Thompson for sixty-hour workweeks, it slashed his non-overtime hourly rate to $11.15. Under this new non-overtime hourly rate, Thompson would gross $780.50 for a sixty-hour workweek—which is only $.50 more than he would have earned if he were paid his former $13.00 non-overtime hourly rate for all sixty hours of work.[4] This arithmetic, together with Thompson's allegations that Regional Security paid him $13.00 per hour as a regular rate during his initial tenure with the company and during the workweeks after it stopped scheduling him for overtime, supports the reasonable inference that Regional Security slashed Thompson's non-overtime hourly rate to avoid paying him an overtime rate equal to one-and-a-half times his established $13.00 rate.

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[4] Thompson's weekly average rate of $11.15 multiplied by forty hours equals $446. His overtime hourly rate of $16.725—that is, one-and-a-half times $11.15—multiplied by twenty overtime hours equals $334.50. The sum of $446 and $334.50 is $780.50.

Of course, it's also possible that Regional Security reduced Thompson's weekly average rate for a different and permissible reason. As we've noted, employers like Regional Security can lawfully reduce an employee's weekly average rate, as long as they do not do so as a work-around of the FLSA's overtime-pay requirements. *Youngerman-Reynolds*, 325 U.S. at 424; *see also* Schneider & Stine, *supra*, § 9:7 (observing that an employer's right to reduce an employee's regular rate does not enable an employer "to manipulate the regular rate so as to prevent overtime pay").

The difference between a permissible reduction in an employee's non-overtime hourly rate and an impermissible one comes down to whether the rate change "is justified by no factor other than the number of hours" an employee worked. 29 C.F.R. § 778.327(b); *see also Parth*, 630 F.3d at 797 (holding that an employer "may reduce" an employee's weekly average rate "so long as the rate reduction was not designed to circumvent" the FLSA's overtime provisions). When a reduction in an employee's non-overtime hourly rate is justified by the length of his workweek, "the device is evasive and the rate actually paid in the shorter or non[-]overtime week is his regular rate for overtime purposes in all weeks." 29 C.F.R. § 778.327(b).

As we've indicated, Thompson's allegations suggest that Regional Security fluctuated his non-overtime hourly rate as a device to evade paying him overtime. In particular, he alleged that Regional Security "reduced" his "established" non-overtime hourly rate "to an artificially low rate to avoid the overtime provisions of

the FLSA." He also alleged that Regional Security increased the length of his workweek and reduced his non-overtime hourly rate from $13.00 to $11.15 to avoid those provisions. During the year that Regional Security paid Thompson a reduced non-overtime hourly rate and scheduled him to work sixty-hour workweeks, Thompson averred, his non-overtime hourly rate across all sixty hours of work was $13.00. *See supra* n.4. And Thompson asserted that once Regional Security ceased scheduling him to work overtime hours, it restored his non-overtime hourly rate to $13.00. Taken as true, these allegations suggest that Regional Security fluctuated Thompson's non-overtime hourly rate for the purpose of ensuring that he would always earn $13 per hour—"no matter how many hours he worked." 29 C.F.R. § 778.327(a).

In urging us to reach the opposite conclusion, Regional Security distinguishes the "agreement, practice, or device that provides for a lower hourly rate to be paid during . . . weeks when overtime is worked," as the regulation prohibits, reasoning that Thompson failed to allege that his non-overtime hourly rate "fluctuated from week to week depending upon whether or not he worked overtime hours." And in a sense, Regional Security is right: Thompson alleged that Regional Security paid him a $13.00 non-overtime hourly rate and worked overtime hours at time-and-a-half based on that rate for seven months before Regional Security reduced his non-overtime hourly rate.

The seven-month period between when Regional Security first scheduled Thompson to work overtime and when it reduced

his non-overtime hourly rate could support competing inferences. For instance, it could suggest that Regional Security changed Thompson's non-overtime rate after seven months because of legitimate "factor[s] other than the number of hours" in his workweek. *Id.* § 778.327(b). But it could alternatively suggest that Regional Security tried to camouflage the fact that it was attempting to circumvent the FLSA when it began effectively paying Thompson roughly $13.00 for every hour—regular and overtime—that he worked during the year or so that followed that seven-month period.

At this stage, though, we "must accept the facts alleged in the complaint as true and view them in the light most favorable to" Thompson. *Samara v. Taylor*, 38 F.4th 141, 149 (11th Cir. 2022) (quoting *Cannon*, 250 F.3d at 1301); *see also Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33, 37 (1st Cir. 2014) (explaining that "the regular . . . rate . . . is a fact question" (citing *Aaron*, 334 U.S. at 461)). And when we do that, we must conclude that the district court erred in granting judgment on the pleadings. Even though Thompson alleged that Regional Security reduced his non-overtime hourly rate and scheduled him to work overtime in two successive steps, he also alleged that Regional Security simultaneously restored his non-overtime hourly rate and ceased scheduling him to work overtime. And during the year or so that Thompson worked overtime hours at a reduced non-overtime hourly rate, his average hourly rate for all those hours, including the overtime hours, was the same as his non-overtime hourly rate before the reduction. Those facts plausibly suggest that Regional Security used

the fluctuation in Thompson's weekly average rate as a device to avoid paying overtime compensation at one-and-a-half times the non-overtime hourly rate that Thompson earned during the weeks he did not work overtime hours.

IV.

Because Thompson's allegations plausibly suggest that Regional Security used the fluctuation in his weekly average rate as a device to avoid paying him overtime, we vacate the district court's order granting Regional Security's motion for judgment on the pleadings and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13719

GLOBAL NETWORK MANAGEMENT, LTD.,

Plaintiff-Appellant,

versus

CENTURYLINK LATIN AMERICAN SOLUTIONS, LLC,
a Florida Limited Liability Company
f.k.a. Level 3 Latin American Solutions, LLC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-20723-JB

Before WILSON, JORDAN, and BRASHER, Circuit Judges.

JORDAN, Circuit Judge:

This diversity case arises out of the theft—possibly by a group of third-party contractors—of 1,380 memory cards which belonged to Global Network Management, LTD., and were stored in a data center operated by Centurylink Latin American Solutions, LLC. Global Network sued Centurylink for implied bailment, breach of contract implied in law, and breach of contract implied in fact to hold Centurylink liable for the theft of the memory cards. The district court dismissed all of the claims with prejudice, and Global network now appeals.

Applying Florida law, and with the benefit of oral argument, we affirm in part and reverse in part. The district court correctly dismissed the contract implied in law and contract implied in fact claims. But Global Network plausibly alleged that Centurylink possessed the memory cards at the time of the theft, and as a result the implied bailment claim survives at the Rule 12(b)(6) stage.[1]

I

We exercise plenary review of the dismissal of a complaint for failure to state a claim. *See Dorfman v. Aronofsky*, 36 F.4th 1306, 1311–12 (11th Cir. 2022). In conducting this review, we

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[1] As to all other issues raised by Global Network, we summarily affirm.

accept the factual allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *See id.* at 1310.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is facially plausible if the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, the factual allegations in the complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (internal quotation marks 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." *Iqbal*, 556 U.S. at 678 (citation omitted). The question, therefore, is whether a claim is "substantive[ly] plausib[le]." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

II

The operative complaint alleges the following facts.

Centurylink operates a data center in Miami, Florida, that houses Global Network's servers. Those servers store and process Global Network's data.

From 2014 through 2018, the parties and some of their predecessors and related entities signed a series of contracts for data

storage and processing services: (1) in 2014, Telegram Messenger LLP and Level 3 Communications GmbH (later acquired by Centurylink) signed a master service agreement; (2) in 2015, Telegram Messenger LLP and Level 3 signed a U.S. addendum agreement to add provisions specific to services rendered in the United States; (3) in 2017, Telegram Messenger LLP and Level 3 signed a letter agreement which canceled the 2014 master service agreement and executed a new one; and (4) in February of 2018, the parties signed (a) a novation agreement substituting Global Network for Telegram Messenger LLP in the 2017 master service agreement, and (b) a novation agreement substituting Global Network for Telegram Messenger LLP in the 2015 addendum. Each of these contracts was attached to the complaint, and Global Network expressly alleged that the parties were "bound" by them. *See* D.E. 24 ¶ 14.

In a paragraph titled "Security," the operative contract—the master service agreement signed in 2017—requires that Centurylink maintain "card readers, scanners [or] other access devices" at its facility. *See* D.E. 24-3 at 16. It also requires that Centurylink provide a "locking mechanism" for the facility. *See id.*

Global Network placed orders for two deliveries of 224 servers (each of which contained eight 128-megabyte memory cards). The servers were delivered to Centurylink's data center in November of 2017 and April of 2018. Global Network hired a Centurylink employee named Diego Oubina to install the servers, and Mr. Oubina in turn hired outside contractors to do the job. He let these contractors into the data center to install the servers in November

and again in April. After the April installation, Global Network discovered that 1,380 memory cards were missing.

According to Global Network, Mr. Oubina circumvented all the data center's extensive security protocols when he let the contractors inside. Those security protocols included the use of key access cards, metal detectors, cameras, and elevator key pads.

The sixth floor of the data center, where Global Network's servers are stored, is protected by doors made of break-resistant glass and security cameras. Visitors to the data center—including the owners of the servers stored there—are required to obtain a ticket to enter, and are escorted by security guards to their destination and back to the entrance when they leave. But on the days the contractors came to install Global Network's servers, Mr. Oubina allowed them to bypass these security measures—they did not obtain tickets to enter and they were not escorted to the sixth floor and back out to the lobby.

III

Global Network asserted a claim for breach of contract implied in law. The district court properly dismissed this claim with prejudice.

Florida courts use the term "contract implied in law" interchangeably with "unjust enrichment" and "quasi contract." *See 14th & Heinberg, LLC v. Terhaar and Cronley Gen. Contractors, Inc.*, 43 So. 3d 877, 880 (Fla. 1st DCA 2010) ("an implied-in-law 'quasi-contract' . . . is also referred to by some courts as unjust

enrichment") (internal citation omitted). In Florida, a contract implied in law exists where "the parties . . . have never by word or deed indicated in any way that there was any agreement between them." *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 805 (11th Cir. 1999) (citing *Com. P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (en banc)). The law will "create" this sort of implied agreement where "it is deemed unjust for one party to have received a benefit without having to pay compensation for it." *Id.*

The elements of a cause of action for a contract implied in law are that "(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred[;] and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value." *Com. P'ship*, 695 So. 2d at 386. The legal fiction of a contract implied in law "was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation." *Id.*

Global Network alleges that it paid Centurylink for services that included security, and that Centurylink "made the representation that it would provide security." Then Centurylink, "having received the benefit of the money," purportedly "failed to properly secure [Global Network's] servers[.]" These allegations do not plausibly set out a claim for breach of a contract implied in law.

First, we reject Global Network's attempt to base the claim on Centurylink's representation that it would provide security. This representation cannot serve as the basis for Centurylink's claim because a contract implied in law is an obligation "created by the law without regard to the parties' expression of assent by their words or conduct." *Com. P'ship*, 695 So. 2d at 386. Global Network's focus on Centurylink's alleged promise is misguided and cannot support a claim for breach of contract implied in law.

Second, even if we ignore this foundational problem the claim still fails. Global Network alleged that there was an express agreement governing the relationship between the two parties, and the 2017 contract sets out Centurylink's obligations regarding security. When a contract addresses a certain topic, that topic cannot be the subject of a claim for a contract implied in law. *See Diamond "S" Development Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) ("Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter."); *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) ("A plaintiff cannot pursue an equitable theory, such as unjust enrichment or quantum meruit, to prove entitlement to relief if an express contract exists."); 42 C.J.S. *Implied Contracts* § 62 (2023 update) ("[F]or a court to award a quantum meruit recovery, the court must conclude that there is no enforceable express contract between the parties covering the same subject matter.").

Global Network's assertion that the parties did not sign a separate, stand-alone agreement for security services does not change this outcome. Global Network paid Centurylink pursuant to the contracts that the parties entered into for data storage and processing services, and Global Network alleged that the "parties were bound by [those] contract[s]." D.E. 24 ¶ 14. As explained earlier, the 2017 contract required Centurylink to take certain security measures to protect Global Network's property. [2]

In a paragraph titled "Security," the 2017 contract requires that Centurylink maintain "card readers, scanners [or] other access devices." D.E. 24-3 at 16. The contract also requires that Centurylink provide a "locking mechanism" for the facility. *See id.* Global Network may not assert an implied-in-law contract claim because it made payments pursuant to a contract that addressed the matter of security. And it may not now demand higher security measures than those that were bargained for. *See* 42 C.J.S. *Implied Contracts* § 60 (2023 update) ("[A] court may not make a better contract for the parties through an unjust enrichment claim than they have made for themselves."). [3]

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[2] Global Network argues in its initial brief that "[t]he various agreements attached to the [c]omplaint are not even contracts between the parties." Initial Br. at 17. This argument is meritless, as Global Network expressly alleged that the parties "became bound by the contractual relationship." D.E. 24 ¶ 14.

[3] Of course, if Centurylink failed to provide the security services or features spelled out in the 2017 contract, and those failures led to the theft of the memory cards, the remedy available to Global Network was a straightforward breach of contract claim. Global Network initially asserted certain breach of

There is also no allegation that Global Network paid Centurylink any additional money for security above and beyond what was owed pursuant to the parties' 2017 contract. Absent this kind of allegation, there is nothing inequitable about Centurylink retaining the contractual payments made by Global Network. *Compare Ruck Bros. Brick, Inc. v. Kellogg & Kimsey, Inc.*, 668 So. 2d 205, 206–07 (Fla. 2d DCA 1995) (holding that an unjust enrichment claim was valid because the contract payments did not include additional material delivery).

IV

Global Network also asserted a claim for breach of contract implied in fact. As the district court correctly explained, this claim similarly fails because of the well-settled rule that "the law will not imply a contract where a valid express one exists." *Quayside Assoc., Ltd. v. Triefler*, 506 So. 2d 6, 7 (Fla. 3d DCA 1987).

Unlike contracts implied in law, parties to contracts implied in fact "have . . . entered into an agreement[.]" *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 806 (11th Cir. 1999) (quoting *Com. P'ship*, 695 So. 2d at 385–86). "[B]ut [they have done so] without sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement." *Id.* A contract implied in fact is "founded upon a meeting of the minds, which, although not embodied in an express contract,

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contract claims, but at some point those claims were dismissed. Global Network does not appeal the dismissal of those claims, so we do not address them.

is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules Inc. v. United States*, 516 U.S. 417, 424 (1996). *See also Tipper v. Great Lakes Chemical Co.*, 281 So. 2d 10, 13 (Fla. 1973) ("Express contracts and contracts implied in fact require the assent of the parties, whereas contracts implied in law . . . do not rest upon the assent of the contracting parties.").

Global Network contends that it can be inferred—from Centurylink's use of various security protocols—that the deal included promises that Centurylink would keep the servers safe and that it would conduct an investigation if property was lost. But a court will not imply a contract in fact where there is an express agreement addressing the matter at hand. *See Baron v. Osman*, 39 So. 3d 449, 451 (Fla 5th DCA 2010) ("[T]he law will not recognize an implied-in-fact contract where an express contract exists."). *See also Triefler*, 506 So. 2d at 7 (the "settled rule [is] that the law will not imply a contract where a valid express one exists"). As previously discussed, the 2017 contract provided the negotiated-for security measures. Because Global Network alleged that this contract constituted a binding agreement, we will not imply another contract to replace the parties' agreed-upon terms.

V

The district court dismissed the implied bailment claim because Global Network did not sufficiently allege that Centurylink had exclusive use and possession of the property (i.e., the servers and the memory cards). Based on our decision in *Puritan Insurance*

Company v. Butler Aviation-Palm Beach, Inc., 715 F.2d 502, 504 (11th Cir. 1983), we disagree.

A

"In a bailment situation, the plaintiff makes a prima facie case for damages when he shows that the bailed property was delivered to the bailee in good condition and that it was damaged while it was in the care, custody, and control of the bailee." *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1299 (11th Cir. 2007) (applying Florida law). Under Florida law, a bailment "requires complete delivery of possession, custody and control of the chattel." *Butler Aviation*, 715 F.2d at 504. As a "general rule, delivery of the item to the bailee must give him or her the right to exclusive[ly] use and possess[ ] the item." *Meeks ex rel. Estate of Meeks v. Fla. Power & Light Co.*, 816 So. 2d 1125, 1129 (Fla. 5th DCA 2002).

As noted, Global Network's claim is for implied bailment. Florida law recognizes that a "constructive bailment" can result when "the possession of one's personal property passes to another by mistake, accident or through force of circumstances under which the law imposes upon the recipient thereof the duty and obligation of a bailee . . . [and] an absence of any voluntary undertaking, and no reasonable basis for implying an intent of any mutual benefit[.]" *Armored Car Service, Inc. v. First Nat. Bank of Miami*, 114 So. 2d 431, 434 (Fla. 3d DCA 1959). *See also* 8A Am. Jur. 2d *Bailments* § 38 (Nov. 2022 update) ("An implied-in-law bailment also may arise when a party engages another to perform some

service with respect to that party's personal property, without instructions as to the property's disposition."); 8 C.J.S. *Bailment* § 14 (Nov. 2022 update) ("[T]here is a class of bailments that arise by operation of law, such as when justice requires it."); 19 Williston on Contracts § 53:3 (4th ed. 2022) (recognizing the concept of "constructive bailment").

The "duty imposed in such circumstances [is for] the bailee to exercise some care, the degree thereof to be determined by the facts relating to the bailment." *Armored Car Service*, 114 So. 2d at 435. But where the bailment is gratuitous a showing of gross negligence is required for recovery. *See id.* at 434; *Fireman's Fund Ins. Co. v. Dollar Systems, Inc.*, 699 So. 2d 1028, 1031 (Fla. 4th DCA 1999).

B

In *Butler Aviation*, an aircraft owner left his plane with a fixed base operator at the Palm Beach Airport. The operator tied down and stored the plane. *See* 715 F.2d at 503.

The operator controlled the area, which was surrounded by a perimeter fence maintained by the county, by stationing a security guard at its access gate and a dispatcher at the service counter at the other entrance. It also had one of its employees conduct a nightly check to see what aircraft were in the parking area. *See id.*

No key was needed to operate the plane, but the owner retained a key and gave another key to a third party who planned to use the plane for business purposes. *See id.* at 504. A day after

leaving the plane, the owner returned. He put his flight case in the wing locker and relocked the plane, but did not move it. A little more than a week later, an unknown person entered the lot, paid the parking and refueling charges, and stole the plane. *See id.*

We affirmed a jury verdict for the plane owner on a bailment claim under Florida law because the operator had practical control of the aircraft, notwithstanding the owner's access: "The facts that we have set out—a fenced area, control of the access gate, a dispatcher on duty, registration procedures, placement and tying down of the plane by [the operator], and a nightly check—indicate that [the operator] had control of the aircraft and was properly considered a bailee. Although [the owner] retained his key (and sent another to a third party) practical control remained with [the operator]." *Id.*

Based on *Butler Aviation*, Global Network plausibly alleged that Centurylink had practical physical control over the servers and the memory cards in its data center. The alleged facts—the use of key access cards, elevator key cards, and security cameras, as well as the requirements for visitors (including owners like Global Network) to obtain entrance tickets and be accompanied by a security guard to and from the data center—plausibly indicate that Centurylink was a bailee. *See id.* *See also Lonray, Inc. v. Azucar, Inc.*, 775 F.2d 1521, 1525 (11th Cir. 1985) (holding under Florida law that a warehouse owner had sole possession and control of the sugar it stored for the plaintiff, even though the plaintiff's agent supervised the loading and weighing of the sugar and visited the warehouse

twice a month for inspections, because "at all times [the warehouse owner] maintained lock and key control over access to the interior of the warehouse and the sugar stored there"). Given cases like *Butler Aviation* and *Lonray*, Global Network has stated a claim for implied bailment.

According to Centurylink, Global Network's ability to visit the servers means that it did not possess the servers exclusively and as a result no bailment relationship was formed. But this argument does not carry the day at this stage of the proceeding, where the standard is plausibility and not probability. The plane owner in *Butler Aviation* was able to visit and access his aircraft (and did in fact do so), and yet we concluded that a bailment existed. *See* 715 F.2d at 504. And in *Lonray* there was a bailment even though an agent for the owner visited the warehouse twice a month for inspections of the sugar. *See* 775 F.2d at 2525.

C

Centurylink also argues that *Butler Aviation* is distinguishable on its facts because Global Network was able to use its servers remotely to run its business, while the plane owner in *Butler Aviation* could not use the plane from afar while it was stored with the fixed base operator. Centurylink contends this continued use precludes us from concluding that an implied bailment existed. The district court essentially agreed, explaining that bailment does "not contemplate" a situation where one party's possession of property does not prevent the owner from using it. *See* D.E. 35 at 7–8.

We are not persuaded. First, although Global Network may have been able to continue to use its servers, it was not able to use the property that was stolen—the memory cards. Second, Global Network does not seek damages for its inability to use its network or intangible data on the servers. Instead, it wants to recover damages to replace the physical memory cards. *See* D.E. 24 ¶ 66. The bailment analysis in a case like this one, dealing with the loss of tangible, physical objects, is relatively straightforward. *See DW Data, Inc. v. C. Coakley Relocation Sys., Inc.*, 951 F. Supp. 2d 1037, 1048–53 (N.D. Ill. 2017) (applying Illinois law and finding, after a bench trial, that plaintiff was entitled to judgment on its bailment claim against the defendant, which lost its servers after delivery). [4]

In addition, Centurylink cites to *S & W Air Vac Systems, Inc. v. Department of Revenue*, 697 So. 2d 1313, 1315 (Fla. 5th DCA 1997). In *S&W*, the Fifth District addressed whether S&W's placement of "air-vac" units at convenience stores and gas stations—units which customers could use for a fee to vacuum their car or put air in the tires—created a bailment. It held that there was no bailment because only S&W had keys to a unit's money vault, and

[4] The tort of trespass to chattels, which Florida recognizes, *see Burshan v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 805 So. 2d 835, 846 (Fla. 4th DCA 2001), has been applied by some courts to the loss of use of computer networks or servers. *See, e.g., Register.com v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (New York law). Whether or not Florida applies the tort in this way is unclear. *Compare Flagstone Island Gardens, LLC v. Ser*, 2011 WL 13223685, at *6 (S.D. Fla. Sept. 13, 2011) (yes), *with Inventory Locator Servs., LLC v. Partsbase, Inc.*, 2005 WL 2179185, at *11 (W.D. Tenn. Sept. 6, 2005) (no).

it was solely responsible for (a) inspecting and maintaining the units at no cost to the business owners and (b) carrying liability insurance for the units. In sum, the business owners did not have exclusive possession of the units. *See id.* at 1214–1215.

S&W makes the exclusive possession element of bailment somewhat closer. But it does not mandate dismissal of the implied bailment claim because of two significant distinctions. The first is that the units in *S&W* (unlike Global Network's servers) were not locked inside the businesses but were instead located outside where they could be accessed by cars. The second is that S&W (unlike Global Network) was "authorized to enter the [premises] at any time to collect monies or perform maintenance and repairs." *Id.* at 1314–15.

Given Global Network's allegations, and our decision in *Butler Aviation*, the implied bailment claim survives Centurylink's motion to dismiss. To be clear, we do not hold there was an implied bailment as a matter of fact or law. We hold only that Global Network plausibly alleged an implied bailment. *Cf. Annecca, Inc. v. Lextent, Inc.*, 345 F.Supp.2d 897, 908 (N.D. Ill. 2004) (explaining that, under Illinois law, an implied bailment existed when the plaintiff delivered its new computer servers to the defendant "to be installed for [the plaintiff's] own use after completion of [its] acquisition [of the defendant]").

VI

We affirm the dismissal of Global Network's claims for breach of contract implied in law and breach of contract implied in fact. We reverse the dismissal of Global Network's claim for implied bailment and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.