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United States District Court, S.D. Florida.

Bevannie SMITH, Plaintiff,

v.

THERAPIES 4 KIDS, INC., a Florida corporation, and Eileen De Oliveira, an individual, Defendants.

CASE NO. 20-61270-CIV-DIMITROULEAS

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Signed 08/23/2021

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILLIAM P. DIMITROULEAS, United States District Judge

***1** THIS CAUSE is before the Court on Defendants THERAPIES 4 KIDS, INC. ("T4K") and EILEEN DE OLIVEIRA ("De Oliveira") (collectively, "Defendants")'s Motion for Summary Judgment [DE 18]. The Court has carefully considered the Motion, Plaintiff BEVANNIE SMITH ("Smith" or "Plaintiffs")'s Response [DE 22], Defendants' Reply [DE 29], Defendants' Statement of Undisputed Material Facts [DE 17], Plaintiff's Response to Defendants' Statement of Undisputed Material Facts [DE 21], Defendants' Response to Plaintiff's Statement of Additional Facts [DE 62], the evidence submitted in the record, and is otherwise fully advised in the premises. For the reasons explained below, the Court will grant in part and deny in part Defendants' summary judgment motion.

I. BACKGROUND [1]

Plaintiff Smith began working for T4K around August 2015. DSOF ¶ 19; PSOF ¶ 19. During her employment with T4K, Smith held various positions, including behavioral therapist, lead therapist, and program coordinator. DSOF ¶ 21; PSOF ¶ 21. On August 4, 2015, Smith signed an acknowledgment that she had received, understood, and would comply with the Company Policies and Procedures that were provided to her in 2015. DSOF ¶ 20; PSOF ¶ 20.

At the start of 2018, Smith's hourly rate of pay was $17.50. DSOF ¶ 22; PSOF ¶ 22. Between January 2018 and February 2020, Smith was given several pay raises and, at the time of her resignation in February 2020, her hourly rate was $22.00 per hour. DSOF ¶ 22; PSOF ¶ 22.

Defendant De Oliveira is the owner and president of Defendant T4K. DSOF ¶ 2; PSOF ¶ 2. [2] The Chief Financial Officer, the ABA Clinical Director, the Chief of Revenue Cycle all report directly to De Oliveira. PSOF ¶ 43; DRSOF ¶ 43. De Oliveira's main job at T4K is marketing and sales; however, she also does some interviewing and hiring at T4K. PSOF ¶ 42; DRSOF ¶ 42. Mary Montero ("Montero") is currently the Chief Financial Officer of T4K. DSOF ¶ 3; PSOF ¶ 3. Prior to being the CFO, Montero served as Director of Finance and Human Resources ("HR") from May 22, 2018 through the summer of 2020. DSOF ¶ 3; PSOF ¶ 3. T4K's Human Resources ("HR") department contains two staff members, Gabriella Paulino ("Paulino") and Claudia Stoutenberg ("Stoutenberg"). DSOF ¶ 4; PSOF ¶ 4.

***2** Prior to the creation of the existing Employee Handbook, T4K's policies and procedures, which were applicable to all employees, were maintained in a booklet comprised of various documents. DSOF ¶ 5; PSOF ¶ 5. The booklet was periodically updated to reflect any changes or updates to T4K's policies and procedures. DSOF ¶ 6; PSOF ¶ 6. For example, such booklet was revised on May 17, 2016 and then revised on July 12, 2017. DSOF ¶ 6; PSOF ¶ 6. Once Montero began working with T4K in 2018, she created the Employee Handbook outlining all of the policies, rules, and guidelines associated with being an employee of T4K. DSOF ¶ 7; PSOF ¶ 7.

T4K's policy regarding employees working more than 40 hours per week is expressly outlined in the Employee Handbook and in the booklets that existed prior to the creation of the existing Employee Handbook. DSOF ¶ 8; PSOF ¶ 8. T4K employees were aware that they were not permitted to work over 40 hours per week and that, if there was ever a time where it was necessary to do so, T4K employees were required to seek supervisor approval in order to do so. DSOF

¶ 9; PSOF ¶ 9. In the event an employee went over the 40 hours in any given week without having received approval from a supervisor, such employee would receive a warning via email. DSOF ¶ 10; PSOF ¶ 10. The direct supervisor of a T4K employee was charged with knowing how many hours their employees worked in any given week. DSOF ¶ 11; PSOF ¶ 11.

T4K maintained a system for employees to record and account for hours worked. DSOF ¶ 12; PSOF ¶ 12.[3] T4K employees were required to manually record their time on weekly time sheets that were submitted to the HR department on a weekly basis. DSOF ¶ 13; PSOF ¶ 13. Before the implementation of the time clock system, Smith submitted written time sheets to T4K for each week, all but one of which were signed by Smith, and nearly all of which were also signed by a supervisor or an office manager. DSOF ¶ 23; PSOF ¶ 23. Of the approximately thirty-one (31) time sheets submitted in evidence, all represent that Smith worked 40 or less total hours per week, apart from one week where she worked 40.5 total hours and one week where she worked 41.35 total hours. DSOF ¶ 24; PSOF ¶ 24; [DE 18-8] at pp. 21, 29.

At the end of 2018, T4K implemented the ADP clock-in and clock-out time clock system and all T4K employees, including Smith, were notified that they were required to record their time through the ADP system. DSOF ¶ 14; PSOF ¶ 14. Once T4K implemented the time clock system, Smith was made aware of the clock in and clock out system and information associated with same via email dated August 21, 2018. DSOF ¶ 25; PSOF ¶ 25. With the ADP time clock system, T4K employees were required to clock in and out at a physical time lock located in each T4K facility. DSOF ¶ 14; PSOF ¶ 14. T4K's policies and procedures for clocking in and clocking out are as follows:

> ***3** Employees should clock in no sooner than 10 minutes before/after the scheduled shift and clock out no later than 10 minutes before/after the scheduled shift. Nonexempt employees are required to clock in/out for lunch breaks in addition to the beginning and end of the day.

DSOF ¶ 15; PSOF ¶ 15.

In 2019, T4K then switched its time clock system from ADP to InfiniTime where employees could clock in on a physical time clock located at each T4K facility or via a mobile app on their cellphone. DSOF ¶ 16; PSOF ¶ 16. At the end of 2019, T4K stopped using InfiniTime and implemented a new time clock system called Paylocity. DSOF ¶ 17; PSOF ¶ 17.

When running its payroll, T4K always made sure to review the time entered by the employees in the time clock system and contact any employees if there was a missing punch or if corrections were necessary. DSOF ¶ 17; PSOF ¶ 17. T4K made sure all employees were contacted and that all corrections were completed before running its payroll. DSOF ¶ 18; PSOF ¶ 18.

Throughout 2019 and 2020, Smith utilized the time clock system in place. DSOF ¶ 26; PSOF ¶ 26. According to the time sheets, Smith typically worked approximately 40 total hours per week, with some weeks going over 40 total hours but less than 42 total hours. DSOF ¶ 27, 28; PSOF ¶ 27, 28; [DE 18-9].

Smith commonly requested time off from work with a form that was required to be completed for supervisor/administrative approval of "Paid Time Off." DSOF ¶ 29; PSOF ¶ 29. The 2018, 2019, and 2020 time sheets reflect that Smith utilized her "Paid Time Off" somewhat regularly. DSOF ¶ 30; PSOF ¶ 30.

In the event of an error in the paycheck, including missing hours or incorrect hours, Smith normally immediately informed the HR department and the necessary changes were made. DSOF ¶ 31; PSOF ¶ 31. Smith notified the HR department directly via email of missing hours or reminded them of hours that had to be accounted for multiple times. DSOF ¶ 31; PSOF ¶ 31. Smith was aware of T4K's policy that employees work no more than 40 hours per week. DSOF ¶ 32; PSOF ¶ 32.

On or about June 29, 2020, Smith filed the above-styled action for damages against Defendants, claiming, as follows: Count I - unpaid overtime wages under to the Fair Labor Standards Act (the "FLSA"); Count II - unpaid minimum wages under the FLSA; Count III - unpaid minimum wages under Florida's Minimum Wage Act ("FMWA"); Count IV - breach of contract; and Count V - unjust enrichment. *See* DSOF ¶ 33; PSOF ¶ 33; [DE 1]. Smith claimed that she worked 50 or 60 hours per week (10-20 hours of overtime

per week) and was not appropriately compensated for same during her employment with T4K from 2018 to 2020. *See* DSOF ¶¶ 34, 35; PSOF ¶¶ 34, 35; [DE 1] at ¶¶ 17, 27, 37. Smith claimed that the hours she worked overtime are not based on hours spent at a T4K facility, but hours she spent "on call" at home. DSOF ¶ 36; PSOF ¶ 36.

II. STANDARD OF REVIEW

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

***4** "A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.' " *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

Defendants move for summary judgment as to each of Counts I-V. Defendants also move for summary judgment as to the issue of De Oliveira's individual employer liability under the FLSA. *See* [DE 18]. The Motion is ripe for review. The Court will analyze each count, in turn, and then address the issue of De Oliveira's individual employer liability under the FLSA.

A. Unpaid Overtime Wages under the FLSA (Count I)

Generally, employers must pay employees overtime for hours worked in excess of forty (40) hours per week. The general provision of the FLSA provides:

> 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 in the production of goods for commerce, for a work week longer than forty hours unless such employee received 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.

29 U.S.C. § 207 (a)(1). The FLSA is remedial in nature, and is to be broadly construed. *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996).

To prevail on an FLSA claim, plaintiffs "must prove that they were suffered or permitted to work without compensation." *Allen v. Bd. of Pub. Educ. for Bibb Cnty.*, 495 F.3d 1306-07, 1314 (11th Cir. 2007). An unpaid-overtime claim has two elements: (1) an employee worked unpaid overtime, and (2) the employer knew or should have known of the overtime work. *Id.* at 1314-15.

Defendants argue that they are entitled to summary judgment on the FLSA overtime wages claim on the grounds that Plaintiff failed to meet her burden of proving that she performed overtime work for which she was not compensated and were not *de minimis*, failed to produce evidence showing that any time she may have spent monitoring her phone and responding briefly to WhatsApp or text messages during non-working hours could have taken more than a few minutes, and failed to demonstrate that Defendants knew or should have

known about her unreported overtime hours. In response to the summary judgment motion, Plaintiff introduces evidence that precludes the Court from determining as a matter of law that the grounds relied on by Defendants apply in this case. Plaintiff introduces record evidence, in the form of her deposition testimony, that she typically worked around 50 hours per week, and that the extra time that she was not compensated for included time spent outside of the office answering phone calls from parents, cancelations from therapists, adjusting the schedule, creating the schedule, readjusting the schedule because something changed, putting together shows for the parents, coming up with activities and designs and creating those things, and putting things together for staff appreciation. *See* [DE 21-1] at pp. 39-43. Plaintiff also introduces record evidence that T4k had knowledge of Plaintiff's overtime work because everything was approved through her supervisor, that her supervisor was well aware that Plaintiff still had to work extra hours outside the office and that Plaintiff was supposed to work those extra hours because the above-listed tasks needed to be done, and that Plaintiff voiced her concerns to her supervisor Victoria that Plaintiff worked overtime hours and was not being paid for those overtime hours. *See* [DE 21-1] at pp. 46-49. Accordingly, the number of hours Plaintiff worked per week and whether T4K knew or should have known of Plaintiff's overtime hours are genuine issues of material fact to be determined by the factfinder, precluding summary judgment on the FLSA overtime wages claim.

B. Unpaid Minimum Wages under the FLSA (Count II) and under the FMWA (Count III)

***5** Defendants contend in their summary judgment motion that the Court should grant summary judgment in favor of Defendants on the unpaid minimum wage claims under the FLSA (Count II) and the FMWA (Count III) because Plaintiff's regular rate of pay exceeded the applicable federal and state statutory minimums at all times and, additionally as to Count III, because Plaintiff failed to comply with the notice requirement of the FMWA. *See* [DE 18].

In Response, Plaintiff admits that "she was paid at least the federal and state minimum wage of hours worked based on the methodology applied to calculations of minimum wage." *See* [DE 22] at p. 3.

As such, the Court shall grant summary judgment in favor of Defendants with respect to Counts II and III for recovery of unpaid minimum wages.

C. Breach of Contract (Count IV)

Defendants argue that Plaintiff's claim for breach of contract fails because Plaintiff cannot pursue equivalent state law claims in addition to FLSA claims, again relying on *Bule v. Garda CL Se., Inc.*, 2014 WL 3501546, at *2 (S.D. Fla. July 14, 2014) ("As a matter of law, [a] plaintiff cannot circumvent the exclusive remedy prescribed by Congress by asserting equivalent state law claims in addition to [a] FLSA claim. Courts dismiss duplicative state law common law claims where they rely on proof of the same facts. As one court stated, a plaintiff may not plead under a theory of unjust enrichment to avoid the statutory framework of the FLSA") (internal citations omitted). The Court generally agrees with Defendant that a "failure to pay an overtime premium—though perhaps illegal under the FLSA—would not constitute a breach of contract," *see Johnson v. Efriedrich Se. Georgia, LLC*, No. 2:19-CV-101, 2020 WL 3520307, at *3 (S.D. Ga. June 29, 2020). However, the Court finds that in this action, Plaintiff is not attempting to state of breach of contract claim for failure to pay her an overtime rate of time-and-a-half for all hours worked over 40 per week in violation of the overtime provisions of the FLSA. Rather, Plaintiff's breach of contract claim is premised on the theory that Plaintiff and Defendants entered into a contract, pursuant to which Plaintiff agreed to provide services to Defendant in exchange for compensation in the amount of $22.00 per hour, and that Defendants breached the contract by failing to pay Plaintiff compensation for all hours that she worked. Accordingly, the breach of contract claim is not impermissibly duplicative of the FLSA overtime wage claim. Further, based upon the Court's review of the parties' arguments and the evidence submitted in the record -- and viewing the evidence in the light most favorable to Plaintiff, the nonmoving party, the Court determines that there are genuine issues of material fact regarding whether Defendant compensated Plaintiff for all hours that she worked for T4K which must be determined by the factfinder. Accordingly, the motion for summary judgment shall be denied as to the breach of contract claim.

D. Unjust Enrichment (Count V)

Defendants argue that Plaintiff cannot pursue equivalent state law claims in addition to FLSA claims, again relying on *Bule v. Garda CL Se., Inc.*, 2014 WL 3501546, at *2 (S.D. Fla. July 14, 2014) ("As a matter of law, [a] plaintiff cannot circumvent the exclusive remedy prescribed by Congress by asserting equivalent state law claims in addition to [a] FLSA claim. Courts dismiss duplicative state law common law claims

where they rely on proof of the same facts. As one court stated, a plaintiff may not plead under a theory of unjust enrichment to avoid the statutory framework of the FLSA") (internal citations omitted). However, upon the Court's review of the relevant case law, and in context of the allegations and theories of liability in this case, the Court finds that Plaintiff may proceed on her unjust enrichment claim in the alternative in the event that her FLSA claim fails. *See Parajon v. Coakley Mech., Inc.*, No. 17-24007-CIV, 2018 WL 1936867, at *4 (S.D. Fla. Apr. 24, 2018) (Scola, J.) (denying motion to dismiss unjust enrichment claim pled in the alternative, while recognizing that, "[u]ltimately, a plaintiff may not recover under both legal and equitable theories"); *Botting v. Goldstein*, No. 15-cv-62113, 2015 WL 10324134, at *3 (S.D. Fla. Dec. 18, 2015) (Bloom, J.) (denying motion to dismiss unjust enrichment claim pled in the alternative).

***6** Defendant also argues that it is entitled to summary judgment on the unjust enrichment claim because, here, it is undisputed that Defendants paid the value of the benefit conferred upon them by Plaintiff. *See W.R. Townsend Contracting, Inc. v. Jensen Civ. Const., Inc.*, 728 So. 2d 297, 303 (Fla. 1st DCA 1999) (reciting that the first element of an unjust enrichment claim under Florida law is "that a benefit was conferred upon the defendant"). However, based upon the Court's review of the parties' arguments and the evidence submitted in the record -- and viewing the evidence in the light most favorable to Plaintiff, the nonmoving party, the Court determines that there are genuine issues of material fact regarding whether Defendant compensated Plaintiff for all hours worked which must be determined by the factfinder, precluding summary judgment.

E. De Oliveira's Individual Employer Liability under the FLSA

Defendants seek summary judgment in De Oliveira's favor as to her individual employer liability under the FLSA. They assert De Oliveira was only sued by Plaintiff because she is the owner of Defendant T4K, and this not a fact that makes her liable.

Under the FLSA, an individual corporate official can be considered an employer. 29 U.S.C. § 203(d) defines an "employer" as "any person acting directly or indirectly in the interest of the employer in relation to an employee." *See* 29 U.S.C. § 203(d). The Eleventh Circuit has routinely interpreted this phrase to mean that an employer must be involved in the day-to-day operations of the business, particularly with respect to the setting of wages in order to be an employer under the Act. *See Patel v. Wargo*, 803 F.2d 632, 637 (11th Cir. 1986) (holding that the individual defendant was not liable under the FLSA due to his role as president of the corporation because he did not "have operational control of significant aspects of [the company's] day-to-day functions, including compensation of employees or other matters in relation to an employee."). "[I]n order to qualify as an employer for this purpose, an officer 'must either be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee.' " *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) (citation omitted). "[W]hile control need not be continuous, it must be both substantial and related to the company's FLSA obligations." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1314 (11th Cir. 2013) (*quoting Alvarez Perez*, 515 F.3d 1150, at 1160). In response to Defendants' summary judgment motion, Plaintiff fails to provide record evidence demonstrating that De Oliveira was involved in the day-to-day operations of T4K, much less that De Oliveira was involved with the setting of employee wages and/or supervising Plaintiff. Defendant De Oliveira is entitled to summary judgment as to her individual employer liability.

IV. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** that Defendants' Motion for Summary Judgment [DE 18] is **GRANTED IN PART AND DENIED IN PART**, as set forth herein. The parties are reminded that their joint pretrial stipulation must be filed on or before August 27, 2021. *See* [DE 14].

DONE AND ORDERED in Chambers in Ft. Lauderdale, Broward County, Florida, this 23rd day of August, 2021.

All Citations

Slip Copy, 2021 WL 4990610

Footnotes

1 All statements in the Background section are derived from uncontested portions of the parties' respective Statements of Material Facts and supporting materials, unless otherwise noted.

2 Defendants' Statement of Undisputed Material Facts [DE 17], Plaintiff's Response to Defendants' Statement of Undisputed Material Facts [DE 21], and Defendants' Response to Plaintiff's Statement of Additional Facts [DE 62] include various citations to portions of the record. Defendants' Defendants' Statement of Undisputed Material Facts [DE 17] is cited as "DSOF", Plaintiff's Response to Defendants' Statement of Undisputed Material Facts [DE 21] is cited as "PSOF", and Defendants' Response to Plaintiff's Statement of Additional Facts [DE 62] is cited as "DRSOF." Any citations herein to the statement of facts, response, and reply thereto should be construed as incorporating those citations to the record.

3 Plaintiff's Response to Defendants' Statement of Undisputed Material Facts [DE 21] as to many of the Defendants' Statement of Undisputed Material Facts [DE 17], including this one, says "disputed," but does not make a counter statement that actually disputes Defendant's asserted fact. *See* [DE 21]. Instead, at most, Plaintiff *adds* additional fact(s), which is insufficient to deem a moving party's asserted material fact disputed for summary judgment purposes. If the party opposing summary judgment wishes to add additional facts, there is a procedure for doing so under Local Rule 56.1(a)(2): "An opponent's Statement of Material Facts shall clearly challenge any purportedly material fact asserted by the movant that the opponent contends is genuinely in dispute. An opponent's Statement of Material Facts also may thereafter assert additional material facts that the opponent contends serve to defeat the motion for summary judgment."