IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

THOMAS HOOTSELLE, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 12AC-CC00518
	)	
vs.	)	
	)	
GEORGE LOMBARDI, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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I. INTRODUCTION

Plaintiffs claim that the Missouri Department of Corrections ("MDOC") must pay corrections officers for the time ("pre- and post- shift time") they regularly spend passing through prison security before and after working at their assigned position within the various State prisons. In order to recover for such unpaid pre- and post- shift time, Plaintiffs have alleged claims of: "Breach of Contract", "Unjust Enrichment", and "Quantum Meruit".

The MDOC disputes these claims. There is no contract to pay correctional officers for pre- and post- shift time, and Plaintiffs admit they have never been promised or told that they would be paid for any such time. Plaintiffs, in fact, have conceded in their depositions both: (1) that the

MDOC never promised to pay them for pre- or post- shift time; and (2) that they never expected to be paid for any pre- or post- shift time.

Under the admitted and uncontroverted facts, Plaintiffs' claims for "Breach of Contract", "Unjust Enrichment", and "Quantum Meruit" fail as a matter of law. Defendants are entitled to summary judgment.

II. PROCECURAL HISTORY

Initially, Plaintiffs alleged five claims against Defendants. Those claims were as follows: "Violation of Missouri's Wage and Hours Laws" (Count I); "Violation of the Fair Labor Standards Act" (Count II); "Breach of Contract" (Count III); "Unjust Enrichment" (Count IV); and "Quantum Meruit" (Count V).

By Orders dated December 19, 2014 and February 11, 2015, the Court dismissed Plaintiffs' "Wage and Hour" claim under Count I and the "Fair Labor Standards Act" claim under Count II. (Orders, 12/19/2014 and 2/11/2015, attached).

Defendants had also moved to dismiss Plaintiffs' "Breach of Contract" claim under Count III because, at that time, the claim under Count III was based upon the collective bargaining agreement ("CBA") between the MDOC and the Missouri Corrections Officers Association ("MOCOA"). As a matter of law, the CBA could be enforced only by MOCOA, not by the Plaintiffs. *See e.g., Brown v. Sterling Aluminum Prods. Corp.*, 365 F.2d 651, 657 (8th Cir.

1966) (holding that individual employees had no standing to sue under collective bargaining agreement). Plaintiffs have acknowledged that they have no standing to enforce the CBA and, therefore, have filed an amended claim for "Breach of Contract" under Count III. Plaintiffs now base their "Breach of Contract" claim upon the MDOC's employee policies and handbooks constitute employment contracts. First Amend. Pet. ¶ 55.

Accordingly, as a consequence of the Court's prior dismissals and Plaintiffs' amendments, the three claims that remain to be decided in this case are as follows:

a. "Breach of Contract" (Count III);

b. "Unjust Enrichment" (Count IV), and

c. "Quantum Meruit" (Count V).

III. SUMMARY OF ARGUMENT

The undisputed evidence shows that the MDOC has not agreed to pay corrections officers for the pre- and post- shift time at issue in this case. Plaintiffs concede that the MDOC has never suggested that it might pay them for such pre- or post- shift time. In fact, whenever a corrections officer has requested to be paid for such time, the MDOC has consistently refused such request. Plaintiffs themselves admit that they at all times have understood that they would ***not*** be paid for the pre- and post- shift time they are claiming in this case.

Under these facts, Plaintiffs cannot possibly prove their claims for "Breach of Contract" (Count III), "Unjust Enrichment" (Count IV), or "Quantum Meruit" (Count V). Defendants are entitled to judgment as a matter of law.

IV. ARGUMENT

A. The Claim "Breach of Contract" Fails as a Matter of Law.

Plaintiffs claim under Count III that they have with the MDOC an employment contract to be paid for certain pre- and post- shift time. As alleged in their First Amended Petition: "[The MDOC] breached this contract by failing to pay for pre- and post- shift activities performed by Plaintiffs and Affected Officers". First Amend. Pet. ¶ 56.

In order to prevail on this claim, Plaintiffs must prove each of the following elements:

1) There exists a contract that obligates the MDOC to pay correctional officers for "pre- and post- shift activities";

2) The correctional officers performed the "pre- and post- shift activities" pursuant to that contract;

3) The MDOC has breached that contract by refusing to pay correctional officers for the time spent on such "pre- and post- shift activities"; and

4) The correctional officers have suffered damages as a result.

Keveney v. Missouri Military Acad., 304 S.W.3d 98, 104 (Mo. 2010) ("A breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff").

As demonstrated below, Plaintiffs cannot prove the first or the second element of their "Breach of Contract" claim. On Count III, therefore, the Court should enter summary judgment.

1. **Plaintiffs Have Conceded That There Is No Employment Contract That Exists Between Them and the MDOC.**

Plaintiffs cannot prove their "Breach of Contract" claim because there is no employment contract. This fact is beyond dispute. Indeed, each of the Plaintiff correctional officers in this case has expressly acknowledged that the MDOC had no employment contract with them. They each have done so by signing and agreeing to the following "Acknowledgement":

> **"[The MDOC] does not recognize verbal or implied contracts for employment".**

(Signature Pages, Exh. H[1]). Each of the Plaintiffs signed this Acknowledgement not just at the time he or she was hired, but has done so repeatedly, throughout his or her employment with the MDOC. For example, the signature pages attached as Exhibit H to

[1] All Exhibits cited are attached to Defendants' Statement of Uncontroverted Facts, filed with this Memorandum of Law.

Defendants' Motion for Summary Judgment show that Plaintiff Thomas Hootselle signed this Acknowledgement *at least three times*: first when he was hired on December 2, 2002; again on July 31, 2007; and yet again on June 15, 2010. Plaintiff Powell Meister likewise signed this Acknowledgement, repeatedly: on January 13, 2003; on August 1, 2007; and on June 8, 2010. Plaintiff Daniel Dicus also repeatedly did so: on August 28, 2002; on August 1, 2007; and on June 21, 2010. (Signature Pages, Exh. H).

Having stated and acknowledged for the past 15 years that they have "no verbal or implied contract for employment", Plaintiffs cannot now be heard to claim otherwise. Plaintiffs have "no verbal or implied contract for employment", and that admitted and acknowledged fact is now beyond dispute. Their claim under Count III for "Breach of Contract", therefore, fails as a matter of law. *Id.*

2. **There is No Employment Contract that Requires the MDOC to Pay for Time Spent on the Alleged "Pre- and Post- Shift Activities".**

Even if – in spite of their express "Acknowledgements" to the contrary – Plaintiffs could somehow prove that the MDOC entered into an employment agreement with them, Plaintiffs would still be unable to show that the terms of any such agreement included a requirement that the MDOC pay Plaintiffs for the pre- and post- shift time that is at issue in this lawsuit. Such a showing is precluded by the fact that each of the Plaintiffs has now testified ***under oath*** that the MDOC, in fact, did ***not*** promise or agree to pay for such pre- and post- shift time.

Indeed, the named Plaintiff in this case, Thomas Hootselle, gave his deposition just three months ago, on September 29, 2016. As Mr. Hootselle testified:

> Q: But your testimony is that you've had to do these pre- and post- shift activities from the time you started [with the MDOC] back in December of 2002: is that right?
>
> A: Correct.
>
> Q: And during that period of time, have you ever been paid for the time it took to perform those activities?
>
> A: No.

(Hootselle Depo. pp. 32:20 – 34:3, Exh. D).

> Q: Has anyone that you spoke with ever suggested that, yeah, you should be paid for this [pre- and post- shift] time?
>
> A: No.

(Hootselle Depo. p. 37:8 - 11, Exh. D).

In response to further questioning from his own lawyer, Mr. Hootselle confirmed that the MDOC has never promised or agreed to pay for pre- or post- shift time:

> Q: Can you put in for extra – But you can't put extra time in for pre- and post- shift activity?
>
> A: No.
>
> Q: And that was taught to you?
>
> A: That was told to us.

Q: By the people you've talked to with Mr. Luepke?

A: Within a – Yes. Within a correctional facility, yes.

Q: Is that – when you say "us", is that everybody, all the CO-Is and CO-IIs, to your knowledge?

A: To my knowledge.

(Hootselle Depo. p. 133:2-15, Exh. D).

Mr. Hootselle thus confirmed under oath both that the MDOC has never promised to pay him or any other correctional officer for the pre- or post- shift time at issue in this case, and that from the beginning of their employment, the MDOC has "told to us" that it will not pay for such "pre- and post- shift activity". *Id.*

In addition, Plaintiff Hootselle himself is now one of the officers who instructs other in-coming C.O.-1s that they will ***not*** be paid for pre- and post-shift time. Mr. Hootselle testified as follows:

Q: Okay. Now, did you testify that you do some training for – for new officers?

A: Yes.

Q: And as part of that training, you tell [these new officers] that they're not going to be compensated for ... the time it takes to do these pre- and post- shift activities?

A: Yes.

Q: I'm sorry. But – [new C.O-1s] are told that [they're] not going to be compensated for the time it takes them to go through pre- and post- shift activities, correct?

A: Once they arrive at the facility, yes.

(Hootselle Depo. pp. 142:18 – 143:14, Exh. D).

This testimony from Mr. Hootselle is confirmed by the deposition testimony of another named Plaintiff, Dan Dicus. Mr. Dicus testified in his September 28, 2016 deposition that the MDOC has never promised or agreed to pay any corrections officers for their alleged "pre- and post- activities":

Q: So – so did anybody from the DOC ever suggest or promise to you that there would be – that you would be paid for any pre- or post- shift activities?

A: No.

(Dicus Depo. p. 91:22 – 92:1, Exh. E).

Q: Is – is it correct then that you've never been told that you would be paid for this [pre- or post- shift time]?

A: No. [The MDOC] did not tell me that I would be paid for that even though I ask, yes.

(Dicus Depo. p. 96:16-22, Exh. E).

Hootselle and Dicus – the named Plaintiffs in this case – thus admit that: (1) the MDOC has never promised or agreed to pay them for pre- and post- shift time; (2) they have never understood or believed that they had a contract to be paid for pre- and post- shift time; and (3) Hootselle himself

teaches newly hired C.O-1s that the MDOC will ***not*** pay them for pre- and post- shift time. There is no contract to pay for pre- and post- shift time.

The MDOC likewise corroborates the fact that it has never promised or agreed to pay corrections officers for the "pre- and post- shift activities" at issue in this case. According to the MDOC's Director, George Lombardi:

> "The MDOC does not consider Pre-Shift Time to be work time for which corrections officers should be paid"; and
>
> "Nor has the MDOC agreed or suggested that it would pay its corrections officers for Pre-Shift Time".

(Lombardi Affidavit ¶s 11 and 12, Exh. A). The MDOC Deputy Directors Dave Dormire and Dwayne Kempker have confirmed that the MDOC does not pay, and has not agreed to pay, for pre- or post- shift time. (Dormire Affidavit ¶s 15, 16, Exh. B; Kempker Affidavit ¶ 25, Exh. C). These statements from Defendants' Affidavits equate with what Plaintiffs have testified in their depositions: the MDOC has ***no*** employment contract with its corrections officers, and the MDOC has ***never*** promised or agreed to pay for the time it regularly takes corrections officer to go through the pre- and post-shift activities that are at issue in this case.

The fact that there is no employment contract for pre- or post- shift time is thus undisputed in this case. That undisputed fact is fatal to Plaintiffs' Breach-of-Contract claim under Count III of its First Amended Petition. The Court should rule accordingly.

3. No Employment Contract Was Created by the MDOC's Employee Handbook or Manual.

To the extent Plaintiffs attempt to base their "Breach of Contract" claim on the MDOC Handbook or Manual (*see* First Amend. Pet. ¶s 55.a. – 55.e), their claim fails as a matter of black letter law. Neither the Handbook nor the Manual constitutes an employment contract, and, in fact, neither of these publications includes any promise or agreement to pay corrections officers for pre- and post- shift time.

a. Under Missouri Law, the MDOC Handbook and Manual Are Not Contracts.

Missouri law holds that an employer's policy manual or handbook does not constitute a contract and cannot serve as the basis for an employee's breach-of-contract claim against his or her employer. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. banc 1988).

The Missouri Supreme Court's decision in *Johnson* is dispositive on this point. In *Johnson*, the Court ruled that an employer's "unilateral act" of publishing an employee handbook did not constitute a contractual offer to employees. *Id.* at 662. The Court accordingly held that "no contract was formed between the plaintiff [employee] and the defendant [employer] on the basis of the employee handbook." *Id.* at 663.

Based upon the decision in *Johnson*, Missouri courts hold that an employee handbook or manual such as Plaintiffs rely upon in this case does

not constitute or create a contract of employment. *See e.g., Reed v. Curators of Univ. of Missouri*, No. WD 79371, 2016 WL 6693611, at *5 (Mo. App. Nov. 15, 2016) (employer's published policies did not create a contract with employee); *Johnson v. Vatterott Educ. Ctrs., Inc.*, 410 S.W.3d 735, 738 (Mo. App. W.D. 2013) ("employee handbooks generally are not considered contracts because they normally lack the traditional prerequisites of a contract"); *Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 659, 664 (Mo. App. E.D. 2011) (employer policy manual did not create employment contract with the plaintiff employee); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 739-40 (Mo. App. W.D. 2011) (employee handbook did not possess the essential contract elements of offer and acceptance); *Doran v. Chand*, 284 S.W.3d 659, 664 (Mo. App. W.D. 2009) ("The unilateral act of an employer in publishing a handbook is not a contractual offer to its employees").

Neither the MDOC's Handbook nor its Manual constitutes a contract. These publications cannot serve as the basis for the Plaintiffs' Breach-of-Contract claim under Count III of their First Amended Petition. *Id.*

b. <u>The Express Terms of MDOC Handbook State that It Is Not an Employment Contract</u>.

In holding that the MDOC Handbook and Manual are not employment contracts, the Court also can rely upon "the parties' actions and words" in

this case and to "what is actually said" in these documents. *Jackson v. Higher Educ. Loan Auth. Of Missouri*, 497 S.W.3d 283, 289 (Mo. App. E.D. 2016) ("The parties' intentions are manifested by reviewing the parties' actions and words"); *see also White v. Pruiett*, 39 S.W.3d 857, 862 (Mo. App. W.D. 2001) ("Whether a contract is made and, if so, what the terms of the contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties").

The MDOC Handbook is attached as Exhibit I to Defendants' Statement of Facts, filed herewith. The Employment Handbook is also cited and incorporated in Plaintiffs' First Amended Petition. First Amend. Pet. ¶ 55.a. Here is "what is actually said" in the Handbook:

> "**The contents of this handbook *do not constitute* an expressed or implied contract of employment.**"

(Signature Pages, Exh. H) (emphasis added).

Each of the named Plaintiffs and each of the Plaintiff class members have acknowledged and signed off on this statement, and they have done so repeatedly. (Signature Pages, Exh. H). Plaintiffs, therefore, cannot possibly show that the Handbook or Manual constitutes the employment contract upon which they hope to base their "Breach of Contract" claim.

Moreover, it is worth noting that nothing in the Handbook or Manual suggests that the MDOC will pay corrections officer for the pre- and post-

shift time at issue in this case. Thus, even if either of these documents were some type of contract, none of their terms would require any of the relief that Plaintiffs seek by way of their Breach-of-Contract claim under Count III.

4. Plaintiffs, By Way of Their "Breach of Contract" Claim Under Count III, May Not Recover Damages for Any Alleged Statutory Violations.

a. Section 105.935 RSMo and 1 C.S.R. 20-5.010

Plaintiffs claim under Count III that they have a contract under which the MDOC promised and agreed to comply both with section "105.935.3" of Missouri Revised Statutes and with the section "1 C.S.R. 20-5.010(1)(E)" of the Code of State Regulations. First Amend. Pet. ¶s 55.d. and 55.e. According to Plaintiffs, the MDOC's refusal to pay for the pre- and post- shift time at issue in this case amounts to a violation of both this State statute and this State regulation and that such violations constitute a "Breach of Contract" for which Plaintiffs are entitled to damages. First Amended Petition. First Amend. Pet., Count III, ¶s 55, 56, 58.

Under Missouri law, a statute or regulatory violation provides no private right of action unless there exists a "clear implication of legislative intent to establish a private cause of action." *Johnson v. Kraft Gen. Foods,* 885 S.W.2d 334, 336 (Mo. banc 1994); *see also, Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466-67, 105 S. Ct. 1441, 1452, 84 L. Ed. 2d 432 (1985) ("absent an adequate

expression of an actual intent of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party").

Nothing in either the Statute (Mo. Rev. Stat. § 105.935.3) or the Regulation (1 C.S.R. 20-5.010(1)(E)) indicates any "clear implication of legislative intent" to establish a private cause of action such as Plaintiffs have alleged in this case. These statutory and regulatory provisions are not contracts, and they are not enforceable as contracts. Such provisions, therefore, may not serve as a basis for the "Breach of Contract" claim that Plaintiffs allege under Count III. *Id.*; *see also Holmes* v. *Kansas City Missouri Bd. of Police Comm'rs ex rel. Its Members*, 364 S.W.3d 615, 623 (Mo. App. W.D. 2012) ("[T]he general rule is that there is no private right of action to enforce a statute or regulation").

b. The Fair Labor Standards Act.

Plaintiffs also base their Breach of Contract claim on the contention that the MDOC promised them that it would "comply with all applicable provisions of the Fair Labor Standards Act". First Amend. Pet. ¶ 55.a. That is not true, and Plaintiffs have no documents or evidence to show otherwise. Rather, as demonstrated above, the evidence in this case shows beyond dispute that Plaintiffs have no employment contract *at all* with the MDOC, much less a contract that contains a private promise to comply with the FLSA. The Court, therefore, should grant summary judgment on the "Breach

of Contract" claim alleged under Count III. *See e.g.* Signature Pages, Exh. H; Hootselle Depo. p. 37:8-11, p. 133:2-15, p. 142:18 – 143:14, Exh. D; Dicus Depo. p. 96:16-22, Exh. E; Lombardi Affidavit ¶s 11 and 12, Exh. A ; Dormire Affidavit ¶s 15, 16, Exh. B; Kempker Affidavit ¶ 25, Exh. C).

To the extent Plaintiffs are attempting to press forward with a claim under the FLSA, that claim has been dismissed for lack of standing. (Order, dated 12/19/2014).

The Court, therefore, should enter Judgment on Count III as a matter of law. *Johnson*, 885 S.W.2d at 337 ("Because there is no clear implication [in the statute] that a private cause of action was intended, the trial court was correct in sustaining the motion to dismiss").

5. **Even If the MDOC Had Promised Plaintiffs That It Would Comply with the FSLA, the Pre- and Post- Shift Activities at Issue in this Case Are Not the "Work" Activities for which Plaintiffs have been Hired to Perform and, Therefore, Are Not Compensable under the FLSA.**

As demonstrated above, the uncontroverted and admitted facts show that Plaintiffs have no employment contract with the MDOC, and there is no contract under which the MDOC promised corrections officers that it would comply with the FSLA. Nevertheless, assuming for the sake of argument that the MDOC had entered into such an employment contract, the most recent case law out of the U.S. Supreme Court shows that the MDOC has

complied. *Integrity Staffing Solutions, Inc. v. Busk, et al.*, 574 U.S. ____, 135 S.Ct. 513, 519, 190 L.Ed.2d 410 (2014). Exh. C).

The Fair Labor Standards Act requires private employers to pay overtime compensation for hours worked in excess of 40 hours each week. In response to a flood of litigation over the issue of what constituted "work" under the FLSA, Congress in 1947 passed the "Portal-to-Portal Act". By way of the Portal-to-Portal Act, Congress amended the FLSA to provide that employers are not required to compensate employees for activities that are "preliminary to or postliminary to" the actual "work" for which the employees have been hired. 29 U.S.C. § 254(a).

In *Integrity Staffing*, the Supreme Court was asked to interpret and apply this provision of the FLSA. In so doing, the Court held that the time that warehouse workers spent to get through a security screening at the workplace – even though such screening took each employee "roughly 25 minutes each day" to pass through – was *not* compensable under the FLSA. *Id.* at 516, 518-19. It was the employer who required employees to pass through such security screenings, but the Supreme Court nevertheless ruled that, because the process of passing through security was not the principal task for which the employee/plaintiffs had been hired – *i.e.* the task of managing and processing inventory – those employee/plaintiffs were not entitled under the FLSA to be paid for the time it took each of them to pass

through security. *Id.*

Similarly in the case at bar, although the Plaintiff corrections officers are required to pass through security and screenings and to walk to their assigned posts within a correctional center, such activities are not the principal task for which they have been hired – *i.e.* the task of managing and processing prison inmates. The MDOC, therefore, like the employer in *Integrity Staffing*, cannot be held liable for the "preliminary or postliminary" time for which the Plaintiff corrections officers are seeking to be paid in this case. *Id.*; 29 U.S.C. § 254(a).

The reasoning and holding in *Integrity Staffing* is consistent with other cases addressing the same question: whether the FLSA requires employers to pay employees for the pre- and post- shift time they spend on security-related activities in the workplace. *See e.g. Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-94 (2nd Cir. 2007) (workers at nuclear power station had no right to be paid for time daily spent on passing through security, waiting to swipe badges, donning safety equipment, and walking to a command post); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (airport construction workers were not entitled to be paid for the time it took them to pass through airport security); *Albrecht v. Wackenhut Corp.*, 379 F. Appdx. 65, 67 (2nd Cir. 2010) (time spent picking up firearms and radios and waiting in line to do so was not compensable); *Colella v. City of New York*,

986 f.Supp.320, 342-44 (S.D.N.Y. 2013) (time spent on checking inventory and safety inspections was not compensable); *see also Mertz v. Wisconsin Dep't of Workforce Dev.*, 365 Wis. 2d 607, 871 N.W.2d 866 (Wis. App. 2015) ("under controlling case law and federal regulations, the time [a corrections officer] spends at check-in is not compensable. ... It follows that [a corrections officer] is also not entitled to compensation for time [the officer] spends walking to his post after check-in").

Thus, even if the MDOC were somehow subject to the FLSA in this case, under the rule set forth in *Integrity Staffing* and other cases applying the FLSA, Plaintiffs' claim under Count III would still fail as a matter of law.

6. The Time It Takes To Go Through the "Pre- and Post- Shift Activities" at Issue in this Case is "*De Minimus*" and, Therefore, is Not Compensable Under the FLSA.

At trial, in order to proceed with a "Breach of Contract" claim based upon the FLSA, Plaintiffs will have to prove that each of the identified pre- and post- shift activities constitutes "work", as contemplated by the FLSA. As demonstrated under Section 5 above, most courts that have considered the question have found that the time it takes to pass through security at the jobsite is not "work" but, rather, is "preliminary" or "postliminary" and, therefore, is not compensable.

Assuming, however, that they can prove that some of the subject activities qualify as "work" activities, Plaintiffs will then have to show that

the time spent on each such activity is more than "*de minimus*". *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 693 (1946).

In *Anderson,* the Supreme Court held that the overtime pay requirements of the Fair Labor Standards Act do not apply to "insubstantial and insignificant periods of time". *Id.* Under the *de minimus* rule, a "few seconds or minutes of work beyond the scheduled working hours may be disregarded". *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 880 (2014) (quoting *Anderson*, 328 U.S. at 692). In applying the *de minimus* rule, courts have generally found that daily periods of up to approximately 10 minutes are *de minimus* and, therefore, not compensable under the FLSA. *See e.g. Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1056 (9th Cir. 2010); *Carter v. Panama Canal Co.*, 314 F.Supp. 386, 392 (D.D.C. 1970) (2 to 15 minutes is *de minimus*).

The uncontroverted evidence in this case shows that most, if not all, of the pre- and post- shift activities for which Plaintiffs seek to be paid in this case is *de minimus,* requiring less than only a few minutes depending upon the particular correctional center and work assignment. For instance, the time it takes to pass through security at the Fulton Reception and Diagnostic Center in Callaway County "varies from between 5 seconds and up to 3 minutes". (Harris Aff. ¶ 8, Exh. F-5). At Maryville Treatment Center, that process "varies from between 10 seconds and up to 1 minute", and the process

of picking up any needed keys or a radio "can take up to an additional 15 to 60 seconds". (Colborn Aff. ¶s 8, 11-12, Exh. F-2). At larger prisons like Moberly Correctional Center in Randolph County, "it takes anywhere from between 2 and 10 minutes for a C.O.-1 or C.O.-2 to pass through security, pick up any needed supplies or information, and go to his or her assigned job post to begin work." (Minor Aff. ¶ 13, Exh. F-8).

Thus, for whatever activities might possibly qualify as "work" under the FLSA, the time spent on those activities is so brief as to be "*de minimus*". As a matter of law, such time is non-compensable. *Id.*

For all of the foregoing reasons and authorities, the Court should enter summary judgment on Count III of Plaintiffs' First Amended Petition.

B. <u>The Claims for "Unjust Enrichment" and "Quantum Meruit" Fail as a Matter of Law</u>.

The theories of unjust enrichment and quantum meruit are separate, but related, equitable remedies in "quasi-contract". *Johnson Grp., Inc. v. Grasso Bros.,* 939 S.W.2d 28, 30 (Mo. App. E.D. 1997). Both theories are pled in lieu of any enforceable employment contract. As Missouri courts have ruled: "a plaintiff may not maintain an action in *quantum meruit* where the plaintiff's relationship with the defendant is governed by an existing contract." *Burrus v. HBE Corp.,* 211 S.W.3d 613, 619 (Mo.App. E.D. 2006); *see also R & R Land Dev., L.L.C. v. Am. Freightways, Inc.,* 389 S.W.3d 234,

243 (Mo.App. S.D. 2012) ("[I]f the plaintiff has entered into an express contract for the very subject matter for which he seeks recovery, unjust enrichment does not apply").

As argued above, Plaintiffs have no employment contract with the MDOC, and, without any employment contract, Plaintiffs cannot succeed on their "Breach of Contract" claim under Count III. For this reason, Plaintiffs have pled as alternative theories of recovery two claims of quasi-contract, *i.e.,* "Unjust Enrichment" (Count IV) and "Quantum Meruit" (Count V).

Both of these claims are based upon the fact that the MDOC has refused to pay its corrections officers for the pre- and post- shift time at issue in this case. First Amend. Pet. pp. 19-21. The two claims essentially allege the same cause of action. A claim for quantum meruit is indeed based upon the principle of unjust enrichment. *Lucent Techs., Inc. v. Mid–West Elecs., Inc.,* 49 S.W.3d 236, 241 (Mo.App. W.D. 2001); *see also Miller v. Horn*, 254 S.W.3d 920, 924 (Mo. App. W.D. 2008) ("Quantum meruit is a quasi-contractual remedy and is generally justified on the theory of unjust enrichment").

1. **Plaintiffs Lack the Evidence Necessary to Prove the Elements of their Claims for "Unjust Enrichment" and "Quantum Meruit".**

A claim for unjust enrichment or quantum meruit arises where the plaintiff has conferred upon the defendant a benefit in circumstances in which retention of the benefit, without paying its reasonable value, would be unjust. *Woods v. Hobson,* 980 S.W.2d 614, 618 (Mo.App. S.D.1998); *see also Graves v. Berkowitz,* 15 S.W.3d 59, 61 (Mo.App. W.D. 2000). "The right to restitution for unjust enrichment presupposes: (1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; (3) that it would be unjust to allow the defendant to retain the benefit." *Petrie v. LeVan,* 799 S.W.2d 632, 635 (Mo.App. W.D.1990). Plaintiffs lack the evidence necessary to prove the first and the third elements.

a. The "Pre- and Post- Shift Activities" at Issue Do Not Enrich the MDOC.

Plaintiffs have no evidence to show that the MDOC is somehow enriched by the "pre- and post- shift" activities at issue in this lawsuit. The benefits that correctional officers provide to the MDOC are that of "supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons". Lombardi Aff. ¶ 2, Exh. A. The MDOC does not hire correctional officers for the purpose of having them pass through a metal

detector and air lock and walk to and from their post. The time spent on such activities by correctional officers is no more beneficial to the MDOC than the time it takes an officer to get out of bed in the morning and drive to work. Corrections officers spend such time on these activities – not to benefit the MDOC – but to benefit themselves, by ensuring that they arrive at their post on time and are able to start the job for which they have been hired.

The MDOC is not enriched by the "pre- and post- shift time" for which the Plaintiff correctional officers seek to be paid in this case, and Plaintiffs have no evidence to show otherwise. For this reason, Plaintiffs' claims for "Unjust Enrichment" and "Quantum Meruit" fail as a matter of law.

b. <u>There is Nothing Unjust in Denying Corrections Officers Payment for the "Pre- and Post- Shift Time" at Issue</u>.

The most significant of the elements for a claim of unjust enrichment is the third element, which is the requirement that the enrichment of the defendant be "unjust". *Associate Engineering Co. v. Webbe,* 795 S.W.2d 606, 608 (Mo.App. E.D.1990). In determining whether it would be unjust for the defendant to retain the alleged benefit, if any, courts consider whether any wrongful conduct by the defendant contributed to the plaintiff's disadvantage. *Graves,* 15 S.W.3d at 61. "'Mere receipt of benefits' is not enough when there is no showing that it would be unjust for defendant to retain the benefit received." *Id.* (quoting *Farmers New World Life Ins. Co.,*

Inc. v. Jolley, 747 S.W.2d 704, 706 (Mo.App. W.D. 1988)). There must be something more than passive acquiescence, such as fault or undue advantage on the part of the defendant, for defendant's retention of the benefit to be unjust. *Graves,* 15 S.W.3d at 64.

It is undisputed in this case that Plaintiffs have at all times known and understood that they would ***not*** be paid for the pre- and post- shift time at issue in this case. Plaintiff Thomas Hootselle testified that, "from the time [he] started" with the MDOC, he has never been paid for the time it took to perform any pre- or post- shift activities. (Hootselle Depo. pp. 32:20 – 34:3, 37:8 – 11, Exh. D). And, in fact, Mr. Hootselle himself has instructed in-coming corrections officers that they will ***not*** be paid for such pre- and post-shift time. (Hootselle Depo. pp. 142:18 – 143:14, Exh. D).

Plaintiff Dan Dicus likewise has acknowledged that he has "***never*** been told" that corrections officers would be paid for the pre- and post- shift time at issue. (Dicus Depo. p. 96:16-22, Exh. E). Mr. Dicus, therefore, has never believed or understood that the MDOC would pay for such time.

It is thus undisputed that for at least the past 15 years corrections officers have daily gone through and performed the "pre- and post- shift activities" at issue in this case all while never expecting or believing they would ever be paid for such activities or for the time spent on such activities. In fact, the testimony of Plaintiffs shows that corrections officers have gone

through and performed such activities know full well that they would not be paid for the time it took to do so. Under these undisputed facts, Plaintiffs cannot possibly show that it would be unjust for the MDOC to continue to do what it at all times has said it would do and what Plaintiffs have at all times expected it to do. *Id.*; *see also Am. Standard Ins. Co. of Wisconsin v. Bracht,* 103 S.W.3d 281, 293 (Mo.App. S.D. 2003) ("There can be no unjust enrichment if the parties receive what they intended to obtain").

2. Plaintiffs' Claims of "Unjust Enrichment" and "Quantum Meruit" Fail Also Because Plaintiffs Have No Evidence to Show What Amount Plaintiffs May Be Entitled To Be Paid.

The theories of "Unjust Enrichment" and "Quantum Meruit" are equitable in nature, and so the remedy is also equitable, *i.e.* the remedy of restitution. In a case of quantum meruit recovery, the party viewed as breaching the implied contract is required to return to the injured party the reasonable value of work and labor furnished. *Bellon Wrecker & Salvage Co. v. Rohlfing,* 81 S.W.3d 703, 711 (Mo.App. E.D. 2002). "The remedy for unjust enrichment is restitution because the law does not allow a party to be compensated for that which it has not lost while another party pays for that which it did not receive." *Title Partners Agency, LLC v. Devisees of Last Will & Testament of M. Sharon Dorsey*, 334 S.W.3d 584, 587–88 (Mo. App. W.D. 2011).

Accordingly, in order to make a submissible claim of "Unjust Enrichment" or "Quantum Meruit", Plaintiffs must present evidence showing the reasonable value of the "pre- and post- shift activities" for which they seek to recover.

What is the "reasonable value" of the "pre- and post- activities" for which Plaintiffs seek to recover in this case? It has been said that reasonable value is "the price usually and customarily paid for such services or like services at the time and in the locality where the services were rendered." *Baker v. Brown's Estate,* 365 Mo. 1159, 294 S.W.2d 22, 27 (1956); *Cavic v. Missouri Research Labs., Inc.,* 416 S.W.2d 6, 9 (Mo.App. E.D. 1967). Plaintiffs have no evidence to show what price is "usually and customarily paid" for passing through a metal detector or an air lock or for walking to a job post. Plaintiffs have no such evidence because such activities have no market value. No one is bidding for the privilege of having people walk through their metal detector or security screening.

Indeed, proof of reasonable value may not be accomplished simply by plaintiff stating the "standard price" which the plaintiff usually charges for a particular job. *McCardie & Akers Constr. Co. v. Bonney,* 647 S.W.2d 193, 195 (Mo.App. E.D. 1983). Rather, Plaintiffs must come forward with testimony or other evidence that the rate or amount claimed is objectively reasonable in

the marketplace. *Hoops v. Gateway Food Prods.,* 824 S.W.2d 451, 453 (Mo.App. E.D. 1991).

Plaintiffs do not have this evidence. They have no evidence to show the reasonable value of the pre- and post- shift time for which they seek to recover in this case. For this reason as well, therefore, their claims for "Unjust Enrichment" and "Quantum Meruit" clearly fail as a matter of law. *Moran v. Hubbartt,* 178 S.W.3d 604, 6010 (Mo.App. W.D. 2005) ("Failure to prove reasonable value is fatal to a quantum meruit claim").

3. Plaintiffs' Claims of "Unjust Enrichment" and "Quantum Meruit" Are Barred Under the Doctrine of Sovereign Immunity.

Plaintiff's common law claims for money damages in their counts for quantum meruit and unjust enrichment are barred by the State's immunity from suit. Although a limited exception to the principle of immunity from suit applies to claims brought under a properly authorized contract, Missouri courts have never applied this exception to quasi-contractual claims for unjust enrichment or quantum meruit. *See, e.g., V.S. DiCarlo Constr. Co., Inc.*, 485 S.W.2d 52, 55 (Mo. banc 1972) ("'The applicable principle is that when a state enters into authorized contractual relations it thereby waives immunity from suit'").

The exception to immunity that permits suit against the State upon an express contractual theory is limited, and has not been expanded to quantum meruit or unjust enrichment claims. Indeed, courts have acknowledged that the contractual claims exception rests upon specific legislative authorization to enter into and pay the contractual price. The limits of this exception were addressed by the Missouri Supreme Court in *State ex rel. State of Missouri, Missouri Dept. of Agriculture,* 687 S.W.2d 178, 181 (Mo. banc 1985), where the plaintiff sought a money judgment, interest, costs and attorney's fees in connection with an underlying bond. The Missouri Supreme Court found the claim barred by the state's sovereign immunity.

> The respondent, desperately seeking authority, cites *V.S. DiCarlo Constr. Co. v. State of Missouri,* 485 S.W.2d 52 (Mo. 1972). There the legislature had specifically authorized a construction contract. This Court held that the legislature necessarily intended for the state to pay the contract price, and impliedly consented to the liquidation of the contractor's claim in a judicial proceeding. There was, then, consent to the suit. IGF argues that the statutory requirements for warehouse and grain dealers' bonds, payable to the State of Missouri for the benefit of persons dealing with the principal, represented a contractual obligation analogous to that of *DiCarlo.* The analogy is inappropriate. In *DiCarlo* the state intended to make payment for services rendered.

Id. (emphasis added). The Court explained that the waiver of sovereign immunity for suits to enforce legislatively authorized contracts rests solely on the General Assembly's demonstrated willingness to pay for the contracted services. But, where "there is no indication whatsoever that the legislature

intended for the state to make any payment whatsoever," the sovereign immunity waiver does not exist. *Id.*

Accordingly, because there is no allegation that plaintiff's common law quasi contract claims arise out of a legislatively authorized contract, and thus that a waiver of sovereign immunity has been authoritatively made, Defendants are immune from Plaintiffs' common law claims for damages. *Id.*

CONCLUSION

Each of Plaintiffs' remaining claims in this case fails as a matter of law. Plaintiffs have no contract to be paid for pre- and post- shift time, and none of the Defendants have been "unjustly enriched" by the pre- and post- shift time for which the Plaintiff class members seek to recover. Under the uncontroverted facts and governing case law, Defendants cannot be held liable under the contract and equitable theories that remain pending against them in this case. The Court should grant summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 28, 2016, Defendants' Motion for Summary Judgment on Plaintiffs' remaining claims, together with the Statement of Uncontested Facts, with attached exhibits, and Memorandum of Law, were filed with the Clerk of the Court using the Missouri Courts Electronic Filing System, and also were served by hand-delivery to:

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/s/ *Henry F. Luepke*