IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

THOMAS HOOTSELLE, JR., et al., Respondents,	)	
v.	)	Case No. WD82229
MISSOURI DEPARTMENT OF CORRECTIONS, Appellant.	)	

MOTION FOR REHEARING AND APPLICATION FOR TRANSFER

Appellant Missouri Department of Corrections ("MDOC") respectfully moves for division rehearing under Supreme Court Rule 84.17(a)(1) and/or transfer under to the Missouri Supreme Court under Supreme Court Rule 83.02.

I. Question of General Interest and Importance

Whether, under the federal Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act, MDOC must pay corrections officers for pre-shift and post-shift activities, such as passing through security, picking up keys and radios, walking to one's post, and waiting in line, solely because officers are expected to remain alert and respond to "unusual" emergencies if they arise during pre-shift and post-shift activities.

II. Authority Contrary to the Division's Opinion

Babcock v. Butler Cty., 806 F.3d 153, 157-58 (3d Cir. 2015)

Henson v. Pulaski Cty. Sheriff Dep't, 6 F.3d 531, 536 (8th Cir. 1993)

Akpeneye v. United States, 138 Fed. Cl. 512, 529 (2018)

Astra USA, Inc. v. Santa Clara County, Cal., 563 U.S. 110 (2011)

MM&S Fin., Inc. v. NASD, Inc., 364 F.3d 908, 912 (8th Cir. 2004)

REASONS FOR GRANTING REHEARING OR TRANSFER

I. The Division Overlooked Material Matters of Fact and Law in Upholding the Circuit Court's Erroneous Summary-Judgment Order on Liability (Addresses Points Relied On I and II).

Rehearing is appropriate because the division opinion overlooked or misinterpreted material matters of fact and law in its decision. Mo. Sup. Ct. R. 84.17(a).

First, the division opinion overlooked material factual matters by overlooking the evidence in the summary-judgment record that contradicts Plaintiffs' characterization of their duty to respond to emergencies during pre-shift and post-shift activities. As the opinion correctly noted, the summary-judgment facts should be viewed in the light most favorable to MDOC. *See* Slip Op. 5; *see also ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Yet the division opinion did not cite the numerous places in the summary-judgment record where MDOC controverted Plaintiffs' claim that all their preliminary and postliminary activities are "integral and indispensable" to principal activities solely because they must respond to occasional emergencies during pre-shift and post-shift time. *See* Slip Op. 5-6. The opinion cited only the excerpts of testimony that Plaintiffs had cited in their briefs, *see id.*, without citing any of the testimony cited by MDOC in its briefs. Yet, as MDOC witnesses attested, "[d]uring no portion of such Pre-Shift Time are C.O.-1s or C.O.-2s required to supervise, guard, or escort any inmates." D448, ¶ 18. Rather, pre-shift and post-shift activities "create for [MDOC] a safe and secure facility where we properly identif[y] staff and we properly equip them." D435, at 11. These activities are "not part and parcel or directly related to offender

supervision or reform or rehabilitation." *Id.* The activities "are pretty far removed from the actual responsibilities of a corrections officer . . . . For instance, we don't employ these corrections officers to pick up keys or carry radios or go through our security gate." *Id.* at 12. "None of this pre-shift time includes any of the tasks for which MDOC has hired and trained its corrections officers." D433, ¶ 9. The pre-shift time "primarily benefits the corrections officers themselves, insofar as this time is expended to help ensure that officers and other staff safely arrive at and are able to perform the job duties for which they have been hired." *Id.* ¶ 10. To be sure, officers must remain alert and are expected to respond to "unusual" emergencies, such as inmate fights or escape attempts. D435, at 7; D397, at 17. During pre-shift and post-shift activities, officers are "on duty" only in the sense that they are "expected to respond" to such unusual emergencies, if they arise. D398, at 11.

Thus, the summary-judgment record confirms that Plaintiffs are "on duty" during pre-shift and post-shift activities *only* to the limited extent that they must respond to "unusual" emergencies if they arise. *See, e.g.*, D397, at 17-18; D435, at 11-12; D448, ¶¶ 16, 18-19; D460, at 1-4. These portions of the summary-judgment record were cited in MDOC's appellate briefs, *see* Brief of Appellant, at 14-16; Reply Brief, at 5-7, but the division opinion did not cite or discuss them. These facts provide critical context for the statements from the summary-judgment record that the opinion did cite. *Glickert v. Loop Trolley Transp. Dev. Dist.*, 542 S.W.3d 383, 390 (Mo. App. E.D. 2017) (summary judgment must be based on "the record as a whole"). "[V]iewing the facts in the light most favorable to DOC," Slip Op. 5, the dominant purpose of the officers' pre-shift activities is to *prepare* for their principal activities of supervising, guarding, and disciplining

offenders—not to directly engage in those principal activities. These are quintessential "preliminary" and "postliminary" activities. 29 U.S.C. § 254(a).

Second, the division opinion also overlooked material matters of law. Mo. Sup. Ct. R. 84.17(a)(1). The opinion failed to cite or discuss the numerous authorities holding that a mere requirement to remain alert and respond to emergencies does not transform non-compensable activities into compensable activities. The opinion did not dispute that activities such as passing through security, picking up keys and radios, waiting in line, and walking to one's post are quintessential "preliminary" activities. Instead, the opinion held that such activities are principal activities solely because the officers are must remain alert and respond to unusual emergencies if they arise. Slip Op. 5-6.

In so holding, the division opinion overlooked numerous cases holding that the mere fact that an employee is required to remain alert and respond to emergencies does not transform non-compensable time into compensable time under the FLSA. MDOC cited eleven such cases in its briefs, and those cases cite many similar cases. *See Babcock v. Butler Cty.*, 806 F.3d 153, 157-58 (3d Cir. 2015) (corrections officers were not entitled to leave the prison without permission during breaks, were required to remain in uniform and close to emergency response equipment, and were on call to respond to emergencies, but their time was not compensable); *Roy v. County of Lexington*, 141 F.3d 533, 546 (4th Cir. 1998) (EMS personnel's time was not compensable though they were required to respond to emergencies and their breaks were interrupted by emergency calls 27 percent of the time); *Barefield v. Village of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996) (time was not compensable though employees "had to remain . . . in radio contact with the building in

case of an emergency"); *Henson v. Pulaski Cty. Sheriff Dep't*, 6 F.3d 531, 536 (8th Cir. 1993) (police officers' meal breaks were not compensable even though officers would "monitor[] . . . their radios for emergency calls to return to service"); *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1134-37 (5th Cir. 1984) (security guards were required to be on-premises 24 hours per day during a strike and available to respond to emergencies, but their off-duty time spent on premises was not compensable); *Akpeneye v. United States*, 138 Fed. Cl. 512, 529 (2018) (Pentagon security officers were required to remain in uniform and on Pentagon property and be available to respond to emergencies, yet their time was not compensable); *Agner v. United States*, 8 Cl. Ct. 635, 638 (1985) (security officers at the Library of Congress were required to respond to "emergency call[s]" during non-compensable time spent on employer premises); *Baylor v. United States*, 198 Ct. Cl. 331, 364 (1972) (employees were "required to eat lunch on the employer's premises and to be on a duty status, subject to emergency call during such period," but their time was not compensable); *Joiner v. Bd. of Trustees of Flavius J. Witham Mem'l Hosp.*, No. 1:13-CV-555-WTL-DKL, 2014 WL 3543481, at *6 (S.D. Ind. July 17, 2014) (hospital maintenance specialists "were expected . . . to respond to emergencies" but their time was not compensable); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1059 (S.D. Iowa 2010) (hospital employees "were required to keep their radios on and respond to [emergency] situations that may arise" but the time was not compensable); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 145 (D. Mass. 2003) (police detective had to "remain on call" during lunch and "terminate his lunch period altogether if an emergency arises," but the time was not compensable) (all cited in Brief of Appellant, at 31-34).

Here, Plaintiffs presented exactly the same argument that was rejected in each of these cases. In each of these cases, employees in security-sensitive positions (such as corrections officers, Pentagon security officers, other security officers, police detectives, and EMS personnel) were required to remain alert and respond to emergencies during otherwise non-compensable time spent on the employer's premises. *See id.* In each case, the employees argued that they should be compensated because they were "on duty and expected to respond" to such emergencies during non-compensable time, as Plaintiffs claim here. In each case, the court concluded that the time was *not* rendered compensable simply because the employees were required to remain alert and respond to emergencies. The opinion erred by overlooking this authority contradicting Plaintiffs' position.

II. The Division Overlooked Material Matters of Law in Upholding Plaintiffs' Attempt to Re-Cast their Barred FLSA Claim as a Breach-of-Contract Claim (Addresses Point Relied On III).

In addition, the Court should grant rehearing because the division overlooked material matters of law in holding that Plaintiffs could pursue their FLSA claim under the guise of a breach-of-contract claim. *See* Slip Op. 8-9. The opinion correctly noted that "FLSA does not create a private right of action for its enforcement." Slip Op. 8; *see also Alden v. Maine*, 527 U.S. 706, 754-55 (1999). The opinion also acknowledged that, on the dispositive question whether pre-shift and post-shift activities are compensable, the contract merely recites that MDOC will comply with FLSA, without imposing any contractual obligation independent of FLSA. *See* Slip Op. 9 (noting that the contract "provide[s] that DOC will comply with FLSA," and that Plaintiffs' claim turns on

"provisions regarding DOC's compliance with FLSA"). Indeed, Plaintiffs conceded in their brief that "the Contract incorporates the FLSA," and that the phrases "time worked" and "physically worked" are to be interpreted according to the FLSA. Resp. Br. 30. Thus, Plaintiffs conceded that they are seeking to enforce *FLSA standards* through their breach-of-contract claim—not other standards arising from an independent contractual duty. *Id.*

Notwithstanding this, the division rejected MDOC's Point III because it held that "the officers' claim is a breach-of-contract claim under state law, and it is not *preempted* by FLSA." Slip Op. 9 (emphasis added) (citing *Bowler v. AlliedBarton Sec. Servs., LLC*, 123 F. Supp. 3d 1152, 1156-57 (E.D. Mo. 2015) (holding that FLSA does not preempt state-law claims)). The division thus misapprehended MDOC's claim. MDOC does not argue that FLSA *preempts* Plaintiffs' breach-of-contract claim. Instead, MDOC argues that—because the operative provision of the contract merely recites that MDOC will comply with FLSA—Plaintiffs' breach-of-contract claim is nothing but a FLSA claim in thin disguise. The *only* language in the contract that addresses the compensability of pre-shift and post-shift activities is the bare recital that MDOC will comply with FLSA.

In its briefs, MDOC cited numerous cases holding that, where the contract merely recites that the employer will comply with a federal statute, a claim for breach of contract constitutes a disguised claim arising under that statute. Thus, if there is no private right of action to enforce the *statutory* obligations, the plaintiff cannot simply manufacture one by re-casting his or her statutory claim as a breach-of-contract claim. *See, e.g., Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 118 (2011) (holding that a constitutional or statutory bar on private suits "would be rendered meaningless" if the bar "could [be]

overcome . . . by suing to enforce the contract" instead); *MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 912 (8th Cir. 2004) ("Any attempt by MM&S to bypass the Exchange Act by asserting a private breach of contract claim for violations of section 78s(g)(1) is fruitless."); *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 313 (Pa. 2012) ("Thus, if Congress failed to authorize a private right of action to enforce a statute, then a party cannot sidestep legislative intent by suing to enforce a contract imposing the same obligations as those set forth in that statute"); *Allen v. Fauver*, 768 A.2d 1055, 1059 (N.J. 2001) (rejecting an attempt by corrections officers to reassert their FLSA claims as breach-of-contract claims because "recharacterization of the claim cannot change the essential nature of the claim"). These cases, moreover, provide a specific application of the long-established general principle: "A promise by a government employee to comply with the law does not transform statutory or regulatory obligations to contractual ones. The violation of the statute or regulation will not be enforceable through a contract remedy." *Pressman v. United States*, 33 Fed. Cl. 438, 444 (1995), *aff'd,* 78 F.3d 604 (Fed. Cir. 1996); *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. 2008). The opinion erred by disregarding these authorities, which were cited in MDOC's briefs.

III. The Division Opinion Erred and Overlooked Material Matters of Fact by Incorrectly Concluding that the Trial Court Struck MDOC's Experts as a Discovery Sanction. (Addresses Point Relied On IV).

The opinion also overlooked and misinterpreted material matters of fact by concluding that the circuit court struck MDOC's experts as a discovery sanction, rather than erroneously excluding their testimony as inadmissible under § 490.065.2, RSMo. *See*

Slip Op. 10-11. Plaintiffs never filed any motion to strike MDOC's experts as a discovery sanction; instead, their motion to strike argued exclusively that the experts should be stricken because they supposedly failed to satisfy § 490.065.2. D271, at 1-18. Neither party briefed or argued on appeal that the experts were stricken as a discovery sanction. *See* Brief of Appellants, 43-58; Respondent's Brief, 33-45; Reply Brief, 17-21. And Plaintiffs' counsel explicitly conceded at oral argument that the circuit court did *not* strike MDOC's experts as a discovery sanction. There is simply no basis in the record to conclude that the circuit court granted the motion to strike as a discovery sanction.

The division opinion stated that "DOC produced a twenty-page affidavit and over 1000 pages of supporting documentation from its rebuttal expert witness" after the close of discovery, implying that MDOC did not make its expert disclosures until after the close of discovery. Slip Op. 11. With respect, this statement misapprehends the course of events in the circuit court. The "twenty-page affidavit" of Dr. Hanvey disclosed after the close of discovery was *not* Dr. Hanvey's expert report, which was disclosed much earlier. It was an affidavit filed in support of *a motion for class de-certification* filed after the close of discovery—which is the appropriate time to file such a motion. Tr. 75. The circuit court, moreover, excluded that later-filed affidavit, in a ruling not challenged on appeal. And though there was an inadvertent late disclosure of certain documents, which MDOC cured as soon as it became aware of the omission, Tr. 98-99, 100, Plaintiffs have never contended that they were prejudiced in any way by that inadvertent late disclosure, and they never accepted MDOC's offer to re-depose Dr. Hanvey regarding those documents. *See id.*

Moreover, any order striking Plaintiffs' experts as a discovery sanction would have been a clear abuse of discretion. Striking a witness's testimony as a discovery sanction is an extreme sanction. As the opinion noted, Dr. Hanvey was retained as a *rebuttal* expert to address the analysis of Plaintiffs' expert, Dr. Rogers. Slip Op. 10. But Dr. Rogers did not disclose his final report until December 19, 2017. D295, at 1. Thus, MDOC's expert disclosure in December 2017 came immediately after MDOC received the final report from Plaintiffs' expert, well before the close of discovery. Tr. 97; *see also* Respondent's Brief, at 33 (conceding that the expert disclosure was made two months before trial was then scheduled). Plaintiffs had plenty of time before the close of discovery to depose both Dr. Hanvey and Ms. Arnold, and in fact they did depose them both. *See* D272 (deposition of Ms. Arnold on Feb. 8, 2018); D273 (deposition of Dr. Hanvey on Feb. 8, 2018). There is no basis to conclude that this disclosure was somehow "untimely," and the division misapprehended material factual matters by so concluding. Slip Op. 10.

In a footnote, the division held that MDOC had failed to demonstrate outcome-determinative prejudice from the circuit court's erroneous ruling. Slip Op. 11 n.10. But Hanvey's offer of proof at trial identified eleven critical flaws in Rogers' trial testimony. These deficiencies include: (1) Rogers' lack of expertise in wage-and-hour calculations, Tr. 1806-09; (2) Rogers' failure to exclude non-compensable activities (like eating pizza and using the weight room) from his calculation, Tr. 1811-14; (3) Rogers' failure to rely on first-hand observation, and his exclusive reliance on self-serving information instead, Tr. 1808-09, 1815; (4) Rogers' failure to account for "tremendous variation" in pre-shift activities across 21 facilities, Tr. 1838-41; (5) Rogers' failure to account for 10-hour and

12-hour shifts, Tr. 1818; (6) Rogers' discounting shifts of less than seven hours, Tr. 1819-20; (7) Rogers' reliance on an eight-hour workday, instead of a 40-hour workweek, in plain violation of FLSA, Tr. 1824-26; (8) Rogers' selective decision to disregard an R-script that he himself had written, which would have reduced his damages calculation by 76 percent, Tr. 1826-28, 1845; (9) Rogers' reliance on a few self-serving affidavits to estimate compensable time outside the security envelope, Tr. 1830-32; (10) Rogers' failure to provide a precise definition of the "security envelope" to class members, Tr. 1835; and (11) Rogers' failure to account for MDOC's understaffing in estimating shifts, Tr. 1836-37.

Dr. Hanvey's critique of Dr. Rogers was devastating. Plaintiffs have offered no substantive defense of Rogers' errors on the vast majority of these points. And while Plaintiffs contended that MDOC adequately challenged Rogers' opinions through cross-examination, they identified only *two* of the eleven deficiencies that were supposedly elicited through cross-examination of other witnesses—*i.e.*, Rogers' lack of expertise in wage-and-hour calculations, and his failure to conduct any empirical analysis. Resp. Br. 41-42. The decision overlooked and misinterpreted these material factual matters.

IV. The Court Should Grant Transfer to the Missouri Supreme Court Because the Case Involves Questions of General Interest and Importance and the Division Opinion Contradicts Many Authorities.

In addition, the Court should grant transfer to the Missouri Supreme Court because the case involves questions of general interest and importance, and the opinion conflicts with many authorities, as discussed herein. *See* Mo. Sup. Ct. R. 83.02. The case is of general interest and importance because it involves one of the largest adverse judgments

against a state agency in the history of Missouri—*i.e.*, a judgment of over $113 million that has increased to over $125 million with post-judgment interest. Moreover, the judgment will have ongoing budgetary impact because it directs MDOC to continue to pay overtime for pre-shift and post-shift activity under the CBA, even though that contract expired in September 2018. *See* D535, at 5. The case also presents one of the first major appellate decision in Missouri courts to interpret FLSA, so it is likely to impact future cases. For all these reasons, the Court should grant transfer to the Missouri Supreme Court.

CONCLUSION

Appellant respectfully requests that this Court grant division rehearing and/or transfer to the Missouri Supreme Court.

Dated: October 22, 2019

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ *D. John Sauer*
D. John Sauer, Mo. Bar 58721
Solicitor General
Julie Marie Blake, Mo. Bar 69643
Deputy Solicitor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8870
John.Sauer@ago.mo.gov
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on October 22, 2019, the foregoing was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record.

/s/ *D. John Sauer*