

**IN THE CIRCUIT COURT  
FOR COLE COUNTY, STATE OF MISSOURI  
19<sup>TH</sup> JUDICIAL CIRCUIT**

THOMAS HOOTSELLE, JR., et al.	)	
	)	
Plaintiffs, Individually and on behalf of	)	
All others similarly situated,	)	
	)	
v.	)	Cause No. 12AC-CC00518
	)	
GEORGE LOMBARDI, in his official	)	Div. 4
Capacity as Director of the Department	)	
Of Corrections, and	)	
MISSOURI DEPARTMENT OF	)	
CORRECTIONS	)	
	)	
Defendants.	)	

**PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF  
UNCONTROVERTED MATERIAL FACTS**

COME NOW, Plaintiffs and provide their response to the Statement of Uncontroverted Material Facts in support of Defendants Motion for Summary Judgment filed on December 28, 2016.

1. Admit. (But it is Plaintiff's understanding from press releases that Defendant Lombardi has recently resigned as director of MDOC).
2. Admit.
3. Admit.
4. Admit.
5. Admit. Further answering, the MDOC employs class member COI's and COII's in very dangerous jobs to guard violent criminals, and not simply to "watch over" them. See additional facts below. Corrections officers' employment is very detailed and regulated, including departmental regulations, regulations at each facility and orders for each different job, or post. See additional facts below.

6. Plaintiffs admit that their job duties include those listed. These job duties are more expansive and more detailed in the many department policies and procedures, facility orders and post orders for each job. See additional facts below. The MDOC also specifically requires COI's and COII's to perform pre and post shift activity. Attached as Exhibit 3 are portions of the deposition of George Lombardi, p. 61 l. 23 – 62 l. 2.

7. Denied. The MDOC pays its COI's and COII's for 40 hours per week and performing these job duties. However, the MDOC does not pay for pre and post shift activity, which are part of their job duties. See additional facts below.

8. Plaintiffs admit that in the MDOC only pays for a job shift beginning and ending when a COI or COII arrives and departs their job post. However, the COI's and COII's have to and have had to arrive at their post 15 minutes before and often leave 15 minutes after. See additional facts below.

9. Admit.

10. Plaintiffs admit that they are paid for the job shifts they work, but deny that they are paid for the full "time they serve on any such shift" as that includes pre and post shift activity, which is required by the MDOC and integral to their job and for which they are not paid. See additional facts below.

11. Denied. The MDOC on numerous times does not pay COI's and COII's when a relieved officer is late for replacing at an assigned job post or when they response to inmate fighting or escape attempts. Officers are dissuaded from requesting over time as well. See additional facts below.

12. Denied. They did with some workers. See additional facts below.

13. Denied. The pre shift activity has been identified by the Defendants in testimony and in answers to Interrogatories as the following:

- a. electronically logging their arrival or departure from the facility by either scanning a Bar Coded or Radio Frequency Identification (RFID), and/or manually signing or initially a paper entry/exit record, and/or submitting to biometric identification such as a finger print or palm scanning instrument, or a combination of these things. It's important to log and identify people coming into the facility. Ex. 3, p. 55 l. 23 et seq. This serves an important security purpose. Ex. 3, p. 56 l. 13 – p. 57 l. 7. This is necessary to operate and maintain a safe and secure facility and it's the standard of practice in the prison industry. Ex. 3, p. 58 l. 9-15. They also have to present their identification card for every CO upon every entry. Attached as Exhibit 4 are portions of the deposition of Dwayne Kempker, p. 42 l. 4-6. They MDOC needs to know who is in the facility at all times. Ex. 4, p. 49, l. 12 – 15.
- b. utility officers may be required to report to the Central Observation Post to receive assignments.
- c. passing through security gates/entry-egress points, including passing through a metal detector in arrival; At all sites all COI's and COII's will go through some manner of search. Ex. 4, p. 40, l. 24, 25. All are searched in pre shift activity. Ex. 4, p. 42, l. 16 - 18.
- d. presenting themselves before a custody supervisor who communicated to the COI or COII's their daily post/duty assignment.
- e. picking up or returning equipment such as keys or radios form electronic key boxes or key/radio issue rooms. Having radios, communicating for relief in shift is integral to their work. Attached as Exhibit 5 are portions of the deposition of David Dormire, p 75, l. 7-14.
- f. walking to and from the entry/egress points to duty post and possibly waiting in a line if one has formed for any of the above activities. COIs and COIIs "have to monitor and pay attention to" inmates walking to and from their posts. Ex. 3, p. 37 l. 15 - 18.) "Corrections officers are responsible to observe offender behavior any time they are present inside the institution ... including walking to/from their bid posts." Attached as Group Exhibit 10 are documents produced by defendant and identified as Deposition exhibits – Ex. 10 – Depo. Ex. 44 – DOC 20811. A COI or COII walking to or form their post has to attend to a fight or a duress activity of inmates, which does occur. Ex. 4, p. 104, l. 4 - 117.
- g. on the case of vehicle patrol officers, inventorying the vehicle patrol's issued weapons, ammunition, and equipment prior to and at the end of each shift.

Ex. 10 - Depo. Ex. 6; Ex. 5, p. 32, l. 12-20.

- h. Passing of pertinent information from one shift to another;

Ex. 10 – Depo. Ex. 33.

- i. Almost all the prisons the correction officers have to go through an airlock. Ex. 4, p. 64, l. 7-21; p. 66, l. 19-22. An airlock is a set of two doors operating so one of the doors is always closed. Id. Only six employees can go through at any one time. Ex. 4, p. 66, l. 23, 24. Post shift activity includes all of the above except searching the officer. Ex. 4, p. 92, l. 19 -24.

In doing any of the above, CO's may have to wait in lines to perform these activities. Ex. 4, p. 72, l. 5 – 73, l. 2. Clog points in the pre and post shift activity process occur. Ex. 4, p. 74, l. 23 – p. 75 l. 20. These vary, but are typically at the airlock and identification process and the search stations and increase when more staff are changing shifts. Id.

The MDOC specifically requires COI's and COII's to perform pre and post shift activity. Ex. 3, p. 61 l. 23 – 62 l. 2. And requires COIs and COIIs to be at work before their shift starts to do these pre shift activities. Ex. 3, p. 57 l. 8 – 11, p. 62 l. 3-6. These are all required because of the nature of the job that the guard is doing. Ex. 3, p. 62 l. 14 – 19; Ex. 4, p. 143, l. 12 -14. They are not allowed to assume their post unless they have done these. Ex. 3, p. 69 l. 2 – 5, and the MDOC cannot get rid of them, Ex. 3, p. 69 l. 18 – 22, because they are necessary, Ex. 3, p. 69 l. 25 – p. 70 l. 4.

These pre and post shift activities are important and essential for guards to perform the job for which the MDOC employs them. Ex. 3, p. 63 l. 15-22, p. 64 l. 8-14. They cannot do their job without doing the pre and post shift activity. Ex. 3, p. 70 l. 8 – 10. These are important for the MDOC and the guards. Ex. 3, p. 75 l. 9 – 16. They create a safe and secure facility where staff is properly identified and equipped and no contraband is introduced (which helps safety and security). Ex. 4, p. 158, l. 9 – 13. They “are necessary to operate and maintain a safe and secure facility.” Ex. 4, p. 158, l. 19, 20.

“These are just activities that are essential to get to where we need you to perform what it is we do employ you for.” Ex. 4, p. 159, l. 16 – 18. “So we like to think they’re essential;” “doing these things are essential to protecting that safety and security.” Ex. 4, p. 160, l. 5 – 11. They are necessary and essential for policies and standards of the MDOC to safely keep and house criminals. Ex. 4, p. 160, l. 12 – 17. “There are bad histories and events that occur because these things aren’t in place .... There are cause for these practices. It’s sound correctional practice to have these activities occur.” Ex. 4, p. 161, l. 3 – 8. The MDOC is making their employees do this because its necessary or essential to running a safe and secure prison.” Ex. 4, p. 161, l. 9 – 16.

There’s a benefit to the MDOC for every pre and post shift activity. Ex. 3, p. 79 l. 4 – 14. The guards are trained to do these pre and post shift activities before and after their post. Ex. 3, p. 64 l. 15 – 19. All Corrections officers going within the secure perimeter in fact do these pre and post shift activities (other than the patrol car items which are limited to those officers). Ex. 4, p. 84, l. 1 -13; 86, l. 10-15; 87 l. 24 – 88 l. 19. And very few do not go within that security perimeter. Ex. 4, p. 86, l. 16 -19. Very close to 100% of COs do pre-shift activity. Ex. 4, p. 89, l. 21 – p. 90 l. 1. When a class member is on the MDOC premises, regardless of whether they are pre or post shift, they have to act as a prison guard. Ex. 4, p. 104, l. 18 -21,

And for some posts at facilities there can be additional pre post directives in excess of those listed above. Ex. 3, p. 66 l. 4 – 20; Ex. 10 - Exhibit 14, 15, 39, 45. These are all things that have to be done on institutional grounds before the start of the work shift, Ex. 4, p. 34 l. 8 – 12, or after the work shift for post shift activity. Ex. 4, p. 93, l. 12 -20. These activities are within the prison, i.e. after the officer goes through the front door and before he leaves through that door at the end of his shift. Ex. 4, p. 96. The class

members must be at their post when their shift begins and cannot depart their post until they are relieved. Ex. 4, p. 96, l. 22 – p. 97 l. 5. Class members are not compensated for their pre and post shift activities. Ex. 4, p. 101, l. 13 -18.

14. Admit. See above and additional facts below.

15. Denied. COIs and COIIs “have to monitor and pay attention to” inmates walking to and from their posts. Ex. 3, p. 37 l. 15 - 18. See additional facts and deposition testimony below of all witnesses who contradict this.

16. Denied. Plaintiffs understand the affiants have so stated, but their own policies define work time as time physically at work and the officers are physically at work for this shift time. See many additional facts below. Further they have paid for this and have settled labor complaints for this. Id.

17. Denied. The MDOC has specifically promised to pay for and compensate class members pursuant to their agreements and the Fair Labor Standards Act which requires payment for pre and post shift activity here. They have promised to pay this through their departmental documents and policies. See additional facts below.

18. Plaintiffs admit that some of their class members are orally told they will not be paid for general pre and post shift activity, at the same time they are told through their policies and documents and other documents that they will be paid for pre shift time. See additional facts below. Specifically certain classes of COI’s and COII’s have been paid for pre shift time and have been ordered through investigations by Federal and State agencies to pay for pre and post shift time. See additional facts below. The Defendants have requested the legislature pay for pre shift time and have done financial analyses to see how to pay for pre shift time. See additional facts below.

19. Denied. See additional facts below.

20. Denied. See additional facts below.
21. Denied. See additional facts below.
22. Denied. This is demonstrably not true. The affidavits attached hereto deny this – see eg. Additional facts 201, 202, 203, 204. Further plaintiff attaches many leave slips for pre and post shift activity produced by defendants. See Exhibit 9. Attached hereto. Note that plaintiffs have not deposed these wardens and most of the wardens whom plaintiffs have deposed are not included here. The wardens listed by defendant and their subordinates discourage leave slips for pre and post activity. Additional fact 206.
23. Admit.
24. Denied. See Motion for Leave to file Third Amended Petition and add MOCO as a party plaintiff to this case.
25. Plaintiffs have insufficient information to admit or deny this paragraph, and therefore denies same.
26. Admit.

**ADDITIONAL FACTS WHICH ARE DISPUTED AND/OR TO WHICH THERE  
IS NO MATERIAL DISPUTE**

Plaintiffs' submit the additional material facts to which there is no material dispute under Rule 74.04.

**DEPOSITION TESTIMONY OF PLAINTIFF TOM HOOTSELLE**

1. There are multiple contracts that govern Hootselle's employment with the MDOC. Attached as Exhibit 1 is the deposition of Thomas Hootselle at page 25, line 9-23.

2. The terms of the contract are contained in the employee handbook. Ex. 1, p. 26, l. 7-9. The handbook referenced states that the MDOC agrees to be bound by the Fair Labor Standards Acts. Ex. 1, p. 129, l. 6-8.
3. There are other documents as well that form the terms of the contract. Ex. 1, p 26, l. 10-13.
4. These include departmental policies, MOCA agreement, and the employee manual. Ex. 1, p. 26.
5. In the agreements, like Exhibit D to his deposition, the MDOC promises to pay Mr. Hootselle for his "time worked." Ex. 1, p. 126, l. 18-21.
6. In the policies Section 8.4, the MDOC discusses paying Hootselle and other corrections officers for time "physically worked." Ex. 1, p. 126, l. 22-25.
7. When he is doing pre and post shift activity, he is physically working pursuant to the policy. Ex. 1, p. 127, l. 3-7. When doing pre and post shift activity, Mr. Hootselle is working. Ex. 1, p. 108, l. 25-p. 109, l. 2. At that time he is "physically working at the facility." Ex. 1, p. 109, l. 3-5.
8. This pre and post shift activity is required in every shift and every time that all these activities are done they are physically working at the location. Ex. 1, p. 127.
9. Post orders are also part of the contracts. Ex. 1, p. 27, l. 2. Post orders sometimes have pre post directives. Ex. 1, p. 127, l. 16-18. For a particular post there may be additional things that you have to do on the post before and after that particular job. Ex. 1, p. 127, l. 19-23.
10. Mr. Hootselle believes the Collective Bargaining Agreement applies in this lawsuit. Ex. 1, p. 147.

11. Mr. Hootselle has put in request for overtime for pre and post shift activity in April of 2011. Ex. 1, p. 77.

12. There are no written policies on pre and post shift activity that he is aware of, but there is a unwritten practice where you cannot put in extra time in for pre and post shift activity. Ex. 1, p. 131-133. He teaches new CO's who come in the differences between practices and policies and what the practices are regarding paying for pre and post shift activity. Ex. 1, p. 133.

13. Mr. Hootselle has listed in Interrogatories pre and post shift activities. These are as follows, Ex. 1, p. 99, l. 9-22; Interrogatory answer 9 and affidavit in support of Class certification:

Pre shift- Plaintiff, arrives at front door, waits in line for metal detector clearance, remove items and duty belt for clearance, waits in line to obtain keys, enter information to obtain keys, scans ID card at control center and waits to be properly identified, waits for air lock, goes through air lock, walks and waits to go through gate, walks to post, goes through gate and security with keys to get into housing unit, walks through housing unit, goes upstairs to conduct shift change, signs out radio, receives information from prior shift, accountability of equipment and relieved prior shift.

Post shift- Plaintiff conduct shift change as Plaintiff would do at the beginning of shift, walk out of housing unit, key open gates and secure, walk through yard, key open gate and secure, wait for airlock, passes through air lock, walk through and scan ID and identity, walks up stairs to return keys, checks for mail.

14. In addition, searches are undertaken of COI's and COII's that were not listed in the above list. Ex. 1, p. 99, l. 25- p. 100, l. 11. Further, on occasion more thorough searches are performed on corrections officers, including taking off boots, thorough searches of belts, removing everything from the belt, pat searches, bags and equipment thoroughly searched. Ex. 1, p. 100, 101.

15. These change over time - at one point at Farmington there was a swipe card system but as of January of 2016 it was not working so all the COI's and COII's had to sign

in and out by hand. Ex. 1, p. 102, l. 1-6. Signing in and out is an additional pre and post shift activity. Ex. 1, p. 102, l. 7-9.

16. In addition, in 2007 they were still checking out radios and keys from communications rooms which took a little longer than it does not because the radios are not kept up there anymore. Ex. 1, p. 102, l. 17-24. The radios were sometime stored with the keys and sometimes not, which contributed to the pre and post shift activity. Ex. 1, p. 103.

17. Over 7 ½ years he was a utility person where he got assigned all over the prison in every spot. In those times he would have to sign different post orders for two to five different times per week-sign them to signify he agreed to them. Ex. 1, p. 128. His pre shift and post shift activities would change with each different posting at the facility. Ex. 1, p. 128, l. 12-23.

18. Mr. Hootselle is now working at both the 30 house and outside in the yard so he has to go to numerous locations for pre and post shift activity, including something called the “9 yard check,” “30 house” and outside in the yard. Ex. 1, p. 105.

19. He is expected to respond to prisoner calls and calls for help from co-workers during that time. Ex. 1, p. 109, l. 6-9. Mr. Hootselle has had to intervene before or after his shift. Ex. 1, p. 109.

20. He was taught as a prison guard to be more cautious during shift change times versus other times. Ex. 1, p. 111, l. 5-8. The prisoners know that shift changes are when the guards are tied up and they take time to pass drugs. Ex. 1, p. 111, l. 9-12. In addition, prisoners use shift change times to attempt suicide, and they have had cases where that has occurred. Ex. 1, p. 111, l. 13, 14.

21. On one occasion coming onto his post during a shift change, Mr. Hootselle found an offender who had hung himself (it was a successful suicide) and he found the body. Ex. 1, p. 111, l. 15-24. Sometimes prisoners use shift change time to get into fights, use drugs, or do other improper activities. Ex. 1, p. 112, l. 1-5.

22. Even though they are not on the clock or at their post they are still on the security and are supposed to response to incidents, be vigilant about contraband, fights, etc. Ex. 1, p. 112, l. 11-17.

23. Anytime he is in the security he is on duty working. Ex. 1, p. 112, l. 18, 19. They are trained that as soon as they walk through the door they are on duty and they act as a prison guard. Ex. 1, p. 112, l. 20- p. 113, l. 5.

24. Officers do not have the option to not act as a prison guard because they are not at their post yet in pre-shift activity. It is not an option to not break up a fight, not stop drugs, not stop a fleeing prisoner. Ex. 1, p. 113, l. 13-20.

25. He had an occasion where he had not made it to his post but there were two offenders fighting - he had to assist with that fight before he ever reported to that housing unit. Ex. 1, p. 109, l. 17-24. One of the prisoners got his ear bitten off in that fight. Id.

26. Mr. Hootselle has to be vigilant when walking to and from his post because he encounters prisoners. Ex. 1, p. 110, l. 2-6. On one occasion, a CO caught a prison escaping while walking into work. Ex. 1, p. 110. The officer's name was Christopher Fleetwood and he had to subdue the prisoner in the parking lot. Ex. 1, p. 110.

27. Another time a cook who was driving a food service truck crashed through the sally port gate and that was during a shift change. Ex. 1, p. 110. These officers had to prevent the prisoners escaping even though they had already made it through the outer perimeter gate. Ex. 1, p. 110, l. 20- p.11, l. 3.

28. Ingress and egress of staff is a security concern. Ex. 1, p. 114. During the entry and egress times staff the supervisors test the security by swapping ID cards. Ex. 1, p. 114, l. 17- p. 115, l. 2. A supervisor asked Mr. Hootselle to swap ID card with him to test the control center to see if they had identified him properly. Id.

29. When testing occurs, CO's get stuck in airlocks until they get through a mock session. Then the lieutenant has to walk all the way over and properly identify everybody before they can leave. Ex. 1, p. 115, l. 3-9.

30. There are many variables on how long pre and post shift activity takes. Like signing the log book waiting in line to sign into the log book (which alone can take 5 minutes or longer), find your name in the sign in sheet when you are leaving, getting buzzed through security doors (there were times when he has to wait 9 minutes for that). Ex. 1, p. 115-117. Mr. Hootselle kept logs of these times which were significant.

31. In his view, Mr. Hootselle estimates it takes 15 to 20 minutes to do pre shift activities on a daily and regular basis. Ex. 1, p. 118, 10-13. Over his 12 years this is his best estimate as to what it takes. Ex. 1, p. 118, l. 16-19. This is based on very specific recordation of this time. Ex. 1, p. 119.

32. Post shift activity takes an average of 10 to 20 minutes - or on average of 15 minutes. Ex. 1, p. 119, l. 6-15.

33. When he started working for the MDOC supervisors wanted officers at work 30 minutes early. Ex. 1, p. 120, l. 23, 24. If Mr. Hootselle came in at 3:15 for a 3:30 shift, he was considered late and the time keeping lieutenant would say something like "nice of you to show up think you can get here a little earlier?" Ex. 1, p. 121, l. 6-8. He has been criticized for only arriving 15 minutes before his shift. Ex. 1, p. 121, l. 10-15.

34. Mr. Hootselle has been instructed to arrive even earlier than 15 minutes before his shift time. Ex. 1, p. 121, l. 21-25. This has happened to other employees as well. Ex. 1, p. 122, l. 12-20. If he did not abide by the request to arrive 15 to 20 or 30 minutes before a shift, he was criticized. Ex. 1, p. 122, l. 21-25.

35. There was a time that he was assigned to housing unit 5 when he was told that because he had to walk so far to his post, that he had to arrive even earlier. Ex. 1, p. 125, 126.

36. All of the pre and post shift activities are indispensable and important- the guards could not get rid of any of them. Ex. 1, p. 124, 125. Further, the MDOC mandates them. Ex. 1, p. 125. Mr. Hootselle is not claiming in this case that those are unnecessary, just that he should get paid for it. Ex. 1, p. 125, l. 14-21.

37. Mr. Hootselle researched the Fair Labor Standards Act and found other things that were questioned in the past that were essential in jobs should be compensable, such as what is being requested in this case. Ex. 1, p. 129, l. 22-25. He complained about this to his supervisors and to the HR Director, Joni Light. Ex. 1, p. 130. In documents like Exhibit 20 some of his co-employees were working 8 ½ hours per day and not being paid for that extra ½ hour pre and post shift activities. Ex. 1, p. 130, 131.

#### **DEPOSITION TESTIMONY OF DAN DICUS**

38. Where Mr. Dicus works for the MDOC in Potosi, he is surrounded by murderers and it used to be the place where executions were performed - his job is very dangerous. Attached as Exhibit 2 is a copy of portions of Mr. Dicus' deposition p. 172, l. 18-24. Mr. Dicus has been bitten, kicked, hit, and attacked by prisoners. Ex. 2 p. 168. Every death row inmate in Missouri is held in Potosi. Ex. 2, p. 210, l. 3-6.

39. He has knives pulled on him as well and immediately before his deposition Defendant Lombardi circulated a memo about an Alabama guard who was killed in a knife attack. Ex. 2 p. 175. He knows of other class members injured by knives. Id.

40. His safety and that of the other class members is vitally important to the mission of the prison, ie. keeping criminals in jail. Ex. 2 p. 173, l. 1-11. Prisoners can kill anybody at any time. Id. They could attack other prisoners, kill visitors, staff, doctors, lawyers, people coming to witness the executions and anyone else that visits the prisoners (and they have lots of visitors). Ex. 2 p. 173, l. 9-22.

41. Mr. Dicus was told by his supervisors to be at his job 15 minutes early. Ex. 2 p. 176, l. 11-25. He is required by the Department of Corrections to be 15 minutes early, was told that regularly and indeed did that. Ex. 2 p. 176.

42. He has been training officers for 20 years and trained other people to do that as well. Ex. 2 p. 177.

43. Corrections officers have been written up for not being there 15 minutes early. p. 178, l. 6-21. Those included a Judy Silly and Jeremiah Kitchell. Ex. 2 p. 178.

44. There were emails from Supervisor Marler stating that CO's had to be at their assigned post at 7:30 am. Ex. 2 p. 181; document exhibit 51. Corrections officers have been criticized and disciplined for not being there 15 minutes early. Ex. 2 p. 181, l. 7-11.

45. Mr. Dicus received a memo from a COII to him on the Department of Corrections Potosi letterhead saying there was a female staff at Fulton who had to show up 15 minutes before her actual shift for a meeting and someone had won their case requesting payment for that. Ex. 2 p. 182, l. 23-6; document exhibit 52.

46. There was a lawsuit in Pacific to stop mandatory line up 15 minutes before shift. Ex. 2 p. 179.

47. Mr. Dicus was concerned about retaliation for complaining about the lack of compensation for pre and post shift activity. If this issue is pushed with a grievance a supervisor would make them walk the perimeter 30 days in a row. This has happened to other employees. Ex. 2 p. 184, l. 17- p. 185, l. 5.

48. This occurred in the facilities of Potosi and Pacific. For a considerable time, Mr. Dicus worked in the control center as a COI at the facility in Potosi, Missouri. Ex. 2 p. 185, l. 12- p. 186, l. 3.

49. While in the control room he personally observed pre and post shift activity and the time it took to do that. It took 15 to 30 minutes for pre shift and 15 to 30 minutes for post shift activity - and sometimes longer. Ex. 2, p. 186, l. 4- p. 187, l. 18.

50. The MDOC requires him to respond to fights regardless of whether he has arrived at his post or not. Ex. 2 p. 170, l. 5-11. Mr. Dicus has had to respond to emergencies before or after his shift while he was working for the MDOC. Ex. 2, p. 168, l. 24- p. 169, l. 2.

51. He was in an assembly room before his shift and had to respond to a fight in 6 house at the Potosi facility. Ex. 2 p. 169, l. 8-17. He had to go help the staff break up a fight. Ex. 2 p. 169, l. 18-20.

52. Pre and post shift activities control offender escapes, control entrance of contraband into the prison and provide material, ie. radios and keys that Dicus needs to do his job. Ex. 2, p. 188, l. 21- p. 189, l. 6. Pre and post shift activities are integral to his job. Ex. 2. P. 189, l. 7-10.

53. No one has ever told him that the pre and post shift activates are not integral and important for his job; further, no pre and post shift activity is unnecessary, and there are no unnecessary hoops with pre and post shift activity the employees have to jump through. Ex. 2, p. 189.

54. Testing during entry and egress time is routinely done by the Department of Corrections to make sure that officers are trained and to make sure that there will be no escaped prisoners or contraband. Ex. 2, p. 197, l. 4-13.

55. In fact, it is the pre and post shift activity time when prisoner escape, prisoner attempts to escape and contrabands smuggling occurs at the prison. Ex. 2, p. 190, l. 13-18.

56. The supervisors conduct tests to ensure security during pre shift and post shift times. Ex. 2, p. 190. For instance, supervisors put rubber guns or knives on class members or switch ID's of class members. These are to test the control center and security at the facility. They know that pre and post shift times very busy and this is the time that they pick to test. Ex. 2, p. 190, 191.

57. Supervisors intentionally put fake contraband to see if officers at the metal detectors or airlocks notice it. Ex. 2, p. 191, l. 2-13. Dicus has personally seen that and they have also done egress tests. Id.

58. In pre and post shift activity MDOC supervisors have tested and left material out on a fence to see if anybody notices - this was a fence where only the successful escape from Potosi occurred. Ex. 2.

59. Supervisors performed an egress test with Mr. Dicus - they put stuff in different areas in his area of control to see if he is checking his area and if he misses it he fails that test (it's not good). Ex. 2, p. 191, l. 21-25.

60. In pre and post shift activity supervisors will put a rubber gun into someone bag and see if security catches it. Ex. 2, p. 192, l. 23-25.

61. Supervisors switch ID's on CO's to see if they are correctly identified by security personnel coming in or out of the prison. Ex. 2, p. 193, l. 1-13. COI's and COII's go

in and out through the sally port (automobile) as well and they put test in pre and post shift activity then. Ex. 2, p. 194.

62. Changing up ID's during entry and exit times occurs at Potosi, Farmington and other facilities. Ex. 2, p. 198.

63. MDOC supervisors once hid a female officer in a laundry cart and had the laundry manager push the cart out to see if security would catch them at entry and exit time. Ex. 2, p. 194. The CO let the person out and the lady came out and crawled out of the laundry cart. This test failed. Ex. 2, p. 194, 195.

64. There was an entry and exit test involved in an area of fence where a person escaped from Potosi. Supervisors had Dicus take a shirt and put it in the area of fence where the only escape that has ever occurred in Potosi occurred. Ex. 2, p. 195.

65. The gentleman who escaped is named Kooksey, and his bosses suggested he put a shirt where Kooksey got out. Ex. 2, p. 195, 196, l. 1-9. That guard passed that test. Id. l. 10-14.

66. At one entry or egress test MDOC supervisors took a glock handgun apart and put pieces of glock in CO's possessions to see if the security guards would catch it. Ex. 2, p. 196, l. 19- p. 197, l. 3.

67. Mr. Dicus is clear that pre and post shift activity each take 15-30 minutes per day. Ex. 2, p. 200. Mr. Dicus has been at Potosi 27 years. He has had numerous conversations with the lieutenant and captains to discuss the 15-30 minute time frame and in fact at least 15 minutes before your shift is required. Ex. 2, p. 200, l. 9-16.

68. The MDOC requires all the pre and post shift activity referenced herein. Ex. 2 p. 170, l. 12-17.

69. In addition to the other pre shift activities listed in response to defendant's fact 13 above, Mr. Dicus noted that he has to pick up pepper spray and handcuffs pre shift and deposit them post shift out of his locker. Ex. 2 p. 170, l. 19- p. 171, l. 5. Radios are essential, they are picked up before and after shift and are an essential to everybody's safety, not just the corrections officers. Ex. 2 p. 171.

70. Guards have to be buzzed through doors on video and sometimes that is delayed. Ex. 2, p. 187. Shift changes take longer, buzzing COs through doors can be delayed by control centers, and buzzing through other doors in the prison can cause delay. Ex. 2, p. 187.

71. There are 50 to 60 people coming in at shift change, and out. With nurses, maintenance and other people that is about 80 people each main shift change. Ex. 2 p. 188.

72. Another pre shift activity is meeting in the assembly room to get post orders. Ex. 2, p. 200, l. 21-24.

73. Mr. Dicus has additional pre and post shift activity. He has to go down to the kitchen that he is supervises to make sure all of his people are there, he has to make sure that everything is set up in the kitchen in the morning, he has to make inventories of all of the items in the kitchen (to make sure knives and other things are not stolen by the prisoners). Ex. 2, p. 202. All of this has to be done pre and post shift. Ex. 2, p. 203, l. 1-9.

74. Sometimes items are missed and items get left and prisoners can take knives and forks to make them into weapons. Ex. 2, p. 203. CO's get disciplined if their counts of these types of materials are off. Ex. 2, p. 203, l. 12-15.

75. Part of the pre and post shift activity making sure all keys and handcuffs, black box restraints and mace and counting them are part of pre and post shift activity. Ex.

2, p. 204. Large big mace canisters are used to break up fights because there are a lot of gangs in the prison. Ex. 2, p. 204, l. 9-14.

76. Mr. Dicus had to break up a fight while he was not getting paid before and after his shift. Ex. 2, p. 204, l. 15-17. Attending to breaking up fights pre and post shift times is necessary. Even if you are driving into the facility you are expected to attend to an escaping prisoner. Mr. Dicus had that occur and had a guy escape out of a blue building. Ex. 2, p. 205.

77. Prisoners counts have to be communicated pre shift and post shift while CO's are not on the clock, and those counts are very important so that the facility knows that a prisoner has not escaped. Ex. 2, p. 205, l. 24- p. 206, l. 4.

78. One time his count was off and they used that to detect an escape-this was detected pre shift. Ex. 2, p. 206, l. 5-9.

79. Prisoners know that shift changes are the time to take action, whether it is escaping, an attack among prisoners, using or distributing contraband. Ex. 2, p. 206, 207. Prisoners know that at shift change times the outgoing shift has to do counts and other things and has to communicate that to the incoming shift, so prisoner know Cos are not watching as close. Ex. 2, p. 207, l. 20-25.

80. The MDOC trains its guards to be careful during pre and post shift activity and shift change time because they know those are the times that prisoner often take action. Ex. 2, p. 206, 207, 208.

81. Escape attempts often also happen during shift changes, and prisoners use fights divert attention from the escaping prisoner. Ex. 2, p. 209.

82. One time after his shift had ended, Mr. Dicus noticed and discovered a tunnel that was being dug for prisoners to try to escapes out of Potosi. Ex. 2, p. 210, l. 12 et

seq. This occurred after his leave time and he stayed late to discover the tunnel and stop this escape attempt. Ex. 2, p. 216, l. 17-23.

83. This was an example of things that happen at shift change. He noticed prisoner moving a heavier bag of trash that he opened and found to be filled with clay. He went into the housing unit, 6 house at Potosi, to "go find a tunnel." Ex. 2, p. 212, l. 4. He found other bags of trash with dirt in them and went cell by cell. In cell 12 to 13 he found a fake floor, pulled it up, and underneath it was a tunnel, knives and marijuana. Ex. 2, p 215.

84. Another time during his shift change he caught a death row inmate in a laundry cart outside of a tunnel trying to escape. Ex. 2, p. 217. This occurred during a shift change, and this death row inmate was put back and later executed. Ex. 2, p. 218, 219.

85. At the MDOC facility in Cameron, Missouri, a guard helped a prisoner escape in post shift activity. Ex. 2, p. 221.

86. Mr. Dicus is aware that comp time was being given out for pre and post shift activity in the prison at Bowling Green. Ex. 2, p. 221, l. 20- p. 222, l. 12.

87. Mr. Dicus testified that Section B 1 B of the MDOC policy on comp time requires COI's and COII's to be compensated for "time worked." Ex. 2, p. 223, l. 3-7. He considers pre and post shift activity work time and all the other CO's in this class are working during pre and post shift activity. Ex. 2, p. 223, l. 8-11.

88. The MDOC is violating that contractual provision when they will not pay for time worked. Ex. 2, p. 223, l. 12-16. If CO's work 40 hours a week and they pre and post shift activity time is in excess of that 40 hours, the CO's are supposed to be paid time and a half according to the MDOC policies. Ex. 2, p. 223, l. 17-23.

89. There are other documents as well. The MDOC policies state that COIs and COIIs will incur over time for hours physically worked in excess of 40 hours. Ex. 2, p. 224, l. 7-10. All COI's and COII's work 40 hour work weeks. Ex. 2, p. 228, l. 2-7.

90. At no time are CO's asking for time they are at home or driving to work. Ex. 2, p. 224, l. 14-16.

91. Mr. Dicus is asking to be compensated for time he is physically working pursuant to that specific agreement for pre and post shift activity in this case. Ex. 2, p. 224, l. 17-21. CO's can get paid for overtime even if they don't get pre approval. Ex. 2, p. 225, l. 3-5.

92. Mr. Dicus relied on the agreement, Defendants Exhibit K in the deposition, that all code 2 employees will be credited straight time or time and one half according to State and Federal guidelines respectively. Ex. 2, p. 225, l. 22- p. 226, l. 1. That document says that if it is under 40 hours it is straight time and if it's over 40 hours it is time and a half. Ex. 2, 226, l. 7-9. Defendants Exhibit A on page 3 promised that and contains that provision. Ex. 2, p. 226, l. 10-12.

93. Mr. Dicus' handbook with the MDOC references the Missouri statute guaranteeing the payment provisions on which Plaintiffs rely. Ex. 2, p. 226, l. 21-25.

94. The MDOC handbook says that the MDOC will comply with the Fair Labor Standards Act. Ex. 2, p. 227, l. 2-4.

95. At Potosi leave slips for minimal amount of time are not accepted and are rejected. Ex. 2, p. 228.

96. The practice at Potosi is different than what the policies say about compensating for overtime and leave slips are rejected. Ex. 2, p. 229. If a leave slip is less than a half hour it will not be approved. Ex. 2, p. 229.

97. Mr. Dicus is asking in this case that the Department of Corrections pay for pre and post shift activity. Ex. 2, p. 230, l. 19-24.

98. There is a process in Potosi where captains and lieutenants (not COI's and COII's) get 45 minutes of overtime a day-30 minutes before shift and 15 minutes after shift to do their pre and post shift activity. Ex. 2, p. 240, l. 11- p. 241, l. 10; document Exhibit 54.

99. So, the MDOC pays the COIII's and above for pre and post shift activity but not the COI's and COII's. If the captains and lieutenants get paid 45 minutes a day overtime or pre and post shift activity, they should pay the COI's and COII's as well. Ex. 2, p. 241, l. 11-17.

100. Mr. Dicus answer to interrogatory No, 9 and Affidavit in Support of Class Certification also state his pre and post shift activity:

Pre Shift: Plaintiff waits in line to Hand Scan at staff entrance, goes to locker room to secure personal items not allowed inside institution but needed outside of institution & change into uniform, reports to Assembly Room, picks up Keys & Radio at Key Issue, waits to enter airlock, enters air lock, waits to exit airlock, exits airlock, shows ID at Control Center, waits to enter stair well until all ID's were checked, enters stairwell, waits in stairwell until stairwell full, exits stairwell and waits at the Zone Gate, enters zone and walks to assigned post, waits to enter airlock at post, waits to enter Control Room at post, checks to make sure all equipment is accounted for and receives pass along information from prior shift. In addition to the above, within the past few years the hand scan has been replaced with a Metal Detector and X-ray, which adds one extra step. The Staff entrance was moved to the Main Entrance and shared with public, which delays entering and exiting. An ID scan has been added to the Main entrance and Control Center, two more additional steps, although showing a picture ID is still required. An addition scan has been added to open a door, one more additional step, after passing the Metal Detector and X-Ray. Keys are no longer issued. An electronic key box requires an entry code, thumb scan and key entry selection, two additional steps. This box is operated by a computer, which is delayed at times. Each individual is in line for their assigned keys. Some radios have been permanently issued to some individuals, other are assigned a radio from the Control Center which delays entry. If there are VIC's or unassigned staff in the Control Air Lock signing out radios, etc. The stairwell door will not be opened until that person is cleared. All staff has been issued a name tag that is to be hung on the appropriate assigned post board when entering the air lock, one more step. This tag is to be taken off when exiting the airlock, one more step, which most times the next shift is blocking the tag, the tag

has been moved or taken off. Staff mail slots are located in the airlock and must be checked each day coming and going. Housing unit Control Room staff are required to pick up mail bags during the work week. The above is required in reverse upon leaving the institution, with the exception of pushing a button to exit the scan door. Since January 2016, electronic entry/exit systems have not functioned. So, we have to sign in and sign out.

Post Shift: Plaintiff signs into the office, scans ID card, waits in security line, waits in line at the air lock, goes through air lock, waits in line at security, passes through security, waits in line at metal detector, passes through metal detector, scans into gate, signs out, checks to see where location will be for the next day, and sometimes there are extra duties, out counts, transfers, or other special duties.

### **TESTIMONY OF LOMARDI, KEMPKER AND DORMIRE<sup>1</sup>**

101. The MDOC agrees to comply with the Fair Labor Standards Act. Attached as Exhibit 3 are portions of the deposition of George Lombardi, p. 79 l. 20 – 24.

102. The MDOC's policy on paying COI's and COII's compensatory time and paying overtime seeks to comply with the FLSA. Ex. 3, p. 32 l. 22 – p. 33 l. 4.

103. The MDOC agrees to pay COI and COII's for "time worked," and compensatory time. Ex. 3, p. 79 l. 25 – p. 80 l. 4.

104. The MDOC compensatory time policy is D2/8.4. "The purpose... is to insure departmental compliance of the Fair Labor Standards Act rules and State merit guidelines." Ex. 5, p. 23, l. 21-25, p. 24, l. 16-22.

105. This compensatory time procedure applies to all employees in the department. Ex. 5, p. 24, l. 23-25. In fact, the entire authority for this policy is from the Fair Labor Standards Act. Ex. 5, p. 25, l. 3-9.

---

<sup>1</sup> The ED Court of Appeals stated in *Calvert v. Plenge*, 351 S.W.3d 851 (Mo.App. 2011): Rule 74.04 allows parties to submit affidavits to supplement the record when making or opposing a motion for summary judgment. Rule 74.04(c)(2). A party may submit contradictory testimony where it is clear that the party was originally mistaken or misspoke. *Powel v. Chaminade College of Preparatory, Inc.*, 197 S.W.3d 576 (Mo. banc 2006) (Wolff, C.J., concurring). However, a party may not avoid summary judgment by giving inconsistent testimony and then claiming the inconsistencies demonstrate a genuine issue of material fact. ITT, 854 S.W.2d at 388.

106. Under the MDOC compensatory time standards, D2-8.4, all COI and COII's have to be paid compensatory time for the time they physically work at the facility. Ex. 5, p. 69, l. 17- p. 70, l. 11. If they physically work over 40 hours in a standard week they get paid overtime. Ex. 5, p. 70, l. 12-15.

107. The CO's get paid straight time for hours physically worked under 40 hours and over time for hours physically worked over 40 hours, at time and a half for overtime. Ex. 5, p. 70, l. 16-24. If their time physically worked is under 40 hours per week they get regular rate but if it is over they get time and a half. Ex. 5, p. 72.

108. All of the pre and post shift activity is done where COI's and COII's "physically work." Ex. 3, p. 79 l. 25 – p. 89 l. 15 – p. 90 l. 19.

109. Lombardi agrees that the MDOC policy that he issued says that the MDOC has to pay compensatory time for any time that the person "physically works." Ex. 3, p. 79 l. 25 – p. 91 l. 1 - 13.

110. Compensatory time is up to 40 hours a week and then employees can either later take off for comp time earned or get paid for that. Ex. 3, p. 80 l. 5 – 9.

111. There's a State of Missouri statute that requires only CO's to be paid compensatory time at the end of the year. Ex. 3, p. 80 l. 14 – 20. If its over 40 hours a week, they have to be paid time and a half. Ex. 3, p. 80 l. 10 – 13. If an employee works overtime they get paid over time at time and a half. Ex. 5, p. 22, l. 25- p. 23, l. 9.

112. There is nothing in writing stating that the MDOC will not compensate employees for pre and post shift activity. Ex. 3, p. 13, l. 5-8; Ex. 5, p. 28, l. 20-p. 29, l. 1.

113. The MDOC has to pay employees for work related activities. Ex. 3, p. 85 l. 15 - 19.

114. The MDOC agrees that it's unfair to require people to do work related activities and not pay them. Ex. 3, p. 80 l. 20 – 22.

115. Lombardi's only reason for not paying for pre and post shift activity is that is how they have always done it. Ex. 3, p. 37 l. 19-23, and on advice from lawyers. Ex. 3, p. 38 l. 2 – 17.

116. Kemper testified the reason no compensation for pre and post shift activities is "cost," or "just the tremendous cost that would be associated with that." Ex. 4, p. 136, l. 18 – p. 137, l. 2.

117. Mr. Dormire has discussed with other managers that to pay for pre and post shift activity would be too costly. Ex. 5, p. 76, l. 7-13.

118. If the MDOC doesn't pay for pre and post shift activity they save money. Ex. 3, p. 82 l. 19 – 23.

119. The idea that pre and post shift activity is prefatory so it does not need to be paid is not part of the compensatory or overtime written policies and is not written down anywhere. Ex. 3, p. 92 l. 3 - 8.

120. In 2004 the MDOC Executive Staff decided to show "the cost of changing the work schedule of custody staff, cooks and maintenance staff to eight hours and 15 minutes to cover pre and post shift activity." Ex. 10 - Depo Exhibit 18 - DOC 21073.

121. In Exhibit 18, the MDOC discussed whether the MDOC compensatory time procedure requires them to pay for pre and post shift activity. Ex. 5, p. 37, l. 9-12. In that document, the action item decided upon was to figure out how much it would cost to pay everybody all COI's and COII's for an extra 15 minutes a shift. Ex. 5, p. 37, l. 13-17.

122. The MDOC determined it would cost the MDOC \$7,524,478 per year to increase from 8 to 8:15 per shift. Id.

123. The pre shift activity has been identified by the Defendants in testimony and in answers to Interrogatories as the following:

- a. electronically logging their arrival or departure from the facility by either scanning a Bar Coded or Radio Frequency Identification (RFID), and/or manually signing or initially a paper entry/exit record, and/or submitting to biometric identification such as a finger print or palm scanning instrument, or a combination of these things. It's important to log and identify people coming into the facility. Ex. 3, p. 55 l. 23 et seq. This serves an important security purpose. Ex. 3, p. 56 l. 13 – p. 57 l. 7. This is necessary to operate and maintain a safe and secure facility and it's the standard of practice in the prison industry. Ex. 3, p. 58 l. 9-15. They also have to present their identification card for every CO upon every entry. Ex. 4, p. 42 l. 4-6. They MDOC needs to know who is in the facility at all times. Ex. 4, p. 49, l. 12 – 15.
- b. utility officers may be required to report to the Central Observation Post to receive assignments.
- c. passing through security gates/entry-egress points, including passing through a metal detector in arrival; At all sites all COI's and COII's will go through some manner of search. Ex. 4, p. 40, l. 24, 25. All are searched in pre shift activity. Ex. 4, p. 42, l. 16 - 18.
- d. presenting themselves before a custody supervisor who communicated to the COI or COII's their daily post/duty assignment.
- e. picking up or returning equipment such as keys or radios form electronic key boxes or key/radio issue rooms. Having radios, communicating for relief in shift is integral to their work. Ex. 5, p 75, l. 7-14.
- f. walking to and from the entry/egress points to duty post and possibly waiting in a line if one has formed for any of the above activities. COIs and COIIs "have to monitor and pay attention to" inmates walking to and from their posts. Ex. 3, p. 37 l. 15 - 18.) "Corrections officers are responsible to observe offender behavior any time they are present inside the institution ... including walking to/from their bid posts." Ex. 10 - Depo Ex. 44 – DOC 20811. A COI or COII walking to or form their post has to attend to a fight or a duress activity of inmates, which does occur. Ex. 4, p. 104, l. 4 -117.
- g. in the case of vehicle patrol officers, inventorying the vehicle patrol's issued weapons, ammunition, and equipment prior to and at the end of each shift.

Ex. 10 - Depo. Ex. 6; Ex. 5, p. 32, l. 12-20.

- h. Passing of pertinent information from one shift to another;

Ex. 10 - Depo. Ex. 33.

- i. Almost all the prisons the correction officers have to go through an airlock. Ex. 4, p. 64, l. 7-21; p. 66, l. 19-22. An airlock is a set of two doors operating so one of the doors is always closed. Id. Only six employees can go through

at any one time. Ex. 4, p. 66, l. 23, 24. Post shift activity includes all of the above except searching the officer. Ex. 4, p. 92, l. 19 -24.

124. Post shift activity includes all of the above except searching the officer. Ex. 4, p. 92, l. 19 -24. David Dormire, the Director of Adult Instructions for the MDOC agrees that the items described in Defendants Interrogatory answers and in Plaintiffs depositions are pre and post shift activity that the MDOC requires class members to do. Attached as Exhibit 5 is the deposition of David Dormire, page 18, 20, 21. No one disagrees with this.

125. In doing any of the above, CO's may have to wait in lines to perform these activities. Ex. 4, p. 72, l. 5 – 73, l. 2. This can add time to their pre or post shift activity. Ex. 5, p 89, l. 4-11.

126. Clog points in the pre and post shift activity process occur. Ex. 4, p. 74, l. 23 – p. 75 l. 20; Ex. 5, p. 89. These vary, but are typically at the airlock and identification process and the search stations and increase when more staff are changing shifts. Id.

127. The MDOC specifically requires COI's and COII's to perform pre and post shift activity. Ex. 3, p. 61 l. 23 – 62 l. 2.

128. The MDOC requires COIs and COIIs to be at work before their shift starts to do these pre shift activities. Ex. 3, p. 57 l. 8 – 11, p. 62 l. 3-6.

129. Pre and post shift activity are required because of the nature of the job that the guard is doing. Ex. 3, p. 62 l. 14 – 19; Ex. 4, p. 143, l. 12 -14.

130. COs are not allowed to assume their post unless they have done these. Ex. 3, p. 69 l. 2 – 5, and the MDOC cannot get rid of them, Ex. 3, p. 69 l. 18 – 22, because they are necessary. Ex. 3, p. 69 l. 25 – p. 70 l. 4.

131. Pre and post shift activities are important and essential for guards to perform the job for which the MDOC employs them. Ex. 3, p. 63 l. 15-22, p. 64 l. 8-14.

They cannot do their job without doing the pre and post shift activity. Ex. 3, p. 70 l. 8 – 10.

These are important for the MDOC and the guards. Ex. 3, p. 75 l. 9 – 16; Ex. 5, p. 31, l. 6-19.

132. Pre and post shift activity create a safe and secure facility where staff is properly identified and equipped and no contraband is introduced (which helps safety and security). Ex. 4, p. 158, l. 9 – 13.

133. Pre and Post shift activities “are necessary to operate and maintain a safe and secure facility.” Ex. 4, p. 158, l. 19, 20; Ex. 5, p. 32, l. 21-p. 33, l. 5.

134. These Pre and Post shift activities are important to the end of housing dangerous criminals. Ex. 5, p. 31, l. 20- p. 32, l. 2.

135. “These are just activities that are essential to get to where we need you to perform what it is we do employ you for.” Ex. 4, p. 159, l. 16 – 18.

136. “So we like to think they’re essential; ” “doing these things are essential to protecting that safety and security.” Ex. 4, p. 160, l. 5 – 11.

137. Pre and post shift activity are integral to keeping the criminals safely locked behind bars. Ex. 5, p. 75, l. 1-6. They are necessary and essential for policies and standards of the MDOC to safely keep and house criminals. Ex. 4, p. 160, l. 12 – 17.

138. “There are bad histories and events that occur because these things aren’t in place .... There are cause for these practices. It’s sound correctional practice to have these activities occur.” Ex. 4, p. 161, l. 3 – 8.

139. The MDOC is making their employees do this because its necessary or essential to running a safe and secure prison.” Ex. 4, p. 161, l. 9 – 16.

140. The MDOC wants to make sure COI’s and COII’s are safe and can safely do their job. Ex. 5, p. 33, l. 21-23.

141. There's a benefit to the MDOC for every pre and post shift activity. Ex. 3, p. 79 l. 4 – 14; Ex. 5, p 75, l. 16-19. The guards are trained to do these pre and post shift activities before and after their post. Ex. 3, p. 64 l. 15 – 19.

142. All Corrections officers going within the secure perimeter in fact do these pre and post shift activities (other than the patrol car items which are limited to those officers). Ex. 4, p. 84, l. 1 -13; 86, l. 10-15; 87 l. 24 – 88 l. 19. And very few do not go within that security perimeter. Ex. 4, p. 86, l. 16 -19.

143. The pre shift activity such as communicating from shift to shift, insuring all counts, inventory, and equipment are accounted for, logging in and out of the facility or using picture id's or biometric scanners, method of security of going in and out of the prison, passing through security gates, passing through metal detectors, searching the guards, get keys and radios, walking to their post, and traversing through check points and inmates are all important to the operations of the MDOC. Ex. 5, p. 84-87.

144. Very close to 100% of COs do pre-shift activity. Ex. 4, p. 89, l. 21 – p. 90 l. 1.

145. When a class member is on the MDOC premises, regardless of whether they are pre or post shift, they have to act as a prison guard. Ex. 4, p. 104, l. 18 -21. Anytime you go through the airlock you are on duty. Ex. 5, p. 52, l 16-21.

146. Incidents have occurred between CO's and corrections officers where offenders confronted staff, before their shift or leaving their post after their shift. Ex. 5, p 52, l. 1-11.

147. While going to their shift or coming back, all corrections officers are on duty and are expected to respond. Ex. 5, p. 52, l. 12-15.

148. Mr. Dormire has had occurrences where someone has had to stop an altercation, combat, contraband or address something in the prison before or after their shift. Ex. 5, p. 80, l. 8-12.

149. And for some posts at facilities there can be additional pre post directives in excess of those listed above. Ex. 3, p. 66 l. 4 – 20; Ex. 10 - Depo Exhibit 14, 15, 39, 45. These are all things that have to be done on institutional grounds before the start of the work shift, Ex. 4, p. 34 l. 8 – 12, or after the work shift for post shift activity. Ex. 4, p. 93, l. 12 -20.

150. Pre and post shift activities all occur within the prison, i.e. after the officer goes through the front door and before he leaves through that door at the end of his shift. Ex. 4, p. 96.

151. The class members must be at their post when their shift begins and cannot depart their post until they are relieved. Ex. 4, p. 96, l. 22 – p. 97 l. 5.

152. Class members are not compensated for their pre and post shift activities. Ex. 4, p. 101, l. 13 -18.

153. Mr. Lombardi changed the practice for Chris Marks and other maintenance workers at the Northeast Correctional Center (Bowling Green) in 2001. Ex. 3, p. 45, l. 19-23.

154. Mr. Lombardi authored a memo deciding that those employees “start time is the time that you document each morning on the sign in log. You should also be provided sufficient time to process through the control center to enter and to depart the facility by the end of your shift.” Ex. 3, p. 17, l. 15-22; Ex. 10 - Depo exhibit 48.

155. The start time was to begin at 7:30 and Lombardi directed the NECC Superintendent “to provide sufficient time to allow the staff to process through the control

center.” Ex. 10 - Depo exhibit 47 – NECC 10036. “Further, I should allow extra time for the Maintenance employees to pick up keys and radios and travel to their work locations.” Id.

156. Mr. Lombardi and the Supervisor decided “not to require your start time to begin at your actual work location,” their work shift would begin when they sign in (and not when they got to their post), and to “allow ten to fifteen minutes for affected staff to walk across the yard to their assigned work areas.” Ex. 3, p. 18, l. 17 – p. 19. L. 10; Ex. 10 - Depo exhibit 47 - NECC 10053. Mr. Lombardi signed this document (Ex. 10 - Depo exhibit 48 and NECC 10056). Ex. 3, p. 20, l. 6-10.

157. This was in response to a State of Missouri Department of Labor Wage and Hour Division investigation because they: “received information alleging [MDOC] employees have not been paid for all hours worked. It has been alleged the employees are required to pick up their keys and sign in at a designated sire and then travel from that point to their work station, but are not compensated for the time it takes for this principle activity.” Ex. 3, p. 20 l. 23- p. 21, l. 13; Ex. 10 - Depo exhibit 47 - NECC 10013.

158. The MDOC admitted that employees “engage in some work related activities before they report to their work station.” Ex. 10 - Depo exhibit 47 - NECC 10013.

159. There was a prior lawsuit in 1985 that related to employees being required to be present and stand for inspection 15, 20 minutes prior to the beginning of their compensable work shift. Ex. 4, p. 151, l. 13 – p. 152 l. 9. That case was settled and corrections officers were granted about 800 hours of comp time. Id.

160. There have been complaints from officers about not paying for pre and post shift time for 30 years. Ex. 4, p. 153, l. 20 -25.

161. In December 2014, the Department of Labor investigated Bowling Green and found overtime violations for pre and post shift activity in excess of half a million dollars. Ex. 3, p. 22 – 23, Ex. 10 - Depo Exhibit 41 - DOC 21077.

162. In that investigation, The United States Department of Labor found that employees reported that they had to scan at one location, go through an airlock security system, pick up radio, keys, mail, walk to another location, actually sign in where they received their assigned post. This took 15 minutes. Ex. 3, p. 25, l. 6-19. Lombardi has no reason to doubt this. Ex. 3, p. 24, l. 20-22, and doesn't recall that they looked into it. Ex. 3, p. 25, l. 23 – 27 l. 10.

163. The DOC refused to pay this because of the pending instant case. Ex. 3, p. 27, l. 1-6, Ex. 10 - Depo Exhibit 41 - DOC 21083.

164. This investigation was under the Fair Labor Standards Act. Ex. 3, p. 32 l. 18-21. The federal government found the COI's and COII's to lose 2.5 hours a week and that this should be paid as overtime at time and a half. Ex. 3, p. 28, l. 11 – 29, l. 5; Ex. 10 - Depo Exhibit 41 - DOC 21082.

165. In working for the MDOC there are real security concerns for inmates. Exhibit 4, Deposition of person most knowledgeable about matters for MDOC, Dwayne Kempker, p. 30, l. 18-19. Being a CO for the MDOC is a highly regulated job because they are guarding prisoners who want to get out. Ex. 4, p. 32 l. 3 – 10.

166. The MDOC endeavors to have only one entry and egress point for each prison. Ex. 4, p. 48, l. 19-22.

167. Although it is not written anywhere, the MDOC takes the position in its interrogatory answers that class members "are compensated for any pre or post shift activity ... which by circumstance were atypically not brief and/or were laborious and

which the employee prepared and submitted an application for compensatory overtime.”

Interrogatory answer 1(d); Ex. 4; Ex. 4, p. 139, l. 19 – p. 140 l. 18, p. 150 l. 1 - 4.

168. There have been grievances of what is normal versus unusual pre and post shift activity. Ex. 4, p. 105, l. 11 -22. “Most” class members arrive early and leave late to do pre and post activities. Interrogatory answer 1(c)(i).

169. Lombardi has no idea that new guards are advised they will not be paid for pre and post shift activity. Ex. 3, p. 74 l. 10 – 17

170. No MDOC supervisors have knowledge of the time periods for pre and post shift activity and no one has timed it. Ex. 4, p. 108, 109. And there are no documents about the time spent on pre and post shift time. Ex. 4, p. 120, l. 18-24. But Kempker has seen longer than 15 minute pre and post shift activity – and up to 30 minutes. Id. Mr. Dormire has heard of it taking 15 minutes to get in and out of a facility. Ex. 5, p. 38, l. 14-17.

171. Although Mr. Lombardi did an affidavit, it should be noted that he has made no inquiry about whether he has any documents about the claims in this case, the practice at issue, changing the practice, or the cost of the practice. Ex. 3, p. 42, l. 22 – p. 43 l. 8. Further, Mr. Lombardi did not participate in any decision to not compensate for pre and post shift activity. Ex. 3, p. 12, l. 20-25. In fact, Lombardi testified, “there was no policy about it one way or the other as far as I can recall.” Ex. 3, p. 13, l. 19-21.

172. Similarly, Mr. Dormire did not do any work to answer discovery, did not review any document, and had no knowledge about the internal MDOC documents about calculating overtime. Ex. 5, p. 39, l. 5-7; p. 12, l. 22-13; p. 16, l. 21, 22.

173. Mr. Dormire has had no involvement in setting out policies or procedures about whether to pay employees to pay employees for pre and post shift activity. Ex. 5, p. 26, l. 1-4.

174. Mr. Dormire had no knowledge about the Department of Labor investigations and faculty to where he was a Deputy Warden and Warden finding violations of the Fair Labor Standards Act for lack of payment for pre and post shift activities. Ex. 5, p. 39, l. 19- p. 40, l. 6. Nor was he aware of the 2014 Department of Labor Investigation attached hereto in Group Exhibit 10 (Depo. Exhibit 40). Ex. 5, p. 41, l. 2-6.

175. Mr. Dormire is not aware of any time where the Department of Corrections has ever gone in or interviewed people or timed people about the time taken for pre and post shift activity. Ex. 5, p. 44, l. 19-24. He knows of no evidence or facts of the Department of Labor that have come in to assess the MDOC. Ex. 5, p. 45, l. 3-7.

176. In fact, he is not aware of any Department of Labor investigations. Ex. 5, p.

177. No management person at the MDOC ever had any knowledge about any of the Department of Labor investigations. See eg Dormire p. 44-48.

178. Mr. Dormire is not studied or looked at hours like the Department of Labor has. Ex. 5, p. 50, l. 1-5. He is not aware that the Department of Corrections studying pre and post shift time, timing it, looking at logs, or anything like that. Ex. 5, p. 50, l 8-13. No one at the MDOC knew of these investigations or any of these matters. *See generally* depositions of all Wardens and directors and officers of the MDOC.

179. Employees lunch certainly takes less than a half hour and may take less than 20 minutes. Ex. 5, p. 67, l 4-7.

#### **AFFIDAVIT FROM MOCOA**

180. Attached as Exhibit 6 is an affidavit from the Missouri Corrections Officer's Association ("MOCOA"). Gary Gross is the Executive Director of MOCOA. MOCOA is a

labor union as defined under the FLSA and Missouri Law. MOCOIA represents all class members in this lawsuit. Ex. 6, ¶ 1-2.

181. The Missouri Department of Corrections (“MDOC”) requires class members to perform a number of work-related tasks at work before their shift begins and after it ends. For all these activities, the class members are physically working at the prison. Ex. 6, ¶ 3

182. This pre and post shift activity is required in every shift and every time that each of these activities is performed, the corrections officers are physically working at the location. Ex. 6, ¶ 4.

183. Class members are expected to respond to prisoner calls and calls for help from co-workers during the time they are performing pre and post shift activities. Class members have had to intervene both before and after their shifts. Ex. 6, ¶ 5.

184. Even though class members are not on the clock or at their post during pre and post shift activity, they are still in the security envelope and are supposed to respond to incidents, as well as be vigilant about contraband, fights and any other improper activity. Anytime class members are in the prison, they are on duty and working. Ex. 6, ¶ 6.

185. Class members have been trained that as soon as they are on the grounds of the prison, they are on duty and have to act as a prison guard. Ex. 6, ¶ 7.

186. Corrections officers do not have the option to not act as a prison guard because they are not at their post yet in pre or post shift activity. It is not an option to not break up a fight, not stop drugs or not stop a fleeing prisoner. Ex. 6, ¶ 8.

187. Ingress and egress of staff is a security concern. During the entry and egress times, MDOC supervisors test the security by swapping ID cards. Ex. 6, ¶ 9.

188. Class members have been taught as a prison guard to be more cautious during shift change times versus other times. The prisoners know that shift changes are when the guards are tied up and they take time to pass drugs, get in fights, or attempt suicide. Ex. 6, ¶ 10.

189. Class members have been instructed to arrive at work before their shift to perform pre shift activity. Ex. 6, ¶ 11.

190. All of the pre and post shift activities performed by class members are indispensable and important. Neither the guards nor the MDOC could eliminate any of them without jeopardizing the safety of corrections officers. Ex. 6, ¶ 12.

191. It is the position of MOCOIA, that MDOC corrections officers are legally entitled to be paid for pre shift and post shift time. Ex. 6, ¶ 13.

192. MOCOIA has complained and/or grieved about its members not being paid for pre and post shift activity. Sometimes we have been successful on behalf of its members and sometimes not. Ex. 6, ¶ 14.

193. MDOC supervisors encourage corrections officers not to put in leave slips for pre and post shift activity. Class members do not want to be criticized by their supervisors for requesting payment for pre and post shift activity. Ex. 6, ¶ 15.

194. Numerous Department of Corrections supervisors say corrections officers should be paid for pre and post shift activity. Ex. 6, ¶ 16.

195. When the Collective Bargaining Agreement between MOCOIA and MDOC was negotiated, payment of overtime pursuant to FLSA standards was an important point of negotiation and a basis of the bargain. Ex. 6, ¶ 17.

196. MOCOIA has consistently held the position that pre- and post-shift work by corrections officers such as performing security post handoffs with other officers, passing

through security envelopes, and reviewing critical correspondence, is compensable work pursuant to the FLSA and should be compensated pursuant to the Collective Bargaining Agreement. MOCO has demonstrated this continuously-held position by complaining on behalf of our members that they are entitled to this pay. Ex. 6, ¶ 18.

**AFFIDAVITS OF SUPERVISORS & OTHER CLASS MEMBERS**

197. Affidavits of other class members set forth their pre and post shift activity and the time taken to do same. See Affidavits attached as Exhibits 3 through 11 to Plaintiff's Motion for Class Certification filed on October 6, 2014 which are adopted and incorporated herein by this reference.

198. Numerous class members have provided affidavits attached hereto as Group Exhibit 7. They are all current or former COIs or COIIs of defendant MDOC. Ex. 7 affidavits at ¶ 2.

199. Numerous MDOC supervisors have provided affidavits attached hereto as Group Exhibit 8. They are all current or former MDOC supervisors and oversee the work of class members. Ex. 8 affidavits at ¶ 2.

200. The MDOC requires its corrections officers to perform a number of work-related tasks at work before their shift begins. For all these activities they are physically working at the facility. Ex. 7 affidavits at ¶ 3; Ex. 8 affidavits at ¶ 3.

201. Numerous class members have filled out and submitted leave slips to be paid for pre and post shift activity – but many of these were not paid by MDOC. Ex. 7 affidavits at ¶ 4. And some were. See attached as Group Exhibit 9 portions of class member leave slips filed with the MDOC.

202. Numerous MDOC supervisors have received leave slips from class members requesting pay for pre and post shift activities, but were forced to deny class members said pay. Ex. 8 affidavits at ¶ 4-5, 7.

203. Numerous class members tried to get paid for the time they spend at the facility before arriving at their posts and after they leave their posts. Ex. 7 affidavits at ¶ 5.

204. Numerous class members have complained (grieved) about not being paid for pre and post shift activity. Ex. 7 affidavits at ¶ 6.

205. Numerous MDOC supervisors have received complaints about not being paid for pre and post shift activities. Ex. 8 affidavits at ¶ 6.

206. Numerous class members have had supervisors and/or coworkers encourage them not to put in leave slips for pre and post shift activity. Many of them do not want to get into trouble or get their coworkers in trouble with their supervisors. Ex. 7 affidavits at ¶ 7.

207. Numerous class members have heard MDOC supervisors say corrections officers should be paid for pre and post shift activity. Ex. 7 affidavits at ¶ 8.

208. Numerous MDOC supervisors have stated that they believe corrections officers should be paid for pre and post shift activities. Ex. 8 affidavits at ¶ 8.

209. Numerous class members believe they should be paid for their pre and post shift work at the prison. Ex. 7 affidavits at ¶ 9.

210. Numerous class members were presented with an Employee Handbook before or immediately upon commencing work with the MDOC. Ex. 7 affidavits at ¶ 10.

211. Numerous class members have stated that when they accepted the MDOC's offer of work, they did so on the basis of a representation that they would be compensated pursuant to the FLSA and Missouri State Law overtime pay rules. They have further stated

that if they believed they would not be compensated pursuant to these standards, they would not have commenced work. Ex. 7 affidavits at ¶ 11.

212. MDOC informed class members that the Employee Handbook included a statement of employee rights. Ex. 7 affidavits at ¶ 12.

213. MDOC informed class members that MDOC compensation practices were compliant with federal and state law. Ex. 7 affidavits at ¶ 13.

214. The pre and post shift activity at issue, is required for every shift, and every time that all these activities are done employees are physically working at the location. Ex. 7 affidavits at ¶ 14.

215. Class members are expected to respond to prisoner calls and calls for help from co-workers any time they are at the prison. Numerous class members have had to intervene before or after their shift. Ex. 7 affidavits at ¶ 15.

216. Even when class members are not on the clock or at their post during pre and post shift activity, they are still in the security envelope and are supposed to response to incidents, be vigilant about contraband, fights, etc. Anytime a corrections officer is in the prison they are on duty working. Ex. 7 affidavits at ¶ 16.

217. Class members were trained that as soon as they walk through the door, they are on duty and have to act as a prison guard. Ex. 7 affidavits at ¶ 17.

218. Corrections officers do not have the option to not act as a prison guard because they are not at their post yet in pre-shift activity. It is not an option to not break up a fight, not stop drugs, or not stop a fleeing prisoner. Ex. 7 affidavits at ¶ 18.

219. Ingress and egress of staff is a security concern. During the entry and egress times staff the supervisors test the security by swapping ID cards. Ex. 7 affidavits at ¶ 19.

220. Class members were taught that they must be more cautious during shift change times versus other times. The prisoners know that shift changes are when the guards are tied up and they take time to pass drugs, get in fights, or attempt suicide. Ex. 7 affidavits at ¶ 20.

221. Numerous class members have been instructed to arrive at work before their shift to do pre shift activity. Ex. 7 affidavits at ¶ 21.

222. All of the pre and post shift activities are indispensable and important- the guards and the DOC could not get rid of any of them. Ex. 7 affidavits at ¶ 22.

223. Plaintiffs have attached hereto as Exhibit 9 many Applications for Leave/Overtime (called leave slips) prepared and submitted by class members for pre and post shift activity. MDOC approved some and denied some of these applications.

Respectfully submitted,

**BURGER LAW FIRM, LLC**



Gary K. Burger, Jr. #43478  
500 N. Broadway, Suite 1350  
St. Louis, MO 63102  
(314) 542-2222  
(314) 542-2229 Facsimile  
[gary@burgerlaw.com](mailto:gary@burgerlaw.com)

Michael J. Flannery #52714  
**CUNEO GILBERT & LADUCA, LLP**  
7733 Forsyth Boulevard  
Suite 1675  
St. Louis, MO 63105  
(314) 226-1015  
(202) 789-1813 Facsimile  
[mflannery@cuneolaw.com](mailto:mflannery@cuneolaw.com)

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that the foregoing was emailed on this 13<sup>th</sup> day of February 2017, to:

Bud Luepke  
Assistant Attorney General  
Post Office Box 899  
Jefferson City, MO 65102

A handwritten signature in black ink, appearing to be 'BL', is written over a solid horizontal line. The signature is stylized and cursive.