

**IN THE CIRCUIT COURT
FOR COLE COUNTY, STATE OF MISSOURI
19TH JUDICIAL CIRCUIT**

THOMAS HOOTSELLE, JR., et al., and)
MISSOURI CORRECTIONS OFFICERS)
ASSOCIATION,)
)
Plaintiffs, Individually and on)
behalf of all others similarly situated,)
)
v.)
)
MISSOURI DEPARTMENT OF)
CORRECTIONS,)
)
Defendant.)

Cause No. 12AC-CC00518

Div. 4

**STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT**

Class Plaintiffs and Class Representatives, Thomas Hootselle, Daniel Dicus, and Oliver Huff (“Class Plaintiffs”), and Plaintiff, Missouri Corrections Officers Association (“MOCOA”) (collectively “Plaintiffs”), hereby submit the following Statement of Uncontroverted Material Facts, pursuant to Rule 74.04(c), in support of their Motion for Summary Judgment and Memorandum in Support:

I. The Parties and Their Agents and Employees

1. MOCOA is the exclusive bargaining representative for Class Plaintiffs. Ex. 6, Labor Agreement § 1.1 (Trial Ex. 69). Gary Gross has served as MOCOA’s Executive Director for over 17 years. Ex. 8, Gross Dep. at 6:21-25.

2. Defendant Missouri Department of Corrections is an agency of the State of Missouri. It can sue and be sued pursuant to R.S.Mo. § 217.020 (hereinafter “Defendant” or “DOC”). Second Am. Pet. □ 16.

3. George Lombardi was Defendant's Director from 2009 to 2016. Ex. 3, Lombardi Dep. at 5:15-20. He was replaced by Anne Precythe on February 9, 2017. Second Am. Pet. ¶ 1 n.1.

4. David Dormire is the Direct of Defendant's adult institutions and has reported directly to the MDOC Director for approximately 6 years. Ex. 5, Dormire Dep. at 5:15-21.

5. Cyndi Prudden is the Deputy Division Director of Defendant's Division of Adult Institutions. EX. 9, Prudden Dep. at 6:9-12.

6. Dwayne Kempker is a Deputy Division Director of Defendant's Division of Adult Supervision. Ex. 4, Kempker Dep. at 9:22-24. He has held that position since approximately 2007. Ex. 4, Kempker Dep. at 9:25-10:2.

7. Troy Steele, Jennifer Sachse, and Thomas Villmer, are wardens at the Easter Region Diagnostic Correctional Center, Missouri Eastern Correctional Center, and Farmington Correctional Center, respectively. Ex. 10, Steele Dep. at 6:7-14; Ex. 11, Sachse Dep. at 7:24-8:1; Ex. 12, Villmer Dep. at 7:21-8:1.

II. The Existence and Terms of the Contract

A. The Labor Agreement and Procedure Manual control the parties' relationship.

8. MOCOA and Defendant entered into a collective bargaining agreement (the "Labor Agreement") on February 1, 2007 and renewed on October 1, 2014. Ex. 6, 2014 Labor Agreement (Trial Ex. 69); Ex. 7, 2007 Labor Agreement (Trial Ex. 70).

9. The terms and definitions set forth in MDOC Procedural Manual (the “Procedure Manual”) are incorporated into the Labor Agreement. Ex. 13 is the two versions of D2-8.4 (Trial Ex. 19 and 42).

10. MOCOA and Defendant were the parties to prior litigation interpreting the Labor Agreement and the Procedure Manual. Ex. 14, Response Brief of MDOC; *Missouri Corr. Officers Ass’n v. Missouri Dep’t of Corr.* (“MDOC I”), 409 S.W.3d 499, 499 (Mo. App. W.D. 2013).

11. The Labor Agreement was entered into for the benefit of Class Plaintiffs. See Ex. 6, 7, Labor Agreement § 1.2 (stating that it applies to “all eligible employees of [MDOC] who are employed only in the classifications of Corrections Officer I and Corrections Officer II”).

12. The Labor Agreement governs a wide array of Class Plaintiffs’ rights and duties as Defendant’s employees. See, e.g., Labor Agreement §§ 7.1-7.2 (governing the security of and Class Plaintiff access to personnel files); *id.* §§ 8.1-8.7 (governing how different positions are assigned); *id.* §§ 9.1-9.2 (governing performance evaluations); *id.* §§ 10.1-10.7 (governing employee discipline procedures); *id.* §§ 11.1-11.10 (governing employee leave and attendance).

13. The Labor Agreement provides: “Employees have the right to participate in the management of the Association and to act for the Association in the capacity of representatives including but not limited to, presentation of its views to elected official, the general public, or other appropriate authority.” Ex. 6, 7, Labor Agreement § 7.4(b).

14. The Labor Agreement mandates that Defendant “will comply with the Fair Labor Standard Act (FLSA), RSMo 105.935 and 1 CSR 20-5 regarding the accrual and payment of overtime.” Ex. 6, 7, Labor Agreement § 12.2.

15. The Procedure Manual is intended “to ensure departmental compliance with Federal Fair Labor Standards Act rules and state merit guidelines.” Ex. 13, Procedure Manual at 1.

16. The Procedure Manual also mandates the Defendant “will comply with the Fair Labor Standard Act (FLSA), RSMo 105.935 and 1 CSR 20-5 regarding the accrual and payment of overtime.” Ex. 13, Procedure Manual at 6.

17. The Procedure Manual states, “Overtime code 2 employees must be compensated for time worked.” Ex. 13, Procedure Manual at 6.

18. There are no written policies dictating whether pre- and post-shift activity can or should be compensated. Ex. 9, Prudden Dep. at 24:5-8.

19. There is nothing in writing stating that the Defendant will not compensate employees for pre and post shift activity. Ex. 3, Lombardi Dep. at 13:5-8; Ex. 5, Dormire Dep. at 28:20- 29:1.

20. 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, Lombardi Dep. at 92:3-8.

B. The Western District Court of Appeals Previously Determined the Terms of the Contract

21. The Western District Court of Appeals has stated that “[t]he [FLSA] requires [MDOC] to compensate corrections officers who actually work more than forty hours in a single work week at ‘a rate not less than one and one-half

hours for each hour of employment for which overtime compensation is required.” *MDOC I*, 409 S.W.3d at 500.

22. In *MDOC I*, Defendant “[did] not dispute that the definitions and terminology in its Department Manual are incorporated into the Labor Agreement” and “the Department Manual defines how state compensatory time and federal overtime are earned by correctional officers.” *Id.*

23. The “Department Manual” referenced in *MDOC I* is Procedure Manual section D2-8.4 and is attached as Exhibit 13 to the Plaintiff’s Second Amended Petition as a contract document between plaintiffs and defendant and marked as Exhibits 19 and 42 in depositions in this case. Ex. 14, Respondent’s Brief at 3 (referencing “DM 8.4”).

24. In *MDOC I*, Defendant acknowledges in its Respondent’s Brief that the Procedure (or Department) Manual is intended “to ensure departmental compliance with Federal Fair Labor Standards Act rules and state merit guidelines.” Ex. 14, Respondent’s Brief at 3 (quoting Procedure Manual D2-8.4).

25. It further admits that “code 2 employees are eligible for ‘federal’ overtime, which is calculated at ‘time and a one half’ when a code 2 employee [Class Plaintiff] ‘*physically* works in excess of 40 hours during a work week.” *Id.* at 4.

26. Defendant acknowledges, “The Department Manual designates employees who are exempt from the FLSA as ‘code 1,’ and those covered by the FLSA as ‘code 2.’” *Id.* (quoting Procedure Manual D2-8.4).

27. Defendant explicitly states, “If the total number of hours an officer physically works in a single week exceeds 40, the officer earns ‘federal overtime’

for every hour above 40 at one-and-a-half times her normal hourly rate.” *Id.* at 23 (quoting the deposition testimony of Deputy Director Dwayne Kempker).

28. Thus, if a correctional officer “‘physically’ work[s] 42 hours during the week, the two extra hours he worked . . . [is] considered ‘federal overtime’ and must be paid or banked at time and one half.” *Id.* at 6, 29 (citing Kempker deposition and Procedure Manual D2-8.4).

29. Defendant also admits in its appellate brief that code 2 employees (which include Plaintiffs) “[are] covered by the FLSA” and that Defendant “*must pay [them] federal overtime, at time and a half, when [they] physically work[] more than 40 hours in a single week.*” *Id.* at 31 (emphasis added).

30. Finally, Defendant admits that “Missouri law requires the Department to ‘pay all [FLSA-covered] state employees in full for any overtime hours accrued during the previous calendar year which have already been paid or used in the form of compensatory leave time.’” *Id.* at 37 (citing § 105.935.3 RSMo).

31. Under the MDOC compensatory time standards set forth in the Procedure Manual, all Class Plaintiffs have to be paid compensatory time for the time they physically work at the facility. Ex. 5, Dormire Dep. at 69:17-70:11.

32. If Class Plaintiffs physically work over 40 hours in a standard week, they get paid overtime. Ex. 5, Dormire Dep. at 70:12-15.

33. Lombardi admits that all pre-shift activity is done where Class Plaintiffs physically work. Ex. 3, Lombardi Dep. at 90:9-19.

34. Most importantly, Defendant admits in its brief that, “[a]gainst the backdrop of the FLSA, Missouri law, and the policies in the Department Manual,

MOCOA and the Department entered into the Agreement to govern their labor relations in 2007.” Ex. 14 at 11.

35. Defendant has made representations to the Court in this case which directly contradict its positions in *MDOC I*:

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

Memo. of Law in Support of Mtn. for Summary J’ment at 15 (emphasis added) (contained in pleadings in instant case).

C. The Grievance Procedure is Futile

36. The Labor Agreement grants MDOC Directors final authority to grant or deny grievances. Ex. 6,7, Labor Agreement § 13.2.

37. Defendant’s director has testified that he has “no intention” of ever “changing the practice” of requiring pre and post shift activity and not paying plaintiff’s for it, “unless there is a ruling in [plaintiffs’] favor in this case.” Ex. 3, Lombardi Dep. at 39:24-40:2.

38. Defendant has, through its Director, rejected multiple grievances by Class Plaintiffs seeking payment for pre- and post-shift activities. Ex. 15 [Trial Exs. 37, 38 and 55), Grievance File for Connie McMillan.

39. Director Lombardi informed Ms. McMillan, in denying her Step 3 grievance, that “[i]t has been determined that the required pre-shift activities are

‘preliminary activities’ which are not compensable.” Ex. 15, McMillan File at DOC-020970.

40. George Lombardi, the Defendant’s Director when this suit was filed and during most of the Class Period, has sworn, in a deposition and affidavit, that Defendant will always require pre- and post-shift activity and will never pay for it. Ex. 3, Lombardi Dep. at 39:12-40:9 (testifying that MDOC will not pay for these activities unless there is a change in the law or a ruling in Plaintiffs’ favor).

41. Lombardi has also averred that Defendant will not pay Class Plaintiffs for pre- and post-shift activities because “the State legislature has never appropriated funds pay [Class Plaintiffs]” for this time. Ex. 16, Lombardi Aff. □ □ 14-16.

42. Defendant stated in responses to Requests for Admission, “Consistent with its policy, **Defendant MDOC has repeatedly and consistently denied, in writing and otherwise, requests for overtime pay for the time it takes to complete the pre- and post- shift activities at issue in this litigation.**” Ex. 17, RFA Responses at 11.

43. Defendant further admits “**that some class members requested compensation or comp time for doing pre and post shift activity**” and that “**such requests were denied.**” *Id.*; *see also id.* at 12 (admitting “that supervisors . . . most of the time did not approve compensation or comp time for time class members spent doing pre and post shift activity from before 2007 to date” and “**all of such requests were denied**”); *id.* (denying that it “sometimes approved compensation or comp time for time class members spent doing pre and post shift activity from before 2007 to date”); *id.* at 13

(denying that supervisors are sometimes compensated for pre- and post-shift activities).

44. Defendant admits that it has instructed Plaintiffs, “[M]embers of the plaintiff class of COIs and COIIs **have been informed that they would not be paid** for the time it took them to complete the pre- and post- shift activities at issue in this class action litigation”. *Id.* (emphasis added).

45. Class Plaintiff Dan Dicus submitted leave slips, in accordance with MDOC procedures, requesting payment for pre- and post- shift activities. Ex. 2, Dicus Dep. at 124, 135, 148, 150-51.

46. There have been complaints from Class Plaintiffs about not being paid for pre- and post-shift time for 30 years. Ex. 4, Kempker Dep. at 153:20-25.

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

48. The U.S. Department of Labor (“DOL”) investigated Defendant in 2007 and 2013 for failing to compensate Class Plaintiffs for pre- and post-shift activity. Ex. 18 (Trial Ex. 41).

49. In 2013, the Department of Labor investigated Defendant’s compensation practices at its Bowling Green facility and found overtime violations for pre and post shift activity in excess of half a million dollars. Ex. 18, DOL Compliance Action Report at DOC-21077.

50. In that investigation, the DOL found that Class Plaintiffs they were required to “scan in at one location, go through an airlock security system, pick up radio, keys, mail, and then walk to another location to actually sign in where they received their assigned post.” Ex. 18, DOL Compliance Action Report at DOC-21081.

51. DOL determined that these tasks took 15 minutes. *Id.*

52. Director Lombardi testified that Defendant did not conduct its own investigation after DOL submitted its findings. Ex. 3, Lombardi Dep. at 25:23-26:10.

53. The DOL found that Defendant’s failure to pay for these activities violated the FLSA and “requested future compliance” and “back wages paid by 05/24/2014.” Ex. 18, DOL Compliance Action Report at DOC-21081-82.

54. Defendant refused to pay back wages or consent to future compliance because of the pending instant case. Ex. 18, DOL Compliance Action Report at DOC-21083.

III. Defendant’s Breach of the Contract

A. Class Plaintiffs Are On Duty and Performing Compensable Work At All Times Within the Security Envelope

1. *The nature of Class Plaintiffs pre- and post-shift activities is undisputed.*

55. Class Plaintiffs are hired “for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons.” Ex. 16, Lombardi Aff. □ 2.

56. Director Dormire described Class Plaintiffs’ job as follows: “Your job is down inside watching offenders.” Ex. 5, Dormire Dep. at 34:25.

57. Class Plaintiffs job duties include:

- Supervising the movement of offenders, conducting periodic counts of offenders, and searching offenders and their living quarters for contraband;
- Escorting and/or transporting offenders to predetermined locations;
- Supervising offenders in housing units and during the performance of work activities and recreational and religious activities;
- Conducting inspections of housing units for health and safety hazards;
- Preparing and submitting reports on offender violations of divisional or correctional facility rules, unusual offender behaviors, and offender security breaches or failures; and
- Promoting offender rehabilitation by attempting to modify offender's social attitudes, discouraging undesirable behaviors, and encouraging worthwhile activities for offenders.

Ex. 25, Dormier Aff. □ 8.

58. Class Plaintiffs perform nearly identical tasks, referred to as Class Plaintiffs' pre- and post-shift activities, at each facility before and after each arriving at their duty station:

- 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.
- utility officers may be required to report to the Central Observation Post to receive assignments.

- passing through security gates/entry-egress points, including passing through a metal detector in arrival and through and airlock when entering and exiting the security envelope;¹
- presenting themselves before a custody supervisor who communicated to the COI or COII's their daily post/duty assignment.
- picking up or returning equipment such as keys or radios form electronic key boxes or key/radio issue rooms.
- 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.
- 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.
- Passing of pertinent information from one shift to another;

Ex. 20, Def. Resp. to Plf. Second Interrog. (Trial Ex. 3) at 4, 7-8, 12-13, 16, 19-20, 23, 26-27, 29-30, 33, 36-37, 39-40, 43, 46-47, 50, 53, 56-57, 60, 63-64, 67, 70-71; Ex. 33, Handwritten Notes (showing the last two pre- and post-shift activities on the list that wardens and Director Lombardi agreed were common to the class); Ex. 5, Dormire Dep. at 32:12-20; Ex. 4, Kempker Dep. at 64:7-21 (describing airlock procedures); *id.* at 89:17-90:1 (testifying that all COs have to perform these tasks)

59. 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, Kempker Dep. at 96:2-21.

¹ An airlock is a set of two doors operating so one of the doors is always closed. Ex. 4, Kempker Dep. at 66:25-67:5. Only six employees can go through at any one time. Ex. 4, Kempker Dep. at 66:23-24.

60. Post shift activity includes all of the above, except searching the officer. Ex. 4, Dormire Dep. at 92:19-24.

61. Mr. Dormire agrees that the items described in Defendant's interrogatory responses and in depositions are the pre- and post-shift activities that Defendant requires Class Plaintiffs to do. Ex. 5, Dormire Dep. at 18:12-20.

62. These pre- and post-shift activities must be completed by all Class Plaintiffs going within the secure envelope (other than the patrol car items which are limited to those officers). Ex. 4, Kempker Dep. at 84:1-4, 86:10-15, 87:24-88:19. *See also id.* at 89:21-90:1 (testifying that very close to 100 percent of Class Plaintiffs do pre-shift activity).

63. Very few Class Plaintiffs do not go within that security perimeter. Ex. 4, Kempker Dep. at 86:16-19.

64. Class Plaintiffs are not compensated for the time they spend performing pre- and post-shift activities. Ex. 16, Lombardi Aff. □□ 7-8.

65. Class Plaintiffs are only compensated for time spent at their posts within MDOC facilities. Ex. 16, Lombardi Aff. □ 3.

2. *Class Plaintiffs are on duty and doing their job when they are within the security envelope.*

66. Class Plaintiffs all pick up their keys and equipment immediately before or immediately after going through the airlock and are fully equipped the entire time they are within the security envelope. Ex. 9, Prudden Dep. at 38:9-39:24, 40:18-41:5 (Algoa); *id.* at 42:7-22 (Booneville); 45:20-48:1, 50:2-5, 11-16 (Chillicothe); *id.* at 52:9-18 (Cremer); *id.* at 53:10-54:6 (Crossroads); *id.* at 55:1-25 (Bonne Terre); *id.* at 58:3-59:24 (Farmington); *id.* at 61:11-18, 62:6-63:3

(Fulton); *id.* at 64:14-17, 65:7-23 (Jefferson City); *id.* at 65:24-66:19 (Kansas City Reentry); *id.* at 66:20-25 (Maryville); *id.* at 69:8-12 (Moberly); *id.* at 70:3-21, 71:8-21 (Northeast); *id.* at 73:2-5, 73:13-74:3 (Ozark); *id.* at 74:19-76:16 (Potosi); *id.* at 77:21-78:12 (South Central); *id.* at 79:20-80:21 (Southeast); *id.* at 80:22-81:10 (Tipton); *id.* at 81:17-82:3 (Women’s Eastern); *id.* at 87:16-88:14 (Western Missouri); *id.* at 89:22-90:18, 91:5-11 (Western Reception); Ex. 1, Hootselle Dep. at 99:9-22 (Farmington).

67. Class Plaintiffs are in uniform and carrying a badge the entire time they within the security envelope. Ex. 12, Villmer Dep. at 67:16-18; Ex. 19, Camp Dep. at 10:3-6; Ex. 20, Jones Dep. at 15:16-10.

68. Class Plaintiffs are prohibited from bringing any cell phones, iPods, or any other personal property into the security envelope. Ex. 20, Camp Dep. at 10:7-11, 11:21-12:3; 15:22-16:6.

69. “All [Class Plaintiffs] will go through some manner of search,” which involves emptying pockets of any bulky or atypical, presenting items such as lunchboxes to the reception officer, and stepping through a metal detector. Ex. 4, Kempker Dep. at 40:24-41:13; Ex. 20, Camp Dep. at 11:21-13:3.

70. Class Plaintiffs are in close proximity to offenders the entire time they are the prisons’ security envelopes. Ex. 12, Villmer Dep. at 79:18-25.

71. Class Plaintiffs “are on duty and expected to respond” when walking to and from their posts. Ex. 5, Dormire Dep. at 52:12-18; *see also* Ex. 4, Kempker Dep. at 104:4-21; Ex. 10, Steele Dep. at 93:10-94:5 (testifying the Class Plaintiffs must “pay attention to the offenders at all times, all staff. When you’re inside, you’re going to be mindful of their behavior.”).

72. Class Plaintiffs are expected to act as prison guards whenever they are inside Defendant's prisons. Ex. 4, Kempker Dep. at 104:18-21.

73. Warden Steele specifically agreed with Class Plaintiff Connie McMillan's claim that "Correction Officers are responsible to observe offender behavior any time they are present inside the institution regardless of their bid posts, including walking to/from their bid posts." Ex. 10, Steele Dep. at 93:10-94:5; Ex. 15, McMillan Grievance File at DOC-020958.

74. Warden Sachse testified that Class Plaintiffs are "expected to handle incidents that rise to the level of needing intervention" while walking from the airlock to their posts. Ex. 11, Sachse Dep. at 41:15-25.

75. Warden Villmer testified that Class Plaintiffs are trained and expected to be vigilant whenever they are in the presence of often dangerous offenders, and Class Plaintiffs are expected to respond to incidents such as fights that occur when they are walking to their post. Ex. 12, Villmer Dep. at 78:16-79:7, 80:21-81:22; Ex. 1, Hootselle Dep. at 111:10-112:5; Ex. 2, Dicus Dep. at 172:18-24.

76. Remaining vigilant and responding to fights and other incidents, even when not on post, is a job requirement. Ex. 1, Hootselle Dep. at 109:6-9, 112:6-19; Ex. 2, Dicus Dep. at 170:5-11; Ex. 11, Sachse Dep. at 35:3-13; Ex. 12, Villmer Dep. at 78:12-79:1.

77. Director Lombardi admitted that Class Plaintiffs "have to monitor and pay attention to offenders walking to their post and walking back." Ex.3, Lombardi Dep. at 37:15-18.

78. It is simply not an option to not stop a fight, drugs, or fleeing prisoner. Ex. 1, Hootselle Dep. at 113:13-20.

79. Class Plaintiffs are considered on duty during this time because, as Mr. Kempker puts it, “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, Kempker Dep. at 161:3-8.

80. Defendant 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. 1, Hootselle Dep. 11:5-8; Ex. 2, Dicus Dep. at 206:10-207:6, 208:3-25.

81. Incidents have occurred between Class Plaintiffs and offenders where offenders confronted staff, before their shift or leaving their post after their shift. Ex. 5, Dormire Dep. at 51:23-52:11.

82. Escape attempts often also happen during shift changes, and prisoners use fights to divert attention from the escaping prisoner. Ex. 1, Hootselle Dep. at 112:1-5; Ex. 2, Dicus Dep. at 209:1-11.

83. Offenders know that shift changes are when the guards are pre-occupied with other tasks, and they use that time to pass drugs. Ex. 1, Hootselle Dep. at 111:9-12; Ex. 2, Dicus Dep. at 207:2-25.

84. Class Representatives Dan Dicus and Thomas Hootselle have both had to respond to emergencies before and after their shifts. Ex. 2, Dicus Dep. at 168:24-169:2; *see also* Ex. 1, Hootselle Dep. at 109:17-24 (testifying to breaking up a fight before reporting to his housing unit); Ex. 1, Hootselle Dep. at 111:15-24 (testifying to a prisoner hanging himself during a shift change); Ex. 2, Dicus Dep. at 169:8-20 (responding to a fight while waiting in assembly room before his

shift); Ex. 2, Dicus Dep. at 204:15-17 (testifying to breaking up a fight during pre- and post-shift activity without getting paid); Ex. 2, Dicus Dep at 217:8-218:25 (describing a thwarted escape by a death row inmate).

3. *Class Plaintiffs other pre- and post-shift activities are integral and indispensable to their principal activity.*

85. Defendant admits – through its director – that Class Plaintiffs are required to arrive at work before their shifts begin to complete their pre- and post-shift activity. Ex. 3, Lombardi Dep. at 57:8-11.

86. Defendant also admits – through its director – the Class Plaintiffs cannot do their jobs without performing these pre- and post-shift activities. Ex. 3, Lombardi Dep. at 70:8-12.

87. Defendant cannot dispose of these required tasks, and Class Plaintiffs cannot assume their post without performing these tasks. Ex. 3, Lombardi Dep. at 69:2-5, 69:18-22.

88. Director Dormire repeated Lombardi’s admission that pre- and post-shift activities are expected of Class Plaintiffs in order to “operate and maintain a safe and secure facility.” Ex. 5, Dormire Dep. at 32:21-33:5.

89. Class Plaintiffs’ pre- and post-shift activities are important to the end of housing dangerous criminals. Ex. 5, Dormire Dep. at 31:20-32:2.

90. Class Plaintiffs’ pre- and post-shift activities are connected to keeping criminals safely locked behind bars. Ex. 5, Dormire Dep. at 75:1-6.

91. Mr. Lombardi stated unequivocally that Class Plaintiffs’ pre- and post-shift activities are “important” and agreed that they “are required because of

the nature of the job that the guards are doing.” Ex. 3, Lombardi Dep. at 61:23-62:2, 62:14-19, 63:18-22; Ex. 4, Kempker Dep. at 143:12-21.

92. Mr. Kempker testified, “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, Kempker Dep. at 159:9-18.

93. Mr. Lombardi and Mr. Dormire agreed that the pre- and post-shift activities are “essential for guards to do to perform what [Defendant] employ[s] them for.” Ex. 3, Lombardi Dep. at 64:8-14; Ex. 5, Dormire Dep. at 31:1-10.

94. “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, Kempker Dep. at 159:9-18.

95. Kempker went on to testify that these activities ensured safety and the facilities, prevented the flow of contraband, and were essential:

They create for us a safe and secure facility where we properly identified staff and we properly equip them. We made sure contraband wasn't introduced in the facility which I guess by extension helps for safety and security.

Ex. 4, Kempker Dep. at 158:9-13.

It's necessary to operate and maintain a safe facility, and you can only do so by knowing the identity of the people within to making sure unauthorized items aren't carried in and that people are properly equipped to protect themselves.

Id. at 158:19-23.

[T]hese are all done in a relative to a level of security we can stand. Could we function for a little while without doing any of them? Sure, but safety and security is going to be compromised in a very traumatic way. So we like to think they're essential.

....

We like to think we have standards about safety and security, and to insure those then we need to – doing these things are essential to protecting that safety and security.

Id. at 160:1-11.

96. Director Dormire admitted that the pre- and post-shift activities exist “to operate and maintain a safe and secure facility.” Ex. 5, Dormire Dep. at 33:3-5.

97. Mr. Kempker also agreed that the pre- and post-shift activities are necessary and essential to safely keep and house criminals. Ex. 5, Kempker Dep. at 160:12-17.

98. MDOC procedures regarding equipment pickup state:

Key and lock control is an essential part of institutional security. The system effectively manages any size network of locks by pinpointing the responsibility of each individual staff member and by providing quick information on all locks and keys. Without proper key control, locks provide little deterrent to illegal or unauthorized entry into a facility or secured areas within a facility. Therefore, it is mandatory that all keys and locking systems utilized within an institution be closely monitored and controlled.

Ex. 22, Policy and Procedure Manual – Locking System Control.

99. Dormire testified, “Offender movement is the primary thing we’re controlling with radios.” Ex. 5, Dormire Dep. at 88:14-15.

100. Having radios and the ability to communicate for relief in shift is integral to Class Plaintiffs’ work. Ex. 5, Dormire Dep. at 75:7-19.

101. Briefings from the main officer are likewise “very important” both for Class Plaintiffs and for Defendant. Ex. 5, Lombardi Dep. at 75:9-22.

102. Prison counts are important to ensure no offenders have escaped, and in fact, Class Representative Dicus once thwarted an escape when the count was off. Ex. 2, Dicus Dep. at 205:24-206:9.

B. Class Plaintiffs' Pre- and Post-Shift Activities Are Not De Minimus

103. Defendant “does not keep record of how much time their hourly-employees work.” Ex. 23, Rogers Rebuttal Report at 1 (May 1, 2018). It likewise “ha[s] not produced an alternative comprehensive review of corrections officers’ work hours.” Ex. 23, Rogers Rebuttal Report at 2.

104. Mr. Dormire is not aware of any time where Defendant has ever gone in or interviewed people or timed people or conducted any other assessments regarding the time taken for pre- and post-shift activity. Ex. 5, Dormire Dep. at 44:19-24, 45:3-7; Ex. 4, Kempker Dep. at 108:5-109:13.

105. Defendant maintains entry and exit logs, either using electronic swipe cards or handwritten logs, at each facility. Ex. 24, Rogers Am. Report at 17-20.

106. Class Plaintiffs are required to use the electronic or handwritten logs to record their entry and exit from Defendant’s facilities. Ex. 3, Lombardi Dep. at 54:19-55:8.

107. Plaintiffs’ expert, William H. Rogers, Ph.D., used the records to calculate Class Plaintiffs “‘time in the security envelope’ (TISE)”. Ex. 24, Rogers Am. Report at 5.

108. “Security records, especially digital records, provide a fairly clear picture of the total time a corrections officer normally spends in the correctional center for a normal shift.” Ex. 24, Rogers Am. Report at 7.

109. Using Defendant’s entry and exit logs, Dr. Rogers determined that “[i]t is common practice for corrections officers to be in the security envelope for more than eight hours, even after rounding to the nearest 15 minutes.” Ex. 24, Rogers Am. Report at 7.

110. Dr. Rogers ultimately concluded that Class Plaintiffs “work, on average, 8 hours and 30 minutes per shift.” Ex. 24, Rogers Am. Report at 9.

Respectfully submitted,

BURGER LAW FIRM, LLC

s/ Gary K. Burger

Gary K. Burger, #43478
Attorney for Plaintiffs and Certified Class
500 N. Broadway, Suite 1860
St. Louis, MO 63102
(314) 542-2222
(314) 542-2229 Facsimile
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

Katherine Van Dyck (*pro hac vice*)
R. Michael Smith (*pro hac vice*)
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20002
(202) 789-3960
(202) 789-1813 Facsimile
kvandyck@cuneolaw.com
mike@cuneolaw.com

Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed and served via the Missouri Court e-filing system and served on counsel of record for Defendant thereby as follows on June 15, 2018 to:

Ryan L. Bangert
Jennifer Baumann
Mary L. Reitz
Joshua D. Bortnick
Andrew D. Kinghorn
Attorneys for Defendants
Assistant Attorney General
PO Box 899
Jefferson City, MO 65102

BURGER LAW FIRM, LLC

s/ Gary K. Burger

Gary K. Burger, #43478
Attorney for Plaintiffs and Certified Class
500 N. Broadway, Suite 1860
St. Louis, MO 63102
(314) 542-2222
(314) 542-2229 Facsimile
gary@burgerlaw.com