IN THE SUPREME COURT OF MISSOURI

THOMAS HOOTSELLE, JR., et al.,	)	
	)	**Circuit Court No. 12AC-CC00518**
Respondents,	)	
	)	**Court of Appeals No. WD82229**
v.	)	
	)	**Supreme Court No. SC98252**
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
	)	**Court of Appeals, Western District**
	)	
Appellant.	)	**Circuit Court of Cole County**

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO APPELLANT'S APPLICATION FOR TRANSFER

INTRODUCTION

The Missouri Department of Corrections ("MDOC") seeks transfer based on alleged "conflicts with many cases" and "questions of general interest and importance." (App. at 2.) Its request fails to satisfy the rigorous standards of Rule 83. This case breaks no new ground and presents a straightforward application of existing and consistent contract and employment law to unique facts holding little precedential value for Missouri's bench and bar. Further, MDOC cites no case conflicting with the Western District's decision and instead points to the amount of a jury verdict it never challenged.

For more than a decade, MDOC has refused to pay Respondents Thomas Hootselle, Daniel Dicus, Oliver Huff and the class of over 13,000 corrections officers they represent ("Officers") for the pre- and post-shift activities it requires, which average 30 minutes per shift during the most dangerous part of the Officers' work day. (D424 ⁋⁋ 80-82, 95, 110.) MDOC has "refused to pay back wages or consent to future compliance [ordered by the U.S. Department of Labor ("DOL")] because of the pending instant case;" it routinely denied Officers' grievances seeking compensation; and its former director "testified that he has 'no intention' of ever 'changing the practice' of requiring pre and post shift activity and not paying [Officers] for it, 'unless there is a ruling in [Officers'] favor in this case.'" (*Id*. ⁋⁋37-44, 54.) Over a year after verdict, MDOC still requires its Officers to work without pay and refuses to record their time as required by the Amended Judgment. (D535 ⁋7.)

These circumstances forced the Officers to seek relief from the courts to enforce the longstanding Labor Agreements and Procedural Manual (the "Contract") voluntarily entered into by the parties. (D424 ¶¶8, 22; *Mo. Corr. Officers Ass'n v. Mo. Dep't of Corr.* ("*MDOC I*"), 409 S.W.3d 499, 500 (Mo. App. W.D. 2013)). The Contract requires MDOC to "comply with the [FLSA]…regarding the accrual and payment of overtime." (D424 ⁋⁋14, 15.) But MDOC conveniently ignores additional Contract terms mandating that Officers "'…be compensated for time worked'" and paid overtime when they "'physically work[] in excess of 40 hours during a work week.'" (D424 ⁋⁋17, 25, 31.) The Western District affirmed summary judgment enforcing this Contract, finding that

MDOC "cite[d] to inapposite precedent in which [it] isolate[d] and t[ook] out of context the entirety of the expectations it has for its officers in arriving at and exiting their shift posts." (Op. at 8.) The instant transfer application suffers from the same defects.

MDOC executives admitted "that pre- and post-shift activities are expected of [Officers] in order 'to operate and maintain a safe and secure facility'" and "are important to the end of housing dangerous criminals." (*Id*. ⁋⁋88-89.) Because shift changes present heightened threats, "[r]emaining vigilant and responding to fights and other incidents, even when not on post, *is a job requirement*." (*Id*. ⁋⁋76, 80-82, 95 (emphasis added).) Officers "are expected to act as prison guards whenever they are inside [[its] prisons." (*Id*. ⁋72.) They are "'on duty and expected to respond' when walking to and from their posts" and "must 'pay attention to the offenders at all times….When you're inside, you're going to be mindful of their behavior.'" (*Id*. ⁋71.) MDOC's wardens testified that "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," and they are "trained and expected to be vigilant whenever they are in the presence of often dangerous offenders." (*Id*. ⁋⁋73, 75.) This pre- and post-shift work embodies the Officers' principal activity of "supervising [and] guarding… offenders incarcerated in our State prisons." (*Id*. ⁋55). Its compensability under the terms of the Contract is clear and uncontroversial.

I. THE WESTERN DISTRICT OPINION IS CONSISTENT WITH STATE AND FEDERAL JURISPRUDENCE

That Officers must be compensated for this "on duty" time is not just a common sense interpretation of the Contract. It is also consistent with federal laws and regulations.

> Under the FLSA, the "workday" is "the period between the commencement and completion on the same workday of an employee's principal activity or activities." "It includes all time within that period whether or not the employee engages in work throughout all of that period."

Helmert v. Butterball, LLC, 805 F. Supp. 2d 655, 658 (E.D. Ark. 2011) (quoting 29 C.F.R. § 790.6(b)). This is the "continuous workday" doctrine, and all activities during that workday must be compensated. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791,

795-96 (8th Cir. 2014). Notably, "[c]ompensable hours of work generally include all of the time during which an employee is on duty on the employer's premises." 29 C.F.R. § 553.221(b); *accord* 5 C.F.R. § 551.401(a).

MDOC argues that on duty time is non-compensable because Officers need only "respond to 'unusual' emergencies." (App. at 6.) The Court of Federal Claims in *Havrilla v. United States* rejected this argument: "[A]n integral part of [p]laintiffs' jobs is to "wait for something to happen," whether it be a threat to…security or a request for assistance from an officer or officers in need of weapons or equipment." 125 Fed. Cl. 454, 465 (2016). Likewise, a critical component of the Officers' job is supervising and guarding offenders. (D424 ¶¶55-56). This was central to the Western District's opinion:

> [T]the most dangerous, relevant, and integral part of the officers' "extra work" is the transition from entering the correctional facility and arriving at their shift post—where the threat of prison riots and attempted escapes are real, formidable, and of such nature as to require diligent attention and readiness to intervene."

(Op. at 7.) MDOC's testimony concedes Officers are "engaged to wait" from the moment they enter the prison and must remain vigilant and "act as prison guards" until they leave. (D424 ¶¶72, 76; 29 C.F.R. § 790.7(h).) As in *Havrilla*, Officers "are required to perform essentially the same duties that they perform for the rest of their shifts during their [pre- and post-shift activities]. Thus, [they] are not merely 'on call' during [this time]; they are on duty," and their time is compensable. 125 Fed. Cl. at 465, 466.

Compensability "necessarily involves factual determinations," *Helmert*, 805 F. Supp. 2d at 659, and MDOC relies on decisions involving different facts, activities and job duties. *See Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 515, 518 (2014) (post-shift security screenings for warehouse workers not intrinsic to retrieving and packaging products and could be eliminated without impairing their work); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 589 (2d Cir. 2007) (nuclear plant employees "entering and exiting the facility, and donning and doffing a helmet, safety glasses and boots"); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 387 (D.D.C. 1970) ("The only requirement is that he report to his duty station (his locomotive) by the time his shift begins."). In

Aguilar v. Management & Training Corp., the officers were not in the presence of offenders, and management disputed that they were on duty. No. 16-cv-00050, 2017 WL 4804361, at *14-15 (D.N.M. Oct. 24, 2017), *argued*, No. 17-2198 (10th Cir. Sept. 24, 2018).

The other cases MDOC relies on do not, in any way, render Missouri an outlier. They involve rules for meal times and breaks that do not apply here (as the Western District appreciated from the extensive briefing on the issue). *See Babcock v. Butler Cty.*, 806 F.3d 153, 157 (3d Cir. 2015) (officers "could request authorization to leave the prison for their meal period and could eat lunch away from their desks"); *Roy v. County of Lexington, S.C.*, 141 F.3d 533, 540 (4th Cir. 1998) (refusing to apply Section 7(k) of the FLSA to EMS employees); *Henson v. Pulaski County Sheriff Dept.*, 6 F.3d 531, 534 (8th Cir. 1993) (officers could change into civilian clothes and go "wherever they please" during breaks); *Agner v. United States*, 8 Cl. Ct. 635, 638 (1985), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986) (employees were off duty and could "eat, rest, or engage in any other appropriate personal activity"); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1137 (5th Cir. 1984) ("guards were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music during their off-duty time"); *Akpeneye v. United States*, 138 Fed. Cl. 512, 534 (2018) (guards could use "public amenities or pursue their own interests in an employer-provided secluded space" during breaks); *Joiner v. Bd. of Trustees of Flavius J. Witham Mem'l Hosp.*, 13-cv-555, 2014 WL 3543481, at *2, 6 (S.D. Ind. July 17, 2014) (employees permitted "to eat, socialize, listen to the radio, eat off-site with a spouse, and leave the hospital with permission"); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1068 (S.D. Iowa 2010) (security guards could "enjoy their meal periods…in an environment conducive to reading, studying, or relaxing, and with virtually unlimited access to every form of electronic entertainment and communication"); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 140 (D. Mass. 2003) (officers permitted to leave vehicle for meal); *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996) (allowing village to offset meal breaks against compensable roll call time). And the court in *Baylor v. United States* actually found similar pre- and

post-shift activity – picking up firearms, traveling to and from post, and exchanging instructions at shift change – compensable. 198 Ct. C. 331, 340, 358-60 (1972), *vacated on other grounds by Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004).

The Officers' unpaid time is tightly controlled, inside a prison, cut off from the outside world, guarding hardened criminals. They are thoroughly searched, prohibited from bringing any personal property (including cell phones) inside, and always in uniform. (D424 ¶¶67-69.) The Officers are not on break but are instead required to act as prison guards while doing MDOC-mandated "necessary" and "essential" pre- and post-shift tasks. (*Id*. ¶¶95, 97.) These tasks are integral and indispensable to their positions and to the safe and secure operation of Missouri's prisons. The Western District correctly found that they must be compensated, as a matter of law, under the Contract. Thus, MDOC's reliance on these cases is substantively unavailing. It is also perplexing in the context of a transfer application as none of the decisions are by Missouri courts that could give rise to a Missouri conflict meriting this Court's attention under Rule 83.

II. THE OFFICERS PROPERLY PURSUED A BREACH OF CONTRACT CLAIM.

The Western District did not "merely recite that 'DOC will comply with FLSA,' without imposing any contractual obligation independent of or in addition to FLSA compliance." (App. at 9.) It instead found that:

> the contract…while it does, in part, provide that DOC will comply with FLSA, also sets forth numerous pages of additional rights and obligations of the officers and of DOC. DOC may not avoid its obligations under the contract it executed with the officers by pointing to provisions that it consented to, which include reiterating its obligation to comply with FLSA.

(Op. at 9.) This properly cabined the pre-existing duty rule. "[I]f the subsequent contract imposes new or different obligations, *i.e.*, it is not identical to the preexisting duties, this constitutes sufficient consideration," and the rule does not apply. *Harris v. A.G. Edwards & Sons, Inc.*, 273 S.W.3d 540, 544-45 (Mo. App. E.D. 2008).

The Contract "governs a wide array of [Officers'] rights and duties as [MDOC]'s employees." (D424 ¶12.) It was voluntarily negotiated, spans over 30 pages, and covers,

among other things, personnel file security, position assignment, performance evaluations, employee discipline, and employee leave and attendance, none of which were pre-existing duties or obligations. (D399; D400; D406.) This additional consideration removed the Contract from the pre-existing duty realm. *Harris*, 273 S.W.3d at 545. In contrast, the "contracts" in MDOC's cited cases were unenforceable because they were entered into by force of law, imposed no duties beyond those created by statute, involved the exclusive jurisdiction of federal courts, and lacked elements of offer and acceptance. (App. at 10-11.) *Allen v. Fauver* did not even involve a breach of contract claim but merely rejected the argument that sovereign immunity from FLSA claims was waived through an employment contract. 769 A.2d 1055, 1060 (N.J. 2001).

Courts regularly enforce contracts that require FLSA compliance. *E.g.*, *Avery v. City of Talladega, Ala.*, 24 F.3d 1337, 1348 (11th Cir. 1994); *Tinsley v. Covenant Care Servs. LLC*, No. 14-cv-00026, 2016 WL 393577, at *5 (E.D. Mo. Feb. 2, 2016); *Uwaeke v. Swope Cmty. Enters., Inc.*, No. 12-cv-1415, 2013 WL 12129948, at *3 (W.D. Mo. Oct. 25, 2013); *Metro Louisville/Jefferson Cty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009). In fact, Missouri courts have already enforced this very Contract. *MDOC I*, 409 S.W.3d at 500, 507 (Mo. App. W.D. 2013). Thus, there is no conflict between the Western District and any court (much less a Missouri decision) that would support transfer, and this case would be the wrong vehicle for this Court to address the issue as MDOC failed to preserve this argument below. (Resp. Br. at 27-28).

III. CONCLUSION

MDOC does not identify any opinion contrary to the one it asks this Court to review, nor does it raise any issues of general interest or importance. The legal questions presented are ordinary, factually driven ones that present no conflict or precedential value. And the size of the verdict, which recognizes the critical work of the Officers, is only the result of MDOC's intransigence in the face of DOL orders and clear contractual promises. The Western District's well-balanced and thoughtful opinion dealt with these issues fairly and compellingly. MDOC provides no valid reason for this Court to retread the same ground. The Officers respectfully request that MDOC's application be denied.

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Respectfully submitted,

BURGER LAW FIRM, LLC

s/ Gary K. Burger

Gary K. Burger, #43478
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
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
(202) 789-3960
(202) 789-1813 Facsimile
kvandyck@cuneolaw.com

Fernando Bermudez, #39943
Bermudez Law STL, LLC
7701 Forsyth Blvd., Suite 950
St. Louis, MO 63105
(314) 339-3082
(314) 862-1606 Facsimile
FBermudez@bermudezlawstl.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that, on January 9, 2020, the foregoing Suggestions in Opposition were served via electronic mail to the following counsel of record:

D. John Sauer, Solicitor General
Missouri Attorney General's Office
815 Olive Street, Suite 200
St. Louis, MO 63101
John.Sauer@ago.mo.gov

Counsel for Appellant

s/ Gary K. Burger
Gary K. Burger