SUPREME COURT OF MISSOURI
en banc

THOMAS HOOTSELLE, JR., et al., individually and on behalf of all others similarly situated, and MISSOURI CORRECTIONS OFFICERS ASSOCIATION,	)	***Opinion issued June 1, 2021***
Respondents,	)	
v.	)	No. SC98252
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
The Honorable Patricia S. Joyce, Judge

The Missouri Department of Corrections ("MDOC") appeals a judgment of the Cole County circuit court awarding a class of Missouri corrections officers approximately $113 million plus post-judgment interest for breach of contract. On appeal, MDOC claims, among other things, that the circuit court erred in determining MDOC is liable on the corrections officers' breach of contract claims for time spent performing all preshift and postshift activities. The corrections officers' statement of undisputed material facts in support of their motion for partial summary judgment demonstrated, as a matter of law, that the retrieval of keys and radios and the supervision of inmates while walking to and from the corrections officers' daily posts are integral and indispensable to their work as correction

officers. Under the continuous workday rule, all preshift and postshift activities after the first and before the last principal activity of either retrieving or returning keys and radios or supervising inmates are also compensable. The undisputed material facts do not establish, however, the chronological order of the preshift and postshift activities to permit a determination of which preshift and post activities are compensable under the continuous workday rule. Additionally, the undisputed facts are insufficient to show all the other preshift and postshift activities are compensable as principal activities, as a matter of law, so the circuit court's determination that all preshift and postshift activities are compensable was erroneous. The award of damages and the circuit court's declaratory and injunctive relief were based on that erroneous finding of liability, so those rulings are also erroneous.

The portion of the circuit court's judgment determining MDOC must compensate the corrections officers for time spent retrieving keys and radios and time spent monitoring and supervising offenders while not on post is affirmed. The remainder of the circuit court's judgment is vacated, and the cause is remanded.

I. Factual and Procedural Background

The plaintiffs are a class of corrections officers employed by MDOC[1] and the corrections officers' collective bargaining unit, the Missouri Corrections Officers Association ("MOCOA"). The class covers approximately 14,000 officers employed within 21 correctional facilities. MDOC employs the corrections officers to supervise, guard, escort,

[1] The class is defined as all persons employed in positions as corrections officer I or corrections officer II by MDOC at any time from August 14, 2007, to the present date for claims relating to unpaid straight-time compensation and from August 14, 2010, to the present date for unpaid overtime compensation.

and discipline offenders incarcerated in Missouri prisons. Before arriving at their posts to perform these duties, however, the corrections officers have long been required to perform a variety of other tasks. These tasks are known within the MDOC as preshift activities.

As part of their preshift activities, the officers log their arrival, scan identification, sign entry and exit records or submit to biometric identification, pass through security, report to a supervisor, retrieve equipment, walk to their posts, and exchange information with other corrections officers. Corrections officers execute these same tasks in reverse upon leaving their posts. When performed after leaving a post, these activities are referred to as postshift activities. MDOC has never paid officers for time spent performing preshift and postshift activities and has consistently denied requests for overtime pay for time spent completing these activities.

In 2007 and 2014, the corrections officers, through MOCOA, entered into labor agreements with MDOC. The labor agreements govern a wide array of corrections officers' rights and duties as MDOC employees and the agreements incorporated MDOC's procedure manual's definitions and terminology. The manual defines how state compensatory time and federal overtime are earned by corrections officers. Together, the agreement and the manual provide that MDOC will comply with the Fair Labor Standards Act of 1938 (FLSA) regarding the accrual and payment of overtime. The procedure manual also states its purpose is to ensure departmental compliance with the FLSA and that the corrections officers must be compensated for "time worked."

In 2012, the corrections officers filed a class action lawsuit,[2] alleging MDOC breached its statutory obligations under the FLSA and its contractual duties under the labor agreements to pay the corrections officers for preshift and postshift activities. As amended,[3] the corrections officers' petition contains seven counts. Counts I and II asserted freestanding claims for violations of section 105.935.3, RSMo Supp. 2005, and the FLSA, respectively. Count III alleged MDOC breached a contract created by operation of section 105.935.3, RSMo Supp. 2005, and 1 C.S.R. 20-5.010(1)(E) by failing to pay the corrections officers for preshift and postshift activities.[4] Counts IV and V alleged claims for damages under unjust enrichment and quantum meruit theories, respectively. In Count VI, MOCOA alleged MDOC breached the 2007 and 2014 labor agreements by failing to pay the corrections officers for preshift and postshift activities under the FLSA. In the alternative to Count VI, MOCOA sought a declaration in Count VII that MDOC was contractually obligated to compensate the corrections officers for preshift and postshift work time pursuant to the labor agreements.

---

[2] When the corrections officers filed their original petition in 2012, MOCOA was not a party. It joined as a plaintiff when the corrections officers filed their second amended petition in June 2017.

[3] The corrections officers filed an amended petition and a second amended petition, and then amended the second amended petition by interlineation.

[4] 1 C.S.R. 20-5.010(1)(E) provides:

> Employees . . . will be compensated at the regular rate of pay for their positions or, at the discretion of the appointing authority, by allowing an equal amount of compensatory time off for those work assignments which cause the employee to exceed forty (40) hours in pay status during a workweek. An employee shall receive an additional one-half (1/2) time compensation, by pay or compensatory time off, for any hours of work which exceed forty (40) hours actually worked within the workweek.

In 2014, MDOC filed a motion for judgment on the pleadings as to Counts I and II, which the circuit court sustained. MDOC next moved for summary judgment in 2016, claiming the corrections officers' breach of contract claims should be treated the same as freestanding claims for violations of the FLSA and dismissed. The motion was overruled.

In June 2018, the corrections officers filed a motion for partial summary judgment on their breach of contract claims, Counts III and VI of the petition. Essentially, the corrections officers sought to have the circuit court determine MDOC was liable on its breach of contract claims and leave the issue of damages to be decided by a jury. As authorized under Rule 74.04(c)(6), the circuit court sustained the corrections officers' motion, entering a partial summary judgment that determined MDOC was liable for all preshift and postshift activities under the terms of the agreements requiring compliance with the FLSA. The circuit court further held the only issue remaining for trial was a computation of the corrections officers' damages.[5]

Before trial, the corrections officers filed a motion seeking to exclude the expert testimony of MDOC's experts, Dr. Chester Hanvey and Elizabeth Arnold, on grounds their testimony did not meet the statutory requirements of section 490.065.2, RSMo Supp. 2018. The circuit court sustained the corrections officers' motion, and the case then proceeded to trial in August 2018. During trial, the corrections officers presented the expert testimony of Dr. William Rogers, who opined the corrections officers sustained actual damages of approximately $113 million. MDOC again sought to introduce the rebuttal testimony of Dr.

[5] Although the issue of damages was the only issue remaining for trial by jury, Count VII seeking declaratory and injunctive relief also remained pending.

Hanvey and made an offer of proof outside the jury's presence, but the circuit court ruled MDOC's expert testimony would remain excluded. The jury returned a verdict awarding the corrections officers approximately $113 million.

The circuit court entered a judgment in favor of the corrections officers on Counts III and VI, the breach of contract claims. Counts IV and V were dismissed. The judgment also adjudicated Count VII and declared the parties' contractual rights and obligations under the labor agreements. Among other things, the judgment declared the parties' labor agreements imposed a contractual duty on MDOC to pay compensation for all work performed by the corrections officers as required by the FLSA, including preshift and postshift activities. The circuit court further ordered MDOC to pay overtime compensation for preshift and postshift activities prospectively and to implement a new department-wide timekeeping system to track time spent performing preshift and postshift activities. MDOC appealed, and this Court granted transfer after an opinion by the court of appeals. Mo. Const. art. V, sec. 10.

II. Analysis

MDOC raises several issues on appeal, including claims that the circuit court erred in: sustaining the corrections officers' motion for partial summary judgment because preshift and postshift activities are not compensable under the FLSA; sustaining the corrections officers' motion for partial summary judgment because they cannot maintain a private cause of action; excluding MDOC's expert witnesses; overruling MDOC's motion to decertify the class; and granting the corrections officers declaratory and injunctive relief on an expired contract.

A. Corrections Officers Can Maintain Private Cause of Action

Whether the corrections officers may maintain a private cause of action to enforce contractual terms that incorporate the FLSA is a threshold issue. MDOC claims the circuit court erred in sustaining the corrections officers' motion for partial summary judgment because the corrections officers' breach of contract claims are indirect attempts to enforce the FLSA and a private cause of action cannot be maintained to enforce MDOC's statutory obligations. The corrections officers respond that MDOC is raising this issue for the first time on appeal and, even had MDOC raised the issue in the circuit court, it is not preserved because MDOC did not include it in its motion for new trial. On the merits, the corrections officers state they seek only to enforce the labor agreements between the corrections officers and MDOC, which provided MDOC would pay for "time worked" and overtime for hours "physically worked." Therefore, the corrections officers claim the causes of action they are maintaining are not freestanding causes of action under the FLSA but rather state law contract claims.

The Court considers first whether MDOC properly preserved this issue for appeal. In its memorandum of law filed in opposition to the corrections officers' motion, MDOC argued the corrections officers could not maintain a private cause of action under the FLSA. On appeal, it reasserts this claim and asserts it was not required to raise the issue again in its motion for new trial. It is true that, to preserve claims of error for appellate review in cases tried by a jury, claims of error must be raised in post-trial motions. *Vance Bros., Inc., v. Obermiller Constr. Servs., Inc.*, 181 S.W.3d 562, 564 n.3 (Mo. banc 2006); Rule 78.07(a). In a case tried without a jury, however, no motion for new trial is necessary to preserve an issue

for appellate review if it "was previously presented to the trial court." Rule 78.07(b). Issues determined under Rule 74.04 are considered tried without a jury. *See Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 393 (Mo. banc 1993). Therefore, Rule 78.07(b) applies, and MDOC preserved this issue for appeal by raising it in opposition to the corrections officers' motion for partial summary judgment.

MDOC's claim that the corrections officers cannot maintain their breach of contract action relies on two fundamental propositions. First, MDOC states the corrections officers cannot maintain a cause of action against the state, or its agencies, directly under the FLSA. Although the FLSA purports to subject states to suit in state courts without their consent, *see* 29 U.S.C. sections 203(x), 216(b), this private cause of action was held constitutionally invalid as applied to states that have not consented to suit, *Alden v. Maine*, 527 U.S. 706, 760 (1999). Claims arising directly under the FLSA may be brought against a state agency only if the state has waived sovereign immunity and consented to suit. *Id.* at 757.

Second, recognizing that the corrections officers are not purporting to bring an action under the FLSA but rather a common law breach of contract claim, MDOC suggests the breach of contract claim should be treated as though it is merely a disguised attempt to enforce the FLSA. Otherwise, MDOC asserts, permitting the corrections officers to maintain a breach of contract claim would circumvent the FLSA's lack of a private cause of action.

In support, MDOC cites *Astra USA, Inc. v. Santa Clara County, California*, 563 U.S. 110 (2011), and *Grochowski v. Phoenix Construction*, 318 F.3d 80, 86 (2d Cir. 2003). Unlike the FLSA, the statutes at issue in those cases did not purport to provide a private cause of action. *Astra*, 563 U.S. at 117; *Grochowski*, 318 F.3d at 85. To give effect to the legislatures'

decisions not to provide a private cause of action in those statutes, the courts declined to let a party bring a state law breach of contract action that merely attempted to enforce statutory obligations. *Astra*, 563 U.S. at 118; *Grochowski*, 318 F.3d at 86. By contrast, the FLSA purports to provide for a private cause of action against states and their agencies. There is no danger here of nullifying a legislative decision not to grant a private cause of action. Therefore, *Astra* and *Grochowski* are distinguishable on their most essential facts. The concern becomes not one of transgressing a legislative scheme but one of sovereign immunity and consent to suit.

MDOC cites *Nuñez v. Indiana Department of Child Services*, 817 F.3d 1042 (7th Cir. 2016), to support the proposition that courts should not find a state consented to suit for FLSA violations by entering into an employment contract that incorporates FLSA obligations. In *Nuñez*, investigators employed by the Indiana department of child services sought to sue the department in federal court for violations of the FLSA. *Id.* at 1043. The investigators claimed Indiana had consented to federal FLSA suits by its employees because "(1) Indiana allows suits to be brought against the state for violations of express and implied contracts, (2) an employment relationship is a contract for purposes of Indiana law, and (3) the FLSA's requirements are embedded in all employment relationships and thus in contracts." *Id.* at 1045. The Seventh Circuit declined to find that Indiana had impliedly consented to freestanding suits for FLSA violations on the basis that it consented to suit for breach of contract. *Id.*

Unlike the plaintiffs in *Nuñez*, the corrections officers do not claim the state has waived sovereign immunity for claims arising under the FLSA. Their counts alleging causes of action

under the FLSA have been dismissed. The corrections officers and MDOC negotiated labor agreements that expressly incorporated MDOC's FLSA obligations. The corrections officers are suing for breach of those labor agreements. They are alleging state-law breach of contract claims, not freestanding claims for violations of the FLSA as the *Nuñez* plaintiffs sought to do.

Breach of contract claims may be maintained against the state to enforce an express contract even when that contract incorporates statutory obligations. *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. banc 1999). The state waives sovereign immunity when it enters into an express contract. *Kubley v. Brooks*, 141 S.W.3d 21, 28 (Mo. banc 2004). Therefore, the corrections officers' breach of contract counts seeking to enforce against the state an express contract with terms that incorporate FLSA obligations do not circumvent the FLSA and do not implicate the state's sovereign immunity. The corrections officers can maintain claims against the state for breach of an express contract even though the contract incorporates obligations imposed by the FLSA.

B. No Error in Refusal to Decertify Class

The circuit court certified this class of plaintiffs in September 2015. In February 2018, MDOC filed a motion for class decertification that alleged the class failed to meet the predominance and superiority requirements of Rule 52.08(b)(3). The circuit court overruled the motion, finding common issues predominated and a class action was still a superior method of fair and efficient adjudication.

MDOC filed a motion to reconsider class decertification in June 2018 and renewed its motion for decertification twice during trial. The circuit court overruled the motions as they

presented the same arguments it considered in MDOC's first motion to decertify the class. On appeal, MDOC again claims the circuit court erred in refusing to decertify the class because the class failed to meet the predominance and superiority requirements of Rule 52.08(b)(3).

Standard of Review

Whether a claim should proceed as a class action "rests with the sound discretion of the trial court." *State ex rel. Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42, 46 (Mo. banc 2019). A circuit court abuses its discretion if its decision "is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 599 (Mo. banc 2012).

Discussion

Class certification is governed by Rule 52.08. In addition to the numerosity, commonality, typicality, and adequacy requirements of Rule 52.08(a), plaintiffs seeking class certification must also satisfy one of the three requirements of Rule 52.08(b). *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 877 (Mo. banc 2008). In the case at hand, the corrections officers were certified as a class under Rule 52.08(b)(3), which requires that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

MDOC alleges the class fails to meet Rule 52.08(b)(3)'s predominance and superiority requirements because individual questions of class members' damages predominate over common questions of liability. It presented deposition testimony to show individual class

members spent varying amounts of time performing the activities for which they seek compensation. The time spent performing the activities varies among each of the 21 facilities that employ the corrections officers and among corrections officers within each individual facility. MDOC contends the method of common proof, i.e., electronic entry and exit logs, used to compute the time spent on these activities, was unreliable and tracked only time spent within the security envelope, not time spent working. It argues the testimony showed corrections officers often log entry into a facility and then work out, socialize, or attend to other personal matters before beginning their preshift activities. MDOC also asserts its affirmative defenses – offset of damages, laches, judicial estoppel, and statute of limitations – do not apply to all class members. Instead, their application turns on individual questions of fact. MDOC claims these individual questions regarding damages overwhelmed the common questions of liability.

The need for inquiry as to individual damages, however, "does not preclude a finding of predominance." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488 (Mo. banc 2003). Predominance "does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues." *Id.* The predominate issues "need not be dispositive of the controversy or even be determinative of the liability issues involved." *Id.* (quotations omitted). Common questions of law or fact may be overriding, "despite the fact that the suit also entails numerous individual questions." *Id.*

In its order overruling MDOC's motion for class decertification, the circuit court expressly found:

> common issues predominate in this litigation, including . . . whether the contract requires Defendants to comply with the FLSA's overtime requirements; whether the pre- and post-shift activities performed by Plaintiffs are compensable under the FLSA and the contract; . . . whether Defendants' refusal to compensate Plaintiffs for pre- and post-shift activities is a breach of its contract with Plaintiffs . . . . Moreover, these common issues will be decided using common evidence. Plaintiffs and the Class performed virtually identical pre- and post-shift activities across different Department of Corrections facilities over the time period of the class, and their employment by [MDOC] is governed by the same Labor Agreement and Procedures Manual.

In light of these numerous common questions of law and fact, the circuit court did not abuse its discretion in overruling MDOC's motion for class decertification.

Relying on the same individual questions of damages, MDOC also claimed class adjudication would be unfair and, therefore, it was not the superior method of adjudication. Yet "[t]he primary focus of the superiority analysis is the efficiency of the class action over other available methods of adjudication." *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 182 (Mo. App. 2006). The analysis permits consideration of the "improbability that large numbers of class members would possess the initiative to litigate individually." *Id.*

The circuit court's order overruling the motion to decertify the class found the superiority requirement was met because decertification would create the need for thousands of mini-trials that would decide identical issues. The circuit court's decision is not clearly against the logic of the circumstances, nor is it arbitrary or unreasonable. The circuit court did not abuse its discretion in overruling MDOC's motion to decertify the class.

C. Undisputed Facts Insufficient to Support Entirety of Partial Summary Judgment

MDOC next contends the circuit court erred in sustaining the corrections officers' motion for partial summary judgment on the breach of contract counts because none of the preshift and postshift activities are integral and indispensable to the work the corrections

officers are employed to perform; therefore, MDOC had no duty to compensate the corrections officers for time spent performing the activities under the terms of the contract requiring compliance with the FLSA. The corrections officers claim they presented undisputed material facts showing, as a matter of law, their preshift and postshift activities are compensable under the FLSA; therefore, the circuit court did not err in granting partial summary judgment in their favor on the issue of liability for breach of contract.

Standard of Review

The circuit court's authority to sustain the corrections officers' motion for partial summary judgment derives from Rule 74.04(c)(6), which provides, "A summary judgment, interlocutory in character, may be entered on any issue, including the issue of liability alone, although there is a genuine issue as to the amount of damages." Whether the undisputed facts render MDOC liable for the corrections officers' breach of contract claims is a question of law that is reviewed *de novo*. *ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The record must be reviewed in the light most favorable to MDOC, as the non-movant. *Id*. As the non-movant, MDOC is given the benefit of all reasonable inferences, so if the corrections officers require an inference to establish their right to a determination that MDOC is liable on their breach of contract claims, and the evidence reasonably supports any inference other than (or in addition to) the corrections officers' inference, a genuine dispute exists and their prima facie showing fails. *Id.* at 382.

To establish there is no genuine dispute as to material facts demonstrating MDOC is liable on the corrections officers' breach of contract claims, Rule 74.04(c)(1) required the corrections officers to "attach to the motion for summary judgment a statement of

uncontroverted material facts." *Green v. Fotoohighiam*, 606 S.W.3d 113, 116 (Mo. banc 2020). The statement of uncontroverted material facts had to state "with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts." *Id.* (quoting Rule 74.04(c)(1)).

Many of the corrections officers' separately numbered paragraphs fail to comply with Rule 74.04(c)(1) because they do not purport to state material facts. Rather, many state only that a fact witness has testified about a fact in his or her deposition. But unless the mere existence of that deposition testimony is, in and of itself, a material fact, an admission of the correctness of the statement of the witness's testimony does not prove the substance of the witness's testimony is undisputed. *Custer v. Wal-Mart Stores, E. I, LP*, 492 S.W.3d 212, 215 (Mo. App. 2016).

Paragraph 74 is an example of how the corrections officers have confused the existence of deposition testimony with the substance of that testimony. It states: "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." That alleged statement of material fact does not assert class plaintiffs are expected to handle incidents that rise to the level of needing intervention while walking from the airlock to their posts. Although MDOC admitted the truth of Paragraph 74, an admission of that paragraph admits only that Warden Sachse said what she said; it does not admit corrections officers are expected to handle incidents that rise to the level of needing intervention while walking from the airlock to their posts. *See Custer*, 492 S.W.3d at 215-16.

The result of the corrections officers presenting the mere existence of deposition testimony as material fact was to require MDOC to engage "in the meaningless activity of admitting or denying whether [the corrections officers] accurately quoted deposition testimony" when responding to the statement of uncontroverted material facts. *See id*. Stating deposition testimony as a material fact does not aid a court in identifying material facts or determining the existence of any genuine issue. *Id.* Consequently, MDOC's admissions of the paragraphs that merely state a witness testified about a fact in his or her deposition will not be considered in reviewing whether the corrections officers met their burden under Rule 74.04.

Discussion

The FLSA requires employers to pay their employees a minimum wage and establishes overtime pay for each hour worked in excess of 40 hours in a workweek. The FLSA does not, however, define "work" or "workweek." Consequently, the Supreme Court of the United States supplied the scope and meaning of the terms and, relying on the statute's remedial purpose, arrived at a broad construction of "work" encompassing physical or mental exertion "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). The Supreme Court also reached a similarly broad construction of "workweek" to include "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

Under its broad definitions, the Supreme Court found nearly every activity undertaken for the benefit of the employer qualified as compensable work, including time spent traveling

to and from the location of work, putting on necessary clothing and equipment, and preparing machinery. *See Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 599 (1944); *Anderson*, 328 U.S. at 691-93. In response, Congress found the Supreme Court's interpretation of the FLSA created "unexpected liabilities," 29 U.S.C. section 251(a), and passed the Portal-to-Portal Act to exempt employers from liability under the FLSA for failing to pay overtime for two categories of work. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 32 (2014). Under the Portal-to-Portal Act, employers are not liable for failing to pay overtime compensation for "(1) walking, riding, or traveling to and from actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. section 254(a).

An employee's principal activities are (1) those the employee is employed to perform and (2) those both integral and indispensable to the performance of the work the employee is employed to perform. *Busk*, 574 U.S. at 33. An activity is integral to the work the employee is employed to perform if it is an intrinsic element of the work. *Id.* It is indispensable if the employee cannot dispense with the activity if he or she is to perform the work. *Id.* Any activity both integral and indispensable to the work an employee is employed to perform is, itself, a principal activity. *Id.* In addition, under the continuous workday rule of the Portal-to-Portal Act, all activities performed after an employee begins the first principal activity of a shift and before the employee completes the last principal activity of a shift are compensable, regardless of whether some of the intervening activities, standing alone, would not be compensable as principal activities. *IBP*, 546 U.S. at 28; 29 U.S.C. section 254(a); 29 C.F.R.

790.6. If any one of the preshift activities is compensable, all subsequent preshift activities are also compensable. 29 U.S.C. section 254(a). Similarly, if any single postshift activity is compensable, all preceding postshift activities are compensable. *Id.*

This rule makes the chronology of activities crucial to the application of the "integral and indispensable" test. For preshift activities, each activity must be evaluated in chronological order until an activity, standing alone, is compensable as a matter of law. Any activities occurring before the first compensable activity need not be compensated, but all activities after the first compensable activity must be compensated. Likewise, for postshift activities, each activity must be evaluated in reverse chronological order until an activity, standing alone, is compensable as a matter of law. Any activities occurring after the last compensable activity need not be compensated, but all activities before the last compensable activity must be compensated.

There is no dispute the work the corrections officers are employed to perform consists of: supervising the movement of offenders; conducting periodic counts of offenders; searching offenders and their living quarters for contraband; supervising offenders; escorting and transporting offenders; or disciplining offenders. Whether the preshift and postshift activities qualify as compensable principal activities depends on whether they are integral and indispensable to the work the corrections officers are employed to do. Although the inquiry is necessarily fact-intensive, *Llorca v. Sheriff, Collier Cnty., Fl.*, 893 F.3d 1319, 1324 (11th Cir. 2018), whether an activity is integral and indispensable to the work the corrections officers are employed to do is a question of law, *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 738 n.13 (1981).

MDOC claims the circuit court's determination that MDOC was liable on the corrections officers' breach of contract claims was erroneous because the preshift and postshift activities do not qualify as principal activities. Rather, MDOC claims, they constitute an ordinary process of ingress and egress, and it offers an activity-by-activity analysis of whether any one of the preshift and postshift activities qualifies as indispensable and integral to the work the corrections officers are employed to do – supervise, guard, escort, and discipline offenders.

The Rule 74.04 record shows that, for their preshift and postshift activities, the corrections officers:

- log arrival and departure through signing a paper record, scanning identification, or submitting to biometric identification;
- report to a central observation post to receive assignments, if needed;
- undergo a security screening and pass through security gates, some of which include metal detectors, except for tower officers;
- pass through an airlock, if the facility is equipped with one;
- report to a custody supervisor to receive daily post and duty assignments, if needed;
- retrieve and return keys and radios from electronic key boxes or "issue rooms," if needed;
- walk to and from their daily posts;
- complete a patrol vehicle inventory, if a patrol car officer; and
- receive or pass on information from one shift to the next.

These activities all occur within the prison and are required of more than 90 percent of corrections officers.[6]

In relation to the activities as a whole, the corrections officers contend they are indispensable and integral to the corrections officers' work, citing two facts. First, they cite the fact MDOC's former deputy division director, Dwayne Kempker, testified:

[6] Tower officers and patrol car officers do not go through security.

> [The preshift and postshift activities] create for us a safe and secure facility where we properly identified [sic] 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.
>
> 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 [sic] sure unauthorized items aren't carried in and that people are properly equipped to protect themselves.
>
> [T]hese are all done . . . 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 [sic] those then we need to – doing these things are essential to protecting that safety and security.

Second, they rely on the fact Mr. Kempker testified the activities "are necessary and essential to keep and house criminals" and "are required because of the nature of the job that the guards are doing." As previously discussed, the corrections officers merely state a fact witness said what he said. By MDOC's admission, it admits only that Mr. Kempker so testified. Because the substance of Mr. Kempker's testimony has not been stated as a material fact or shown to be undisputed, it cannot be considered in determining whether MDOC is liable, as a matter of law, on the corrections officers' breach of contract claims.

The only other facts in the Rule 74.04 record relating to the activities as a whole are that the activities are "important to the end of housing dangerous criminals" and "connected to keeping criminals safely locked behind bars." These two facts do not establish all preshift and postshift activities are either integral or indispensable to the work. Because no other facts

relate to the activities as a whole, the activities will be considered separately[7] to determine whether the facts relating to specific activities demonstrate any activity, standing alone, is compensable. An activity qualifies as a principal activity if it is either: (1) the work the corrections officers are employed to do or (2) both integral and indispensable to that work.

1. *Logging Arrival and Departure*

MDOC asserts logging arrival and departure is not compensable because it is precisely the sort of activity the Portal-to-Portal Act provides is merely preliminary to the work and not compensable. It cites two cases holding a check-in process of one kind or another was not compensable, *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007), and *Haight v. Wackenhut Corp.*, 692 F. Supp. 2d 339, 344 (S.D.N.Y. 2010).[8] Notably, however, neither of these cases involves corrections officers. Because an activity's compensability depends on whether it is integral and indispensable to the work an employee is hired to do, an activity may be compensable in relation to one job but not compensable in relation to another. The corrections officers offer no argument specific to logging arrival and departure.

Logging arrival and departure is not the work the corrections officers are employed to do – supervising, guarding, escorting, or disciplining offenders – so it is compensable only if it is integral and indispensable to that work. The generally applicable facts that all activities

---

[7] As discussed below, the undisputed material facts are insufficient to show the exact chronological order in which preshift and postshift activities are done. For that reason, this opinion analyzes the activities in the order they are listed in the corrections officers' statement of uncontroverted material facts.

[8] It also cited a third case, *Mertz v. Wisconsin Department of Workforce Development*, 365 Wis.2d 607 (Wis. App. Oct. 22, 2015), but this decision is unpublished. It has no precedential authority in its own jurisdiction, much less in this state. *In re Desmond F. v. Brenda B.*, 795 N.W.2d 730, 741 n.11 (Wis. 2011) ("An unpublished opinion has no precedential value and is not binding on any court of this state.").

are "important to the end of housing dangerous criminals" and "connected to keeping criminals safely locked behind bars" do not suffice to show logging arrival and departure is integral or indispensable to the work. "The fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40; *see also Busk*, 574 U.S. at 36 ("If the test could be satisfied merely by the fact that an employer required an activity, it would sweep into "principal activity" the very activities that the Portal-to-Portal Act was designed to address.").

Because there are no undisputed material facts showing that logging arrival and departure is an intrinsic element of supervising, guarding, escorting, or disciplining offenders, the corrections officers failed, as a matter of law, to carry their burden under Rule 74.04.

2. *Security Screenings*

When entering the facility, all corrections officers must "go through some manner of search." For more than 90 percent of the officers, that means undergoing a security screening that involves passing through security gates, metal detectors, or airlocks. MDOC articulates two reasons this activity is not compensable and the circuit court erred in holding otherwise. First, it claims the purpose of the security screenings is to keep employees safe by preventing weapons and dangerous items from entering the facility. This assertion is not supported by facts in the Rule 74.04 record. Second, it claims everyone entering the facility, employees and visitors alike, must submit to the security screenings, precluding finding the activity is integral to the corrections officers' work. The Rule 74.04 record, however, does not show everyone entering the facility must submit to a security screening. No statement of fact,

whether compliant with Rule 74.04(c)(1) or not, says visitors must submit to security screenings.

The corrections officers contend the security screenings are compensable because they are tied to the corrections officers' work of supervising and guarding offenders and interdicting contraband and MDOC could not eliminate the screenings without impairing the corrections officers' ability to complete their work. Dispensing with the activity, they say, would result in the introduction of weapons or other contraband into the facility and make it impossible for the corrections officers to safely and effectively maintain custody and discipline of inmates. The corrections officers, however, fail to cite to any facts in the Rule 74.04 record supporting these assertions. There are no facts to show what impact, if any, eliminating security screenings would have on the corrections officers' work.

The Rule 74.04 record establishes only that submitting to a search upon entry, like all preshift activities, is "important to the end of housing dangerous criminals" and "connected to keeping criminals safely locked behind bars." These two facts, alone, do not demonstrate submitting to a search when entering the facility is a compensable principal activity.

The United States Court of Appeals, Tenth Circuit, reached the opposite conclusion in *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020). It found submitting to a correctional facility's security procedures was integral and indispensable to the officers' principal activities of maintaining custody and discipline of inmates and providing security, in part, because the screenings and the principal activities shared the same goals of providing prison security. *Id.* at 1278-79. This is a subtle expansion of the test formulated in *Busk*, and *Aguilar* cites no authority for the proposition that an activity may be

integral if it shares a common goal with the work. In fact, *Aguilar* is the only case this Court has found that uses such a test. This Court is not bound to follow *Aguilar's* interpretation of the Portal-to-Portal Act, *see Wimberly v. Lab. & Indus. Rels. Comm'n of Mo.*, 688 S.W.2d 344, 347 (Mo. banc 1985), and doing so would likely result in the very issue the Portal-to-Portal Act was passed to address – unexpected liabilities due to an overly broad definition of compensable work.

Accordingly, the corrections officers failed to establish sufficient undisputed facts entitling them to a determination, as a matter of law, that the security screenings are indispensable and integral to their work. The portion of the circuit court's judgment finding liability on this issue was not supported by the Rule 74.04 record.

3. *Receiving Assignments*

The circuit court also found the corrections officers were entitled to be compensated for time spent receiving assignments from a supervisor. MDOC claims the circuit court erred in so finding because a handful of cases have held the activity is not compensable. Those cases are not persuasive; it makes no difference that, in other circumstances, an activity is not compensable. Due to the focus on an activity's relation to an employee's work, *per se* holdings that a certain activity is not compensable are impossible. The corrections officers do not offer an argument specific to the preshift activity of receiving assignments.

The Rule 74.04 record discloses only that some corrections officers must report to a supervisor for assignment and that, like all preshift activities, doing so is important for and connected to housing offenders. The Rule 74.04 record is devoid of facts that could be found to demonstrate obtaining a work assignment is integral to supervising, guarding, escorting, or

disciplining offenders. On this record, the corrections officers have failed to show time spent reporting to a supervisor for assignment is compensable, as a matter of law.

4. *Picking Up and Returning Equipment*

Some corrections officers must retrieve equipment such as keys and radios from electronic key boxes or "issue rooms."[9] MDOC claims the circuit court erred in finding this activity was compensable because picking up equipment is a quintessential preliminary activity. It asserts the Portal-to-Portal Act was enacted to override cases like *Anderson* that had held time spent "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, [and] preparing the equipment for productive work" was compensable. To bolster its claim, MDOC cites several cases that hold donning and doffing or picking up ordinary safety equipment is not compensable.

The corrections officers emphasize that, in MDOC's Rule 74.04(c) response, it admitted "having radios and the ability to communicate for relief in shift is integral" to the corrections officers' work, and corrections officers are "fully equipped" the entire time they are within the security envelope. They also cite to *Aguilar*, which held a similar activity in the context of the work of corrections officers could not be eliminated without impairing the corrections officers' ability to do the work. 948 F.3d at 1280. They assert radios and keys are closely connected to their work and argue it "seems obvious that an officer could not effectively complete [his or her] essential functions" without checking out the equipment needed to supervise, guard, escort, and discipline an offender.

[9] Not all corrections officers need to collect radios or keys. Some are issued their own radios or receive them at their posts.

In regard to this activity, the Rule 74.04 record shows corrections officers "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" and "having radios and the ability to communicate for relief is integral to the corrections officers' work." Additionally, like all preshift and postshift activities, picking up and returning radios and keys is "important to the end of housing dangerous criminals" and "connected to keeping criminals safely locked behind bars." These facts, especially the fact corrections officers use radios to communicate for relief while on shift, demonstrate retrieving radios and keys is integral to the corrections officers' work. The work is, in part, using radios to communicate. Therefore, the undisputed material facts demonstrate the time spent picking up and returning equipment used in supervising, guarding, escorting, and disciplining offenders on shift is a principal activity. The Rule 74.04 record established as a matter of law, that MDOC is liable to compensate them for this activity.

5. *Time Spent Supervising Offenders*

After passing through security, receiving assignments, passing through the airlock (if applicable), and retrieving keys and radios, corrections officers walk to their posts. The Rule 74.04 record shows that, during this time, corrections officers are, as a job requirement: "on duty and expected to respond" to incidents involving offenders; required to act as prison guards whenever they are inside the prisons; and required to remain vigilant and respond to incidents as they arise.

MDOC claims the requirement that corrections officers remain vigilant and intervene in emergent incidents involving offenders while performing preshift and postshift activities

does not transform the time spent on the activities into compensable time. For support, it cites cases dealing with a wide swath of security-related professions that found time spent merely being required to remain alert and respond or to be "on call" is not compensable time.

The corrections officers' assertion they are entitled, as a matter of law, to a determination that this time is compensable is demonstrated by several facts MDOC admitted in their Rule 74.04(c) response:

- they are "on duty and expected to respond" when walking to and from their posts;
- they are expected to act as prison guards whenever they are inside the prisons;
- as a job requirement, they are required to remain vigilant and respond to fights and other incidents, even when not on post;
- MDOC trains corrections officers to be careful during preshift and postshift activities and shift change times;
- incidents have occurred between corrections officers and offenders where offenders confronted staff, before their shift or leaving their post after their shift; and
- MDOC compensates them for time spent responding to incidents while off-shift.

The corrections officers are employed to supervise, guard, escort, and discipline offenders. The Rule 74.04 record shows that, although the corrections officers are not at their posts, they are required to do the work they are employed to do – specifically, supervising offenders and, when the need arises, intervening in fights or responding to other incidents (i.e., guarding and disciplining offenders). This is the same work expected of the corrections officers during their shifts. The only difference is where within the facility they do the work, at or away from their posts. Because the corrections officers are supervising, guarding, and disciplining offenders during this time, once they are in the presence of inmates and "on duty and expected to respond" to emergent incidents, they are performing the work they are employed to do.

MDOC seeks to avoid this conclusion by asserting the time spent actually responding to an incident is compensable (and, indeed, the corrections officers are paid for time spent responding) but time spent remaining vigilant or merely supervising offenders is not compensable. It draws a distinction between actually responding to or intervening in fights and other incidents on the one hand and the preceding activity of supervising and monitoring offenders on the other. But this distinction is immaterial. An important part of the work the corrections officers are employed to do is supervising, guarding, and disciplining offenders. It is true the need to respond to an incident may not arise on a daily basis, but the work of supervising offenders is, in and of itself, part of the corrections officers' work.

Corrections officers are required to perform essentially the same duties during preshift and postshift time as they are required to perform when on shift. Whether done at or away from their posts, supervising and monitoring offenders and intervening when necessary is the work MDOC employs them to do. While merely walking to and from their posts, alone, has not been shown to be compensable, time they are "on duty and expected to respond," which includes time spent walking to and from their posts, is compensable. [10]

[10] The Rule 74.04 record shows corrections officers supervise offenders and respond to fights and other incidents, at the latest, when walking to and from their posts. There is some indication they may supervise offenders and respond to emergent incidents at other times. For example, they are expected to "act as prison guards" at all times. But the record is insufficient to show at what other times, if any, corrections officers supervise and respond while away from their posts. The time spent supervising, guarding, and disciplining offenders happens to coincide with the time spent walking to and from posts, but the compensability of time spent supervising offenders is not dependent on the activity of walking to and from posts.

6. *Exchange of Information*

The final preshift activity and first postshift activity expected of the corrections officers is to communicate information between incoming and outgoing shifts. Other than listing the passing of pertinent information from one shift to the next as a preshift and postshift activity and describing preshift activities, generally, as important to and connected with the end of housing offenders, the Rule 74.04 record contains no facts related to this activity. It cannot be determined whether this activity refers to individual officers communicating information to the officers relieving them or to a main officer briefing the next shift as a whole. It is also impossible to determine whether this exchange of information occurs at their posts or at some central location. This absence of facts on the issue precludes any determination that the activity is indispensable or integral to the work or that it occurs after the corrections officers pick up radios and keys or are deemed to be on duty and expected to respond to emergent incidents, i.e., within the continuous workday.

7. *Patrol Vehicle Inventory*

Some of the corrections officers work as vehicle patrol officers. One of the vehicle patrol officers' preshift activities is to inventory their vehicles' weapons, ammunition, and equipment. Other than identifying this as a required activity, the corrections officers have not supplied facts relating to the purpose or impact of this activity. The undisputed facts do not show whether the vehicle patrol officers could dispense with this activity without impairing their ability to do their jobs or whether it is an intrinsic element of supervising, guarding, escorting, or disciplining offenders. On this record, the facts are insufficient to demonstrate the vehicle inventory is a compensable principal activity.

The corrections officers established only two of their preshift and postshift activities are integral and indispensable to the work they are employed to do, as required by the Portal-to-Portal Act. The circuit court's grant of partial summary judgment on Counts III and VI is affirmed insofar as it holds time spent picking up and returning equipment and time they are "on duty and expected to respond" when not on shift is compensable. Because the corrections officers' statement of uncontroverted material facts did not present facts sufficient to decide whether the other activities are compensable, either because they qualify as principal activities or because they occur after the first and before the last principal activity, the circuit court erred in holding all preshift and postshift activities are compensable, as a matter of law.

D. Proof of Compensability on Remand

Because the compensability of preshift and postshift activities was decided on summary judgment, the Court is not finding on the merits that those activities that were not shown to be compensable affirmatively are not compensable. The corrections officers have merely failed to establish undisputed material facts that demonstrated all of their preshift and postshift activities are compensable. Having failed to meet their burden on summary judgment, whether the labor agreements require MDOC to compensate the corrections officers for time spent performing preshift and postshift activities other than picking up and returning equipment and supervising offenders while not on shift remains unadjudicated and subject to further proof on remand. If the remaining activities are indispensable and integral to the corrections officers' work or if they occur after the first and before the last principal activity, they are compensable. After the circuit court determines which activities are compensable, damages must be recomputed accordingly.

E. Declaratory and Injunctive Relief Improper

MDOC next claims the circuit court erred in granting declaratory and injunctive relief on Count VII of the Officers' petition. The circuit court's amended judgment found, regarding Count VII, that the parties' labor agreements required MDOC to pay for time spent performing all preshift and postshift activities, as required by the FLSA. Believing the time spent on preshift and postshift activities qualified as compensable worktime, the circuit court also declared MDOC in violation of its contractual duty to track all time worked. It then ordered MDOC to compensate the corrections officers for their preshift and postshift activities prospectively and implement a timekeeping system to record time spent on preshift and postshift activities.

For the reasons discussed above, the corrections officers failed to show all their preshift and postshift activities qualify as compensable principal activities. Consequently, the circuit court's judgment on Count VII, which was premised on its determination that all preshift and postshift activities were compensable, cannot stand. On this record, the circuit court erred in holding the FLSA required compensation for the time spent performing all such activities and in granting the corrections officers declaratory and injunctive relief on Count VII.

Vacating the award of damages further eliminates any alleged prejudice from the circuit court's exclusion of MDOC's expert witnesses on the issue of damages during the jury trial. Therefore, this claim of error need not be addressed.

III. Conclusion

The corrections officers can maintain a private breach of contract cause of action against MDOC, and the circuit court did not err in refusing to decertify the class. The circuit

court did err, however, when it determined pursuant to Rule 74.04(c) all the corrections officers' preshift and postshift activities are compensable principal activities that must be compensated under the terms of the labor agreements incorporating the FLSA. Insofar as the circuit court's judgment determined time spent picking up radios and keys and time they are on duty and expected to respond to emergent incidents is compensable, the circuit court's judgment is affirmed. In all other respects, including the award of damages, the circuit court's judgment is vacated. Because the circuit court's grant of declaratory and injunctive relief was based on its erroneous finding that all preshift and postshift activities qualify as compensable principal activities, it further erred in granting declaratory and injunctive relief. The circuit court's judgment is affirmed in part and vacated in part, and the cause is remanded.

_____

PATRICIA BRECKENRIDGE, JUDGE

Draper, C.J., Wilson, Russell,
Powell and Fischer, JJ., concur.