

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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

**MOTION TO STAY THE DECLARATORY ACTION PART OF THE AMENDED JUDGMENT ENTERED SEPTEMBER 14, 2018**

Appellant Missouri Department of Corrections (“MDOC”) requests that the Court stay the portion of the Amended Judgment that grants declaratory relief. The portion of the Amended Judgment directing MDOC to implement a “comprehensive” timekeeping system at its 21 institutions that will track pre- and post-shift work performed by members of the Respondent Class because MDOC never promised to install that kind of time-keeping system and breached no obligation to do so. The portion of the Amended Judgment directing MDOC to pay plaintiffs for certain activities specifically related to the portions of the Judgment being appealed and this portion of the declaratory judgment should be stayed as well. Moreover, MDOC is likely to prevail on appeal on its argument that it breached no contractual obligations *whatsoever*. Forcing it to make extra-contractual capital improvements using funds that

were not appropriated for that purpose will substantially prejudice MDOC, as those improvements and expenditures cannot be unwound after MDOC prevails on appeal. The prejudice to the Respondent Class, however, is minimal as they have already obtained a jury verdict for damages and will be compensated in the event they prevail on appeal. Accordingly, a partial stay of the Amended Judgment is warranted.

## **I. Background**

Following a jury trial in August 2018, the trial court entered an Amended Judgment on September 14, 2018. In addition to awarding damages, the trial court entered declaratory relief based in part on Count VII of Respondents' Second Amended Petition as Amended by Interlineation. Count VII requested a declaration that DOC violated contractual obligations to compensate members of the Respondent Class for pre- and post-shift work in accordance with the FLSA. The trial court granted this request.

The trial court's Amended Judgment went beyond that request, however, and directed that MDOC implement a "comprehensive" timekeeping system in its facilities and provide records created by that system to the corrections officers' union, MOCOA. Those requirements are found in subparagraphs 7(b) and 7(c) of the Amended Judgment:

- b. No later than 90 days from the entry of this judgment, Defendant shall implement a system that complies with this

Order and maintains comprehensive, accurate, and reliable records of all time worked by Plaintiffs' Class and payment for pre- and post-shift work. Defendant shall immediately inform the Court, MOCO, and Plaintiffs' Class counsel that such a system has been implemented.

- c. Defendant shall make all such records available to MOCO, Plaintiffs' Class, and the Court for inspection upon request.

DOC requested that the trial court stay these requirements. DOC noted that instituting a comprehensive timekeeping system at all 21 institutions where COs work in less than three-months would place an unreasonable burden on MDOC in light of budgetary constraints and logistical hurdles. Moreover, MDOC explained that implementing the required changes prior to resolution of MDOC's appeal risks wasting state resources on a potentially unnecessary capital project. The trial court denied MDOC's stay motion on October 19, 2018.

## II. Argument

The Supreme Court of Missouri has adopted the federal four-factor test for considering whether to issue a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. banc 1996) (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.*, 812 F.2d 288, 290 (6th Cir. 1987)). A motion to stay should be granted

when the moving party has shown “that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued.” *Id.* at 840 (citing *Celebrezze*, 812 F.2d at 290). The balance of these four factors “cannot be accomplished with mathematical precision,” so “the equitable nature of the proceedings mandates that the court’s approach be flexible.” *Id.* (internal citations omitted).

The balance of these factors weighs in favor of granting a stay of the requirements of the declaratory portions of the Amended Judgment—particularly subparagraphs 7(a), 7(b) and 7(c)—pending appeal. First, MDOC is likely to succeed on appeal because, *inter alia*, the alleged contracts at issue were not violated, and none of those alleged agreements required a timekeeping system of the sort ordered by the trial court. Second, MDOC will suffer irreparable harm absent a stay by being forced to implement capital improvements using money that was not appropriated for that purpose, and that will be nearly impossible to unwind should MDOC prevail on appeal. Third, and the implementation of these requirements would necessitate an unauthorized use of public funds.

**A. The alleged contracts at issue do not require implementation of the timekeeping system ordered by the Amended Judgment.**

The Amended Judgment found contractual liability based on several documents, including the MDOC employee handbook, various Missouri

statutes and regulations, and on the MOCO A collective bargaining agreement (a/k/a Labor Agreement). None of those alleged agreements require MDOC to implement a “comprehensive” timekeeping system or to report data gathered by that system to MOCO A. Consistent with that fact, the Respondent Class did not request such relief in its Amended Petition.

Despite this absence of a contractual hook or a specific pleading, however, the trial court ordered MDOC to implement a timekeeping system and reporting system. The only basis for the court’s order is Missouri Rule of Civil Procedure 87.10, which allows a plaintiff to seek “further relief” after a declaratory judgment is entered. But this procedure was not followed in this case. In addition, awarding such “further relief” under Rule 87.10 in this case is particularly inappropriate given that the labor agreement—which is the only actual contract alleged by the Respondent Class—expired a mere two weeks after the Amended Judgment was entered.

**B. MDOC is likely to prevail on its argument that none of the alleged contracts were breached.**

In addition to exceeding the permissible bounds of relief allowed under the alleged contracts, the declaratory relief awarded in the Amended Judgment is likely to be overturned because the contracts on which it depends either do not exist or were not breached.

The Missouri Supreme Court has rejected the notion that an employer's handbook or employee manual create any type of contract that any employee could enforce against his or her employer. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988). The Respondent Class's breach of contract claim based on employee manuals therefore fails as a matter of law.

Similarly, statutes and regulations will not form the basis of a private cause of action unless there is a "clear implication of legislative intent to establish a private cause of action." *Johnson v. Kraft Gen. Foods*, 885 S.W.2d 334, 336 (Mo. banc 1994); *see also Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466-67 (1985) (holding that "absent an adequate expression of an actual intent of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party"). There is no clear implication in this case of a legislative intent to create a private cause of action for MDOC employees via the statutes and regulations, so Appellant has a likely chance of success on the merits.

Moreover, the labor agreement between MDOC and MOCOA was not breached. The trial court found that agreement required payment for the pre- and post-shift activities because it required compliance with the FLSA. However, testimony by MOCOA's representative, Gary Gross, unequivocally demonstrates that both MOCOA and MDOC knew at the times the labor

agreement was negotiated in 2007 and again in 2014 that MDOC would *not* pay for pre- and post-shift time and class members knowingly performed those duties anyway. Collective bargaining agreements “may include implied terms that can be interpreted from the parties’ ‘practice, usage, and custom.’” *State ex rel. Union Pac. R. Co. v. Dierker*, 961 S.W.2d 816, 819 (Mo. 1998) (quoting *Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n*, 491 U.S. 299, 311 (1989)). MOCOA’s trial testimony precludes any interpretation of the labor agreement that would make payment of pre- and post-shift activities one of its requirements as required by 7(a) of the declaratory judgment.

More specifically, the same timekeeping system has been in place throughout the duration of both contracts. At no time did the parties agree to change MDOC’s timekeeping system. In fact, the timekeeping system is not even mentioned in either contract and there has never been a finding by any governmental agency that the timekeeping system in place did not comply with the FLSA. Under these circumstances, it was improper to interpret the collective bargaining agreement as requiring payment for those activities when the signatories to the agreement knew that the language of the agreement and the usage of the parties clearly did not require such payment.

**C. Appellant will suffer irreparable harm if the stay is not granted due to the substantial, irrecoverable costs that implementation of a new timekeeping system imposes.**

To implement the requirements of parts 7(b) and 7(c) of the Amended Judgment, MDOC must install new timekeeping systems at all the correctional facilities in the State. Each of these 21 facilities is unique in its setup, and the facilities are of varying ages and sizes. Each facility will require an individualized assessment, plan, and installation process in order to comply with the trial court's order. Such complications will result in increased costs of implementation for MDOC. These costs will never be recovered by MDOC, even if the judgment is reversed on appeal.

**D. Any potential harm to Respondents if the stay is granted is minimal.**

The stay will not reduce the Respondent Class' current damages award. Nor will it affect the Class' ability to benefit from the timekeeping and disclosure systems in the future after the appeal, assuming the judgment is affirmed. Moreover, to the extent some negligible harm arises, it will be small in comparison to the heavy costs that a hasty execution of such an enormous task will impose on both MDOC and Missouri taxpayers. Any harm to the Respondents during the stay could easily be repaired through a monetary payment should the Appellant not prevail on appeal. However, any harm to the Appellant and Missouri taxpayers would be impossible to repair.



- E. The public interest weighs in favor of the stay so that MDOC can determine the most efficient and reasonable use of the funds reserved for capital improvements without violating budgetary limits set by the legislature.**

All funds appropriated through the budget process to MDOC are categorized, and there are limited funds for capital improvements such as timekeeping systems. Implementing a uniform timekeeping system at all 21 MDOC institutions will require state-wide capital improvements to all prisons. The public interest is best protected by allowing MDOC time and opportunity to explore options for instituting changes to the timekeeping system currently used at the prisons within the limits of the existing budget, and additional time to determine options for any new timekeeping systems, the feasibility of the options, the time required to institute a new timekeeping system based on the individual status of each institution, and the options for funding such a system-wide change. MDOC has within the confines of the current budget appropriations, begun to make provision for, and coordinated with an appropriate vendor, to purchase new time keeping systems to be installed at each facility, but this process requires significantly more time to complete.

MDOC's budget is funded by taxes and set by the legislature. If MDOC is required to implement a new timekeeping system that requires expenditures beyond the limited funds available for capital improvements without legislative appropriation of the money to do so, it will be using public funds for

unauthorized purposes, skirting the democratic process of appropriations. Such an unauthorized use of taxpayer money would be illegal and clearly contrary to the public interest. Here, not only do “the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest,” *see Gabbert*, 925 S.W.2d at 840, but even the public interest itself weighs in favor of granting the stay.

### **III. Conclusion**

For the reasons set forth in this motion, this Court should grant a stay of the requirements of paragraphs 7(a), 7(b) and 7(c) of the Amended Judgment.

WHEREFORE, Appellant respectfully requests that this Court grant a stay of the implementation of the requirements of paragraphs 7(a), 7(b) and 7(c) until 30 days after the appeal in this matter is concluded, or until such time as the limited funds budgeted by the legislature for capital improvements can be used in the most efficient and appropriate manner to fund and implement the new timekeeping system mentioned in paragraph 7 of the Amended Judgment.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13 day of December, 2018, the foregoing was filed electronically with the Court to be served upon all counsel by operation of the Court's electronic filing system.

/s/ Mary L. Reitz