

**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

PLAINTIFFS' MOTION FOR CIVIL CONTEMPT

Plaintiffs' Class and Class Representatives, Thomas Hootselle, Daniel Dicus, and Oliver Huff ("Class Plaintiffs"), and Plaintiff, Missouri Corrections Officers Association ("MOCOA") (collectively "Plaintiffs"), hereby move this Court for an order holding Defendant, Missouri Department of Corrections, in civil contempt for failing to comply with the Amended Judgment entered by this Court on September 14, 2018. Defendant has failed to comply with the mandates of this Court order and is, for the foregoing reasons, in contempt of this Court.

I. PROCEDURAL HISTORY

Following entry of partial summary judgment and a full trial on the issue of liability, this Court made the following findings of fact:

- a. The Labor Agreement and D2-8.4 of the Procedure Manual impose contractual obligations on Defendant to pay straight time and overtime compensation for all work performed by the COs as required by the Fair Labor Standards Act ("FLSA"), and this work includes the time spent inside Defendant's prisons before and after each shift, including the time spent performing pre- and post-shift activities, as testified to at trial and referenced in Plaintiffs' exhibits 6 and 33.

b. Defendant requires all of Plaintiffs' Class do this pre- and post-shift activity in violation of these agreements; it has failed and refused to ever compensate [Plaintiffs'] Class for performing these activities, in breach of these agreements; it will continue to require this activity of Plaintiffs' Class and refuse to pay them for it in the future; Defendant has continued its policies in the face [of] governmental investigations, Plaintiffs' Class complaints, years of litigation in this case, and the Court's partial summary judgment order and original judgment.

c. Defendant has failed and continues to fail to comply with its legal obligation to keep comprehensive, accurate, and reliable records of all time worked by Plaintiffs' Class (and its contractual obligations to do so under Policy D2-8.1).

d. Defendant's past and ongoing course of conduct demonstrates that it will not comply with Section 12.2 of the Labor Agreement or the relevant terms of the Procedure Manual unless a declaratory judgment is entered requiring Defendant to do so. Thus, a justiciable dispute exists about Defendant's future compliance with the Labor Agreement, which is ripe for resolution by a judgment that declares and protects Plaintiff Missouri Correction Officer's Association (MOCOA) and Plaintiffs' Class' contractual rights.

Amended Judgment at 4-5. In light of these findings, the Court ordered Defendant to immediately begin compensating Plaintiffs' Class in accordance with the FLSA and to implement a proper timekeeping system for Plaintiffs' Class within 90 days of entry of judgment. *Id.* at 5-6. Defendant was also ordered to "immediately inform the Court, MOCOA, and [Plaintiffs'] Class counsel that such a system has been implemented." *Id.* at 6.

Defendant filed a motion to stay enforcement of those portions of the Amended Judgment on September 20, 2018, which was denied. Defendant next filed its Notice of Appeal with the Western District on October 26, 2018 and it then filed a second motion to stay enforcement of the Amended Judgment with the Western District on December 13, 2018. That motion to stay the declaratory judgment was also denied, without

prejudice, on January 31, 2019. As a consequence, all of the mandates of this Court's Amended Judgment are in full force and effect.

II. ARGUMENT

Civil contempt is criminal in nature. *City of Pagedale v. Taylor*, 831 S.W.2d 723, 724 (Mo. Ct. App. 1992)

[T]he notice prescribed for criminal contempt is equally applicable to civil contempt. The notice must include (1) the time and place of the hearing, (2) the essential facts constituting the contempt charged, and (3) a description of the charge as contempt. Although the notice constituting the charge of contempt, a *sui generis* proceeding, need not meet the specificity and technical requirements of an indictment or information, it must sufficiently advise the alleged contemnor of the actions which it is claimed constitute the contempt. The notice must be such as to fairly and fully inform the accused of the specific acts of contempt with which he is charged.

Id. (citations omitted). Though Defendant has filed a notice of appeal, this Court retains jurisdiction to rule in civil contempt proceedings during the pendency of the appeal.

Roberts v. Flowers, 996 S.W.2d 130, 134 (Mo. Ct. App. 1999). This motion "is addressed to the sound discretion of the trial court." *Id.* at 136.

Defendant has been aware of its obligations under the Amended Judgment for more than five months. In addition, Defendant has twice filed and twice lost motions to stay enforcement of those obligations, yet Defendant has willfully failed to implement the changes to its policies that this Court's partial summary judgment order and Amended Judgment require.

In particular, in contravention of the mandate of this Court, Defendant: (1) is not compensating its COs for the pre- and post-shift duties they perform every day; (2) has not implemented a timekeeping system to record the time its COs spend performing those duties; and (3) has not provided notice to Class Counsel, MOCO, or the Court of

any efforts to change those practices. This conduct is direct violation and in contempt of this Court's Amended Judgment.

Defendant was required to seek a supersedeas bond "at or prior to the time of filing notice of appeal" to cover the wages earned by the COs while the appeal is pending in order for the Amended Judgment to be stayed. *State ex rel. GTE N., Inc. v. Missouri Pub. Serv. Comm'n*, 835 S.W.2d 356, 366 (Mo. App. W.D. 1992); Mo. Sup. Ct. R. 81.09(a); Mo. Ann. Stat. § 512.080.1.

The sole and only purpose of an appeal bond is to stay the issuance of an execution until the cause can be passed upon and disposed of by the appellate court." A bond guarantees that a party's ability to collect on a judgment is not impaired although execution is deferred, if that party is successful on appeal.

Id.; see also *Green v. Perr*, 238 S.W.2d 922, 923 (Mo. App. St. Louis 1951) ("The recognized purpose of a supersedeas bond is to stay the execution or enforcement, pending the appeal, of any order or judgment which commands or permits some act to be done, or which is of a nature to be actively enforced against the party affected."); *Roussin v. Roussin*, 792 S.W.2d 894, 898 (Mo. App. E.D. 1990). Defendant has made no efforts to obtain a bond, and without one in place, there are no funds available to reimburse Plaintiffs' Class for their wages.

At the same time, Defendant's defiance of this Court's Amended Judgment is resulting in significant lost wages for Plaintiffs' class, with unpaid overtime accruing at a rate of approximately \$787,989 every month. When Plaintiffs' Class prevails on appeal, Defendant's contempt will force them to seek production of entry and exit logs at each of Defendant's prisons and procure a second report from their expert, Dr. William Rogers, calculating the wages owed, a procedure that required the review of millions of data points when damages were first calculated for trial. As Dr. Rogers' testimony showed at

trial, these lost wages are not easily calculated retroactively, particularly given Defendant's parallel failure to implement proper timekeeping systems at its prisons. Indeed, that failure is obviously calculated to position Defendant to argue, as it did at trial, that Plaintiffs' Class cannot prove the amount of their lost wages with sufficient specificity.

III. CONCLUSION

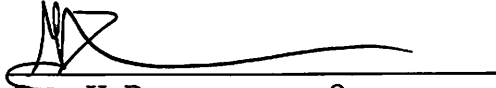
Defendant's recalcitrance violates the letter of this Court's Amended Judgment and ignores the findings of fact and conclusions of law in this Court's partial summary judgment order. The Amended Judgment has been in place for over five months. Defendant has twice sought to stay the mandate of the Court and twice been denied. Defendant's violation of the Order has damaged Class Plaintiffs by over \$2 million in wages in that time.

Class Plaintiffs, therefore, request that this Court enter the attached order: (1) finding Defendant in contempt of court; (2) ordering the immediate implementation of the policies and procedures set forth in Paragraph 7 of the Amended Judgment entered on September 14, 2018; (3) awarding Class Plaintiffs the attorneys' fees and costs incurred as a result of Defendant's contempt; and (4) sanction defendant \$1,575,978 per month since the date of judgment to be paid to the class and distributed per the Court's Amended Order and Judgment. Class Plaintiffs further request a hearing to determine the wages lost since the mandates of Paragraph 7 took effect on September 14, 2018 and that Class Plaintiffs be awarded the amount determined at that time.

Dated: February 21, 2019

Respectfully submitted,

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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:

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