IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY

KEITH E. BARNWELL, et al.	)	
	)	
On Behalf of Themselves and	)	
All Others Similarly Situated,	)	
	)	
Plaintiffs,	)	
	)	Case no.: 08-CV-2151-JWL/DJW
vs.	)	
	)	
CORRECTIONS CORPORATION	)	
OF AMERICA	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR CONDITIONAL CERTIFICATION OF CLASS CLAIMS
UNDER §216(b) OF THE FLSA

COME NOW the Plaintiffs, on behalf of themselves and all others similarly situated, and hereby set forth the following memorandum in support of the *Plaintiffs' Motion for Conditional Certification of Class Claims Under §216(b)of the FLSA.*

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I. INTRODUCTION

Corrections Corporation of America ("CCA") is a publicly traded company that operates 65 prison/detention facilities in 19 states including the District of Columbia. CCA contracts with various state and federal agencies to house inmates and detainees. CCA employs correction officers at these facilities as well as case managers, corrections counselors, and clerks. CCA identifies all of these officers and employees as non-exempt hourly employees entitled to overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*. Under Count I of the First Amended Complaint, the correction officer Plaintiffs allege that CCA has a policy of not paying compensation for work performed in violation of the FLSA. In particular, the Plaintiffs allege that CCA requires these officers to be present and perform work before and after their scheduled shifts, but fails to pay them for these minutes. CCA also requires some correction officers to attend meetings and complete paperwork off the clock and without compensation. Also, at the end of some shifts, correction officers are detained by CCA in the workplace until volunteers come forward for future shifts. They are not paid for this detention time as well. To date, 282 correction officers from fourteen (14) states, representing twenty-nine (29) facilities have joined this matter as Plaintiffs.

Under Count II, the Plaintiffs allege that CCA has a policy of not paying corrections counselors, case managers, and clerks for work performed in violation of the FLSA. In particular, CCA requires these employees to be present at work before their shift starts, but fails to compensate them for this time. Also, these employees have been required to attend meetings at work off the clock. To date, seventeen (17) people have joined this matter as Plaintiffs.

To assist in accomplishing these FLSA violations, CCA utilizes a "rounding" payroll scheme whereby minutes worked before and after shifts are "rounded-down" and erased from the

Plaintiffs' time. This policy is company wide and used to CCA's benefit. When the correction officers and other employees clock-in early for mandatory pre-shift meetings (usually around seven minutes before their shifts), those minutes are rounded away. The corrections officers are not paid for this time. The same rounding occurs for correction counselors, case manages, and clerks at the beginning of their shifts. They are required to clock in early and begin work. In the end, all of these employees are affected by the same CCA pay policy/plan that requires them to be present and work outside their scheduled shifts without compensation.

As this Court has consistently found, there is a low threshold for conditional certification under §216(b) for collective action claims at the "notice stage." The court makes an initial notice stage determination whether the Plaintiffs are "similarly situated" which requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan. The Plaintiffs have set forth substantial allegations in their First Amended Complaint and sworn statements that all correction officers, corrections counselors, case managers, and clerks are similarly situated in that they are affected by CCA's policy of not paying them for work performed outside their scheduled hours. For these reasons, this Court should grant class certification under §216(b) for all current and former correction officers, correction counselors, case managers, and clerks from April 3, 2005 to the present.

II. NATURE OF THE MATTER

On April 3, 2008, Keith Barnwell brought a collective action claim under §216(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq*. against CCA for compensation on behalf of all corrections officers. On May 2, 2008, the Plaintiff Barnwell and fourteen additional Plaintiffs filed a First Amended Complaint against CCA. Under Count I, the Plaintiffs allege that CCA violated the FLSA by failing to compensate correction officers, and pay overtime to

correction officers, for work performed. Under Count II, the Plaintiffs allege that CCA violated the FLSA by failing to compensate and pay overtime to corrections counselors, case managers, and clerks. In both counts, the Plaintiffs allege that all respective employees are similarly situated and affected by the same CCA pay plan or policy. On May 27, 2008, the Defendant filed its Answer to the First Amended Complaint. As of this date, 282 correction officers representing fourteen (14) states and twenty-nine (29) CCA facilities are participating in this matter. As of this date, 17 correction counselors, case managers, and clerks have joined this matter.

III. ISSUE PRESENTED

a. Under the lenient standard, which typically results in conditional certification under §216(b), have the Plaintiff corrections officers set forth sufficient allegations that they are similarly situated in that all such officers were subject to the same pay policy or plan at CCA?

b. Under the lenient standard, which typically results in conditional certification under §216(b), have the Plaintiff correction counsels, case mangers, and clerks set forth sufficient allegations that they are similarly situated in that all such employees were subject to the same pay policy or plan at CCA?

IV. STATEMENT OF FACTS

The Plaintiffs in this matter hereby set forth the following Statement of Facts ("SOF"):[1]

1. Corrections Corporation of America ("CCA") is a publicly traded company that operates 65 prison facilities in 19 states and the District of Columbia. (Defendant's Answer, ¶18).

2. CCA employs correction officers at all 65 of its facilities. (First Amended Complaint, ¶37; Defendant's Answer, ¶37).

[1] Unlike a dispositive motion, there is no requirement that these facts be uncontroverted. The facts alleged by the Plaintiffs in the First Amended Complaint and sworn statements should be accepted as true when ruling on a Motion for Conditional Certification. (See "Argument" section herein).

3. Defendant employs corrections counselors, case managers, and clerks at all 65 of its facilities. (First Amended Complaint, ¶¶56, 57; Defendant's Answer, ¶¶56, 57) (Salazar Sworn Statement, ¶¶ 2-3, **Exhibit A**).

4. CCA classifies corrections officers as hourly employees entitled to receive overtime under the FSLA. (Defendant's Answer, ¶38).

5. CCA classifies corrections counselors, case managers, and clerks as hourly employees entitled to receive overtime under the FSLA. (Amended Complaint, ¶57, Defendant's Answer, ¶57).

6. On April 3, 2008, correction officer Keith Barnwell filed a collective action Complaint under the FLSA on behalf of all persons working as correction officers for CCA at all of its facilities.

7. On May 2, 2008, Barnwell and fourteen other correction officers, corrections counselors, case managers, and clerks filed a First Amended Complaint against CCA. Under Count I, the fifteen plaintiffs brought a collective action claim against CCA on behalf of all correction officers working at all 65 facilities. They alleged that all correction officers are similarly situated in that they all perform the same job functions. (First Amended Complaint, ¶39). They alleged that all correction officers are similarly situated because they are all subject to CCA's policy that requires them to be present at work and perform work while not being compensated for their services, and in turn, denying them compensation and overtime compensation for such services under the FLSA. (First Amended Complaint, ¶40). Under Count II, four of these fifteen plaintiffs holding the positions of correction counselor, case manager, and clerk alleged that they are all subject to CCA's policy that requires them to be present and perform work while not being

compensated for their services, and in turn, denying them overtime compensation for such services under the FLSA. (First Amended Complaint, ¶58).

Correction Officers

8. To date, 267 correction officers have joined these fifteen Plaintiffs. There are now a total of 282 correction officers as Plaintiffs in this matter. The table attached as **Exhibit B** demonstrates that these 282 corrections officers are from 14 states representing 29 facilities.

9. To date, 197 correction officers have also provided sworn statements regarding their allegations that CCA failed to provide compensation and overtime compensation for work performed both before and after their shifts.[2] (Collection of Sworn Statements attached hereto as **Exhibit C**). These officers worked for CCA in time frames from the late 1980s up to the present.

10. Like the First Amended Complaint, these 197 corrections officers testified that they all performed essentially the same job duties. (Collection of Sworn Statements, ¶4). They testified that all corrections officers are paid as hourly employees entitled to overtime. (Collection of Sworn Statements, ¶5).

11. These 197 corrections officers testified that CCA has a policy of requiring them to be present at work before their shift begins, and requires them to clock-in before that shift begins. (Collection of Sworn Statements, ¶¶6-7). All have testified that CCA does not pay them for this time. (Collection of Sworn Statements, ¶6-7). Fifty-three (53) of these 197 corrections officers (or 27%) testified that CCA required them to be present at work more than 7 minutes early. (Collection of Sworn Statements, ¶6). The remaining 72%

[2] As time passes, Plaintiffs anticipate receiving additional sworn statements. If received prior to the Court ruling on this Motion, the Plaintiffs will request the ability to supplement the record.

testified that they were required to be present at work seven minutes before their shift began. (Collection of Sworn Statements, ¶¶6-7)

12. These 197 corrections officers testified that if you failed to present for the pre-shift meetings (*see*, SOF ¶13) before your shift began, you would be reprimanded by CCA. (Collection of Sworn Statements, ¶7).

13. These 197 corrections officers testified that during this pre-shift time, in which they were not paid, they participated in any of the following: roll calls, meetings, briefings, briefings on job assignments, or obtaining any paperwork or equipment necessary for working on your shift. (Collection of Sworn Statements, ¶8).

14. These 197 corrections officers testified that at the end of their shift, they had to brief their replacement and then walk through the corrections facility. (Collection of Sworn Statements, ¶9). They all considered themselves on duty as corrections officers during this walk. (Collection of Sworn Statements, ¶11). They all testified that this could cause them to punch out up to seven minutes after their shift was supposed to end, but again, they were not compensated for these minutes. (Collection of Sworn Statements, ¶9).

15. These 197 corrections officers testified that all other corrections officers were subject to the same requirements set forth in SOF ¶¶ 11-14. (Collection of Sworn Statements, ¶10).

16. Of these 197 corrections officers, 68 (or 35%) testified that CCA also required them to attend meetings off the clock and without compensation. (Collection of Sworn Statements, ¶12). These 68 corrections officers testified that some other officers were required to do the same. (Collection of Sworn Statements, ¶12).

17. Of these 197 corrections officers, 84 (or 43%) testified that CCA also required them to complete reports and other paperwork off the clock and without compensation.

(Collection of Sworn Statements, ¶13). These 84 testified that some other officers were required to do the same. (Collection of Sworn Statements, ¶13).

18. On occasion, 163 of these 197 corrections officers (or 83%) testified that they were also detained at work by CCA after their shifts ended, and without pay, until somebody volunteered for a following shift. (Collection of Sworn Statements, ¶15).[3]

19. These 197 corrections officers testified that they received infrequent or no breaks, and that any breaks taken were less than 20 minutes and regularly interrupted. (Collection of Sworn Statements, ¶14).[4]

20. CCA has a centralized time keeping policy for its hourly employees at all facilities. (Salazar sworn statement, ¶¶3-6).

21. CCA's payroll software is capable of recording the exact minutes an hourly employee timed in and out. However, the system was set up to round down and not pay any hourly employees if they punched in 7 minutes or less before their shifts. It was also set up to not pay hourly employees, including corrections officers, for any minutes if they punched out 7 minutes or less after their shift was supposed to end. (Salazar sworn statement, ¶9).

22. Consistent with the corrections officers' allegations and testimony, a CCA human resources clerk testified that under CCA's system, if an employee punched in early on the time keeping system 7 minutes or less before their shift began, the system would eliminate these minutes and the employee would not be paid for them. If an employee punched out after their shift ended 7 minutes or less, an employee would not be paid for

[3] Requiring an employee to be present at work for any reason is compensable time under the FLSA. 29 C.F.R. §785.28.

[4] To offset any overtime or hours worked, paid breaks must be more than 20 minutes in length and must not be regularly interrupted. 29 C.F.R. §§ 785.18, 785.19.

these minutes. This applied to all hourly employees including corrections officers. (Salazar sworn statement, ¶6).

23. Consistent with the corrections officers' allegations and testimony, all corrections officers were required by CCA to be present for pre-shift meetings, to punch in early before, and were not paid for this time. (Salazar sworn statement, ¶7). If a corrections officer failed to be present early and punch in, they would be punished or reprimanded by CCA. (Salazar sworn statement, ¶7).

Corrections Counselors, Case Managers & Clerks

24. To date, there are 17 plaintiffs who worked as corrections counselors, case managers, and clerks. (The four named in the First Amended Complaint, and 13 others who have joined this matter) (Amended Complaint, ¶¶52-55)

25. As set forth in the First Amended Complaint, these non-exempt hourly employees are alleging that CCA failed to provide compensation and overtime compensation for work performed both before and after their shifts. (SOF ¶7).

26. Six of these employees have also provided sworn statements regarding their allegations that CCA failed to provide compensation and overtime compensation for work performed before their shifts. (Collection of Hourly Employee Sworn Statements attached hereto as **Exhibit D**).

27. The case managers, corrections counselors, and clerks testified that they all performed the same respective job duties. (Collection of Hourly Employee Sworn Statements, ¶4).

28. They testified that all three positions are paid as hourly employees entitled to overtime. (Collection of Hourly Employee Sworn Statements, ¶5).

29. All of these employees testified that they were required to be present at work 7 or more minutes before their shifts began. They were not compensated for this time. If they failed to clock in early, they would be reprimanded by CCA. (Collection of Hourly Employee Sworn Statements, ¶6; Salazar sworn statement ¶7).

30. Human Resource administrative clerk Melissa Salazar testified that all hourly employees were subject to CCA's policy of not paying them for any time when they clocked in 7 minutes or less before their shifts. (Salazar sworn statement, ¶¶ 3-11).

31. As previously stated, Salazar testified that due to CCA's "rounding" payroll system, since they were required to be a work seven minutes early and clock-in at that time, these minutes were erased and the employees were not compensated for this time.

32. Regarding CCA's "rounding practices" for hourly employees, this policy benefited CCA. All hourly employees punching in 7 minutes or less early were not getting paid. If an employee punched out 7 minutes or less late, again, they would not be paid. If an hourly employee punched out more than 7 minutes late there would be no benefit to the hourly employee. On a following shift, that employee would be forced to wait around and punch in late for that shift in order to erase those minutes. (Salazar sworn statement, ¶¶ 9, 11).

V. ARGUMENT

The Plaintiffs seek conditional certification of a collective action for purposes of providing notice to putative class members under 29 U.S.C. §216(b) of the FLSA. This motion for certification is being sought on behalf of two classes of employees: (i) all corrections officers working for CCA from April 3, 2005 to the present; and (ii) all case managers, corrections

counselors, and clerks working for CCA from April 3, 2005 to the present.[5] Section 216(b) provides in part that "[a]n action . . . may be maintained against an employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). Under the FLSA §216(b), this is an "opt-in" class. This provision is the exclusive procedural mechanism for class certification in actions under the FLSA. Renfro v. Spartan Computer Services, Inc., 2007 U.S.Dist.LEXIS 45157, *2-3 (D.Kan. 2007) (citing Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 679 (D.Kan. 2004) (Lungstrum)).

The FLSA does not define the phrase "similarly situated," but the Tenth Circuit has approved of an *ad hoc* approach that is determined on a case-by-case basis whether the members of the putative class are similarly situated. Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001). Under this approach, the court engages in a two-step process. First, the court makes an initial "notice stage" determination whether plaintiffs are "similarly situated" which requires ***nothing more than substantial allegations*** that the putative class members were together the ***victims of a single decision, policy or plan***. Id. at 1102 (quoting Vaszlavik v. Storage Tech. Corp., 175 F.R.D. 672, 678 (D.Colo. 1997)). By this determination, the court decides whether a collective action should be certified for purposes of sending notice of the action to potential class members. Brown, 222 F.R.D. at 679. "This initial step creates a ***lenient standard*** which ***typically results in conditional certification*** of a representative class." Renfro 2007 U.S.Dist.LEXIS 45157 at *3 (emphasis added) (citing Gieseke v. First Horizon Home Loan Corp., 408 F. Supp.2d 1164, 1166 (D.Kan. 2006)); *see*, Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 679 (D.Kan. 2004) (Lungstrum); Pivonka v. Board of County Commissioners of Johnson County, Kansas, 2005 U.S.Dist.LEXIS 17553, *5-6 (D.Kan. 2005) (Lungstrum).

[5] Under the FLSA, a collective action may reach back as far as three years for remedy. 29 U.S.C. §255(a). Therefore, since this matter was filed on April 3, 2008, it could reach back to April 3, 2005.

Under the second step initiated at the close of discovery, the court will then utilize a stricter standard of "similarly situated" which requires evaluation of several factors, including: (1) disparate factual and employment settings of individual plaintiffs; (2) the various defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. Thiessen, 267 F.3d at 1102-03. This second step is not typically addressed until the close of all discovery, and via defendant's motion for de-certification. Id. at 1103. Therefore, the lenient "notice stage" standard that usually leads to certification applies in the early stage of discovery where ample time remains for the defendant to conduct discovery. Pivonka, 2005 U.S.Dist.LEXIS 17553, *6-7; Brown, 222 F.R.D. at 680. The Plaintiffs in this matter are clearly in this early stage.

The Plaintiffs' burden that the employees at issue are similarly situated under the first stage is very lenient. This is a result of the remedial nature of the FLSA which "should be given a broad reading, in favor of coverage." *See* Pendlebury v. Starbucks Coffee Co., 518 F. Supp. 2d 1345, 1363 (S.D. Fla. 2007). Thus, "the '***similarly situated standard' . . . is lenient***, plaintiff's burden is not heavy, the evidence is minimal and ***the existence of some variations between potential claimants is not determinative of lack of similarity***." Kelly Marie Camp, et. al. v. Progressive Corp., No. 01-2680, 2002 U.S. Dist. LEXIS 21903 *11-12 (E.D.La Nov. 8, 2002) (emphasis added).

The goal of judicial economy weighs heavily in favor of certification and the issuance of notice to potential class members. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989). The reason why courts use a lenient standard under the first stage is that collective actions benefit the judicial system by enabling the "efficient resolution in proceeding of common issues of law and fact. . . ." Id. A collective action also provides the plaintiffs an opportunity to

"lower individual costs to vindicate rights by pooling of resources." Id. Under the FLSA, there is a two year statute of limitations and a three year statute of limitations for willful violations. 29 U.S.C. §255(a). As each day passes in this litigation, one day is taken away from potential putative plaintiffs' claims. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. at 168-69 (a person is not a member of the class until that person files a consent). These rights need to be protected by certification and issuing the notice.

The Plaintiffs are seeking this certification and Court approved notice to the class members. Court authorized notice protects against "misleading communications" by the parties, resolves the parties' disputes regarding content of any notice, prevents the proliferation of multiple individual lawsuits, and assures that joinder of additional parties is accomplished properly and efficiently, and also expedites resolution of the dispute. Hoffman, 493 U.S. at 171-72.

In responding to initial certification motions under §216(b), defendants often attempt to argue the underlying merits of the overtime claim (e.g. the second step, Thiessen, *supra*). However, this Court should not address the underlying merits of the Plaintiffs' claim. *See* Gieseke, 408 F. Supp.2d at 1166; Hammond v. Lowe's Home Ctrs., Inc., 2005 U.S.Dist.LEXIS 18975, 2005 WL 2122642, at *3 (D.Kan. 2005) (collapsing first and second stage not tactic approved by any court; would skew burden of proof); Brown, 222 F.R.D. at 680 (until completion of discovery, only the first stage analysis is proper). All that is relevant for this Motion is whether the Plaintiffs have sufficiently alleged that they were affected by the same pay policy or plan. This has been accomplished.

Also, the defendant cannot argue that certification should be denied because it has not had time to conduct sufficient discovery. This is a rouse that many defendants attempt in order

to delay notice being sent to the class. If allowed, defendants will later argue that since discovery has been conducted, a heightened (non notice stage) burden for certification should apply. This very issue was discussed by the Plaintiffs during the scheduling conference with the Magistrate Judge in hopes of putting the Court on notice of this tactic. As this Court has ruled, the two stage approach would addresses the defendant's concern by allowing such discovery to be conducted in the second stage. Lack of discovery being conducted is not a viable defense to conditional certification. Brown, 222 F.R.D. at 682.

A. The Correction Officers Were Together the Victims of a Single Decision, Policy or Plan at CCA:

Certification should be granted since the Plaintiffs have set forth sufficient evidence that all correction officers were affected by the same pay policy or plan at CCA. Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001). The policy/plan is CCA's failure to compensate correction officers for work performed outside their scheduled shifts. This occurred in the following forms: (i) time required to be present at work before their shifts began for meetings, roll call, etc., (ii) time required for corrections officers at the end of their shifts to perform their job functions, (iii) time required to attend meetings off the clock, (iv) time required to complete paperwork assignments after shifts and off the clock, and (v) time required while being detained at work against their will until volunteers came forward for future shifts. CCA's company wide "rounding" policy played a role in its scheme to deny corrections officers compensation for work performed outside their scheduled hours. To date, 282 correction officers allege a FLSA violation under this common pay policy/plan. One hundred and thirty-one (197) correction officers have provided sworn testimony to support these allegations. This Court should rely upon the substantial allegations made by the Plaintiffs in their First Amended Complaint, and the accompanying sworn statements, in granting conditional certification at the

notice stage for correction officers. *See*, Pivonka v. Board of County Commissioners of Johnson County, Kansas, 2005 U.S.Dist.LEXIS 17553, *8-10 (D.Kan. 2005) (Lungstrum) (Having allegations of overtime violations, same pay policies applied, and same job duties being asserted in the complaint, and verified by affidavit testimony, is sufficient to support initial certification under the FLSA); Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 680 (D.Kan. 2004) (Lungstrum) (at notice stage of FLSA certification, court looks to substantial allegations and plaintiffs' affidavits); Williams v. Sprint/United Mgmt. Co., 222 F.R.D. 483, 485 (D.Kan. 2004) (at notice stage of FLSA certification, court analyzes certification under lenient standard looking to substantial allegations and plaintiff's affidavits); Baldozier v. Am. Family Mut. Ins. Co., 375 F. Supp.2d 1089, 1093 (D.Colo. 2005) (motion for initial certification under FLSA granted based only on substantial allegations and plaintiffs' declarations), Greer v. Challenge Financial Investors Corp., case no. 05-1109-JTM (D.Kan. Oct. 17, 2005) (granting FLSA certification based upon sufficient allegations in Complaint and sworn statements).

The "decision, policy, or plan," Theissen, *supra*, at issue in this case is CCA's requirement that its corrections officers are present and performing work outside their scheduled work hours. This policy is enabled through CCA's company wide "rounding" practices. All the correction officers testified that they are required to be at work for pre-shift meetings, roll call, etc. and that they start clocking-in at the seven minute mark before their shifts begin.[6] (SOF ¶¶ 11, 23). An employer requiring someone to be present at work and not providing compensation is a violation of the FLSA. 29 C.F.R. §758.28. Indeed, a failure to be present for these pre-shift meetings would lead to a reprimand from CCA. (SOF ¶12, 23). Despite being required to be present at for this time, during the mandatory pre-shift meetings, the correction officers

[6] As the Court will note, several corrections officers testified that CCA required them to be at work more than 7 minutes before their shift, and then allowed them to only clock at the 7 seven minute mark. (SOF ¶11).

performed work in the form of meetings, roll calls, etc. (SOF ¶13). Once again, at the end of their shifts, correction officers performed work by de-briefing their replacement and then moving through the facility to the time clock. (SOF ¶14). Officers testified that they were on duty during this time frame. (SOF ¶14). Again, CCA would not pay them for these minutes under its rounding practices. In addition, 39% of correction officers testified that they attended meetings, or completed paperwork, off the clock and without compensation.[7] (SOF ¶¶17-18). Finally, 83% testified that CCA required them to remain at work, off the clock, until officers volunteered for future shifts. (SOF ¶18). All of CCA's actions reveal its policy of not paying correction officers for work performed outside their scheduled shift times. The above described policy/plan is common to all correction officers at CCA. This is especially true since all are affected by CCA's company wide rounding practices. Not paying these officers for this overtime violates the FLSA.

Two hundred and eighty-two (282) correction officers are alleging a FLSA violation in the First Amended Complaint. One hundred and ninety-seven (197) correction officers have provided sworn testimony to support these allegations. This demonstrates a "substantial allegation" of a FLSA violation. These allegations warrant "notice stage" certification by this Court and notice of such claims to all correction officers employed by CCA from April 3, 2005 to the present. Theisen, *supra*.

It is important to note that the Plaintiffs are not required to demonstrate the existence of similarly situated persons at each and every CCA location in the proposed class.[8] Rather, the Plaintiffs only need to demonstrate that there existed at least one similarly situated person at a

[7] This percentage represents an average between the persons attending meetings and persons completing paperwork. (SOF ¶¶ 16-17).

[8] However, the Plaintiffs can represent that of the 30 CCA facilities they have inquired, each one has presented numerous employees claiming this FLSA violation.

facility other than their own. Adams v. Inter-Con Security Services, Inc., 242 F.R.D. 530, 537 (N.D.Ca. 2007).

> For conditional certification, plaintiffs do not need to provide evidence that every facility relevant to the proposed class maintains an illegal policy. *See Allen v. McWane, No. Civ.A.2:06-CV-158, 2006 U.S. Dist. LEXIS 81543, 2006 WL 3246531, at *3 (E.D. Tex. Nov. 7, 2006)* ("Although the affidavits and declarations do not encompass all of Defendant's facilities, the Court finds that the Plaintiffs have come forward with competent evidence.").

Id. at 537. *See also*, Levy v. Verizon Information Systems, Inc., 2007 WL 1747107, *4-5 (E.D.N.Y. June 11, 2007) (holding that it was not necessary for Plaintiff to have representatives from all of defendant's locations when alleging a pay plan that applied to all). In Adams, the Court granted conditional certification to security guards claiming that Inter-Con violated the FLSA by requiring employees to work off-the-clock overtime without proper compensation. The Court rejected the defendant's argument that the plaintiffs did not sufficiently represent all locations in order to be similarly situated. The motion for conditional certification sought coverage for 500 different locations in 36 different states. In support of this motion, the plaintiffs provided the court with only 13 declarations addressing 78 locations (or 15.6% of all Inter-Con locations) in three states (or 23% of all states where Inter-Con is located). Id. at 537-38.

The Plaintiffs in this matter seek conditional certification regarding 65 facilities in 19 states. In support of their motion, the Plaintiffs have presented 197 declarations addressing 26 locations (or 40% of all CCA locations) in 14 states (or 73.6% of all states where CCA is located). Also, the class of Plaintiffs represent 29 locations in 14 states. This evidence is much more encompassing than the plaintiffs' proffer in Adams. Despite the fact that the Plaintiffs are not required to show the existence of similarly situated persons at every location, Melissa Salazar, a former Human Resource employee, has provided such evidence. Salazar testified that

all hourly employees at all CCA facilities, including corrections officers, are not paid for off the clock work due to CCA's company wide rounding policy. (SOF ¶¶21-23). As such, the Plaintiffs have set forth sufficient evidence that all correction officers at all 65 facilities were affected by the same rounding policy/plan. Theissen, *supra*. Couple this fact with the findings in Adams, and the Plaintiffs have demonstrated under the lenient conditional certification standard that all corrections officers have set forth substantial allegations that they are subject to the same plan.

As previously stated, at the conditional certification stage, this Court should not address the underlying merits of the FLSA claim. Gieseke, Hammond, *supra*. This very Court has rejected any attempt by defendants to argue the merits of the underlying claims, argue individual factual disparities and employment settings, or argue individual defenses when defending a motion for conditional certification under the notice stage. Brown, 222 F.R.D. at 682 (Lungstrum). Regarding the similarly situated analysis, it does not matter that some correction officers were denied payment for more time off the clock than others. For example, it does not matter that some of the correction officers did not attend meetings or complete paper work off the clock. These factors are not a viable defense to conditional certification. Such an argument goes only to individual damages under the pay plan at issue and cannot defeat certification. Id. (quoting Reab v. Electronic Arts, Inc., 214 F.R.D. 623, 629 (D. Colo. 2002) ("[I]t is well established that individual questions with respect to damages will not defeat class certification . . .")).

Indeed, the only issue before this Court is whether correction officers have set forth "substantial allegations" that they were subject to the same CCA policy/plan of not paying overtime compensation for work performed. The Plaintiffs have met this burden. They have

established that CCA required them to be present a work outside their scheduled hours and, in turn, failed to pay them overtime due. For these reasons, the Court should grant this motion for conditional certification.

B. Corrections Counselors, Case Managers, and Clerks Were Together the Victims of a Single Decision, Policy or Plan at CCA:

The same CCA policy at issue with corrections officers applies to corrections counselors, case managers, and clerks. CCA utilized its "rounding" policy to its benefit by requiring these employees to be present at work and clock-in before their shifts began. In turn, under CCA's company wide rounding policy, they are not compensated for their overtime. The allegations in the First Amended Complaint are substantiated by the sworn statements. The testimony supports the allegation that this policy applies to corrections counselors, case managers, and clerks. In addition, the sworn statement of a human resource clerk familiar with CCA's policies verifies that *all* hourly employees are subject to this same policy and not paid for these minutes. The corrections counselors, case managers, and clerks have set forth substantial allegations they were together the victims of a single decision, policy or plan by CCA. Theissen, *supra*.

C. The Court Should Approve the *Notice of Claims and Right to Opt-In*:

The Court has discretion to facilitate notice to potential class members by authorizing judicial notice of a collective action. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). Rule 23 governs "opt-out" class notices by requiring "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B). Some courts have adopted this standard when evaluating the propriety of notice in FLSA opt-in actions. *See e.g.* Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630 (D.Col. 2002).

The *Notice of Claims and Right to Opt-In* for correction officers and corrections counselors, case managers, and clerks, attached as **Exhibit E** and **Exhibit F** respectfully, provides adequate and fair notice to these two classes of employees regarding the claims at issue and their rights. This notice is not prejudicial to the Defendant. The Defendant possesses all the names, last known addresses, and social security numbers for these employees. The best notice practicable under these circumstances would be mailing Exhibit E and Exhibit F to both classes of employees. In addition, due to the size of this class of employees, the Plaintiffs request that "reminder" post-cards be mailed to class members thirty (30) days before return deadline.

WHEREFORE, the Plaintiffs respectfully request that this Court issue an order for the following:

a. Granting conditional class certification regarding the Plaintiffs' claims under §216(b) of the FLSA as alleged under Count I of the First Amended Complaint regarding all employees who performed as correction officers for Defendant from April 3, 2005 to the present;

b. Ordering that Plaintiff Keith Barnwell and his counsel respectfully act as class representative and counsel for the class of corrections officers;

c. Granting conditional class certification regarding the Plaintiffs' claims under §216(b) of the FLSA as alleged under Count II of the First Amended Complaint regarding corrections counsel, case manager, and clerk employees from April 3, 2005 to the present;

d. Ordering that Plaintiff Feanja D. Smith and her counsel respectfully act as class representative and counsel for the class of corrections counsel, case manager, and clerk employees;

e. Directing the Defendant to provide two lists within ten days of the Court's order of all persons who (i) worked for the Defendant as corrections officers and (ii) all corrections counsel, case manager, and clerk employees from April 3, 2005 to the present, with both lists providing each person's last know addresses, phone numbers, social security numbers, and dates of employment in an agreeable format for mailing;

f. Approval and authorization for the Plaintiffs to send the *Notice of Claims and Right to Opt-In* that are attached as **Exhibit E** and **Exhibit F** to the *Memorandum in Support of Plaintiffs' Motion for Conditional Certification of Class Claims Under §216(b)of the FLSA for Corrections Officers*; and

g. Granting such other relief the Court deems just and proper.

Respectfully submitted:

/s/ Brendan J. Donelon
Brendan J. Donelon, KS #17420
802 Broadway, 7th Floor
Kansas City, Missouri 64105
Tel: (816) 221-7100
Fax: (816) 472-6805
brendan@donelonpc.com

/s/ Jason Brown
Jason Brown, KS #70700
Brown & Associates, LLC
7505 N.W. Tiffany Springs Pkwy., Ste. 130
Kansas City, MO 64153
Tel: 816-505-4529
Fax: 816-379-4040
kclawyerbrown@yahoo.com

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing was sent on August 21, 2008 via email address as registered with the Court and under the requirements set forth by the District of Kansas under the policies for ECF Management and standing Orders to:

Robert W. Pritchard
Rachel A. O'Driscoll
Littler Mendelson, P.C.
625 Liberty Avenue, 26th Floor
Pittsburgh, PA 15222

Erin A. Webber
Littler Mendelson, P.C.
2300 Main Street, Ste. 900
Kansas City, Missouri 64108

Lisa A Schreter
Angelo Spinola
Littler Mendelson, P.C.
3348 Peachtree Road, N.E., Ste. 1100
Atlanta, Georgia 30326

ATTORNEYS FOR DEFENDANT