

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

1. Adam Stewart
2. Kyle Young
3. Jill Adamucci
4. Joel Ahlbin
5. Christopher App
6. Robert Aronson
7. Eric Asp
8. Ashley Aumiller
9. Monica Austin
10. Kara Ayers
11. Michael Bailey
12. Thomas Bailey
13. Christopher Barber
14. Barbara Bargy
15. Jordan Barnard
16. Matthew Best
17. Thomas Beuler
18. Christopher Bierbower
19. Max Bizzak
20. Tyler Bizzak
21. Adam Bleech
22. Jason Bonetto
23. Nathan Booth
24. Jennifer Borda
25. Michael Boser
26. Dustin Bottore
27. Amy Boyer
28. Geoff Brabham

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29. Lukas Breese
30. Danielle Brown
31. Lottie Brown
32. Dustin Bundy
33. Eric Button
34. William Callahan
35. Kevin Cannon
36. Ryan Cannon
37. Stephen Cannon
38. Larry Carlson
39. Philip Causer
40. Garrett Childs
41. Joshua Chumrih
42. William Chuzie
43. Elizabeth Claro
44. Michael Clawson
45. Danni-Jo Cobb
46. Joshua Cobb
47. Daniel Colebert
48. Ashley Colley
49. Brandy Colley
50. Daniel Confer
51. Peter Crowley
52. Burney Darr
53. Larry Dennis
54. Michael Dibble
55. Jerry Dipenti
56. Kayla Doberstein
57. Jonnie Donoghue
58. Katelyn Donovan
59. Austin Dorrion

60. David Dracup
61. Jerome Dragone Jr.
62. James Drozdiel
63. John Eodice
64. Michael Esch
65. Nigel Ewing
66. William Fadie Jr.
67. Brittany Falconi
68. Michael Farnham
69. Jon Fitzpatrick
70. Raymond Ford Jr.
71. Hannah Foster
72. Matthew Foster
73. Allen Fowler IV
74. Chad Frantz
75. David Gabriel
76. Mitchel Galbraith
77. Heather Geer
78. Ryan Geer
79. Robert Geh
80. Adam Gordon
81. Kelly Graves
82. Griffin Greenawalt
83. Chad Greene
84. Matthew Guncheon
85. Charles Hagg
86. Brian Haines
87. Kayla Hayden
88. Dennis Hendersot
89. Amy Hendryx
90. Nathaniel Herne

91. Thomas Hill
92. Robin Imbrogno
93. Crystal Ingerson
94. Justin Jefferds
95. Donald Jerman
96. Anthony Johnson
97. Shawn Johnson
98. Dennis Johnson, Jr
99. Patrick Johnston
100. Rona Kalile-Matasich
101. Brian Kane
102. Hailey Kane
103. Chad Kelley
104. Robert Kelley
105. Scott Kerr
106. Kevin Ketchner
107. Ryan Kiehl
108. Kenneth Kinner
109. Nicholas Kinner
110. Dane Kio
111. Kaitlyn Kio
112. Daniel Kiser
113. Shawna Kiser
114. Tyler Koch
115. George Koch Jr.
116. Zachary Kossack
117. Nazarath Kremer
118. Roberta Kribbs Dispue
119. Adam Kulbatsky
120. Jessica Labarbera
121. Ryan Labenne

122. Patrick Lasko
123. Stephanie Lathrop
124. Taylor Lawson
125. Timothy Lawson
126. Derek LeBlanc
127. Karla Lent
128. Joshua Lineman
129. Benjamin Lobdell
130. Kim Lockerby
131. Jared Lokerberg
132. Jessica Mack-Bundy
133. Timothy Marshall
134. Dennis Martinelli
135. Michael Mcchesney
136. Seth McClory
137. Michael McCormack
138. Lisa McKenna
139. Alexander McKinney
140. Stephen Meissner
141. Diane Miller
142. Michael Miller
143. Ryan Miller
144. Tiffany Minor
145. Danielle Morgan
146. Heidi Morris
147. Matthew Morris
148. Amber Morrisroe
149. William Murphy
150. Gilberto Natal
151. Cameron Neff
152. Donald Nero

153. Bobbi Newman
154. Kay Newman
155. Timothy Newman
156. Craig Oconnor
157. Sean O'Hara
158. Cari Olewinski
159. Cyril Paden
160. Jennifer Paulik
161. Sean Payne
162. Cody Pearce
163. Thomas Perry
164. Harley Peterson
165. Thomas Peterson
166. Christopher Phillips
167. Katherine Pitner
168. Juwan Placo
169. Theresa Putnam
170. Nikolaus Ratzburg
171. Daniel Reese
172. Scot Reynolds
173. Thomas Reynolds
174. Andre Rhoades
175. Brandi Rogers
176. Ashley Rolick
177. Kalli Rook
178. Matt Roth
179. Joshua Rothermel
180. Thomas Saxman
181. Paula Schenfield
182. Margret Schleef
183. Richard Schlimm

184. Theresa Schofield
185. Michael Shaffer
186. Patrick Sharp
187. Dakota Shelley
188. Joshua Shoup
189. Summer Silvis
190. Emily Simms
191. Jared Simms
192. Tammy Simonds
193. William Skinner
194. Tyler Smead
195. Deryk Smith
196. Timothy Smith
197. Zachary Smith
198. Bryce Snyder
199. Larry Snyder
200. Peggy Sproveri
201. Cortney Stambauch
202. Andrew Streicher
203. Andrew Sturzenbecker
204. Tina Swanson
205. John Szarowicz
206. Tiffany Taylor
207. Jason Tessena
208. Joseph Testani
209. Jared Thomas
210. Nathan Thomas
211. Paul Thompson
212. James Tryniak
213. Joseph Turner
214. Craig Tutton

- 215. Chad Vinelli
- 216. Todd Vinelli
- 217. Joshua Walker
- 218. Jay Walter
- 219. Nathan Warters
- 220. Joshua Watson
- 221. Justin Wells
- 222. Brian Weseman
- 223. Brandon West
- 224. Justin Westerburg
- 225. Jacob Whitcomb
- 226. Elise Whitmore
- 227. Jess Wilson
- 228. Jacob Windsor
- 229. Aspyn Wolff
- 230. Christopher Wood
- 231. Jason Yaegle
- 232. Tyler Yetzer
- 233. Bambi Yohe
- 234. Jennifer Young
- 235. John Zekas

Plaintiffs,

v.

THE UNITED STATES

Defendant.

**COMPLAINT**

1. Plaintiffs are current and former employees employed by the defendant United States Government (“defendant” or “Government”) at the U.S. Department of Justice, Bureau of



Prisons, at Federal Correctional Institution (“FCI”) McKean, located in Lewis Run, Pennsylvania. (hereinafter “FCI McKean” or the “Institution”). Plaintiffs bring this action for damages and other relief, pursuant to 29 U.S.C. § 216(b); 28 U.S.C. §§ 1346(a)(2), 1491; 5 U.S.C. §§ 5545(d), 5343(c)(4), 5596 (the Back Pay Act), and the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, to remedy the defendant’s willful and unlawful violations of law complained of herein.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1491, 29 U.S.C. § 216(b), 5 U.S.C. § 5545(d), 5 U.S.C. § 5343(c)(4), 5 U.S.C. § 5596 and 28 U.S.C. § 2501. Venue is proper pursuant to 28 U.S.C. § 1402.

### **PARTIES**

3. Plaintiff Adam Stewart is a resident of McKean County, Pennsylvania, and is currently employed by defendant United States pursuant to Title 5 of the U.S. Code. Plaintiff Stewart is currently employed as a Correctional Officer, GS-8, Step 9 (paid under the “General Schedule”), at FCI McKean. At various times within the last six years, plaintiff Stewart has been required to perform duties involving unusual physical hardship and hazards within the meaning of 5 U.S.C. § 5545(d), and therefore, as detailed below, plaintiff Stewart is entitled to “hazardous duty pay” for each such day.

4. Plaintiff Kyle Young is a resident of Warren County, Pennsylvania, and is currently employed by defendant United States pursuant to Title 5 of the U.S. Code. He is currently employed as a Material Handler Supervisor, WS-4, Step 4 (paid under the “Federal Wage System”), at FCI McKean. At various times within the last six years, plaintiff Young has been required to perform duties involving unusually severe working conditions or unusually severe

hazards within the meaning of 5 U.S.C. § 5343(c)(4), and therefore, as detailed below, plaintiff Young is entitled to “environmental differential pay” for each such day.

5. The additional persons who are plaintiffs in this action also are or were employees of the defendant at FCI McKean within the relevant timeframe. Each of the additional plaintiffs has been required to perform duties involving unusual physical hardship and hazards within the meaning of 5 U.S.C. §5545(d) and/or has been required to perform duties involving unusually severe working conditions or unusually severe hazards within the meaning of 5 U.S.C. § 5343(c)(4), and therefore, as detailed below, are entitled to “hazardous duty pay” and/or “environmental differential pay” for each such day.

6. Each plaintiff in this action is, or has been, an “employee” within the meaning of Title 5 of the U.S. Code, specifically 5 U.S.C. §§ 2105, 5102, and 5342, and within the meaning of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1).

7. Each plaintiff is a current or former correctional worker employed by the U.S. Department of Justice, Bureau of Prisons, at FCI McKean in Lewis Run, Pennsylvania. They have given their written consent to be party plaintiffs in this action pursuant to 29 U.S.C. § 216(b), and their consent to sue forms are attached as Exhibit A. These written consent forms set forth each plaintiff’s name and home address.

8. The defendant, United States, is and at all material times has been, an employer under Title 5 of the U.S. Code, specifically 5 U.S.C. §§ 5102 and 5541. In addition, defendant United States is, and at all material times has been, a “public agency” and “employer” within the meaning of the FLSA, 29 U.S.C. § 203(x) and § 203(d). Defendant employs, or has employed, plaintiffs and other employees in similar activities and has its principal place of business in Washington, D.C.

**FACTS**

9. At all times material herein, plaintiffs have been entitled to the rights, protections, and benefits provided under the FLSA, 29 U.S.C. § 201, *et seq.*

10. At all times material herein, plaintiffs have been suffered or permitted to work, and have in fact worked, in excess of the hourly levels specified in the FLSA, 29 U.S.C. § 207. As a result, at all times material herein, plaintiffs have been entitled to overtime compensation at a rate of not less than one and one-half times their regular rates of pay for the hours of overtime they have worked.

11. FCI McKean is a medium security institution, which consists of four main housing units in the FCI and a satellite Federal Prison Camp with two housing units (“FPC”). FCI McKean houses over 1,000 male inmates, including violent offenders, drug dealers, rapists, murderers, and gang members.

12. Section 5545(d) of Title 5 of the U.S. Code provides that the United States Office of Personnel Management (“OPM”) shall establish a schedule of pay differentials for duty involving unusual physical hardship or hazard. Pursuant to 5 U.S.C. § 5545(d), OPM has issued regulations at 5 C.F.R. §§ 550.901-550.907, which establish a schedule of hazardous duty pay differentials and provide that an employee who qualifies for hazardous duty pay shall be paid the hazardous duty pay differential for each day that the employee is exposed to hazardous duty.

13. The schedule of hazardous duty pay differentials set forth in Appendix A to Subpart I of Part 550 of Title 5, Code of Federal Regulations, provides that agencies shall pay a twenty five percent (25%) hazard pay differential when employees perform work with or in close proximity to “virulent biologicals,” which are defined as “materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which

protective devices do not afford complete protection.” 5 C.F.R. Pt. 550, Subpt. I, App. A.

14. OPM has also issued regulations for prevailing rate employees pursuant to 5 U.S.C. § 5343(c)(4), which provide for environmental pay differentials for duty involving unusually severe working conditions or unusually severe hazards. *See* 5 C.F.R. § 532.511.

15. The schedule of environmental pay differentials set forth in Appendix A to Subpart E of Part 532 of Title 5, Code of Federal Regulations, provides that agencies shall pay an eight percent (8%) environmental differential when employees perform work with or in close proximity to “micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease” where “the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserums and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury” and a four percent (4%) environmental pay differential when employees perform work with or in close proximity to “micro-organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man” where “the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury” and 5 C.F.R. Pt. 532, Subpt. E, App. A.

16. Beginning in or around October 2020, and continuing and ongoing, plaintiffs have performed work with, or in close proximity to, COVID-19, the virulent biological, including, without limitation, work with or in close proximity to facilities, rooms, offices, workspaces, equipment, objects, surfaces, and/or individuals infected with the novel coronavirus that causes COVID-19.

17. COVID-19 is a virus<sup>1</sup> that, when introduced into the body, is likely to cause serious disease or fatality. The Centers for Disease Control and Prevention (“CDC”) has determined that COVID-19 meets the definition for “severe acute respiratory syndromes” as set forth in Executive Order 13295, as amended by Executive Orders 13375 and 13674, and, therefore, is a “quarantinable communicable disease.” See Office of Pers. Mgmt., CPM 2020-05, *Coronavirus Disease 2019 (COVID-19): Additional Guidance* (March 7, 2020), available at <https://www.chcoc.gov/content/coronavirus-disease-2019-covid-19-additional-guidance>.

COVID-19 can cause symptoms ranging from mild illness to severe illness. See *Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Apr. 23, 2021).

18. COVID-19 is often fatal. More than 3,066,113 people worldwide, including more than 567,352 in the United States, have died from COVID-19. See *Coronavirus disease (COVID-19) pandemic*, World Health Org., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Apr. 23, 2021); *Coronavirus Disease 2019 (COVID-19), Cases in the U.S.*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Apr. 23, 2021).

19. COVID-19 spreads “very easily from person to person” and has been characterized as a pandemic by the World Health Organization (“WHO”). *Coronavirus Disease 2019 (COVID-19), How COVID-19 Spreads*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 23, 2021).

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<sup>1</sup> Although COVID-19 is technically the disease caused by the novel SARS-CoV-2 coronavirus, plaintiffs will hereafter refer to the virus and the disease it causes simply as “COVID-19.”

20. COVID-19 can be spread by touching infected objects or surfaces and by breathing in areas where an infected person has coughed or exhaled. As the WHO explains, “The virus can spread from an infected person’s mouth or nose in small liquid particles when they cough, sneeze, speak, sing, or breathe heavily. . . . The virus can also spread after infected people sneeze, cough on, or touch surfaces, or objects, such as tables, doorknobs and handrails.” *Coronavirus disease (COVID-19): How is it transmitted?* (July 9, 2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted> (open “How does COVID-19 spread between people?”) (last updated Oct. 20, 2020).

21. According to researchers at the National Institutes of Health, COVID-19 can persist on surfaces for up to three days. *Study suggests new coronavirus may remain on surfaces for days*, Nat’l Institutes of Health, <https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (Mar. 24, 2020). Accordingly, contact with an infected object or surface may present a risk of transmission for days from the time the object or surface becomes infected.

22. A person who is infected with COVID-19 may not present symptoms immediately. Rather, there is an “incubation period” in which a person is infected but has not begun to present symptoms. According to the WHO, “[t]he time from exposure to COVID-19 to the moment when symptoms begin is, on average, 5-6 days and can range from 1–14 days.” *Q&A on coronaviruses (COVID-19)*, WHO, (Apr. 17, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (open “How long does it take to develop symptoms?”) (last updated Oct. 20, 2020).

23. An infected individual may spread COVID-19 before he or she begins to present significant symptoms. As the WHO explains, “[w]hether or not they have symptoms, infected people can be contagious and the virus can spread from them to other people. Laboratory data

suggests that infected people appear to be most infectious just before they develop symptoms (namely 2 days before they develop symptoms) and early in their illness.” *Coronavirus disease (COVID-19): How is it transmitted?* (July 9, 2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted> (open “When do infected people transmit the virus?”) (last updated Oct. 20, 2020).

24. Correctional facilities present an especially hazardous environment for the spread of virulent biologicals such as COVID-19. As United States Department of Justice (“DOJ”), Office of the Inspector General (“OIG”) has explained, and according to the CDC, “the confined nature of correctional facilities, combined with their congregant environments, heighten[s] the potential for COVID-19 to spread once introduced into a facility.” *Pandemic Response Report 21-012, Remote Inspection of Federal Medical Center Fort Worth*, DOJ OIG (Dec. 15, 2020), available at <https://oig.justice.gov/sites/default/files/reports/21-012.pdf>; see also *Pandemic Response Report 21-032, Remote Inspection of Federal Correctional Institution Milan* (Jan. 28, 2021), available at <https://oig.justice.gov/sites/default/files/reports/21-032.pdf>. The CDC has also observed that “[c]orrectional and detention facilities face unique challenges in the control of COVID-19.” *COVID-19 Management Assessment and Response Tool (CMAR) for Correctional and Detention Facilities*, CDC, CS 320395-A at 1 (Nov. 19, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/Manage-Assess-Response-Tool-508.pdf>. “Facilities include custody, housing, education, recreation, healthcare, food service, and workplace components in congregate settings, where recommended physical/social distancing may often be impractical.” *Id.*

25. FCI McKean is experiencing an ongoing outbreak of COVID-19 among its inmate population and correctional workers. FCI McKean identified its first COVID-19 positive case at

least as early as October 2, 2020. As of March 1, 2021, the cumulative cases among employees and inmates at FCI McKean have increased to more than 500 confirmed infections, with at least 5 recent active cases among FCI McKean's correctional workers.

26. Within the past six years, through the present and continuing and ongoing, plaintiffs and others similarly situated have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices.

27. Unlike many Government employees, plaintiffs cannot work remotely, even during a pandemic. This is because FCI McKean must be physically staffed 24 hours per day, 365 days per year with correctional workers, including plaintiffs.

28. Plaintiffs are charged with the primary job duty of maintaining the safety and security of the Institution at all times, in significant part by coming into close physical proximity with inmates and other correctional workers.

29. Both before and during the documented outbreak of COVID-19 among the inmates and correctional workers at the Institution, plaintiffs have been assigned to individual posts and/or positions within the Institution for each shift. Defendant maintains a record of each plaintiff's employment and daily assignments, going back to the plaintiff's first assignment within the Institution. Accordingly, defendant knows the posts and/or positions to which each plaintiff has been assigned on a daily basis going back at least six years from today.

30. The posts and/or positions to which plaintiffs have been assigned within the Institution involve prolonged, close-quarters exposure to coworkers and/or inmates, often in indoor or enclosed settings.

31. Plaintiffs regularly interact with inmates and come into close proximity or direct physical contact with members of the inmate population on a daily basis. For example, whether at



an assigned post or otherwise traveling within the Institution, plaintiffs are responsible for performing inmate “pat downs” requiring close proximity and direct physical contact with inmates. Plaintiffs must also participate in other searches (e.g., of inmate living quarters) which put them in close proximity and physical contact with inmates and their personal effects.

32. Plaintiffs also come into close physical proximity with coworkers and inmates when performing daily job duties around the Institution, such as closely supervising inmates assigned to daytime activities (“work detail”), correcting inmate behavior, distributing equipment for use by inmates, escorting inmates throughout the Institution, and/or waiting in small, enclosed “sallyports” with coworkers or inmates.

33. In addition, Plaintiffs come into close physical proximity and direct contact with coworkers when they engage in a required information and equipment exchange during the shift exchange process for the 24-hour posts. During this exchange, the outgoing correctional worker provides a critical verbal briefing to the oncoming officer or other correctional worker regarding security incidents and inmate information obtained during the prior shift. The outgoing correctional worker also hands off a set of shared but required security equipment—including radios, keys, and OC spray—to the oncoming correctional worker.

34. For the non-24-hour posts, staff arrives in the institution – go through x-ray machine, go through sally port, administration building, control centers – exchange chits for equipment for keys OC spray, handcuffs, radio and at the end of the day they back through the same steps.

35. The housing units at FCI McKean have an A side and a B side. Each side has capacity for around 115 inmates each. Since around October 2020, FCI McKean set up housing unit C-A as a quarantine unit.

36. Plaintiffs who are assigned to a post on the C housing unit being used as a COVID-19 unit come into close physical proximity and have direct contact with inmates who are known to have COVID-19 while performing their job duties on a daily basis, as these officers frequently move about the unit during their shifts. For example, the housing unit officers inspect cells, conduct searches of inmates' cells for contraband, search the common areas for contraband, search inmates for contraband, and make sure inmates are following the Institution's rules. The job duties and responsibilities of the Plaintiffs assigned to posts on the C housing unit are the same as those of Plaintiffs assigned to posts in other housing units.

37. The existence of a quarantine unit, however, has not contained the virus to only unit C-A due to the nature of the virus and the procedures of the Institution. Plaintiffs count together and if they are assigned to work housing unit C (regardless of the side), they are exposed to the positive inmates in the quarantine unit. In addition, FCI McKean regularly moves plaintiffs between housing units, meaning that exposed plaintiffs are consistently exposing other housing units. After FCI McKean experienced an outbreak in the fall of 2020, they started putting all COVID-19 positive inmates in the unit C-B side. Soon after, inmates in the A and D units also were testing positive. FCI McKean eventually switched the quarantine back to the A side again.

38. FCI McKean has failed to segregate the positive inmates. Positive inmates regularly get out of their cells to use showers, phones, and computers. In addition, the quarantine unit also houses inmates that have recently arrived at FCI McKean and those scheduled to be transferred to other facilities or be released. FCI McKean has taken on a large number of transfers. For example, since around January 2021, McKean has taken 200 inmate transfers. These transferred inmates are housed with the positive inmates.

39. Regardless of post or assignment, plaintiffs must enter into the Institution for each shift, coming into close personal contact with coworkers and/or inmates, and physically touch equipment that is regularly handled by coworkers, including but not limited to metal chains, metal accountability chits, keys, handcuffs, radios, and the radio charging stations located at each housing unit.

40. Regardless of post or assignment, plaintiffs must also physically touch objects and surfaces throughout the Institution that are regularly handled by coworkers and inmates, including but not limited to door handles, security gates, cell doors, work stations/computers, logbooks, trash and trash receptacles, inmate effects and possessions, work tools, restroom surfaces, sinks and toilets, and other communal objects.

41. In addition, at various times since the global pandemic commenced, plaintiffs were required to perform duties involving temporary duty travel to other BOP facilities and other areas. For example, plaintiffs that were members of FCI McKean's Disturbance Control Team ("DCT") and Special Operations Response Team ("SORT") were required to travel to FCI Elkton (Ohio) during its COVID-19 outbreak in the fall of 2020. While the DCT and SORT team was at FCI Elkton, numerous inmates had to be transported to local hospitals and 9 inmates died from COVID-19. The DCT and SORT team also traveled to Washington, D.C. in June 2020 and January 2021 to assist the National Guard in various protests. Two members of the SORT team tested positive for COVID-19 after returning from the January 2021 duty travel. FCI McKean has not been consistently quarantining or testing these plaintiffs when they return from duty travel, even though many have been exposed to COVID-19 during their travels or have tested positive upon their return.

42. Plaintiffs working these temporary duty assignments experienced direct exposures while on assignment and carried the risk of indirect exposure with them back to coworkers and inmates at FCI McKean.

43. Plaintiffs also work in close proximity to inmates and other coworkers potentially infected with COVID-19 when transporting prisoners in between institutions (typically by van), when processing new arrivals and their personal effects, and when escorting new arrivals to points within FCI McKean. As the OIG has admitted, “[a]ny time prisoners are moved, there is an inherent risk that the prisoner could transmit COVID-19 to other parties including the transporting officials, other prisoners, and staff or inmates of the destination facility.” *Review of the United States Marshals Service’s Response to the COVID-19 Pandemic, Audit Division 21-034*, OIG (Feb. 3, 2021), available at <https://oig.justice.gov/sites/default/files/reports/21-034.pdf>. “This is because of the necessary interactions between prisoners and staff that take place during transportation operations as well as the confined spaces of buses and aircraft, even when social distancing is encouraged.” *Id.* At FCI McKean, correctional workers are not informed of the COVID-19 status of all transported inmates, even when that status is known by the Agency. Plaintiffs, as well as the institution as a whole, are at substantial risk of COVID-19 exposure with every interaction with transported prisoners, every prisoner escorted, and every new arrival processed.

44. The foregoing exposure to areas, objects, surfaces, and/or individuals infected with COVID-19 was not taken into account in the classification of plaintiffs’ positions.

45. Defendant has not provided sufficient protective equipment nor measures to practically eliminate the hazard of exposure to COVID-19 at FCI McKean.

46. Plaintiffs work in close proximity to COVID-19 at the Institution, and they have performed work that involves potential personal injury such as death, or temporary, partial, or

complete loss of faculties or ability to work due to acute, prolonged, or chronic disease within the meaning of subpart E of Part 532 of Title 5, Code of Federal Regulations.

47. As a result of plaintiffs' performance of their official duties in close proximity to COVID-19 on objects, surfaces, and/or individuals infected with COVID-19, as alleged herein, plaintiffs have been exposed to "virulent biologicals" within the meaning of Subpart I of Part 550 of Title 5, Code of Federal Regulations, and hazardous micro-organisms within the meaning of Subpart E of Part 532 of Title 5, Code of Federal Regulations.

48. Defendant has not compensated plaintiffs with the hazardous duty pay differential for exposure to virulent biologicals as set forth in Appendix A to Subpart I of Part 550 of Title 5, Code of Federal Regulations, or the environmental differential for exposure to hazardous microorganisms set forth in Appendix A to Subpart E of Part 532 of Title 5, Code of Federal Regulations. Accordingly, defendant has failed to provide hazardous duty and environmental differential pay to plaintiffs when they work with or in close proximity to COVID-19 on objects, surfaces, and/or individuals infected with COVID-19 as required by 5 U.S.C. § 5545(d) and 5 U.S.C. § 5343(c)(4).

49. Because defendant has failed to pay plaintiffs hazardous duty pay and/or environmental pay differentials, defendant has not included such pay when calculating plaintiffs' regular rates of pay for purposes of calculating and paying overtime compensation under the FLSA.

## **CLAIMS**

### **COUNT ONE – Hazardous Duty Pay**

50. Plaintiffs re-allege and incorporate by reference herein paragraphs 1 through and including paragraph 49 of this Complaint.

51. Section 5545(d) of Title 5 of the U.S. Code provides that the United States Office

of Personnel Management (OPM) shall establish a schedule of pay differentials for duty by federal employees involving unusual physical hardship or hazard. Section 5545(d) further provides that OPM prescribe “such minimum periods as it determines appropriate” during which an employee who performs duty involving physical hardship or hazard is entitled to hazardous duty pay.

52. Pursuant to Section 5545(d) of Title 5, OPM has issued regulations at 5 C.F.R. §§ 550.901-550.907 pertaining to hazardous duty pay. These regulations establish a schedule of hazardous pay differentials and provide, *inter alia*, that an employee who qualifies for hazardous duty pay shall be paid hazardous duty pay for each day that the employee is exposed to hazardous duty or physical hardship.

53. The schedule of hazardous duty pay differentials that OPM has established in regulations 5 C.F.R. §§ 550.901-550.907 provides that agencies shall pay hazardous duty pay to employees who are exposed to virulent biologicals, such as COVID-19, to which plaintiffs have been exposed. They further provide that the hazardous duty pay differential which the agency shall pay the employees equals twenty five percent (25%).

54. Since at least October 2020, through the present and continuing and ongoing, plaintiffs and others similarly situated have performed work with or in close proximity to COVID-19, including, without limitation, work performed with or in close proximity to facilities, rooms, offices, workspaces, equipment, objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices. The defendant is in exclusive possession of relevant personnel files, records, and information, including but not limited to plaintiffs’ dates of hire/separation, job descriptions, and work assignments. Defendant also retains records reflecting the names of employees and inmates who have had COVID-19, when they had COVID-19, and their locations in the Institution during that time of infection and potential infection. Each BOP

facility has a daily roster of assignments for correctional workers—from which their location and movements throughout the day can be shown—as well as records reflecting the location and COVID-19 status of inmates at the Institution. These records, as well as other evidence in the defendant's exclusive custody and control, will readily demonstrate plaintiffs' close proximity to the virulent biological COVID-19.

55. Although plaintiffs have been exposed to virulent biologicals, defendant has failed and refused, and continues to fail and refuse, to pay plaintiffs the twenty five percent (25%) pay differential for each day that plaintiffs have been required to work in close proximity to COVID-19. By failing and refusing to pay plaintiffs a twenty five percent (25%) pay differential on these occasions, and continuing to fail and refuse to pay plaintiffs for this hazardous duty, the defendant has violated, and is continuing to violate, the provisions of Title 5 relating to hazardous duty pay at 5 U.S.C. § 5545(d).

56. As a consequence of defendant's failure and refusal to pay plaintiffs hazardous duty pay at all times material herein, plaintiffs have been unlawfully deprived of hazardous duty pay and other relief for the maximum statutory period allowed under federal law.

57. As a result of the defendant's willful and purposeful violations of Title 5, there has become due and owing to each plaintiff various amounts which have not yet been precisely determined. The employment and work records, including each plaintiff's daily assignments within the Institution, are in the exclusive possession, custody and control of defendant and its public agencies and plaintiffs are unable to state at this time the exact amounts owing to each of them. For example, the defendant is in exclusive possession of relevant personnel files and records reflecting plaintiffs' dates of hire/separation, job descriptions, and work assignments, as well as records reflecting the names of employees and inmates who have had COVID-19, when they had

COVID-19, and their locations in the Institution during that time of infection and potential infection. Each BOP facility has a daily roster of assignments for correctional workers—from which their location and movements throughout the day can be shown—as well as records reflecting the location and COVID-19 status of inmates at the Institution. Defendant and its public agencies are under a duty imposed by the Government Accounting Office retention schedule, the FLSA, 29 U.S.C. § 211(c), and various statutory and regulatory provisions to maintain and preserve payroll and other employment records with respect to plaintiffs and other employees similarly situated from which the amounts of defendant’s liability can be ascertained.

58. Pursuant to the Back Pay Act, 5 U.S.C. § 5596, plaintiffs are entitled to recover interest on their back pay damages for the defendant’s failure to pay them hazardous duty pay.

59. Plaintiffs are entitled to recover attorneys’ fees and costs under the Back Pay Act, 5 U.S.C. § 5596, as well as other applicable laws and regulations.

#### **COUNT TWO – Environmental Differential Pay**

60. Plaintiffs re-allege and incorporate by reference herein paragraphs 1 through and including paragraph 59 of this Complaint.

61. Pursuant to 5 U.S.C. § 5343(c)(4), OPM has issued regulations regarding wage schedules and rates for prevailing rate employees which provide for environmental pay differentials for duty involving unusually severe working conditions or unusually severe hazards. *See* 5 C.F.R. § 532.511.

62. The schedule of environmental differentials is contained in Appendix A to Subpart E of Part 532 of Title 5, Code of Federal Regulations. *See* 5 C.F.R. § 532.511(d).

63. The schedule of environmental differentials provides that agencies shall pay an eight percent (8%) environmental differential when employees perform work with or in close



proximity to “micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease” in situations where “the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserums and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury” or a four percent (4%) environmental differential when employees perform work with or in close proximity to “micro-organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man” where “the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury.” 5 C.F.R. Pt. 532, Subpt. E, App. A.

64. The regulations provide that “[a]n employee entitled to an environmental differential shall be paid an amount equal to the percentage rate authorized by the Office of Personnel Management for the category in which the working condition or hazard falls, multiplied by the rate for the second step of WG–10 for the appropriated fund employees and NA–10 for the nonappropriated fund employees on the current regular non-supervisory wage schedule for the wage area for which the differential is payable, counting one-half cent and over as a whole cent.” 5 C.F.R. § 532.511(b)(1).

65. An employee entitled to an environmental differential on the basis of hours in a pay status “shall be paid for all hours in a pay status on the day on which he/she is exposed to the situation.” 5 C.F.R. § 532.511(b)(3).

66. Since at least October 2020, through the present and continuing and ongoing, plaintiffs paid pursuant to the prevailing rate pay system and other similarly situated prevailing rate employees have performed work with or in close proximity to COVID-19, including, without

limitation, work performed with or in close proximity to facilities, rooms, offices, workspaces, equipment, objects, surfaces, and/or individuals infected with COVID-19 without sufficient protective devices. The defendant is in exclusive possession of relevant personnel files, records, and information, including but not limited to plaintiffs' dates of hire/separation, job descriptions, and work assignments. Defendant also retains records reflecting the names of employees and inmates who have had COVID-19, when they had COVID-19 or potential/likely Covid-19 infection, and their locations in the Institution during that time. Each BOP facility has a daily roster of assignments for correctional workers—from which their location and movements throughout the day can be shown—as well as records reflecting the location and COVID-19 status of inmates at the Institution. These records, as well as other evidence in the defendant's exclusive custody and control, will readily demonstrate plaintiffs' close proximity to the virulent biological COVID-19.

67. Defendant has failed, and continues to fail, to pay plaintiffs the eight or four percent environmental differential listed in Appendix A to Subpart E of Part 532 of Title 5, Code of Federal Regulations for each period when they have been exposed to COVID-19 through the performance of their official duties.

68. By failing to pay plaintiffs the eight or four percent environmental differential on these occasions, and continuing to fail and refuse to pay plaintiffs for this hazardous duty, the defendant has violated, and is continuing to violate, the provisions of 5 U.S.C. § 5343(c)(4).

69. As a consequence of defendant's failure to pay plaintiffs environmental differential pay, plaintiffs have been unlawfully deprived of environmental differential pay and other relief.

70. As a result of the defendant's willful and purposeful violations of Title 5, there has become due and owing to each plaintiff various amounts which have not yet been precisely

determined. The employment and work records, including each plaintiff's daily assignment within the Institution, are in the possession, custody and control of the defendant and plaintiffs are unable to state at this time the exact amounts owing to each of them. For example, the defendant is in exclusive possession of relevant personnel files and records reflecting plaintiffs' dates of hire/separation, job descriptions, and work assignments, as well as records reflecting the names of employees and inmates who have had COVID-19, when they had COVID-19 infection or potential/likely Covid-19 infection, and their locations in the Institution during that time. Each BOP facility has a daily roster of assignments for correctional workers—from which their location and movements throughout the day can be shown—as well as records reflecting the location and COVID-19 status of inmates at the Institution. Defendant is under a duty imposed by the Government Accounting Office retention schedule, the FLSA, 29 U.S.C. § 211(c), and various statutory and regulatory provisions to maintain and preserve payroll and other employment records with respect to plaintiffs and other employees similarly situated from which the amounts of defendant's liability can be ascertained.

71. Pursuant to the Back Pay Act, 5 U.S.C. § 5596, plaintiffs are entitled to recover interest on their back pay damages for the defendant's failure to pay them environmental pay differential.

72. Plaintiffs are entitled to recover attorneys' fees and costs under the Back Pay Act, 5 U.S.C. § 5596, as well as other applicable laws and regulations.

### **COUNT 3 – FLSA Regular Rate**

73. Plaintiffs re-allege and incorporate by reference herein paragraphs 1 through and including paragraph 72 of this Complaint.

74. Section 7(a) of the FLSA, 29 U.S.C. § 207(a), provides that overtime shall be paid

to employees for work hours in excess of 40 hours in a week at the rate of one and one-half times an employee's "regular rate of pay." In addition, Section 551.501 of Part 5 of the Code of Federal Regulations, 5 CFR § 551.501, provides that federal agency employers, such as the Bureau of Prisons, shall compensate their employees at a rate of not less than one and one-half times the employees' regular rate of pay for all hours of work in excess of 8 in a day and/or 40 in a workweek.

75. At all times material herein, during the work weeks in which plaintiffs have worked in excess of 40 hours in a week and/or 8 hours in a day and have been paid overtime pay for such work, defendant has failed to properly calculate the "regular rate of pay" used to calculate FLSA overtime pay. Defendant has violated the FLSA by failing to include hazardous duty pay and environmental pay differential payments, owed to plaintiffs as set forth in Counts 1 and 2 above, in the regular rate of pay at which FLSA overtime is paid. The FLSA claim in this case is limited exclusively to the improper calculation of the regular rate of pay used by the Defendant when it paid FLSA overtime pay to plaintiffs caused by the failure of the defendant to include hazardous duty and/or environmental pay differential payments, to which plaintiffs have been and continue to be entitled as explained in paragraphs 1-66 herein.

76. By failing to properly calculate the regular rate of pay for plaintiffs and other employees similarly situated as required under law, defendant has violated, and is continuing to violate in a willful and intentional manner, the provisions of the FLSA. Therefore, at all times material herein, plaintiffs have been unlawfully deprived of overtime compensation and other relief for the maximum statutory period allowed under federal law.

77. As a result of defendant's willful and purposeful violations of the FLSA, there have become due and owing to plaintiffs an amount that has not yet been precisely determined. The

employment and work records for plaintiffs are in the exclusive possession, custody and control of defendant and its public agencies and plaintiffs are unable to state at this time the exact amount owing to them. Defendant and its public agencies are under a duty imposed by the Government Accounting Office retention schedule, the FLSA, 29 U.S.C. § 211(c), and various statutory and regulatory provisions to maintain and preserve payroll and other employment records with respect to plaintiffs from which the amount of defendant's liability can be ascertained.

78. Pursuant to 29 U.S.C. § 216(b), plaintiffs are entitled to recover liquidated damages in an amount equal to their back pay damages for Defendant's failure to pay overtime compensation at the correct rate on occasions when Defendant paid plaintiffs for overtime work.

79. Pursuant to the Back Pay Act, 5 U.S.C. § 5596, plaintiffs are entitled to recover interest on their back pay damages for defendant's failure to pay them overtime compensation at the correct rate on occasions when Defendant paid plaintiffs for overtime work.

80. Plaintiffs are entitled to recover attorneys' fees and costs under 29 U.S.C. § 216(b), and the Back Pay Act, 5 U.S.C. § 5596, as well as other applicable laws and regulations.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs, on their own behalf and on behalf of others similarly situated who opt into this lawsuit, pray that this Court:

(a) Enter judgment declaring that defendant has willfully and wrongfully violated its statutory obligations, and deprived each of the plaintiffs of their rights;

(b) Order a complete and accurate accounting of all the compensation to which plaintiffs are entitled;

(c) Award each plaintiff monetary damages, plus interest;

(d) Award each Plaintiff liquidated damages equal to the backpay awarded on their FLSA regular rate violation claims;

(e) Award plaintiffs their reasonable attorneys' fees to be paid by the defendant, and the costs and disbursements of this action; and

(f) Grant such other relief as may be just and proper.

Respectfully submitted,

Dated: April 29, 2021

/s/ Sara L. Faulman  
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