

JAN 19 2011

Santa Fe, Rio Arriba &
Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

JAMES RIGDON,
RICHARD HENDERSON,
RICHARD CHILELLI,
KENNETH LANGSTON,
MARK GRIEGO,
ROLANDO VALENCIA,
KENNETH CORREJO, and
TERRY ROMO
Individually and
On Behalf of All Others Similarly
Situated,

NO. D101 CV 2010 03716

Plaintiffs,

v.

NEW MEXICO DEPARTMENT
OF CORRECTIONS and JOE R.
WILLIAMS and LUPE MARTINEZ,
as Secretaries of the New Mexico
Department of Corrections,

Defendants.

**SECOND AMENDED COMPLAINT FOR UNPAID OVERTIME
& APPLICATION FOR PERMANENT INJUNCTION**

James Rigdon, Richard Henderson, Richard Chilelli, Kenneth Langston, Mark Griego and Rolando Valencia, Individually and on Behalf of all Others Similarly Situated ("Plaintiffs") complain of the New Mexico Department of Corrections, Joe R. Williams and Lupe Martinez, as Secretaries of the New Mexico Department of Corrections ("Defendants") and show as follows:

I. NATURE OF SUIT

1.01 Plaintiffs are or were employed by Defendants as Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

1.02 Plaintiffs bring this suit to recover back pay, liquidated, and other damages as a result of Defendants' failure to pay overtime minimum and wages as required by law.

1.03 Plaintiffs bring this suit under the New Mexico Minimum Wage Act and state common law and as a representative action as authorized under N.M.S.A. § 50-4-26(D).

II. JURISDICTION AND VENUE

2.01 This Court has subject matter jurisdiction over Plaintiffs' claims, because the Complaint alleges a cause of action under the laws of the State of New Mexico, namely The New Mexico Minimum Wage Act, NMSA 1978 §50-4-1 *et seq.* and state common law causes of action.

2.02 This Court has personal jurisdiction over Defendants, because Defendants are a governmental entity in the State of New Mexico and individual citizens of the State of New Mexico.

2.03 Venue is proper in this judicial district, because Defendants' offices are located in this judicial district. NMSA 1978 §38-3-1.

III. PARTIES

3.01 Named Plaintiff James Rigdon is a resident of Albuquerque, New Mexico and is employed as a Correctional Officer II (Lieutenant) by Defendants.

3.02 Named Plaintiff Richard Henderson is a resident of Belen, New Mexico and has been employed as a Correctional Officer III (Captain) by Defendants within the three-year period immediately preceding the filing of this Complaint.

3.03 Named Plaintiff Richard Chilelli is a resident of Los Lunas, New Mexico and is employed as a Correctional Officer II (Lieutenant) by Defendants.

3.04 Named Plaintiff Kenny Langston is a resident of Albuquerque, New Mexico and is employed as a Correctional Officer III (Captain) by Defendants.

3.05 Named Plaintiff Mark Griego is a resident of Los Lunas, New Mexico and is employed as a Correctional Officer II (Lieutenant) by Defendants.

3.06 Named Plaintiff Rolando Valencia is a resident of Los Lunas, New Mexico and is employed as a Correctional Officer II (Lieutenant) by Defendants.

3.07 Plaintiff Kenneth Correjo is a resident of Belen, New Mexico and is employed as a Correctional Officer III (Captain) by Defendants.

3.08 Plaintiff Terry Romo is a resident of Albuquerque, New Mexico and is employed as a Correctional Officer II (Lieutenant) by Defendants.

3.09 Defendant **New Mexico Department of Corrections** is a governmental entity organized and operating subject to the laws of New Mexico and of the United States. This Defendant has been served with summons and a copy of the Original and First Amended Complaint, but has not yet answered or otherwise appeared.

3.10 Defendant **Joe R. Williams** is the former Secretary for the New Mexico Department of Corrections. This Defendant has been served with summons and a copy of the Original and First Amended Complaints, but has not yet answered or otherwise appeared.

3.11 Defendant **Lupe Martinez** is the current Secretary for the New Mexico Department of Corrections. This Defendant may be served with summons and a copy of this Second Amended Complaint by serving her at 4337 NM 14, Santa Fe, New Mexico 87508.

IV. FACTUAL BACKGROUND

4.01 Defendants operate six state-owned correctional facilities in New Mexico.

4.02 At these facilities, Defendants employ Correctional Officers II (Lieutenants) or Correctional Officers III (Captains), whose primary duty is to help provide safety and security of the correctional facility at which they work.

4.03 Defendants require Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) to work significantly more than 40 hours each workweek.

4.04 Defendants compensate Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) on an hourly basis, including payment of their regular hourly rate for overtime hours, without payment of an overtime premium.

4.05 Defendants require Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) to attend meetings on their days off or when they are otherwise not on duty. The Correctional Officers receive no compensation whatsoever for this time.

4.06 Defendants require Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) to arrive at work well in advance of their scheduled shifts and to remain at the prison after their shifts are concluded. However, the Correctional Officers are compensated only for the hours they are scheduled to work.

V. BREACH OF CONTRACT

5.01 Defendants maintain and publish to their employees, and to the public via their website, written policies notifying employees that “Overtime Compensation for Corrections Department employees shall be made in accordance with the Fair Labor Standards Act (FLSA), this policy, and the State Personnel Board rules.”

5.02 Defendants' policies incorporate definitions of "Administrative" and "Executive Employee," which Defendants purport to rely on in denying the appropriate overtime pay to Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

5.03 Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) do not meet the definitions of either Administrative or Executive employees, as defined by Defendants policies.

5.04 Defendants' policies also define "Hours Worked" to include "all hours that an employee is required or permitted by the employer to work."

5.05 Defendants' policies control the employer-employee relationship.

5.06 Defendants' employees reasonably rely on Defendants to conform to their own policies.

5.07 Defendants' policies constitute an implied-in-fact contract.

5.08 Defendants have breached their contract with Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) by failing to pay overtime and failing to pay the minimum wage for all hours worked in compliance with the Fair Labor Standards Act, as adopted by Defendants policies.

5.09 Plaintiffs seek to certify a class action, pursuant to NMRA, Rule 1-023, as to those persons affected by Defendants' breach of contract.

5.10 The class is so numerous that joinder of all members is impracticable. Plaintiffs believe that more than 200 members exist.

5.11 There are questions of law and fact common to the class.

5.12 The claims of the Plaintiffs are typical of the claims of the class.

5.13 The Plaintiffs will fairly and adequately protect the interests of the class.

5.14 Questions of law or fact common members of the class predominate over any questions affecting only individual members.

5.15 The prosecution of separate actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

5.16 A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

VI. VIOLATION OF THE NEW MEXICO MINIMUM WAGE ACT

6.01 Defendants are required by N.M.S.A. 1978, § 50-4-22(A) to pay a minimum wage of at least \$7.50 for each hour of work.

6.02 Plaintiffs engage in work before and after their scheduled shifts, and when required to attend meetings outside their scheduled shifts, for which they are paid nothing in violation of the Minimum Wage Act.

6.03 Defendants maintain a systematic policy which requires Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) to perform work without receiving at least the minimum wage for each such hour of work

6.04 Plaintiffs have actual knowledge that other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) have been denied payment of the minimum wage for all hours worked.

6.05 Plaintiffs performed the same or similar work as other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) in the provision of services on behalf of the Defendants.

6.06 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) were paid in the same manner.

6.07 Plaintiff and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) are similar in terms of their primary duties, pay structures, and requirement that they work hours for which they are not paid the minimum wage.

6.08 Defendants' minimum wage violations result from generally applicable policies or practices and do not depend on the personal circumstances of the Plaintiffs or other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

6.09 Plaintiffs' experiences are typical of the experiences of other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

6.10 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) were not paid all wages due to them on their regular paydays, in violation of N.M.S.A. 1978, § 50-4-1 through 50-4-32.

6.11 Defendants' violations occurred and are occurring as part of a continuing course of conduct as provided by N.M.S.A. 1978, § 50-4-32.

6.12 Although the issue of damages may be individual in character, there remains a common nucleus of liability facts.

VII. CLAIM FOR INJUNCTIVE RELIEF AS TO JOE R. WILLIAMS AND LUPE MARTINEZ, FORMER AND CURRENT SECRETARIES OF THE DEPARTMENT OF CORRECTIONS

7.01 Defendants Williams and Martinez are an employer under N.M.S.A. 1978, §50-4-21(A).

7.02 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) are employees of Defendants Williams and Martinez under N.M.S.A. 1978, §50-4-21(B).

7.03 Defendants Williams and Martinez maintain a systematic policy which requires similarly situated employees who were improperly classified as exempt to work more than 40 hours per week without paying them proper overtime compensation and which required employees to perform work without their receiving the minimum wage in violation of the MWA.

7.04 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) are non-exempt employees under the MWA who were improperly classified as exempt employees to avoid the requirement to pay overtime at time and one-half their regular hourly rate of pay.

7.05 Plaintiffs have actual knowledge that other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) have been denied overtime pay for hours worked over forty hours in a week.

7.06 Plaintiffs perform the same or similar work as other members of Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) in the provision of services on behalf of Defendants Williams and Martinez.

7.07 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) were paid in the same manner.

7.08 Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) are similar in terms of their primary duties, pay structures, and requirement that they work overtime hours without proper overtime compensation and they work certain hours for which they do not receive the minimum wage.

7.09 Defendants Williams' and Martinez's failures to pay overtime compensation results from generally applicable policies or practices and does not depend on the personal circumstances of the Plaintiffs or other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

7.10 Plaintiffs' experiences are typical of the experiences of other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains).

7.11 Defendants Williams' and Martinez's conduct constitutes an ongoing violation of the MWA.

7.12 Plaintiffs, on behalf of themselves and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains) seek an injunction prohibiting Defendants Williams and Martinez from continuing to pay them in violation of the MWA.

VIII. PRAYER

WHEREFORE, Plaintiffs, on behalf of themselves and Correctional Officers II (Lieutenants) or Correctional Officers III (Captains), pray for relief as follows:


- (a) Certification of the Plaintiffs' claims contract damages as a class action authorized by NMRA, Rule 1-023;

- (b) Certification of the Plaintiffs' claims for violations of N.M.S.A. 1978, § 50-4-22(A) as a collective action pursuant to N.M.S.A. 1978, § 50-4-26(D);
- (c) That Defendants are found to have violated the minimum wage, and failure to timely pay wages penalty provisions of the MWA;
- (d) That Defendants' violations occurred and are occurring as part of a continuing course of conduct as provided by N.M.S.A. 1978, § 50-4-32;
- (e) Judgment against Defendant New Mexico Department of Corrections for loss of minimum wages, plus an amount equal to twice those wages;
- (f) Entry of a mandatory injunction prohibiting Defendants Williams and Martinez from failing to pay proper overtime and minimum wage compensation to Plaintiffs and other Correctional Officers II (Lieutenants) or Correctional Officers III (Captains), requiring Defendants Williams and Martinez to post in the correctional facilities a notice describing the violations of the MWA as found by the Court and/or a copy of a cease and desist order;
- (g) An award of reasonable attorneys' fees and costs of the action;
- (h) An award of pre-judgment and post-judgment interest; and
- (i) For such other and further relief, in law or equity, as this Court may deem appropriate and just.

Respectfully Submitted,

THE YOUNG LAW FIRM, P.C.
Jeremi K. Young
(Motion Pro Hac Vice Forthcoming)
112 West 8th Avenue, Suite 900-D
Amarillo, Texas 79101
Telephone: (806) 331-1800
Facsimile: (806) 398-9095
E-mail: jyoung@youngfirm.com

LOVELL, LOVELL, NEWSOM & ISERN, L.L.P.
Tim Newsom
112 West 8th Avenue, Suite 1000
Eagle Centre Building
Amarillo, Texas 79101-2314
Telephone: (806) 373-1515
Facsimile: (806) 379-7176
E-mail: tim@loyell-law.net

By: 

Tim Newsom
State Bar No. 16886

Attorneys for Plaintiffs and Class Members