

ELECTRONICALLY FILED  
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION AT LEXINGTON  
CIVIL ACTION NO. 5:06-CV-00299-JBC

JUSTIN CRAWFORD, *ET AL.*,

PLAINTIFFS,

v.

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION  
TO DECERTIFY MEAL BREAK SUBCLASS**

LEXINGTON-FAYETTE URBAN  
COUNTY GOVERNMENT,

DEFENDANT.

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Come the Plaintiffs, by counsel, and for their Response to the Defendant's Motion to Decertify Subclass A, state as follows:

INTRODUCTION

In conditionally certifying this case as a collective action under 29 U.S.C. § 216(b), the Court found that the Plaintiffs had "bolstered their claims with evidence provided by the named plaintiffs regarding the DCC policies at issue in this case." (D.E. 97, p. 13). The parties have concluded extensive discovery, including the taking of 74 depositions, concerning the Plaintiffs' claim that the twenty-minute unpaid meal periods allegedly provided to the members of conditionally-certified Subclass A (Plaintiffs who now work or who have worked in Custody, Intake, and Master Control) are not bona fide and are compensable under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. That claim is now bolstered by testimony not only from the named Plaintiffs, but also from opt-in Plaintiffs, non-Plaintiffs, current and former administrators of the Division of Community Corrections ("DCC"), and witnesses designated by the Lexington-Fayette Urban County

Government (“LFUCG”), including Assistant Director James Kammer, who is the LFUCG’s designated Rule 30(b)(6) witnesses concerning DCC “meal break” policies. The suitability of the claim for collective treatment is even clearer at present than at the time of conditional certification.

The Plaintiffs (a term which, as used herein, refers only to the members of Subclass A) acknowledge that their individual employment experiences are not, of course, perfectly identical. Any two employees in any imaginable workplace will inevitably have differing perspectives, recollections, and impressions. If § 216(b) required perfect identity of workplace experiences, however, no FLSA collective action would ever remain certified.

The Plaintiffs’ meal break claim is based upon policies and practices which are supported by overwhelming evidence, including, in many instances, admissions from Kammer and other LFUCG “administrators.” Because the Plaintiffs believe that those policies result in meal breaks which satisfy neither the applicable Department of Labor (“DOL”) regulations defining a bona fide meal break nor the “predominant benefit” test adopted by the United States Court of Appeals for the Sixth Circuit, the Plaintiffs seek recovery for all of their twenty-minute “meal periods,” not for specific interruptions to specific breaks on specific days. The common policies binding together the members of Subclass A render most of the differences recited in the LFUCG’s Motion to Decertify irrelevant. Other differences are exaggerated, and based upon erroneous citations to the record. To the extent any meaningful distinctions do exist among the members of Subclass A, they reflect differences not between individual Plaintiffs, but between the Intake, Master Control, and Custody Bureaus (for example, Intake Employees’ meal breaks are interrupted by inmate disturbances which may not be signaled by the formal “tones” that sound in the Custody Bureau), and which are readily accommodated by the division of Subclass A into groups according to Bureau, in addition to a group

comprised only of Custody Officers and Corporals.<sup>1</sup> None of the differences alleged by the LFUCG justify decertification and the consequent litigation of over 317 individual Plaintiffs' meal break claims.

## **FACTUAL BACKGROUND**

### **I. SUBSTANTIAL EVIDENCE CONFIRMS COMMON POLICIES AND PRACTICES WHICH DENY THE PLAINTIFFS BONA FIDE MEAL BREAKS**

The LFUCG takes the unsupportable position that the only policy or practice that it applies to Subclass A is the policy of providing twenty (20) minute unpaid meal breaks to Custody, Intake, and Master Control Employees. (LFUCG's Memorandum in Support of Motion to Decertify Meal Break Subclass ("Mem."), p. 25). Despite that assertion, however, the DCC is clearly not a workplace in which Employees are free to create and follow their own individualized break rules and practices. The twenty-minute meal breaks are highly regulated by the LFUCG through policies and practices which are more than amply supported by the testimony of Assistant Director Kammer, the DCC's Director, non-Plaintiff Employees, and the Plaintiffs. The Plaintiffs' meal breaks claim is based upon those policies.

The Plaintiffs repeat their acknowledgment that one of the policies alleged by Subclass A is relevant only to a smaller but easily identifiable group within the Subclass. According to the

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<sup>1</sup> As explained below, and as consistently acknowledged by the Plaintiffs in their Reply to the Defendant's Response to the Plaintiffs' Motion for Subclasses (D.E. 169, p. 14) and their Memorandum in Support of Partial Summary Judgment (D.E. 233, p. 9), the meal break claim asserted by Custody Corporals and Officers is somewhat unique. Those Employees seek compensation for their meal breaks not only because of the policies and practices applied by the LFUCG to all members of Subclass A (the policy that they remain within the facility, the policy that they remain responsive to inmates, the policy that they respond to radios and/or telephone or other interruptions, and the policy that they perform other work tasks, all during their meal breaks), but also and independently because of the policy that they spend a portion of their meal break time traveling from their work station to a "break sheet" and signing that break sheet.

LFUCG, “break sheets” for Intake and Master Control Employees are located at those Employees’ work stations (Mem., p. 7-8). Custody Lieutenants, Captains, and Majors are not required to sign break sheets at all; Custody Sergeants do sign break sheets, but at least one sheet is located in Shift Command, where Sergeants have their work stations. (*Id.*, p. 8). The LFUCG’s break sheet policy therefore does not result in the loss of “break time” for Intake Employees, Master Control Employees, and Custody Sergeants, Lieutenants, Captains and Majors. In contrast, and as reflected by the testimony cited below, Custody Officers and Corporals are required by policy to travel from their work stations to one of three (3) break sheets, to sign a break sheet, and to travel from the break sheet to the place at which a break may be taken, all during their already-brief twenty-minute meal breaks. The Custody Officers’ and Corporals’ meal break claim, therefore, is based upon the LFUCG’s “break sheet” policy, in addition to the policies which govern the meal breaks of all Subclass A members.

Those remaining policies include the following: (1) the policy requiring the Plaintiffs to remain at the Facility during their meal breaks; (2) the policy requiring the Plaintiffs to remain alert for and responsive to inmate problems during their meal breaks; (3) the policy requiring the Plaintiffs to respond to radio, telephone, and other interruptions during their meal breaks; and (4) the practice of requiring the Plaintiffs to perform other work duties during their meal breaks. The substantial evidence supporting each policy and practice is set forth below.

**A. LFUCG Policy Forbids the Plaintiffs from Leaving the Facility’s Grounds During Their Meal Breaks, and Requires Them to Remain in Uniform**

Assistant Director and Rule 30(b)(6) witness Kammer testified that DCC Employees are not

permitted to leave the Facility's grounds without obtaining prior approval. (Kammer at 124-125).<sup>2</sup> LFUCG policy further requires that Employees leave the Facility only through the upper level front doors. (*Id.* at 194). Assistant Director Kammer's articulation of these rules is consistent with the testimony of non-Plaintiffs and Plaintiffs. Major Capillo, who is purportedly a member of the "administration," testified that Employees are not permitted to leave the Facility during their meal breaks as a "general rule." (Capillo at 50-51). (*See also* Captain Carter at 44-45 (the DCC's "practice" is that Employees may not leave the facility during breaks); Officer Compston at 45 (he does not believe he is permitted to leave the facility during breaks); Lieutenant Johnson at 21, 65-66 (Employees may exit the Facility only through upper level doors); Captain Hall at 70 (Employees cannot leave the Facility while on break); Lieutenant Jones at 214 (Employees are not permitted to leave the Facility during meal breaks)).

Also according to Kammer, DCC Employees are not permitted to change out of uniform during their meal breaks. (Kammer at 207). (*See also* Lieutenant R. Jones at 214 (same)).

**B. LFUCG Policy Requires the Plaintiffs to Serve as the DCC's "Response Team" for Inmate Incidents and Disturbances During Their Meal Breaks**

LFUCG policy requires the Plaintiffs in all three Subclass A Bureaus to remain vigilant for and responsive to inmate incidents, emergencies and altercations throughout their unpaid meal breaks. While the manner in which Employees are alerted to inmate problems differs according to Bureau (for example, "tones" indicate specific types of problems in Custody, while disturbances in Intake may or may not result in a formal tone), the Plaintiffs' responsibility to respond to and resolve the problem continues throughout their meal breaks pursuant to an admitted LFUCG policy.

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<sup>2</sup> In the interest of brevity, deposition testimony is cited in the short format.

1. Custody

Custody Employees are required by LFUCG policy to respond to “tones,” including Signal 7s, Code 100s, and Code 101s, even if they are attempting to eat during their unpaid twenty-minute “breaks.”<sup>3</sup> DCC Director Ron Bishop testified that “it’s pretty much mandatory” for Employees to respond to tones, including Code 100s and Code 101s:

Q. And **what’s the policy** of the Fayette County Detention Center when there is a medical emergency or an officer needs help or there is some other reason why an officer needs to respond?

A. **If it is indicated that it is a medical emergency, we would expect our medical staff to respond immediately. We would expect available officers to respond also.**

Q. Is that discretionary or mandatory?

A. **It’s pretty much mandatory.**

(Bishop at 22 (emphasis added)). Director Bishop further admitted that this “mandatory” policy is necessary to the safe and efficient operation of the DCC. (*Id.* at 59). Director Bishop’s testimony was confirmed by Kammer, who testified:

Q. And in the custody area, **the lieutenants and the sergeants and the officers all have to respond to tones; is that correct?**

A. **They all respond; that’s correct.**

...

Q. Do captains have to respond to tones in the custody area?

A. They respond to tones as well.

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<sup>3</sup> A “Signal 7” signifies some type of emergency or that a staff member or inmate needs assistance. (1/3/07 Tr., p. 114 (Kammer testimony)). A Code 100 and a Code 101 signify medical emergencies.

(Kammer at 127-28 (emphasis added)).

**Q. All right. Now, do - is there a policy or order concerning who is to respond to these different kinds of tones?**

A. The responses to Signal 7 is an officer emergency response. All of the responses are fired off in custody. Custody commanders, custody officers that are rovers are expected to respond. So the custody bureau responds to those.

...

**Q. Now, if an officer is being relieved of duty by a rover and is on break and there is a signal, would that officer be expected to respond to that?**

A. Yes.

...

(1/3/07 Tr., p. 114-115 (Kammer testimony) (emphasis added)).<sup>4</sup>

This policy has been further corroborated by non-Plaintiffs, including LFUCG witnesses and members of the “administration.” (Major Capillo at 43 (even Officers must respond to a Code 101, and “probably should respond to a code 100”); Major Korb at 47 (“any available officer” must respond to tones and signals, and the term “available officer” includes any Employee who is not physically inside a housing unit, even if he or she is on break), 83 (as a Major, he would look “unfavorably” upon any Employee who failed to respond to a Signal 7 while taking a meal break); Major Hill at 16 (officers and commanders, including those who are on “break,” must respond to Signal 7s), 67-68 (it is not “acceptable” for Employees to ignore tones during meal breaks); Captain Kelly at 27-28 (“anybody that’s available,” including himself, must respond to a Signal 7 during a

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<sup>4</sup> The LFUCG defines the term “commander” as including the ranks of Sergeant, Lieutenant, Captain, and Major. Non-commanders, or non-supervisors, include the ranks of Officer and Corporal. (Kammer at 175). The LFUCG considers the DCC administration to include the rank of Major. (1/3/07 Tr., p. 37, 50 (Kammer testimony)).

meal break and “[i]t’s always been that way”); Captain Carter at 18-19 (the DCC could not operate safely under an order permitting Employees to ignore tones during meal breaks because “those are the only staff that can respond”), 44 (DCC Employees who are taking meal breaks constitute the Facility’s “response team” because “we have to have someone there”); Sergeant Dulin at 12 (as a Custody Sergeant, he must respond to tones regardless of where they occur within the Facility, and the same is true of lower-ranked Employees); Officer Frasher (1/4/07 Tr., p. 91) (his breaks have been interrupted because “[t]here are emergency codes or tones that happen throughout the shift that we would be required to go to if we were - even if we were on a break”); Sergeant Isaacs at 7 (an officer on break must respond to a Signal 7); Sergeant Hershey at 28 (when asked to articulate the “policy” on responding to tones, testifying, “I believe they [officers] are supposed to”); Corporal Compston at 13-14 (“you’ve got to” respond to a Signal 7, and he believes he is “[p]robably” required to respond to a Code 100 or Code 101); *see also* former Director Brown at 15 (during his tenure, Employees on “break” were required to respond to tones “just like other staff that were not on break because you don’t know the severity of what’s happening”).

The Plaintiffs’ testimony regarding this policy is strikingly consistent with the above-cited testimony from non-Plaintiffs. (Captain Simpson at 47, 63 (Employees, including Captains, must respond to tones); Lieutenant Deleon at 51 (all Employees must respond to Signal 7s), 52 (Employees are instructed to respond to Signal 7s and Code 100s), 71 (when a Signal 7 sounded, Employees in the ODR left their food to respond), 133 (the Facility could not operate safely if Employees did not respond to tones during breaks); Sergeant Reams at 99-100 (as a Custody Lieutenant, he responded to Signal 7s and other tones even while on break); Sergeant Webb at 32, 78 (he responds to tones and signals during his meal breaks); Corporal Rankin at 107 (“[w]e were

required to respond if we were available to all tones”, including Code 100s and 101s); Corporal Byrd at 47-48 (his understanding of the LFUCG’s policy regarding Signal 7s is that all available staff must respond; even as to medical codes, “[w]e all are expected to respond because another officer’s life is in danger”); Corporal Cason at 21 (“If I was on my break and there was a tone, I had to respond”); Corporal Balltrip at 19-20 (while on a break, she would “pretty much drop everything and go to the tone” if it sounded); Corporal Trotter at 26 (she is required to respond to “all tones” during meal breaks); Corporal Hughes at 44 (in training, she was instructed that “if we was on our break and a tone goes off, that we have to respond whether it was a signal seven or a code 100 or whatever”), 88 (“it was policy that we respond if we were out or whatever to a tone”), 61 (if she is outside of her housing unit because a rover is inside her unit, she must respond to a tone); Corporal Stormbringer at 78 (based upon her training, she understands that she is required to respond to codes or signals if she is “available”); Corporal Tuttle at 19-20 (he does not consider himself to be relieved from his duties while in the ODR during his meal break because he must respond to his radio and to tones); Corporal Cook at 66 (“[w]e were told in training anytime there’s a signal seven that’s an officer needs help and that could be you one of these days, so you respond to assist”); Officer Corbett at 77 (he has responded to a Code 100 during his meal break), 80-81 (while in the ODR or smoke room, he remains responsible for responding to tones); 1/10/08 Officer Hood at 90 (breaks are interrupted by tones)).<sup>5</sup>

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<sup>5</sup> The opt-in Plaintiffs’, non-Plaintiffs’, and LFUCG administrators’ testimony regarding the LFUCG’s policy of requiring Custody Employees to resolve inmate issues during their meal breaks is consistent with the testimony from the original named Plaintiffs on which the Court based its conditional certification Order. (Sergeant Crawford at 152-154 (available officers must respond to tones, and the term “available” refers to any Employee with freedom of movement); 12/1/06 Sergeant Johnson at 88-89 (if a tone occurs during a break, an officer must respond); 11/30/06 Lieutenant Grillo at 126 (as a “matter of common knowledge,” Employees must

Despite all of this testimony, the LFUCG continues to insist that “[i]n most cases, only Commanders and rovers respond to a Signal 7 unless otherwise directed” and that “[o]nly Commanders and medical personnel respond to medical tones, such as a Code 100 or Code 101.” (Mem., p. 7). The LFUCG provides two citations to support that assertion: (1) testimony from a non-Plaintiff, Sergeant Taylor, and (2) Operational Order 8.1.1 (Ex. 32 to LFUCG’s Response brief regarding exemption). The LFUCG cites no authority for the proposition that the testimony of a single non-Plaintiff regarding his perception of policy (which conflicts with the testimony of administrators, designated defense witnesses, other non-Plaintiffs, and Plaintiffs) is sufficient to warrant decertification. Further, and contrary to the LFUCG’s citation, Operational Order 8.1.1 does not state that “[i]n most cases, only commanders and rovers respond to a Signal 7 unless otherwise directed.” Instead, the Order specifically contemplates a response by Employees other than commanders and rovers: “Other officers who are not currently involved in the direct custody or supervision of inmates may respond, if available.” (*Id.*). Substantial evidence confirms that, as applied and enforced by Director Bishop and Assistant Director Kammer, Operational Order 8.1.1 requires Custody Officers who are on their breaks to respond to Signal 7s. The LFUCG should not be permitted to escape collective accountability merely because its written Operational Order fails to accurately memorialize the uniform rule admitted to and enforced by the LFUCG’s own administrators.

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respond to tones even if they are on break), 50 (when a tone sounds, all available officers must report, including those on “break”); 3/30/08 Grillo at 284-85 (as a commander, she must respond to all tones); Corporal Vannatta at 146 (she must respond to tones while in the ODR, and believes she would be disciplined if she did not); Corporal J. Herbel at 143 (when she worked in Custody, she was required to respond to tones during her meal breaks); 12/15/06 Corporal Lennon at 60-61 (she must respond to tones during her meal breaks, and believes she would be disciplined if she did not do so).

2. Intake

“The intake area is the primary place where the processing [of] new arrestees into the facility” takes place. (1/3/07 Tr., p. 38 (Kammer testimony)). Major Capillo, who is not a Plaintiff, characterized the Intake area as including “the most volatile group” of inmates. (Capillo at 53). In light of the mission and atmosphere of Intake, the applicability of the LFUCG policy that Employees remain responsive to inmates throughout their breaks to that Bureau is essential and unsurprising.

While Intake differs from Custody insofar as inmate disturbances may not result in a formal Signal or Code being “toned” throughout the Facility, the requirement that on-break Employees remain alert for and responsive to inmate problems applies in Intake just as in Custody. This has been confirmed by the LFUCG’s own administrators and by non-Plaintiff witnesses. (See Kammer at 126 (if there is a tone in Intake, Employees who work in Intake must return to the area if they are on a break); Major Hill at 17 (he would expect Intake officers to respond to an emergency), Sergeant Taylor at 26-27 (as an Intake Sergeant, he responds to tones even if he is on break); Corporal Roberts at 59-60 (“[i]n intake if something was to happen that they needed my assistance with I would have to go right then”)).

The Plaintiffs’ testimony is the same. (See Captain Whittlesey at 101 (Intake officers may be required to respond to issues arising among prisoners in Intake); Lieutenant Cunningham at 49 (combative inmates interrupt meal breaks in the Intake area), 51 (if a combative inmate arrives during a meal break, Intake staff must stop eating and stand-by while the inmate is frisked in order to ensure sufficient “coverage”); Sergeant Reams at 29 (Intake Employees respond to combative or disruptive inmates); Sergeant Hines (“If they’re in intake and they’re on a break sitting at the table and a combative inmate comes in, they’re going to go over and assist. They’re not going to just sit

there”); Corporal Blair at 16-17 (because Intake is under-staffed and because these guys that were coming straight off the street had just been arrested and a lot of them still angry and upset and mad”, he only “rarely” ate in the ODR), 36-37 (in Intake, he spent his meal breaks “[d]ealing a lot with combative inmates or, you know, doing fingerprinting”); Corporal Legear at 50-51 (“combatives” arrive in the Intake area on a nightly basis, and if he is on a break when a combative arrives, he assists); Corporal Brookshire at 35-37 (“multiple” combative inmates arrive “every night”).<sup>6</sup>

Numerous Plaintiffs also testified that, if they are outside the Intake area during their meal breaks, they must also respond to the Codes or Signals that sound within the Custody area. (Corporal Brookshire at 31 (“At any time you were on shift there, you were subject to be called for an emergency, any time. I could have been in the ODR . . . right that second, I would have had to go”); Corporal Blair at 80 (he responded to fights and false alarms during his meal period while traveling to and from the ODR); Sergeant Hines at 28-29 (“if they’re in the ODR and a tone goes off, they’re likely to respond”); Corporal Legear at 48 (when he worked as an Intake Officer, he would have responded to tones while in the ODR or the hallway outside Intake)).<sup>7</sup>

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<sup>6</sup> This is consistent with the testimony from the original named Plaintiffs on which the Court’s conditional certification Order was based. (*See* B. Herbel at 52 (he ate at his work station because he might be needed to deal with combative inmates); Reynolds at 65 (even if he is in the smoke room, his break can be interrupted if he sees (through the smoke room window) that a combative has arrived, and he has never been told that he is free to ignore combatives while on break)).

<sup>7</sup> This is consistent with the testimony from the original named Plaintiffs on which the Court’s Order of conditional certification was based. (B. Herbel at 44 (he must respond to a tone while in the ODR), 128-29 (he believes that he must respond to tones while in the ODR “by policy”); J. Herbel at 68 (she must respond to tones in the Custody area if she travels to the ODR)).

3. Master Control

The Master Control area is located on the “upper level” of the DCC Facility. (1/3/07 Tr., p. 42 (Kammer testimony)). Using computers and monitors, Master Control observes the entire facility and functions as “the security and operations center.” (*Id.*). Because Master Control is removed from the secure Custody area, Master Control Employees do not physically report to the Custody location from which a tone sounds. Instead, these Employees respond to tones by operating computer work stations, opening and closing locked doors, videotaping incidents, and making necessary contacts with outside agencies. Plaintiff James Cook explained:

Q. Now, respond to tones. Now, how are you responding to tones if you’re in the [Master Control] bubble area?

A. When that tone goes off we’re the ones who have to announce the tone, open the doors and make sure everybody gets where they need to be, record what has to be recorded, and if any calls need to be made to an outside agency for help, such as an ambulance, that’s our job.

(Cook at 30-31). (*See also* Sergeant Powell at 32-33 (during a tone, Master Control Employees “make sure that everyone gets to the right area”, videotape, and “make sure they get in and out”).

Substantial evidence confirms that, as in Custody and Intake, Master Control Employees must remain alert for and responsive to inmate problems during their meal breaks. Master Control Lieutenant Charlesetta Johnson admitted that “[n]othing really changes” between her regular work duties and the work she performs during her meal breaks. (C. Johnson at 34). She testified that this is also true for lower-ranked Master Control Employees. (*Id.*). She further admitted that Master Control Employees answer the telephone, watch the security monitor, and remotely open doors during their meal breaks. (*Id.* at 39). When a tone occurs in another area of the Facility while she is eating, she “will get on another station [and] start assisting with opening doors.” (*Id.* at 61).

The testimony of the Plaintiffs who now work or who have worked in Master Control corroborates non-Plaintiff Lieutenant Johnson's testimony. (Sergeant Powell at 131-132 (as a Master Control Sergeant, "if a tone breaks out, I get up off my break and make sure that my people are letting the appropriate people in and out"; also, she spends her meal breaks "watching monitors" as she eats); Sergeant Coles at 43 (in Master Control, as well as in Custody, he spends his meal breaks answering telephone calls, conducting escorts, and supervising trustees; "it's just constant supervision"); Corporal Cook at 30-31 (he performs his "[r]egular duties", such as opening doors, answering telephones, responding to tones, and handling "general master control duties", during his meal breaks), 50-52 (he opened doors from his Master Control work station while eating because "[i]t's a never-ending thing, all day long"). LFUCG policy requires Master Control Employees who attempt to eat in the ODR to respond to tones from that location. (Cook at 21 ("If you were in the Custody area, you responded to the tone"), 66 ("we are told in training any time there's a signal seven that's an officer needs help and that could be you one of these days, so you respond to assist"); Bartlett at 129-130 (if a tone sounds while a Master Control Employee is in the ODR, "you are supposed to respond"))).

**C. LFUCG Policy Requires the Plaintiffs to Spend Their Meal Breaks Responding to Radios, Telephone Calls, and Overhead Pages**

1. Custody

Assistant Director and Rule 30(b)(6) witness Kammer has admitted that LFUCG "policy" requires Custody Employees to carry and answer radios during their meal breaks:

Q. When say I'm in a housing unit and a rover comes to relieve me for my break, I've got 20 minutes, it's my meal break, does the rover give me his or her radio to take with me?

A. Can.

**Q. What's the policy?**

**A. You have the housing unit radio, you have a rover's radio. Both of them are going to have a radio. The person that leaves the unit is going to take a radio, because they take over. The unit officer will leave the unit with a radio as long as it's one-man housing unit.**

(1/3/07 Tr., p. 191-92 (Kammer) (emphasis added)) (*See also* Kammer at 194-241 (Sergeants, Lieutenants, and Captains must carry and answer radios during their breaks)). This policy has been further acknowledged by non-Plaintiff witnesses. (Major Capillo at 51 (he expects "every officer to respond on the radio if they are trying to be communicated with" unless he or she does not have a radio); Captain Hall at 69 (Custody Officers must carry and respond to radios during breaks); Captain Kelly at 49 (he carries his radio throughout his shift and must respond to it even if he is on break, and the same is true for all other commanders on his shift); Lieutenant Morgerson at 16 (she must respond to her radio during meal breaks); Sergeant Dulin at 14-15 (he answers his radio and telephone calls during meal breaks)).

Even if an Employee happens not to have a radio during a meal break, he or she is nevertheless required to answer telephone calls and/or overhead pages. This has been admitted by non-Plaintiff Employees designated as LFUCG witnesses. (Major Hill at 71-72 (when he eats in his office, he "absolutely" answers the telephone, and also did so when he held lower ranks); Lieutenant Morgerson at 80-81 (she answers the telephone during her meal breaks); Sergeant Southworth at 22 (if a Custody Officer fails to answer a radio, he or she will be contacted by the overhead page system "[s]o one way or another" he or she will be reached)).

This LFUCG policy has been further corroborated by the opt-in Plaintiffs. (Captain Simpson

at 57 (as a Custody Captain, his meal breaks were interrupted by his radio or pager “daily,” and responding to those interruptions was “just required; it was a given”); Captain Mitchell at 111 (Custody Officers may be called over the radio while on their meal breaks), 141 (during her meal break, she is called on the radio and by overhead page, and she believes that she must answer in order to be “true to her job”); Lieutenant Jones at 215 (Custody Employees must carry radios on break and are required to respond to them); Lieutenant Deleon at 95 (he must respond when he is called on the radio, and 75% of his breaks are interrupted by overhead pages instructing him to telephone someone), 120 (Custody Officers must carry and respond to radios while on meal breaks, and if they do not respond, they will be paged); Sergeant Reams at 99-100 (as a Custody Lieutenant, he carried a radio and answered the telephone during his meal breaks), 23-24 (he eats in his office because he needs “to be around the phone”); Sergeant Coles at 26 (when he worked as a commander in Custody, he ate at his work station because “you was [sic] either going to have to get up every two or three minutes, someone call you, checked on the radio, or somebody ringing the phones, so it always was best to be at least be by a phone while you were eating”), 39-40 (commanders in Custody carry a radio at all times), 81 (as a Custody commander, “[t]he phone didn’t stop ringing” during his meal period); Sergeant Webb at 32, 78 (he carries a radio and answers the telephone while on his meal breaks); Officer Corbett at 74 (he has responded to radio calls and overhead pages during his meal break), 80-81 (he must take his radio with him during break and must respond to it); Corporal Byrd at 116 (by policy, “[y]ou’ve got to answer the radio. You can’t be in the building and not respond.”); Corporal Tuttle at 19-20 (he must carry a radio while on meal break, whether he is in the ODR or the smoke room), 87 (he believes he would be disciplined if he turned his radio off); Corporal Barker at 77-78 (she answers the telephone while in the ODR); Corporal Duncan at 89 (she

responded to radio calls or overhead pages during her meal breaks three times per week)).

2. Intake

This LFUCG policy also applies to Intake Employees, who, according to Assistant Director and Rule 30(b)(6) witness Kammer, must carry and answer radios if they attempt to take a meal break away from the Intake work area. (Kammer at 126). If they remain in the Intake area, they must answer telephones and respond to other interruptions. (Sergeant Taylor at 36-37, 69 (as a non-Plaintiff, testifying that he eats at his desk in Intake and answers the telephone as well as questions from co-workers, that the telephone rings “pretty constant” in Intake, and that an Intake Employee might answer two to three calls during a single meal break)).

The applicability of this policy to Intake Employees is further confirmed by the testimony of opt-in Plaintiffs with work experience in Intake. (Captain Whittlesey at 62, 68 (she answers the telephone or pager during her meal break); Lieutenant Cunningham at 40 (she does not believe she has had a single uninterrupted meal break during her employment), 49 (her meal breaks are interrupted by telephone calls and other work tasks); Sergeant Reams at 18-19 (during meal breaks in Intake, he answered telephone calls, inmate questions, and staff questions); Sergeant Hines (during meal breaks in Intake, she answered the telephone, radio, and overhead page, and also answered inmate and staff questions); Corporal Brookshire (in Intake, he usually ate at his work station because “[y]ou don’t get a break in an area like that when the possibility of anything can happen, and usually did”); Corporal Blair at 36-37 (during meal breaks, he was “always called to translate” because he speaks Spanish)).

3. Master Control

This policy further applies to the Master Control Bureau. Lieutenant Charlesetta Johnson,

who is not a Plaintiff, admitted that she answers the telephone during her meal breaks, and that lower-ranked Master Control Employees do the same. (C. Johnson at 34, 39). Corporal Rankin testified that he was instructed during Master Control training to take a radio on his breaks so that he could “respond in case something happened.” (Rankin at 109-110). He therefore carried a radio “the majority of the time” he left Master Control for breaks “in case a tone was called or something, an emergency.” (*Id.* at 106). Corporal Cook testified that he performed his “[r]egular duties” during his meal breaks, which specifically included answering telephones. (Cook at 30-31). This is consistent with the testimony of the original Plaintiffs. (Bartlett at 67-68 (she was required to answer the telephone during meal breaks in Master Control at least a few times each week)).

**D. LFUCG Practice Requires the Plaintiffs to Perform Other Work Duties During Their Meal Breaks**

1. Custody

a. *Substantial evidence confirms that Custody Employees must perform work duties during meal breaks*

Unsurprisingly, the LFUCG has no written policy requiring its Employees to perform work duties or errands during their meal breaks, just as it has no written policy requiring them to respond to tones, radios, telephone calls, and other interruptions those twenty-minute periods. Overwhelmingly consistent evidence from DCC administrators, non-Plaintiffs, and Plaintiffs, however, confirms the LFUCG’s practice of requiring Custody Employees to perform work duties during meal breaks. Assistant Director and Rule 30(b)(6) witness Kammer admitted that Custody Employees perform at least some work tasks during their “meal break” time. (Kammer at 113 (while he did not know, before the lawsuit, that officers had a “complaint,” he testified: “I am sure that people were taking razors back to shift command. All of that stuff occurs.”)). Director Bishop

admitted that he is personally aware that Custody Officers obtain coffee for trustees and transport razors from units to Shift Command during their break time. (Bishop at 34). Former DCC Director Glen Brown also admitted that, during his tenure, Employees who were on “break” transported mail, razors, cleaning supplies, jumpsuits, hygiene packs, laundry, trash, clippers, and other items. (Brown at 31).

The non-Plaintiffs’ testimony confirms the LFUCG’s practice of requiring Custody Employees to perform work during meal breaks or, at the very least, of encouraging that work to be done and then accepting the benefits of it. (Corporal Compston at 13 (during a meal break, a Custody Employee “might run back and get an inmate a jumpsuit or shower shoes, you know, something that the rover didn’t get”); Officer Roberts at 54 (admitting that she has been asked to deliver items and perform other work duties during her meal breaks)). Officer Roberts, who is not a Plaintiff, testified that eating “on the run” is “something that everybody’s made aware of in training. When you first get your job there everybody’s made aware of that.” (Roberts at 12).

In addition to the above-cited testimony, the Plaintiffs’ testimony provides substantial evidence of this policy and practice. (Captain Mitchell at 111 (officers may pick up shoes or conduct escorts during breaks); Lieutenant Jones at 63 (if cleaning supplies or other items are needed in a unit, they are typically obtained during a break), 204 (it is an “accepted practice” for Custody Employees to perform duties during meal breaks); Lieutenant Deleon at 69 (as a commander, his breaks have been interrupted to provide assistance in housing units); Sergeant Reams at 90 (he “felt compelled” to perform job duties during his break “because it’s my job”); Sergeant Taylor at 36-37 (he spends meal breaks at his desk answering the telephone, answering questions, completing paperwork, and working on his computer); Sergeant Coles at 75 (in Custody, he picked up cleaning

supplies during meal breaks); Sergeant Webb at 32-33 (he has escorted attorneys and others during meal breaks), 55-56 (he has supervised trustees during meal breaks); Corporal Lindsay at 50-51 (during breaks, “most of the time, I had to pick up care packs, maybe jumpsuits. I would have to get more cleaning supplies, so I had to go to Shift command and pick all that up and then go right back to my unit”), 52-54 (“it was just a standing understanding, that if you wanted something [for your unit], you would have to get it on your break”), 63 (during his twenty-minute break, he obtained care packs or jumpsuits for inmates); Officer Hood at 79 (she must pick up supplies for the unit during her meal break); Officer Corbett at 17-18 (he may be asked to pick up jumpsuits or cleaning supplies during his break), 67 (he has obtained coffee for trustees during his twenty-minute meal period), 74 (during his break, “[a] lot of times the rover would check you on your radio and tell you to call the unit or bring something back to the unit that you needed”); Corporal Cook at 161-67 (he has obtained coffee for trustees and transported cleaning supplies and jumpsuits during his meal break); Corporal Barker at 14 (during meal breaks, she returned razors, obtained cleaning supplies, delivered mail, and retrieved other items needed for the housing unit), 20-21 (even “minor” tasks, such as picking up clean jumpsuits, “were still time consuming”); Corporal Hauryluck at 87-88 (he transported soiled jumpsuits in biohazard bags during his break), 92 (he escorted prisoners during his break); Corporal Cason at 13-14 (she transported razors and other items during her meal break); Corporal Tuttle at 38-39 (“you could still be performing duties while on break because you may have to run errands or pick up stuff for someone”), 59-60 (during meal breaks, he retrieved hygiene items, underclothing, jumpsuits, and latex gloves because “[i]t was the only time long enough to be able to get these items”); Corporal Balltrip at 32 (“[i]t was policy” for her to obtain razors, toiler paper, and new clothing during her breaks); Corporal Trotter at 20-21 (during meal breaks, she was

instructed to run errands, such as delivering or retrieving jumpsuits, biohazard bags, forms, and cleaning supplies “[a]ll the time” and “[a]t least two to three times a week”); Corporal Hughes at 199 (after delivering razors to Shift Command and signing the break sheet during her meal break, she picked up her meal and ate in the unit because “I did those duties first”); Corporal Dee at 18-19 (during meal breaks, “[s]ometimes you’d have to transport an inmate out of your unit, go pick up stuff”); Officer DeWitt at 20 (during twenty-minute meal breaks, “you’d have to get supplies and run the unit”); Corporal Duncan at 90 (she escorted prisoners during her meal breaks as much as three times per week)).

- b. *The LFUCG’s argument that Custody rovers are “supposed to” perform the work imposed upon Custody Employees who are taking their meal breaks cannot defeat certification*

The LFUCG attempts to dodge its clear practice of requiring Custody Employees to perform work duties during their meal breaks by arguing that “[r]overs are supposed to perform the duties that some Plaintiffs allege they perform on their breaks.” (Mem., p. 6). Relying partially upon a written description of third shift rover tasks, the LFUCG again ignores the reality that workplace policies and rules need not be in writing in order to exist, or in order to support continued certification of a collective action. Further, the Plaintiffs’ testimony explains why the presence of rovers does not allow them to ignore the LFUCG’s practice of requiring them to perform work during meal breaks. (*See* 11/30/06 Lieutenant Grillo at 149, 172 (it is not practical for rovers to do the work tasks performed by Officers during their meal breaks); Corporal Vinegar-Ford at 101 (rovers cannot pick up all needed supplies “[b]ecause everybody knows the jail is understaffed, and the rovers are pushed to their limits. And once you get behind as a rover, you stay behind all day long”); Corporal Franklin at 19 (the rovers who will obtain supplies for a unit Officer are “the ones

that can run, literally, and then the other ones will make you get it; stuff you need, supplies, any of that kind of stuff”); Corporal Hood at 79 (an Officer must obtain supplies for the unit during the meal break because rovers must give breaks in other units as well as perform other duties); Officer Corbett at 17-18 (a rover relieving him for a meal break might ask him to “pick up jumpsuits, pick up cleaning supplies, go to shift command for whatever reason the commander wanted you there, sign your break sheets”); Corporal Blair at 18-19 (“I would always go to the ODR and bring my lunch back to the housing unit, because I wanted - you know, I didn’t want to hold the rover up from going to another housing unit to give somebody else their break”); Corporal Lindsay at 52-53 (he was instructed to obtain supplies during his meal break because “you can’t always have the rover to do it because the rover’s busy doing other things”), 64 (“it was just an understanding that - due to the fact of the rovers having to do all this other stuff, it was easier for us to get it done on our break”); Corporal Barker at 76 (testifying to her understanding that rovers could not return razors to Shift Command because “you are responsible for the razors that you check out”); Corporal Tuttle at 59-60 (as a Custody Officer, he could not ask a rover to relieve him so that he could pick up supplies at a time other than his meal period, and while he might ask a rover to pick them up, “[i]t depends on how busy the rover is at the time”)).

The LFUCG’s “rover defense” is not individualized. If, as the LFUCG insists, the rover position truly nullifies any need for a Custody Employee to perform these work duties during meal breaks, then such a defense would seem to apply to the meal break claims of all Custody Plaintiffs. For purposes of this Court’s certification analysis, however, the Plaintiffs have provided far more than substantial evidence of an LFUCG’s practice requiring them to perform work duties despite the presence of rovers.

- c. *The LFUCG's representation that the duties performed by Custody Plaintiffs during meal breaks are "minor and insubstantial" does not justify decertification*

The LFUCG also claims that Custody Officers are not truly "required" to perform work tasks during meal breaks, and that those tasks are "minor and insubstantial in comparison with the duty of guarding inmates." (Mem., p. 6). Again, if the LFUCG is correct, then such a defense would apply to all members of Subclass A rather than only a few individuals. In any event, much of the testimony cited by the LFUCG (Mem., p. 6) in support of this claim is incorrect:

- While Corporal Blair testified that he was not "required" to perform tasks such as obtaining coffee for trustees during his meal break, he also testified that "it was done to get your trusty [sic] to do things that you needed him to do and help you - basically ease your day" (Corporal Blair at 93);
- While Major Hill claimed that Custody Officers no longer obtain coffee for trustees during meal breaks, he also noted that they have done so in the past. (Hill at 57).
- At the page cited by the LFUCG, Lieutenant Deleon testified that Officers do obtain cleaning supplies during meal breaks. While not "required", he explained "that's just something that, you know, people expected you to do." (Deleon 8/16/07 at 127).
- At the page cited by the LFUCG, Officer Hauryluck testified that, while he might smoke a cigarette or talk to a friend during his meal break, "I also deal with whatever little things I need to get for my unit, you know, such as toilet paper, care packs, jumpsuits, shower shoes." (Hauryluck at 79).

2. Intake

The same unwritten practice of requiring the performance of work duties during meal breaks applies in Intake. Sergeant Taylor, who is not a Plaintiff and who now works in Intake, testified that he spends his meal break eating at his desk and answering questions. (Taylor at 36). The testimony from the opt-in Plaintiffs provides substantial evidence that they, too, are subject to this policy. (Captain Whittlesey at 62, 68 (she performs paperwork during her meal break); Lieutenant Jones at 120 (he has observed Intake Officers spend meal breaks assisting the "ID Officer," obtaining

cleaning supplies, delivering “speed notes,” and supervising trustees); Sergeant Reams at 18-19 (during meal breaks, he answered telephone calls, inmate questions, and staff questions); Sergeant Hines at 57-58 (during meal breaks in Intake, she answered the telephone, escorted prisoners, supervised trustees, observed inmates, and answered inmate and staff questions); Corporal Blair (in Intake, he spent meal breaks translating for Spanish-speaking inmates, dealing with combative inmates, and doing fingerprinting)). This is consistent with the testimony of the original Plaintiffs. (Reynolds at 36 (he typically spends his meal break with a sandwich in one hand, “working with the other”), 37 (during meal breaks, he must respond to inmate property requests); J. Herbel at 67-68 (while eating, she may also process releases or perform “triage” for newly-arrived inmates); B. Herbel at 39 (Intake Officers must deliver certain property to inmates during their “breaks”)).

### 3. Master Control

In Master Control, as in Intake and Custody, Employees must perform work duties during their meal breaks. This practice is perhaps best reflected in the testimony of non-Plaintiff Lieutenant Charlesetta Johnson, who admitted that “[n]othing really changes” between her regular work duties and the work she performs during her meal breaks. (C. Johnson at 34). She also admitted that Master Control Employees watch the security monitor and remotely open doors during their breaks. (*Id.* at 39). The Plaintiffs’ testimony confirms Lieutenant Johnson’s testimony. (Corporal Cook at 30-31 (during meal breaks, he performed his “[r]egular duties”, including opening doors and handling “general master control duties”), 50, 52 (he opened doors from Master Control even while eating because “[i]t’s a never-ending thing, all day long”); Sergeant Powell at 131-132 (she spent her meal breaks “watching monitors” while she ate)).

**E. LFUCG Policy Provides Employees in Subclass A with Only Twenty Minutes for Their Unpaid “Meal Breaks”**

There is no question as to the uniform application of the LFUCG’s policy of providing the members of Subclass A with only twenty minutes for an unpaid meal break. (Mem., p. 25). The LFUCG argues, however, that decertification is appropriate because “[e]mployees are not required to eat at their desks or take their breaks in the area where they are assigned to work”, that “[i]f employees bring food back to their desks . . . it is their choice”, and that “[c]ommanders who choose to eat in their offices are not required to answer telephone calls or respond to other interruptions.” (Mem., p. 4). The Plaintiffs have provided substantial evidence that the LFUCG imposes unwritten but clear policies requiring them to remain alert for and responsive to inmate problems and needs, radios, telephone calls, and overhead pages throughout their “meal breaks.” As a result of those policies, the Plaintiffs often eat at their work stations.

Moreover, much of the evidence cited by the LFUCG in support of its allegation that Employees are free to eat away from their desks or to ignore interruptions actually confirms that central issues bind the Subclass together. The testimony cited by the LFUCG in support of its claim that “[e]mployees are not required to eat at their desks”, that they do so as a matter of choice, and that commanders who eat at their desks need not respond to any interruptions (Mem., p. 4), actually reflects that the witnesses do eat at their desks and respond to interruptions because they are subject to the above-described policies (including the LFUCG’s uniform policy of providing them with a meal break which falls far below the minimum threshold established by 29 C.F.R. § 785.19(a), and instead qualifies as a compensable “rest period” under 29 C.F.R. § 785.18):

- Former Corporal Balltrip testified:

Q. Were you required to bring your meal back to your work location?

A. **You aren't required, but after you sign in, get your food sometimes you wouldn't have enough time to sit there and eat all of it** so you'd have to take some of it back even if you're attempting to eat there.

....

Q. Was it your choice to bring your food to master control to eat?

A. Yeah, pretty much, **so I'd have enough time** - like if I would have sat down there and ate it, it would have sucked up more of my time and it would have took me longer to get back up there. But when I - and when I was in master control, I ate a lot more upstairs so there's really nowhere else to go upstairs and eat.

...

Well, if I'd sat down there and ate, actually, it would take me longer than 20 minutes anyway. So I try to get it upstairs so if I have to finish eating I can do it in front of my station.

(*Id.* at 58, 90-91 (emphasis added)).

- When asked whether she was “required” to eat at her desk, former Master Control Corporal Bartlett testified:

A. We were not required to. We could go downstairs to the ODR, the Officers Dining Room; **however, the amount of time it would take to get down there, you did not have enough time to eat.**

(Bartlett at 68-69 (emphasis added)).

- Officer DeWitt stated that he was required to eat at his desk or work station as a practical matter: “If you wanted to eat, yes.” (DeWitt at 23).
- Corporal Rankin explained his “preference” for eating at his work station in Master Control:

By the time we walked down to the ODR, order what we want, wait for it to be cooked or whatever, fixed, then walk back up to master control, you know, you didn't have that much quick time to eat, so

you ate what you could and went back, and then if you weren't finished, you know, you finished eating while you were letting somebody else go.

(Rankin at 98-99).

- Corporal Cason, at the transcript page cited by the LFUCG, testified: "I just think 20 minutes is not a long enough time to sit down and actually eat your lunch and be able to - be able to, you know, let it digest and then get back up and go to your unit." (Cason at 12).
- At the transcript page cited by the LFUCG (Taylor at 69), Sergeant Taylor did not testify about eating at his desk at all. Elsewhere in his deposition, however he confirmed that he eats at his work station in the Intake area, where he simultaneously answers the telephone, responds to staff questions, performs paperwork, and types on his computer. (Taylor at 36-37).
- At the transcript page cited by the LFUCG, Corporal Franklin testified:

Q. Now where do you go once you pick your food up?

A. I usually go back to my work station.

Q. **Why do you take your lunch back to your work station?**

A. **Time. Due to time. My time is usually up,** plus I'm scared I'm going to be late anyway so I'm always in a hurry.

(Franklin at 15-16 (emphasis added)).

- Sergeant Crawford testified that an Officer will eat in the ODR only "if time allowed", but that he has observed Officers eating in their housing units. (Crawford at 112).
- Lieutenant Grillo explained why it is her "choice" to eat at her desk:
  - A. Most of the time because other officers need to talk to me on the phone. If they can't reach me on the phone, they are usually on the radio. So it's easier for me to go back to my desk and talk to them there.

Q. Could you say with what frequency that you get called while eating your meal?

A. Daily.

(3/13/08 Grillo at 296-97).

- At the very pages cited by the LFUCG in support of its claim that commanders eating at their desks can ignore interruptions, Captain Mitchell acknowledged that she is, obviously, capable of verbalizing the words, "I'm on break," but she also made clear that doing so would have negative consequence:

Q. Now, at your choice, couldn't you close your office door while you're taking a meal break and not take any calls, not do any work?

A. No, because to close my office door, I would have to explain to somebody why my office door is closed, and to not answer any calls is being unrealistic.

Q. Well, as the shift commander, do you not have the discretion to say I'm on break, I'll be on break for 20 minutes, I'll get back to you, and if anything needs to happen in 20 minutes?

A. I could say it, but it never would happen. It wouldn't happen, it doesn't happen.

...

Q. Well, yes or no, do you have the discretion or not?

A. I have the discretion to say those words, yes.

Q. And you have the discretion to do that if you want to?

A. I could start it, but it never happens.

**Q. Yes or no, do you or do you not have the authority and discretion to take a 20 minute break uninterrupted if you want to?**

A. **No, sir.**

Q. **Why not?**

A. **Because the building won't stop because I say I'm taking a 20 minute break.**

Q. I don't think you're answering my question, ma'am. Do you have the authority as the shift commander to tell other people not to bother you for 20 minutes?

A. I have the authority to say that.

Q. And likewise, do you have the authority not to look at the cameras or answer the phone or do any other work activities during your 20 minute meal break?

A. No, sir.

Q. Why not?

A. Because if I'm being written up for things that happen, and I'm not even in the building, what's going to happen if I'm in the building, and I don't answer a call? This is a life and death facility we work in, things happen. Just because I'm taking a lunch break doesn't mean there's somebody over there having a seizure, I'm going to say I'm not going to deal with that. Somebody's having a family crisis, and they need to come and talk to me on my lunch break when it happens to be their lunch break, and I'm going to tell them to go away, of course not.

**Q. Well, is that your choice though, as the commander?**

**A. No. It's the necessity. It's just the way it is.**

Q. So if somebody comes to you with a problem like you just described, you can't tell them I'll get back to you in 20 minutes, or if you can't wait, go see the lieutenant?

A. I can do that, I can tell that person, then there's one behind me, or someone's calling to ask questions. By that time me telling everybody I'm on my 20 minute lunch break, it's over with.

Q. You're speaking truthfully here now?

A. Yes, sir.

(01-23-08 Mitchell at 67-69 (emphasis added)).

- Captain Simpson explained that he eats at his desk “so I’m assessable [sic].” (Simpson at 57). When asked whether he had enough time to eat his meal, he acknowledged that he does have enough time in his current position in the Auxiliary Bureau, which is not included in Subclass A. He clarified, however, that this was not the case when he worked in Custody:

Q. Do you have enough time to eat your meal?

A Yeah. I mean, when I was in custody, usually when I wasn’t doing the checks I was doing paperwork, **so I was constantly being called by medical staff or comp care staff, classification staff, administration.** Now with auxiliary services it’s not so much now. But I’m still called, yes.

(Simpson at 57 (emphasis added)).<sup>8</sup>

**E. LFUCG Policy Requires Custody Officers and Corporals to Devote Meal Break Time to Traveling to and Signing Mandatory “Break Sheets”**

As explained above, and in the Plaintiffs’ Memorandum in support of summary judgment regarding meal breaks, the Custody Officers’ and Corporals’ meal breaks are compensable not only

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<sup>8</sup> Many of the LFUCG’s citations in support of its claim that Employees are free to spend their meals as they like and wherever they choose are simply incorrect. The LFUCG cites “Mitchell Depo., pp. 59-60” in support of its claim that Employees need not eat at their work stations. (Mem., p. 4). Captain Mitchell was deposed by the LFUCG on three (3) separate occasions; the Plaintiffs find no statement at the LFUCG’s citation in any of those three transcripts which supports the LFUCG’s characterization of her testimony. Likewise, the LFUCG’s citation to Lieutenant Jones’s testimony is incorrect; at the page cited by the LFUCG, and contrary to the LFUCG’s representation (Mem., p. 4), Lieutenant Jones did not state that he is free to eat his meal anywhere he likes. Instead, he testified that “the extent of my break” was to walk to the ODR, “get a cup of coffee, maybe,” and stretch his legs. (Jones at 57).

Even the non-Plaintiffs whose testimony is cited by the LFUCG do not support its characterization of its policy and practice as permitting Employees to eat their meals anywhere they like. Major Gibbs, who is not a Plaintiff, was asked whether Intake Employees eat their meals in the Intake area. He answered: “**I’m sure some have**, but I don’t really pay attention to that.” (Gibbs at 18 (emphasis added)). Lieutenant Charlesetta Johnson testified that she works on the computer, monitors Master Control, and answers the telephone during her meal period. (C. Johnson at 34, 76). While she claims that this is by choice, she admitted that “[n]othing really changes” in her regular duties between her break time and her non-break time. (C. Johnson at 34).

because they are subject to the policies and practices described (and substantiated) above, but also and independently because of the LFUCG's "break sheet" policy. As applied to Custody Officers and Corporals, the break sheet policy requires these Employees to sacrifice already-inadequate break time to the mandatory task of traveling to and signing a "break sheet" during each break. As a result of that policy, the meal breaks provided to Custody Officers and Corporals are not bona fide and are instead "rest periods" which, under 29 U.S.C. § 785.18, must be treated as compensable time.

Custody Officers and Corporals are rotated through the various housing units on a regular basis. (1/3/07 Tr., p. 73 (Kammer testimony)). Because Custody Officers obviously cannot leave inmates unattended, they cannot take their meal breaks until and unless they are "relieved" by a rover. (*Id.* p. 72 (Kammer testimony)). Unlike Master Control and Intake break sheets, Custody break sheets are not located at the Officers' and Corporals' work stations. Instead, the Custody break sheets are located at the ODR, Shift Command, and the smoke room. (Kammer at 52).

Substantial evidence reflects the LFUCG's "break sheet" policy and the manner in which it is applied to Custody Officers and Corporals. Kammer admitted that the LFUCG requires Custody Officers and Corporals to travel to and sign one of three (3) break sheets during their twenty-minute meal breaks. (*Id.*, p. 52 (Kammer testimony)). Signing the break sheet is not optional. Kammer himself describes the break sheet rule as a "directive." (1/4/07 Tr., p. 122). Coaching and Counseling ("C&C") forms may be and have been issued to Custody Officers who fail to follow that directive. (*Id.*, p. 191; Ex. D to the Plaintiffs' Memorandum in Support of Motion for Summary Judgment on Meal Breaks).<sup>9</sup> Director Bishop testified:

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<sup>9</sup> Lieutenant Cunningham testified that "[j]ust recently," she was instructed by the administration to issue a C&C to a Corporal who completed the break sheet all at one time. (Cunningham at 25-26).

**Q. So an officer - it's mandatory for an officer in custody to actually physically, personally travel to a break sheet three times a day?**

**A. If the break sheet is required for that area, yes.**

(*Id.* at 29 (emphasis added)). (*See also* Bishop at 12 (when asked to identify any obligations imposed upon Officers during meal breaks, testifying: “[w]hen relieved, to sign the break sheet . . . .”). Director Bishop also confirmed that Custody Officers are required to physically travel to a break sheet three times each day. (*Id.* at 29).

Major Hill, who is characterized by the LFUCG as an “administrator” and who is not a Plaintiff, testified:

Q. Are second shift custody officers required to sign a break sheet on each occasion that they take a break?

A. Custody staff at the jail, yes, they are.

**Q. Now, is that a policy you've developed or is it somebody else's policy?**

**A. No, sir. It's a policy at the jail.**

**Q. Is every officer on second shift custody required to go to one of the break sheets three times a day to sign out on breaks for their break?**

**A. They should be going and signing one of them, yes.**

Q. And where are the three sign-out sheets?

A. Shift command, the ODR, and the designated smoking area.

Q. Now, if I wanted to - I've just left Unit C and I want to take my break somewhere different than any of those places. I just want to hang out in the hall, talk to my buddy. Am I still required to walk to a break sheet and sign out?

A. You would need to sign out on the break sheet if you're on break. Maybe I misunderstood the relevance of where you said you were taking it.

Q. No, sir, I don't think you did. **So no matter where I choose to take my break,**

**your officers, the people you command on second shift custody are required to go to one of those three break sheets and sign out?**

**A. They would need to do sign out, yes.**

(Hill at 55-56 (emphasis added)).

The LFUCG attempts to avoid these clear admissions of policy by arguing that “[t]here is no uniform understanding of when breaks begin.” (Mem., p. 19). This argument is not sustainable in light of Kammer’s testimony that Custody Officers’ meal breaks begin when they are relieved from their housing units by the rovers and not when they reach and sign the break sheet. (1/3/07 Tr., p. 121 (Kammer testimony)). Kammer further testified:

Q. Okay. And so if the officers in AA and LL go to sign the break sheet, about how long - what would be the normal time that it would take them to get to the ODR to sign the break sheet?

A. Potentially a minute or two.

Q. Okay. So if they leave the - they’re off post, they are relieved of their duties at 12 o’clock, they go to the ODR to sign out on the break sheet, do they use 12 o’clock or if it takes them two minutes, do they write down 12:02?

**A. I would expect them to write 12 o’clock, the time they were relieved from post.**

Q. 12 o’clock?

**A. That’s what I would expect them to write.**

Q. Okay. And then when they leave - let’s assume they go down and have a cup of coffee at the ODR. And then when they leave to come back to their post, **what time are they supposed to put down?**

**A. Well, again, it’s the time that they are returning to their post.**

Q. So it would be 12:10?

A. If it was a 10 minute break and they took 10 minutes - again, now, I think there’s

assumptions being laid in. But, again, if they're returning to the unit and they are going to make it back, they believe, by about 12:10, that's what they should write down, is 12:10.

Q. Well, that's what I am asking you. I don't - I couldn't figure out looking at the break sheets whether you're looking at two different time periods, the off post to back on post period as the break or sign on the break sheet, sign off the break sheet as your break period. **So what you are telling me is what the real break period is, is the time you're off post until the time you come back on post; is that correct?**

A. **That's the break.**

(Kammer at 162-63 (emphasis added)).

Even if Assistant Director Kammer's and Director Bishop's testimony is ignored, the Plaintiffs have provided far more than substantial evidence of the LFUCG's policy of requiring Custody Officers and Corporals to spend their meal breaks traveling to and signing the "break sheets." LFUCG witnesses, who are not Plaintiffs and who include members of the "administration," confirmed that signing the break sheet is mandatory for these Employees, and that their break time begins to run when they leave the housing units and not when they reach and sign the break sheet. (See Major Hill at 55-56 (Custody Officers must sign a break sheet during each break no matter where they desire to spend their break time, and their break time includes the time required to travel to and sign the break sheet because a Custody Officer who is "away from [his or her] work station" is deemed to be "on break"); Major Capillo at 42 (when errands are not performed by the Custody Officer, the break time begins when the Officer leaves the housing unit and ends when the Officer returns to the housing unit); Captain M. Kelly at 40-41 (Assistant Director Kammer has informed him that the break begins when the Officer leaves his or her work station)).

The opt-in Plaintiffs' testimony is the same. (See Captain Simpson at 71, 105 (traveling to and from the break sheet cuts into break time, and a rover expects an Employee to return either ten

(10) or twenty (20) minutes from the time the Employee was relieved), 120 (the policy does not allow for additional break time for walking to a break sheet); Lieutenant Deleon at 78 (the instructions are that an Officer must sign in and out on a break sheet when the Officer takes a break); Lieutenant Jones at 123 (it is “mandated” that a Custody Officer travel to one of the break sheets, which takes break time away from the Officer); Sergeant Webb at 82-83 (to the best of his knowledge, the break time begins when the Officer actually leaves the housing unit); Corporal Cook at 48-49 (the twenty-minute break includes the time spent traveling to the ODR and signing the break sheet); Corporal Barker at 30 (she lost break time in order to sign the break sheets); Corporal Cason at 24-25 (due to the break sheet requirement, “you lost time because the rover actually put down the time when you actually leave out of the unit instead of putting it down from the time you signed it on the ODR sheet”); Corporal Vinegar-Ford at 133 (she was instructed that she would be written up if she did not sign the break sheet); Corporal Balltrip at 26-27 (“the rovers start counting [the minutes] as soon as you walk out that door”, despite the fact that it might take up to five minutes to reach and sign the break sheet); Corporal Duncan at 31 (even if she brought her own lunch and wanted to eat inside her unit, she had to travel to the ODR in order to sign the break sheet); Corporal Dee at 25 (he received a C&C for forgetting to sign a break sheet during his break); Corporal Lindsay at 89 (“[o]ur break started when the rover came into the unit. That’s when our break started”).<sup>10</sup>

The LFUCG’s denial of any “uniform understanding of when breaks begin” and its assertion

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<sup>10</sup> This testimony is also consistent with the testimony from the original named Plaintiffs on which the Court based its Order of conditional certification. (Sergeant Crawford at 124 (a break begins when the Employee is relieved from a housing unit, and the walk to and from the break sheet results in the loss of break time); 3/13/08 Grillo at 294 (a Custody Officer’s break “starts from the time they leave the unit”)).

that “employees have testified that breaks begin when [Custody Officers] sign the break sheet” (Mem., p. 19) not only ignores the extraordinarily consistent testimony of its own witnesses and of the Plaintiffs, but also rests upon erroneous citations. Specifically, the LFUCG cites the following witnesses’ testimony in support of its claim that some Employees “have testified that breaks begin when they signed the break sheet” (Mem., p. 19):

- At the LFUCG’s citation, former Corporal Balltrip testified that she recorded the time at which she left her unit as the time at which her break began. (Balltrip at 27).
- Glen Brown’s cited testimony shows only that he applied the break sheet rule quite differently (and far more compatibly with the regulations and caselaw defining bona fide meal breaks) than Director Bishop and Assistant Director Kammer. Under former Director Brown, “[t]he break would start at the point of when the officer signed out” on the break sheet, not when the Officer left the unit. (Brown at 22-23). The above-quoted testimony from Bishop and Kammer confirms that the policy has since been changed, and Director Brown’s testimony lends no support to the LFUCG’s attempt to decertify this case.
- The testimony of Captain Mark Kelly (who is not a Plaintiff) does not support the LFUCG’s claim that “breaks begin [when Custody Officers] sign the break sheet.” Instead, his testimony further substantiates the Plaintiffs’ allegation of a uniform policy and practice regarding the signing of break sheets by Custody Officers and Corporals. Captain Kelly testified that it “was” his “assumption” that the twenty minutes would not begin until the Officer signed the break sheet, but that Assistant Director Kammer had corrected that “assumption”:

Q. And what’s your understanding when the break starts? When that person is relieved in the housing unit until they are brought back - until they return?

A. **I have in the past believed** that your break started once you signed the sheet. **I have been informed it’s once you leave that work station.**

Q. And when were you informed of that?

A. A month ago, maybe.

Q. Okay. Who informed you of that?

A. Mr. Kammer.

Q. Did he talk to you directly?

A. Yes, sir.

(*Id.* (emphasis added)).

- At the LFUCG's citation, Sergeant Southworth specifically testified that his belief that break time begins upon the signing of the break sheet was based upon statements by Captain Kelly. (Southworth at 17). Since Captain Kelly's misunderstanding of the LFUCG's policy has been corrected by its Rule 30(b)(6) witness concerning meal breaks, Sergeant Southworth's testimony cannot support the LFUCG's allegation that Employees are free to follow their own rules regarding the starting times for their meal breaks. Sergeant Southworth is also supervised by Major Capillo who, as noted above, testified that a meal break begins when a Custody Officer leaves the housing unit. (Capillo at 42).
- At the LFUCG's citation, Captain Simpson testified that he does not consider walking to the break sheet to qualify as a "break" (Simpson at 60-61); however, his testimony about the LFUCG's policy regarding the starting time of a break is consistent with the admissions of Kammer and Bishop. Captain Simpson stated:

Q. Do you consider the break sheets out of the way from where they take a break?

A. I just - I think **the travel time to the break sheet cuts into a person's break.**

Q. You said you didn't think that the breaks started until they got there.

A. I don't think that **it should** start until you can get there. But, you know, the relieving officer will call them, you know. If it takes someone three or four minutes to get to the break sheet and then they take their 10, well that officer is going to be calling them 10 minutes from the time he relieved them.

(Simpson at 72-73 (emphasis added)) (*See also* Simpson at 104-105 (a rover may time the break from the moment the substitution occurs inside the housing unit)).

**F. The LFUCG's Attempts to Create Inconsistencies among the Plaintiffs' Testimony Will Not Support Decertification**

1. The LFUCG's claim that Plaintiffs can resume their meal breaks after they are interrupted does not justify decertification

While insisting that it imposes no meal break policies upon the Plaintiffs other than a policy of providing them with twenty minutes in which to eat a meal (Mem., p. 25), the LFUCG simultaneously argues that its "policy and practice" permits Employees to resume interrupted breaks.<sup>11</sup> First, the LFUCG's citations do not support the existence of such a policy. Second, and even assuming that such a policy exists, it supports rather than defeats continued certification.

At best, and even according to the LFUCG's citations, Employees who are "commanders" attempt to enable other Employees (and themselves) to resume whatever small portion of a meal break remains after a tone is resolved. Substantial evidence confirms that resumption of an interrupted break is not always possible, and is certainly not assured by any LFUCG policy.

- At the LFUCG's citation (Mem., p. 10), Lieutenant Cunningham testified:

Q. If your meal is interrupted, do you then do what you have to do, then go back to taking your meal break?

A. It depends on what I'm doing. **Sometimes I'll go ahead and eat while I'm doing what I'm doing.**

(Cunningham at 40 (emphasis added)).

- At the LFUCG's citation (Mem., p. 10), Lieutenant Grillo testified:

Q. And after the tone was cleared [during a meal break], what did you do?

A. If I needed to do a report, I had to go do a report.

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<sup>11</sup> This alleged policy, like the policies and practices challenged by the Plaintiffs, is apparently unwritten.

...

Q. **Do you have to do it right way, or can you do it later?**

A. **I do mine right away.**

Q. All right. You don't have to, though?

A. **I think it's common knowledge you're supposed to do it right away -**

Q. Okay.

A. - while it's fresh.

Q. Did you get to go back and resume your break in the instance you're thinking of, or if you can recall?

A. I don't remember, but I - **I think I just continued to do my work. I cut my break short.**

Q. Okay. But if you had wanted to go back and resume your break, could you have?

A. Depending on the circumstances, yes.

Q. Well, as a - as a commander, if you're aware that a - an officer's break has been interrupted by virtue of responding to a tone, you know, what is your responsibility with respect to that officer's getting his or her breaks?

A. I - I don't think you, as a commander, can think about that as break. I mean, that's not your number one priority. Taking care of the code is what's your number one priority.

...

Q. Now, if somebody did let you know, and said, you know, I didn't get my break or I didn't get to finish my break because of this code and I want - I want to finish my break, you know -

A. **If it can be done, then we'll do it.**

Q. Okay. **Does that ever happen, or is this totally hypothetical on my part?**

A. **I think it's kind of hypothetical.**

(11-30-06 Grillo at 51-54 (emphasis added)).

- Kevin Johnson's cited testimony (Mem., 10) reflects that Employees may "attempt" to resume an interrupted meal break, but he also testified that "[t]he way that the protocol is and that we are conducting the duties is that **we're always on duty.**" (2/11/2008 K. Johnson at 90 (emphasis added)). Even when a break can be resumed, the same LFUCG policies that permitted the interruption in the first instance continue to apply:

Q. Okay. And I thought you had told me previously when you were interrupted during your meal period, then you came back and resumed your meal period; is that correct?

A. I attempt to, yes, ma'am.

Q. Okay. And do you do that?

A. I attempt to. It's not an everyday, every time that I get a meal period occurrence that I am able to complete that.

Q. Do you - well, go ahead.

A. Again, **with attempting to complete those, we are still available by phone, radio, overhead page that - that I may be able to come back and sit back down to finish my meal. Then again, another tone goes off; again, another radio call or another situation where I have to respond to an officer's request.**

(*Id.* at 57 (emphasis added)).<sup>12</sup>

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<sup>12</sup> Many of the LFUCG's citations in support of its claim that Employees are, by policy, allowed to resume interrupted meal breaks are simply incorrect. For example, in support of its claim that the Plaintiffs are free to resume their breaks after responding to tones, the LFUCG cites the deposition of Lieutenant Morgerson. (Mem., p. 10). At the cited page, however, Morgerson only answered questions about the manner in which she would document an

The Plaintiffs' testimony offers substantial evidence that the resumption of an interrupted break is only occasionally possible and not at all guaranteed, despite the LFUCG's claim that interrupted breaks may be resumed pursuant to "policy." (Major Pitts at 127 (when asked whether Officers may resume breaks after responding to tones, he answered: "If they could"); Captain Whittlesey at 65 (she is able to resume an interrupted break "[a]t times", but "[s]ometimes when I'm called away from the desk to go over to intake, it's a large issue, and I don't get right back to my meal break"); Sergeant Webb at 35 (when asked whether he might resume an interrupted break, he answered: "It's hard to say because it depends on the type of incident that's involved, because you may have to come back and do other things or you may have to help the unit officer out. It just - I mean, it's hard to put a definitive answer on something like that. It would have - varies"); Corporal Blair at 42 (after being interrupted during a meal break to translate, to handle a combative inmate, to fingerprint an inmate, or to answer the telephone, "[t]here was times" that he could "resume completion" of the meal); Corporal Brookshire at 131 (she was able to resume her meal break after

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interrupted break in her Activity Report. (Morgerson at 78). She did not testify that Custody Employees are able to resume their breaks after a Code or a Signal. The LFUCG also cites page 10 of the deposition transcript of Corporal Legear to support its claim that Employees may resume interrupted breaks; at that citation, however, Legear testified only about his ability to resume an interrupted break in the Training Bureau, which has no relevance to this Subclass's claim. (Legear at 10). He testified that, during his service in Intake, he ate his meal at his duty station, performing the same duties that he normally performed when not on break, and that he could recall no occasion when he was not subject to work interruptions. (*Id.* at 24). Similarly, the LFUCG cites page 38 of the deposition transcript of Sergeant Webb; at that citation, however, Webb did not testify at all about the resumption of a break after performing work tasks. (Webb at 38). Instead, he claimed only that he did not "see . . . a problem" with an Officer taking a 10-minute rest break returning within 11 or 12 minutes. (*Id.*). The LFUCG cites page 99 of the deposition transcript of former Master Control Corporal Bartlett; there, however, she specifically testified that she had been "lectured" when she had returned late to a housing unit from a meal break. (12/4/06 Bartlett at 99).

an interruption “[s]ometimes”); Corporal Byrd at 45 (he resumed his meal after an interruption if he had time to do so)). Corporal Tuttle, whose testimony is cited by the LFUCG in support of its “policy” that interrupted breaks may be resumed, testified that, when his meal period is interrupted, he returns “to pick the meal up” and then goes back to his duty station. (Tuttle at 75-76). (*See also* Corporal Balltrip at 20 (when asked whether she resumed her break after responding to a tone, she answered: “[n]ot always because we had that time, and rovers would be calling you wondering where you’re at and - if they’re behind for somebody else’s or they have to do something else”); Officer DeWitt at 37 (when his breaks have been interrupted, “[m]ost of the time I would just go straight back to the unit . . . either I’d go get supplies or escort an inmate or do what I needed to do and then get back.”); Officer Corbett at 20 (when asked whether he received additional time for his meal break after he responded to a combative inmate, he answered: “I don’t recall. I believe I went back to my unit after that had concluded”), 66-67 (he did not resume 20-minute meal breaks after responding to tones because “if the break was over and we were involved in something else and my time had expired on my break, I had to get back to my unit to relieve the rover”); Corporal Cason at 33 (as a commander, she was not able to resume a break after responding to a tone “[b]ecause of the needs of the rover”); Corporal Tuttle at 28 (after responding to a tone, and rather than resuming his meal break, he “usually” returned to his unit); Corporal Barker at 27 (she does not recall ever resuming a break after being interrupted to a tone because “[u]sually if a tone happens, it puts the rover so far behind that we would go back to our units”); Corporal Lindsay at 84 (he did not extend his break to obtain a full twenty minutes after performing work tasks “because it puts the rover behind as far as relieving everybody else”); Corporal Rankin at 153 (he was not told during training or thereafter to take more than twenty minutes to complete his break if he responded to a tone during that break)).

Even if the Plaintiffs' testimony could be rewritten to support the LFUCG's representation that its "policy" is to permit the resumption of interrupted breaks, this would not threaten - or even pertain to - the continued certification of Subclass A. The parties and the judicial system are best served by a collective determination of whether such a policy truly exists and, if so, whether it may excuse the LFUCG from liability under the FLSA.

2. *The LFUCG's argument that the Plaintiffs are responsible for reporting their own time does not justify decertification*

The LFUCG's argument that decertification is necessary because the Plaintiffs allegedly report their own time (Mem., p. 16) seems to imply that any FLSA violations are attributable to the Plaintiffs themselves. Even if this allegation could provide the LFUCG with a defense to the meal break claim, that defense would be applicable to the entire Subclass, not to particular individuals. If, as the LFUCG claims, the Plaintiffs are to blame for the lack of compensation for their meal breaks because they make entries on their own time cards, then this argument is far more efficiently presented in a single collective action than in 317 individual actions.

3. *The LFUCG's argument that no "unwritten rule" applies to discourage overtime does not justify decertification*

Similarly, the LFUCG can attempt to refute the Plaintiffs' allegation of an "unwritten rule" discouraging the reporting of overtime at a collective trial. Moreover, and contrary to the LFUCG's representation, substantial evidence does support this allegation. For example, Lieutenant Deleon testified:

Q. And were you ever told not to ask to be paid if you were putting in time that you felt you should be paid for?

A. No.

Q. How did you learn of this unwritten policy not to be -- not to ask for payment?

A. **It was just like common knowledge.** That's what people did. That's what people did.

Q. But how did you learn of that?

A. **Because people were just doing it. People would go and work overtime and not ask to get paid or not and not even get paid.**

Q. Do you know whether other people ever asked to be paid?

A. No, I don't know

(Deleon 1/23/08 at 72-73 (emphasis added)). Lieutenant Johnson testified,

Q. And when you miss those breaks, do you record that as time that you should be compensated for?

A. No, ma'am.

Q. You don't?

A. No, ma'am.

Q. And why not?

A. Again, with the attitudes of the commanders, it's - **it's a protocol or practice** that it's - that it's not accepted to put in for time like that.

(K. Johnson at 116 (emphasis added)). (See also Major Pitts at 150 (a request to be paid for work performed during a meal break would not be approved because the policy was that such time would not be paid); Captain Simpson at 57 (although he worked during his meal break daily while in Custody, he did not write down the time on his time card because the work was required and was "just a given"); 3/13/08 Lieutenant Grillo at 305-06 ("basically it was understood that you don't give people pay" for work during their meal breaks); 01-23-08 Lieutenant Deleon at 70-71 ("it's kind of like an unwritten policy . . . you'd be labeled a troublemaker or a person that's always asking for

things, so it was kind of like an unwritten law; you just did you work and you worked overtime and you went home”); Sergeant Coles at 48-49 (on days he did not receive a break, he did not write down the time “[b]ecause there ain’t no sense, you know, you don’t want to stir waves, you know, you want to kind of keep the peace”); Corporal Balltrip at 51 (“it was a general consensus” that recording overtime was discouraged); Corporal Barker at 25-26 (she did not record time missed during a meal break due to responding to a tone because “it was known that that was what we did, so that’s kind of how we were taught to handle the situation . . . No one did it”), 48 (she was aware of the “unwritten rule” based on “what we observed the other officers doing when we started, and it was just understood that that was part of your duties”); Corporal Tuttle at 63-64 (the unwritten rule against reporting time worked during breaks was a “normal routine. We thought it was a normal routine.”).<sup>13</sup>

The LFUCG’s claim that “Employees were not told not to record time they worked, were not told not to record all hours worked, were not told not to record any meal breaks that were missed, and were not told not to request to be paid for missed breaks” (Mem., p. 16) misses the point. The Plaintiffs testified that they were not instructed to record their meal breaks as time worked. (Captain Simpson at 106 (the LFUCG has no policy of making sure that an Employee who works during a break will be paid for it); 11/30/06 Lieutenant Grillo at 33-34 (she has not been told to document when an Officer misses a break); Lieutenant Cunningham at 73 (DCC administration never told her to write down that she worked on 20 minute break); Corporal Legear at 46-47 (when he complained

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<sup>13</sup> It is important to note that the Plaintiffs work in an environment in which they are subject to mandatory schedule-adjusting, a policy imposed by the LFUCG in order to avoid paying overtime. (Kammer at 60 (schedule-adjusting was implemented “[b]ecause the overtime was exorbitant” and the policy “was a method to save the city money”). There is nothing surprising or mysterious about the Plaintiffs’ belief that the reporting of overtime is discouraged.

about breaks, he was told, “that’s just part of the job”); Corporal Dee at 95, 101 (he was never told in training or otherwise to record time spent performing work during his twenty-minute break on his time card); Officer Corbett at 79 (he was never instructed in training or at any other time to record time if he worked on a twenty-minute meal break); Corporal Cason at 67 (she was never told to write down time on her time card if she responded to a tone during her break); Corporal Byrd at 124-125 (he was never told to record 20 minutes when he was not relieved for a break during hospital duty); Officer DeWitt at 31-32, 34 (he did not record time necessary to respond to tones during meal periods on his time card because “I thought it was what was required of us” and “sometimes the needs of the facility overrode the person getting a break”); Corporal Rankin at 153-54 (he was not told during training or thereafter to write extra time on his time card if he responded to a tone during his meal break); Corporal Brookshire at 120 (he has never been instructed how to ask for payment for work performed during his meal break); Corporal Trotter at 31 (she did not record the time she spent responding to a tone because she believed she was “[n]ot supposed” to do so)).

**G. The Plaintiffs’ Meal Break Claims Are Not in Conflict**

The LFUCG attempts to support its decertification effort based upon alleged “conflicts” within Subclass A. Specifically, the LFUCG argues that decertification is appropriate because (1) Lieutenants, Majors, and Captains are not required to sign break sheets (Mem., p. 8); (2) supervisory Plaintiffs have testified “adversely” to non-supervisory Plaintiffs (*id.*); (3) “conflicts” exist regarding the amount of time necessary to eat (*id.*, p. 9); (4) “[s]ome employees” have “confirmed” that they received meal breaks (*id.*, p. 11), and (5) Employees “sometimes” take more than twenty minutes for a meal break and/or take “excessive” breaks (*id.*, p. 11-12). Even if these “conflict” allegations could justify decertification of a case premised upon admitted and/or substantiated policies and

practices, they are defeated by the Plaintiffs' substantial evidence and, in many instances, are based upon erroneous citations.

1. *The fact that Lieutenants, Captains, and Majors do not sign break sheets, like the fact that Intake and Master Control Employees and Custody Sergeants do not "lose" break time due to the break sheet policy, cannot justify decertification*

As explained above, in the Plaintiffs' Memorandum in support of their Motion for Partial Summary Judgment, and in the Plaintiffs' Reply regarding the certification of Subclasses, the Plaintiffs acknowledge that the "break sheet" policy has unique relevance to the meal break claim asserted by Custody Corporals and Officers. The LFUCG has represented that Lieutenants, Majors, and Captains need not sign break sheets (Mem., p. 8), and that the "break sheets" for Intake and Master Control Employees as well as for Custody Sergeants are located in those Employees' work stations. The overwhelming evidence set forth above, however, confirms that Custody Officers and Corporals are required to travel from their work stations to the break sheets, and to sign the break sheets, all during their twenty-minute meal breaks. The Custody Officers' and Corporals' meal break claim, therefore, is based not only upon the policies and practices which apply to all members of Subclass A (the admitted policy that they respond to inmate problems, the admitted policy that they carry and answer radios, and the well-substantiated policy that they perform work-related errands during their meal breaks), but also upon the LFUCG's "break sheet" policy. While the break sheet policy provides Custody Officers and Corporals with an additional and independent basis for seeking compensation for their meal breaks, that distinction is easily accommodated by grouping these readily-identifiable Employees together for purposes of trial, as suggested in the Plaintiffs' Reply to the Defendant's Response to the Plaintiffs' Motion to Certify Subclasses. (D.E. 183, p. 14).

2. *There is no conflict among supervisory and non-supervisory Plaintiffs*

The testimony of original and opt-in Plaintiffs uniformly reflects that supervisory Employees do their best to obey the LFUCG's written "rule" that Employees receive twenty-minute meal breaks. At the same time, however, supervisory Plaintiffs - like non-supervisory Plaintiffs - are bound by the above-described unwritten policies which require all members of Subclass A to perform work tasks and to remain on duty throughout those twenty-minute time periods.

Interestingly, one "supervisory" Plaintiff testified that she did not know that she should - or even could - ensure that her subordinates receive their meal breaks until after the filing of this lawsuit. Sergeant Hines testified:

Q. As the sergeant, are you responsible for making sure your subordinates get their breaks?

A. I am now.

Q. Why do you say now?

A. **Because before you just - you know, that's how you did it. You just worked through it. But since the lawsuit, they've managed to, you know, tell the supervisors that you are responsible for making sure that people get their breaks.**

Q. And were you a supervisor before the lawsuit?

A. Yes.

Q. **And you didn't understand that to be your responsibility prior to the lawsuit?**

A. **I signed a lunch-on-the-run sheet when I first started, so no.**

Q. Did you understand that those intake officers, they signed lunch-on-the-run sheets as well?

A. Some of them probably have, yes. I don't know that all of them. We always just worked through lunch. I mean, there was no you must take a break. **I mean, the supervisors worked through lunch; the employees worked through lunch.**

**That's just the way it was.**

Q. If their lunch break was interrupt - well, let me ask you this: So if they worked through lunch, were they all - were they allowed more than 20 minutes to eat lunch or was it just you get 20 minutes to sit down and eat and -

A. You just kind of tried to eat at your station while you were working. You didn't get up and go, I'm taking a 20 minute break, I'll be back. **You just kind of went and got your food and sat down and started to eat it, so - and you ate while you worked.**

(Hines at 19-21 (emphasis added)).

Another supervisory Plaintiff, Sergeant Reams, explained how his "responsibility" to ensure that subordinate Officers receive meal breaks requires him to achieve the impossible:

Q. Isn't it one of your responsibilities, though, to ensure that the officers get their breaks?

A. Ideally, I wished it was. I wish that I had the staff, and I wish that I had the lieutenant who could say, hey, I want this officer relieved for his 20-minute break so he doesn't have to be at his work station and worry about the work there, but I couldn't do that.

Q. Why not?

A. Because that's how it's always been done.

(Reams at 47-48).

Sergeant Reams's explanation that he cannot fully relieve a subordinate "[b]ecause that's how it's always been done" is echoed by other Plaintiffs. During his deposition, for example, Lieutenant Jones referred to a recent shift when no Intake Employee received any meal break. He stated that none of his subordinates asked him for overtime pay because they understood that, pursuant to "practice", overtime pay is not received for a missed break. (7/9/07 Jones at 207). Even subordinate Employees understand that their commanders are powerless to ensure that their

meal breaks are uninterrupted by work. Corporal Cook testified:

Q. Who required you to work through the meal break?

A. If nobody's there to give you that break when it's time to eat, and you can't get up and leave the station, then you're going to be required to sit there.

(Cook at 112-113).

Second, the LFUCG's representation of the Plaintiff commanders' testimony as stating that their subordinates receive their breaks ignores the overwhelming evidence, described below, that the opportunity to take a "break" at the DCC does not equate to the receipt of a bona fide meal break.

3. "Conflicts" do not exist with regard to the amount of time necessary to eat

The LFUCG's claim that "Plaintiffs who have joined this action have testified that twenty minutes is sufficient time to eat" (Mem., p. 9) is not supported by the testimony, including the testimony cited by the LFUCG. The witnesses cited by the LFUCG as testifying that twenty (20) minutes might constitute a sufficient meal break were asked about hypothetical circumstances, under which they might be allowed to begin their break time only upon reaching the ODR or might be ensured of no interruptions:

- Lieutenant Deleon testified that Employees are not receiving "actual 20-minute breaks." (Deleon 8/16/07 at 82). "There's too much interruptions within their - the allotted time." (*Id.* at 82). His own meal breaks are interrupted on every shift, "[a]ll the time." (*Id.* at 119-20).
- Corporal Franklin stated: "You usually don't get a break on second shift at all . . . Period, not being a rover on second shift." (Franklin at 17). She is able to spend two to three minutes in the smoke room. (*Id.*). When asked whether she believes twenty (20) minutes is sufficient time in which to eat, she testified: "Yeah, **if I start it right when I get in the line.**" (Franklin at 18 (emphasis added)).
- Corporal Cook testified that, except on occasions when he worked as a rover, he did not know whether twenty (20) minutes would be sufficient to eat even if he did not have to stand in line: "I couldn't answer that, never tried it." (Cook at 27). Because

he must stand in line when he eats in the ODR, however, twenty minutes is not enough time to travel to the ODR, obtain a meal, and eat it. (*Id.* at 26).

- Corporal Barker testified that her meal breaks are not sufficient because “in order to get to where you would eat the meal and do the other duties that you had to do to eat the meal - I would say 20 minutes is sufficient to eat, **if you actually get to eat for the 20 minutes.**” (Barker at 18 (emphasis added)).
- Corporal Lennon (whose testimony is cited by the LFUCG) stated that, hypothetically, twenty minutes might be enough time in which to eat a sandwich. However, twenty minutes is not enough time “**when I’m having to do other things. That’s why I always eat in the unit.**” (Lennon at 25-26 (emphasis added)). She spends her twenty-minute meal period “returning razors and clippers and underclothing sheets back to shift command. That’s the first thing that I’ll do.” (*Id.*).
- Corporal Dee stated that twenty minutes might be enough time “**if you’re just sitting . . . there with your meal**”. (Dee at 20 (emphasis added)).
- Officer DeWitt stated that twenty minutes may be a sufficient amount of time to eat “[i]f it’s uninterrupted.” (DeWitt at 24).
- Sergeant Reams stated that twenty minutes may be a sufficient amount of time to eat, but that he does not receive twenty minutes for his meal breaks:

I didn’t take a 20-minute break. I would - if you’re talking about when I went to the kitchen and got food and came back to eat, I ate my food, and occasionally if I had to deal with an inmate or help staff, then that - but as far as, hey, this is the beginning of my 20-minute break, and here’s the end of it, and I do something in there, no, I never did that. I’d go to the kitchen; I’d get my food, and I sit at my work station and that’s where I eat my food.

(Reams at 15-16).

- Corporal Brookshire, whose testimony is cited by the LFUCG, testified that twenty minutes is sufficient time to eat only “[s]ometimes”. (Brookshire at 56).
- Corporal Hauryluck testified that, after twelve (12) years in the military, he had learned to eat a meal in “about four-and-a-half minutes.” (Hauryluck at 82). He also testified, however, that his meal breaks are spent working:

. . . you’re getting your food, you’re going back to your housing unit and you’re sitting there eating while you’re dealing with 80 - you

know, anywhere between 40 to 80-plus inmates, trying to eat your food and deal with their questions and answering the panel, answering the phone, answering the radio, dealing with visitation . .

..

So you're sitting there trying to eat your dinner, checking your visitation tracking queue, trying to get your visitors, your people who are going out to visit getting ready for them so they know, making sure that the unit's running right, answering the questions, letting them out to get a towel, letting them out to do their laundry if they're in AA, BB or CC or DD, answering the constant question [sic] you get 57 million times a day: CO, what time is it? Do I have a visit? And this, that and the other thing. So basically on second shift you really don't get a break. You're constantly working.

(*Id.* at 14-15).<sup>14</sup>

The LFUCG's characterization of these Plaintiffs' testimony as acknowledging their meal breaks to be sufficient is misleading. As Lieutenant Deleon, Officer DeWitt, and Officer Hauryluck noted, it is not the case that meal periods are uninterrupted. It is not the case, as Corporal Franklin and Corporal Cook were asked to assume, that Custody Employees may begin their meal breaks "right when [they] get in line" at the ODR rather than when they are relieved from their housing units. As Corporal Barker, Corporal Lennon, and Corporal Dee confirmed, it is not the case that work duties may be set aside to allow Employees to take a full twenty minutes to do nothing other than eat. Even Kammer admits that twenty minutes may not be sufficient "to sit down and have an extended period at meal time." (1/3/07 Tr., p. 158). (*See also* 3/13/08 Grillo at 281-82 (officers eat

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<sup>14</sup> In support of its claim that the Plaintiffs "have testified that twenty minutes is sufficient time to eat" (Mem., p. 9), the LFUCG also cites page 7 of Sergeant Powell's testimony and "Justin Depo. pp. 20-21." The Plaintiffs are unable to find any testimony by Sergeant Powell regarding the sufficiency of twenty minutes for a meal break at the cited page, and they are not aware of any deponent with the last name of Justin. Testimony regarding the sufficiency of the twenty-minute time period does not appear at pages 20-21 of the deposition transcripts of either Justin Crawford or Justin Dee.

their food in the unit because, otherwise, “they haven’t got enough time to get stuff from the ODR and get back to their unit”); Cook at 25 (as a Master Control Employee, “[i]t wouldn’t make any sense to go down to the ODR, even if you didn’t bring your lunch, because most of the time you wouldn’t have enough time to go eat it and come back, not within 20 minutes”).

4. *Testimony that “[s]ome employees” received a twenty-minute meal break cannot justify decertification*

The LFUCG claims that a conflict exists within Subclass A because “[s]ome employees have confirmed that they received their twenty-minute meal breaks.” (Mem., p. 11). Again, the LFUCG misses the point. The Plaintiffs’ claims do not rest on an assertion that the LFUCG has altogether denied them the “opportunity” to take so-called meal breaks. The Plaintiffs’ claim is that, because of the LFUCG’s admitted meal break policies and practices, those meal breaks are not bona fide.

The testimony cited by the LFUCG regarding this issue (Mem., p. 11) confirms the commonly-applicable policies which make the Plaintiffs similarly situated to one another:

- Officer Compston did not testify (as the LFUCG contends), that he received an uninterrupted twenty-minute meal break. Instead, he testified that his meal breaks are routinely interrupted by work tasks. (Compston at 71).
- Corporal Barker (whose testimony is cited by the LFUCG), testified that she did not have the opportunity “to eat a meal uninterrupted” in either Custody or Master Control. (Barker at 44). She performed work during her meal breaks “daily.” (*Id.* at 46).
- Corporal Brookshire testified that he has performed work during his meal periods approximately three (3) times every week, an estimate he characterizes as falling on “the low end.” (Brookshire at 84, 86).
- The LFUCG cites page 20 of the deposition transcript of former Corporal Bartlett (Mem., p. 11) for the proposition that its Employees “have confirmed” that they received twenty-minute meal breaks; at that citation, however, Bartlett was not questioned about that issue at all. (Bartlett at 20). Elsewhere in her deposition, however, Bartlett testified:

**A. We're provided the opportunity to get a meal break; however, because of our duties we are not able to take a full 20-minute break away from all of the requirements.**

Q. In other words, you're not fully relieved of duty during your 20-minute breaks?

A. No, we are not.

Q. And that is on a weekly basis?

**A. That is on a daily basis.**

(*Id.* at 37 (emphasis added)).

- Sergeant Kevin Johnson testified that he cannot eat a meal without being interrupted:

Q. Okay. Tell me about the interruptions.

A. As a - a sergeant, as a commander, I am available or have to be available during the whole tour of duty. They have radios. I have to carry a radio, be responsible for and respond to, and then they have an overhead page calling system. If the staff can't reach me on radio, they contact Master Control and they overhead page.

Q. Okay. Now, is your claim that - how often do you get radioed while you're eating?

A. Daily.

Q. Okay. How about pages?

A. Overhead pages?

Q. Uh-huh (affirmative).

A. It could be daily if I don't answer the radio.

Q. And tell me about the nature of the things that you're being contacted about.

A. Depending on the time of day that I take a break, it may be during

the time that the unit officers are conducting their meal feeding procedures. Get contacted for shortages that we have to do call-backs for trays or other items that the - are missing off the food trays. It could be for inmate disturbances. Could be for a policy or procedural question. It could be to notify me that the unit officer had an incident occur in their unit and this is the action that they are taking to resolve it.

(K. Johnson at 31-32)

Other Plaintiffs' testimony confirms the distinction between "taking" a meal break and receiving an adequate, uninterrupted period of time in which to eat while relieved from work duties. (Corporal Barker at 21 (her meal break was interrupted "daily"); Corporal Brookshire at 33 ("[t]he normal things was, is you usually got interrupted")). As explained by Corporal Cason:

**Q. You had said at one point that you usually got all three breaks. I just wanted to clarify, what did you mean by saying you usually got all three?**

**A. I was meaning that the rovers would come to the unit to relieve you to go on your break.**

**Q. Were you still subject to interruptions on your break?**

**A. Yes.**

**Q. Did you still perform work duties on your break?**

**A. Yes.**

(Cason at 69-70 (emphasis added)). (See also Deleon 8/16/07 at 82 ("people are getting their breaks, but I don't think they're getting their actual 20-minute breaks. There's too much interruptions within their - the allotted time")). Non-Plaintiffs testified similarly. (Sergeant Dulin at 16 (his meal breaks are subject to interruptions and therefore taken in "different time groups, you know . . . Five minutes here, 10 minutes here . . .")); Roberts at 12 ("it is hard to take a break, you know . . . and you are required to kind of eat on the run and if something happens you're required to respond . . .")).

5. *Evidence that employees “sometimes” take more than twenty minutes for a meal break and/or take “excessive” breaks does not support decertification*

The LFUCG claims that this action should be decertified because “[e]mployees sometimes take more than twenty minutes for a meal break, particularly if they perform any work functions on their meal break,” because “some employees get more than three breaks” (Mem., p. 11), and because some employees testified about the practice of “ghosting” (*id.*, p. 12-16). The testimony on which the LFUCG relies, however, does not support its argument. For example, Corporal Cook, whose testimony is cited by the LFUCG, did not testify that he or any other Plaintiff took meal breaks longer than twenty minutes in Master Control. (Cook at 44-45). Officer Corbett, whose testimony is also cited by the LFUCG, testified that his meal breaks were not extended:

Q. So if you had to perform some work for the facility on your 20-minute meal break, you would take more time in light of that work performance; is that what you’re stating?

A. I would not take more time, but in - while I was on my break, if I was required to do anything, then that would supersede my break and if it put me back to my unit late, that’s why I would take more time.

(Corbett at 17).

Similarly, Corporal Hughes, whose testimony is also cited by the LFUCG, testified that the requirement that she perform work duties sometimes meant that she was out of her unit for longer than twenty minutes. She did not testify that her meal breaks lasted for longer than twenty minutes:

Q. Did you - I guess in the four years, three years that you worked first shift custody did you ever take more than 20 minutes for your meal break?

A. No.

Q. Never?

A. No. It wasn’t fair to the other people because other people had to get their breaks

....

(Hughes at 60-61).

DeWitt's testimony, also cited by the LFUCG, was the same:

Q. Have you ever taken longer than 20 minutes for a meal period?

A. If I had to get supplies, yes, or respond to a tone.

(DeWitt at 55). None of these witnesses testified that they received more than twenty (20) minutes in which to eat or otherwise spend time for their own benefit rather than for the LFUCG's benefit.

The LFUCG also argues that decertification is appropriate because "some employees did not begin counting their break time until after they had completed any activities." (Mem., p. 12). The LFUCG relies, however, on only two citations to the Plaintiffs' testimony. First, the LFUCG cites "Jones 7/19/07 Depo. p. 56", which contains no testimony at all as to the time at which Lieutenant Jones (or any other Plaintiff) began counting their twenty minutes. Second, the LFUCG cites "Deleon Depo. p. 73", at which Lieutenant Deleon acknowledged only that Officers might have taken an additional five minutes if a work task (such as picking up cleaning supplies) took them five minutes, but that he did not know whether they had, in fact, done so. (Deleon at 72-73). The LFUCG's remaining citations regarding the time at which breaks begin are to the testimony of Major Capillo and Corporal Williams, neither of whom are Plaintiffs. The Plaintiffs do not believe (and the LFUCG cites no law suggesting) that any inconsistencies between the Plaintiffs' testimony and the testimony of the LFUCG's witnesses can support decertification.

## LEGAL ARGUMENT

### A. Standard for Decertification

An employer's motion to decertify an FLSA action under § 216(b) must be denied where,

“on balance, the differences among the plaintiffs do not outweigh the similarities in the practices to which they claim to have been subjected . . . .” *Wilks v. Pep Boys*, 2006 WL 2821700, \*6 (M.D. Tenn. 2006)). Section 216(b) requires only that the Plaintiffs be “similarly situated.” 28 U.S.C. § 216(b). “[E]ven at the decertification stage, *similarly* situated does not mean *identically* situated.” *Wilks* at \*3 (emphasis in original). Otherwise, Congress’s decision to permit similarly situated Plaintiffs to maintain FLSA actions collectively would be nullified:

In sum, every class under § 216(b) will have differences; however, class members need only be similar, not identical. If Defendant’s contentions that the class must be similar in almost all respects was to prevail, the intent behind class certification under § 206(b) [sic] would be frustrated and the statute’s class provisions would be effectively emasculated.

*Pendlebury v. Starbuck’s Coffee Co.*, 2007 WL 2967106, \*14 (S.D. Fla. 2007). *See also DeLuna-Guerrero v. The North Carolina Growers Association, Inc.*, 338 F.Supp.2d 649, 655 (E.D.N.C. 2004) (“similarly situated” means “similarly situated with respect to the legal and, to a lesser extent, the factual issues to be determined”, and “[d]ifferences as to time actually worked, wages actually due and hours involved “are, of course, not significant to the determination”).

Moreover, and even at the second stage of the certification analysis, the burden of establishing that class members are similarly situated “is not a heavy one.” *Bradford v. Bed Bath & Beyond*, 184 F.Supp. 2d 1342, 1346 (N.D. Ga. 2002). The standard for continued certification is “considerably less stringent” than the requirement that common questions “predominate” in a class action certified under Rule 23(b). *Ayers v. SGS Control Services, Inc.*, 2007 WL 646326, \*4 (S.D.N.Y. 2007) (*citing Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 481 (E.D.N.Y. 2001)).

A motion to decertify asks the Court to consider a “variety of factors,” which may include: (1) “the disparate factual and employment settings of the individual plaintiffs” (such as job duties,

geographic location, supervision, and salary), (2) the defenses available to the defendant which appear to be individual to each plaintiff, and (3) fairness and procedural considerations. *Wilks* at \*3 (citing *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000)). Courts then consider whether certification

would serve the purposes of a collective action under the FLSA, *e.g.*, whether it would (1) lower the cost of the action to individual plaintiffs; and (2) increase judicial utility by providing for efficient resolution of many claims in one proceeding. See *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Courts then balance those interests against factors such as (1) “any prejudice to the defendant”; and (2) “any judicial inefficiencies that may result from allowing plaintiffs to proceed collectively.

*Wilks* at \*3. In this case, each factor weighs strongly in favor of continued certification of the meal break.

**B. The Plaintiffs’ Meal Break Claim Is Based upon Common Policies and Practices, Rendering Any Differences in Individual Plaintiffs’ Job Duties or Supervision Insufficient to Warrant Decertification**

Most of the LFUCG’s arguments in favor of decertification are based upon alleged disparities among the Plaintiffs’ “factual and employment settings.” For example, the LFUCG claims that some Employees eat at their desks while some do not, some eat during a ten-minute break rather than the twenty-minute break, some receive more assistance from commanders in obtaining their breaks, and some shifts are busier than others. The LFUCG further argues that individualized proof will be needed as to the duration and frequency of each interruption to each meal break provided to each Plaintiff. Where the Plaintiffs in a collective action offer substantial evidence of common practices and policies underlying their FLSA claims, however, such disparities have little relevance to the continuation of collective treatment:

One of the factors material to many courts' analysis of the plaintiffs' factual and

employment settings is whether they were all impacted by a “single decision, policy, or plan.” *See Moss*, 201 F.R.D at 409-10 (citing *Thiessen v. Gen. Elec. Capital Corp.*, 996 F.Supp. 1071, 1082 (D.Kan.1998)). The existence of this commonality may assuage concerns about plaintiffs' otherwise varied circumstances. *See Hill v. Muscogee County Sch. Dist.*, No. 4:03-CV-60, 2005 WL 3526669, at \*3-\*4 (M.D.Ga. Dec. 20, 2005) (finding that the plaintiffs “had met their burden of showing that they [were] similarly situated with regard to employment setting and job duties by presenting substantial allegations of a pattern of potential FLSA violations); *Moss*, 201 F.R.D at 410 (finding that the plaintiffs' claim that they were subjected to a common, impermissible practice trumped the disparity in their employment situations)

*Wilks* at \*3. *See also Berger v. Cleveland Clinic Foundation*, 2007 WL 2902907 (N.D. Ohio 2007) (denying motion to decertify meal break claim where plaintiffs had presented substantial evidence “that a central policy exists that binds the potential class members together”); *Torres v. Gristede's Operating Corp.*, 2006 WL 2819730, \*10 n. 9 (S.D.N.Y. 2006) (where plaintiffs have “amply shown” that they were subject to a common practice or scheme that violated the law, “issues related to potential disparate factual and employment settings do not defeat Plaintiffs’ valid basis for moving forward with collective action”; this is true even where “some of the evidence is inconsistent” in light of the FLSA’s remedial purpose).

The Plaintiffs do not seek compensation for particular meal breaks on particular days because of particular interruptions. Instead, they claim that the LFUCG’s policies (most of which have been expressly admitted by the LFUCG’s own administrators) renders all of their twenty-minute meal breaks compensable. In other words, the Plaintiffs allege that, because they are required by the LFUCG to remain responsive to inmates, radios, telephones, and other interruptions, to perform work duties, and, in the case of Custody Officers and Corporals, to travel to and sign break sheets, they are denied bona fide meal breaks on a daily basis. Having provided substantial evidence of the existence of these policies, “issues related to potential disparate factual and employment settings do

not defeat Plaintiffs' valid basis for moving forward with collective action"; in light of the FLSA's remedial purpose, that "valid basis" exists even where "some of the evidence is inconsistent". *Torres* at \*10 n. 9. *See also Berger, supra* (denying motion to decertify plaintiffs' meal break claim where plaintiffs had presented substantial evidence "that a central policy exists that binds the potential class members together").

In permitting the meal break claim asserted by Subclass A to continue collectively, the Court obviously makes no final determination about whether the policies alleged by the Plaintiffs do or do not exist. *Berger* at \*21 (even where "a genuine issue of material fact" exists about whether the defendant's policy permitted the plaintiffs to record interrupted lunches and about the manner in which the defendant defined a "missed lunch", continued certification was appropriate); *Hill v. Muscogee County School Dist.*, 2005 WL 3526669, \*4 (M.D. Ga. 2005) (not reported) (denying defendant's motion to decertify despite assertion that employees were instructed not to work overtime because "a fact-finder could conclude that such statements amount to form over substance"). Instead, the standard is whether the Plaintiffs have supported their allegations of those common policies and practices by substantial evidence. Based upon the above-described testimony of the LFUCG's Rule 30(b)(6) witness, other LFUCG administrators, Plaintiffs, and non-Plaintiffs, the Plaintiffs have far exceeded that standard. Substantial - indeed, overwhelming - evidence confirms the LFUCG's meal break policy of requiring the Plaintiffs to (1) remain on DCC grounds and in uniform; (2) respond to inmate problems; (3) respond to radios, telephone calls, and overhead pages; (4) perform other work tasks and errands; and, in the case of Custody Corporals and Officers, (5) travel to and sign "break sheets."

Caselaw rejects the LFUCG's attempt to defeat certification by relying upon supposed

variations in the duration of each interruption to each meal break taken by each Plaintiff. In *Kasten v. Saint-Goain Performance Plastics Corp.*, 2008 WL 2262076 (W.D. Wis. 2008), the plaintiffs claimed that they had not been compensated for time spent donning and doffing safety gear and walking on the employer's premises. While the amount of time spent and the type of gear involved varied from one plaintiff to another, "the variations do not negate the existence of a practice of not compensating employees for donning, doffing and walking, and challenging such a practice supports a finding that plaintiffs are similarly situated." *Id.* at \*6. Similar variations were relied upon by the employer to seek decertification in *Frank v. Gold'n Plump Poultry, Inc.*, 2007 WL 2780504 (D. Minn. 2007). That Court held that differences among the plaintiffs as to the amount of uncompensated time, as well variations among shifts and departments, did not render the case inappropriate for collective treatment. On the contrary,

[The employer] exaggerates the factual differences among employees on various shifts and in different departments. If one zooms in close enough on anything, differences will abound; even for a single employee doing a single job, the amount of time that she spends donning and doffing on Monday will differ, at least minutely, from the amount of time that she spends donning and doffing on Tuesday. But plaintiffs' claims need to be considered at a higher level of abstraction.

*Id.* at \*4. (See also *Chabrier v. Wilmington Finance, Inc.*, 2008 WL 938872, \*3 (E.D. Pa. 2008) ("A showing that there are elements of plaintiffs' claims that differ . . . cannot override the similarities present in most plaintiffs' claims and circumstances"); *Kautsch v. Premier Communications*, 2008 WL 294271, \*3 (W.D. Mo. 2008) (based on evidence that some employees were told not to report overtime, a fact-finder could conclude that the employer maintained a policy that employees were not to claim overtime, "even if not every one of 743 technicians was personally instructed by a manager not to claim overtime"))).

Here, overwhelming evidence supports the Plaintiffs' allegation that the LFUCG's policies require that they remain on duty and working throughout their meal breaks, rendering those breaks compensable. Obviously, if the LFUCG "zooms in close enough", differences do exist between each Plaintiff. Some may have had the bad luck to respond to inmates more often than others during meal breaks. Some may have been contacted by radio more frequently, or some may have the good fortune to be assigned to quieter and better-staffed shifts. These variations cannot, however, foreclose collective adjudication of whether the LFUCG's meal break policies render the meal breaks provided to Subclass A Plaintiffs compensable. Again, the Plaintiffs do not seek compensation for a few minutes of time which might vary from one individual Plaintiff to another. The LFUCG's undisputed policies result in the denial of a legitimate, bona fide meal break to each member of Subclass A on a daily basis.

The LFUCG's effort to cast the DCC as an environment devoid of any meal break rules or policies must also fail. The LFUCG's allegation that it has no policy other than providing Employees with 20-minute meal breaks cannot be reconciled with the policy statements made by Director Bishop, Assistant Director Kammer, non-Plaintiffs, and Plaintiffs. In any event, however, even an employer's refusal to adopt a policy can support continued certification under § 216(b). In *Frank*, 2007 WL 2780504, the employer operated three separate chicken-processing plants in two different states. A conditionally-certified class of employees alleged that the employer had failed to pay them for off-the-clock work, including time spent donning, doffing, and sanitizing clothing and equipment and walking on the employer's premises, and for their inadequate meal breaks. The defendant, like the LFUCG, moved to decertify by insisting that "it has no overall policy at the corporate or even the plant level about whether and how to pay (or not to pay) for donning and

doffing time,” and instead “simply leaves the question of whether to pay for donning and doffing to the whims of individual supervisors.” *Id.* The court rejected that argument, finding that the defendant’s decision to leave payment questions to supervisors - even if taken “seriously” - was enough to establish the plaintiffs’ similarity:

There is no doubt that Gold’n Plump has a corporate policy regarding the payment of donning and doffing time, although there is some dispute as to what that corporate policy is. Plaintiffs contend that Gold’n Plump’s policy is *not* to pay for donning and doffing time - i.e., that Gold’n Plump *forbids* its supervisors to pay for donning and doffing time. Gold’n Plump argues that it simply leaves the question of whether to pay for donning and doffing time to the individual supervisors. Gold’n Plump’s assertion is difficult to take seriously . . . Putting that aside, though, even if Gold’n Plump is correct, it does have a policy - **a policy not to have a policy . . . The bottom line is that Gold’n Plump has, at a minimum, decided not to require that its employees be paid for donning and doffing. That no-policy policy has allegedly injured all members of the putative class and is properly challenged through a class action.**

*Id.* at \*3 (italicized emphasis in original, bold emphasis added).

Certainly, the LFUCG’s unsurprising refusal to articulate the meal break policies described by Kammer, Bishop, and other witnesses through a written rule or Operational Order lends no support to its decertification attempt. The Plaintiffs may demonstrate “their subjection to a common, impermissible practice in a manner that suffices to meet their burden at this decertification stage” even if those practices are inconsistent with the employer’s written policies. *Wilks* at \*5. *See also Hill* at \*4 (M.D. Ga. 2005) (the “similarly situated inquiry” may be satisfied by allegations of either a “formal or informal” policy, and even where evidence shows that plaintiffs were specifically instructed not to work the overtime for which they seek compensation).

The LFUCG concludes that the Plaintiffs confront a “predicament” because “named Plaintiffs themselves are responsible for some of the alleged damages of other putative class members.”

(Mem., p. 24). The “conflicts” which the LFUCG attempts to identify within Subclass A, however, do not support decertification. Where, as here, the conditionally-certified claim is based upon policies and practices which apply to all of the Plaintiffs, the employer’s allegation of conflict between supervisory and non-supervisory employees will not permit it to escape collective liability. In *Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005), employees sought to assert state and federal wage and hour claims under Rule 23(b) as well as § 216(b). In opposing the certification of a Rule 23(b) class as to the Plaintiffs’ state law claims, the employer argued that the representative plaintiff’s claims were not typical of or in common with those of the proposed class because the named plaintiff held a managerial position and was responsible for verifying and submitting the employee’s time sheets. However, the court noted that the named plaintiff alleged that he was subject to the same unlawful practices as other class members, and so his managerial position would not preclude a class action:

In addition, even if Mendez told the employees under his supervision not to report certain time, such as travel time or time in excess of 40 hours per week, based on the allegations of the complaint it appears that in doing so, Mendez would simply have been passing along directives - which he was also subject to - that he had received from above. There does not appear to be any allegation that he in any way helped create or endorsed defendants’ policies in this regard. According to plaintiffs’ allegations, Mendez no more “participated” in any Labor Law violations than did the Radec electricians who, at the direction of their supervisors, submitted time cards that did not reflect the actual number of hours that they had worked. Mendez, then, like other Radec employees, simply did what he was told by his superiors.

*Id.* at 92. The Court then applied “essentially the same reasons” supporting its certification of a Rule 23 class to its decision to deny the defendant’s motion to decertify the plaintiffs’ FLSA claims. *Id.*

The LFUCG’s argument of a conflict between supervisory and non-supervisory Employees is unpersuasive for another reason. The employer, not the employee, is responsible for complying

with the FLSA. Courts not only look unfavorably upon employers' attempts to blame lower-level employees for FLSA violations, but actually cite such attempts as evidence of the type of bad faith which will support an award of liquidated damages. *See, e.g., Dole v. Solid Waste Services, Inc.*, 733 F.Supp. 895, 932 (E.D. Pa. 1989). In *Shea v. Galaxie Lumber & Construction Co., Ltd.*, 152 F.3d 729 (7<sup>th</sup> Cir. 1998), for example, the appellate court reversed a district court's refusal to award liquidated damages based upon the employer's showing that it had relied upon the plaintiff to maintain "accurate" payroll records. That responsibility "does not let [the employer] off the hook." *Id.* at 733.

The cases cited by the LFUCG in support of decertification have no application here. In *O'Brien v. Ed Donnelly Enterprises, Inc.*, 2006 WL 3483956 (S.D. Ohio 2006), only eight (8) employees out of a potential class of 426 opted into the conditionally-certified action, joining only two (2) original plaintiffs. Five of those ten (10) plaintiffs (only 1.17% of the proposed class) concurred with the plaintiffs' allegations of the employer's illegal practices of changing time records and/or requiring off-the-clock work. Indeed, three of the ten plaintiffs did not allege that they had been subject to either practice. The Court's summary of the plaintiffs' deposition testimony revealed that the case was not premised upon any common policies or practices at all. Two plaintiffs complained that they were not paid for a three-hour orientation, but one of the two admitted that she had not even attended the session. Two other plaintiffs testified that their managers had improperly "punched" their time cards. Another complained about an alleged policy that required him to clock out at the end of one shift and then clock in at the beginning of the next shift, but admitted that he was paid for all of his time. Another sought payment for a single workday, but later admitted that her name was not on the work schedule for that day and she had no idea whether she had worked on

that day or not. Each *O'Brien* plaintiff thus had his or her own FLSA “theory”, based upon policy and fact allegations that were entirely independent from one another. Unsurprisingly, the Court found that the plaintiffs were not “similarly situated because they have not demonstrated the existence of an unlawful common policy or plan that victimized both the original and opt-in plaintiffs.” *Id.* at \*4.

Similarly, in *Dudley v. Texas Waste Systems*, 2005 WL 1140605 (W.D. Tex. 2005) (not reported), conditional certification was denied because the plaintiff had “present[ed] **no evidence** refuting Defendant’s written policy that employees were admonished to take their lunch breaks” or refuting the manager’s testimony that employees who work through their lunch breaks are instructed to report the time to their supervisor so that they will be compensated. *Id.* at \*1 (emphasis added). *Bayles v. American Medical Response of Colorado, Inc.*, 950 F.Supp. 1053 (D. Col. 1996), does not hold, or even suggest, that meal break claims are so inherently individualized that they cannot be tried collectively. Indeed, in *Bayles*, the Court permitted the meal break claims asserted by one group of plaintiffs to proceed. *Id.* at 1058.

In this case, unlike *O'Brien*, the meal break claims asserted by Subclass A are not based upon a hodgepodge of policies or practices that randomly apply to some Plaintiffs and not others. All of the meal break policies challenged by Subclass A and substantiated by the above-described evidence apply to all members of the Subclass, with the exception of the “break sheet” policy, which applies to all Custody Officers and Corporals within the Subclass. And, unlike *Dudley*, the LFUCG cannot contend that the Plaintiffs have presented “no evidence” refuting the LFUCG’s claim that its sole meal break policy is to provide Custody, Intake, and Master Control Employees with a twenty-minute break, or the LFUCG’s (inconsistent) claim that it has a policy permitting Employees to

resume interrupted meal breaks. The Plaintiffs have provided far more than “substantial evidence” that their meal break claims are governed by common policies and practices imposed by the LFUCG. Even without considering the Plaintiffs’ testimony, those policies have been conceded by the LFUCG’s own administrators and other witnesses. Continued collective treatment is therefore appropriate.

**C. The LFUCG’s Defenses Do Not Require Individualized Proof**

The defenses on which the LFUCG apparently intends to rely do not require individualized proof. Again, the meal break claim asserted by Subclass A is based upon the LFUCG’s policies and practices. Consequently, the LFUCG’s defenses will not “implicate individual plaintiffs because, here, the standard of proof and required evidence under FLSA is not an individualized inquiry but one based on policy, practice, and conduct.” *Torres* at \*11. This does not mean that the LFUCG cannot present evidence that some Employees testified that their meal breaks are sufficient, that others have stated that they may resume interrupted breaks, that rovers are “supposed to” perform the work alleged to have been performed during meal breaks, that “ghosting” occurs, or that Custody Officers’ meal breaks do not officially begin until the break sheet is signed. Instead, assuming they truly exist, “[t]hese contradictions are matters of credibility for the factfinder, not individualized defenses.” *Pendlebury v. Starbucks Coffee Co.*, 2007 WL 2967106, \*15 (S.D. Fla. 2007) (emphasis in original).<sup>15</sup>

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<sup>15</sup> Individualized proof that, on some occasions, Employees receive more than forty (40) total minutes of “break” time or that some Employees engage in “ghosting” will not assist the LFUCG in either a collective action or in individualized actions. In *Martin v. Waldbaum*, 1992 WL 314898 (E.D.N.Y. 1992) (not reported), the plaintiffs asked the Court to rule as a matter of law that their breaks of less than twenty (20) minutes qualified as compensable time. In response, the employer argued “that many employees have testified in depositions taken throughout this case that they extended rest breaks beyond twenty minutes, or that multiple

The LFUCG's stated intention to rely upon an equitable estoppel defense and *de minimis* defense does not mandate decertification because neither defense requires individualized proof. *Rawls v. Augustine Home Health Care*, 244 F.R.D. 298 (D.Md. 2007) (“[t]he individualized defenses factor assesses whether potential defenses pertain to the plaintiff class or whether the potential defenses require proof of individualized facts as trial”). To the extent the LFUCG hopes to establish equitable estoppel by relying on its alleged policy of requiring Employees to make entries on their own time cards, or some as-yet-unrevealed policy of affirmatively instructing Employees to record interrupted meal breaks as time worked, then those facts will necessarily relate to the claims of all members of Subclass A rather to only a few. *See Moss*, 201 F.R.D. at 411 (where employer's statute of limitations defense would not be asserted against specific plaintiffs but against every member of the class, decertification was not appropriate because it would require the court to perform the same analysis in multiple lawsuits).<sup>16</sup>

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breaks were taken which, when aggregated, exceed the twenty minute period in the course of a workday.” *Id.* at \*1. That argument failed: “Even to the extent that an individual employee arguably may have been abusive of break time, efficiency and common sense would dictate that management's attention to the situation at its incipience would provide the proper remedy.” *Id.* at \*2.

<sup>16</sup> Alternatively, to extent the LFUCG hopes to rely upon individualized facts suggesting that the Plaintiffs were free to ignore specific radio calls or tones, or to sign the break sheet at their leisure, such facts will not support equitable estoppel in either a collective action or in multiple individual actions. As the Sixth Circuit applies equitable estoppel in the context of FLSA actions, an employee must be compensated for the time he or she works outside of scheduled time “even if the employer did not ask that the employee work during that time . . . .” *Wood v. Mid-America Mgmt. Corp.*, 192 Fed. Appx. 378, 380 (6<sup>th</sup> Cir. 2006). Compensation is owed when the employer “knows or has reason to believe that the employee is continuing the work” and the work was “suffered or permitted by the employer.” *Id.* *See also Burry v. National Trailer Co.*, 338 F.2d 422 (6<sup>th</sup> Cir. 1964) (an employer must pay “for all hours that he knowingly ‘suffers or permits’ an employee to work, notwithstanding any agreement to work fewer hours or to obtain authorization to work beyond the specified work period”); *Schneider v. Landvest Corp.*, 2006 WL 322590, \*30-31 (D. Colo. 2006) (not reported) (estoppel bars an employee's claim for

The LFUCG's proposed *de minimis* defense provides even less justification for decertification. A determination of whether time spent is *de minimis* requires a consideration of the following facts: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Jordan v. IBP, Inc.*, 542 F.Supp.2d 790, 810 (M.D.Tenn. 2008). Here, the Plaintiffs seek compensation for the entirety of each of their meal breaks based upon the LFUCG's policies and practices, which they believe to require them to remain on duty and working for the LFUCG's predominant benefit throughout the entirety of each twenty-minute meal period. In this case, therefore, the *de minimis* defense does not present questions requiring an individualized determination. If, as the LFUCG apparently hopes to show, there is some inherent administrative difficulty in recording an additional twenty minutes as time worked by the Plaintiffs, or in measuring that period of time, then those defenses would obviously apply to the entire Subclass. *Frank* at \*4 (an employer's *de minimis* defense "raises legal questions susceptible of class-wide resolution, such as how much time is *de minimis* as a matter of law and what characteristics time must have before it can be considered *de minimis*").

Even if the LFUCG's defenses truly required individualized proof as to individual Plaintiffs, those defenses may easily be accommodated within this collective class. Courts have held that

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unpaid wages only when the employer had no knowledge of the overtime work; moreover, the defense "is not applicable to an employer who encourages workers to falsely report their hours"). The question relevant to the LFUCG's equitable estoppel defense, therefore, is not whether individual Plaintiffs performed "voluntary" tasks during specific meal breaks, but whether the LFUCG was aware that, as a matter of policy, the Plaintiffs continued their job duties of responding to inmates and others and of performing work tasks during those meal breaks. Because these policies have been admitted by the LFUCG's own witnesses, the LFUCG's equitable estoppel defense does not rest upon individualized proof.

affirmative defenses, specifically including the *de minimis* defense and/or the defense that the plaintiffs' work was "voluntary," may be adequately presented by a defendant through the use of representative testimony. *Falcon v. Starbucks Corp.*, 2008 WL 155313, \*9 (S.D. Tex. 2008). In *Falcon*, the defendant employer argued that decertification was necessary because it wished to present proof regarding "individualized" defenses such as the *de minimis* doctrine, the claim that the plaintiffs' off-the-clock work at charitable events was voluntary, and the claim that the defendant lacked any actual or constructive knowledge of the plaintiffs' work. The court disagreed, finding that the employer could raise all of those asserted defenses by examining representative plaintiffs and presenting its own evidence at trial. *Id.* at \*9. Alternatively, individual defenses may be accommodated by bifurcation, which has already been ordered in this case. The LFUCG may, "if necessary, debate the impact of [its] policy or practice on individual plaintiffs" during the damages phase, after a collective trial regarding the policies and practices which are challenged by Subclass A. *Wilks* at \*7. Even during the collective trial on liability, "the defendant will be free to present evidence of its lawful employment policies and practices, to cross-examine individual representative plaintiffs, and to call to the stand others with material testimony that helps the defendant's case." *Id.* See also *Ayers* at \*6 ("to the extent Defendants present individual defenses, the Court may grant collective action and bifurcate trial as necessary, to address those defenses"); *Torres* at \*10 n. 2 ("[e]ven if defendants were to raise highly individualized defenses," the Court may bifurcate the trial to address those defenses).

The cases upon which the LFUCG relies (Mem., p. 27) are distinguishable. In *Basco v. Wal-Mart Stores, Inc.*, 2004 WL 1497709 (E.D. La. 2004) (not reported), the Plaintiffs sought certification of a class potentially consisting of 100,000 employees from all Wal-Mart stores in

Louisiana. The plaintiffs' allegation that they had been required to work off-the-clock, however, was supported by the testimony of only seven (7) plaintiffs. Those plaintiffs' testimony did not reflect "evidence of a policy or practice," but instead only "extremely anecdotal - one manager requiring it as opposed to all, perhaps once or twice during the course of a plaintiff's work." *Id.* at \*6. Indeed, the only apparent "policy" underlying the plaintiffs' claims was the extremely generalized allegation that the employer had a corporate policy to keep employee wage costs low. *Id.* at \*7. Such a policy could not support certification of the proposed class, since neither the policy nor its effects were "homogeneous" nor did they "lend themselves to collective inquiry." *Id.* Instead, "[t]he effects of the policy as alleged are anecdotal, that is to say particularized. Plaintiffs' own witnesses demonstrate that the 'policy' was not even uniformly or systematically implemented at any given store." *Id.* In the absence of any allegations (much less substantial evidence) of specific policies that resulted in the alleged off-the-clock work, the Court held that individualized defenses further justified decertification. *Id.* at \*8.

*Moriskey v. Public Service Electric and Gas Co.*, 111 F.Supp.2d 493 (D.N.J. 2000), is completely inapposite. There, the common policy challenged by the plaintiffs was an alleged "policy of ignoring - or at the very least misapplying the proper analysis in making the determination that plaintiff employees are exempt." *Id.* at 497. The case had nothing to do with meal break policies, much less policies that, like those challenged in this case, have been largely conceded by the employer's own witnesses. The plaintiffs did not even attempt to show that the job responsibilities of the named plaintiffs were similar to those of the remaining members of the proposed class; "[i]nstead, plaintiffs reference an extremely broad 'general connection' all plaintiffs have to the production of electricity." *Id.* at 498.

**D. Fairness and Procedural Considerations**

While only briefly addressed by the LFUCG, “fairness and procedural considerations” are critical to a determination of whether an action should continue collectively under § 216(b). At least one Court has held that these considerations may justify continued collective treatment even if the employer convinces the Court that “some differences in employee job settings and individual defenses weigh[ ] against class certification.” *Kautsch*, at \*4.

“Fairness and procedural considerations” include a determination of whether certification will serve the purposes of the FLSA, either by lowering the cost of the action to individual plaintiffs or by increasing judicial utility “by providing for efficient resolution of many claims in one proceeding.” *Wilks* at \*8. This factor also requires a determination of whether collective treatment “would comport with the purposes of the FLSA, e.g., with Congress’s aim to make the statute ‘broadly remedial and humanitarian.’” *Id.* (citing *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6<sup>th</sup> Cir. 1984)). Because of the FLSA’s remedial nature, “a close call as to whether Plaintiffs are similarly situated should be resolved in favor of certification.” *Falcon*, 2008 WL 155313, \*10.

Whether the meal break claims of the Subclass A Plaintiffs are tried collectively or individually, a finder of fact must determine whether the Plaintiffs have proven the LFUCG’s above-described meal break policies and practices (a question which will largely be resolved by the testimony of the LFUCG’s own administrators, including its Rule 30(b)(6) witness), and whether those policies and practices have rendered the Plaintiffs’ meal breaks compensable under the applicable regulations and the Sixth Circuit’s “predominant benefit” standard. The LFUCG provides no explanation for why these determinations must be made in as many as 317 separate lawsuits. Where, as here, “the unavoidable fact is that the plaintiffs’ meal period claim . . . will go forward

under any circumstances . . . there is an exceptionally strong interest” in resolving claims collectively. *Jordan*, 542 F.Supp. at 814. Further, where the plaintiffs’ allegations regarding the defendant’s policies and practices “play a predominant role” in each of their claims, “any requirement that each plaintiff prove his or her claims individually would waste more judicial time and resources than trying their cases individually would conserve.” *Wilks* at \*8. Individual trials would exponentially increase the cost to the Plaintiffs. Even the LFUCG benefits from a collective action, since its attorneys’ fees and costs in defending a collective action (and, if the Plaintiffs’ prevail, its liability for the Plaintiffs’ attorneys’ fees and costs (§ 216(b)) will be far lower than the cost of litigating three hundred separate trials. There is nothing inherently inconsistent or prejudicial in the Plaintiffs’ assertion of claims in their individual capacities as well as collectively, since, as the Court noted in its Order permitting the filing of the Tenth Amended Complaint, those individual claims were asserted specifically to preserve their right to proceed individually in the event this action is decertified. (Order, D.E. 311, p. 5).

**E. The Prior Bankruptcies of Some of the Named Plaintiffs Does Not Justify Decertification**

The LFUCG correctly notes that seven of the original named Plaintiffs have filed for bankruptcy. The LFUCG then summarily concludes that those Plaintiffs lack standing to pursue this action, without reference to when each Plaintiff filed for bankruptcy or what type of bankruptcy was involved. Two of the named Plaintiffs, Grillo and Reynolds, filed for Chapter 7 bankruptcy years prior to the commencement of this action. Moreover, those bankruptcies were concluded, and the plaintiffs’ debts were discharged, prior to the accrual of any claims which are the subject of the instant action (i.e., prior to September 6, 2003). Grillo petitioned for bankruptcy on April 15, 1998,

and her debts were discharged on September 24, 1998. Reynolds filed a Chapter 7 petition on March 13, 2002, and his debts were discharged on July 16, 2002. (*See* Bankruptcy Records of Named Plaintiffs, Collective Exhibit A). Thus, Grillo and Reynolds clearly have standing to pursue their FLSA claims and may act as class representatives. *See* 11 U.S.C.A. § 541(a)(1) (property of the bankruptcy estate consists of legal and equitable interests of the debtor in property “as of the commencement of the case”); *In re RCS Engineered Products Co. v. Himmelspach*, 102 F.3d 223, 225 (6th Cir. 1996) (“ . . . causes of action belonging to the debtor **prior to bankruptcy** constitute estate property”) (emphasis added).

Three of the named Plaintiffs filed for Chapter 7 bankruptcy in 2004. Those Plaintiffs are: Deborah Lennon, who filed her petition July 23, 2004 and whose debts were discharged on November 10, 2004; Bobbi Bartlett, who filed her petition on August 20, 2004 and whose debts were discharged on November 16, 2004; and Justin Crawford, who filed on September 9, 2004 and whose debts were discharged on December 21, 2004. Based on the above law, each of those plaintiffs would, at the very least, have standing to pursue claims accruing after the commencement of their bankruptcy case.

Of the seven Plaintiffs at issue, only two have filed for bankruptcy relief since the commencement of the instant case. Brian and Jessica Herbel filed a petition for Chapter 13 bankruptcy on September 21, 2006. An Order confirming their payment plan was entered on February 2, 2007, and their debts were discharged on June 6, 2008. The LFUCG argues that each of the seven Plaintiffs lacks standing only “[t]o the extent Plaintiffs’ failed to schedule any of the purported claims in their bankruptcy.” (Mem., p. 30). **Notably, the Herbels listed the instant action as an asset on their bankruptcy schedule.** Additionally, the LFUCG ignores the

fundamental differences between Chapter 13 and Chapter 7 bankruptcies. A district court sitting in the Sixth Circuit has explained:

The Court recognizes that the courts in the cases cited by Defendant National Mortgage, as well as the Sixth Circuit, have held that a Chapter 7 bankruptcy trustee, as the bankruptcy estate's representative, reserves the exclusive right to assert causes of action belonging to the bankruptcy estate . . . However, several circuit courts have held that Chapter 13 debtors may invoke 11 U.S.C. § 1306(b) **to pursue and control claims that are property of the estate.** *Olick v. Parker & Parsley Petrol. Co.*, 145 F.3d 513 (2d Cir.1998); *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1209 n. 2 (3rd Cir.1991); *Cable v. Ivy Tech State College*, 200 F.3d 467, 472-74 (7th Cir.1999); see also 8 Collier on Bankruptcy ¶ 1306.03 (Lawrence P. King ed., 15th ed. rev.1997) . . . **Unlike a Chapter 7 bankruptcy in which a trustee is appointed to liquidate the assets of the bankruptcy estate for the benefit of creditors, a chapter 13 bankruptcy provides for a reorganization plan in which the creditors' recovery is drawn from the debtor's earnings, not from the assets of the estate.** *Olick*, 145 F.3d at 516. **Therefore, this Court concludes that Plaintiffs do have standing to assert their claims.**

*Smith v. ABN AMRO Mortg. Group, Inc.*, 2007 WL 950334, at \* 6, (S.D. Ohio 2007) (not reported) (some internal citations omitted) (emphasis added). *See also Paris v. Sansom*, 2007 WL 1345368, at \*4, (E.D. Tenn. 2007) (slip copy) (Chapter 13 debtor had standing to pursue race discrimination claims which accrued prior to bankruptcy).

Finally, where a debtor files for relief under Chapter 13, “except as otherwise provided in the plan or order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.” 11 U.S.C.A. § 1327(b) (emphasis added). *See Foreman v. J. Walter Construction Co.*, 378 B.R. 717, 722 (Bankr.S.D. Ga. 2007) (“[W]hen the debtor’s plan is confirmed, only the amount required for the plan payments remain[s] property of the estate”); *Green Tire Servicing, LLC v. Mann*, 2008 WL 793632, at \*4, (W.D. Ky. 2008) (slip copy) (Under 11 U.S.C. § 1327(b), debtors’ property revested in them upon confirmation of their Chapter 13 plan, and subsequent insurance proceeds were not part of their bankruptcy estate). Thus, at the very least, the Herbels have standing

to pursue their claims for lost wages accruing from February 2, 2007 forward.

Ultimately, the bankruptcies of each of the above named plaintiffs are irrelevant to the certification of this case as a collective action; if anything, the bankruptcies are germane only to the issue of damages for these plaintiffs.

#### CONCLUSION

Substantial evidence confirms that the Plaintiffs within Subclass A are similarly situated to one another. For the reasons set forth above, the Plaintiffs ask that the LFUCG's Motion to Decertify be denied and that Subclass A proceed to trial collectively.

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been electronically filed this the 3<sup>rd</sup> day of July 2008, through the ECF system, which will send a notice of electronic filing to all parties' counsel in the electronic filing system in this case.

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