

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JUSTIN TAROVISKY	:	
	:	
GRAYSON SHARP	:	
	:	
SANDRA PARR	:	
	:	
JUSTIN BIEGER	:	
	:	
JAMES BRATTON	:	
	:	
WILLIAM FROST	:	
	:	
STEVE GLASER	:	
	:	
AARON HARDIN	:	
	:	
STUART HILLENBRAND	:	
	:	
JOSEPH KARWOSKI	:	
	:	
PATRICK RICHOUX	:	
	:	
DERREK ROOT	:	
	:	
CARLOS SHANNON	:	Civil Action No. 19-4C
	:	
SHANNON SWAGGERTY	:	Judge Patricia E. Campbell-Smith
	:	
GEOFFREY WELLEIN	:	Collective Action
	:	
BECKY WHITE	:	
	:	
TAMMY WILSON	:	
	:	
Plaintiffs, et. al,	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA	:	
	:	
Defendant.	:	
	:	

THIRD AMENDED COMPLAINT

COME NOW the plaintiffs Justin Tarovisky, Grayson Sharp, Sandra Parr, Justin Bieger, James Bratton, William Frost, Steve Glaser, Aaron Hardin, Stuart Hillenbrand, Joseph Karwoski, Patrick Richoux, Derrek Root, Carlos Shannon, Shannon Swaggerty, Geoffrey Wellein, Becky White, and Tammy Wilson on their own behalves and on behalf of all others similarly situated, and allege as follow:

INTRODUCTION

1. Plaintiffs bring this collective action lawsuit individually and on behalf of other similarly-situated individuals who would have been barred from working by their employer, the Defendant United States of America, during the partial government shutdown due to a lapse in appropriations starting at 12:01 a.m., on December 22, 2018 through January 25, 2019, except that they were classified as “excepted employees” (“Excepted Employees”). The U.S. Office of Personnel Management (“OPM”) uses the term “excepted” to refer to “employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations.” OPM Guidance for Government Furloughs, Sect. B.1. (Sept. 2015), *available at* <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>. Such Excepted Employees “include employees who are performing emergency work involving the safety of human life or the protection of property or performing certain other types of excepted work.” *Id.* These Excepted Employees were not paid for overtime work performed after the commencement of the shutdown on their regularly scheduled payday (“Scheduled Payday”) for biweekly pay period 25, which includes December 9, 2018 through December 22, 2018 (“Pay Period 25”). As a result, Excepted Employees who are classified as

non-exempt from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”), were not paid on their Scheduled Payday for work performed after the commencement of the shutdown in excess of the applicable overtime thresholds. Plaintiffs seek payment of wages owed, liquidated damages, and all appropriate relief under the FLSA for themselves and all other FLSA non-exempt Excepted Employees in the amount of any overtime payments to which they were entitled on the Scheduled Paydays for work performed between December 22, 2018 and January 25, 2019.

2. Additionally, on January 6, 2019, Acting White House Chief of Staff John Michael Mulvaney declared: “If we don’t have an agreement I think by midnight on the 8th, which is Tuesday, then payroll will not go out as originally planned on Friday night.” *See* Jane C. Timm, *Government employees could go without pay for nearly a month, at least*, NBC News (January 7, 2019), available at <https://www.nbcnews.com/politics/donald-trump/government-employees-could-go-without-pay-nearly-month-n955741>. As a result, the government failed to pay Excepted Employees the minimum wage of \$7.25 for each hour worked on each regularly scheduled pay date from December 23 until the shutdown resolved on January 25, 2019 and the employees were actually paid. Plaintiffs seek payment of the owed wages, liquidated damages, and all other appropriate relief under the FLSA, for themselves and all other Excepted Employees at the rate of \$7.25 per hour times the number of hours worked during each Pay Period, or alternatively, for themselves and other Excepted Employees an amount equal to the difference between \$290 (the minimum wage of \$7.25 per hour times forty hours per week) per week and the amount paid on the Scheduled Payday for work performed during each week, as well as related payments for any failure to pay the overtime wage on Scheduled Paydays until the shutdown resolved on January 25, 2019. Plaintiffs seek liquidated damages in the full amount of any overtime earned as well as

the employees' appropriate straight time rate of pay for non-overtime hours in weeks in which the Excepted Employee also worked overtime pursuant to 5 C.F.R. § 550.512(c).

3. Plaintiffs bring this action on their own behalves and on behalf of all government employees who (a) were classified by Defendant as "Excepted Employees," (b) performed FLSA non-exempt work for Defendant at any time after 12:01 a.m. on December 22, 2018, and (c) were not paid for such work on their Scheduled Payday. The members of this proposed collective action, including the Plaintiffs and Excepted Employees, are also referred to as "Members."

JURISDICTION AND VENUE

4. The United States Court of Federal Claims has jurisdiction and venue over this action pursuant to 28 U.S.C. § 1491(a)(1), as this is a claim against the United States founded on an Act of Congress and for damages in a case not sounding in tort.

PARTIES

5. Original Plaintiff Justin Tarovisky was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 25. Plaintiff performed work, including overtime work, for Defendant on at least one day during Pay Period 25 for which Plaintiff was not compensated on the Scheduled Payday. Plaintiff was classified as an Excepted Employee and performed work for Defendant during subsequent pay periods until the shutdown ended on January 25, 2019 for which Plaintiff was not compensated on his Scheduled Payday.

6. Original Plaintiff Grayson Sharp was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice during Pay Period 25. Plaintiff performed work, including overtime work, for Defendant on at least one day during Pay Period 25 for which Plaintiff was not compensated on the Scheduled Payday. Plaintiff was

classified as an Excepted Employee and performed work for Defendant during subsequent pay periods until the shutdown ended on January 25, 2019 for which Plaintiff was not compensated on his Scheduled Payday.

7. Plaintiff Sandra Parr was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on her Scheduled Payday.

8. Plaintiff Justin Bieger was an employee of Defendant classified as FLSA non-exempt in its Federal Emergency Management Agency within the Department of Homeland Security and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

9. Plaintiff James Bratton was an employee of Defendant classified as FLSA non-exempt within U.S. Immigration and Customs Enforcement within the Department of Homeland Security and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

10. Plaintiff William Frost was an employee of Defendant classified as FLSA non-exempt within Voice of America within the U.S. Agency for Global Media and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

11. Plaintiff Steve Glaser was an employee of Defendant classified as FLSA non-exempt in its National Park Service within the Department of the Interior and performed work for

Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

12. Plaintiff Aaron Hardin was an employee of Defendant classified as FLSA non-exempt in its National Weather Service within the Department of Commerce and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

13. Plaintiff Stuart Hillenbrand was an employee of Defendant classified as FLSA non-exempt within the U.S. Secret Service within the Department of Homeland Security and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

14. Plaintiff Joseph Karwoski was an employee of Defendant classified as FLSA non-exempt within U.S. Customs and Border Protection within the Department of Homeland Security and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

15. Plaintiff Patrick Richoux was an employee of Defendant classified as FLSA non-exempt in its Federal Bureau of Investigation within the Department of Justice and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

16. Plaintiff Derrek Root was an employee of Defendant classified as FLSA non-exempt in its Bureau of Alcohol, Tobacco, Firearms and Explosives within the Department of Justice and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

17. Plaintiff Carlos Shannon was an employee of Defendant classified as FLSA non-exempt in its Bureau of Prisons within the Department of Justice and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff was not compensated on his Scheduled Payday.

18. Plaintiff Shannon Swaggerty was an employee of Defendant classified as FLSA non-exempt in its Transportation Security Administration within the Department of Homeland Security and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

19. Plaintiff Geoffrey Wellein was an employee of Defendant classified as FLSA non-exempt in its Drug Enforcement Administration within the Department of Justice and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on his Scheduled Payday.

20. Plaintiff Becky White was an employee of Defendant classified as FLSA non-exempt in its Food Safety Inspection Service within the Department of Agriculture and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on her Scheduled Payday.

21. Plaintiff Tammy Wilson was an employee of Defendant classified as FLSA non-exempt in its Indian Health Service within the Department of Health and Human Services and performed work for Defendant between December 22, 2018 and January 25, 2019 for which Plaintiff did not receive overtime and/or minimum wage compensation on her Scheduled Payday.

22. Plaintiffs have given their written consents to be party Plaintiffs in this action pursuant to 29 U.S.C. § 216(b). Such written consents, containing each Plaintiff's name, address and signature, are appended to this Complaint.

23. Defendant United States is an "employer" and "public agency" within the meaning of 29 U.S.C. § 203(d), (x).

ADDITIONAL FACTUAL ALLEGATIONS
RELEVANT TO ALL EXCEPTED EMPLOYEES CLASSIFIED AS
NON-EXEMPT FROM THE FLSA OVERTIME PROVISIONS
AND WHO WORKED OVERTIME

24. Defendant partially shut down starting at 12:01 a.m., December 22, 2018 until January 25, 2019.

25. The partial shutdown did not cause certain individuals within the government to cease working, including members of the military, employees who were "exempted" from the shutdown because their positions are not funded by annually appropriated funds, such as the Postal Service and the Federal Reserve, or Presidential appointees who are not covered by the leave system in 5 U.S.C. chapter 63. While most of the military – including the U.S. Army, Navy, Air Force, and Marines – had separate funding, the Coast Guard was affected by the lapse in appropriations and the shutdown that ran from December 22, 2018 through January 25, 2019, because it is part of the U.S. Department of Homeland Security.

26. Defendant designated all its civilian employees in agencies and positions that were affected by the partial shutdown either as Excepted Employees or as Non-Excepted Employees. Excepted Employees were required to report to work and perform their normal duties, but they were not timely compensated for certain work performed in Pay Period 25, including work performed on December 22, 2018. In addition, as contemplated by Acting White House Chief of Staff Mulvaney that Excepted Employees would not be receiving pay in Pay Period 26 if the

shutdown continued past Tuesday, January 8, 2019, Plaintiffs did not receive compensation on the Scheduled Payday for the work they performed during Pay Period 26 and future pay periods until the shutdown ended on January 25, 2019.

27. Upon information and belief, there were over approximately 400,000 Excepted Employees, including each of the Plaintiffs, during the partial shutdown that started on December 22, 2018.

28. Defendant is obligated to pay overtime pay for work performed in excess of applicable thresholds which may differ for FLSA non-exempt employees classified as law enforcement employees or fire fighters than for other FLSA non-exempt employees. For overtime work performed during Pay Periods 25 and 26 and subsequent Pay Periods affected by the partial shutdown, the FLSA obligated Defendant to make such overtime payments on the Scheduled Payday.

29. Defendant did not pay non-exempt Excepted Employees on the Scheduled Payday for work in excess of the applicable overtime thresholds performed on December 22, 2018, during the pay period beginning on December 23, 2018, and on subsequent paydays until after the shutdown was resolved.

30. Excepted Employees typically are paid biweekly.

31. For most or all Excepted Employees, the first pay period affected by the partial shutdown commenced Sunday, December 9, 2018 and ended Saturday, December 22, 2018.

32. Upon information and belief, Excepted Employees, including some of the Plaintiffs, were not paid on their Scheduled Payday for overtime work performed on Saturday, December 22, 2018.

33. Each Excepted Employee received information showing the amount received for work performed during each week of the preceding pay period.

34. Because Excepted Employees were paid for a maximum of only six days during the second week of Pay Period 25, between December 16 and December 22, 2018, each Excepted Employee was not paid at all on the Scheduled Payday for any work performed on December 22, 2018.

35. As a result, the Excepted Employees, including some of the Plaintiffs, were not timely paid for work performed on Saturday, December 22, 2018, on the date when such payment was due in violation of the FLSA.

36. As anticipated by the Acting White House Chief of Staff's statement, Defendant did not pay non-exempt Excepted Employees on the Scheduled Payday for work in excess of the applicable overtime thresholds performed in the pay period beginning on December 23, 2018, nor did it pay for related payments on scheduled paydays moving forward until after the shutdown ended on January 25, 2019.

37. Upon information and belief, Defendant conducted no analyses to determine whether its failure to pay Excepted Employees on their regularly scheduled payday complied with the FLSA and can rely on no authorities indicating that its failure to pay Excepted Employees on their regularly scheduled payday complied with the FLSA.

38. This Court has found that the federal government's failure to timely pay similarly-situated plaintiffs violates the FLSA and that the government is liable for liquidated damages for committing such violations. *See Martin v. United States*, 130 Fed. Cl. 578 (Feb. 13, 2017). Under the circumstances, Defendant violated the FLSA by not paying Excepted Employees on their

regularly scheduled payday for work performed between December 22, 2018 and January 25, 2019.

39. Defendant's violation of the FLSA described above is willful, and in conscious or reckless disregard of the requirements of the FLSA.

40. Because of the actions alleged above, the Excepted Employees, including some of the Plaintiffs, have suffered monetary damages and are entitled to wages owed, liquidated damages, and all other appropriate relief available under the FLSA.

ADDITIONAL FACTUAL ALLEGATIONS
RELEVANT TO ALL EXCEPTED EMPLOYEES

41. As it relates to the government's failure to pay the minimum wage, the first pay period affected by the partial shutdown commenced Sunday, December 23, 2018. That pay period ended on January 5, 2019. Plaintiffs and Excepted Employees were not paid on their regularly Scheduled Payday for work performed during this period.

42. As a result, the Defendant did not pay Excepted Employees for work performed between December 22, 2018 and January 25, 2019 on the date when such payment was due, in violation of the FLSA.

43. Excepted Employees are paid pursuant to schedules that permit their pay rates to be calculated as a certain amount per hour.

44. If compliance with the FLSA's minimum wage is evaluated on an hourly basis or a weekly basis, then Defendant paid Excepted Employees less than minimum wage on their Scheduled Paydays.

45. The minimum wage applicable to Members is \$7.25 per hour, or \$290 for a forty-hour week.

46. Because Members were not paid for work performed on the date when such payment was due, Excepted Employees were paid less than \$290 each week for work performed during the shutdown which lasted from December 22, 2018 through January 25, 2019.

47. Upon information and belief, Defendant conducted no analyses to determine whether its failure to pay Excepted Employees the minimum wage for work performed complied with the FLSA and relied on no authorities indicating that its failure to pay Excepted Employees the minimum wage complied with the FLSA.

48. As further described in Paragraph 38 above, under the circumstances, Defendant violated the FLSA by not paying Excepted Employees minimum wage on the Scheduled Payday for work performed between December 22, 2018 and January 25, 2019.

49. Defendant's violation of the FLSA described above was willful, and in conscious or reckless disregard of the requirements of the FLSA.

50. As a result of the actions alleged above, the Excepted Employees, including the Plaintiffs, have suffered monetary damages and are entitled to payment of wages owed, statutory liquidated damages, and any other remedy available under the FLSA.

COLLECTIVE ACTION ALLEGATIONS

51. Defendant uniformly failed to pay Plaintiffs and many or all Excepted Employees throughout the United States overtime wages and minimum wages on their Scheduled Payday.

52. As contemplated by the Acting White House Chief of Staff's statement, the Defendant also uniformly failed to pay Plaintiffs and other Excepted Employees throughout the United States overtime wages and minimum wages on their Scheduled Payday for the pay period beginning on December 23, 2018, and on future paydays until the government shutdown resolved on January 25, 2019.

53. The amount of wages owed and liquidated damages due Plaintiffs and other Excepted Employees, including the amount of unpaid overtime and liquidated damages due Excepted Employees, can be computed for all Excepted Employees using the same methodologies and Defendant's payroll records and employee data.

54. The amount of wages owed and liquidated damages due Plaintiffs and other Excepted Employees, including the amount of unpaid minimum wages, straight time wages, and unpaid overtime and liquidated damages due Excepted Employees, who worked regular time and overtime can be computed for all Excepted Employees using the same methodologies and Defendant's payroll records and employee data.

55. Based on reports in various sources, Plaintiffs are informed and believe that there are about 400,000 Excepted Employees who were affected by the actions and failures alleged here. A collective action is the most efficient means for resolution of the claims alleged.

56. Defendant should be required to give electronic notice of this collective action to all Excepted Employees at their work email addresses using Court-approved language because of the large number of Excepted Employees and the ease with which Defendant may communicate with the Excepted Employees electronically at those email addresses.

COUNT ONE

FAILURE TO PAY OVERTIME TO EXCEPTED EMPLOYEES CLASSIFIED AS NON-EXEMPT FROM THE FLSA OVERTIME PROVISIONS AS REQUIRED UNDER THE FLSA

57. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

58. Defendant failed to pay overtime to Excepted Employees classified as non-exempt from the FLSA overtime provisions who worked in excess of the applicable threshold for overtime performed between December 22, 2018 and January 25, 2019 on their Scheduled Payday.

59. Many Excepted Employees classified as non-exempt from the FLSA's overtime provisions worked in excess of the applicable threshold for overtime pay on December 22, 2018, as well as during the period December 23, 2018 through January 25, 2019.

60. Defendant violated the FLSA by failing to pay overtime pay on the Scheduled Payday to Excepted Employees classified as non-exempt from the FLSA's overtime provisions who worked in excess of the applicable threshold for overtime pay. Its violation was willful, and in conscious or reckless disregard of the requirements of the FLSA.

61. As contemplated by the Acting White House Chief of Staff, Defendant also violated the FLSA by failing to pay overtime pay on the Scheduled Payday to Excepted Employees classified as non-exempt from the FLSA's overtime provisions who worked in excess of the applicable threshold for overtime pay during the period December 23, 2018 through January 25, 2019. Such violations are willful, and in conscious or reckless disregard of the requirements of the FLSA.

62. As a result, Excepted Employees covered by the FLSA's overtime provisions suffered injuries, including monetary damages, and are entitled to wages owed and to liquidated damages in the full amount of any overtime earned as well as the employees' appropriate straight time rate of pay for non-overtime hours in weeks in which the Excepted Employee also worked overtime.

COUNT TWO

**FAILURE TO PAY MINIMUM WAGES TIMELY TO EXCEPTED
EMPLOYEES CLASSIFIED AS NON-EXEMPT FROM THE FLSA
AS REQUIRED UNDER THE FLSA**

63. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

64. As contemplated by the Acting White House Chief of Staff's statement, Defendant failed to pay Excepted Employees for work performed during the period December 23, 2018 through January 25, 2019, on the Scheduled Payday. As a result, all Excepted Employees were paid less than minimum wage if the obligation is determined on an hourly basis or weekly basis.

65. Defendant's failure to pay Excepted Employees minimum wage on their Scheduled Payday violates the FLSA. Defendant's violation was willful and in conscious or reckless disregard of the requirements of the FLSA.

66. As a result, Plaintiffs and other Excepted Employees suffer injuries, including monetary damages, and are entitled to wages owed and statutory liquidated damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant relief against Defendant as follows:

(a) Enter a declaration that Defendant has violated its statutory and legal obligations and deprived Plaintiffs and all other Excepted Employees of their rights, privileges, protections and compensation under the law, that the violations were not in good faith and that Defendant did not have reasonable grounds for believing that its acts complied with its obligations under the FLSA, and that the violations were willful;

(b) Convene a collective action pursuant to 29 U.S.C. § 216(b) and require Defendant to provide electronic notice to all Members and to provide to Plaintiffs the last known names and

addresses (including electronic mail addresses) of all Members in a readily readable and useable electronic format;

(c) Award Members classified as non-exempt from the FLSA's minimum wage and overtime provisions the wages they are owed and monetary damages in the form of liquidated damages under the FLSA equal to the amount of minimum wages and overtime compensation that they should have been paid on the Scheduled Paydays for work performed between December 22, 2018 and January 25, 2019, except that those Members who worked overtime hours should also receive damages equal to the amount of their straight time wages for non-overtime hours worked during that same week;

(d) Award Plaintiffs and all other Members their reasonable attorneys' fees to be paid by Defendant, and the costs and disbursements of this action; and

(e) Grant such other legal and equitable relief as may be just and proper.

Respectfully submitted,

s/ Heidi R. Burakiewicz
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Of Counsel for the Plaintiffs

January 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Federal Claims by using the CM/ECF system. I also certify that the foregoing document is being served on Defendant's counsel of record and that service will be accomplished by the CM/ECF system.

Respectfully,

s/ Heidi R. Burakiewicz

Heidi R. Burakiewicz

January 26, 2021