## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

SHEAN EMMONS,	)
JOHN GIBSON,	)
KEVIN SMITH,	)
BRIAN FANCHER,	)
CARLTON ACKISS,	)
MICHAEL WINSLOW,	)
and	
CHRISTINE DOSMANN,	)
Plaintiffs,	) )
v.	) Civil Action No. 2:18cv 402
CITY OF CHESAPEAKE,	)
Defendant.	)

## **COMPLAINT**

NOW COME Plaintiffs Shean Emmons, John Gibson, Kevin Smith, Brian Fancher, Carlton Ackiss, Michael Winslow, and Christine Dosmann, and, for their Complaint against Defendant City of Chesapeake, allege and say as follows:

- 1. This is an action by Plaintiffs pursuant to 29 U.S.C. § 216(b) to recover compensatory and liquidated damages, attorney fees, and other relief from Defendant for violations of the Fair Labor Standards Act ("FLSA").
- 2. Plaintiffs also assert Virginia State law claims under the Virginia Gap Pay Act, Virginia Code § 9.1-700 et seq., from Defendant's violations of that statute.

## **PARTIES**

- 3. Plaintiff Emmons is a citizen and resident of South Mills, North Carolina.
- 4. Plaintiffs Gibson, Smith, Winslow, and Dosmann are citizens and residents of Chesapeake, Virginia.

- 5. Plaintiff Fancher is a citizen and resident of Norfolk, Virginia.
- 6. Plaintiff Ackiss is a citizen and resident of Portsmouth, Virginia.
- 7. Defendant City of Chesapeake is a political subdivision of the Commonwealth of Virginia.

#### JURISDICTION AND VENUE

- 8. This Court has subject matter jurisdiction over Plaintiffs' FLSA claims pursuant to 28 U.S.C. §§ 216 and 1331. The Court has supplemental jurisdiction over Plaintiffs' Virginia law claims pursuant to 28 U.S.C. § 1367.
- 9. A substantial part of the events and omissions giving rise to Plaintiffs' claims occurred in this district. The unpaid wages sought in this action were earned in this district. Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(b) and Local Civil Rule 3.

#### **FACTUAL ALLEGATIONS**

- 10. Defendant is a public agency and an enterprise engaged in commerce as those terms are defined in the FLSA. Defendant is a covered employer under the Act.
- 11. Defendants operate the Chesapeake Fire Department (CFD), an organization responsible for emergency medical response, fire fighting, and other emergency services within the geographic limits of the City of Chesapeake and elsewhere.
- 12. All Plaintiffs are employees of Defendant and have been for the three years prior to the filing of this action.
  - 13. Plaintiffs are active Battalion Fire Chiefs employed by Defendant in the CFD.
- 14. Plaintiffs are first responders. Plaintiffs are required to respond to all calls for service that satisfy criteria established by Defendant that are received by their unit. Plaintiffs

have no discretion to refuse to respond to such a call.

- 15. Plaintiffs must respond to calls for service with firefighting gear and equipment. Plaintiffs are all certified fire fighters.
- 16. Plaintiffs are required to participate in emergency response training and meet the physical standards requirements of fire fighters.
  - 17. Plaintiffs have no authority to administer discipline and do not write policies.
- 18. Plaintiffs do not set budgets, hire or fire employees, set pay, set work schedules, or set minimum staffing levels.
- 19. All of Plaintiffs' duties are undertaken in conjunction with, or directly related to, their firefighting duties.
- 20. Plaintiffs are fire protection employees as that term is defined in Virginia Code § 9.1-700.
- 21. Plaintiffs are employees in fire protection activities as that phrase is defined in 29 U.S.C. § 203(y) and described in 29 C.F.R. § 541.3.
- 22. Under the FLSA, Plaintiffs are entitled to overtime compensation for all hours worked in excess of 159 in a 21-day work cycle.
- 23. Under the Virginia Gap Pay Act, Plaintiffs are entitled to overtime compensation for all hours worked in excess of their scheduled hours up to 159 hours in a 21-day work cycle.
- 24. Plaintiffs are regularly scheduled to work 168 hours in every 21-day work cycle, consisting of seven shifts, each of twenty-four hours.
- 25. In addition, Plaintiffs work additional hours prior to and after the scheduled work shift and in performing ancillary duties on "off" days attending staff meetings and assigned committees, instructing, and training.

- 26. In each 21-day work cycle in which a Plaintiff worked all seven shifts, i.e., worked more than 159 hours, Defendants owe the Plaintiff overtime under the FLSA for at least 9 hours of scheduled work plus additional hours from work before and after shifts and on "off" days.
- 27. In some 21-day work cycles, Plaintiffs take leave for one or more shifts. In such work cycles, Plaintiffs work additional hours beyond their scheduled hours as described in paragraph 25, resulting in them working more than their scheduled hours.
- 28. In each 21-day work cycle in which a Plaintiff worked less than seven shifts, or equal to or less than 159 hours, Defendants owe the Plaintiff overtime under the Virginia Gap Pay Act for the unscheduled additional hours of work before and after shifts and on "off" days.

### 29. For example:

- a. Emmons worked seven shifts in the work cycle from February 7, 2017, through February 27, 2017, working more than 168 hours, and was not paid overtime due under the FLSA. Emmons worked six shifts in the work cycle from December 27, 2016, through January 16, 2017, working more than 144 hours, and worked at least an additional fourteen unscheduled hours in pre- and/or post-shift work and as an instructor and was not paid overtime due under the Virginia Gap Pay Act.
- b. Gibson worked seven shifts in the work cycle from February 27, 2018, through March 19, 2018, working more than 168 hours, and was not paid overtime due under the FLSA. Gibson worked five shifts in the work cycle from May 22, 2018, through June 11, 2018, working more than 120 hours, and worked at least an additional 7 unscheduled hours in pre- and/or post-shift work and attending a mandatory staff meeting and was not paid overtime due under the Virginia Gap

Pay Act.

- c. Ackiss worked seven shifts in the work cycle from January 31, 2017, through February 20, 2017, working more than 168 hours, and was not paid overtime due under the FLSA. Ackiss worked six shifts in the work cycle from July 18, 2017, through August 7, 2017, working more than 144 hours, and worked at least an additional eight unscheduled hours in pre- and/or post-shift work and attending a mandatory staff meeting and was not paid overtime due under the Virginia Gap Pay Act.
- d. Smith worked seven shifts in the work cycle from March 20, 2018, through April 9, 2018, working more than 168 hours, and was not paid overtime due under the FLSA. Smith worked six and one-half shifts in the work cycle from November 14, 2017, through December 4, 2017, working more than 156 hours, and worked at least an additional nine unscheduled hours in pre- and/or post-shift work and attending a mandatory staff meeting and was not paid overtime due under the FLSA and the Virginia Gap Pay Act.
- e. Dosmann worked seven shifts in the work cycle from February 27, 2018, through March 19, 2018, working more than 168 hours, and was not paid overtime due under the FLSA. Dosmann worked five shifts in the work cycle from September 13, 2016, through October 3, 2016, and worked at least an additional four unscheduled hours in pre-shift work and attending a mandatory staff meeting and was not paid overtime due under the Virginia Gap Pay Act.
- f. Fancher worked seven shifts in the work cycle from September 19, 2017, through October 8, 2017, working more than 168 hours, and was not paid overtime due

under the FLSA. Fancher worked six shifts in the work cycle from August 16, 2016, through September 5, 2016, working more than 144 hours, and worked at least an additional sixteen unscheduled hours as a safety officer/firestarter for training fires and was not paid overtime due under the FLSA and the Virginia Gap Pay Act.

- g. Winslow worked seven shifts in the work cycle from September 19, 2017, through October 9, 2017, working more than 168 hours, and was not paid overtime due under the FLSA. Winslow worked five shifts in the work cycle from November 21, 2017, through December 11, 2017, working more than 120 hours, and worked at least an additional six unscheduled hours in pre-shift work and attending a mandatory staff meeting and was not paid overtime due under the Virginia Gap Pay Act.
- 30. Despite the non-exempt nature of Plaintiffs' duties, Defendant classified them as exempt from the overtime provisions of the FLSA. Defendant did so based on job title and salary, ignoring the actual duties of Plaintiffs' employment of which it was well aware.
- 31. Defendant had knowledge of the hours Plaintiffs were working through its supervision of Plaintiffs by its Division Chiefs and the Fire Chief.
- 32. Defendant knew that the FLSA was applicable to its employees and did so for the three years preceding the filing of the Complaint. Defendant paid overtime wages to its employees who worked more than 159 hours per work cycle and whom it had not misclassified.
- 33. Defendant knew or showed reckless disregard as to whether it was violating the FLSA in its classification of Plaintiffs. Defendant knew that Fourth Circuit case law required overtime pay for first responders with duties similar to Plaintiffs. Furthermore, Defendant

undertook a review of Plaintiffs' duties but disregarded the factual results and maintained the erroneous classification of Plaintiffs as exempt.

# COUNT ONE UNPAID OVERTIME UNDER THE FLSA

- 34. The allegations in paragraphs 1 through 33 above are incorporated by reference as if fully set forth herein.
- 35. Plaintiffs worked in excess of 159 hours in some work cycles and were not paid the overtime pay required by law.
- 36. Defendant knew or showed reckless disregard for the matter of whether its failure to pay overtime pay was prohibited by law.
- 37. Plaintiffs have been damaged from Defendant's failure to pay the overtime pay required by law.

# COUNT TWO UNPAID OVERTIME UNDER THE VIRGINA GAP PAY ACT

- 38. The allegations in paragraphs 1 through 37 above are incorporated by reference as if fully set forth herein.
- 39. Plaintiffs worked in excess of their scheduled hours, but equal to or less than 159 hours, in some work cycles and were not paid the overtime required by law.
- 40. Defendant knew or showed reckless disregard for the matter of whether its failure to pay overtime pay was prohibited by law.
- 41. Plaintiffs have been damaged from Defendant's failure to pay the overtime pay required by law.

### WHEREFORE, Plaintiffs respectfully pray the Court:

1. That Plaintiffs recover unpaid overtime wages, liquidated damages, attorney fees,

and other relief by reason of Defendant's violations of the FLSA;

- 2. That Plaintiffs recover double the unpaid overtime wages, or in the alternative the unpaid overtime wages plus prejudgment interest at the rate of eight percent, attorney fees, and other relief by reason of Defendant's violations of the Virginia Gap Pay Act;
  - 3. For a trial by jury on all issues so triable; and,
  - 4. For such other and further relief as the Court may deem just and proper.

This the 24th day of July, 2018.

SHEAN EMMONS, JOHN GIBSON, KEVIN SMITH, BRIAN FANCHER, CARLTON ACKISS, MICHAEL WINSLOW, and CHRISTINE DOSMANN

/s/	
Counsel	

James R. Theuer (VSB #68712) JAMES R. THEUER, PLLC 555 E. Main St., Suite 1212 Norfolk, VA 23510

Tel: (757) 446-8047 Fax: (757) 446-8048 jim@theuerlaw.com

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

purpose of illitiating the civil do	beket sheet. (BEE INSTRUC	HONS ON NEXT LAGE O.	1 111151-0	AUVI.)			
I. (a) PLAINTIFFS Shean Emmons, John Gibson, Kevin Smith, Brian Fancher, Michael Winslow, and Christine Dosmann,			el	DEFENDANTS City of Chesapeake			
<b>(b)</b> County of Residence of	f First Listed Plaintiff C	Camden, NC		County of Residence	of First Listed Defendant		
* *	XCEPT IN U.S. PLAINTIFF CA			County of reestachee	(IN U.S. PLAINTIFF CASES O	ONLY)	
				NOTE: IN LAND CO THE TRACT	ONDEMNATION CASES, USE TO OF LAND INVOLVED.	HE LOCATION OF	
(c) Attorneys (Firm Name, A	Address and Telephone Numbe	r)		Attorneys (If Known)			
James R. Theuer	•	'')					
555 E. Main St., Ste 1212 Norfolk, VA 23510 (757)							
II. BASIS OF JURISDI	CTION (Place an "X" in C	ne Box Only)	III. CI	TIZENSHIP OF P	RINCIPAL PARTIES	(Place an "X" in One Box for Plaint.	
□ 1 U.S. Government	■ 3 Federal Question	3 Federal Ouestion		(For Diversity Cases Only) P1	TF DEF	and One Box for Defendant) PTF DEF	
Plaintiff (U.S. Government Not a Party)		Citize	Citizen of This State				
☐ 2 U.S. Government ☐ 4 Diversity Defendant		ip of Parties in Item III)	Citizen of Another State				
				en or Subject of a reign Country	3 🗖 3 Foreign Nation	□ 6 □ 6	
IV. NATURE OF SUIT			I no				
CONTRACT  ☐ 110 Insurance	PERSONAL INJURY	ORTS PERSONAL INJUR		DRFEITURE/PENALTY 25 Drug Related Seizure	BANKRUPTCY  ☐ 422 Appeal 28 USC 158	OTHER STATUTES  ☐ 375 False Claims Act	
□ 120 Marine	□ 310 Airplane	☐ 365 Personal Injury -		of Property 21 USC 881	☐ 423 Withdrawal	☐ 400 State Reapportionment	
☐ 130 Miller Act ☐ 140 Negotiable Instrument	☐ 315 Airplane Product Liability	Product Liability  367 Health Care/	□ 69	00 Other	28 USC 157	☐ 410 Antitrust☐ 430 Banks and Banking	
☐ 150 Recovery of Overpayment	☐ 320 Assault, Libel &	Pharmaceutical			PROPERTY RIGHTS	☐ 450 Commerce	
& Enforcement of Judgment  151 Medicare Act	Slander  ☐ 330 Federal Employers'	Personal Injury Product Liability			☐ 820 Copyrights ☐ 830 Patent	<ul><li>☐ 460 Deportation</li><li>☐ 470 Racketeer Influenced and</li></ul>	
☐ 151 Medicare Act ☐ 152 Recovery of Defaulted	Liability	☐ 368 Asbestos Personal			☐ 840 Trademark	Corrupt Organizations	
Student Loans (Excludes Veterans)	☐ 340 Marine ☐ 345 Marine Product	Injury Product Liability		LABOR	SOCIAL SECURITY	☐ 480 Consumer Credit☐ 490 Cable/Sat TV	
☐ 153 Recovery of Overpayment	Liability	PERSONAL PROPER	RTY 🗷 71	0 Fair Labor Standards	□ 861 HIA (1395ff)	☐ 850 Securities/Commodities/	
of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 370 Other Fraud	<b></b> 72	Act	☐ 862 Black Lung (923)	Exchange	
☐ 160 Stockholders' Suits ☐ 190 Other Contract	☐ 355 Motor Vehicle Product Liability	☐ 371 Truth in Lending☐ 380 Other Personal		20 Labor/Management Relations	☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI	☐ 890 Other Statutory Actions☐ 891 Agricultural Acts	
☐ 195 Contract Product Liability	☐ 360 Other Personal	Property Damage		0 Railway Labor Act 1 Family and Medical	□ 865 RSI (405(g))	893 Environmental Matters	
☐ 196 Franchise	Injury  ☐ 362 Personal Injury -	☐ 385 Property Damage Product Liability	/3	Leave Act		□ 895 Freedom of Information Act	
DEAL BRODERTY	Medical Malpractice	DDICONED DETITION		00 Other Labor Litigation	FEDERAL TAX SUITS	☐ 896 Arbitration	
REAL PROPERTY  210 Land Condemnation	CIVIL RIGHTS  ☐ 440 Other Civil Rights	PRISONER PETITION Habeas Corpus:	15 19	11 Employee Retirement Income Security Act	☐ 870 Taxes (U.S. Plaintiff	■ 899 Administrative Procedure Act/Review or Appeal of	
□ 220 Foreclosure	☐ 441 Voting	☐ 463 Alien Detainee		,	or Defendant)	Agency Decision	
☐ 230 Rent Lease & Ejectment☐ 240 Torts to Land☐	☐ 442 Employment ☐ 443 Housing/	☐ 510 Motions to Vacate Sentence	;		☐ 871 IRS—Third Party 26 USC 7609	☐ 950 Constitutionality of State Statutes	
245 Tort Product Liability	Accommodations	☐ 530 General			20 050 7007	State Statutes	
☐ 290 All Other Real Property	☐ 445 Amer. w/Disabilities - Employment	☐ 535 Death Penalty Other:	<b>1</b> 46	IMMIGRATION 52 Naturalization Application	l		
	☐ 446 Amer. w/Disabilities -	540 Mandamus & Othe		55 Other Immigration			
	Other  448 Education	☐ 550 Civil Rights ☐ 555 Prison Condition		Actions			
	1 446 Education	☐ 560 Civil Detainee -					
		Conditions of Confinement					
V. ORIGIN (Place an "X" in		Commencia					
▼ 1 Original □ 2 Rea	• •	Remanded from Appellate Court	J 4 Rein Reop		r District Litigation		
	129 U.S.C. 8 216	ntute under which you ar	re filing (1	Do not cite jurisdictional stat			
VI. CAUSE OF ACTION	Brief description of ca Unpaid overtime	nuse:					
VII. REQUESTED IN COMPLAINT:	CHECK IF THIS UNDER RULE 2	IS A CLASS ACTION 3, F.R.Cv.P.	) D	EMAND \$	CHECK YES only <b>JURY DEMAND:</b>	if demanded in complaint: Yes   No	
VIII. RELATED CASI	E(S)						
IF ANY	(See instructions):	JUDGE			DOCKET NUMBER		
DATE		SIGNATURE OF ATT		OF RECORD			
07/24/2018		/s/James R. Th	euer				
FOR OFFICE USE ONLY							

DECEMBER AMOUNT ADMINISTED HIDGE MAG HIDGE