

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 VIRGINIA 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

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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.)

I. (a) PLAINTIFFS

Shean Emmons, John Gibson, Kevin Smith, Brian Fancher, Michael Winslow, and Christine Dosmann,

(b) County of Residence of First Listed Plaintiff Camden, NC (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

James R. Theuer
555 E. Main St., Ste 1212
Norfolk, VA 23510 (757)446-8047

DEFENDANTS

City of Chesapeake

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Labor Standards, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 U.S.C. § 216
Brief description of cause:
Unpaid overtime

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 07/24/2018 SIGNATURE OF ATTORNEY OF RECORD /s/James R. Theuer

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPROVED BY JUDGE MAG. JUDGE