

No.

IN THE
Supreme Court of the United States

JEFFREY ALLEN, *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether, under the Fair Labor Standards Act (the “FLSA”), 29 U.S.C. § 201, *et. seq.*, the Employer is required to pay its Employees for off-duty overtime work if the Employer has actual knowledge of that work.
- II. Whether, under the FLSA, the Employer is required to pay Employees for off-duty overtime work if the Employer has constructive knowledge of that work because its written policies and procedures prevent or discourage its Employees from reporting and being paid for that work.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, 50 Petitioners opted in to this cause in accordance with 29 U.S.C. § 213 of the FLSA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(b) and 29.6, Petitioners Jeffery Allen, *et al.*, make the following disclosures:
Petitioners are not a non-governmental corporation.

TABLE OF CONTENTS

	Page
APPENDIX TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	1
INTRODUCTION.....	4
STATEMENT OF THE CASE.....	6
A. Factual Background.....	6
B. Litigation Background.....	9
REASONS FOR GRANTING THE PETITION	10
ARGUMENT	11
I. THE SEVENTH CIRCUIT’S FINDING THAT THE EMPLOYER’S ACTUAL KNOWLEDGE OF OVERTIME WORKED DOES NOT TRIGGER LIABILITY IS IN CONFLICT WITH ESTABLISHED CASE LAW OF OTHER CIRCUIT COURTS AND IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT.....	11
II. THE SEVENTH CIRCUIT’S FINDING THAT THE EMPLOYER DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF OVERTIME WORKED, EVEN THOUGH ITS WRITTEN POLICIES PREVENT OR DISCOURAGE THE REPORTING OF OFF-DUTY WORK, IS IN CONFLICT WITH ESTABLISHED CIRCUIT COURT PRECE-	

DENT AND IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT.....	19
CONCLUSION.....	24

APPENDIX TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals for the Sev- enth Circuit, Order Denying Rehearing, dated September 11, 2017	1a
---	----

APPENDIX B

United States Court of Appeals for the Sev- enth Circuit, Panel Opinion, dated August 3, 2017	2a
---	----

APPENDIX C

United States District Court for the North- ern District of Illinois, Eastern Division, Memorandum Opinion and Order, dated December 10, 2015.....	23a
---	-----

APPENDIX D

Chicago Police Department General Or- ders, Compliance Statement, and Bureau of Organized Crime Memorandum on the Off- Duty Use of Department Issued BlackBer- rys	74a
--	-----

TABLE OF AUTHORITIES

CASES	Page
<i>Allen v. Bd. of Pub. Educ.</i> , 495 F.3d 1306 (11th Cir. 2007).....	passim
<i>Brennan v. General Motors Acceptance Corp.</i> , 482 F.2d 825 (5th Cir. 1973)	passim
<i>Barrentine v. Arkansas-Best Freight Sys.</i> , 450 U.S. 728 (1981).....	5,6
<i>Burry v. National Trailer Convoy, Inc.</i> , 338 F.2d 422 (6th Cir. 1964).....	16
<i>Chao v. Gotham Registry, Inc.</i> , 514 F.3d 280 (2d Cir. 2008).....	10,15,23
<i>Forrester v. Roth's I.G.A. Foodliner, Inc.</i> , 646 F.2d 413 (9th Cir. 1981)	13,14,17
<i>Gaines v. K-Five Constr. Corp.</i> , 742 F.3d 256 (7th Cir. 2014)	12,13
<i>Hertz v. Woodbury County</i> , 566 F.3d 775 (8th Cir. 2009)	14,15
<i>Holzapfel v. Town of Newburgh</i> , 145 F.3d 516 (2d Cir. 1998).....	10,16,17
<i>Kellar v. Summit Seating Inc.</i> , 664 F.3d 169 (7th Cir. 2011)	12,19
<i>Kuebel v. Black & Decker Inc.</i> , 643 F.3d 352 (2nd Cir. 2011).....	15,16,20
<i>Mumbower v. Callicott</i> , 526 F.2d 1183 (8th Cir. 1975)	16
<i>Newton v. City of Henderson</i> , 47 F.3d 746 (5th Cir. 1995)	14,15

<i>Nolan v. City of Chicago</i> , 162 F. Supp. 2d 999 (N.D. Ill. 2001)	4
<i>Pabst v. Oklahoma Gas & Elec. Co.</i> , 228 F.3d 1128 (10th Cir. 2000)	20,22
<i>Raczkowski v. TC Const. Co., Inc.</i> , 8 F.3d 29 (9th Cir. 1993)	13,14
<i>Reich v. Dep't of Conservation & Natural Res.</i> , 28 F.3d 1076 (11th Cir. 1994)	16
<i>Tony & Susan Alamo Foundation v. Sec. of La-</i> <i>bor</i> , 471 U.S. 290 (1985)	5
<i>White v. Baptist Mem'l Health Care Corp.</i> , 699 F.3d 869 (6th Cir. 2006)	passim

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1)	1
29 C.F.R. § 785.11	3,19
29 C.F.R. § 785.12	3,12
29 C.F.R. § 785.13	3,19,23
29 U.S.C. § 207	1
29 U.S.C. § 207 (a)	1,2,15
29 U.S.C. § 207 (k)	2
29 U.S.C. § 207 (k)	2
Fed. R. of App. Pro. 35(b)	9,10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (the “Seventh Circuit”) affirming the district court’s ruling is reported at 865 F.3d 936, and is included in the appendix hereto (“App.”) at 2a-22a. The United States District Court for the Northern District of Illinois’s Memorandum & Opinion entering judgment in favor of Respondent is reported at 2015 U.S. Dist. LEXIS 165906 & 2015 WL 8493996. 23a-73a.

JURISDICTION

Petitioners appealed the district court’s entry of judgment. App. 2a-3a. The ensuing opinion by the Seventh Circuit was rendered on August 3, 2017. App. 2a-22a. Petitioner’s timely petition for rehearing *en banc* was denied on September 11, 2017. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

STATUTES –

29 U.S.C. § 207 – MAXIMUM HOURS

29 U.S.C. § 207 (a), Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or

in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207 (k), Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975 . . . , compensation at a rate not less than one and one-half times the regular rate at which he is employed.

REGULATIONS –**29 C.F.R. §§ 785.11 to 785.13 –
EMPLOYEES “SUFFERED OR
PERMITTED” TO WORK**

29 C.F.R. § 785.11, General. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.12, Work performed away from the premises or job site. The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

29 C.F.R. § 785.13, Duty of management. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

INTRODUCTION

In a 2001 opinion, a Chicago district court noted that the City of Chicago: “has been unable, thus far, to implement an automated timekeeping system for police officers because of the complexities of computing overtime benefits.” *Nolan v. City of Chicago*, 162 F. Supp. 2d 999, 1001 (N.D. Ill. 2001). But not to worry. The opinion adds that the: “City continues to work towards a more automated system and hopes to phase in such a system within the next eighteen months to two years.” *id.* Fast forward sixteen years to 2017 and the Chicago Police Department (“CPD” or “Department”) is an agency in crisis. Manual, handwritten timekeeping is still in place. Chicago has a murder rate that dwarfs New York and Los Angeles, a disgracefully low clearance rate for those crimes, and a badly demoralized police department. Expecting and allowing its best and brightest officers in the Bureau of Organized Crime to work overtime and not get paid for that work has not helped matters.

The Bureau of Organized Crime is a prestigious, coveted assignment in the CPD. Meeting work expectations in that Bureau gets officers promoted. One of those expectations is a willingness to work off the clock, often with, or at the direction of, the Bureau’s command staff, and not request overtime pay for it. This off-the-clock work primarily takes place on CPD-issued BlackBerry devices. Chicago Police Commander Thomas Waldera testified that at least eighty percent of the meritorious selections for promotion to the rank of sergeant, detective, or lieutenant, come out of the Bureau of Organized Crime. He

added: “So I think there is an expectation that if you answer your BlackBerry, you do a good job . . . and I think people put up with this because they know if they – they know if they would get dumped out of the Organized Crime Division [now called the “Bureau of Organized Crime”] or leave voluntarily, it would hurt their chances for promotion.”

Before his promotion to the exempt rank of Commander, Waldera would handle an average of 100 off-duty emails and/or phone calls on his CPD-issued BlackBerry every day, amounting to 3-5 hours of off-duty work each day. Waldera testified that he never submitted an overtime slip for this work because he already averaged 15-20 hours of overtime a month and he believed it was his personal choice to not put an overtime slip in. Waldera had been one of the plaintiffs in this action, but dropped out after he was promoted to the FLSA-exempt rank of Commander before trial.

Commander Waldera was just one of several CPD supervisors who testified that they believed that they had a “right” or “discretion” to decide not to submit overtime slips when they performed work off-duty. The FLSA prohibits public employees from volunteering to perform for their employer the same type of services for which they are paid. See *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (“If an exception to the Act were carved out for employees willing to testify that they performed work ‘voluntarily,’ employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.”); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (“we have held that FLSA rights cannot be abridged by con-

tract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”) The Chicago Police Department’s Bureau of Organized Crime, with its work culture, mixed messages and contradictory orders, encourages it.

STATEMENT OF THE CASE

This Petition arises from a Fair Labor Standards Act collective action. Petitioners are current and former members of the Chicago Police Department’s Bureau of Organized Crime (“Bureau”) who claim that their employer, City of Chicago, did not compensate them for work they performed off-duty on their mobile electronic devices (“BlackBerries”).

A. Factual Background

On May 24, 2010, Jeffrey Allen (“Allen”), a sergeant in the Chicago Police Department (“CPD” or “Department”), filed a Complaint (“Complaint”) against Respondent, City of Chicago (“City”), alleging failure to pay overtime for the performance of off-duty work in accordance with the FLSA. In December of 2013, members from the Bureau joined the lawsuit and were conditionally certified as an FLSA Collective Class (“Petitioners”).

Months later, on October 13, 2010, the City issued General Order 98-07-09 (the “2010 General Order”), which “established the guidelines and responsibilities of members using Department-issued electronic devices.” App. 74a-75a. The 2010 General Order expressly forbid compensation for working on

the BlackBerry while off-duty except in very limited circumstances, stating:

Members accessing their Department e-mail account, responding to electronic messages, or using a Department-issued electronic communication device related to Department business will not be compensated unless the member is officially on a “call-back” assignment as defined by existing labor contractual agreements or the member is directed by their superior to immediately perform a substantial task with overtime authorization from the superior directing the request.

App. 74a-75a, Section III.C. The 2010 General Order also stated that “Department Members are not obligated or required to access, respond to electronic communications, and/or carry the devices on their person while off-duty.” *Id.* The Order did not prohibit or limit off-duty BlackBerry work. *Id.*, Section III.B.1.

As part of the 2010 General Order, members of the Bureau were required to sign a Compliance Statement, which contained the verbatim 2010 General Order compensation language, expressly forbidding compensation for off-duty BlackBerry use except in very limited circumstances. App. 76a-77a. The Compliance Statement did not contain the 2010 General Order’s language that members are, “not obligated or required to access” their BlackBerrys while off-duty. *Id.*

On August 7, 2013, the 2010 General Order was replaced by General Order G09-01-05 (“2013 General Order”), which expressly forbid off-duty

BlackBerry use and compensation altogether except for in limited circumstances:

Off-duty members will not use a Department-issued electronic communication device to access their Department e-mail account, respond to electronic messages, or perform other work related to Department business unless the member is officially on a “call-back” assignment as defined by existing labor contractual agreements or the member is directed by a supervisor to immediately perform any work and overtime is authorized by the supervisor directing the request. If there is a request and approval for overtime, the Department member must comply with the applicable Department directives concerning the submission of an Overtime/Compensatory Time Report (CPD-11.608). If overtime is not approved, the member is not to perform the work.

App. 78a-79a, Section III.C. The 2013 General Order also changed the 2010 General Order’s restriction of only compensating for a “substantial task.” *Id.*

On October 30, 2013, Chief Nicholas Roti, Commander of the Bureau of Organized Crime, drafted and distributed a Memorandum (“Roti Memo”) reminding Bureau members to “comply with the policies set forth in the ‘Policy’ section of” the 2013 General Order, and further reminding Petitioners that the Bureau has a Compliance Statement on file indicating compliance with Department policies. App. 80a-83a. The Memo was disseminated to subordinates in the Bureau. App. 80a-81a.

B. Litigation Background

On August 17, 2015, a bench trial was held before the Honorable Sidney I. Schenkier in the Northern District of Illinois in Chicago, Illinois. That trial lasted six days, concluding on August 24, 2015. On December 10, 2015, Magistrate Schenkier entered his Memorandum Opinion and Order finding on behalf of Respondent. App. 23a-73a. The district court's decision was a radical departure from the spirit and letter of the FLSA. Petitioners were found to have:

1. Met their burden of demonstrating that they performed compensable work off-the-clock, as Petitioners did;
2. Met their burden of demonstrating that their supervisors were sometimes aware they were performing the work; yet,
3. *Not* met their burden of demonstrating their employer knew or should have known they were not being compensated.

The district court also found that the Department's own written policies on off-duty BlackBerry use and compensation were merely "guidelines" and not applicable to the Petitioners' use of, and compensation for, off-duty BlackBerry work.

Petitioners filed a notice of appeal to the Seventh Circuit Court of Appeals on January 5, 2016. On August 3, 2017, the Seventh Circuit appeal was denied and the judgment of the district court affirmed. App. 2a-22a. Pursuant to Federal Rule of Appellate Procedure 35(b), Petitioners filed a Petition for Rehearing and Suggestion for Rehearing

En Banc of the panel's August 3, 2017, Opinion in this case. On September 11, 2017, that petition was denied.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision to follow a Sixth Circuit case, *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869 (Sixth Cir. 2006), presents a question of exceptional importance because it conflicts with other circuit court decisions, including *Chao v. Gotham Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008), *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2d Cir. 1998), *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306 (11th Cir. 2007), and *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973). Consideration by the United States Supreme Court is therefore necessary to resolve the conflict and maintain uniformity of the law.

There was no dispute that the City of Chicago had actual knowledge that Petitioners were working off-duty on their BlackBerrys. Nevertheless, the district and circuit courts here required Petitioners to also prove that Respondent knew, or should have known, that Petitioners were not reporting and not being paid for that work, in conflict with established circuit court precedent.

The appellate decision is in further conflict with other circuits because the CPD's written orders on off-duty BlackBerry use actually discouraged the Petitioners' reporting of overtime for that work. In spite of finding that those written orders "run flatly contrary to the Bureau's FLSA obligations," the circuit court incorrectly shifted the employer's obliga-

tion to monitor and control its employees' work from to the employees. App. 20a-21a. By ignoring the CPD written orders, the Seventh Circuit departed from precedent in other circuits by holding that the Respondent here did not have constructive knowledge of Petitioners' overtime work, even though its written orders discouraged Petitioners' reporting of overtime, contradicting *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, and *Brennan*, 482 F.2d 825.

ARGUMENT

I. THE SEVENTH CIRCUIT'S FINDING THAT THE EMPLOYER'S ACTUAL KNOWLEDGE OF OVERTIME WORKED DOES NOT TRIGGER LIABILITY IS IN CONFLICT WITH ESTABLISHED CASE LAW OF OTHER CIRCUIT COURTS AND IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

The Seventh Circuit Opinion contradicts established precedent in other circuit courts and ignores precedent in its own circuit. The Opinion creates a new burden that employees must meet before they can be paid for off-duty work. The Seventh Circuit held that not only must an employee prove that the employer had actual knowledge of the overtime work being performed, the employee must prove that the employer knew, or should have known, that the employee was not reporting and not being paid for the work:

[P]laintiffs emphasize that the Bureau knew they worked overtime on their BlackBerrys Plaintiffs also had to show that the Bureau actually or constructively knew they were not reporting that work. As we have explained,

that point does not win the case. The district court agreed that the Bureau knew about at least some off-duty BlackBerry work. But it also found that the Bureau did not know that such work was not being reported and paid. Repeating the former point does not respond to the latter.

App. 18a. Given that, the Seventh Circuit and trial court determined that the employer had actual knowledge that its employees were working while off-duty. App. 8a, 18a. However, contradicting precedent in other circuit courts, the Seventh Circuit held that the employer must have either actual or constructive knowledge that the employees were not reporting those hours in order to prove their case.¹

¹ The Seventh Circuit also contradicted its own established precedent. In both *Kellar* and *Gaines*, the Seventh Circuit held that employees meet their burden if they can prove that the employer had actual knowledge of work being performed, regardless of whether the employer knew, or should have known, that employees were not reporting, or being paid for, their overtime hours. See *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177-178 (7th Cir. 2011) “[N]o reasonable trier of fact could conclude that Summit had reason to know that Kellar was working before her shift . . . FLSA imposes an obligation on the employer ‘to exercise its control and see that work is not performed if it does not want it to be performed.’ . . . The employer ‘cannot sit back and accept the benefits without compensating for them. See 29 C.F.R. § 785.13.’” The employer’s “duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.”); *Gaines v. K-Five Constr. Corp.*, 742 F.3d 256 (7th Cir. 2014)(“While an employer cannot

Instead, the Seventh Circuit panel relied almost exclusively on *White*, 699 F.3d at 878, and set a new burden that employees must meet in order to be compensated for off-duty work even if the employer has actual knowledge of the off-duty work being performed. App. 5a, 12a-15a.

In *White*, the majority opinion held that “if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process.” 699 F.3d at 876. *White* focused on the Ninth Circuit Decision, *Forrester v. Roth’s I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981), to support its holding that the employer must have actual knowledge of overtime work *and* knowledge that the employee was not compensated for that work. Inexplicably, *White* cites *Forrester* via an unpublished Ninth Circuit Order, *Rackowski v. TC Const. Co., Inc.*, 8 F.3d 29 [published in full-text format at 1993 U.S. App. LEXIS 26257] (table) (9th Cir. 1993). *Rackowski* attributes the following analysis to *Forrester*: “The relevant knowledge is not ‘I know that the employee was working,’ but ‘I know the employee was working and not reporting his time.’” 699 F.3d at 875; 9TH

slyly sit back in order to reap extra work without pay, it has no obligation to pay for work it did not know about and had no reason to know about.” Accordingly, the only issue for review is whether Gaines has presented a genuine issue of material fact as to whether K-Five *knew* that Gaines worked an extra 15 minutes on certain days.).

CIR. R. 36-3. However, that analysis is nowhere to be found in *Forrester*. 646 F.2d 413.

Instead, *Forrester* supports the Petitioners' position in holding that:

an employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [the FLSA]. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, *even if the employee does not make a claim for the overtime compensation*.

However, where an employer *has no knowledge* that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of [the FLSA].

646 F.2d at 414 (*Emphasis added*). Both the Seventh Circuit and *White* claim to rely on *Forrester*. App. 5a. But, applying *Forrester* to the instant case would have resulted in a judgment for the Petitioners.

The *White* majority also relied on Fifth and Eighth Circuit cases that contemplate the *employer's constructive*, not actual knowledge, of employees working while-off duty. 699 F.3d at 874 (*Emphasis added*); *Hertz v. Woodbury County*, 566 F.3d 775, 781-82 (8th Cir. 2009) ("Access to records indicating that employees were working overtime, however, is not necessarily sufficient to establish constructive knowledge."); *Newton v. City of Henderson*, 47 F.3d

746, 749 (5th Cir. 1995)(“as a matter of law such ‘access’ to information does not constitute constructive knowledge that [the officer] was working overtime.”). Thus, the Sixth and Seventh Circuits are alone in their conclusion that the employee must prove that the employer knew that the employee was working *and* was not compensated for that work. 699 F.3d at 875. It is a substantial departure for the Seventh Circuit to disregard well-settled jurisprudence and rely instead on *White*.

Additionally, the majority in *White* inaccurately claimed that *Chao v. Gotham Registry, Inc.*, stood for the proposition that the employer is liable if it “had ‘full knowledge’ that its employees were working overtime and failed to compensate them.” 699 F.3d at 876. Instead, *Gotham Registry, Inc.*, held that the employer is liable if the employee “suffered or was permitted to work.” 514 F.3d at 287, 291(“Gotham is liable . . . if it suffered or permitted the nurses to work. . . . It follows that Gotham suffered or permitted the nurses’ overtime and, by failing to compensate them in accordance with 29 U.S.C. § 207(a), violated the [FLSA].”). *Gotham Registry, Inc.*, also found that even where an employee fails to report overtime worked, the FLSA requires the employer to compensate the employee for that overtime because an “employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance.” *Id.* at 288.

Moreover, numerous circuit court cases cited in *White* hold that an employee only needs to prove that the employer had actual knowledge of off-duty work, while none of those cases require the employee prove that the employer knew, or should have

known, that the employee was not compensated for that work. See *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 365 (2nd Cir. 2011); *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1314 (11th Cir. 2011); *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1083-84 (11th Cir. 1994); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975); *Burry v. National Trailer Convoy, Inc.*, 338 F.2d 422, 426 (Sixth Cir. 1964).

Furthermore, the *White* dissent correctly pointed out that the majority erred by “relying on cases analyzing evidence of *constructive* knowledge, which frequently do consider a plaintiff’s own failure to report hours, without first considering the evidence in support of *actual* knowledge.” 699 F.3d at 878 (Moore, J., dissenting)(*Emphasis in original*), see also *Id.* at 882-83 (None of the cases the majority relied upon “suggest that an employer *with actual knowledge* of overtime can defeat its obligations by pointing to incomplete time-sheets” or to the “employee’s failure to report hours *actually known to be worked* by the employer.”)(*Emphasis in original*).

Aside from the majority in *White*, circuit court precedent on the subject of knowledge uniformly holds that an “employer must pay its employees for any time the employer knows or should have known the employee is working, even if the employee fails to report the work.” 699 F.3d at 880(Moore, J., dissenting)(quoting *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998) (“[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours.”), *cert. denied*, 525 U.S. 1055 (1998); see also *White*, 699 F.3d at 881(Moore, J., dissenting) (“No

court has held that failing to report hours can defeat a claim under the FLSA where the employer had *actual* knowledge of the work performed. Holding otherwise would be akin to holding that an employee may waive FLSA protections by not reporting time her employer knows about, which would defeat the very purposes of the FLSA and be contrary to direct Supreme Court precedent.”).

The Seventh Circuit then cites *Forrester*, 646 F.2d at 414, for the proposition that employers who set up processes for reporting overtime can escape liability if plaintiffs do not use those processes, even though the panel’s quote from that case confirms that such a policy applies only “where an employer *has no knowledge* that an employee is engaging in overtime work . . .” App. 5a. (*Emphasis added*).

The Seventh Circuit reasoned that the facts in *White* parallel the facts in this case because both the Petitioners and the *White* plaintiff worked overtime “sometimes with their supervisors’ knowledge.” App. 13a. Describing the facts in *White* as similar or parallel to the facts presented in the instant matter is not appropriate. After all, the *White* plaintiff had a clear and unequivocal written policy regarding what she should do to get paid if she worked through her lunch break. The Petitioners in this case signed a Compliance Statement which explicitly informed them that they would not get paid for off-duty BlackBerry work, and Chief Roti issued a Memo telling the Bureau to follow the 2013 General Order. App. 76a-77a, 20a-21a. Petitioners here also were subject to General Orders that the Seventh Circuit described as appearing “to run flatly contrary to the Bureau’s FLSA obligations.” App. 20a-21a. In *White*, the plaintiff testified that “[f]rom time to time she

told her supervisors that she was not getting a meal break.” *White*, 699 F.3d at 872. Here, all Petitioners and most Bureau supervisors consistently testified that the employer knew that the Petitioners were working overtime. App. 8a, 13a, 18a, 31a-34a, 38a, 65a. The Seventh Circuit even acknowledged that Petitioners proved that the City had actual knowledge of Petitioners’ off-duty work. App. 8a, 13a, 18a.

The Seventh Circuit simply ignored the uncontroverted fact that the employer here had actual knowledge that Petitioners worked overtime, and instead applied what appears to be the “constructive knowledge” analysis as laid out in *White*.

This case is ripe for review because the Seventh Circuit is not at all clear on whether the heightened burden of proof in *White* is applicable when the employer has *actual knowledge* of the employees’ overtime work. Indeed, *White* is the only case the Seventh Circuit cites that might support such a finding. Instead, almost all of the Seventh Circuit’s analysis of case law outside of *White* focuses on cases involving *constructive knowledge*. App. 11a-13a. Petitioners request this Court grant their Petition, so that it can determine whether *White* should apply to cases such as this, where employees have proven that the employer has actual knowledge of its employees working off-duty.

II. THE SEVENTH CIRCUIT’S FINDING THAT THE EMPLOYER DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF OVERTIME WORKED, EVEN THOUGH ITS WRITTEN POLICIES PREVENT OR DISCOURAGE THE REPORTING OF OFF-DUTY WORK, IS IN CONFLICT WITH ESTABLISHED CIRCUIT COURT PRECEDENT AND IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

Petitioners argue that this Petition should be granted because the Respondent Employer’s written policies on off-duty BlackBerry use did, in fact, discourage and prevent Petitioners from reporting their overtime. The Petitioners have proven that the Respondent had constructive knowledge of off-duty BlackBerry work via Respondent’s written orders that discourage reporting such work. The Seventh Circuit cited one of its decisions, *Kellar*, for the proposition that the FLSA imposes an obligation on the employer to exercise control and see that work is not performed if it does not want it to be performed. App. 3a, citing 664 F.3d at 177 (employer cannot “sit back and accept” work without compensating it, even if employer has rules against overtime work), quoting 29 C.F.R. § 785.13. See also *Kellar*, 664 F.3d at 178 (“[a] court need only inquire whether the employer had the opportunity through reasonable diligence to acquire knowledge.”), citing 29 C.F.R. § 785.11.

Additionally, other circuits are unequivocal in holding that an employer is liable under the FLSA if it prevents or discourages accurate reporting of hours worked. In its Opinion, the Seventh Circuit cites decisions from the Fifth and Eleventh Circuits, *Brennan and Allen v. Board of Public Education re-*

spectively, for that proposition. App. 5a; *Brennan*, 482 F.2d at 827-828 (supervisors' insistence "that all work be completed within certain defined time limits . . . squelched truthful responses" in overtime reports.); *Allen v. Board of Public Education*, 495 F.3d at 1316 (employees were told that they should not record their overtime hours and that their employer would not pay overtime. Accurate time sheets were rejected, torn up, or edited.).

The Second and Tenth Circuits have also reached the same conclusion that an employer is liable if it has policies and practices in place that prevent employees from accurately reporting overtime hours. *See, e.g., Kuebel*, 643 F.3d at 356-57 (2d Cir. 2011) (employer did not allow the employee to report overtime); *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1133 (10th Cir. 2000) (Employer cannot claim lack of knowledge for employees' off-duty time spent monitoring their computers and pagers if its policy states that employees will only be paid for responding to an alarm.)

The Seventh Circuit here ignored established precedent in other circuits in affirming the district court's judgment in favor of the Respondent. Instead, the Seventh Circuit relied upon *White* for the proposition that employers can avoid liability if they set up a process for reporting overtime that the employees did not use. App. 4a.

Inexplicably, the Seventh Circuit does not ever contemplate if the City's written policies on off-duty BlackBerry work prevented or discouraged accurate reporting of hours worked. *See generally* App. 12a-22a. Five months after this lawsuit was filed in May of 2010, the City issued its 2010 General Order on off-duty BlackBerry use, which provided that Offic-

ers may work on their BlackBerrys while off duty, but expressly prohibited compensation for that work except in very limited circumstances. App., 74a-75a. As part of the 2010 General Order, Petitioners were required to sign a Compliance Statement. App. 9a, 76a-77a. The Compliance Statement contained the 2010 General Order language limiting compensation, but did not include the language that members are, “not obligated or required to access” their BlackBerrys while off-duty. App. 76a-77a.

The 2010 General Order was replaced by the 2013 General Order, which expressly forbid off-duty BlackBerry use altogether except for in circumstances where a member is on “call-back” or “directed by a supervisor to perform any work with overtime authorization from the superior directing the request.” App. 9a-10a, 78a-79a. While the 2013 General Order purported to prohibit BlackBerry work performed while off-duty, Petitioners and supervisors alike testified that the General Orders and the Compliance Statement did not change their obligation to monitor, review, and be responsive to their BlackBerrys while off-duty. App. 10a, 22a.

After the 2013 General Order was enacted, Chief Nicholas Roti, Commander of the Bureau of Organized Crime, drafted and distributed a Memorandum (“Roti Memo”) reminding the Petitioners to “comply with the policies set forth in the ‘Policy’ section of” the 2013 General Order, and further reminding Petitioners that the Bureau has a Compliance Statement on file indicating compliance with Department policies. App. 10a, 80a-83a. The Memo was disseminated to subordinates in the Bureau. App. 80a-81a.

Like the district court, the Seventh Circuit wrestled with the 2010 and 2013 General Orders (“Orders”), noting that the “language appears to run flatly contrary to the Bureau’s FLSA obligations.” App. 20a-21a. However, the Seventh Circuit agreed with the district court’s findings that they had no effect on Petitioners or their supervisors. App. 21a-22a. Petitioners take issue with that finding.

First, Petitioners who testified at trial repeatedly established that the Orders reaffirmed that they were not going to be paid for off-duty BlackBerry work. In fact, the Petitioners signed Compliance Statements, and Chief Roti issued the 2013 Memo explicitly stating that the Petitioners were to follow the policies set forth in the Orders. App. 76a-77a, 82-83a. For reasons unknown, in its analysis, the Seventh Circuit ignored the 2013 Roti Memo and mentioned the Compliance Statement only in passing. App. 20a. Indeed, the Roti Memo and Compliance Statement made it clear that the Bureau required that the Petitioners follow the 2010 and 2013 General Orders.

Instead of finding that Respondent is liable for the policies and practices set forth in its written policies, the Seventh Circuit shifted that obligation to the Petitioners. Viewing the General Orders, Compliance Statement, and Roti Memo, especially considering that they were all issued after the filing of the lawsuit, there is no uncertainty that the Respondent Employer attempted to avoid compensating Petitioners for their off-duty BlackBerry use. *Allen v. Board of Public Education*, 495 F.3d at 1316; *Brennan*, 482 F.2d at 827; *Pabst*, 228 F.3d at 1133.

Second, it is difficult to comprehend just how the Seventh Circuit concluded that the General Or-

ders having no effect on Petitioners' off-duty use of their BlackBerrys could, or should, favor the Employer here. As the Seventh Circuit noted, Petitioners consistently testified that they did not submit overtime slips for off-duty BlackBerry work. App. 20a. Also, the Seventh Circuit held that the General Orders did not change their lack of reporting of BlackBerry overtime. App. 21a-22a. The Seventh Circuit stated: "no plaintiff stopped submitting slips" because of the Orders. App. 21a-22a. Technically, the Seventh Circuit Court is correct. However, that is because, as Petitioners testified, and the district court confirmed, they were not submitting slips for off-duty BlackBerry use prior to, or after, the Orders were enacted. App. 20a. The Orders, at minimum, discouraged accurate reporting of overtime and confirmed what Petitioners already knew – the Respondent was attempting to avoid payment for off-duty BlackBerry use.

Plaintiffs are unaware of any case where a court ignored an employer's own written policies on overtime to the benefit of the employer, and imposed the obligation of receiving overtime compensation on the employee. "It is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. . . . *The mere promulgation of a rule against such work is not enough.* Management has the power to enforce the rule and must make every effort to do so." *Chao v. Gotham Registry, Inc.*, 514 F.3d at 288, quoting 29 C.F.R. § 785.13 (*emphasis in original*).

Here, not only did the Department's 2010 General Order severely restrict any chance of compensation for off-duty BlackBerry work, it did not even promulgate a rule prohibiting that off-duty

work. App. 74a-75a. Essentially, the Seventh Circuit rewarded the employer by allowing it to avoid any responsibility for its own written policies that “run flatly contrary to the Bureau’s FLSA obligations.” App. 20a-21a. Such a ruling conflicts with the purpose and protections of the FLSA.

Petitioners request this Petition be granted because Petitioners have proven the Respondent’s constructive knowledge of Petitioners’ off-duty BlackBerry work due to the Respondent’s discouragement of reporting overtime through its General Orders, Compliance Statements, and the Roti Memo.

CONCLUSION

For the foregoing reasons, Petitioners request this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Filed September 11, 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1029

JEFFREY ALLEN, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 10C3183 –

Sidney I. Schenkier, *Magistrate Judge*

September 11, 2017

Before

FRANK H EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

ORDER

On consideration of plaintiffs-appellants' petition for rehearing and rehearing en banc, filed on August 18, 2017, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition.

Accordingly, the petition for rehearing and rehearing en banc filed by plaintiffs-appellants is DENIED.

APPENDIX B

FILED AUGUST 3, 2017

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1029

JEFFREY ALLEN, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court For the
Northern District of Illinois, Eastern Division

No. 10C3183 –

Sidney I. Schenkier, *Magistrate Judge*

ARGUED APRIL 6, 2017 – DECIDED AUGUST 3, 2017

Before EASTERBROOK, MANION, and
HAMILTON, Circuit Judges.

Hamilton, *Circuit Judge*. This appeal arises from a Fair Labor Standards Act collective action. Plaintiffs are current and former members of the Chicago Police Department's Bureau of Organized Crime who claim that the Bureau did not compensate them for work they did off-duty on their mobile electronic devices (BlackBerrys). The case was tried to the court, Magistrate Judge Schenkier, presiding by consent under 28 U.S.C. § 636(c). The judge issued detailed findings of fact and conclusions of law in favor of the Bureau, finding that it did not prevent plaintiffs from requesting payment for such non-scheduled overtime work and did not know that plaintiffs were not being paid for it. Plaintiffs appeal,

but we find no persuasive reason to upset the judgment of the district court. We affirm the judgment for the Bureau.

I. The Fair Labor Standards Act

We begin by explaining the standards that apply under the Fair Labor Standards Act when an employer asserts that it did not know of the overtime work for which employees claim they were not paid. The Act, codified as 29 U.S.C. § 201 *et seq.*, requires employers to pay covered employees at one-and-a-half times their usual pay rate if they are employed for longer than a certain hourly threshold. That threshold is usually forty hours per week. § 207(a)(1). For law enforcement employees like these plaintiffs, the threshold is one hundred and seventy-one hours per twenty-eight day period. § 207(a)(1) & (k); 29 C.F.R. § 553.230(b).

The statute defines "employ" broadly, as "to suffer or permit to work." § 203(g). That broad definition is central to the purpose of the Act. It helps prevent evasion by employers who might seek to issue formal written policies limiting overtime that are widely violated, or who might deliberately close their eyes to overtime work their employees are doing. See *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (employer cannot "sit back and accept" work without compensating it, even if employer has rules against overtime work), quoting 29 C.F.R. § 785.13. Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work. *Id.*,

citing *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2d Cir. 2008). If the employer does not want to pay overtime, its management must "exercise its control and see that the work is not performed." 29 C.F.R. § 785.13.

That strict rule has a limit, however. It "stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." *Kellar*, 664 F.3d at 177. The employer's knowledge can be either actual or constructive. *Id.* An employer has constructive knowledge of an employee's work if it should have acquired knowledge of that work through reasonable diligence. *Hertz v. Woodbury County*, 566 F.3d 775, 781 (8th Cir. 2009).

One way an employer can exercise diligence is by establishing a reasonable process for an employee to report uncompensated work time. That principle has been at least implicit in our cases. In *Gaines v. K-Five Construction Corp.*, 742 F.3d 256, 271 (7th Cir. 2014), for example, we affirmed summary judgment for an employer that did not know the plaintiff was working overtime. We reasoned, in part, that although the employer gave its employees a form on which to record their time, the plaintiff did not use the form as intended: he noted the overtime in a margin note on the wrong part of the form and omitted it when completing the appropriate section. That misuse prevented an inference that the employer knew about the overtime. *Id.*

The Sixth and Ninth Circuits have been more explicit, affirming summary judgment for employers

who set up processes for reporting overtime that the plaintiffs did not use. *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012)(affirming summary judgment for employer: "When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee"); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (affirming summary judgment for employer: "where an employer has no knowledge that an employee is engaging in overtime work and that employee ... deliberately prevents the employer from acquiring knowledge ... , the employer's failure to pay ... is not a violation of [§] 207"). We agree with their reasoning.

But an employer's formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice. *White*, 699 F.3d at 876(distinguishing cases "where the employer prevented the employees from reporting overtime"). Such employer misbehavior might be overt. In *Allen v. Board of Public Education*, 495 F.3d 1306, 1316 (11th Cir. 2007), for example, plaintiff-employees were told that they should not record their overtime hours and that their employer would not pay overtime. Accurate time sheets were rejected, torn up, or edited. Or the employer might be more subtle. In *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 827 (5th Cir. 1973), the employees' jobs demanded "long and irregular hours," but their supervisors "insisted that all work be completed within certain defined time limits." The employer's

practices effectively "squelched truthful responses" in overtime reports. *Id.* at 827-28.

II. *Factual and Procedural Background*

With that legal background, we turn to the facts of this case, which comes to us following a trial to the court. We therefore review the district court's factual findings deferentially, and our account of the facts tracks its factual findings. See Fed. R. Civ. P. 52(a)(6) ("Findings of fact ... must not be set aside unless clearly erroneous ..."). We focus especially on the court's findings about the Bureau's knowledge of plaintiffs' overtime reporting, the issue central to the district court's decision and this appeal.

This case was brought by Jeffrey Allen and fifty-one other opt-in plaintiffs. Plaintiffs are current or former members of the Chicago Police Department's Bureau of Organized Crime. (Although the City of Chicago is the defendant here, the focus is on practices specific to the Bureau, though we must consider some actions of the larger Chicago Police Department.) The Bureau is a prestigious assignment for Chicago police officers. Its members conduct sophisticated investigations into, for example, gangs, narcotics trafficking, and human trafficking. Although members have scheduled shifts, the nature of their work sometimes requires them to work outside their shifts during what would otherwise be off-duty time. The police department issued plaintiffs mobile electronic devices (BlackBerrys), which they sometimes used in their off-duty work. This suit is over whether they were

appropriately compensated for off-duty work on their BlackBerrys.

The police department has a process that officers use to obtain overtime compensation: they submit "time due slips" to their supervisors. The slips are small; there is some space for explaining what work was done, and officers usually put a short, vague phrase in the space. The slip does not ask how the work was done, and officers do not typically include that information. Supervisors approve the time, and the slips are sent to payroll and processed. Plaintiffs regularly used that system; the fifty-two plaintiffs collectively reported and received pay for three to four thousand overtime hours per year from 2011 to 2014. But during the period relevant to this suit, many plaintiffs did not submit slips for off-duty work done on mobile electronic devices.

The central question in the trial court was whether plaintiffs were prevented or discouraged from submitting slips by an unwritten policy of the Bureau's.¹ The district court certified an FLSA collective action before discovery, then after discovery refused to decertify the collective action, denied summary judgment, and held a bench trial. After a six-day bench trial, the court ruled for the Bureau in a thorough memorandum opinion.

¹ Plaintiffs tell us that they did not specify whether the policy was written or unwritten; they attribute the "unwritten policy" framing to the district court. Plaintiffs' complaint did not refer to an unwritten policy, but their response to the Bureau's decertification motion did, as did their pre- and post-trial proposed findings of fact.

The court resolved several preliminary questions before addressing whether the Bureau had the unwritten policy plaintiffs alleged. The court agreed with plaintiffs that some of their off-duty BlackBerry activity was work that was compensable under the FLSA. It acknowledged evidence that Bureau supervisors knew plaintiffs sometimes worked off-duty on their BlackBerrys. But the court also found that the supervisors did not know or have reason to know that plaintiffs were not submitting slips and therefore were not being paid for that work. Although supervisors in theory could have checked what they knew of plaintiffs' off-duty work against the time slips they approved, the court found that requiring them to do so would be impractical: supervisors approved a large number of slips per day, and slips were sometimes submitted and reviewed well after the work was performed. Also, the court found, plaintiffs never told their supervisors that they were not being paid for such work.

The court then turned to the central question: whether plaintiffs had shown the existence of an unwritten policy not to compensate them for off-duty work performed on their BlackBerrys. It considered four categories of plaintiffs' evidence of such a policy: evidence of (1) a Bureau-wide belief that officers should not turn in slips for BlackBerry work; (2) written policies to that effect; (3) pressure to reduce overtime in general; and (4) pressure not to seek compensation for BlackBerry work in particular.

On the first point, the evidence was in conflict. Some plaintiffs testified that the Bureau's culture

would frown on submitting slips for BlackBerry work. But other Bureau officers, including some plaintiffs, submitted slips for such work and were never denied compensation. Some supervisors knowingly approved slips submitted for such work; others probably did so without knowing it since the slips did not indicate whether the work was done on a BlackBerry or not. No one ever told plaintiffs not to submit slips for that work, and no one was ever reprimanded or disciplined for submitting such slips. All told, the court concluded, the evidence did not bear out the common culture plaintiffs alleged.

Plaintiffs' second point focused on four documents. The first was a "General Order" issued by the Chicago Police Department in October 2010. The order established "guidelines and responsibilities" for officers using department-issued electronic devices. The order said that officers were not required to use such devices while off-duty. It said that officers would not be compensated for such use except in two circumstances: if the officer was on a "call-back" assignment (a term defined in collective bargaining agreements) or if a superior directed and authorized overtime for the work. The order also introduced the second significant document, a "Compliance Statement," to be signed when an officer received a device. By signing, the officer acknowledged that he would "not be compensated" for accessing the device off-duty except under the same circumstances explained in the order.

In 2013, the Department issued another General Order on the same topic. It repeated many of the 2010 Order's points word-for-word. But instead of

saying that officers would "not be compensated" for off-duty device use except under certain circumstances, it said that off-duty officers "will not use" devices except under those circumstances. The Bureau's chief issued a memorandum to the Bureau's deputy chief and commanders reiterating that the 2013 General Order applied to the Bureau, although he did not distribute the memorandum to lower-ranking officers.

The district court wrestled with the orders, noting confusion about what they were meant to accomplish and expressing disappointment that the Bureau never made a "simple written statement" on compensation of BlackBerry work. Despite the confusion, the court made two important findings. First, it rejected plaintiffs' trial position on the orders. Plaintiffs contended that the orders required them either to obtain a supervisor's approval before working overtime or to forgo compensation. The court disagreed, noting that the orders described themselves as "guidelines" and that neither plaintiffs nor the Bureau ever acted as though the orders required pre-approval of overtime. Second, in a lesson that might not surprise students of organizational behavior, the court found that the orders actually had no effect on plaintiffs or their supervisors. The judge emphasized the uniform testimony to that effect, as well as the witnesses' incomplete and inconsistent understandings of the orders' meaning. As a result, the judge found that the orders neither created a policy not to compensate plaintiffs nor reaffirmed an existing unwritten policy.

The third and fourth categories of plaintiffs' evidence posed fewer problems. The district court noted testimony that the Bureau sporadically tried to reduce its officers' overtime. Supervisors occasionally discussed the topic and sent emails to their subordinates about reducing overtime requests. This was not a concerted effort, and it was unsuccessful. Total overtime in the Bureau did not decrease, and plaintiffs' overtime increased over the relevant period. No plaintiff changed how he or she handled overtime slips for BlackBerry work because of these efforts. Nor did Bureau supervisors deter submission of slips for BlackBerry work. Plaintiffs cited two examples of alleged pressure, but both addressed overtime generally, not BlackBerry work specifically, and neither became common knowledge. Plaintiffs also emphasized that their supervisors did not tell them to submit slips for BlackBerry work, but the court found that the Bureau's overtime procedure did not require such directions. Officers usually submitted slips without being told to do so.

After its discussion of plaintiffs' arguments and the evidence, the court found that plaintiffs had not shown that the Bureau maintained an unwritten policy to deny them compensation for off-duty BlackBerry work. It ruled in the Bureau's favor.

III. *Analysis*

Plaintiffs convinced the district court that they worked overtime on their BlackBerrys. But plaintiffs also had to show that the Bureau actually or constructively knew they were not reporting that work. According to the district court, they failed. We

review the court's legal conclusions *de novo* and its factual findings for clear error. *Isby v. Brown*, 856 F.3d 508, 521 (7th Cir. 2017), citing *Ernst v. City of Chicago*, 837 F.3d 788, 795-96 (7th Cir. 2016).

Plaintiffs make two legal arguments: (1) that the district court's decision is unprecedented; and (2) that the district court misapplied the constructive knowledge standard. But their primary arguments are factual; they take an "any of the above" approach to challenging the district court, arguing that the Bureau actually knew about their underreporting, or should have known, or caused it. Because they rely on the same evidence to support each theory, we consider the theories together, although we do not consider several arguments made for the first time on appeal.

A. *Legal Error*

Plaintiffs believe three of the district court's findings make this case unique: (1) that plaintiffs performed compensable off-duty work; (2) that their supervisors knew about the work; and (3) that their supervisors neither knew nor should have known the plaintiffs were not compensated for that work. No case in this or any other circuit, they claim, shares those features. That is not correct. The district court cited such a case, which plaintiffs do not attempt to distinguish: *White v. Baptist Memorial Health Care Corp.* The plaintiff in that case, a nurse, was not compensated for her meal breaks because she usually did not work during them. 699 F.3d at 872. If the meal break was interrupted by work, she and her co-workers were supposed to record their work in a

log book to be paid for the time. The employer also had a procedure employees could use to report payroll errors. The plaintiff did not use either process but later sued to be paid for interrupted meal breaks. *Id.* at 872-73. Even though she sometimes told her supervisors that she worked during her meal breaks, the district court granted summary judgment for the employer and the Sixth Circuit affirmed. The court reasoned that the plaintiff never told anyone that she was not being paid for missing her meal breaks, even though her employer had a reporting system and did not prevent her using it. *Id.* at 876-77.

White parallels what the district court found happened here. Plaintiffs in this case, like the nurse in *White*, worked time they were not scheduled to work, sometimes with their supervisors' knowledge. They had a way to report that time, but they did not use it, through no fault of the employer, according to the district court's factual findings. Reasonable diligence did not, in the district court's view, require the employer to investigate further. Since, as we explain below, we see no clear error in that view of the facts, we see no legal error in reaching the same conclusion as the *White* court.²

² The *White* panel was divided on whether the case should have been resolved on summary judgment. See *White*, 699 F.3d at 879-84 (Moore, J., dissenting). In this case the trial record reveals genuine issues of material fact that could not have supported summary judgment.

Plaintiffs also claim that the district court misapplied the concept of constructive knowledge, but they are not clear about what the court's error was. Plaintiffs seem to contend that constructive knowledge should be found whenever the employer could have known about uncompensated work through, for example, examining all its records. In this case, the Bureau could have discovered plaintiffs' uncompensated BlackBerry work by comparing the time slips to call and email records the BlackBerrys generated, and so (plaintiffs reason) it should be deemed to have had constructive knowledge of the unpaid work.

The Bureau contends that we need not address that argument. It reads *White* to hold that an employer's constructive knowledge is categorically irrelevant if its employee has intentionally falsified his time records. *White* did not go that far. It held that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." *Id.* at 876. But *White* distinguished cases in which "the employer prevented the employees from reporting overtime or were otherwise notified of the employees' unreported work," and listed several such cases. *Id.* (collecting cases). The Bureau believes the court's "otherwise notified" language means that only an employer's actual knowledge suffices. But *White*'s list of example cases included *Reich v. Dep't of Conservation & Natural Resources*, 28 F.3d 1076, 1083-84 (11th Cir. 1994), which the *White* court characterized as a case in which the "employer had constructive knowledge." 699 F.3d at

876. That undercuts the Bureau's broad interpretation.

Moreover, such a broad interpretation of *White* equates reasonable diligence with a reasonable reporting process, implying that all an employer ever needs to do is establish a reasonable process for reporting overtime. We see no need to create such a blanket rule. The requirements of reasonable diligence depend on the facts of each case. *White* did not change that, and neither do we.

Nor do we accept plaintiffs' position, which would break still more sharply with established precedent. The reasonable diligence standard asks what the employer should have known, not what "it could have known." *Hertz*, 566 F.3d at 782, citing *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997); *Craig v. Bridges Brothers Trucking LLC*, 823 F.3d 382, 392 (6th Cir. 2016) ("Some cases may lend themselves to a finding that access to records would provide constructive knowledge of unpaid overtime work, but that is not a foregone conclusion.") (quotation omitted); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (holding, as a matter of law, that employer's access to records reflecting uncompensated overtime "does not constitute constructive knowledge"). The district court applied that standard correctly here.

B. Waiver

It is "well settled that arguments presented for the first time on appeal are waived." *Bailey v. International Brotherhood of Boilermakers, Iron*

Ship Builders, Blacksmiths, Forgers and Helpers, Local 374, 175 F.3d 526, 529 (7th Cir. 1999). That rule serves several important purposes, including that it keeps appellate courts from resolving questions "that require the factfinding abilities of the district judge." *Id.* at 530. The rule also protects both parties' ability to present evidence in support of their positions. See *Singleton v. Wulff*, 428 U.S. 106, 119-21, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (reversing "unacceptable" appellate court decision to proceed to merits questions not considered in trial court in part because losing party "has had no opportunity" to offer evidence or arguments); cf. *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015) (divided panel debating appropriateness of appellate court conducting its own factual research), rehearing en banc denied by equally divided court, 2015 U.S. App. LEXIS 23072, 2015 WL 10767326 (7th Cir. Dec. 7, 2015).

On appeal, plaintiffs have argued new factual theories, including interpretations of the evidence not argued to the district court.³ They argue, correctly, that we have discretion to consider arguments raised for the first time on appeal. See *County of McHenry v. Insurance Co. of the West*, 438 F.3d 813, 820 (7th Cir. 2006). We use that discretion rarely, however, when the waiver "has caused no one—not the district judge, not us, not the

³ The Bureau raised the waiver issue in its appellate briefing; in their reply, plaintiffs asserted that the allegedly waived issues "were raised, often repeatedly, during the trial." They did not cite the record to support that claim, and our review of the record produced no support for it.

appellee—any harm of which the law ought to take note." *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993). We may use it "to entertain arguments that turn on pure issues of law," particularly arguments that would have been foreclosed in the district court by binding precedent. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc). Plaintiffs' arguments are not in that category. They would require us in effect to retry the case on a cold record. We do not consider them.

That decision covers two of plaintiffs' arguments. They argued on appeal that their complaint gave the Bureau actual knowledge that they were working without compensation; they did not make that argument to the district court. They also argued on appeal that the Bureau's culture discouraged compensation for all "not significant" overtime—short-duration work, work on administrative tasks, and work performed from home. But in the district court, they argued only that the Bureau discouraged compensation for work done on a BlackBerry. They did qualify that argument, conceding that the Bureau would compensate certain kinds of BlackBerry work, including long stretches of work. But the broader argument that all insignificant overtime was forbidden is new on appeal.

C. Factual Errors?

We turn to the factual arguments that are properly before us. Plaintiffs argue that the district court got the facts of this case wrong—that it clearly erred by holding that the Bureau did not actually or

constructively know they were underreporting their overtime or pressure them to do so.

We reject these arguments. First, plaintiffs emphasize that the Bureau knew they worked overtime on their BlackBerrys. As we have explained, that point does not win the case. The district court agreed that the Bureau knew about at least some off-duty BlackBerry work. But it also found that the Bureau did not know that such work was not being reported and paid. Repeating the former point does not respond to the latter.

Second, plaintiffs emphasize that their supervisors did not tell them to submit slips for BlackBerry work. But supervisors did not give those instructions for any particular type of work. As the district court found, plaintiffs and other officers knew the procedures for claiming overtime pay and used them without regular reminders.

Third, plaintiffs point out that supervisors remembered approving very few slips for BlackBerry work and that the Bureau was not able to produce many slips submitted for that work. True, but as the district court found, that was because slips need not and usually did not say how work was done.

Fourth, plaintiffs argue that the Bureau could and should have cross-referenced slips that had been submitted against either phone records or supervisors' knowledge of overtime to ensure that its employees were reporting their time correctly. Plaintiffs cite supervisors who said that they

regularly looked at slips and called plaintiffs' proposal "possible." Those citations in plaintiffs' appellate brief edit out contrary testimony describing plaintiffs' proposal as "burdensome" and "an impossible task."⁴ Given that testimony, the district court reasonably found that plaintiffs' proposal was "extremely impractical."

Finally, plaintiffs attempt to undercut the force or credibility of various evidence, pointing out, for

⁴ Elsewhere in their brief, plaintiffs selectively quote a former chief of the Bureau. The witness explained that when he was non-exempt, he sometimes would not submit overtime slips for short work sessions. He was asked if that was how to get ahead in the Chicago Police Department. Plaintiffs quote part of his reply, implying his answer was equivocal agreement: "I think you get ahead by, if you want to—I think it's just hard work. And if that's part of hard work in getting the job done, maybe." But his full reply was, "No, I don't think so. I mean, I don't think anyone—honestly, I don't think anyone really keeps that close a track of that. I think you get ahead by, if you want to—I think it's just hard work. And if that's part of hard work in getting the job done, maybe. But just the fact that, oh, I worked overtime, didn't put a slip in, there's guys in these units, Detective Division and in Organized Crime, that have prolific amounts of overtime, and they still get promoted and get ahead." This court has cautioned counsel to be conscientious when editing quotations to avoid giving the appearance of trying to mislead the court. See *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1069 (7th Cir. 2000); *United States v. Burrell*, 963 F.2d 976, 983-84 (7th Cir. 1992); *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291, 1297 n.14 (7th Cir. 1987).

example, that one supervisor testified that her subordinate submitted slips for phone calls but did not produce those slips, that another testified about a misdated slip and others submitted recently, and that a third was not sure whether his subordinate's off-duty phone calls were made on his BlackBerry. Plaintiffs also point out that the district court mistakenly implied that a particular person testified when in fact someone else testified about him. This is not the stuff from which clear errors are made. We do not sit to re-weigh the district court's plausible findings about credibility, much less the occasional scrivener's error. See *TABFG, LLC v. Pfeil*, 746 F.3d 820, 823 (7th Cir. 2014) (clear error standard requires special deference to the district court's determinations of credibility); *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1028 (7th Cir. 2002) (clear error standard does not permit reversal based on reweighing evidence), quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

We do not mean to imply that plaintiffs had no evidence in their favor. As the district court found, "many plaintiffs credibly testified that they did not submit" slips for off-duty BlackBerry work. Some said that was because of the Bureau's culture or out of concern for their positions. One plaintiff, a supervisor, told his subordinates that others might frown on such slips. We are especially troubled by the 2010 General Order and the accompanying compliance statement, which announced that employees "will not be compensated" for BlackBerry work except under certain circumstances. That language appears to run flatly contrary to the

Bureau's FLSA obligations.⁵ The Bureau says that the order still permitted compensation in most circumstances, but that argument is cold comfort: the Bureau cannot refuse to compensate any of its employees' work. If the Bureau had won summary judgment, or judgment as a matter of law, this appeal would present very different issues.

But having correctly proceeded to trial, the district court was not obliged to resolve conflicts in the evidence in plaintiffs' favor. And there were conflicts in the evidence. While witnesses blamed the Bureau for their reluctance to submit overtime slips, they could not point to anything the Bureau did to cause that reluctance—not instructions, discipline, or reprimands. Some officers did submit slips for BlackBerry work, and the Bureau paid them.⁶ As for

⁵ The trial testimony also reflected some employee confusion about the circumstances in which they needed to submit slips. One can certainly argue that an employer has not created a reasonable reporting system—has not been reasonably diligent—if its employees do not know when to use that system. See *Craig*, 823 F.3d at 390 (reversing summary judgment for employer in part because it was "unclear whether Craig even knew she was allowed to petition for overtime compensation at all"). But that was not plaintiffs' theory at trial, so the district court did not and we do not draw any conclusions from that testimony.

⁶ Plaintiffs explain this evidence with a more elaborate version of their unwritten-policy theory. On this account, the Bureau's unwritten policy had (at least) two exceptions: it would pay for BlackBerry work so long as the work session was long enough or the work was part of an "official assignment" (an undefined term). At some

the General Orders, the district court found that no plaintiff stopped submitting slips and no supervisor refused to approve slips because of them. Plaintiffs point to no contrary evidence on appeal. As unfortunate as the Bureau's phrasing was in the General Order, we are not "left with the definite and firm conviction that a mistake has been committed." *Furry v. United States*, 712 F.3d 988, 992 (7th Cir. 2013) (defining clear error) (citation omitted).

The judgment of the district court is AFFIRMED.

point, elaborating a theory to avoid bad facts looks like *post hoc* rationalization—the equivalent of Ptolemaians adopting epicycles to fit their geocentric theory to inconvenient facts instead of adopting Copernican heliocentrism. The court was not obliged to accept plaintiffs' explanations.

APPENDIX C

Filed December 10, 2015

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEFFREY ALLEN,	)	
Individually and on	)	
behalf of other	)	
similarly situated	)	
employees of the	)	Case No. 10 C 3183
Chicago Police	)	
Department,	)	Magistrate Judge
	)	Sidney I. Schenkier
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF CHICAGO	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER¹

Jeffrey Allen, a sergeant in the Chicago Police Department ("CPD"), filed this action on May 24, 2010, on behalf of himself and current and former police personnel assigned to CPD's Bureau of Organized Crime ("BOC") (collectively, "plaintiffs")

¹ On December 21, 2010, by consent of the parties and pursuant to 28 U.S.C. § 636(c) and Local Rule 73.1(b), this case was assigned to this Court for all proceedings, including entry of final judgment (docs. ## 35, 38).

against the City of Chicago ("the City"). In their complaint (amended on October 5, 2010), plaintiffs allege that the City willfully violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* Plaintiffs allege that CPD required them to use their BlackBerry devices to be available to access work-related emails, phone calls and messages while they were off duty, and that they in fact received many such communications and performed work using their BlackBerry devices while off duty. Plaintiffs allege they were not compensated for the work involved in receiving and following up on these communications, because CPD maintained an unwritten policy to deny plaintiffs compensation for off-duty work they performed on their CPD-issued BlackBerry devices (doc. # 25: Am. Compl. ¶¶ 2, 17).

On March 15, 2011, the Court denied a motion to dismiss. *Allen v. City of Chicago*, No. 10-3183, 2011 U.S. Dist. LEXIS 27137, 2011 WL 941383 (N.D. Ill. Mar. 15, 2011). Thereafter, on January 14, 2013, the Court granted conditional certification of the following opt-in class:

A Sworn Member at or below the rank of Lieutenant who has been employed by the Chicago Police Department in the Bureau of Organized Crime, and who has been in possession of a Department issued BlackBerry Device and who has worked a minimum of 171 hours, including uncompensated off duty hours, over a twenty-eight (28) day pay period at least once during the past three years; and has used a Department issued BlackBerry for work purposes while off-duty during at

least one of the aforementioned pay periods.

Allen v. City of Chicago, No. 10-3183, 2013 U.S. Dist. LEXIS 5394, 2013 WL 146389, at *1 (N.D. Ill. Jan. 14, 2013).

Notice of the lawsuit and consent forms were mailed to potential class members on February 27, 2013. Seventy-five persons returned signed consent forms opting to join this action. On January 31, 2014, we dismissed twenty-three of those persons for want of prosecution due to their failure to respond to discovery requests (doc. # 115). In addition, Sgt. Maureen Laurich requested to withdraw as a plaintiff in this case on August 3, 2015 (docs. ## 188, 189). We granted her request and terminated her as a plaintiff in this case on August 5, 2015 (doc. # 190). Thus, fifty-one plaintiffs, consisting of patrol officers, sergeants and lieutenants who were issued a BlackBerry while working in the BOC, remain in the case.

On October 22, 2014, after completion of discovery, we denied the City's motion to decertify the conditional class. *Allen v. City of Chicago*, No. 10-3183, 2014 U.S. Dist. LEXIS 150308, 2014 WL 5461856 (N.D. Ill. Oct. 22, 2014). On March 9, 2015, in an oral ruling, the Court denied the City's motion for summary judgment (doc. # 172). At that time, the Court bifurcated the case and set the matter for trial on the threshold issue of whether the CPD maintained an unwritten policy not to pay plaintiffs for compensable work performed outside of normal work hours on their CPD-issued BlackBerry devices.

Twenty-four witnesses testified at the trial, which ran from August 17 to August 21, 2015, with

closing arguments on August 24, 2015.² Both sides submitted proposed findings of fact and conclusions of law before trial (docs. ## 191, 192), as well as revised proposed findings of fact after the trial (docs. ## 217, 218).

This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). The Court has considered and weighed all admissible evidence, including the testimony of witnesses and the exhibits admitted at trial, and we have adopted certain proposed findings only to the extent they are supported by the evidence presented at trial, as described below. To the extent that any of the Court's findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are adopted as such.

LEGAL STANDARD

We begin with a brief overview of the governing legal principles (some of which we will discuss more fully below), which will provide context for the findings of fact that follow.

The FLSA's overtime provision requires that employees receive a premium wage (one and one-half

² Witnesses consisted of various sergeants and lieutenants who are plaintiffs in this case as well as commanders and other lieutenants who testified in their role as supervisors of various plaintiffs. In addition, the Court accepted into evidence the parties' designations from plaintiff Patrol Officer Vincent Mancini's deposition transcript, because he could not appear at trial due to illness.

times the regular rate of pay) for each hour of overtime that they work. For many employees, the requirement to pay overtime is triggered when a person is "employ[ed] for more than forty hours in one work week. 29 U.S.C. §§ 206(a), 207(a). Employees of a public agency who are engaged in law enforcement activity -- as are plaintiffs here -- earn overtime on a different basis: they are entitled to receive overtime for all "hours worked" in excess of 171 hours during a 28-day work period. 29 C.F.R. § 553.230(c).³ The FLSA defines the term "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g), but the Act does not define "work." The Supreme Court has filled that gap, explaining that "work" is an activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) (internal citations and quotations omitted).

To succeed on their FLSA claim, plaintiffs must prove, by a preponderance of the evidence, that they performed overtime work for which they were not properly compensated. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 173 (7th Cir. 2011); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507-08 (7th Cir. 2007) (holding that in FLSA overtime case, like in other federal civil cases, the burden of proof is proof

³ Although the Department of Labor's interpretative regulations do not have the force of binding law, courts may rely on them as "persuasive evidence both of Congress's legislative and the Secretary [of Labor]'s regulatory intent." *Blakes v. Ill. Bell Tel. Co.*, 77 F. Supp. 3d 776, 781 n.2 (N.D. Ill. 2015) (quoting *Howard v. City of Springfield*, 274 F.3d 1141, 1146 (7th Cir. 2001)).

by a preponderance of the evidence). In addition, plaintiffs must show that the City had actual or constructive knowledge that plaintiffs worked overtime without compensation because "the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." *Kellar*, 664 F.3d at 177 (citing 29 U.S.C. § 203(g) ("Employ' includes to suffer or permit to work."); 29 C.F.R. § 785.11 ("The employer knows or has reason to believe that he is continuing to work"))).

FINDINGS OF FACT

As explained above, the trial focused on the question of whether the City maintained an unwritten policy to deny plaintiffs payment for compensable off-duty work they performed on their CPD-issued BlackBerry devices. Below, we set forth our findings of fact, which were proven by a preponderance of the evidence at trial, relating to the existence or non-existence of this alleged unwritten policy.⁴

I.

Plaintiffs are (or, at the relevant time, were) members of the Bureau of Organized Crime. Former Chief of BOC, Nicholas Roti, testified that the number of sworn police officers assigned to BOC was "generally in the nine hundreds" (Tr. 991-92). BOC is

⁴ As used in these Findings and Conclusions, "JX" refers to the joint exhibits admitted into evidence, "PX" refers to plaintiffs' exhibits admitted into evidence, and "DX" refers to defendant's exhibits admitted into evidence.

a "no-bid" unit within CPD, meaning BOC members are assigned to the bureau at CPD's discretion. The BOC is a prestigious, coveted assignment. The work of BOC is widely considered the highest level work within CPD, and an important stepping stone to further advancement.

The BOC is comprised of four divisions: Gang Enforcement, Gang Investigations, Narcotics, and Vice and Asset Forfeiture. Each division is headed by a commander, who supervises one to three lieutenants; each lieutenant, in turn, supervises approximately ten to forty sergeants. Each sergeant supervises a group of patrol officers. Each division commander typically reports to the deputy chief of BOC, who in turn reports to the chief of BOC. The lieutenants, sergeants and patrol officers work in different locations in and around Chicago, depending on the geographic areas to which they are assigned.

The Gang Enforcement division primarily functions as a street-level tactical unit that responds to front-line gang activities in real time. Sixteen of the plaintiffs currently work or have worked in this division, including several who testified at trial: Lt. Nathan Hamilton, Sgt. Maurizio Inzerra, Sgt. Robert Lohman and Sgt. Joseph Schachelmayer.⁵

The Gang Investigations division primarily focuses on conducting sophisticated, longterm investigations of gangs and gang members. Twelve plaintiffs currently work or have worked in the Gang Investigations division, including several who

⁵ Some plaintiffs -- such as Sgt. Inzerra -- worked in more than one division during the relevant time period.

testified at trial: Sgt. James Fiduccia, Sgt. Inzerra, Sgt. Darrell Spencer and Sgt. James Washburn.

The Narcotics Division primarily focuses on street-corner, mid-level and high-level narcotics trafficking, but also conducts longer term investigations. Nineteen plaintiffs currently work or have worked in the Narcotics division of BOC, including a number who testified at trial: Sgt. Jeffrey Allen, Lt. Robert Cervenka, Sgt. George Karuntzos, Sgt. James Padar, Sgt. Laurence Stec and Sgt. Brad Williams.

The Vice and Asset Forfeiture division deals with prostitution and human trafficking, and handles and processes assets recovered by officers in BOC and other CPD units. Seven plaintiffs currently work or have worked in this division, including two who testified at trial: Sgt. Allen and Sgt. Diego Flores. The CPD routinely assigns BOC officers to work on joint task forces with federal, state and county law enforcement agencies.

II.

The lieutenants, sergeants and certain patrol officers within BOC are issued BlackBerrys, which they use to assist them in performing work both on and off duty, primarily through telephone and email communications. Plaintiffs presented evidence that they regularly communicate both on and off duty via their CPD-issued BlackBerrys with their superiors, their subordinates, confidential informants ("CIs") and other law enforcement agencies in conjunction with police investigations.

In addition to plaintiffs' testimony, their attorneys assembled a binder of "Email Exemplars" (PX1) and "Phone Record Exemplars" (PX2) in an

attempt to demonstrate that plaintiffs performed work activities, within the meaning of the FLSA, on their BlackBerrys. While some of the emails in PX1 were brief, merely informational, and plainly did not require an immediate response, other emails required plaintiffs -- while off duty -- to follow up by communicating with other officers or performing additional research. For example:

- Lt. Cervenka received and responded to emails from the Chief Roti while he was off duty, asking if Lt. Cervenka's team was heading to the scene of a police shooting (PX1-014, PX1-018). Lt. Cervenka testified that he had to contact people on his team after receiving such emails (Tr. 500).
- Sgt. Fiduccia received and responded to emails off duty from Lt. James Sanchez regarding the need for him to keep an eye on a particular district and have his guys "play" and "monitor" certain areas (PX1-021). Sgt. Fiduccia also received emails about shootings while he was off duty from Cmdr. Christopher Kennedy (PX1-026-028, 032-033) and from Lt. Scott Dedore (PX1-029-030). Sgt. Fiduccia testified that he made telephone calls in conjunction with email exchanges like this to gather information for his superiors as soon as possible (Tr. 152-54).
- Sgt. Inzerra received an email from Lt. Sanchez when he was on furlough (PX1-054). Sgt. Inzerra's response required him to reach out to everyone on his team (Tr. 415-16).
- Sgt. Karuntzos received some emails requiring follow up from other agencies as a result of his joint task force activities. One example was an email from James Walsh of the Department of Justice requesting advice, to which Sgt. Karuntzos

responded that he "will discuss it" and get back to Mr. Walsh (PX1-068). Sgt. Karuntzos testified that in addition to responding via email, he was required to make additional telephone calls and perform other follow up (Tr. 369).

- Sgt. Lohman received emails while he was off duty from then-Lt. (and former plaintiff) Thomas Waldera regarding late evening shootings, in response to which Sgt. Lohman had to promptly arrange his team's response (PX1-083, 086, 088).
- Sgt. Schachelmayer responded to requests by Lt. Waldera to gather information on certain warrants, contraband and investigations while Sgt. Schachelmayer was off duty, and to a request by Cmdr. Leo Schmitz on a Sunday to make sure his teams were placed to assist in a possible increase in shootings (PX1-103-04, 108). Sgt. Schachelmayer testified that he needed to promptly make follow-up telephone calls and emails in response to these emails from his superiors (Tr. 526-27).
- Sgt. Spencer received an email from Lt. Sanchez telling him to reach out to his CI and get an update while Sgt. Spencer was off duty (PX1-113). Sgt. Spencer testified that he had to review additional emails and make work-related telephone calls in response to this email (Tr. 558).
- Sgt. Stec conducted follow up in response to an email he received while off duty from Cmdr. Eric Carter regarding narcotics complaints from an alderman (PX1-125).

Other plaintiffs were required to perform substantial off-duty work using their BlackBerrys due to their unique positions within BOC. Sgt. Washburn testified that as the only supervisor in the

"tech lab" at BOC, he was obligated to be available and responsive on his BlackBerry at all times to assist in other police officers' investigations by retrieving video and "pinging" -- or locating -- telephones. PX1 contains several emails to and from Sgt. Washburn that required him to respond while he was off duty (*see, e.g.*, PX1-133, 138, 142). Likewise, Sgt. Williams testified that he held a unique position as supervisor of a Midwest HIDTA ("High Intensity Drug Trafficking Area") task force that required him to be available on his BlackBerry to be ready to assist in the interception of packages containing suspected contraband at any time. PX1 contained examples of these types of communications that he in fact received (*see, e.g.*, PX1-149, 152).

Plaintiffs routinely kept their BlackBerry telephone ringer on while they were off duty, including during the night. Most plaintiffs testified that they felt obligated to "monitor" their BlackBerrys while off duty in case they received a telephone call from someone that required an immediate response. They would endeavor to answer every call they received on their Department-issued BlackBerry, because that was the means by which they would likely be contacted if there was an emergency that required their immediate response, whether the calls came from their supervisors, subordinates, other agencies or CIs. When they received these calls, plaintiffs testified that they often had to respond not only to the individual calling them, but that they also had to perform

additional follow-up action, including follow-up calls and research.⁶

That said, many emails plaintiffs received off duty did not require them to respond while they were off duty. In addition, some of the plaintiffs' responses to emails received while off duty consisted of little or no follow-up work. Sgt. Stec testified that his off-duty responses did not always consist of any follow-up work (Tr. 672-73), and Sgt. Inzerra testified that some of his email responses consisted of only quick, one-minute responses (Tr. 434).

Several BOC members -- including Lt. William Kilroy, Chief Roti, and Sgts. Inzerra, Padar and Schachelmayer -- testified that they regularly turned off the email notification feature on their BlackBerrys at night or kept their BlackBerrys out of their bedroom so that they would not interfere with their sleep. In addition, Sgt. Flores testified that he turned his BlackBerry off while he was on furlough (Tr. 469-70). Sgt. Stec received emails from his supervisor indicating that he could wait until he was on duty to respond (PX1-128, 130).

Other plaintiffs testified that they ignored Mass Crime Prevention and Information Center ("CPIC") emails while off duty. CPIC emails describe crimes or potential crime-related incidents and other emergency situations that occur City-wide. These

⁶ The BlackBerry telephone records in PX2 did little to give context to these calls, as most plaintiffs testified that they simply assumed that the telephone calls to their BlackBerry numbers were "work-related," and they could only guess at the source of the telephone numbers listed. We therefore do not find the call records in PX2 to be persuasive evidence of off-duty work.

emails are sent to hundreds of CPD members, including certain command level and supervisory BOC officers. Sgt. Allen programmed his BlackBerry so that he would not receive notifications of CPIC emails, and Sgt. Karuntzos testified that he had not received CPIC emails for several years. Of the plaintiffs who testified, only Sgts. Fiduccia, Lohman, Schachelmayer and Williams said they felt obligated to read CPIC emails off duty, in order to track and provide information about violence in their areas of investigation; but, they usually did not perform any immediate follow-up work after reviewing the CPIC emails.

The evidence established that plaintiffs did not use their BlackBerrys solely, or even principally, as a device to allow for off-duty work. However, the evidence showed that the BlackBerry devices were a primary means of communication with their teams, supervisors, subordinates, CIs and other agencies. While not every response to a phone call, or review or follow up on an email, constituted compensable work activity, we find that plaintiffs have proven that at least some of their off-duty BlackBerry activity qualifies as such.

III.

CPD has a long-established process for police officers to use when seeking overtime compensation. CPD's process requires officers to fill out and submit "time due slips" (*i.e.*, "overtime/compensatory time reports") to their supervisors for work they perform while off duty. The overtime slips are then processed through payroll to ensure the officer is compensated for the additional time worked. These half-page slips (an example is DX7) provide a small space, labeled

"Explain Assignment," for the officer to fill out stating the work that was done. The space is too small to allow for a detailed explanation of the work performed. Police officers who completed the form typically described in just a handful of words the work done (e.g., "kennel cough investigation, set up traffic stop" (Sgt. Inzerra, Tr. 430); "Press release" (Sgt. Fiduccia, Tr. 184)). Lt. Kilroy testified that the descriptions of the work set forth on the time due slips are "almost always very general and vague" (Tr. 1156). When completing the forms, officers do not typically set forth the location or manner in which the work was performed; thus, it is not usually possible to tell from the time due slips if and when an officer was submitting a slip for off-duty work done using a BlackBerry.

At least three plaintiffs testified that they submitted time due slips for off-duty work they performed on their BlackBerrys (although the time due slips did not specify that the work was performed on their BlackBerrys), and they were compensated for this work:

- Lt. Hamilton submitted time due slips for overtime that included work on his BlackBerry when he worked a minimum of two hours overtime, and he has approved time due slips he knew were submitted by his subordinates for off-duty work performed using a BlackBerry.
- Sgt. Padar submitted approximately 20 time due slips for processing investigative alerts from home, which included work on his BlackBerry.
- Sgt. Neal Schultz submitted time due slips stating that he performed off-duty work via phone and email.

In addition, BOC Sgt. Mark George, who is not a plaintiff in this case, submitted multiple time due slips for fielding calls on his BlackBerry while off duty because he has unique expertise in animal crimes. And, the testimony established that the following three plaintiffs may have submitted time due slips for off-duty work they performed on their BlackBerrys:

- Sgt. Dave Betz submitted time due slips for completing administrative reports while off duty, which may have included BlackBerry work.
- Sgt. Fiduccia submitted a time due slip for drafting a press release while off duty, which he may have done using a Department-issued electronic device.
- Sgt. Inzerra submitted time due slips for obtaining and sharing information relating to an investigation, which work may have been done on his BlackBerry.

The City offered additional evidence that time due slips submitted for work done off duty on a BlackBerry were approved. Lt. Konow and Cmdr. Kevin Ryan testified that they approved time due slips for off-duty BlackBerry work from their subordinates. Cmdr. Ryan approved such slips for "gang school safety teams," who use their CPD-issued BlackBerrys and iPads while off duty to monitor social media to interdict gang violence among school-aged youths. In addition, Lt. Konow not only submitted multiple time due slips herself for work she performed on her BlackBerry while off duty (such as for giving guidance by telephone regarding asset forfeiture questions), but she has also approved time due slips from her subordinates for off-duty work they performed using a BlackBerry.

There was also evidence presented at trial that supervisors may have unknowingly approved time due slips for off-duty BlackBerry work. As we explained above, time due slips are half-page forms that provide minimal space in which to explain *what* work was performed, and they do not require an officer to explain *how* the work was performed. The witnesses who testified to submitting slips for off-duty BlackBerry work noted on the time due slips the nature of the overtime work they performed or the name of the investigation, but they did not indicate on those slips that they used a BlackBerry to perform the work while off duty.⁷

We find the credible evidence showed that some members of the BOC submitted time due slips for off-duty work they performed on their BlackBerrys, and that these time due slips were approved. Nevertheless, many plaintiffs credibly testified that they did not submit time due slips for work they performed while off duty on their BlackBerrys. Because we find that at least some plaintiffs performed work using the BlackBerrys while off duty and did not submit time due slips for that work, we turn next to the central issue at trial: plaintiffs' contention that they did not submit time due slips to receive compensation for off-duty BlackBerry work because the City maintained an illegal, unwritten policy not to pay them for that work.

⁷ Two plaintiffs -- Lt. Hamilton and Sgt. Schultz -- wrote on at least some slips that they performed overtime work was by email or telephone, but there was no evidence that any time due slip specified that off-duty work was completed on a "BlackBerry."

IV.

At trial, plaintiffs attempted to show the existence of an unwritten policy not to compensate them for off-duty work performed on their BlackBerrys through evidence of: (1) a common understanding within BOC that they should not turn in time due slips for off-duty work performed on their BlackBerrys; (2) language in CPD General Orders and in compliance statements police officers were required to sign when they were issued BlackBerrys; (3) discouragement from supervisors, which led plaintiffs to believe that turning in slips for off-duty BlackBerry work might jeopardize their positions within BOC; and (4) CPD pressure to decrease the amount of overtime being worked and paid. We address each of these points in turn.

A.

Plaintiffs contend that there was a uniform culture, or belief, within BOC that it was not acceptable for members to turn in time due slips for off-duty work performed on their BlackBerrys. For the reasons we explain below, we find that the evidence failed to establish such a shared culture or belief.

1.

Some plaintiffs, such as Sgt. Stec, testified that they never submitted slips for off-duty BlackBerry work because they believed no one submitted such slips, and they thought submitting slips for this work would be frowned upon due to the culture within BOC (Tr. 636, 655-56, 684). However, these plaintiffs' subjective belief was not universally shared. Sgt. Stec's testimony (and similar testimony

from some other testifying plaintiffs) contrasts starkly with the BOC members, including some plaintiffs, who did turn in time due slips for off-duty BlackBerry work, and were compensated for it. We find that this is strong evidence against the existence of a uniform culture or unwritten policy as alleged by plaintiffs.

2.

Despite some BOC members submitting time due slips for off-duty BlackBerry work, plaintiffs contend that they have nevertheless shown that there was a pervasive culture within BOC not to compensate for this work. Plaintiffs offered evidence that supervisors in BOC generally were aware that plaintiffs at times did off-duty work on their BlackBerrys -- and, in some instances, knew that a particular officer did so on a particular date. But, we find plaintiffs have failed to prove that supervisors knew if and when particular officers failed to submit time due slips for off-duty BlackBerry work.

Like Sgt. Stec, some supervisors within BOC -- namely Lts. Cervenka and Kilroy -- testified that they believed time due slips were not turned in for off-duty BlackBerry work because it was contrary to the culture within BOC (Tr. 494, 1167). However, Lts. Hamilton and Konow testified that they have knowingly approved time due slips that their subordinates submitted for off-duty BlackBerry work. The evidence further showed that Lt. Kilroy may have unknowingly approved time due slips from Sgt. Padar for off-duty work he completed on his BlackBerry for processing investigative alerts from home. Lt. Kilroy testified that he did not know whether his subordinates completed their work on a

BlackBerry because the time due slips generally do not state how the off-duty work was performed.

Moreover, Lts. Kilroy and Dedore testified that they review so many time due slips each day -- up to 100 for Lt. Dedore and up to 120 for Lt. Kilroy - - that even if they knew a plaintiff had performed off-duty work on a BlackBerry, it would be impractical to verify whether a time due slip was turned in for that work. In addition, Lts. Kilroy and Hamilton testified that they may not review time due slips until one or more days after they are generated by their subordinates, making it even more difficult to match up particular off-duty work to a specific slip.

The evidence also showed that plaintiffs' supervisors often were not aware when plaintiffs were working off duty. Most plaintiffs testified that their off-duty BlackBerry work occurred outside the physical presence of their supervisors, at plaintiffs' homes or other locations while off duty. Much of plaintiffs' off-duty activities using their BlackBerrys took place with individuals other than their direct supervisors. Depending on their particular assignment, plaintiffs communicated off duty on their BlackBerrys with a variety of individuals, including CIs, federal agents, other CPD divisions, subordinates, and other supervisors within BOC. Plaintiffs' direct supervisors would not be aware in these instances when, why or with whom plaintiffs were communicating on their BlackBerrys while off duty.

Even if a plaintiff's off-duty work was done at the request of a supervisor, that supervisor would not invariably know that he or she was requesting work to be performed while a plaintiff was off duty.

Although some plaintiffs said they worked consistent shifts and hours (Sgt. Flores, for example, testified that he consistently worked the night shift), other plaintiffs (including Lt. Hamilton and Sgts. Allen, Inzerra and Karuntzos) testified that their shift hours frequently changed -- sometimes daily -- depending on the needs of their work. In such situations, as Lt. Kilroy and Cmdr. O'Grady testified, supervisors may not know whether their subordinates were on or off duty when they contacted them.

We find that plaintiffs have failed to show that supervisors within BOC routinely knew if or when plaintiffs were working off duty on their BlackBerrys without submitting time due slips for the work.

B.

Plaintiffs contend that General Orders and compliance statements that the City issued in 2010 and 2013 created or furthered an unwritten policy of denying plaintiffs payment for off-duty BlackBerry work, because they created insuperable obstacles to receiving compensation for this work. For the reasons we explain below, we find that this evidence fails to demonstrate the unwritten policy that plaintiffs assert.

1.

On October 13, 2010, CPD issued General Order ("G.O.") 98-07-09 (also sometimes referred to as "the 2010 General Order"), five months after the instant lawsuit was filed. There was scant evidence presented at trial about the deliberative process that

went into its promulgation.⁸ The text of G.O. 98-07-09 states that it was intended to "establish[] guidelines and responsibilities of members using Department-issued electronic communication devices" (JX3: G.O. 98-07-09, § 1.A).

The 2010 General Order states that BlackBerry devices "are issued to members as a convenience to enhance on-duty job performance only," and Department members "are not obligated or required to access, respond to electronic communications, and/or carry the devices on their person while off-duty" (*Id.*, §§ 3.A and 3.B.1). Furthermore, with regard to compensation, the 2010 General Order states that:

Members accessing their Department e-mail account, responding to electronic messages, or using a Department-issued electronic communication device related to Department business will not be compensated unless the member is officially on a "call-back" assignment as defined by existing labor contractual agreements or the member is directed by their superior to immediately perform a substantial task with overtime authorization from the superior directing the request.

⁸ While the testimony at trial did not specifically link the 2010 General Order to the filing of the lawsuit, Chief Roti testified that after the lawsuit, CPD's legal, management and labor affairs departments began looking at policy and having meetings to develop guidelines regarding some of the issues raised in the lawsuit (Tr. 942, 1012).

(*Id.*, § 3.C).⁹ A note under Section 3.0 states that "[t]his guideline includes accessing electronic messages using personally owned electronic communication devices" (*Id.*).

G.O. 98-07-09 also introduced an Electronic Communication Device Compliance Statement, CPD-65.109 (G.O. 98-07-09, § 1.C.). This form, which officers were required to sign upon receiving a BlackBerry, repeated the same language above regarding when an employee may be compensated for using the BlackBerry for Department business while off duty (JX2).

Plaintiffs contend that the 2010 General Order's stated prerequisites to receiving compensation for off-duty BlackBerry work -- being

⁹ The City attached a copy of the July 2007 through June 2012 collective bargaining agreement ("CBA") between the City and the sergeants' union to their response to plaintiffs' motion to conditionally certify the class (doc. # 79: Def.'s Resp. to Mot. for Cond'l Cert., Ex. B). We may take judicial notice of the CBA. *See Minch v. City of Chicago*, 486 F.3d 294, 300 (7th Cir. 2007) (taking judicial notice of a CBA that the Chicago City Council had formally adopted and enacted into law, because courts may take judicial notice of local ordinances, historical documents, and documents contained in the public record); *see also* Fed. R. Evid. 201(b). The CBA defined a "call-back" as "an official assignment of work . . . which does not continuously precede or continuously follow a Sergeant's worked hours" (*Id.* at § 20.4). The CBA further stated that "[s]ergeants who are called back or who are required to report to any location for work on a regular day off shall be compensated for two (2) hours at the appropriate overtime rate or for the actual time worked, whichever is greater, at the overtime rate" (*Id.*).

on a call-back assignment or being directed by a superior to immediately perform a substantial task with overtime authorization -- were often impossible to meet. *First*, although the CBA defines call-back assignments, many plaintiffs -- including Sgts. Fiduccia, Karuntzos, Stec and Williams -- testified that they had never been on a call-back assignment, and some plaintiffs were unsure how even to define the term. Chief Roti, Cmdr. O'Grady and Lt. Cervenka testified that they thought a "call-back" meant that an officer was physically brought back to work at a particular work location. Only one witness -- Sgt. Padar -- testified that he had ever checked the box for "call-back" on a time due slip; but, we note that he checked this box for processing investigative alerts from his home on his BlackBerry (Tr. 1089, 1101).

Second, most plaintiffs testified that they often faced circumstances where they had to perform off-duty BlackBerry work without first being directed and authorized by a superior to perform it. Plaintiffs testified that their off-duty BlackBerry work could result from sources other than supervisor requests: for example, from another officer working on a joint task force or from dealings with a CI. Thus, according to plaintiffs, they often could not meet this requirement of obtaining supervisory "pre-approval" -- as it was referred to at trial -- in order to receive compensation for off-duty BlackBerry work.

However, the evidence showed that the requirements of the 2010 General Order were not as immutable as plaintiffs suggest. To begin with, the 2010 General Order itself states that it is a "guideline." And, in fact, the evidence made clear that neither plaintiffs nor the City treated the 2010

General Order as imposing unyielding requirements. The 2010 General Order said that CPD members were not obligated to carry or respond to BlackBerrys while off duty, a statement that the plaintiffs appear uniformly to have ignored (we do not say that to be critical, but rather to underscore how the general order was regarded.) And, we note that neither plaintiffs nor any other CPD member ever filed a grievance asserting that the 2010 General Order and/or compliance statement imposed preconditions to seeking compensation for overtime work that were impossible to meet.

Moreover, despite the absence of pre-approval, various BOC members (listed above) submitted and/or approved time due slips for off-duty BlackBerry work. This was consistent with the practice with respect to off-duty work performed without using a BlackBerry, where plaintiffs testified that they would often work (and get paid) for off-duty work activity even without pre-approval if it was impractical to obtain prior approval, or if their supervisors simply trusted them to know when the off-duty work was necessary.

We also note that many testifying plaintiffs had only a very general -- and often incomplete -- understanding of the terms of the 2010 General Order as it pertained to BlackBerry use. Some plaintiffs, such as Sgt. Stec, testified that they read the General Order as stating that employees would not be compensated for off-duty BlackBerry work (Tr. 684) -- which clearly is inconsistent with even the most restrictive reading of the General Order. Moreover, plaintiffs uniformly testified that the 2010 General Order and compliance statements had no effect on their practice with regard to working off

duty on their BlackBerrys and submitting, or not submitting, time due slips for this work. The plaintiffs who turned in time due slips and were compensated for off-duty work they performed on their BlackBerrys -- and the supervisors who testified that they approved such slips -- did not testify that this practice changed depending on whether the plaintiffs received pre-approval before working off duty on their BlackBerrys. Conversely, none of the plaintiffs who testified that they refrained from submitting time due slips for off-duty BlackBerry work said they refrained from doing so because of the 2010 General Order and associated compliance statement.

2.

On August 7, 2013, G.O. G09-01-05 ("the 2013 General Order") was issued, which revised Section 3.0 of the October 2010 order, regarding compensation for off-duty BlackBerry work. The other sections of the 2010 General Order mentioned above remained unchanged.

The language of Section 3.0 was modified to state that:

Off-duty members will not use a Department-issued electronic communication device to access their Department e-mail account, respond to electronic messages, or perform other work related to Department business unless the member is officially on a "call-back" assignment as defined by existing labor contractual agreements or the member is directed by a supervisor to immediately perform any work and overtime is

authorized by the supervisor directing the request. If there is a request and approval for overtime, the Department member must comply with the applicable Department directives concerning the submission of an Overtime/Compensatory Time Report (CPD-11.608). If overtime is not approved, the member is not to perform the work.

(JX5: G09-01-05). The Electronic Communication Device Compliance Statement was revised to conform to the amended language in G.O. G09-01-05 (JX1).

Unlike the 2010 General Order, the 2013 General Order did not simply state that CPD members would not be compensated for off-duty BlackBerry work if they were not on a callback or if they did not receive pre-approval by a supervisor to perform the overtime work. Rather, the 2013 General Order stated that off-duty members "*will not*" use their CPD-issued BlackBerrys to perform Department work if they did not meet these prerequisites. Furthermore, the 2013 General Order stated that if the prerequisites were met, the CPD members must submit a time due slip -- as they would for other overtime work performed -- in order to receive compensation for the off-duty BlackBerry work.

There was no trial testimony or other evidence offered to explain the reason for this revision. There also was no evidence explaining how this revised general order was disseminated to members of BOC. We did receive evidence that on October 30, 2013, Chief Roti issued a memorandum to the deputy chief and commanders in BOC stating that the 2013

General Order applied to members of the BOC who were issued BlackBerrys. The memorandum stated that:

All non-supervisory members of the Bureau of Organized Crime are reminded they are not required to reply to non-emergency, work related phone calls, e-mails or text messages while they are off-duty unless they are receiving compensation. Upon receiving notification of an emergency situation which necessitates the member acting in their official capacity, and being compensated, the member will reply to phone calls, e-mails and text messages until they have been released from the assignment. . . . Supervisory members, and other BOC members issued BOC communications devices, are further reminded they are to comply with the policies set forth in the 'Policy' section of General Order G09-01-05, III.

(JX6). Chief Roti did not distribute this memorandum to lieutenants, sergeants or patrol officers, and, at trial, no plaintiff was shown the memorandum or asked about it. General Orders are available for officers to review, but as with the 2010 General Order, the testimony of the plaintiffs did not reflect a close familiarity with the 2013 General Order.

In any event, as with the 2010 General Order, the issuance of the 2013 General Order had no impact on plaintiffs' performance of off-duty work on their BlackBerrys. Plaintiffs continued to perform off-duty BlackBerry work when they were not on a call-back assignment, and they often did so without

pre-approval from their superiors. Sgts. Karuntzos, Padar, Schachelmayer, Stec and Williams and other plaintiffs testified that seeking pre-approval was often not practical or possible. For example, if an officer was contacted by a CI, that officer could not wait to respond to the CI until he or she was able to contact a supervisor for approval. Likewise, plaintiffs' practices regarding submitting -- or not submitting -- time due slips for off-duty BlackBerry work did not change with the issuance of the 2013 General Order. The evidence did not establish that a time due slip for work done on a BlackBerry would be rejected if there was an absence of pre-approval.

3.

We close our discussion of the 2010 and 2013 General Orders with a few final observations. *First*, neither of these general orders existed at the time Sgt. Allen commenced this lawsuit in May 2010. Thus, the general orders could not have created an unwritten policy not to compensate BOC members for off-duty work done using their BlackBerrys, which Sgt. Allen first alleged in his initial complaint.

Second, for the reasons we have set forth above, we find that plaintiffs have failed to prove that these general orders emphasized, or reaffirmed, an alleged unwritten policy. As we have already pointed out, neither side elicited any meaningful evidence about what CPD sought to accomplish by issuing these general orders, other than what appears on the face of the orders themselves. To the extent that these general orders were intended to convince members of BOC that they did not need to respond to BlackBerry emails or phone calls while off duty, the testimony established that the orders were

an abject failure. The testifying plaintiffs uniformly said that despite what the orders said, they felt obligated to be responsive to BlackBerry communications they received while off duty. We find that testimony credible.

To the extent that the general orders were intended to ensure that members of BOC received supervisory approval before using their BlackBerrys for off-duty work, and that they not receive compensation for off-duty work without that prior approval, the orders failed on this score as well. There were members of BOC who used their BlackBerrys to perform off-duty work, submitted time due slips for that work, and received payment for that work, all without pre-approval. In short, these general orders did not affect the conduct of the members of BOC, which perhaps is not surprising inasmuch as the language of the general orders describes them as "guidelines," and the evidence shows that neither plaintiffs nor others in CPD treated them as binding.

Third, we have considered the possibility that CPD intended the general orders as a means of conveying to BOC members the point that, in this rapidly evolving age of technology, off-duty work using BlackBerrys should be reserved for the occasions that truly warrant it: in other words, not for off-duty matters that are trivial or that could await an officer's arrival at work when next on duty. That would be a legitimate reason to issue the orders: to provide better clarity about how officers should (or should not) use the BlackBerrys while off duty. If that was the goal, the evidence shows that the general orders were a poorly crafted means of achieving it.

As we expressed during closing argument, we wonder about each side's failure to take basic steps that would have eliminated any ambiguity about CPD's approach to compensating off-duty work performed using BlackBerrys. CPD could have cut through the verbiage of the general orders by making a simple written statement that it distributed to every member of the BOC: "if you perform off-duty work on the BlackBerry that is necessary to your job, submit a time due slip for it and it will be approved." For their part, plaintiffs could have obtained clarity by submitting time due slips which clearly stated that they were being submitted for off-duty work performed on the BlackBerrys, and thus put to a meaningful test their assertion that CPD would not compensate them for the work -- and the City's assertion that the time would be paid.¹⁰

We consider it unfortunate that this ambiguity, or confusion, was allowed to linger. But, the existence of ambiguity or confusion does not constitute a policy forbidding submission of time due

¹⁰ During closing argument, plaintiffs' counsel asserted that the plaintiffs did not submit time due slips for off-duty BlackBerry work they performed because they were "scared" of retaliation (Tr. at 1256). As we stated then, that explanation is not persuasive. Each of these plaintiffs decided to opt into this case by mid-2013, which means by that time they had joined in a lawsuit against the City. We find it difficult to accept that for two years since then, these same officers who had the backbone to sue the City were so fearful of retribution that they could not submit time due slips seeking compensation for off-duty BlackBerry work they performed.

slips for off-duty BlackBerry work. The evidence we have already discussed persuades the Court that plaintiffs have failed to prove the unwritten policy that they have alleged.

C.

We now turn to plaintiffs' contention that their supervisors discouraged them from submitting time due slips for off-duty BlackBerry work, and that plaintiffs believed their positions in BOC would be jeopardized if they sought overtime compensation for this work. Plaintiffs presented only two examples of a supervisor ever discouraging his or her subordinates from turning in time due slips. *First*, Lt. Dedore testified that he often sent emails to his subordinates to manage their overtime more efficiently, including seeking to limit the number of officers who stayed late on a single arrest and restricting overtime for work that was pre-planned and could have been done on a scheduled workday. In one of these emails, Lt. Dedore wrote that "pigs get fat. hogs get slaughtered." *Second*, Lt. Kilroy testified that Cmdr. O'Grady once ridiculed him for turning in a time due slip for as little as one hour of overtime worked.

These two examples fail to establish that supervisors in BOC pressured their subordinates not to put in for off-duty work -- whether or not performed on a BlackBerry. Neither example addressed work performed off duty using a BlackBerry. Nor is there any evidence that these examples became common knowledge among members of BOC. Given that fourteen plaintiffs testified, we also would have expected more examples to be offered if supervisors were engaged in

a pattern of discouraging the submission of time due slips for off-duty work done using a BlackBerry. To the contrary, the evidence showed that plaintiffs were never told that they would not be compensated for off-duty work performed on their BlackBerrys, or instructed not to submit time due slips for this work.

Plaintiffs emphasize that they were not directed by their superiors to submit time due slips for off-duty BlackBerry work. However, the evidence shows that this was not universally the case. Sgt. Fiduccia testified that recently, in the spring or summer of 2015, his commander instructed him to submit a time due slip for about two hours of work he performed on his BlackBerry while off duty. In addition, Lts. Hamilton and Konow testified that they encouraged their subordinates to submit slips for this work. More importantly, the CPD overtime procedure did not require supervisors to direct their subordinates to submit a slip before they did so, and there is no evidence that BOC supervisors routinely directed their subordinates to put in time due slips for non-BlackBerry work but failed to do so for BlackBerry work. Plaintiffs routinely submitted time due slips for other types of off-duty work without first being told to do so by a supervisor.

A few of the plaintiffs also testified that they believed their assignments in BOC would be jeopardized if they submitted slips for off-duty BlackBerry work. For example, Off. Mancini and Sgts. Karuntzos, Spencer and Stec testified that they believed there would be repercussions if they turned in slips for off-duty work they performed on their BlackBerrys. However, these plaintiffs had never heard of anyone submitting a slip for off-duty BlackBerry work, or being reprimanded or otherwise

disciplined for doing so. Plaintiffs presented no evidence that anyone who submitted time due slips for off-duty BlackBerry work was ever reprimanded, disciplined or removed from BOC.¹¹ We find that plaintiffs did not establish a well-grounded fear of adverse consequences if they submitted time due slips for off-duty BlackBerry work.

D.

Plaintiffs contend that upper-level command in BOC exerted pressure on them to limit all overtime work, and by so doing, discouraged them from submitting time due slips for off-duty work they performed on their BlackBerrys. Several witnesses at trial testified that they recalled a few sporadic discussions over the years regarding a desire to limit overtime in BOC. Cmdr. Gorman recalled a push to reduce overtime between 2008 and 2010, and Cmdr. Ryan testified that he sent an email to his subordinates in May 2013 stating that there was room to decrease overtime requests for carrying out search warrants. Sgts. Lohman and Williams also recalled some discussions about excessive use of overtime.

However, no plaintiff testified that any alleged restriction on working overtime was a reason he or she did not submit a time due slip seeking compensation for off-duty work performed on a BlackBerry. Chief Roti testified that although at times there were general directives, or requests, to

¹¹ Though Sgt. Allen was removed from BOC, he had never submitted a slip for off-duty work he performed on his BlackBerry, and the grievance he filed after his removal did not mention any overtime payment issue.

shrink the budget and reduce overtime, total overtime in BOC never actually decreased, and no official policies ever were instituted to limit overtime or overtime compensation. The evidence concerning the amount of overtime that plaintiffs worked tends to support Chief Roti's testimony.

Defendant provided data of the recorded overtime each plaintiff worked while in the BOC during the period 2011 through 2014 (DX1). The data set forth: (1) the number of 28-day periods in which each plaintiff recorded time worked in excess of 171 hours,¹² and (2) the total number of overtime hours each plaintiff worked during each of those four years. We have aggregated this data for all plaintiffs, collectively, in the chart below:¹³

Year	Number of 28-day work periods in which plaintiffs worked greater than 171 hours	Total number of overtime hours plaintiffs worked greater than 171 hours
2011	155	2,922
2012	170	3,539
2013	171	3,810

¹² There are thirteen 28-day pay periods per calendar year.

¹³ DX1 included additional data which we do not include here: (1) the last [*44] 28-day period in 2010; and (2) data for Sgt. Laurich, who is no longer a plaintiff in the case. Including this additional data would not alter the results of the analysis we offer.

Year	Number of 28-day work periods in which plaintiffs worked greater than 171 hours	Total number of overtime hours plaintiffs worked greater than 171 hours
2014	149	3,540.75

The data shows that the total number of overtime hours for which plaintiffs were compensated actually increased by 618.75 hours, or approximately 21.2 percent, from 2011 to 2014. Overtime hours increased by 617 hours from 2011 to 2012 alone, and by another 271 hours in 2013. What's more, the apparent decrease in the number of overtime hours from 2013 to 2014 likely does not represent an actual decrease in overtime hours worked by each plaintiff, because several of the plaintiffs retired or transferred out of BOC before or during 2014.¹⁴ This

¹⁴ DX1 collects only hours worked by plaintiffs while they were assigned to BOC. Of the fifty-one plaintiffs, [*45] DXI shows the following plaintiffs did not work in BOC through all or part of 2014: (1) P.O. Mancini was on paid medical leave from approximately March 2014 until his retirement on December 15, 2014; (2) Sgt. Timothy Casey transferred out of BOC on August 17, 2014; (3) Lt. Hamilton retired on November 2, 2013; (4) Sgt. Karen Skipper transferred out of BOC on May 1, 2014; (5) Sgt. Betz transferred out of BOC on February 8, 2014; (6) Sgt. Tony DiCristofano transferred out of BOC on April 27, 2014; (7) Sgt. Steven Dziak transferred out of BOC on June 22, 2014; (8) Sgt. Patrick Gillespie transferred out of BOC on May 1, 2014; (9) Sgt. Padar transferred out of BOC on April 10, 2014; (9) Sgt. Melvin Roman transferred out of BOC on February 9, 2014; (10)

large overall increase in overtime during the class period does not square with plaintiffs' contention that BOC pushed to limit the amount of overtime compensation it paid.¹⁵

Given the mission of BOC, and the public pressure on police to effectively address violent crime, it is not surprising that the amount of overtime work would increase (and not decrease) between 2011 and 2014. In addition, the evidence

Sgt. Stec transferred out of BOC on October 11, 2014; (11) Sgt. Yolanda Talley transferred out of BOC on December 7, 2014. In addition, a few of the plaintiffs retired or transferred out of BOC before 2013: (1) P.O. David Dombkowski retired on September 15, 2012; (2) Sgt. Kenneth Epich retired on December 23, 2011; (3) Sgt. Mark Golosinski transferred out of BOC on September 14, 2011; (4) Sgt. Allen transferred out of BOC on February 3, 2010; [*46] (5) Lt. Cervenka retired on December 16, 2011; (6) Sgt. Flores retired on November 15, 2011; (7) Sgt. Mark Higgs transferred out of BOC on July 22, 2011; (8) Sgt. Rodney Hill did not perform any work for BOC during the time period; (9) Sgt. Michelle Rubino transferred out of BOC on July 21, 2012; (10) Lt. Osvaldo Valdez transferred out of BOC on April 11, 2012; (11) Sgt. Washburn retired on August 3, 2012.

¹⁵ Plaintiffs have asserted that the City's records concerning overtime are incomplete (doc. # 218: Pl.'s Rev. Proposed Findings ¶ 18). We do not make any finding on this assertion, which is unnecessary to our decision. But, we do note that if by this assertion plaintiffs mean they actually worked more hours than the amounts set forth in DX1, that would only reinforce our conclusion that the evidence failed to show any push by CPD to reduce or limit the amount of overtime worked in BOC.

shows another reason why CPD would not have been motivated to push to limit all overtime work in BOC. For BOC officers who worked on federal task forces (including testifying plaintiffs Sgts. Allen, Inzerra, Karutnzos and Williams), the federal government reimbursed CPD for a substantial amount of overtime hours these personnel worked as part of the joint federal task force teams. We find that plaintiffs have failed to prove that CPD engaged in any concerted effort to reduce the amount of overtime worked in BOC.

CONCLUSIONS OF LAW

We now consider whether, in light of this Court's findings of fact, plaintiffs have met their burden of proving, by a preponderance of the evidence, that they performed off-duty work on their BlackBerrys, and that the CPD had an unwritten policy to deny plaintiffs compensation for that work.

I.

The first question we address is whether the off-duty activities plaintiffs performed on their BlackBerrys constituted compensable "work" under the FLSA, *i.e.*, whether the activities were pursued necessarily and primarily as part of their jobs within BOC. *Alvarez*, 546 U.S. at 25, 37. We conclude that some, but not all, of the off-duty activities plaintiffs performed on their BlackBerrys constituted compensable work under the FLSA.

The Department-issued BlackBerrys give the plaintiffs the ability to perform certain necessary work while on and off duty. Some activities plaintiffs performed on their BlackBerrys had to be done

immediately, even if they were off duty. These activities include reaching out to CIs, gathering information on investigations that were heating up, and contacting and reallocating teams of officers in response to a shooting. Such off-duty activities were at times pursued necessarily and primarily as part of plaintiffs' jobs in BOC, and constituted compensable work under the FLSA. *See Busk*, 135 S.Ct. at 519; *Alvarez*, 546 U.S. at 25.

However, the evidence failed to show that all of the off-duty activities plaintiffs performed on their BlackBerrys were a necessary part of their jobs. For example, the mere act of plaintiffs "monitoring" their BlackBerrys does not constitute an activity pursued necessarily and primarily for the benefit of the City under the FLSA, so long as the plaintiffs could still spend their off-duty time "primarily for [their] own benefit without persistent interruptions." *Brand v. Comcast Corp.*, No. 12-1122, 135 F. Supp. 3d 713, 2015 U.S. Dist. LEXIS 130114, 2015 WL 5693659, at *17 (N.D. Ill. Sept. 28, 2015). *See also Ruffin v. MotorCity Casino*, 775 F.3d 807, 812-13 (6th Cir. 2015) (collecting cases finding that requirement that an employee carry a radio and respond if necessary does not convert a meal period to compensable time under the FLSA, unless monitoring the radio prevented the employee from using those break periods predominantly for the employee's own benefit).¹⁶

¹⁶ "The gist of these cases is that monitoring a radio, and being available to respond if called, is a *de minimis* activity, not a substantial job duty." *Ruffin*, 775 F.3d at 812. In its answer to plaintiffs' amended complaint, defendant asserted that any work plaintiffs performed on their BlackBerrys was *de minimis*, and

Although the dividing line between work that is *de minimis* and that which is substantial may be murky in some instances, the evidence showed that at least some of plaintiffs' off-duty activities using BlackBerrys qualify as work. We conclude that plaintiffs have met their burden of proving that they performed off-duty work using their BlackBerrys.

II.

In addition to proving that they performed off-duty work using their BlackBerrys, to succeed on their claims plaintiffs also must show that they were "not properly compensated" for this off-duty work. *Kellar*, 664 F.3d at 173. In this case, where the

therefore non-compensable (doc. # 120: Am. Answer to Aff. Defenses at 11). The issue of what constitutes *de minimis* work under the FLSA is not well-defined in the Seventh Circuit. *Compare Kellar*, 664 F.3d at 176-77 (finding that the amount of overtime work at issue, "both per day and in the aggregate," was substantial at between 10 and 40 minutes each day) *with Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 845 (7th Cir. 2014) (holding that a few minutes spent each day donning and doffing during mealtime was *de minimis*). *But see Mitchell*, 745 F.3d at 851 (Wood, J., dissent)(disagreeing with the majority's decision to analyze "each day, or part of a day, separately" -- instead of aggregating the amount of time spent each work-week - - to find that the amounts of time the employees spent donning and doffing clothes fell below the *de minimis* threshold, because *Sandifer v. United States Steel Corporation*, 134 S.Ct. 870, 880, 187 L. Ed. 2d 729 (2014), asked whether the period at issue can "on the whole, [*50] be fairly characterized as time spent in changing clothes or washing").

City maintains an established process for seeking and receiving overtime compensation, that requires plaintiffs to prove two things: (1) that the CPD maintained an unwritten policy to deny compensation for off-duty work performed using a BlackBerry, and (2) that including time worked off duty on their BlackBerrys, plaintiffs would have worked more than 171 hours during one or more 28-day periods, entitling them to overtime payments they did not receive. We bifurcated this case for trial because the question of whether plaintiffs were "not properly compensated" thus depends on the ability of plaintiffs to prove, at the threshold, the alleged unwritten policy to deny them compensation for off-duty BlackBerry work. We conclude that plaintiffs have not proven that the City maintained an unwritten policy to deprive plaintiffs of payment for off-duty work performed on their BlackBerrys.¹⁷

A.

The Sixth Circuit has held that "[u]nder the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-

¹⁷ "Because the trial focused on the question of whether the CPD maintained the alleged unwritten policy, we did not ask the parties to present evidence regarding specific amounts of time they spent doing off-duty work on their BlackBerrys. We therefore need not, and do not, make any finding as to whether any plaintiff in fact would have more than 171 compensable hours of work during any given 28-day period if one were to include off-duty BlackBerry time that was not submitted on a time due slip but that would qualify as "work."

payment if the employee fails to follow the established process." *White v. Baptist Mem. Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012); *see also Jones-Turner v. Yellow Enterprise Sys., LLC*, 597 Fed. Appx. 293, 298 (6th Cir. 2015) (holding that where the employer did not have knowledge of an employee's overtime work because the employee did not report his or her overtime work according to the reasonable process established, the employer was not liable for non-payment of the unreported time). While the Seventh Circuit has not directly held that the failure to follow established overtime procedures extinguishes an FLSA claim, in *Gaines v. K-Five Constr. Corp.*, 742 F.3d 256, 271 (7th Cir. 2014), the Seventh Circuit upheld a district court's decision to grant summary judgment to the employer on an FLSA overtime claim where the employee's failure to follow the employer's clear overtime procedures may have precluded the employer from learning of the employee's overtime work. In *Gaines*, the employee failed to record the overtime he allegedly worked in his "daily driver reports," which "very clearly and prominently" sought information about the hours the employee worked each day. *Id.*

Nevertheless, a lawful, written policy to pay overtime for off-duty work will not shield an employer from liability if plaintiffs can show that the employer in fact followed an unwritten practice or policy that violated the FLSA. *Allen*, 2014 U.S. Dist. LEXIS 150308, 2014 WL 5461856, at *5. *See also Russell v. Ill. Bell Tel. Co., Inc.*, 721 F. Supp. 2d 804, 815-16 (N.D. Ill. 2010); *Brand v. Comcast Corp.*, No. 12-1122, 2012 U.S. Dist. LEXIS 137714, 2012 WL 4482124, at *5 (N.D. Ill. Sept. 26, 2012); *see also Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360,

374-75 (7th Cir. 2015) (upholding the district court's decision to grant class certification on the common question of whether the defendant had an unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours). Plaintiffs contend that the City's established process for seeking overtime compensation did not apply to off-duty work they performed on their BlackBerrys. Instead, plaintiffs argue that the City had an unwritten -- and unlawful -- policy not to pay for this work. Defendant, by contrast, contends that off-duty work performed on CPD-issued BlackBerrys, like all other off-duty work, would be compensated if plaintiffs followed CPD's established procedures. Thus, the City contends that plaintiffs' failure to follow the established procedures precludes their FLSA claims.

B.

As we explained above, some plaintiffs testified that they believed they could not turn in time due slips for off-duty BlackBerry work because there was a pervasive culture or understanding within BOC that this work would not be compensated. However, the evidence at trial failed to bear out the culture these witnesses alleged.

The evidence established that several plaintiffs submitted time due slips for off-duty work performed on their BlackBerrys, and they were never denied compensation for this work. The evidence also showed that at least two supervisors -- Lts. Hamilton and Konow -- approved time due slips for off-duty work they knew was performed on BlackBerrys. No plaintiff was ever told that he or she should not submit time due slips for off-duty

BlackBerry work. As explained above, this is strong evidence against a shared understanding or policy that BOC members should perform this work without pay.

Plaintiffs argued in closing that they showed that the City nevertheless "suffer[ed] or permit[ted]" or "knew or had reason to believe" that other plaintiffs were continuing to perform off-duty BlackBerry work without compensation, in violation of the FLSA (Tr. 1248).¹⁸ In *Kellar*, the Seventh Circuit held that the FLSA's definition of "employ" as including "to suffer or permit to work" means that "the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about;" i.e., overtime work of which the employer did not have "actual or constructive knowledge" that its employee performed. *Kellar*, 664 F.3d at 177.

At trial, plaintiffs testified that it was well-known within BOC that members performed off-duty work on their BlackBerrys. They also testified that on some specific occasions, a supervisor may have known a plaintiff was performing off-duty BlackBerry work when the supervisor contacted the plaintiff on his or her BlackBerry. However, the evidence did not show a common understanding or knowledge within BOC that off-duty BlackBerry work was not compensated.

¹⁸ It is well-settled, and the parties do not dispute, that knowledge of a supervisor within BOC would be imputed to their employer, the City. *See, e.g., Skelton v. Am. Intercontinental Univ. Online*, 382 F. Supp. 2d 1068, 1074 (N.D. Ill. 2005).

A showing of knowledge under the FLSA must go beyond speculation that an employee's performance of unpaid overtime work was "theoretically possible." *Roberts v. Advocate Health Care*, No. 14-442, 119 F. Supp. 3d 852, 2015 U.S. Dist. LEXIS 103631, 2015 WL 4719897, at *8 (N.D. Ill. Aug. 7, 2015). A plaintiff must show "which [employees] were working [off-the-clock], how frequently they were doing it, and why it was occurring." *Blakes v. Ill. Bell Tel. Co.*, 75 F. Supp. 3d 792, 810 (N.D. Ill. 2014) (citing *Boelk v. AT&T Teleholdings, Inc.*, No. 12-40, 2013 U.S. Dist. LEXIS 101111, 2013 WL 3777251, at *10 (W.D. Wis. July 19, 2013))(emphasis in original). It is not enough that managers knew or should have known that "unidentified" employees were performing off-the-clock work without being paid. *Id.*

Plaintiffs have not shown that their supervisors invariably knew or should have known when they were working off duty on their BlackBerrys. *First*, much of plaintiffs' off-duty BlackBerry work occurred outside the physical presence of their supervisors, and the testimony at trial persuades us that supervisors were often unaware whether a subordinate was on or off-duty. *Second*, much of plaintiffs' alleged off-duty work on their BlackBerrys was performed with individuals other than their direct supervisors. Plaintiffs' supervisors would not be aware in these instances when, why or with whom plaintiffs were communicating on their BlackBerrys while off duty.

Plaintiffs also have failed to prove that the City knew or had reason to know that they were not receiving compensation for any particular overtime a plaintiff may have worked. *First*, supervisors within

BOC did not know whether their subordinates turned in time due slips to receive compensation for off-duty BlackBerry work, both because the time due slips generally do not state how overtime work was completed, and because they reviewed so many time due slips (up to 120) each day, sometimes well after the work was performed. *See Roberts*, 2015 U.S. Dist. LEXIS 103631, 2015 WL 4719897, at *8 (holding that it was speculative to assume that the supervisor was able to detect that the plaintiff's time cards were short certain overtime hours). Even if the supervisor knew a plaintiff had performed off-duty work on his or her BlackBerry, it would be extremely impractical to verify that a time due slip was turned in for that work. *See Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 781-82 (8th Cir. 2009) ("access to records indicating that employees were working overtime . . . is not necessarily sufficient to establish constructive knowledge").

Second, while the evidence showed that plaintiffs were rarely specifically instructed to submit overtime slips for off-duty BlackBerry work, there is no legal requirement that an employer advise its employees to request payment each time overtime is worked when the employer maintains a legal overtime payment policy. And, there is no evidence plaintiffs were routinely instructed to submit requests for overtime work that did not involve off-duty BlackBerry use.

Third, plaintiffs never raised any concern or complaint to any supervisor or union representative that they were not being paid for time they worked on their BlackBerry while off duty. "By failing to record their hours accurately and failing to tell their supervisors or managers about [the unpaid, off-duty

work], plaintiffs prevented defendants from having actual knowledge of their off the clock work." *Kellar*, 664 F.3d at 178. Plaintiffs have not shown that complaining to their supervisors about not being paid for their off-duty work would have been futile, or that the City prevented them from accurately reporting their off-duty BlackBerry work. *Compare Blakes*, 77 F. Supp. 3d at 783-84. As in *Roberts*, the uncontroverted evidence shows that plaintiffs' employer (with minimal exceptions) paid them for almost all the overtime they sought when they filled out time due slips, including for off-duty BlackBerry work. *Roberts*, 2015 U.S. Dist. LEXIS 103631, 2015 WL 4719897, at *9. Nothing prevented plaintiffs from submitting time due slips for off-duty BlackBerry work. We agree with the district court judge in *Roberts* that a plaintiff's "subjective belief that a further complaint about not being paid . . . would fall on deaf ears has no bearing on whether [the plaintiff] could have complained about the alleged unpaid overtime at issue in th[e] case." *Id.*

Thus, we conclude that plaintiffs fell far short of showing a uniform culture or well-grounded understanding that off-duty BlackBerry work would not be compensated in BOC. Plaintiffs have not proven that supervisors within BOC had specific knowledge of off-duty BlackBerry work being performed without compensation (*i.e.*, without a corresponding time due slip being turned in). And, in light of the evidence that BOC members (including plaintiffs) turned in slips for off-duty BlackBerry work and were compensated, plaintiffs have not shown that there was a common understanding (or an unwritten policy) that such work would not be compensated.

C.

We also conclude that the general orders and compliance statements did not create or institutionalize an unwritten policy of not compensating plaintiffs for off-duty BlackBerry work. The facts showed that the general orders had no effect on plaintiffs' practices with regard to working off duty on their BlackBerrys and submitting, or not submitting, time due slips for this work.

First, despite language in the 2010 General Order stating that members would not be paid for performing off-duty BlackBerry work unless on a call-back assignment or specifically directed and authorized by a supervisor to perform the overtime work, plaintiffs continued to regularly perform off-duty BlackBerry work that was not pre-approved or on a call-back assignment. In addition, plaintiffs' practices with regard to submitting or not submitting time due slips for this work did not change with the issuance of the 2010 General Order.

Second, despite language in the 2013 General Order stating that plaintiffs *will not* use their BlackBerry to perform off-duty work unless on a call-back assignment or specifically directed and authorized by a supervisor to perform the overtime work, plaintiffs continued to perform off-duty work on their BlackBerrys without pre-approval from their supervisors. Plaintiffs' practices regarding submitting or not submitting time due slips did not change with the issuance of the 2013 General Order.

Third, the 2010 and 2013 General Orders themselves state that they are only "guidelines," and plaintiffs treated them as such. *See Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir.

2006)(noting that CPD's general orders regarding the use of force were "intended merely to 'provide members guidance on the reasonableness of a particular response option,' when taking a suspect into custody"). Plaintiffs did not follow the general orders if it was not practicable for them to do so.

We conclude that the General Orders did not reaffirm an unwritten policy to deny payment for off-duty work performed on BlackBerrys, and did not create such a policy.

D.

Plaintiffs also failed to show that they had a reasonable basis to believe that their positions within BOC would be jeopardized if they sought overtime compensation for off-duty BlackBerry work. Plaintiffs were never told they would not be compensated for off-duty work performed on their BlackBerrys or instructed not to submit a time due slip for this work. Those who submitted time due slips for off-duty BlackBerry work were never reprimanded, disciplined or removed from BOC, even though some supervisors (Lts. Konow and Ryan) said they were aware these slips were being submitted and approved them. Moreover, once these plaintiffs joined this lawsuit alleging that they were not compensated for off-duty BlackBerry work -- and faced no repercussions at work for doing so -- plaintiffs cannot convincingly argue that they still had reason to fear repercussions for submitting a slip seeking compensation for this work.

E.

We also find that the City did not push to limit all overtime in BOC, including for off-duty

BlackBerry work. *First*, as the findings above demonstrate, any plans by the City to limit overtime were sporadic and never enforced within BOC. To the contrary, the amount of overtime worked within BOC increased, rather than decreased, during the relevant time period. *Second*, plaintiffs were not discouraged from submitting time due slips for off-duty BlackBerry work due to any sporadic push to limit overtime. No plaintiff testified that any alleged restriction on overtime was a reason they did not submit a time due slip to seek compensation for work they performed off duty on their BlackBerrys. Plaintiffs did not show that any purported push to limit overtime within BOC supported their contention that the City maintained an unwritten policy not to compensate for off-duty BlackBerry work.

In sum, plaintiffs have not proven by a preponderance of the evidence that the City maintained an unwritten policy to deny them compensation for off-duty work they performed on their CPD-issued BlackBerrys.

CONCLUSION

While plaintiffs have shown that they performed off-duty work on their BlackBerrys, they have not met their burden of showing that they were not compensated pursuant to any unlawful policy by the City or that the City suffered or permitted this work to be done without compensation. Because plaintiffs have failed to make the necessary showing on this threshold issue, plaintiffs have failed to prove their claim that the City violated the Fair Labor Standards Act. We therefore rule in favor of the City

and against plaintiffs, all of whom are bound by this judgment as members of this FLSA collective action into which they have opted. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 771-72 (7th Cir. 2013) (citing 29 U.S.C. § 216(b)).

Our ruling today only resolves the plaintiffs' claims for payment of overtime in this specific lawsuit. Even had we found for plaintiffs, this Court would lack the authority to dictate the procedures that the City should adopt to deal with off-duty use of the BlackBerrys. *See Heitmann v. City of Chicago, Ill.*, 560 F.3d 642, 644 (7th Cir. 2009) (under the FLSA, injunctive relief is permissible only in suits by the Secretary of Labor; otherwise, changes in the City's practices must be achieved through collective bargaining). That said, we hope our ruling today provides helpful guidance to the parties. The march of technology has been steadily (indeed, rapidly) moving forward. We expect that this march forward will continue, and that our use of and reliance on devices that allow work to be performed remotely will not abate. We thus expect that members of BOC will continue to use their BlackBerrys or like devices while off duty, because of the important work that can be accomplished with them. It is up to the parties to work cooperatively to prevent future litigation concerning compensation for the off-duty use of Department-issued BlackBerrys.

We enter judgment in favor of the City and against defendants. This case is terminated.

ENTER:

/s/ Sidney I. Schenkier
SIDNEY I. SCHENKIER
United States Magistrate Judge

DATE: December 10, 2015

APPENDIX D

G.O. 98-07-09 Chicago Police Department**DEPARTMENT-ISSUED ELECTRONIC COMMUNICATION DEVICES****TITLE:**

13 October 2010

ISSUE DATE:

13 October 2010

EFFECTIVE DATE:**DISTRIBUTION:****RESCINDS:****I. PURPOSE**

This addendum:

- A. establishes guidelines and responsibilities of members using Department-issued electronic communication devices.
- B. continues the use of the E-Mail Compliance Statement form CPD-65.118 (2/08).
- C. introduces the Department-issued Electronic Communication Device Compliance Statement CPD-65.109 (10/10).

II. SCOPE

For the purposes of this directive, Department-issued electronic communication devices will be considered any device, issued by the Department, which gives members the ability to communicate via voice, internet, E-mail, instant messages, text messages, or multimedia messages over a cellular or wireless telecommunications network.

III. POLICY

A. Department-issued electronic communication devices (e.g., BlackBerry devices) are issued to members as a convenience to enhance on-duty job performance only.

B. Department members:

1. are not obligated or required to access, respond to electronic communications, and/or carry the devices on their person while off-duty.
2. have no expectation of privacy regarding any communication made with or the files stored on Department-issued devices. Administrative searches of electronic files may be conducted as deemed necessary by Department supervisory or command staff personnel without prior notice to the affected member and without the existence of probable cause or the procurement of a search warrant.

C. Members accessing their Department e-mail account, responding to electronic messages, or using a Department-issued electronic communication device related to Department business will not be compensated unless the member is officially on a "call-back" assignment as defined by existing labor contractual agreements or the member is directed by their superior to immediately perform a substantial task with overtime authorization from the superior directing the request.

NOTE: This guideline includes accessing electronic messages using personally owned electronic communication devices.

G.O. 98-07-08
ISSUE DATE:

DEPARTMENT-ISSUED ELECTRONIC COMMUNICATION DEVICES
13 October 2010

Page 1

CPD 00045

Department-Issued Electronic Communication Device Compliance Statement
Chicago Police Department

I have read and understand the Chicago Police Department directive entitled "Department-Issued Electronic Communication Devices" and acknowledge that Department-issued electronic communication devices are issued as a convenience to enhance on-duty performance only.

I understand that:

1. I have no expectation of privacy regarding any communication made with or the files contained on Department-issued devices. Administrative searches of electronic files may be conducted as deemed necessary by Department supervisory or command staff personnel without prior notice and without the existence of probable cause or the procurement of a search warrant.
2. If I access my Department e-mail account, respond to electronic messages, or use the Department-issued electronic communication device related to Department business off-duty, I will not be compensated unless I am officially on a "call-back" assignment as defined by existing labor contractual agreements or I am directed by my superior to immediately perform a substantial task with overtime authorization from the superior directing the request.

Members are subject to all City of Chicago ordinances and Department Rules and Regulations, policies, and directives while using the device.

Member Name: _____ Unit: _____

Member Signature: _____ Date: _____

Approved By: _____ Date: _____
(Signature of Commander/Commanding Officer - No substitutes accepted)

All requests should be sent to:
Commander, Public Safety Information
Technology (PSIT), Unit 125

 Chicago Police Department		General Order G09-01-05	
DEPARTMENT-ISSUED ELECTRONIC COMMUNICATION DEVICES			
ISSUE DATE:		07 August 2013	EFFECTIVE DATE:
RESCINDS:		22 February 2012 version	07 August 2013
INDEX CATEGORY:		Information Management	

I. PURPOSE

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- B. Department members:

1. are not obligated or required to access, respond to electronic communications, and/or carry the devices on their person while off-duty.
2. have no expectation of privacy regarding any communication made with or the files stored on Department-issued devices. Administrative searches of electronic files may be conducted as deemed necessary by Department supervisory or command personnel without prior notice to the affected member and without the existence of probable cause or the procurement of a search warrant.

C. Off-duty members will not use a Department-issued electronic communication device to access their Department e-mail account, respond to electronic messages, or perform other work related to Department business unless the member is officially on a "call-back" assignment as defined by existing labor contractual agreements or the member is directed by a supervisor to immediately perform any work and overtime is authorized by the supervisor directing the request. If there is a request and approval for overtime, the Department member must comply with the applicable Department directives concerning the submission of an Overtime/Compensatory Time Report (CPD-11.608). If overtime is not approved, the member is not to perform the work.

NOTE: This guideline includes accessing electronic messages using personally owned electronic communication devices.

IV. PROCEDURES

- A. Members issued a Department-issued electronic communication device will:
 1. read, complete, and obtain the proper signatures as indicated on:
 - a. the Department-Issued Electronic Communication Device Compliance Statement (CPD-65.109).
 - b. E-Mail Compliance Statement form (CPD-65.118).



From the Desk of
Chief Nicholas J. Roti
Bureau of Organized Crime

BOC # 13-0394

MEMO

30 October 2013

TO:	☒	Eric Carter Deputy Chief Bureau of Organized Crime
	☒	Eric Washington Commander Narcotics Division
	☒	Kevin Ryan Commander Gang Enforcement Division
	☒	Christopher Kennedy Commander Gang Investigation Division

☒ Kenneth Angarone
Commander
Vice Division

SUBJECT: CELL PHONE USE POLICY

- ☒ For Your Information and Attention
☒ For Your Information and Dissemination
☐ For Your Information and Appropriate Action
☐ For Your Review and/or Approval
☐

COMMENT: Please see the attached REMINDER from Chief Roti.



Chief Nicholas J. Roti
Bureau of Organized Crime - Chicago Police Department

REMINDER

All non-supervisory members of the Bureau of Organized Crime are reminded they are not required to reply to non-emergency, work related phone calls, e-mails or text messages while they are off duty unless they are receiving compensation. Upon receiving notification of an emergency situation which necessitates the member acting in their official capacity, and being compensated, the member will reply to phone calls, e-mails and text messages until they have been released from the assignment.

This notification in no way absolves any member from the Department's requirement to provide a current address and telephone number as cited in the Department's Rules and Regulations, Section V - Rules of Conduct, Rule# 26. Any member needing to update their address or phone number will make their updates via the Personnel Change Notice (CPD-11.611), as specified in Employee Resource E02-02-09, III, A.

Supervisory members, and other BOC members issued BOC communication devices, are further reminded they are to comply with the policies set forth in the "Policy" section of General Order G09-01-05, III. Members in possession of BOC communication devices have a signed copy of the "Department-Issued Electronic Communication Device Compliance Statement Chicago Police Department" and "E-mail Compliance Statement" on file indicating acknowledgment of the requirement to comply with Department policies. Members in possession of a BOC issued device are encouraged to review G09-01-05, in its entirety, to refresh themselves on the cited regulations.



Nicholas J. Roth

Chief

Bureau of Organized Crime