

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ELIZABETH MANNING, LISA RIVERS,
RHONDA WILLIAMS AND REVA MCCARTHY,
*on behalf of themselves and all other employees
similarly situated,*

Plaintiffs,

v.

BOSTON MEDICAL CENTER CORPORATION,
ELAINE ULLIAN, AND JAMES CANAVAN

Defendants.

AMENDED COMPLAINT-
CLASS ACTION
AND DEMAND FOR JURY
TRIAL

Civil Action No.
09-cv-11463

NATURE OF CLAIM

1. This is a proceeding for injunctive and declaratory relief and monetary damages to redress the deprivation of rights secured to plaintiffs, Elizabeth Manning, Lisa Rivers, Rhonda Williams, and Reva McCarthy, individually, as well as all other employees similarly situated (“Class Members”) under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (“FLSA”) and under the common law of Massachusetts.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343 (3) and (4) conferring original jurisdiction upon this Court of any civil action to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights; under 28 U.S.C. § 1337 conferring jurisdiction of any civil action arising under any Act of Congress regulating interstate commerce; under the Declaratory Judgment Statute, 28 U.S.C. § 2201; and under 29 U.S.C. §216 (b).¹

¹ Plaintiffs filed their Massachusetts state law claims in Massachusetts Superior Court on September 9, 2009, however defendants subsequently removed the action to this Court. On March 10, 2011, this Court ruled plaintiffs’ state law claims were either preempted by § 301 and/or exercised supplemental jurisdiction over

3. Venue is appropriate in the District of Massachusetts since the allegations arose in this district and at least one of the Plaintiffs resides in this district.

CLASS ACTION ALLEGATIONS

4. The claims arising under this complaint are properly maintainable as a class action under state and federal law pursuant to Rule 23.

5. The class consists of current and former employees who worked for defendants, were paid hourly and were not paid for all the time they worked including applicable premium pay.

6. The class size is believed to be well over 4,000 employees.

7. Common questions of law and fact predominate in this action because the claims of all Plaintiffs and Class Members are based on defendants' policies and practice of not properly paying employees for all hours worked including applicable premium pay in violation of the laws of Massachusetts.

8. The named Plaintiffs will adequately represent the interests of the Class Members because they are similarly situated to the Class Members and their claims are typical of, and concurrent to, the claims of the other Class Members.

9. There are no known conflicts of interest between the named Plaintiffs and the other Class Members.

10. The class counsel, Collora LLP and Thomas & Solomon LLP, are qualified and able to litigate the Plaintiffs' and Class Members' claims.

11. The class counsel practice in employment litigation, and their attorneys are

statutory claims and then dismissed them. *See Manning v. Boston Medical Center Corp.*, No. 09-11724 D. Mass. Mar. 10, 2011), Docket No. 38 at 4. Plaintiffs file this amended complaint asserting common law claims only on behalf of non-union members in accordance with the Court's written and oral ruling to file these state law claims in one complaint together with the federal claims, but expressly reserve all rights. *See* Docket, Text Order April 15, 2011.

experienced in class action litigation, including class actions arising under state wage and hour laws.

12. The class action is maintainable under Rule 23 because the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Absent this action, the Plaintiffs and Class Members likely will not obtain redress of their injuries and defendants will retain the proceeds of their violations of the laws of Massachusetts.

PARTIES

A. Defendants

13. Collectively, defendants Boston Medical Center Corporation (referred to as “BMC”), Elaine Ullian, and James Canavan (“collectively referred to as defendants”) are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

14. The FLSA defines “employer” to include any person acting directly or indirectly in the interest of an employer in relation to an employee and an employee is anyone who is suffered or permitted to work. As a result, including as further described below, all of the defendants are liable as employers under the FLSA.

15. Defendants are also jointly and severally liable as joint employers under 29 C.F.R. § 791.2 for the violations complained of herein.

16. In particular, the regulations allow for joint and several liability if employers are not acting entirely independently of each other or if employers are not completely disassociated from each other, including when one employer controls, is controlled by, or is under common control with the other employer. Commonly, this arrangement of employers is referred to as a “joint employer” or “single employer.”

17. Courts look to the economic realities of the enterprise and the totality of the circumstances to determine whether there is a joint or single employer relationship.

18. Here, defendants are jointly and severally liable under the Department of Labor regulations because they act directly or indirectly in the interest of an employer, and because they are not acting entirely independently or are not completely disassociated from each other. The following facts set forth some examples of the legal and factual basis supporting joint and several liability under the statute and regulations.

19. Collectively, BMC comprises a single, integrated enterprise, as it performs related activities through common control for a common business purpose.

20. In fact, BMC claims it is the largest safety net hospital in the New England area.

21. Collectively, BMC is an enterprise engaged in the operation of a hospital and/or the care of the sick and is a healthcare consortium. Further, the Boston Medical Center continues to identify its mission in its 990 tax documentation form as serving the health needs of the people of Boston through the integrated delivery system.

22. Defendants operate one health care facility or center and employ approximately 4,000 individuals.

23. BMC constitutes an integrated, comprehensive, consolidated health care delivery system, offering a wide range of services.

24. Defendants integrate their public health, preventive, emergency and rehabilitative programs.

25. For example, defendants have centralized healthcare quality and safety programs, supply chain management, financial, computer, payroll and health records systems that are integrated throughout their locations.

26. In fact, defendants implemented a data center virtualization strategy to centralize consolidated storage, servers and desktops and reduce operating costs.

27. Further, defendants' own website claims their vision of meeting the health needs of the residents of Boston and surrounding areas can be met because of their integrated delivery system.

28. Defendants' labor relations and human resources are centrally organized and controlled, including defendants' employment of a Senior Human Resources Director as part of the executive management team as well as the maintenance of system-wide policies and certain employee benefit plans.

29. Defendants share common management, including oversight and management by an executive management team and board of Trustees.

30. Defendants uses a scorecard for tracking progress of organizational performance. Each month the scorecard is distributed to management, posted on BMC's Intranet Web Page, reviewed at leadership meetings, departmental meetings, Medical Management Council and employee town meetings.

31. Defendants utilize a centralized job posting system.

32. Defendants have common ownership.

33. As such, defendants are the employer (single, joint or otherwise) of the Plaintiffs and Class Members and/or alter egos of each other. For example, as discussed herein, the component entities implemented the policies as required by defendants due to the control defendants exercised on them, causing the fraud and wrongs at issue in this case.

34. These facts also support liability of the defendants based on principal/agency liability and as alter egos. For example, as discussed herein, the component entities implemented

the policies as required by defendants due to the control defendants exercised on them, causing the fraud and wrongs at issue in this case.

35. Defendants are also liable to Plaintiffs and Class Members under a theory of joint venture. Defendants engage in a joint venture of operational control for providing healthcare services by entering an agreement, established through their conduct in sharing the profits and losses.

36. Defendants jointly managed and controlled this venture as well as its employees and assets. Further, as discussed above, the Boston Medical Center identifies its mission in its 990 tax documentation form as serving the health needs of the people of Boston through the integrated delivery system. For example, BMC claims it will integrate its public health, preventative, emergency and rehabilitative programs.

37. Defendants are jointly and severally liable to the Plaintiffs and Class Members for the damages arising out of this joint venture.

38. Based in part on the foregoing, defendants, under 29 C.F.R. § 791.2, are also jointly and severally liable for the violations occurring at each of their locations, including their health care facility and center and more than 10 affiliated health care facilities and centers.

39. Defendants are jointly and severally liable to the Plaintiffs and Class Members for the damages arising out of this joint venture.

Elaine Ullian

40. Under the FLSA, individuals can also be held individually liable for violations of its provisions.

41. Elaine Ullian was the President and Chief Executive Officer (“CEO”) of BMC from approximately 1994 until 2010.

42. As President and CEO of BMC, Ms. Ullian had operational control over BMC.

43. In her role, Ms. Ullian controlled significant functions of the business. In fact, Ms. Ullian oversaw the 1996 merger of Boston City Hospital, Boston Specialty Rehabilitation Hospital and Boston University Medical Center, creating the Boston Medical Center.

44. Further, Ms. Ullian was involved in the budget for the hospital, including the money used for organizational development and training.

45. In 2009, Ms. Ullian was involved in suing the state of Massachusetts for taking money away from BMC.

46. In her role, Ms. Ullian was credited with growing patient volume and outpatient volume for BMC.

47. Ms. Ullian was involved in regular presentations and meetings in the community on behalf of the Boston Medical Center. Further, Ms. Ullian was on the boards of several public for-profit health care corporations.

48. As President and CEO, Ms. Ullian made decisions regarding the resources needed for the system-wide implementation of electronic medical record system.

49. Ms. Ullian is credited with the building of the Moakley Building, which enhanced BMC's cancer care.

50. Ms. Ullian had the authority to, and did, make decisions that concerned the policies defendants adopted and the implementation of those policies.

51. As President and CEO, Ms. Ullian believed being very visible and practicing "Management-by-Walking-Around" while at BMC. Further, in 2003, she outlined a need for a leader of a hospital system to be highly accessible to staff, the governing body, patients and the community.

52. For example, Ms. Ullian was involved in the creation and implementation of a new policy regulating the interaction between clinicians and representatives of pharmaceutical and device industries.

53. Ms. Ullian was involved in the modernization and transformation of BMC, including creating the position Chief Quality Officer.

54. Ms. Ullian created BMC's HealthNet Plan, the largest managed care organization for low income residents in the state.

55. As President and CEO, Ms. Ullian invested millions annually in interpreter services for BMC.

56. Ms. Ullian had the authority to, and did, make decisions that concerned defendants' operations, including functions related to employment, human resources, training, payroll, and benefits.

57. For example, Ms. Ullian was involved in the hiring of employees, including from various community-based organizations.

58. Ms. Ullian was actively involved in the recruitment of employees, including the minority representation of all management, professional and technical positions.

59. Further, Ms. Ullian was involved in the reduction of jobs and services at BMC due to budget cuts. Ms. Ullian was actively involved in strategy behind the system's spending, positions to cut, and overall decisions to reduce expenses.

60. As President and CEO, Ms. Ullian was involved in a rally, organized in part by one of the hospital unions, to show patients and medical workers united together in a fight to save health-care services for the underprivileged.

61. Due in part to her role as President and CEO, Elaine Ullian was actively involved

in the creation of the illegal policies complained of in this case.

62. Ms. Ullian was involved in the negotiation with unions, including relating to the unfair labor practices of nurses.

63. As President and CEO, Elaine Ullian actively advised defendants' agents on the enforcement of the illegal policies complained of in this case.

64. Due in part to her role as President and CEO, Ms. Ullian actively ensured defendants' compliance or non-compliance with federal law, including the requirements of the FLSA.

65. Ms. Ullian had the authority to, and does, make decisions that concern training and education functions across BMC.

66. Because Ms. Ullian had authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of Plaintiffs, and control the drafting and enforcement of the policies which governed the hiring and firing of employees, Elaine Ullian had the power to hire and fire employees.

67. Based upon the foregoing, Ms. Ullian is liable to Plaintiffs because of her active role in operating the business, her status as an employer, and/or according to federal law or state law.

James Canavan

68. As the Senior Human Resources Director for BMC, James Canavan had operational control over the functions across BMC from approximately 1997 until February 2010.

69. Mr. Canavan was actively involved in significant functions of the hospital, including payroll functions across BMC.

70. Mr. Canavan was responsible for, provided direction and control over, and was authorized to direct all aspects of human resources functions across BMC.

71. As the Senior Human Resources Director for BMC, Mr. Canvan was actively involved in community organizations.

72. Due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Canavan was actively involved in the creation of the illegal policies complained of in this case.

73. As Senior Human Resources Director, in concert with others, Mr. Canavan actively advised defendants' agents on the enforcement of the illegal policies complained of in this case.

74. Due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Canavan actively ensured defendants' compliance or non-compliance with federal law, including the requirements of the FLSA.

75. Mr. Canavan was actively involved in reviewing and counseling defendants regarding employment decisions, including hiring and firing of Plaintiffs.

76. Mr. Canavan was actively involved in decisions that set employees' schedules, hours and standard benefit levels.

77. Mr. Canavan was actively involved in decisions that set standard pay scales.

78. For example, Ms. Canavan was the chief negotiator of contracts between unions. Further, he negotiated hourly pay rates and health insurance benefits on behalf of BMC.

79. Mr. Canavan was actively involved in the determination and drafting of human resources policies, the resolution of issues and disputes regarding policies and their application,

the counseling locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

80. In fact, in his role, Mr. Canavan was named on the ratification of a collective bargaining agreements on behalf of BMC.

81. Mr. Canavan was actively involved in defendants' employment and human resources records, including the systems for keeping and maintaining those records.

82. Mr. Canavan was actively involved in training and education functions across BMC.

83. Mr. Canavan was actively involved in determining the type and scope of training employees must attend as well as any compensation they receive for attending training.

84. Mr. Canavan was actively involved in payroll functions across BMC.

85. Mr. Canavan was actively involved in determining the type and scope of benefits available to employees, the method and manner in which information regarding those plans is conveyed to employees, and the system for keeping and maintaining records related to employees' benefits.

86. Because Mr. Canavan had authority to hire or fire employees, provided and directed support regarding human resources issues, including the hiring and firing of employees, and controlled the drafting and enforcement of the policies which governed the hiring and firing of employees, Mr. Canavan had the power to hire and fire employees.

87. Based upon the foregoing, Mr. Canavan is liable to Plaintiffs because of his active role in operating the business, his role in the violations complained of in this action, his status as an employer, and/or otherwise according to federal law and state law.

B. Plaintiffs

Named Plaintiffs

88. At all relevant times, Elizabeth Manning, Lisa Rivers, Rhonda Williams, and Reva McCarthy (“Plaintiffs”) were employees under the FLSA and the state laws of Massachusetts, employed within this District and reside within this District.

89. At all relevant times, as set forth in ¶¶ 14-87, the defendants employed Named Plaintiff Elizabeth Manning, and she was employed at the defendants’ Newton Pavilion location from approximately November 15, 2004 until February 20, 2009 (however stopped performing work for defendants in April 2008 due to an injury) as a registered nurse in the Cardiothoracic unit. Ms. Manning’s hourly rate was approximately \$52 per hour. As a registered nurse for defendants, Named Plaintiff Manning was typically scheduled from 7 a.m. until 7:30 p.m. or 7 p.m. until 7:30 a.m. approximately three days a week totaling 36 hours, excluding time for which Ms. Manning did not receive compensation. However, approximately once a month Ms. Manning worked a 16 hour shift instead of her 12 hour shift, resulting in a workweek of at least 40 hours, again excluding any time for which Ms. Manning did not receive compensation. In addition to the scheduled hours listed above, Ms. Manning worked time for which she did not receive compensation, as further discussed below, including during her meal breaks which she missed or had interrupted approximately 90% of the time, resulting in 1.5 hours during a typical week, when she was, for example, charting, answering calls, monitoring patients, and transporting and assisting patients for testing or procedures; before her scheduled start time in order to, for example, receive her assignment, receive report, and look up labs for her patients, typically resulting in 15 minutes each shift; after her scheduled shift in order to, for example, complete charting, report, speak with physician or patient, tend to emergency or complete regular

duties, typically resulting in 30 minutes each shift; and for training such as in-service trainings on new procedures, like a bypass procedure done by a robotic arm, which was approximately 10 hours. This additional time of at least 3 hours and 45 minutes during weeks without training, often should have been paid at overtime rates when Ms. Manning's scheduled shifts exceeded 40 hours in a week, as discussed above, and at straight time rates when her scheduled hours did not exceed 40. For example, during the weeks when she worked 40 scheduled hours, the additional 3 hours and 45 minutes of uncompensated time should have been paid at overtime rates, resulting in approximately \$78 per hour or \$292.50 total time not paid each week. Ms. Manning was a member of the Massachusetts Nurses Association and subject to their collective bargaining agreement ("CBA").

90. At all relevant times, as set forth in ¶¶ 14-87, the defendants employed Named Plaintiff Lisa Rivers, and she worked at the defendants' Newton Pavilion location from approximately February 23, 2003 until December 31, 2008 as a registered nurse in the Adolescent Psychiatric unit. Ms. Rivers' hourly rate began at approximately \$37 per hour and ended at approximately \$45 per hour. As a registered nurse for defendants, Named Plaintiff Rivers was typically scheduled from 11 p.m. until 7:30 a.m. approximately five days a week, totaling 40 hours, excluding time for which Ms. Rivers did not receive compensation. Further, Ms. Rivers worked an additional 3 hours after her regularly scheduled shift approximately every other week, resulting in a week of 43 hours, again excluding time for which Ms. Rivers did not receive compensation. Approximately once a month, Ms. Rivers also picked up an additional 8 hour shift during the period of time between approximately February 2003 until October 2005, resulting in a workweek of 48 hours, once again excluding time for which she was not compensated. In addition to the scheduled hours listed above, Ms. Rivers worked time for which

she did not receive compensation, as further discussed below, including during her meal breaks which she was missed or interrupted approximately 90% of the time, resulting in 2.5 hours in a typical week, while she assisted patients who had difficulties sleeping and performed safety checks; and for training such as clinical conferences and in-service training on new research and procedures, resulting in an additional 32 hours per year. As a result, Ms. Rivers experienced additional work that would amount to approximately 2.5 hours during weeks without training. This additional uncompensated time should have been paid at overtime rates when Ms. Rivers' scheduled shifts exceeded 40 hours in a week and at straight time rates when her scheduled hours did not exceed 40. For example, toward the end of her employment and during the weeks when she worked 40 scheduled hours, the additional 2 hours and 30 minutes of uncompensated time should have been paid at overtime rates of \$67.50 per hour or \$168.75 total time not paid each week. When Ms. Rivers was hired by defendants, she was not part of a union or subject to a CBA. In approximately 2008, Ms. Rivers recalls becoming a member of the Massachusetts Nurses Association and subject to their CBA.

91. At all relevant times, as set forth in ¶¶ 14-87, the defendants employ Named Plaintiff Rhonda Williams, and she began working at the defendants' Memino Pavilion location in approximately January 2004 as a registered nurse in MedSurg, Rehabilitation, Telemetry, and Oncology units. Ms. Williams' hourly rate is approximately \$49 per hour. As a registered nurse from approximately January 2004 until 2006, Ms. Williams was typically scheduled 40 hours per week, excluding time for which she was not compensated. From approximately 2006 until present, Ms. Williams is typically scheduled 24 hours per week, excluding time for which she was not compensated. Throughout her employment, at least once a year Ms. Williams is scheduled for at least 40 hours a week. As a per diem nurse, Ms. Williams' shifts vary in length,

including those that are 4 hours, 8 hours, and 12 hours. Because the lengths of her shifts vary she can be scheduled for shifts including 7 am until 3:30 pm, 3 pm until 11:30 pm, 11 pm until 7:30 am, 3 pm until 7:30 pm; 7 pm until 11:30 pm; 7 am until 7:30 pm, 7 pm until 7:30 am. In addition to the scheduled hours listed above, Ms. Williams works time for which she did not receive compensation, as further discussed below, including during her meal breaks which she almost always misses or is interrupted, resulting in an additional 30 minutes each shift, while, for example, handling patient calls, patient admissions, administering medication, charting, and filling out paperwork; after her scheduled end time while she, for example, cleaned or finished notes resulting in an additional 30 minutes per shift; and for training such as 15 hours of continuing education, CPR, which is 8 hours every 2 years, or computerized health stream classes resulting in an additional 10 hours per year. As a result, Ms. Williams experienced additional work that would amount to approximately 3 hours during weeks without training when she was scheduled for three shifts a week. This additional uncompensated time of at least 3 hours per week should have been paid at overtime rates when Ms. Williams' scheduled shifts exceeded 40 hours in a week and at straight time rates when her scheduled hours did not exceed 40. For example, during the weeks when she worked 40 scheduled hours, the additional 3 hours of uncompensated time should have been paid at overtime rates of \$73.50 per hour or \$220.50 total time not paid each week. Ms. Williams was a member of the 1199 SEIU union and was subject to their CBA while employed with the defendants.

92. At all relevant times, as set forth in ¶¶ 14-87, the defendants employed Named Plaintiff Reva McCarthy at the defendants' East Newton Campus location from approximately October 2002 until August 2009 as an administrative assistant in the Cardiothoracic unit. Ms. McCarthy's hourly rate was approximately \$26.94 per hour. As an administrative assistant, Ms.

McCarthy was typically scheduled from approximately 7:30 am until 4 pm, five days a week resulting in a workweek of 40 hours per week, excluding time for which she was not compensated. In addition to the scheduled hours listed above, Ms. Williams worked time for which she did not receive compensation, as further discussed below, including during her meal breaks which she missed or was interrupted approximately 95% of the time, resulting in 2.5 hours during a typical week, while, for example, scheduling patients, making phone calls, drafting letters, and answering questions from individuals walking into office; before each of her scheduled shifts for approximately 15 minutes while she was checked messages and prepared the clinic, including the charts and cat scans; and after each of her scheduled shifts for approximately one hour while she, for example, booked the scheduled tests, completed filing, and prepared charts and forms. As a result, Ms. McCarthy experienced additional work that would amount to approximately 8 hours and 45 minutes each workweek. This additional uncompensated time should have been paid at overtime rates when Ms. McCarthy's scheduled shifts exceeded 40 hours in a week and at straight time rates when her scheduled hours did not exceed 40. For example, because Ms. McCarthy was scheduled for 40 hours per week, the additional 8 hours and 45 minutes of uncompensated time should have been paid at overtime rates of \$40.41 per hour or \$353.59 total time not paid each week. Ms. McCarthy was not a member of a union or subject to a CBA.

Class Members

93. The Class Members are those employees of defendants who were suffered or permitted to work by defendants and not paid their regular or statutorily required rate of pay for all hours worked ("Class Members").

FACTUAL BACKGROUND

94. BMC is one of the largest health care providers in Massachusetts.

95. Across the United States, pay practices throughout the health care industry are being investigated for failure to properly pay hourly employees for all time worked, including overtime to those employees working over 40 hours in a week. *See* New York Times Article “Pay Practices in Health Care Are Investigated,” attached hereto as Exhibit A.

96. Class Counsel’s investigation has confirmed that indeed there is a common practice in the healthcare industry that results in hourly employees not being compensated for all time worked, including overtime compensation.

97. As discussed below, defendants here maintained several illegal pay policies that denied Plaintiffs and Class Members compensation for all hours worked, including applicable premium pay rates.

Meal Break Deduction Policy

98. One of the policies resulting in Plaintiffs and Class Members not receiving compensation for all time worked was defendants’ “Meal Break Deduction Policy.” Defendants maintain the Meal Break Deduction Policy throughout their facilities and centers.

99. Under this policy, defendants’ timekeeping system automatically deducts time from employees’ paychecks each day for meals, breaks and other reasons.

100. Plaintiffs and Class Members are deducted at least thirty minutes from their pay each shift they work long enough shifts for a meal break. This deduction occurs on every shift to every Plaintiff and Class Members, regardless of their position, unit or location.

101. Defendants operate on a 24/7 basis, and in doing so, defendants do not ensure that Plaintiffs and Class Members perform no work during the breaks. Further, defendants actually

expect Plaintiffs and Class Members to be available to work throughout their shifts and consistently require their employees to work during their unpaid breaks.

102. Plaintiffs and Class Members do in fact perform work during those breaks and are not paid for that time. During this time, employees were performing tasks such as charting, answering calls, monitoring patients, transporting and assisting patients receiving testing or procedures, performing safety checks, handling patient admissions, administering medications, filling out paperwork, scheduling appointments, drafting letters, and answering questions.

103. Moreover, defendants know or should have known that the Plaintiffs and Class Members perform work during these meal and other unpaid breaks, but still do not pay them for this time pursuant to their Meal Break Deduction Policy.

104. One of the ways defendants are aware of such work being performed is because the defendants permit, and often request, that such work be done by the employees during their unpaid meal breaks. This work is done on defendants' premises during operational hours, and in full view of the defendants' managers and supervisors. Thus defendants permit that such work be done, and have actual and constructive knowledge it is being performed.

105. Plaintiffs and Class Members also had conversations with defendants' managers in which they discussed how they were working through their meals or unpaid breaks and were not getting paid for such work.

106. When questioned by employees about the Meal Break Deduction Policy, the defendants affirmatively stated that the employees were being fully paid for the work time for which they were entitled to be paid, even though defendants knew compensable work time was being excluded from the employees' pay. Such conversations occurred with Plaintiffs and Class Members on a number of occasions.

107. Further, defendants do not prohibit Plaintiffs and Class Members from working during their unpaid breaks and do not have rules against such work.

108. Defendants also know that employees are receiving assigned tasks that must be completed by the appointed deadline, which results in employees having to work through their meal breaks even though they are not getting paid for the work.

109. Plaintiffs and Class Members are also not relieved by another employee when their break comes, or asked to leave their work location. Further, given the demands of the health care industry and short staffing, defendants' management knew in order to timely complete the tasks they assigned to Plaintiffs and Class Members, Plaintiffs and Class Members had to work through their unpaid meal breaks.

110. Accordingly, defendants should have known that Plaintiffs and Class Members perform work during their unpaid breaks. Even though defendants knew or should have known their employees are performing such work, defendants fail to compensate their employees for such work.

111. All Plaintiffs and Class Members, regardless of location, position, unit or shift, are subject to the Meal Break Deduction Policy and are not fully compensated for work they perform during breaks, including, without limitation, hourly employees working at BMC's facilities and centers, such as secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, transport nurses, nurse aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, nurse aides, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse techs, trainers,

transcriptionists, occupational therapists, occupational therapy assistants, physical therapists, physical therapy assistants, radiation therapists, staff therapists, angiotechnologists, x-ray technicians, CAT scan technicians, mammographers, MRI technologists, sleep technologists, surgical technologists, radiographers, phlebotomists, respiratory technicians, respiratory care specialists, respiratory care practitioners, clinical coordinators, medical assistants, home care nurses, home health aides, clinical case managers, midwives and other health care workers.

112. As a result of the uniform policy, all Plaintiffs and Class Members are entitled to compensation for all time they performed work for defendants, including during their unpaid breaks.

113. As discussed more fully above, this additional uncompensated time should have been paid at overtime rates when, as discussed above, Plaintiffs and Class Members' scheduled shifts exceeded 40 hours in a week, or when the uncompensated time from missed or interrupted meal breaks, pre- and post-schedule work, and training time, pushed their hours for the week over 40.

114. Additionally, Plaintiffs and Class Members' claims under the Meal Break Deduction Policy do not arise under any CBA, and instead arise under federal law and Massachusetts state laws.

115. Plaintiffs and Class Members subject to the Meal Break Deduction Policy are members of Subclass 1.

116. Additionally, Plaintiffs and Class Members claiming violations of the FLSA (Count I), are further grouped as follows:

- a. Subclass 1A includes all Plaintiffs and Class Members for workweeks during which they were not subject to a collective bargaining agreement.
- b. Subclass 1B includes any Plaintiffs and Class Members who are or were

subject to a collective bargaining agreement, only for the workweeks they were subject to the terms of such an agreement.

Unpaid Pre- and Post-Schedule Work Policy

117. Another policy resulting in uncompensated time for Plaintiffs and Class Members is defendants' "Unpaid Pre- and Post-Schedule Work Policy."

118. Under this policy, defendants suffered or permitted Plaintiffs and Class Members to perform work, predominantly to the benefit of defendants, before and/or after the end of their scheduled shifts.

119. However, defendants failed to pay Plaintiffs and Class Members for all time spent performing such work as a result of defendants' policies, practices and/or time recording system.

120. For example, employees were not allowed to record all of their work performed before or after scheduled shifts.

121. Additionally, even if time was recorded before or after scheduled shifts, it was not compensated properly.

122. For example, employees often had to complete their regular shift responsibilities before and/or after their scheduled shift ended. During this time, for example, employees charted, received assignment, reviewed labs, received/gave report, spoke with physicians or patients, tended to emergency issues, completed regular duties, cleaned, completed notes, prepared clinic, checked messages, prepared charts, forms, cat scans, and filed. This time spent working was uncompensated.

123. Although defendants, including managers, were aware employees performed this work beyond their scheduled work shifts, employees continued to perform work for which they were not compensated.

124. As discussed more fully above, this additional uncompensated time should have

been paid at overtime rates when, as discussed above, Plaintiffs and Class Members' scheduled shifts exceeded 40 hours in a week, or when the uncompensated time from missed or interrupted meal breaks, pre- and post-schedule work, and training time, pushed their hours for the week over 40.

125. Additionally, Plaintiffs and Class Members' claims under the Unpaid Pre- and Post-Schedule Work Policy do not arise under any CBA, and instead arise under federal law and Massachusetts state laws.

126. Plaintiffs and Class Members subject to the Unpaid Pre- and Post-Schedule Work Policy are members of Subclass 2.

127. Additionally, Plaintiffs and Class Members claiming violations of the FLSA (Count I), are further grouped as follows:

- a. Subclass 2A includes all Class Members for workweeks during which they were not subject to a collective bargaining agreement.
- b. Subclass 2B includes any Class Members who are or were subject to a collective bargaining agreement, only for the workweeks they were subject to the terms of such an agreement.

Unpaid Training Policy

128. Defendants also suffered or permitted Plaintiffs and Class Members to attend compensable training.

129. However, defendants fail to pay employees for all time spent attending such training sessions (the "Unpaid Training Policy").

130. Often these training activities occurred during regular working hours; were required by defendants; and were directly related to their position with defendants. Further, Plaintiffs and Class Members were often required to actively participate in the training.

131. For example, employees attended clinical conference, trainings, computerized

streaming education and in-services, covering topics such as new research and procedures, including bypass surgery completed by a robotic arm and CPR. Such training related to employees' jobs by, for example providing instruction on techniques to be used by employees when performing their jobs and regularly occurred during working hours.

132. Although defendants, including managers, were aware employees performed this training, employees continued to perform work for which they were not compensated.

133. For example, defendants scheduled and led the required training sessions attended by employees.

134. As discussed more fully above, this additional uncompensated time should have been paid at overtime rates when, as discussed above, Plaintiffs and Class Members' scheduled shifts exceeded 40 hours in a week, or when the uncompensated time from missed or interrupted meal breaks, pre- and post-schedule work, and training time, pushed their hours for the week over 40.

135. Additionally, Plaintiffs and Class Members' claims under the Unpaid Training Policy do not arise under any CBA, and instead arise under federal law and Massachusetts state laws.

136. All Plaintiffs and Class Members subject to the Unpaid Training Policy are members of Subclass 3.

137. Additionally, Plaintiffs and Class Members claiming violations of the FLSA (Count I), are further grouped as follows:

- a. Subclass 3A includes all Class Members for workweeks during which they were not subject to a collective bargaining agreement.
- b. Subclass 3B includes any Class Members who are or were subject to a collective bargaining agreement, only for the workweeks they were subject to the terms of such an agreement.

138. Collectively, the Meal Break Deduction Policy, the Unpaid Pre- and Post-Schedule Work Policy, and the Unpaid Training Policy, are referred to herein as the “Unpaid Work Policies.”

Additional Allegations

139. Plaintiffs and Class Members were subject to defendants’ timekeeping policies which fail to ensure that employees are compensated for all hours worked, including pursuant to the Unpaid Work Policies.

140. Among the relief sought, Plaintiffs seek injunctive relief to prevent BMC from continuing the illegal policies and practices perpetuated pursuant to the Unpaid Work Policies.

141. Even at-will employees can enter into contracts for employment. *See Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984) (noting that “an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace.”).

142. Defendants, through its management, recruiters and/or Human Resource employees, entered into express and implied contracts with Plaintiffs and Class Members that were explicitly intended to order and govern the employment relationship between defendants and Plaintiffs and Class Members. Specifically, by hiring plaintiffs, defendants entered into an employment contract with defendants.

143. The terms of the agreement included that Plaintiffs and Class Members provide their labor and services in a specified role for defendants, in exchange for an agreed upon hourly pay rate for “all hours worked” by plaintiffs. Further, defendants agreed Plaintiffs and Class Members would be provided a meal break according to applicable state law.

144. Plaintiffs accepted the terms of the agreement and began performing work for defendants in which they were to be paid the hourly pay rate. The labor and services provided

by Plaintiffs and Class Members included tasks, as described in detail above, performed by Plaintiffs and Class Members pursuant to defendants' Unpaid Work Policies.

145. As alleged herein, because of defendants' Meal Break Deduction Policy, Unpaid Pre- and Post-Schedule Work Policy, and Unpaid Training Policy, Plaintiffs and Class Members regularly worked hours both under and in excess of forty per week and were not paid for all of those hours.

146. The defendants, in violation of the express agreement to pay plaintiffs for "all hours worked," failed to pay for time that Plaintiffs and Class Members worked including, but not limited to, during their meal breaks, time that Plaintiffs and Class Members spent in required, job related training, and time that Plaintiffs and Class Members spent before and after their regular work hours performing work-related tasks. Plaintiffs and Class Members have been harmed and as a direct and proximate result have suffered damages including all amounts they should have been paid for all time worked including applicable premium pay. Thus, defendants are liable to Plaintiffs and Class Members for breach of contract.

147. Plaintiffs and Class Members were further deprived the "opportunity to stop work and eat a meal in peace during a busy workday[.]" a benefit in itself with value. *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374 (Mass. 2008).

148. Defendants have received financial gain at the expense of Plaintiffs and Class Members because they did not pay Plaintiffs and Class Members for all hours worked and Defendants kept monies owed to the Plaintiffs and Class Members.

149. Defendants have received that financial gain under such circumstances that in equity and good conscience Defendants ought not to be allowed to profit at the expense of Plaintiffs and Class Members.

150. In addition, defendants' implied contract with Plaintiffs and Class Members embodied all binding legal requirements concerning the payment of such wages to Plaintiffs and Class Members that were in force at the time of that contract.

151. Defendants failed to compensate Plaintiffs and Class Members in compliance with this implied contract by failing to compensate Plaintiffs and Class Members for time that they worked, including pursuant to the Unpaid Work Policies.

152. Each such contract also included an implied or express term that defendants agreed to fulfill all of their obligations pursuant to applicable Massachusetts and federal law, including payment for all time worked including applicable premium pay.

153. Defendants failed to act in good faith and breached the express and/or implied contract terms by failing to pay Class Members for all of the time Class Members worked and by failing to pay Class Members all time worked including applicable premium pay. As a result of defendants' breach of express and implied contracts, Plaintiffs and Class Members have been harmed and as a direct and proximate result have suffered damages including all amounts they should have been paid for all time worked including applicable premium pay.

154. Defendants made clear, definite promises to Plaintiffs and Class Members that they would be paid for all hours worked including applicable premium pay in accordance with the applicable Massachusetts and federal law.

155. Defendants made these promises with the clear understanding that Plaintiffs and Class Members were seeking employment and therefore were seeking assurances that they would be paid for all hours worked. Plaintiffs and Class Members relied on this promise. Without such a promise of being paid for all hours worked, Plaintiffs and Class Members would not have worked for defendants.

156. Plaintiffs and Class Members acted to their substantial detriment in reasonable reliance on defendants' promise to pay them for wages and benefits earned. Injustice can only be avoided if this Court mandates that defendants pay its employees for all hours worked.

157. At all relevant times, defendants had and continued to have a statutory or common law obligation to pay Plaintiffs and Class Members all earnings and overtime due. The wages belong to Plaintiffs and Class Members as of the time the labor and services were provided to defendants and, accordingly, the wages for services performed are the property of the Plaintiffs and Class Members.

158. In refusing to pay wages and applicable premium pay to Plaintiffs and Class Members, defendants knowingly, unlawfully and intentionally took, appropriated and converted the wages and overtime earned by Plaintiffs and Class Members for defendants' own use, purpose and benefit. At the time the conversion took place, Plaintiffs and Class Members were entitled to immediate possession of the amount of wages and overtime earned. As a result, Plaintiffs and Class Members have been denied the use and enjoyment of their property and have been otherwise damaged in an amount to be proven at trial. This conversion was done in bad faith, oppressive, malicious, and fraudulent and/or done with conscious disregard of the rights of the Plaintiffs and Class Members. This conversion was concealed from Plaintiffs and Class Members.

159. Defendants' failure to compensate Plaintiffs and Class Members for all the time they worked, including applicable premium pay, constitutes the conversion of the monies of Plaintiffs and the Class Members.

160. As a direct and proximate result of the conversion by defendants of monies belonging to Plaintiffs and Class Members, Plaintiffs and Class Members have suffered damages

including all amounts they should have been paid at regular or premium rates for time worked.

161. Plaintiffs and Class Members conferred a measurable benefit upon defendants by working on defendants' behalf without receiving compensation, including premium overtime compensation.

162. As detailed herein, rather than incur additional labor costs by paying non-exempt hourly-paid employees for all of the hours that they worked, defendants accepted the services provided by Plaintiffs and Class Members and required Plaintiffs and Class Members to work hours under and in excess of forty without receiving any compensation for those hours. Plaintiffs and Class Members provided their services with the reasonable expectation of receiving compensation from the defendants.

163. Defendants failed to compensate Plaintiffs and Class Members for all hours worked, pursuant to the Unpaid Work Policies.

164. Defendants had an appreciation or knowledge of the benefit conferred by these Plaintiffs and Class Members. For example, defendants' management has: observed Plaintiffs and Class Members working through their unpaid meal breaks, directed Plaintiffs and Class Members to work during their unpaid meal breaks, and affirmatively told Plaintiffs and Class Members that they could not be paid for such time.

165. Defendants have received financial gain at the expense of Plaintiffs and Class Members because they did not pay Plaintiffs and Class Members for all hours worked and defendants kept the monies and benefits owed to the Plaintiffs and Class Members.

166. Defendants have received that financial gain under such circumstances that, in equity and good conscience, defendants ought not to be allowed to profit and retain the benefits without payment of its value.

167. Defendants enjoyed the benefit of the monies rightfully belonging to the Plaintiffs and Class Members at the expense of the Plaintiffs and Class Members.

168. Defendants failed to act in good faith by failing to pay for all the hours worked including applicable premium pay, which has unjustly enriched defendants to the detriment of Plaintiffs and Class Members.

169. Defendants failed to act in good faith and violated their obligations by failing to pay Plaintiffs and Class Members for the reasonable value of the services performed by Plaintiffs and Class Members for defendants.

170. As a direct and proximate result of defendants' unjust enrichment, Plaintiffs and Class Members have suffered injuries and are entitled to reimbursement, restitution and disgorgement from defendants of the benefits conferred by Plaintiffs' and the Class Members' work without compensation as required by state and federal law.

171. The defendants engaged in such conduct and made statements to conceal from the Plaintiffs their rights and to frustrate the vindication of the employees' rights under Massachusetts and federal law.

172. As a result, employees were unaware of their claims.

173. Through the paystubs and payroll information it provided to employees, BMC deliberately concealed from its employees that they did not receive compensation for all compensable time and misled them into believing they were being paid properly.

174. Plaintiffs and Class Members are under no duty to inquire of defendants that they were paid for all hours worked including applicable premium pay. As a direct and proximate cause of defendants affirmatively misleading Plaintiffs and Class Members regarding the fact that they were to be paid for all compensable time.

175. Further, in the course of their business, by maintaining and propagating the illegal policies, defendants deliberately misrepresented to Plaintiffs and Class Members that they were being properly paid for compensable time, even though Plaintiffs were not receiving pay for all compensable time.

176. Defendants, in the course of their business, through their corporate publications and through statements of their agents, represented that wages would be paid legally and in accordance with defendants' obligations pursuant to applicable Massachusetts and federal law. Defendants failed to exercise reasonable care in communicating to Plaintiffs and Class Members that they would be paid for all compensable time.

177. In the course of their business, defendants misrepresented in their employee manuals and policy manuals to Plaintiffs and Class Members that they would be paid for all compensable time including those worked both under and in excess of forty in a work week.

178. Defendants intended for Plaintiffs and Class Members to rely upon defendants misrepresentations that they would be paid for all compensable time, including applicable premium pay.

179. Defendants, however, at all times intended to violate applicable Massachusetts and federal law by failing to pay Plaintiffs and Class Members for all compensable time, including applicable premium pay.

180. These misrepresentations were material to the terms of Plaintiffs' and Class Members' employment contracts (express and implied), and Plaintiffs and Class Members justifiably relied on the misrepresentations in agreeing to accept and continue employment with defendants. This reliance was reasonable, as Plaintiffs and Class Members had every right to believe that defendants would abide by their obligations pursuant to applicable Massachusetts

and federal law.

181. When defendants hired Plaintiffs and Class Members, they represented to Plaintiffs and Class Members that they would be fully compensated for all services performed.

182. Defendants affirmatively misled Plaintiffs and Class Members regarding the fact that defendants failed to pay Plaintiffs and Class Members for all compensable time.

183. Defendants induced Plaintiffs and Class Members to accept employment with defendants by misrepresenting to Plaintiffs and Class Members that they would be fully paid for all compensable time.

184. There was no reasonable basis for defendants to believe these representations because defendants had a continuing practice and policy of failing to pay their employees for all compensable time, including applicable premium pay. Defendants concealed the fact that they did not pay Plaintiffs and Class Members for all compensable time from Plaintiffs and Class Members. Plaintiffs and Class Members relied upon defendants' representations by performing work and services for defendants. This reliance was reasonable, as Plaintiffs and Class Members had every right to believe that defendants would abide by their obligations to pay for all hours worked pursuant to federal and state law.

185. As a direct and proximate cause of defendants' fraud and negligent misrepresentations Plaintiffs and Class Members have suffered damages because they were not compensated for all compensable time that they worked both under and in excess of forty per week.

186. Plaintiffs and Class Members were not classified as exempt employees because hourly employees do not fall under one of the enumerated exemptions under federal or state law.

COUNT I
FLSA

187. Plaintiffs and Class Members reallege the above paragraphs as if fully restated herein.

188. Defendants willfully violated their obligations under the FLSA and are liable to Plaintiffs and Class Members.

COUNT II
Breach of Contract: Failure to Pay Earned Wages

189. Plaintiffs reallege the above paragraphs as if fully restated herein.

190. Defendants are liable to Plaintiffs and Class Members for breach of their contract.

191. As a direct and proximate cause of defendants' breach of contract, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT III
Breach of Contract: Failure to Provide and Pay for Missed and/or Interrupted Meal Breaks

192. Plaintiffs reallege the above paragraphs as if fully restated herein.

193. Defendants are liable to Plaintiffs and Class Members for breach of their contract.

194. As a direct and proximate cause of defendants' breach of contract, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT IV
Breach of Implied Contract

195. Plaintiffs reallege the above paragraphs as if fully restated herein.

196. Defendants are liable to Plaintiffs and Class Members for breach of implied contracts.

197. As a direct and proximate cause of defendants' breach of implied contracts, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have

suffered damages.

COUNT V
Money Had and Received in Assumpsit

198. Plaintiffs reallege the above paragraphs as if fully restated herein.

199. Defendants are liable to Plaintiffs and Class Members based on money had and received in assumpsit.

200. As a direct and proximate cause of defendants' failure to pay Plaintiffs and Class Members for all hours worked under circumstances in equity and good conscience, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT VI
Quantum Meruit/Unjust Enrichment

201. Plaintiffs reallege the above paragraphs as if fully restated herein.

202. Defendants are liable to Plaintiffs and Class Members based on quantum meruit.

203. As a direct and proximate cause of defendants' failure to pay Plaintiffs and Class Members the reasonable value of their services, including defendants' failure to act in good faith, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT VII
Fraud

204. Plaintiffs reallege the above paragraphs as if fully restated herein.

205. Defendants are liable to Plaintiffs and Class Members for fraud.

206. As a direct and proximate cause of defendants' misrepresentations Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT VIII
Negligent Misrepresentation

207. Plaintiffs reallege the above paragraphs as if fully restated herein.

208. Defendants are liable to Plaintiffs and Class Members for negligent misrepresentation.

209. As a direct and proximate cause of defendants' misrepresentations Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT IX
Promissory Estoppel

210. Plaintiffs reallege the above paragraphs as if fully restated herein

211. Defendants are liable to Plaintiffs and Class Members for promissory estoppel.

212. As a direct and proximate cause of defendants' promises Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

COUNT X
Conversion

213. Plaintiffs reallege the above paragraphs as if fully restated herein.

214. Defendants are liable to Plaintiffs and Class Members for conversion.

215. As a direct and proximate result of the conversion by defendants of monies belonging to Plaintiffs and Class Members, Plaintiffs and Class Members, whose claims are not preempted by this Court's rulings, have suffered damages.

WHEREFORE, Plaintiffs and Class Members demand judgment against defendants in their favor and that they be given the following relief:

(a) an order preliminarily and permanently restraining defendants from engaging in the aforementioned pay violations;

(b) an award of the value of Plaintiffs' and Class Members unpaid wages, including fringe benefits;

- (c) liquidated damages under the FLSA equal to the sum of the amount of wages and overtime which were not properly paid to Plaintiffs and Class Members;
- (d) an award of reasonable attorneys' fees, expenses, expert fees and costs incurred in vindicating Plaintiffs' and Class Members rights;
- (e) an award of pre- and post-judgment interest; and
- (f) such other and further legal or equitable relief as this Court deems to be just and appropriate.

JURY DEMAND

Plaintiffs demand a jury to hear and decide all issues of fact.

Dated: April 29, 2011

Respectfully submitted,
ELIZABETH MANNING, et al.,
and all others similarly situated

By their attorneys,

/s/ Patrick J. Solomon

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CERTIFICATE OF SERVICE

I hereby certify that the amended complaint was filed through the Court's ECF system on April 29, 2011, and will be sent electronically to all registered participants, as identified on the Notices of Electronic Filing (NEF).

Dated: April 29, 2011

/s/ Patrick J. Solomon
Patrick J. Solomon