Nos. 02-1679, 02-1739

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ABDELA TUM, ET AL.,

Plaintiffs-Appellants, Cross-Appellees,

v.

BARBER FOODS, INC., D/B/A BARBER FOODS,

Defendant-Appellee, Cross-Appellant.

On Appeal from the United States District Court
for the District of Maine

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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STATEMENT OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of the argument that the pre- and post-shift time employees spent waiting and walking after their first principal activity, and before their last principal activity, is compensable work under the Fair Labor Standards Act ("FLSA"), because it is a part of the employees' "workday." Such time therefore is not excluded from "hours worked" under section 4(a) of the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. 254(a). The relevant provision of the Portal Act excludes only those activities performed by employees before the beginning of the

"workday" or after the end of the "workday." The "workday" is marked by the commencement and cessation of the performance of the employees' principal activity or activities. See 29 U.S.C. 254(a). The Secretary's interpretive regulations clearly support this result. See 29 C.F.R. Parts 785 and 790. Because the panel misapprehended the plain meaning of the Portal Act and misconstrued the Secretary's interpretive regulations, the Secretary believes that panel rehearing is appropriate in the first instance. See Fed. R. App. P. 40(a)(2). Should the panel decline to rehear the case, the Secretary believes that rehearing en banc is warranted because the case involves a question of "exceptional importance." See Fed. R. App. P. 35(b)(1)(B).[1]

STATEMENT OF THE CASE

1. Depending upon their particular job duties, the poultry processing employees in this case are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats, back belts, aprons, vinyl gloves, and hard hats. Tum v. Barber Foods, Inc., d/b/a Barber Foods, 2003 WL 21270602, at *1-*2 (1st Cir. June 3, 2003). The employer generally requires the employees to put on these items prior to their punching in to a

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[1] The Secretary recently presented this argument, as amicus, in the Ninth Circuit in a case that raises the issue of walking and waiting that takes place within the "workday" in the context of a meatpacking plant -- Alvarez v. IBP, Inc., Nos. 02-35042, 02-35110 (case pending). Thus, this issue arises in both the poultry and meatpacking industries, and may have more general application.

computerized time-keeping system at the entrances of the production floor, and the items are taken off only after the employees punch out at the exits of the production floor. Id. The employees obtain many of these items from the equipment cage or from tubs located in the hallway between the entranceway and the equipment cage. Id. at *2. Many of these items are dropped off in receptacles that are placed in the hallway leading from the production floor exits to the plant exits. Id. In the words of the Court, "[e]mployees may have to wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and [equipment] cage window. There may also be a line at the time clocks." Id.

2. A panel of this Court (Torruella, Boudin, Lynch) rejected the employees' argument that the Portal Act excludes from compensable activities only that walking which occurs either before an employee commences his first principal activity (obtaining an initial piece of clothing or equipment required by the employer or by United States Department of Agriculture regulations), or after he performs his last principal activity (disposing of clothing and equipment after the employee punches out). Id. at *4. Rather, relying on the Secretary's interpretive regulations at 29 C.F.R. 790.7(g) n.49,[2] the panel

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[2] As explained in detail infra, the Secretary here argues that the panel's reliance on the interpretive regulations to reach its conclusion was misplaced.

concluded that the walking time in question comes within the Portal Act because "walking time is not automatically excluded from the purview of the Portal-to-Portal Act by virtue of following compensable doffing." Id. Since, the panel stated, employees concede that walking to the place where the gear is first picked up is exempted by the Portal Act from being compensable work, "if Barber Foods were to dispense all of the gear from one point, then it could eliminate Employees[']claim for walk time between dispensing areas. It would be nonsensical for us to conclude that the compensability of walk time depended on whether they picked up their gear at one bin or two. Employers could prevent compensability for walk time by placing all of the items at one location instead of at a few locations in close proximity." Id.

Again, in reliance on the Secretary's interpretive regulations (29 C.F.R. 790.7(d), 790.7(f), and 790.7(g)), the panel concluded that Congress intended for most types of walking to be noncompensable. Id. at *5. "The examples of walking that the Code [of Federal Regulations] describes as not preliminary or postliminary fit into a narrow category of walking in which the act is part of the actual work activity," such as the logger who carries heavy equipment (as opposed to ordinary hand tools) to a cutting area in the woods. Id. The panel analogized the walking in this case to walking while carrying ordinary hand tools, and

therefore concluded that "the time spent walking to gather gear before punching in, walking to the time clocks, and walking to dispose of gear after punching out falls under the Portal-to-Portal Act as preliminary and postliminary activity." Id.

The panel further concluded that Barber Foods need not compensate its employees for time spent waiting in line for any required clothing or equipment or to punch in at the time clocks. Id. at *5-*6. The panel again referred to the Secretary's interpretive regulations in reaching this conclusion -- 29 C.F.R. 790.8. Id. It stated that even when changing clothes may be deemed a principal activity, checking in and out and waiting in line to do so would not ordinarily be considered integral to the principal activity. Id. at *5. With regard to waiting in line for required gear, the panel stated "that a short amount of time spent waiting in line for uniforms is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." Id. at *6.

ARGUMENT

THE TIME SPENT BY THE POULTRY PROCESSING EMPLOYEES WAITING AND WALKING AFTER PERFORMING THEIR FIRST PRINCIPAL ACTIVITY AND BEFORE PERFORMING THEIR LAST PRINCIPAL ACTIVITY IS COMPENSABLE "HOURS WORKED" BECAUSE IT WAS TIME SPENT DURING THE COURSE OF THE EMPLOYEES' "WORKDAY"

The plain language of the Portal Act and the import of the Secretary's interpretive regulations when read in their entirety

require that the first and last principal activities performed by an employee mark the beginning and end of his "workday," and all time spent between the performance of those activities, including walking and waiting time, is compensable.[3]

The Portal Act excludes from compensable "hours worked" under the FLSA only those activities, including walking,[4] "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). The statutory language of the Portal Act is clear. The "workday," as measured by the time between the performance of an employee's first principal activity and the performance of an employee's last principal activity of the day, determines compensable "hours worked."

The Senate Report that accompanied the passage of the Portal Act in 1947 illustrates this bedrock principle. It states that "[a]ny activity occurring <u>during a workday</u> will continue to be

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[3] Of course, bona fide meal periods, 29 C.F.R. 785.19, as well as "[p]eriods during [the workday in] which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes," 29 C.F.R. 785.16(a), are not "hours worked."

[4] The activities specified by the Portal Act as noncompensable are "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. 254(a)(1) and (2).

compensable in accordance with the existing provisions of the [FLSA]." S. Rep. No. 48, at 48 (80th Cong., 1st Sess.) (emphasis added). The Report defines "workday" as

> that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. [Section 4] relieves an employer from liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after [1947], if such activities take place outside of the hours of the employee's workday.

Id. at 46-47 (emphases added); see also 93 Cong. Rec. 4269 (statement of Senator Wiley).

The interpretive regulations at 29 C.F.R. Part 785 ("Hours Worked") and Part 790 ("General Statement As To The Effect Of The Portal-To-Portal Act Of 1947 On The Fair Labor Standards Act Of 1938") adhere to the "workday" principle.[5] Those regulations state that "[s]ection 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper . . . ."

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[5] These interpretive regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also United States v. Mead, 533 U.S. 218, 227-28 (2001). The interpretive regulations at 29 C.F.R. Part 790, first promulgated by Congress at 12 Fed. Reg. 7655 (Nov. 18, 1947), were ratified by Congress in 1949 when former section 16(c) of the FLSA, 29 U.S.C. 216(c), was enacted. See Steiner v. Mitchell, 350 U.S. 247, 255 n.8 (1956) (quoting section 16(c) to the effect that existing Wage-Hour regulations and interpretations were to remain in effect unless inconsistent with the amendments, 29 U.S.C. 208, 63 Stat. 920 (1949) (note)).

29 C.F.R. 790.6(a); see also 29 C.F.R. 785.9(a) (same). Indeed, consistent with the text of the Portal Act, the interpretive regulations state that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a) (footnote omitted). Furthermore, the interpretive regulations define "workday," as used in the Portal Act, as "the period between the commencement and completion on the same workday of an employee's principal activity or activities. . . . includ[ing] all time within that period whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b); see also 29 C.F.R. 785.38 (addressing the compensability of "travel that is all in the day's work").

The case law, relying on the Secretary's interpretive regulations, faithfully applies the "workday" concept. Thus, in United Transportation Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1119 (10th Cir. 1999), the court, referring to the definition of "workday" in 29 C.F.R. 790.6(b), concluded that the time spent by bus drivers on a shuttle service transporting them between the ending point of their first shift in the morning and the garage, and then between the garage and the starting point of

their second shift in the evening (the shifts being separated by a non-compensable off-duty period), was not excluded as ordinary commuting time under the Portal Act. Rather, that travel time was compensable because it took place during a single "workday." Id. By contrast, the court held that the time the drivers spent shuttling to their first bus run and from their last bus run of the day was "classic commuting-to-work time," and thus was excluded from compensable "hours worked" under the Portal Act. Id. at 1120.

In Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1414 (5th Cir. 1990), the court, relying upon the Secretary's definition of "workday" in 29 C.F.R. 790.6(b), held that employees required to arrive at work at a specific time to sign in and then wait until the beginning of productive work should be compensated for their waiting time. As the court stated, "[p]laintiffs are not seeking compensation for periods of time spent waiting outside the workday. Rather, plaintiffs contend that they are entitled to pay for time spent waiting during the workday that they are not able to use effectively for their own purposes." Id. (footnote omitted).

Finally, in Dole v. Enduro Plumbing, Inc., 30 WH Cases (BNA) 196, 200 (C.D. Cal. Oct. 16, 1990), the district court, relying on the "express terms" of the Portal Act and 29 C.F.R. 785.38, stated that where an employee is required to arrive at a

designated place to receive instructions or pick up tools, arrival at that designated place triggers the start of the "workday." Any subsequent hours spent up to the last principal activity constitute compensable "hours worked" under the FLSA. Id. The court specifically explained that all work time during the "workday" is compensable -- "The express terms of said Section 4(a) of the Portal Act make clear that activities mentioned in subsections (1) [walking and travel time] and (2) [activities that are preliminary or postliminary to the principal activities] of section 4(a) cannot be excluded from hours worked when they occur after the commencement of any principal activity or activities for the workday and before the cessation of all the principal activity or activities for the workday." Id.

By culling from the Secretary's interpretive regulations isolated language, the panel failed to recognize the overriding dictate of the regulations -- that the reach of the Portal Act is limited by the "workday" principle. For example, to exclude walking time from being compensable, the panel relied on footnote 49 of 29 C.F.R. 790.7(g), which states that because washing up after work or changing clothes may be compensable as an integral part of the employee's principal activity "does not necessarily mean . . . that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the

type of travel to which section 4(a) [of the Portal Act] refers." But that footnote comes under section 790.7, headed "'Preliminary' and 'postliminary' activities," and stands for nothing more remarkable than the proposition that the travel discussed may be noncompensable if the preceding activity at the washroom or the clothes-changing place is, under the particular circumstances, not considered a principal activity. This is the only reasonable construction when the interpretive regulations are read as a whole, as they must be. Cf. Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, 184 F.3d 88, 101 (1st Cir. 1999) (statute must be examined as whole).[6]

Similarly, the panel's reliance on 29 C.F.R. 790.7(d) is misplaced. That interpretive regulation provides that the time a logger spends walking into the woods carrying a portable power saw, as opposed to ordinary hand tools, is compensable because the walking "is not segregable from the simultaneous performance of his assigned work (the carrying of equipment, etc.) and it does not constitute travel to and from the actual place of performance of the principal activities he is employed to perform." 29 C.F.R. 790.7(d) (internal quotation marks omitted). Thus, section 790.7(d) does not address employees who must walk

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[6] To the extent there is any ambiguity in the regulations, the Secretary's interpretation of them is entitled to deference if such interpretation is reasonable. See Christensen v. Harris County, 529 U.S. 576, 588 (2000); South Shore Hospital, Inc. v. Thompson, 308 F.3d 91, 98-100 (1st Cir. 2002).

after performing their first principal activity, the issue in the present case. Rather, that provision (and the examples of loggers who carry either heavy equipment or ordinary hand tools "into the woods") only describes those situations when commuting time independently would or would not be considered a compensable principal activity, thereby starting the "workday."[7]

Other interpretive regulations cited by the panel -- 29 C.F.R. 790.7(g) and 790.8(c) -- do not support its conclusion. In fact, those interpretive regulations identify activities that normally or ordinarily would not be considered principal activities, and thus would be considered "preliminary" or "postliminary" in nature (i.e., outside the purview of the "workday") and subject to the Portal Act. Again, this is consistent with the "workday" principle set forth in the Portal Act, the interpretive regulations, and this brief by the Secretary.[8] The panel assumed for purposes of its decision that

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[7] Unlike the ordinary hand tools presumably brought by the logger from home into the woods, the items picked up by the poultry workers for donning in this case were located at the workplace. The Secretary would not argue that the time spent by poultry employees donning clothes at home was the first principal activity of their day, and would not argue that the time spent traveling to work thereafter was compensable as part of the employees' "workday." Thus, if poultry workers could put on gear at home and merely had to arrive at the production line to start their shift, they would not be compensated until they were required to arrive at the production line.

[8] Some of the activities mentioned by the interpretive regulations as not "normally" or "ordinarily" principal activities are checking in and out and any attendant waiting in

the donning and doffing of required clothing is an integral part of employees' principal activity and thus compensable, 2003 WL 21270602, at *4-*5, and therefore should have ruled that time spent by employees between the beginning and end of the performance of these activities (except for bona fide meal periods and those periods during which an employee is completely relieved from duty and which are long enough to enable the employee to effectively use the time for his own purposes) was compensable, in accordance with the "workday" concept.

Finally, the panel, in rejecting the compensability of walking time, stated that "if Barber Foods were to dispense all of the gear from one point, then it could eliminate Employees[']claim for walk time between dispensing areas." But this is

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line, changing clothes, washing up or showering, and waiting in line to receive pay checks. See 29 C.F.R. 790.7(g) and 790.8(c). It is important to note, however, that the interpretive regulations state that "Congress intended the words 'principal activities' to be construed liberally," 29 C.F.R. 790.8(a), and that, for example, "[i]f an employee in a chemical plant . . . cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c) (footnotes omitted); see also Steiner, 350 U.S. at 256 (concluding that the employees' required changing of clothes in a battery plant was "an integral and indispensable part of the principal activity of the[ir] employment . . . ."); Secretary of Labor v. E.R. Field, Inc., 495 F.2d 749, 751 (1st Cir. 1974) ("[T]he Portal Act does not cover 'any work of consequence performed for an employer.'") (quoting 29 C.F.R. 790.8(a)). As the interpretive regulations make clear, "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions." 29 C.F.R. 790.7(h) (footnote omitted).

precisely the point. The beginning and end of the "workday," i.e., when the first and last principal activity occur, are completely within the employer's control. Thus, the walking and waiting done by the employees between these activities are also under the direct control of the employer, and are done for the employer's benefit. The employees should not be denied compensation because the employer could have arranged the "workday" in a different manner, so as to avoid some of the walking and waiting time after the first principal activity. Until such time as the employer does arrange the "workday" differently, the employees should be paid for those activities performed between their first and last principal activities.

CONCLUSION

For the foregoing reasons, the Secretary supports panel rehearing. Should the panel deny rehearing, the Secretary believes that rehearing en banc is warranted.

Respectfully submitted,

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