06-2432

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELAINE L. CHAO,
Secretary of Labor,

Plaintiff-Appellant,

v.

GOTHAM REGISTRY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217, 28 U.S.C. 1331 (federal question), and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review the March 20, 2006 Order of United States District Court Judge Louis L. Stanton, 1:92-cv-06381-LLS (JA 76),[1] pursuant to 28 U.S.C. 1291

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[1] Documents contained in the Joint Appendix are cited "JA (Appendix page number(s))." Testimony contained in the transcript is cited "Tr. (Transcript page number(s))." Material

(final decisions of district courts). The Order is a final judgment that disposes of all claims. A timely notice of appeal from the district court's final order was filed by Plaintiff-Appellant Elaine L. Chao, Secretary of Labor ("Secretary"), on May 18, 2006. JA 81.

STATEMENT OF THE ISSUE

Gotham Registry, Inc. ("Gotham" or "Gotham Registry"), after entering into a consent judgment in 1994 that enjoined it from violating the FLSA's overtime provisions, issued a work rule providing that its temporary staffing nurses who were assigned to hospitals would not be paid overtime compensation if Gotham did not pre-approve their overtime hours. Nurses continued to work overtime hours with the full knowledge of, but without prior authorization from, Gotham. The issue is: Whether the district court abused its discretion by denying the Secretary's Petition for Contempt against Gotham, when Gotham knew that its nurses were working overtime hours, and benefited from that work, but did not pay them overtime compensation for those hours.

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contained in the Record is cited "R. (number corresponding to certified list filed with this Court)."

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Gotham Registry is a temporary staffing registry that places nurses in hospitals in the New York City metropolitan area, bills the hospitals for each hour worked, and then pays an hourly rate to the nurses from the hourly billing. JA 47; Tr. 56. Caroline Barrett is the president of Gotham Registry, which is one of five corporations in the "Gotham/Midpoint Family" of companies. Tr. 8. There are approximately 25 other companies in the region that provide similar staffing services. Tr. 57.

Gotham enters into non-exclusive employment agreements with nurses under which it temporarily places nurses at hospitals. JA 86; Tr. 9-10. As described below, Gotham is operating under a consent decree under which it is obligated to treat the nurses it places as employees for all FLSA purposes, including the payment of overtime. JA 7. It also has non-exclusive contracts with hospitals to supply temporary nurses. JA 47. When a hospital needs additional staff, the hospital contacts Gotham and asks it to find a nurse who can fill the hospital's needs. Tr. 8-9. Gotham then contacts nurses who are registered with it and offers the assignment. Pursuant to the contract entered into by the nurses and Gotham, the nurses are obligated to fulfill the terms of the placement once it is accepted. JA 86;

Tr. 10-11. Failure to provide the agreed-upon service can result in termination of the agreement. Id.

Once a nurse accepts the assignment and performs the work, Gotham bills the hospital at the agreed gross rate for every hour that the Gotham nurse works. Tr. 22-25. From the gross hourly rate, Gotham pays a lesser amount to the nurses, and keeps the remainder. Id. Gotham requires the nurses it places at each hospital to complete a sign-in/sign-out sheet at the beginning and end of their shifts in order to know the number of hours that the nurse worked at the hospital. JA 84. Each hospital then transmits this time sheet to Gotham at the beginning of the week following the workweek, so that Gotham can prepare pay checks for the nurses it placed at its various client hospitals. Tr. 34. At trial, Barrett testified that it would be difficult for Gotham to collect the time sheets on a daily basis, because the hospital must first verify the shifts. Tr. 53. She also testified that the hospital would not permit a Gotham representative on the hospital grounds to validate the time sheets. Tr. 56.

Gotham typically places nurses in hospitals for no more than 40 hours per week. JA 47, at 3. However, once the Gotham nurses are at the hospital, the hospitals' supervisory nurses often request them to work beyond those originally scheduled hours, resulting in overtime hours. Tr. 29. At the time the

hospital supervisor requests a Gotham nurse to work the additional hours, Gotham is not aware of this request because it has no supervisors of its own on the hospital premises. Tr. 42. Gotham, however, knows that one of its nurses has worked more hours than those for which she was originally assigned when the hospital submits the nurses' sign-in/sign-out sheet at the beginning of the following week, before she is paid. Id. Some nurses do request and receive authorization from Gotham to work overtime hours, but most requests are not granted. Tr. 38.

2. In 1992, the Secretary commenced an enforcement action against Gotham Registry claiming that Gotham was in violation of the overtime pay requirements of section 7 of the FLSA, 29 U.S.C. 207(a). At the time of the investigation preceding the suit, Gotham's practice was to pay registered nurses their regular straight-time hourly rates for all hours worked over 40 in a workweek. Gotham maintained that this practice was lawful because the nurses were not its employees, but independent contractors not entitled to overtime compensation under the Act. Tr. 59. The Department of Labor ("Department"), on the other hand, claimed that the nurses were employees of Gotham and were entitled to overtime compensation. The case settled when Gotham entered into a consent judgment, dated June 6, 1994, which was approved by District Court Judge Louis L. Stanton. JA 7. The consent judgment, in which Gotham agreed to treat its nurses as

employees for purposes of the FLSA, included a prospective injunction that enjoined Gotham from committing future violations of section 7 of the FLSA. Id. The prospective injunction specifically states:

> ORDERED, ADJUDGED, AND DECREED that defendant GOTHAM REGISTRY, INC., its officers, agents, servants, employees, and all persons acting or claiming to act on its behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. Section 201 et seq.), hereinafter called the Act, in any of the following manners:
>
> Defendant GOTHAM REGISTRY, INC. shall not, contrary to Section 7 of the Act, employ any of its employees including registered nurses in any workweek who are engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than the hours now, or which in the future become, applicable under Sections 7 and 15(a)(2) of the Act, unless the said employees receive compensation for their employment in excess of the prescribed hours at rates not less than one and one-half times the employees' regular rates.

Id. (emphasis added). Not only does the consent judgment provide that Gotham will treat its nurses as employees for purposes of the FLSA, but Barrett conceded at trial that the nurses are Gotham's employees. Tr. 32.

3. The Secretary's second investigation of Gotham, initiated in January 1999, found that Gotham was once again paying its hospital nurses straight-time rates for overtime hours worked. Gotham defended its practice by relying on a work rule it issued subsequent to the 1994 Consent Judgment, which

states that nurses will not be paid overtime compensation for unauthorized overtime hours worked:

> You must notify GOTHAM in advance and receive authorization from GOTHAM for any shift or partial shift that will bring your total hours to more than 40 hours in any given week. If you fail to do so, you will not be paid overtime rates for those hours.

JA 84. Gotham reprints this work rule at the bottom of every sign-in sheet it posts at hospitals and on its time cards. JA 84-85. It pays the nurses straight time for each unauthorized overtime hour worked. Tr. 17, 25. Gotham pays the nurses an overtime premium only if it approves the overtime hours before they are worked or if, after the shift is worked, it negotiates for the hospital to pay overtime rates for those hours.[2] Tr. 37.

Thus, pursuant to its work rule, Gotham in most cases does not pay overtime compensation to nurses for unapproved overtime work. Barrett stated that Gotham's work rule was enacted

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[2] In general, Gotham's contracts with hospitals do not provide that the hospitals will pay Gotham one and one-half times the contract rate for the nurses' overtime hours. JA 47, at 8. When a nurse obtains prior authorization to work overtime, Gotham pays the nurse overtime compensation for those overtime hours, regardless of whether or not the hospital paid it the overtime rate. JA 47, at 3. As Gotham's president testified, however, Gotham rarely approves such requests, and only permits overtime hours to be worked about 25 percent of the time. Tr. 38. If the nurse works unscheduled overtime hours at the request of the hospital but fails to ask for prior authorization, Gotham will sometimes try to negotiate an overtime rate with the hospital retrospectively. Tr. 37. If Gotham is successful in negotiating an overtime rate with the hospital, Gotham will pay the nurse one and one-half times her regular rate of pay. JA 47, at 3. If not, the nurse is paid on a straight-time basis. Tr. 64.

specifically for the purpose of curtailing the nurses' unscheduled overtime, that the amount of unauthorized overtime worked decreased after the work rule was put into effect, and that Gotham intends to continue to apply the work rule. Tr. 117-18. Gotham claims that it is not the primary beneficiary of the nurses' overtime work because, notwithstanding the monetary gain by Gotham for the nurses' overtime hours, that amount is negligible compared to the effort required to administer overtime compensation under Gotham's current system. Tr. 28-29, 50-51.

4. On December 29, 2004, the Secretary filed a Notice of Petition for Adjudication of Civil Contempt, claiming that Gotham's failure to pay its nurses overtime compensation for unauthorized hours was in contempt of the 1994 consent judgment. JA 31. The Secretary's petition sought back wages of over $100,000, plus prejudgment interest, for the period from 1999 through 2001, and proposed that Gotham give an accounting of back pay due for overtime hours worked from 2001 to the present. JA 31 and JA 47, at 21.

B. The District Court's Decision

A one-day contempt hearing was held on March 20, 2006. As relevant to this appeal, Judge Stanton ruled from the bench that Gotham was not in contempt of the 1994 injunction because the nurses' unauthorized hours were not work performed for Gotham

within the meaning of the FLSA, but were instead work for the hospital, which arranged the overtime hours directly with the nurses. JA 76. He then issued an Order denying the Secretary's Petition for Contempt, which was docketed on March 23, 2006.[3] JA 76.

The judge based his decision primarily on this Court's decision in Holzapfel v. Town of Newburgh, 145 F.3d 516 (1998), which addresses whether a trial judge's jury instructions were correct in regard to the compensability of time spent off-site by a K-9 officer caring for his police dog. The proper approach to measuring compensable hours, this Court concluded, is to first determine whether the officer met the two-part test for "work" articulated by the Supreme Court in Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), stating that work is physical or mental exertion (1) controlled or required by the employer and (2) pursued primarily for the benefit of the employer; then, if the performance of work is established, it must be determined whether the work was performed with the employer's knowledge.

Applying these factors, Judge Stanton ruled that Gotham had not violated the Act by refusing to pay the nurses overtime

[3] The district court's decision also denied the Secretary's claim of recordkeeping violations, as well as Gotham's counterclaim seeking to dissolve the 1994 consent judgment. Neither of these issues is before this Court on appeal.

compensation for their unauthorized hours, because those hours were neither controlled by Gotham nor performed for Gotham's benefit, and thus were not work for Gotham under the FLSA:

> The record is sufficiently complete to answer the first part of the description of work in the Holzapfel case, by which I am bound. It is the applicable law, and the argument and the evidence make plain that the performance or nonperformance of the work is controlled and required by the hospital and by the employee, not by Gotham in at least the first instance. Gotham has a right to approve or to disapprove but does not initiate, require or really desire the employee to perform the overtime work. The source of that extra time lies within the hospital and its needs and the nurse and her schedule and desire to work further. Indeed, the performance of the extra work carries a noticeable increase in Gotham's earnings but, because of the burden that comes with that increase, it is not sufficient to make it either desired or required by Gotham. So the work performed is not work under the statute and that claim is viewed as so much in doubt that Gotham's belief that the case would go as it has gone on that point prevents it from being in contempt of the consent injunction and the motion for contempt is denied.

Tr. 110-111 (excerpt from the amended transcript) (emphasis added). Judge Stanton reached this conclusion despite his earlier statement that the overtime hours of the nurses clearly constituted "work":

> [O]ne of the questions at issue between the parties [is] how it should be construed on the point of whether the work performed in excess of the 40-hour week by a nurse who has not notified Gotham qualifies as work under the Fair Labor Standards Act. Now, nobody in their wild imaginings would argue that it's play. Of course it's work. Indeed, it's work compensated at straight time by Gotham. The question is a narrower one: Is it work for the special meaning given by the Fair Labor Standards Act or applied by the court cases construing it.

Tr. 60 (excerpt from the transcript) (emphasis added).

SUMMARY OF ARGUMENT

Reversal of the district court's decision that Gotham was not in contempt of the consent judgment is appropriate because the consent order here is "clear and unambiguous," there is "clear and convincing" proof that Gotham did not comply with that order, and Gotham was not "reasonably diligent and energetic" in its attempt to comply. Dunn v. New York State Dep't of Labor, 47 F.3d 485, 490 (2d Cir. 1995).

It is beyond dispute that the consent judgment, which requires explicitly that Gotham comply with the overtime compensation requirements of the FLSA with regard to its nurses, was clear and unambiguous. There also was clear and convincing evidence that Gotham's nonpayment of overtime compensation to its nurses for their overtime hours, which obviously were "work" for Gotham within the meaning of the FLSA, violated that order. First, because Gotham exercised considerable control over the nurses' overtime (and non-overtime) work, as evidenced by its ability to hire and fire the nurses and to ultimately control their pay, and because it received a significant monetary benefit as a result of the overtime hours worked, the nurses' overtime hours necessarily were "work" performed for Gotham. The district court's finding to the contrary is patently incorrect. Furthermore, it is undisputed that Gotham knew the overtime hours were being performed, thereby "suffering or

permitting" that overtime work. It is irrelevant in this regard that such overtime work was not specifically requested by Gotham.

Gotham also was not reasonably diligent and energetic in attempting to comply with the consent judgment. It clearly knew its nurses were working overtime hours, yet took no viable steps to prevent those hours from being performed. In fact, rather than actually prohibiting overtime hours from being performed, Gotham's work rule recognized that overtime work could be performed; the work rule stated only that overtime compensation would not be paid unless the overtime hours were pre-approved. Gotham's failure to take any meaningful steps to stop its nurses from performing overtime hours, and its conscious decision to pay the nurses straight time but not overtime compensation for those hours (while accepting reimbursement from the hospitals for such hours), compels the conclusion that it was not reasonably diligent in complying with the consent judgment.

In sum, the district court's decision fundamentally undermines the foundation of the 1994 consent judgment, agreed to by Gotham and approved by Judge Stanton, which unequivocally states that Gotham has the responsibility to assure that its nurses are compensated in accordance with the overtime requirements of the FLSA. The district court's decision

concluding that Gotham was not in contempt constitutes an abuse of discretion, and should be reversed.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FIND GOTHAM IN CONTEMPT OF THE CONSENT JUDGMENT FOR NOT PAYING OVERTIME COMPENSATION FOR WORK THAT IT SUFFERED OR PERMITTED TO BE PERFORMED BY ITS NURSES FOR ITS BENEFIT

A. Standard of Review

A district court's decision whether or not to hold a party in contempt is reviewed under an abuse of discretion standard. See Dunn v. New York State Dep't of Labor, 47 F.3d 485, 490 (2d Cir. 1995). Whether the district court applied the correct legal standard is reviewed de novo. See, e.g., LoPresti v. Terwilliger, 126 F.3d 34, 39 (2d Cir. 1997); Hadden v. Brown, 851 F.2d 1266, 1268 (10th Cir. 1988). "A district court abuses its discretion if, in making the decision at issue, it applies the incorrect legal standard or makes findings of fact that are clearly erroneous." U.S. v. Barner, 441 F.3d 1310, 1315 (11th Cir. 2006) (citations and internal quotation marks omitted).

B. Standard for Proving Contempt

In order to prove contempt, the order violated must be "clear and unambiguous," the proof of noncompliance "clear and convincing," and it must be shown that the party alleged to be in contempt was not "reasonably diligent and energetic" in attempting to comply. Dunn, 47 F.3d at 490 (internal quotation

marks omitted) (citing United States v. O'Rourke, 943 F.2d 180, 189 (2d Cir. 1991)). It is not necessary to show that the noncompliance with the court's order was willful. See Equal Employment Opportunity Comm'n v. Local 638, 81 F.3d 1162, 1171 (2d Cir. 1996). Similarly, since the sanction for civil contempt is remedial in nature, good faith is not a defense. See, e.g., McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) ("The decree [requiring compliance with specific provisions of the FLSA] was not fashioned so as to grant or withhold its benefits dependent on [respondents'] state of mind [but] laid on them a duty to obey specified provisions of the [FLSA]. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."). As argued below, because the district court in this case did not properly apply the test for contempt, it abused its discretion. Moreover, because Gotham clearly engaged in contemptuous conduct, reversal of the district court's decision is appropriate.

C. The Consent Judgment Clearly and Unambiguously Enjoined Gotham from Future Violations of the Overtime Compensation Provisions of the FLSA with Regard to Its Nurses.

The consent judgment is "clear and unambiguous." In plain language, it requires Gotham to comply with the overtime requirements of the FLSA with regard to all its employees, including its registered nurses:

> Defendant GOTHAM REGISTRY, INC. shall not, contrary to Section 7 of the Act, employ any of its employees including registered nurses in any workweek who are engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than the hours now, or which in the future become, applicable under Sections 7 and 15(a)(2) of the Act, unless the said employees receive compensation for their employment in excess of the prescribed hours at rates not less than one and one-half times the employees' regular rates.

JA 7 (emphasis added); see Local 638, 81 F.3d at 1171 (an order generally proscribing discrimination was clear and unambiguous); see also McComb, 336 U.S. at 192 ("Decrees [generally enjoining practices that violate statutory provisions] are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown."). Thus, the first prong of the test for proving contempt has been met.

D. Gotham's Nonpayment of Overtime Compensation for Work it Suffered or Permitted to be Performed for its Benefit is Clear and Convincing Evidence that it Violated the Consent Judgment.

There is "clear and convincing" proof of Gotham's noncompliance with the injunction. The "clear and convincing" standard "requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred." Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002) (internal quotation marks omitted). Clear and convincing proof of noncompliance in this case is manifested by Gotham's failure to

pay overtime compensation to its employee nurses for work they performed for Gotham, a statutory requirement it was enjoined from violating. Gotham's work rule, which permitted the nurses to work overtime hours, did not relieve Gotham of its overtime compensation obligations under the FLSA.

1. The Nurses' Overtime Work was Compensable "Work" for Gotham Within the Meaning of the FLSA.

The district court committed clear legal error by concluding that the nurses' overtime hours were not "work" for Gotham within the meaning of the FLSA, and therefore were not compensable. The FLSA was intended to "guarantee[] compensation for all work or employment engaged in by employees covered by the Act." Tennessee Coal, 321 U.S. at 602. The term "work," while not defined in the FLSA, has been described by the Supreme Court as any "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Id. at 598. The term "work" has been construed broadly. IBP, Inc. v. Alvarez, 126 S. Ct. 514, 519 (2005).

In this case, because the overtime hours were under the control and for the benefit of Gotham, they constituted work for Gotham. This conclusion is supported by the fact that Gotham paid the nurses straight-time compensation for their overtime hours and was reimbursed by the hospitals for that compensation.

The district court, however, concluded that where the overtime work was controlled and required by the hospital and the employee "in at least the first instance" and where the benefit to Gotham was "not sufficient to make it either desired or required by Gotham," the nurses' "work" was "not work [for Gotham] under the statute." Tr. 110.[4] The district court's analysis of "control" and "benefit," however, misapplied the FLSA's test for compensable "work."

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[4] The district court stated that its decision was influenced by this Court's decision in Holzapfel v. Town of Newburgh, 145 F.3d 516 (1998), Tr. 110-11, a case that is largely inapposite to the issue presented by this litigation. Holzapfel addresses the validity of jury instructions in a case involving the compensability of time spent by a police officer outside of his scheduled shift caring for his assigned police dog. In examining the lawfulness of the jury instructions, this Court first discussed the parameters of compensable "work" under the FLSA. See Holzapfel, 145 F.3d at 521. Restating the two-prong test set forth in Tennessee Coal, this Court noted that, while "[a]n uncritical application of the definition of work" might lead the jury to conclude that all of such dog care work was compensable, "common sense and policy concerns argue against such a result" because, "[a]t some point, an officer's attention to his assigned dog may not be provided primarily for the employer's benefit but rather out of the caretaker's own sense of love and devotion to this animal in his charge." Id. at 522-23. This Court stated that the district court's jury instruction should not have asked whether the officer's work was "reasonably required," but instead should have focused on the Supreme Court's definition of "work." Once the jury finds that the officer has engaged in "work," the court continued, it must determine whether the work was performed with the employer's knowledge, citing the Department's regulation at 29 C.F.R. 785.12 (one of the "suffer or permit" regulations -- "[w]ork performed away from the premises or job site"). This Court's decision in Holzapfel thus does little more than restate the Supreme Court's interpretation of "work" and apply the longstanding concept of "suffer or permit."

There are many indicia of Gotham's control over the nurses' work, whether during the performance of overtime or non-overtime hours. As an initial matter, Gotham's control is shown by its ability to hire and fire the nurses and to assign them work. Furthermore, Gotham's employment contract with the nurses requires them to comply with recognized standards of medical care; maintain professional licensing and immunization requirements; comply with Gotham's billing requirements; and maintain a specific amount of malpractice and liability insurance. Finally, Gotham controls the nurses' pay, whether through its payments to the nurses for hours "worked," the wages negotiated by Gotham with the hospitals or, as highlighted by this case, through the work rule itself.[5] See Barfield v. New York City Health and Hospitals Corp., 432 F. Supp. 2d 390, 392 (S.D.N.Y. 2006) (noting, in the context of a joint employment analysis, that the nurse "was paid, and in that sense employed, by the nursing referral agencies.").

The district court's statement that the work is controlled and required "not by Gotham in at least the first instance," but by the hospitals, Tr. 110, suggests that only one entity may exercise control. That is not the case. In a joint employment

[5] Gotham's ability to control the performance of the nurses' overtime hours, but its failure to exercise such control, is considered in the "diligence" analysis set out infra.

context, which may very well exist here,[6] the very nature of the employment relationship necessarily involves dual control. Gotham, the acknowledged employer of the nurses, clearly exercises a substantial degree of control over the nurses' overtime work.[7]

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[6] Gotham and the hospitals were probably joint employers of the nurses. Both Gotham and the hospitals exercised control over the nurses. See, e.g., Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61, 72 (2d Cir. 2003) (factors used to determine joint employment under FLSA measure whether an entity has functional control over the terms and conditions of employment even in the absence of formal control). See generally Rutherford Food Group v. McComb, 331 U.S. 722 (1947). In a very recent case, another district court judge in the Southern District of New York held in a similar situation that hospitals and temporary staffing agencies were joint employers of contract nurses. See Barfield, 432 F. Supp. 2d at 390. Joint employers are both responsible for FLSA compliance. See Chao v. A-One Medical Service, Inc., 346 F.3d 908, 917 (9th Cir. 2003); Moon v. Kwon, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002).

[7] The Department's Petition for Contempt was directed only at Gotham, since it was the signatory to the consent judgment the Department was seeking to enforce, and had agreed in that judgment to treat the nurses as its employees. In Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988), this Court held that the nurses of a temporary staffing agency that supplied private nurses to individual patients, nursing homes, and other health care institutions were the employees of the staffing agency rather than independent contractors. In reaching this conclusion, this Court found convincing the district court's finding that "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request," and that Superior Care "unilaterally dictated the nurses' hourly wage, limited working hours to 40 per week where nurses claimed they were owed overtime, and supervised the nurses by monitoring their patient care notes and visiting job sites." Id. at 1059-60. In spite of Superior Care's argument that its infrequent visits to the work site illustrated a lack of control, this Court found that "Superior Care unequivocally expressed the

Additionally, there is no question that Gotham derived a substantial benefit from the nurses' work. Most significantly, and as the district court itself recognized in regard to the overtime hours, the hospitals paid Gotham for the nurses' overtime work, and "the performance of the extra work carrie[d] a noticeable increase in Gotham's earnings." Tr. 110.[8] It also can fairly be assumed that the nurses' overtime hours benefited Gotham's reputation as a temporary staffing company that provided reliable nurses willing to work unscheduled hours.

Therefore, the district court erred as a matter of law by concluding that Gotham's nurses were not performing "work" for Gotham under the FLSA when performing overtime hours. This

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right to supervise the nurses' work," and noted that "[a]n employer does not need to look over his workers' shoulders ever day in order to exercise control." Id. (citing Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1383-84) (3d Cir. 1985)). Similarly, in Holzapfel, this Court noted that in Reich v. New York City Transit Authority, 45 F.3d 646, 651 (1995), it had concluded that some off-site activities, such as dog care, can constitute compensable "work." These cases support the Secretary's argument that, although the nurses' work for Gotham was not performed at Gotham's headquarters, but at the contract hospitals, their overtime hours were work performed for Gotham.

[8] While acknowledging that "the performance of the extra work carries a noticeable increase in Gotham's earnings[,]" the district court, apparently referring to testimony about the administrative burden Gotham would face as a result of being required to pay overtime compensation for those hours, stated that "the burden that comes with that increase [in earnings] is not sufficient to make it either desired or required by Gotham." Tr. 110. In the context of defining "work" under the FLSA, however, any benefit accruing to Gotham as a result of the overtime hours is not negated by any attendant administrative "burden."

fundamental legal error infected the district court's entire contempt analysis.

2. It is Undisputed that Gotham Knew its Nurses Were Performing Overtime Work.

It is also clear that Gotham suffered or permitted the nurses' overtime "work" hours to be performed, i.e., they were performed with Gotham's knowledge, despite not being specifically requested by Gotham. See Holzapfel, 145 F.3d at 523 (once it is established that the employee has engaged in "work," the question becomes whether the work was "suffered or permitted" by the employer). The district court's failure to apply correctly the "suffer or permit" analysis also constitutes legal error.

Section 7(a) of the Act states that "no employer shall employ any of his employees" for more than 40 hours in a workweek unless the employee is compensated at least at one and one-half times her regular rate. 29 U.S.C. 207(a). "Employ" is defined as "to suffer or permit to work," 29 U.S.C. 203(g), thereby giving the term "employ" a scope that is the "broadest . . . that has ever been included in any one act.'" Zheng, 355 F.3d at 69 (quoting U.S. v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)); see also Superior Care, Inc., 840 F.2d at 1058 (definition of "employ" is necessarily broad in accordance with the remedial purposes of the FLSA).

The relevant interpretive regulations explain the concept of "suffer and permit" set forth in the statute:

> Work not requested but suffered or permitted is work time. . . . The reason [such work is performed] is immaterial. [If] the employer knows or has reason to believe that [the employee] is continuing to work . . . the time is working time.

29 C.F.R. 785.11 (emphasis added).[9] Thus, Gotham cannot persuasively argue that its employees are not entitled to compensation for work that it did not request to be performed. "[A]n employee must be compensated for time she works outside of her scheduled shift, even if the employer did not ask that the employee work during that time, so long as the employer 'knows or has reason to believe that [the employee] is continuing to work' and that work was 'suffered or permitted' by the employer." Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 718 (2d Cir. 2001) (quoting 29 C.F.R. 785.11); see

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[9] The longstanding "suffer or permit" regulations (promulgated in 1961) have been left undisturbed by Congress in its numerous subsequent reexaminations of the FLSA and reflect the considered and detailed views of the agency charged with enforcing the FLSA. They are, therefore, entitled at least to Skidmore deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); cf. Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (Chevron deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time").

also Zheng, 355 F.3d at 66 ("An entity suffers or permits an individual to work if, as a matter of economic reality, the entity functions as the individual's employer.") (citations and internal quotation marks omitted); Holzapfel, 145 F.3d at 524 ("[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. An employer need not have actual knowledge of such off-site work; constructive knowledge will suffice.") (citations omitted); Barfield, 432 F. Supp. 2d at 395 (citing Holzapfel, 145 F.3d at 524, for the proposition that constructive knowledge is sufficient).

Courts outside this Circuit have similarly set out this well-established principle of "suffer or permit." Thus, the Eleventh Circuit, in Reich v. Dep't. of Conservation and Natural Resources, State of Alabama, 28 F.3d 1076, 1082 (1994), stated that "[t]he reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted." (Citing 29 C.F.R. 785.11.).[10] And, in

[10] In Dep't of Conservation and Natural Resources, the Eleventh Circuit concluded that a state agency had knowledge of unauthorized overtime in a case very similar to the one at hand. After enforcement officers sued the state for nonpayment of overtime compensation, the Department of Conservation began using a weekly report form that specifically advised officers

Mumbower v. Callicott, et al., 526 F.2d 1183, 1188 (1975), the Eighth Circuit stated, "The term 'work' is not defined in the FLSA, but it is settled that duties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer 'knows or has reason to believe' the employee is continuing to work." (Quoting 29 C.F.R. 785.11.) See also Davis v. Food Lion, 792 F.2d 1274, 1276 (4th Cir. 1986) ("suffer or permit" requires a showing that the employer had actual or constructive knowledge of the overtime work).

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that they were not allowed to work more than 40 hours per week unless directed otherwise by the Commissioner. The Department had a policy that enforcement officers were only permitted to work 40 hours per week. See 28 F.3d at 1079. In spite of these warnings against overtime work, many of the Department of Conservation's officers, all of whom worked from home, continued to work in excess of 40 hours per week without documenting the additional hours on their weekly reports. In discussing an employer's knowledge of overtime hours worked, the Eleventh Circuit noted that an employer is not relieved of the duty to inquire into the conditions prevailing in his business "'because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. . . . The cases must be rare where prohibited work can be done . . . and knowledge or the consequences of knowledge avoided.'" Id. at 1082 (quoting Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 512 (5th Cir. 1969)). "In reviewing the extent of an employer's awareness, a court 'need only inquire whether the circumstances . . . were such that the employer either had knowledge [of overtime hours being worked] or else had the 'opportunity through reasonable diligence to acquire knowledge.'" Id. (quoting Gulf King Shrimp Co., 407 F.2d at 512). In this case, Gotham argues that it could not keep track of the nurses' hours because it did not have supervisory personnel at the hospitals. As the Eleventh Circuit's opinion in Dep't of Conservation and Natural Resources illustrates, however, even the inability to conduct on-site supervision does not allow an employer to avoid the consequences of its knowledge.

In this case, there can be no doubt that Gotham knew about the overtime work performed by its nurses. The hospitals forwarded time sheets (which contained the nurses' sign-in and sign-out times) to Gotham at the beginning of the week following the workweek in question, which Gotham used to prepare pay checks for the nurses. Thus, Gotham knew not only that overtime hours were being worked by the nurses, but the precise number of those hours, and was in possession of such knowledge shortly after the hours were worked. Indeed, the work rule itself acknowledges that overtime work, albeit unauthorized, could be performed. Moreover, Gotham paid the nurses for their overtime work, although it only paid them at the straight-time rate. See Reich v. Stewart, 121 F.3d 400, 407 (8th Cir. 1997) (assuming that the employer did not prohibit overtime work because he paid the employee straight time for such work). Gotham also was paid for this work by the hospitals. It can hardly claim that it did not suffer or permit such work when it benefited financially from it. Therefore, irrespective whether Gotham specifically directed the nurses to work the overtime hours, they are compensable because those hours of work were suffered or permitted.

E. Gotham Failed to Curtail the Nurses' Overtime Hours, and Therefore Cannot Assert that it Was "Reasonably Diligent and Energetic" in Complying with the Consent Judgment.

The final prong of the contempt standard requires a showing that the party alleged to be in contempt was not "reasonably diligent and energetic" in attempting to comply with the contempt order. Dunn, 47 F.3d at 490. This Court reviews district court findings regarding reasonable diligence for clear error. See Local 638, 81 F.3d at 1176. The district court, however, did not specifically address whether Gotham exercised reasonable diligence. In any event, Gotham's promulgation of a work rule -- the only possible example of diligence -- cannot be considered a reasonably diligent and energetic attempt to comply with the consent judgment.

The district court based its decision in part on its determination that the nurses' overtime hours were not "desired or required by Gotham." Tr. 110-11. If Gotham truly did not want the nurses to work overtime hours, however, it could have prevented that work from being performed. Yet it did not do so despite being fully aware that such overtime hours were being worked. As the Department's regulations provide:

> 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.

29 C.F.R. 785.13.[11]

Gotham's work rule states that nurses will not be paid overtime compensation for unauthorized overtime hours worked. This is not a prohibition on the performance of unauthorized overtime work; rather, it is a disclaimer that any such work will be compensated at the overtime rate. Thus, the rule tacitly accepts that such overtime work might be performed, while simultaneously attempting to disengage Gotham from any overtime liability. Gotham had every opportunity to issue and enforce a work rule against the performance of unauthorized overtime hours, but it did not exercise its inherent control to prevent such hours from being worked. Indeed, the nurses' employment contract provides that Gotham can terminate a nurse who works fewer hours than originally scheduled, but it does not provide for a nurse's termination when she works hours in excess of those scheduled. Rather than, for example, disciplining nurses who worked any unauthorized overtime hours, Gotham continued both to allow the nurses to work those hours and to garner the financial benefits from that work. Its actions were

[11] This regulation, too, is entitled at least to Skidmore deference. See n.9, supra.

not nearly sufficient to evince reasonable diligence to comply with the consent order.[12]

The Eleventh Circuit faced a similar situation in Dep't of Conservation and Natural Resources, where no officer had ever been disciplined for violating a work rule which did prohibit overtime hours from being worked.[13] The court properly concluded that the employer had suffered or permitted the work to be performed because it "had a duty to do more than to simply continue to apprise the officers of the policy. The [employer] had an obligation to 'exercise its control and see that the work [was] not performed if it [did] not want it to be performed.'" 28 F.3d at 1083 (quoting 29 C.F.R. 785.13). The same is true here where the work rule forewarns nurses that they will not be paid for unauthorized overtime, yet Gotham does not discipline the nurses for performing the extra work. See also U.S. Dep't

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[12] Any argument that the nurses waived their right to overtime compensation by virtue of the work rule must also fail. The statutory right to overtime compensation cannot be contractually waived or superseded by an agreement to work for less. See, e.g., Tennessee Coal, 321 U.S. at 602-03 ("Any custom or contract falling short of [the FLSA's] basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."). Such agreements would undermine the Act's purpose of "spreading work to more employees by requiring employers to pay each individual a premium for excessive hours." Mumbower, 526 F.2d at 1188 (citing Overnight Motor Co. v. Missel, 316 U.S. 572, 577-78 (1942)).

[13] In the present case, there was no 40-hour work rule but, rather, an over-40-hour pay rule.

of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 779-80 (6th Cir. 1995) ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed. The management 'cannot sit back and accept the benefits without compensating for them.'") (quoting 29 C.F.R. 785.13); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981) ("An employer who is armed with [knowledge of an employee's overtime work] cannot stand idly by and allow an employee to perform overtime work without proper compensation."); Mumbower, 526 F.2d at 1188 ("The employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee's weekly total for purposes of overtime compensation.") (citing 29 C.F.R. 785.13); see also Holzapfel, 145 F.3d at 525 (distinguishing a situation where an officer is specifically told not to work unauthorized overtime hours -- "Officer Holzapfel was not told to limit his activities to two hours per week, but rather was simply told that he would not be paid for more hours than that"); Barfield, 432 F. Supp. 2d at 394 (citing Holzapfel, 145 F.3d 525, for the proposition "that an employee might be entitled to overtime where he was told that he would not be paid overtime but was not told to

limit his hours"); Moon v. Kwon, 248 F. Supp. 2d 201, 228 (S.D.N.Y. 2002) (quoting 29 C.F.R. 785.13).[14]

In sum, Gotham's failure to take any meaningful measures to stop the nurses from performing overtime work, and its continuing failure to pay overtime compensation owed the nurses for that work, compels the conclusion that it was not reasonably diligent in complying with the overtime requirements of the FLSA as it was enjoined to do by the terms of the consent judgment.[15]

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[14] Gotham introduced evidence at trial, in support of its motion to dissolve the consent judgment, that it relied on the advice of legal counsel in implementing the work rule. Tr. 59, 112. This Court has recognized, however, that "advice of counsel is not a defense to the act of contempt." United States v. Remini, 967 F.2d 754, 757 (2d Cir. 1992) (citing United States v. Goldfarb, 167 F.2d 735 (2d Cir. 1948) (per curiam)). The fact that Gotham did not seek a determination from either the court or the Department that its work rule complied with the consent judgment, JA 47, at 3-4, is a further indication of Gotham's lack of diligence. See, e.g., McComb, 336 U.S. at 192 (where defendants did not seek clarification from the court of a general decree enjoining them from violating specific provisions of the FLSA, but "undertook to make their own determination of what the decree meant[,] [t]hey knew they acted at their peril").

[15] If the district court's ruling is allowed to stand, its ruling that any overtime hours worked by the nurses are not "work" for Gotham within the meaning of the FLSA would probably collaterally estop the Department from either attempting to enforce the consent judgment with Gotham in the future, or bringing a new enforcement action against the staffing agency. See generally United States v. Stauffer Chemical Co., 464 U.S. 165, 172 (1984) (mutual defensive collateral estoppel available against the United States; in order to "protect[ ] litigants from burdensome relitigation and [to] promot[ ] judicial economy," the government is not permitted "to litigate twice with the same party an issue arising in both cases from virtually identical facts"). This would leave Gotham free to

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and find Gotham in contempt of the consent judgment.

Respectfully submitted,

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continue to pay straight time to its nurses for overtime work, or theoretically, to not pay the nurses at all for this work, thereby gaining a competitive advantage over other employers.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28, I certify the following with respect to the foregoing brief of the plaintiff-appellant Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 7,913 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2003.

3. The digital copy of this brief provided to the court and opposing counsel via electronic mail pursuant to 2nd Cir. R. 32(a) has been scanned for viruses and is virus-free.

8/21/06
DATE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August 2006, two copies of the foregoing Secretary of Labor's Brief as Plaintiff-Appellant and two copies of the Joint Appendix have been sent via **Federal Express**, and, pursuant to Second Circuit Local Rule 32, one Portable Document Format copy of this brief has been sent via electronic mail, to the following:

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