Nos. 10-1725/26

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GERALD A. FAST, et al.,

Plaintiffs-Appellees,

v.

APPLEBEE'S INTERNATIONAL, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Missouri

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MARIA VAN BUREN
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Avenue, NW
Washington, DC 20210
(202) 693-5555

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of plaintiffs-appellees Gerald Fast et al. The district court correctly deferred to the Department of Labor's ("Department") interpretation of its own legislative rule (29 C.F.R. 531.56(e)), as set forth in the Wage and Hour Division's ("WHD") Field Operations Handbook ("FOH"), providing that an employer cannot take a tip credit under section 3(m) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 203(m), for the time spent by a tipped employee in duties related to the tipped occupation when the employee spends more

than 20 percent of his or her time in such related duties. Therefore, the district court's decision should be affirmed.

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary, who is responsible for the administration and enforcement of the FLSA, see 29 U.S.C. 204(a), (b), 216(c), 217, has compelling reasons to participate as amicus curiae in this appeal in support of the employees, because the application of section 3(m) of the Act is central to achieving FLSA compliance with respect to tipped occupations. In this case, the district court properly deferred to the Department's reasonable interpretation of its regulation, issued pursuant to specific congressional authorization and after notice and comment, which permits an employer to continue to take a tip credit for any time a tipped employee "occasionally" spends on duties related to the tipped occupation but provides a 20 percent limitation for those related duties beyond which the tip credit would not be available. In this way, the 20 percent rule ensures that an employer is not paying its tipped employees the reduced tipped wage of $2.13 an hour when more than 20 percent of the employee's time is being spent on duties that do not produce tips.

STATEMENT OF THE ISSUE

Section 3(m) of the FLSA, 29 U.S.C. 203(m), which sets forth the requirements for the payment of tipped employees, permits an employer to take a "tip credit" against the cash wage it is required to pay its tipped employees when they are engaged in a tipped occupation. An employer that meets the section 3(m) requirements is only required to pay its tipped employees $2.13 an hour, provided the employees earn enough in tips to bring their hourly wage up to the minimum wage of $7.25. In this case, the tipped employees have alleged that they were paid the reduced tipped wage for all hours worked, even when they spent more than 20 percent of their time performing duties that were related to their tipped occupation but that were not tip-producing. The issue presented is whether the district court properly concluded that the Department's interpretation of its regulation, setting a 20 percent limitation on the amount of time a tipped employee can engage in "related duties" before the employer loses the benefit of the tip credit, is a reasonable interpretation of the Department's regulation and thus is entitled to deference.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Applebee's restaurants require servers and bartenders to clean and set up the restaurant before it opens and after it

closes. Fast v. Applebee's, Int'l, Inc., 2010 WL 816639, at *2 (W.D. Mo. 2010). Its waitstaff and bartenders are also required to clean bathrooms during their shifts; sweep the restaurant; clean and stock service areas; roll silverware; and "do other duties not directed to specific customers." Id. Applebee's takes a tip credit for all of the work performed by its servers and bartenders, even when their general preparation and other work for which they do not receive tips exceeds 20 percent of the work performed over the course of a workweek. Id.

2. On July 13, 2006, former Applebee's servers and bartenders filed suit alleging that they performed a number of duties during their shifts, as well as pre- and post-shift, for which they were improperly paid a reduced tipped wage of $2.13 an hour instead of the minimum wage (R. 1).[1] On February 15, 2007, plaintiffs sought to certify a collective action under the FLSA pursuant to 29 U.S.C. 216(b) for current and former servers and bartenders of "corporate" Applebee's restaurants (i.e., those operated by defendant or its subsidiaries, rather than franchises) who "'were/are directed or permitted to perform duties that would not generate tips such as general maintenance and preparatory work in excess of twenty percent (20%) of their shift without paying them at least the minimum wage.'" Order

[1] Citations to the district court docket are given as ("R." (followed by the applicable docket entry number)).

(R. 83) Granting in Part Plaintiff's Motion for Conditional Class Certification and Approval of Notice to Putative Class Members dated June 19, 2007 (quoting R. 69 at 1-2). Applebee's filed a motion for summary judgment that the district court denied in all relevant respects on May 3, 2007. See Fast v. Applebee's Int'l, Inc., 502 F. Supp. 2d 996, 1007 (W.D. Mo. 2007).

On June 19, 2007, the district court certified the tipped employee claim as a collective action covering 43,000 current and former Applebee's employees who worked as servers and/or bartenders (R. 83). In September 2007, notice and consent to join forms were sent to the 43,000 putative class members; 5,500 individuals filed such forms by February, 2008. Following discovery, Applebee's filed a motion to decertify the class, which the court denied on August 3, 2009 (R. 251). On August 26, 2009, the parties discussed with the district court the possibility of interlocutory appeal of the "tipped work claim," and the court vacated its May 3, 2007 ruling on that issue and requested additional briefing (R. 299).

B. The District Court's Decision

1. On March 4, 2010, the district court, having reviewed the additional briefing, affirmed its conclusion that Applebee's was not entitled to summary judgment, but certified the tipped employee claim for interlocutory appeal to this Court pursuant

to 29 U.S.C. 1292(b). See Fast, 2010 WL 816639, at *10. In its motion for summary judgment, Applebee's claimed that the plain language of the FLSA permits it to take a tip credit for all of the work performed by its waitstaff and bartenders, irrespective of the specific duties they are required to perform and whether those duties are "tip producing," because the individuals are tipped employees within the meaning of the Act, i.e., they are "engaged in an occupation in which [they] customarily and regularly receive[] more than $30 a month in tips." 29 U.S.C. 203(t) (defining a "tipped employee"); see 29 U.S.C. 203(m) (permitting the taking of a tip credit for "tipped employees"). The district court, however, denied Applebee's motion on the ground that the Department's interpretation of its regulation at 29 C.F.R. 531.56(e), codified at FOH ¶ 30d00(e), which creates a 20 percent tolerance for non-tip producing work within a particular tipped occupation, draws "a persuasive line between when a tipped employee is engaged in a tipped occupation and when the employee is no longer working in that occupation." Fast, 2010 WL 816639, at *3. The court also noted that the FOH provision is consistent with other regulations that interpret FLSA exemptions to provide for a 20 percent limitation on nonexempt work. Id. at *5 n.5. It observed that the 20 percent limitation enures to the employer's benefit, because it effectively works as a "cushion [that] ensures that employers

will not lose the tip credit until they assign substantial work that is not tip producing, i.e., general preparation and maintenance instead of work directed to specific customers, the source of all tips." Id. at *5. The court also noted that the FOH provision reflects the evolution of WHD's view of this issue. Id. It thus concluded that the FOH provision constituted "'a body of experience and informed judgment to which the courts and litigants may properly resort for guidance,'" and was entitled to deference. Id. (quoting Reich v. Miss Paula's Day Care Center, Inc., 37 F.3d 1191, 1194 n.5 (6th Cir. 1994)).

The court concluded that Applebee's argument, that the plain language of the definition of a "tipped employee" in section 3(t) of the Act precludes the FOH's 20 percent limitation because it requires only that an employee work in a tipped occupation, stretches the tipped wage provision, regulations, and FOH "so far that they become meaningless." Fast, 2010 WL 816639, at *6. In support of this statement, the court proffered a scenario where servers and bartenders were required to perform non-tipped duties for the majority of their shifts, which would result in the employees receiving very few tips; under such a scenario, the employer would be permitted to pay its tipped employees only the reduced tipped wage even though the majority of their work was not tip-producing. Id.

The district court also rejected Applebee's argument that a 20 percent limitation would be impossible to track and enforce, on the ground that the FLSA and its implementing regulations, including recordkeeping provisions, require employers to be aware of and to record when an employee is engaged in a tipped occupation. Id. Finally, the court concluded that it would impose the burden-shifting mechanism established by Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946), to assess liability and damages. Id. at 8-9.

SUMMARY OF ARGUMENT

Section 3(m) of the FLSA, which governs the pay of tipped employees, states that an employer may use a portion of its employees' tips as a credit against its minimum wage obligations to its tipped employees. Absent such a credit, the employer must pay the full minimum wage in cash. The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. 203(t). The Department's "dual jobs" regulation, issued pursuant to specific legislative authority and after notice and comment, provides that an employer may continue to take a tip credit if a tipped employee "occasionally" engages in duties related to the tipped occupation, such as making coffee and washing dishes, but clearly envisions such related duties to take up only "part of

[the tipped employee's] time." 29 C.F.R. 531.56(e). The WHD's Field Operations Handbook affixes a specific limit to the regulation's tolerance for the "occasional" performance of such related duties, capping it at 20 percent of the tipped employee's time. Thus, under this interpretation of the regulation, an employer can continue to take a tip credit for an employee who engages in duties that are related to his or her tipped occupation, but only if those duties do not exceed 20 percent of the tipped employee's time; if the related duties exceed 20 percent, the employer cannot take the tip credit for that employee. In this way, the 20 percent rule ensures that a tipped employee is paid the reduced tipped wage only when he or she is actually earning tips to supplement his or her reduced wages. The Department's interpretation of its legislative rule as permitting an employer to continue taking a tip credit for its tipped employee's performance of duties related to the tipped occupation, provided that it does not exceed 20 percent of the employee's time, is therefore reasonable and entitled to controlling deference.

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DEPARTMENT'S INTERPRETATION OF ITS LEGISLATIVE RULE, WHICH ESTABLISHES A TWENTY PERCENT LIMITATION FOR THE PERFORMANCE OF DUTIES "RELATED" TO THE TIPPED OCCUPATION BEYOND WHICH THE TIP CREDIT WOULD NOT BE AVAILABLE, IS REASONABLE AND THUS IS ENTITLED TO CONTROLLING DEFERENCE

1. The FLSA is a statute of broad remedial purpose. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947). Congress enacted the FLSA to protect workers from "substandard wages and oppressive working hours." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981); see 29 U.S.C. 202(a), (b) (congressional finding that "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" adversely affects commerce, and thus it is the policy, "through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power"). The provisions of the Act are broadly construed "to apply to the furthest reaches consistent with Congressional direction." Klem v. County of Santa Clara, Cal., 208 F.3d 1085, 1089 (9th Cir. 2000) (internal quotation marks omitted); see Brennan v. Plaza

_________________, 522 F.2d 843, 846 (8th Cir. 1975) (FLSA should be "liberally construe[d] . . . to apply to the furthest reaches consistent with congressional direction" and "in fulfillment of its humanitarian and remedial purposes") (internal quotation marks omitted).

2. Section 3(m) of the FLSA, 29 U.S.C. 203(m), permits an employer to take a "tip credit" against the minimum wage it is required to pay its tipped employees. If an employer meets all the requirements for taking a tip credit, it is required to pay its tipped employees only $2.13 an hour instead of the federal minimum wage of $7.25. Section 3(t) of the FLSA, 29 U.S.C. 203(t), defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." The Department's regulation at 29 C.F.R. 531.56(e) explains that in those cases where an individual works for an employer in a tipped and a non-tipped occupation, and therefore is employed in "dual jobs," the employer can only take a tip credit, and thus pay the employee a reduced minimum wage, for the hours the employee has worked in the tipped occupation. The rule uses as an example a hotel employee who is employed both as a maintenance man and a waiter, and explains that under such circumstances the individual is deemed to be "employed in two occupations, and no tip credit can be taken for his hours of employment in his [non-tipped]

occupation of maintenance man." 29 C.F.R. 531.56(e). The rule also provides, however, that an employer may still take a tip credit for a tipped employee who spends "part of her time" performing duties related to the tipped occupation, even when those duties are not tip-producing:

> [A dual occupation] situation is distinguishable from that of a waitress who spends <u>part of her time</u> cleaning and setting tables, toasting bread, making coffee and <u>occasionally</u> washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such <u>related duties in an occupation</u> that is a tipped occupation need not by themselves be directed toward producing tips.

<u>Id.</u> (emphases added).

In its Field Operations Handbook ("FOH"), WHD interprets the limitations on "related duties in an occupation that is a tipped occupation" expressed in the regulatory provision ("part of her time" and "occasionally") to place a 20 percent limitation on the amount of related duties that a tipped employee can perform; if more than 20 percent of the employee's time is spent on duties related to the tipped occupation, "no tip credit may be taken for the time spent in such duties." FOH ¶ 30d00(e) (last revised 12/9/1988). The FOH explains in full:

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends <u>some time</u> cleaning and

> setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Id. (emphases added); see WHD Fact Sheet 15: Tipped Employees Under the Fair Labor Standards Act at http://www.dol.gov/whd/regs/compliance/whdfs15.pdf (setting forth the 20 percent tolerance).

3. WHD issued several opinion letters prior to the publication of the relevant provision of the FOH. In a 1980 opinion letter, WHD opined that an employer could continue to take a tip credit for an unspecified amount of time that its tipped employees spent cleaning the salad bar and waitress station, cleaning and resetting the tables (including filling salt and pepper shakers), and vacuuming the dining room after the restaurant closed, because the employees were engaged in duties related to their tipped occupation. WHD Opinion Letter WH-502, 1980 WL 141336 (March 28, 1980). The letter noted that "[i]nsofar as the after-hours clean-up you describe are assigned generally to the waitress/waiter staff, we believe that such duties constitute tipped employment within the meaning of the

regulation"; it went on to state, however, that "[w]e might have a different opinion if the facts indicated that specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming." Id. In a 1985 opinion letter, WHD clearly stated its position limiting the amount of time that a tipped employee could spend in duties related to the tipped occupation. The 1985 letter addressed a situation where designated waitstaff were required to clock in up to two hours before the restaurant opened to perform "opening responsibilities," which included stocking tables and waitress stations, preparing tea and coffee, and preparing vegetables for a salad bar. WHD Opinion Letter FLSA-854 (Dec. 20, 1985).[2] WHD began its analysis by reiterating the regulatory language in 29 C.F.R. 531.56(e) providing that the tip credit could be taken for the hours spent by a tipped employee in activities related to the tipped occupation, such as "a waitress who spends part of

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[2] As an initial matter, WHD rejected the employer's argument that the salad bar preparation was a duty "related to" the tipped occupation of waitperson, stating that since such duties were more akin to those typically performed by a chef, they were not related to the tipped occupation, and no tip credit could be taken for any time spent on salad preparation. WHD Opinion Letter FLSA-854 (Dec. 20, 1985); see WHD Opinion Letter FLSA-895 (Aug. 8, 1979) (reaching the same conclusion); Myers v. The Copper Cellar Corp., 192 F.3d 546, 550-51 (6th Cir. 1999) (salad preparers are not tipped employees under section 3(m) of the FLSA because they, inter alia, perform duties "traditionally classified as food preparation or kitchen support work"); see also n.6 infra for similar treatment of cleaning bathrooms.

her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses," even though such duties are not tip-producing. Id. WHD stated, however, that the tolerance for such related duties was limited to those activities that are "incidental to the waiter or waitress's regular duties"; if the tipped employees spent "a substantial amount of time in performing general preparation work," no tip credit could be taken for hours spent in such activities. Id. (emphases added). Because the "opening responsibilities" did not focus on the particular area that a waiter or waitress would serve but rather on the entire restaurant, and because the preparatory work "consume[d] a substantial portion of the waiter or waitress' workday" -- from 30 to 40 percent of the five-hour shift -- WHD concluded that the employer could not take a tip credit for the hours spent on those duties. Id.[3]

4. WHD's longstanding and reasoned interpretation of the dual jobs/related duties legislative rule, as reflected in the FOH and the instant amicus brief, is entitled to controlling deference. See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007); Culpepper v. Schafer, 548 F.3d 1119, 1122 (8th

[3] An opinion letter proposing to abolish the FOH's 20 percent limitation was published and simultaneously withdrawn with an accompanying statement by WHD that it could not be relied on as a statement of agency policy. See WHD Opinion Letter FLSA2009-023 (Jan. 16, 2009) (published and withdrawn March 2, 2009).

Cir. 2008) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)); Belt v. EmCare, Inc., 444 F.3d 403, 415-16 (5th Cir. 2006) (affording controlling deference to the DOL's interpretation of an ambiguous regulation, as expressed in an opinion letter, the FOH, and an amicus brief); see also Murray v. Stuckey's, Inc., 50 F.3d 564, 569 (8th Cir. 1995) (looking to DOL's FOH for guidance); Ash v. Sambodromo, LLC, 676 F. Supp. 2d 1360, 1367 n.10 (S.D. Fla. 2009). The regulation, which was promulgated pursuant to express congressional authorization and after notice and comment, states that an employer is entitled to utilize the tip credit for a tipped employee who "spends part of her time" in related duties in a tipped occupation. 29 C.F.R. 531.56(e); Pub. L. No. 89-601, § 602 (Sept. 23, 1966); 32 Fed. Reg. 13575 (Sept. 28, 1967).[4] The FOH provision in turn provides

[4] Applebee's argues (br. at 20) that the Department's interpretation of its regulation is not entitled to controlling deference because the regulation is only an "interpretive" rule. However, the fact that 29 C.F.R. 531.56(e) is contained in a section of the regulations titled "Interpretations" does not mean that WHD did not intend the regulation "to carry no special legal weight," particularly where "other considerations strongly suggest the contrary," specifically, "where [the] agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable." Long Island Care at Home, 551 U.S. at 172-74 (internal quotation marks omitted). If all of those factors are present, as they are here, "a court ordinarily assumes that Congress intended it to defer to the agency's determination." Id. at 173-74.

specificity to this tolerance for "occasional" non-exempt activity, capping it at 20 percent of the tipped employee's time.[5]

There is a reasonable basis for the 20 percent limitation on related duties. The FLSA's tip credit provision permits an employer to take a partial credit against its minimum wage obligations when its employees are earning tips. It is illogical under this scheme, however, to permit an employer to use an employee's tips to subsidize an employee's work that is not tip-producing. In the words of the district court, "[u]nder Applebee's reading of the FLSA, it can have its servers and bartenders perform an unlimited amount of non-tipped duties while Applebee's pays them the tipped wage, so long as those non-tipped duties are related in some amorphous or ever changing way to the occupation of servers or bartenders." Fast, 2010 WL 816639, at *6. The Act does not permit an employer to use the tips earned by an employee while engaged in tip-producing work, such as waiting tables, to subsidize that same employee's wages for non-tip-producing work, such as vacuuming floors or cleaning

[5] To the extent that WHD's position evolved in any way between the publication of the 1980 opinion letter and the 1988 FOH chapter, deference is still appropriate. Indeed, even if the Department's position had changed, it would still merit deference. Cf. Long Island Care at Home, 551 U.S. at 170-71.

the bathroom.[6] As the district court observed, the 20 percent limitation for related duties is important to protect against abuse, guaranteeing that an employer cannot pay his or her employee the much lower tipped wage of $2.13 an hour for an entire shift if more than 20 percent of the employee's work during that shift is not tip-producing. Id. And, as the district court also recognized, the limited tolerance for related duties essentially provides the employer with a cushion; only if the related duties exceed the 20 percent tolerance does the employer lose its right under section 3(m) to assert an exemption from paying the full minimum wage. Id. at *5.

Applebee's argues (br. at 39-41) that an opinion by the Sixth Circuit in Kilgore v. Outback Steakhouse of Florida, Inc., 160 F.3d 294, 302-03 (1998), supports its position that the FOH's 20 percent tolerance for related duties is not entitled to deference because it does not have a basis in the statute. In Outback, the employer challenged WHD's limitation on employee contributions to mandatory tip pools that the agency had articulated in two opinion letters. One opinion letter stated that an employer could not require its tipped employees to make

[6] As the district court noted, the time that Applebee's waitstaff and bartenders spent cleaning bathrooms would not even be counted toward the 20 percent limitation in this case, since "[t]here is no reasonable argument that cleaning bathrooms is related to occupations where food and beverages are handled." Fast, 2010 WL 816639, at *6 n.7.

contributions to a mandatory tip pool beyond that which was "customary and reasonable"; another opinion letter set a more specific cap at 15 percent of an employee's tips. Id. at 302.[7] The court agreed with the employer that the cap on contributions expressed in the opinion letters was not entitled to deference because "neither the statute nor its regulations mention this requirement and the opinion letters do not cite to any part of the statute for this requirement." Id. Furthermore, the court stated that "[t]he opinion letters provide no reasoning or statutory analysis to support their conclusion that there is a 'reasonableness' limit on how much an employer can require an employee to tip out." Id. at 303. The Sixth Circuit's rationale in Outback is not applicable to the present case, however, because WHD's 20 percent limitation on related duties is interpreting its dual jobs regulation, 29 C.F.R. 531.56(e), which in turn interprets the statutory definition of a "tipped employee" in section 3(t) of the Act, 29 U.S.C. 203(t). Therefore, the FOH's 20 percent limitation on related duties clearly has a firm basis in the statute and the regulations. Furthermore, the FOH and this brief provide a reasonable rationale for the 20 percent rule, explaining that such a limitation on related duties is necessary to prevent abuse; as

[7] Although an FOH provision that was published at the time, ¶30d04(b), contained the same 15 percent limitation, the court did not address that provision in its analysis of the issue.

the district court reasoned, without the 20 percent restriction on related duties, an employer could "use servers and bartenders as janitors and cooks both during and outside business hours when no customers were present." Fast, 2010 WL 816639, at *5.

5. Several recent court decisions have referenced with approval the FOH's 20 percent limitation for nontipped work. In Holder v. MJDE Venture, LLC, 2009 WL 4641757, at *4 (N.D. Ga. 2009), the district court relied on the FOH to conclude that the defendants could not claim a tip credit for any "substantial time [spent by plaintiffs] on work that did not produce tips." And district courts in Ash, 676 F. Supp. 2d at 1367, and Roussell v. Brinker Int'l, Inc., 2008 WL 2714079, at *12 (S.D. Tex. 2008), indicated that they would apply the FOH's 20 percent limitation in determining whether a tip credit could be taken for time spent in non-tipped duties. Further, a number of courts have recognized generally that employers cannot receive the benefit of a tip credit when its tipped employees spend a substantial amount of time performing non-tipped duties. Thus, in Dole v. Bishop, 740 F. Supp. 1221, 1228 (S.D. Miss. 1990), a district court concluded that because cleaning and food preparation were not incidental to the waitresses' tipped duties, the employees were entitled to be paid the full minimum wage for the pre- and post-shift time spent on those tasks. Likewise, in Hodgson v. Frisch's Dixie, Inc., 1971 WL 837, at

*3, 5 (W.D. Ky. 1971), another district court concluded that an employer could not take a tip credit for the "substantial periods of time" its carhops and waitresses spent in "nontipped work." But see Pellon v. Business Representation Int'l, Inc., 528 F. Supp. 2d 1306, 1313-14 (S.D. Fla. 2007) (concluding that it was "infeasible" to apply the 20 percent tolerance), aff'd, 291 Fed. Appx. 310 (11th Cir. 2008); cf. Driver v. AppleIllinois, LLC, 265 F.R.D. 293, 311 (N.D. Ill. 2010) (concluding that the application of the 20 percent rule "is not workable in a Rule 23 class action setting"); Townsend v. BG Meridian, Inc., 2005 WL 2978899, at *7 (W.D. Okla. 2005) (without addressing the FOH's 20 percent rule, the court concluded that where plaintiff "primarily performed duties as a waitress, but was also called upon to answer phones and check out customers," the employer was entitled to take a tip credit for all duties because they were "related [to] duties incident to her waitress position").

6. It is instructive that WHD utilizes a 20 percent tolerance for nonexempt work under the FLSA in many different contexts. The statutory exemption in section 13(c)(6) of the Act, 29 U.S.C. 213(c)(6), permitting 17-year-olds to drive when, inter alia, such driving is "only occasional and incidental," defines "occasional and incidental" to comprise "no more than one-third of an employee's worktime in any workday and no more

than 20 percent of an employee's worktime in any workweek." 29 U.S.C. 213(c)(6)(G). WHD's regulations reflect other 20 percent limitations for the performance of nonexempt work under the FLSA for: switchboard operators under section 13(a)(10) of the Act (29 C.F.R. 786.100); employees of an employer engaged in the operation of rail or air carriers under sections 13(b)(2) and (b)(3) of the Act (29 C.F.R. 786.150 and 786.1); and drivers employed by an employer engaged in the taxicab business under section 13(b)(17) of the Act (29 C.F.R. 786.200). The regulations also employ 20 percent limitations on nonexempt work to determine whether an individual qualifies for an exemption from the Act's minimum wage and overtime requirements as a casual babysitter or a companion pursuant to section 13(a)(15) of the Act. See 29 C.F.R. 552.5 and 552.6. Finally, WHD applies a 20 percent limitation on nonexempt work for seamen under section 13(b)(6) of the Act. See 29 C.F.R. 783.32 and WHD Opinion Letter FLSA1260 (July 12, 1994). Thus, limitations on the amount of nonexempt work that may be performed before the exemption is lost are common in the context of the FLSA, and are consistent with the narrow construction to be given to exemptions from the Act's requirements. See Spinden v. GS Roofing Products Co., Inc., 94 F.3d 421, 426 (8th Cir. 1996); McDonnell v. City of Omaha, Neb., 999 F.2d 293, 295 (8th Cir. 1993).

Applebee's argues (br. at 43) that the 20 percent limitations on nonexempt work related to statutory exemptions are not comparable to the 20 percent limitation on duties related to the tipped occupation. In support of this argument, Applebee's posits that those regulations' limitations on nonexempt work apply to duties outside of, or unrelated to, the occupation in question, whereas the 20 percent limitation on related duties in a tipped occupation is essentially a subset of the duties that make up the occupation in question. However, the regulations set out at 29 C.F.R. 786.1, 786.100, 786.150, and 786.200 define nonexempt work as "work of a nature other than that which characterizes the exemption." The exemption from the Act's minimum wage provisions for employees engaged in a tipped occupation is based on the employee receiving tips; therefore, engaging in duties that do not produce tips is parallel to nonexempt work in a non-tip context, because it is also "work of a nature other than that which characterizes the exemption." Moreover, at least one limitation set forth supra includes on its face work that is "related" to the exempt employment. See 29 C.F.R. 552.6 (permitting a 20 percent limitation in the context of the companionship exemption for "household work related to the care of the aged or infirm person").

7. Applebee's claims (br. 51-53) that the district court's application of the Mount Clemens standard in this case presents an undue hardship for the employer, because WHD's recordkeeping regulations require only that an employer keep a record of the hours worked in a tipped occupation, not the individual duties that comprise such an occupation (including related duties). Specifically, the FLSA recordkeeping regulations require employers to keep track of "[h]ours worked each workday in any occupation in which the employee receives [or does not receive] tips." 29 C.F.R. 516.28(a)(4) & (5) (emphasis added). It is settled law under the FLSA, however, that the employer bears the burden of proving its entitlement to a statutory exemption from the Act's minimum wage and overtime requirements. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Arnold, 361 U.S. at 392; Spinden, 94 F.3d at 426; McDonnell, 999 F.2d at 296. The courts have recognized that an employer is similarly required to show its entitlement to a tip credit, which is in effect a partial exemption from the Act's minimum wage requirements. See, e.g., Barcellona v. Tiffany English Pub., Inc., 597 F.2d 464, 467 (5th Cir. 1979); Pedigo v. Austin Rumba, Inc., -- F. Supp. 2d --, 2010 WL 2730462, at *7 (W.D. Tex. 2010); Driver, 265 F.R.D. at 298 (citing FOH ¶ 30d00(b)) (section 3(m) evidences congressional intent to put the burden on the employer the amount of the tip credit, if any, the

employer may claim). And it is without question under the FLSA that "'the application of an exemption . . . is a matter of affirmative defense on which the employer has the burden of proof.'" Hertz v. Woodbury County, Iowa, 566 F.3d 775, 783 (8th Cir. 2009) (quoting Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974)). The legislative history to the 1974 amendments to the Act reflects that by amending section 3(m) to eliminate a mechanism whereby an employee could request the Secretary to review the lawfulness of his or her employer's use of the tip credit, Congress intended "'to place on the employer the burden of proving the amount of tips received by tipped employees and the amount of tip credit, if any, which [such employer is entitled to] claim as to tipped employees.'" WHD Opinion Letter WH-352 (Aug. 12, 1975) (quoting S. Rep. No. 93-690, at 43).[8]

Therefore, if the employer intends to utilize the tip credit with the attendant 20 percent limitation on tip-related activities, it is incumbent on the employer to show its entitlement to that credit. Thus, if challenged on the use of the tip credit on the ground that it exceeded the 20 percent

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[8] Similarly, section 11(c) of the FLSA, 29 U.S.C. 211(c), imposes upon the employer "the duty . . . to keep proper records of wages, hours and other conditions and practices of employment [because the employer] is in position to know and to produce the most probative facts concerning the nature and amount of work performed." Mount Clemens, 328 U.S. at 687.

limitation, it would be incumbent on the employer to show by records, or some other means (e.g., testimony), that it did not exceed that limitation.

As a practical matter, employers should generally be aware if their tipped employees are engaging in excess of 20 percent per shift on duties that do not directly produce tips. In one case involving a tipped employee employed in the tipped occupation of a restaurant server, for example, the employee was required to perform so-called "side work" before and after her shift that included cleaning up the bar area and making sure the server station was clean and stocked. Ash, 676 F. Supp. 2d at 1366. The court concluded that since this "side work," which the plaintiff estimated to take up to one-and-one half hours per shift, did not exceed 20 percent of the plaintiff's typical eight-hour shift, the employer was entitled to pay the employee the tipped wage of $2.13 an hour for the time spent in these related duties. Id. at 1367. It is particularly feasible for an employer to track such so-called "side work" performed before or after the shift, since the employer is in that instance requiring its employees to report before and stay after the establishment is open to the public.[9] An employer should also be

[9] Amicus National Council of Chain Restaurants argues (br. at 12-14) that it is difficult for employers to determine which duties are not part of, but are related to, the tipped occupation. The regulation and FOH provision identify a number of duties related

able to determine whether, during the course of an eight-hour shift, a tipped employee is spending in excess of one-and-one half hours performing related duties. This is a significant period of time, and it is not onerous for an employer to be required to prove (by records or other means) that their employees for whom they are utilizing a tip credit are not performing related duties in excess of 20 percent of the time.[10]

8. Applebee's argues (br. at 15-16) that the court should use the Occupational Information Network ("O*Net") database to identify the scope of tipped occupations, such as "server" or "bartender," and to permit an employer to take a tip credit for any amount of time its tipped employees spend in those occupations.[11] Pursuant to this approach, all of the duties

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to the tipped occupation of a waitperson, which is the tipped occupation at issue in this case. The regulation, for example, identifies as duties related to the tipped occupation of a waitperson washing dishes or glasses; cleaning and setting tables; toasting bread; and making coffee. See 29 C.F.R. 531.56(e). These kinds of duties must be deemed related, as they cannot be said to be in and of themselves tip-producing.

[10] As the district court observed, Fast, 2010 WL 816639, at *6, Applebee's agreed to audit its restaurants to ensure compliance with the 20 percent limitation on related duties following a 2005 WHD investigation, and agreed to stop its practice of paying the tipped wage for time its tipped employees spent in salad portioning and dishwashing. Thus, the court concluded, "Applebee's own history with FLSA enforcement in this case indicates that it is capable of enforcing the twenty percent limitation." Id.

[11] The O*Net website states that the site is developed under the sponsorship of the U.S. Department of Labor/Employment and

listed on O*Net within a particular occupation would be part of the tipped occupation, and thus tip-producing; those duties not listed on O*Net would presumably be outside of the scope of the tipped occupation, and thus not tip-producing. In this scenario, there would be no need to identify "related" duties or to apply the 20 percent limitation for such work.[12] However, it is not for Applebee's or the district court to determine whether the amount of related duties performed should be considered in the payment of tipped employees. DOL reasonably has construed the FLSA's tip credit provision (as explained in its regulations and FOH) to permit an employer to continue paying its tipped employees a tipped wage when they are performing duties that are

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Training Administration (USDOL/ETA) through a grant to the North Carolina Employment Security Commission. The website describes O*Net as "the nation's primary source of occupational information" that "contain[s] information on hundreds of standardized and occupation-specific descriptors. The database, which is available to the public at no cost, is continually updated by surveying a broad range of workers from each occupation." http://www.onetcenter.org/overview.html (last visited Aug. 10, 2010).

[12] Applebee's argument does not account for O*Net's breakdown of "core" and "supplemental" tasks, which could potentially be used by a court as a means to identify related tasks in any analysis of the 20 percent limitation. Moreover, duties that tipped employees at Applebee's were required to perform, such as sweeping and cleaning bathrooms, would not, even according to Applebee's analysis of O*Net, constitute employment in a tipped occupation because they are not included in the list of duties for the tipped occupation; Applebee's would therefore not be permitted to take a tip credit for the time its employees spend performing these duties. See O*Net at http://online.onetcenter.org/link/summary/35-3031.00#Tasks.

related to the tipped occupation, as long as those duties do not exceed 20 percent of an employee's time. The Department's interpretation is controlling.

CONCLUSION

For the foregoing reasons, the district court's opinion should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation

____
MARIA VAN BUREN
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Avenue, NW
Washington, DC 20210
(202) 693-5555

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), and 8th Cir. R. 28A(c) and (d), I certify the following with respect to the foregoing amicus brief of the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 6,963 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 on diskette provided to the court pursuant to 8th Cir. R. 28A(d) has been scanned for viruses and is virus-free.

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DATE

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MARIA VAN BUREN
Senior Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2010, I filed ten paper copies and one digital version of this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via **Federal Express Overnight Mail**.

I HEREBY CERTIFY that two copies of the foregoing Secretary of Labor's Amicus Brief, in compliance with 8th Cir. R. 28A(a) and (d), have been sent via **Federal Express Overnight Mail** on this 15th day of September, 2010 to the following:

Matthew A. Clement
Kari A. Schulte
Timothy W. Van Ronzelen
COOK & VETTER
231 Madison Street
Jefferson City, MO 65101-0000

Charles A. Gentry
Jason H. Ludwig
CARSON & COIL
515 E. High
P.O. Box 28
Jefferson City, MO 65102-0000

Rachel Frankel
Lisa Schiavo Blatt
Robert Alexander Schwartz
ARNOLD & PORTER
555 12th Street, N.W.
Washington, DC 20004-1202

Douglas Michael Werman
Jamie G. Sypulski
WERMAN LAW OFFICE, P.C.
77 W. Washington Street
Suite 1402
Chicago, IL 60602

____

MARIA VAN BUREN
Senior Attorney

United States Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Ave., NW
Washington, DC 20210

(202) 693-5555