No. 12-12614

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL SCANTLAND, et al.,

Plaintiffs-Appellants,

v.

JEFFRY KNIGHT, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

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

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SCANTLAND v. JEFFRY KNIGHT, INC., Case No. 12-12614

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

To the Secretary's knowledge at this time, the following persons and entities have or may have an interest in the outcome of this appeal:

1. Brand, Jennifer S. (Associate Solicitor, U.S. Dep't of Labor)
2. Bright House Networks, LLC (former Defendant)
3. Cabassa, Luis Antonio (counsel for Defendants-Appellees)
4. Cho, Eunice Hyunhye (counsel for potential *amicus curiae*)
5. Cors, Gary (counsel for Plaintiffs-Appellants)
6. Department of Labor (*amicus curiae*)
7. Downs, Terrence (Plaintiff-Appellant)
8. Ferrell, Joshua (Plaintiff-Appellant)
9. Frieden, Paul L. (Counsel, U.S. Dep't of Labor)
10. Graunke, Kristi (counsel for potential *amicus curiae*)
11. Hauser, III, Frederick (Plaintiff-Appellant)
12. Interfaith Worker Justice (potential *amicus curiae*)
13. Jeffry Knight, Inc. (Defendant-Appellee)
14. Knight, Jeffry D. (Defendant-Appellee)
15. Kovachevich, Elizabeth (Judge, U.S. District Court for the Middle District of Florida)
16. Lichten, Harold L. (counsel for Plaintiffs-Appellants)
17. Lichten & Liss-Riordan, P.C. (counsel for Plaintiffs-Appellants)
18. Liss-Riordan, Shannon (counsel for Plaintiffs-Appellants)

19. National Employment Law Project (potential *amicus curiae*)

20. National Employment Lawyers Association (potential *amicus curiae*)

21. Rabieh, Michael (counsel for Plaintiffs-Appellants)

22. Reighard, Kristine M. (counsel for Plaintiffs-Appellants)

23. Romhilt, Dean A. (Attorney, U.S. Dep't of Labor)

24. Ruckelshaus, Catherine K. (counsel for potential *amicus curiae*)

25. Russell, Ian O. (counsel for Plaintiffs-Appellants)

26. Scantland, Michael (Plaintiff-Appellant)

27. Secretary of Labor (*amicus curiae*)

28. Smith, M. Patricia (Solicitor, U.S. Dep't of Labor)

29. Southern Poverty Law Center (potential *amicus curiae*)

30. Sperry, Leon (Plaintiff-Appellant)

31. Staack, James A. (counsel for Plaintiffs-Appellants)

32. Staack Simms & Hernandez, P.A. (counsel for Plaintiffs-Appellants)

33. Wenzel Fenton Cabassa, P.A. (counsel for Defendants-Appellees)

34. Wenzel, Steven G. (counsel for Defendants-Appellees)

35. Zapata, Phillip (Plaintiff-Appellant)

/s/ Dean A. Romhilt
DEAN A. ROMHILT

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

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants, a group of cable installers who brought a collective action under the Fair Labor Standards Act ("FLSA" or "Act") against their employer.

INTEREST OF THE SECRETARY

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because she administers and enforces the Act. See, e.g., 29 U.S.C. 204, 211(a), 216(c), 217. The Secretary has been continually concerned with employers who misclassify their workers as independent contractors as opposed to employees under the FLSA, thus

depriving them of the Act's protections. She investigates complaints by workers that they have been misclassified as independent contractors, and brings enforcement actions on behalf of workers who have been misclassified. The Secretary has recently obtained several favorable judgments on behalf of misclassified workers, including a judgment on behalf of cable installers who perform work similar to the work performed by the installers here.[1] Thus, decisions by the courts of appeals regarding the scope of the employment relationship under the FLSA affect the Secretary's enforcement efforts.

STATEMENT OF THE ISSUE

Whether the district court erred in determining on summary judgment that the cable installers are independent contractors as opposed to employees under the FLSA.

[1] See Solis v. Kansas City Transp. Group, No. 4:10-00887, 2012 WL 3753736 (W.D. Mo. Aug. 28, 2012) (granting summary judgment for the Secretary and ruling that the employer's drivers are employees and not independent contractors under the FLSA); Solis v. Cascom, Inc., No. 3:09-cv-00257, Dkt. No. 45 (S.D. Ohio Sept. 21, 2011) (following a bench trial, ruling in the Secretary's favor that the employer's cable installers are employees under the FLSA and are entitled to overtime) (copy of slip opinion attached as Exhibit A); Solis v. Int'l Detective & Protective Serv., Ltd., 819 F. Supp.2d 740 (N.D. Ill. 2011) (granting summary judgment for the Secretary, ruling that the employer's security guards are employees and not independent contractors under the FLSA, and awarding them over $200,000). In addition, the Secretary relies on FLSA actions by private parties to complement her own enforcement efforts against misclassification.

STATEMENT OF THE CASE

1. Statement of Facts.

Plaintiffs-Appellants are current and former cable installers engaged by Defendants-Appellees Jeffry Knight, Inc. and related parties (collectively, "Knight") to install and repair cable, internet, and phone services. See District Court's March 29, 2012 Order, Dkt. No. 216 ("Order"), 1. Bright House Networks ("Bright House") provides the cable, internet, and phone services, but it subcontracts out to Knight the installation and repair of its services and equipment. See id. at 1, 3. Knight engages hundreds of "technician installers" to perform the work and classifies them as independent contractors. Id. at 1, 4; Dkt. No. 192-4. Knight does not require installers to have prior cable television installation experience before engaging them. See Order, 7. When it engages an installer without prior experience, it provides training and technical specifications, and has the newly-engaged installer ride with another installer. See id. Beginning in 2008, Knight required its installers to complete specific coursework and take tests to obtain certain certifications. See id.

The installers generally are required to work for Knight six days per week, although the volume of work fluctuates. See Order, 5-6. Several Plaintiffs had been working for Knight for as long as seven or nine years when they filed their FLSA

action. See id. at 4-5. Some installers set up corporate entities through which they work for Knight. See id. at 5.

Knight receives work orders from Bright House, determines which installer is qualified and available to perform the work, and assigns the work orders to the installers. See Order, 3. Installers typically arrive at the office between 6:30 am and 7:15 am to receive a "route" consisting of a series of work orders to be completed in specified time slots, turn in to Knight work orders and unused equipment from the previous day, and pick up new equipment. See id. at 6. If an installer is late, his route could be given away to another installer. See id. Knight pays the installers a set amount per job, which it determines and modifies at its sole discretion. See id. at 4, 11. Some installers partner with other installers to complete assigned work, and in such cases they decide how to split the pay for the work. See id. at 7. Installers also may transfer work orders among themselves. See id. at 6.

Bright House requires Knight to screen and conduct background checks on installers before engaging them. See Order, 4. As mandated by Bright House, Knight requires the installers to display a Knight ID badge, wear Knight clothing, display a Knight logo on their vehicles, and inform customers that Knight is an authorized contractor for Bright House; Knight also bars them from stating or implying that they are employed

by Bright House. See id. Bright House provides Knight with the hardware that the installers install. See id. at 3. As required by Knight, the installers provide their own vehicles, purchase tools and safety equipment identified by Knight, purchase liability and auto insurance, pay for their gas and required telephone service, and pay their own taxes. See id. at 5; Dkt. No. 192-4 at 1 (referring to "Installation Tool List"). Knight's Vice President of Operations testified that the vehicle provided by an installer can be "[p]retty much anything." Dkt. No. 192-18 at 24; see also Dkt. No. 192-4 (vehicle can be truck, van, or SUV). Regarding the required tools, the testimony showed that Knight provides the tools, the cost of which it deducts from the installers' pay. See Dkt. No. 192-23 at 9.[2]

Knight requires the installers to perform the work according to Bright House's technical specifications. See Order, 3. Bright House performs quality control audits on approximately ten percent of the jobs performed by the installers, and Bright House may impose chargebacks on Knight if the jobs do not meet the specifications. See id. Knight, in turn, backcharges installers for failing to perform work according to Bright House's specifications, failing to correctly

[2] See also Dkt. No. 192-5 at ¶ 12 (installer would get tools from Knight and Knight would take cost of the tools out of installer's pay); Dkt. No. 192-18 at 24 (installers purchase tools through warehouse and cost is deducted from pay weekly).

use the Work Force Management system ("Work Force"), and losing equipment. See id. at 7. Work Force is software that Knight requires the installers to purchase for their phones so that it can monitor the progress of the installers' jobs and their locations. See id. at 24; Dkt. No. 192-5 at ¶ 13; Dkt. No. 192-3 at 2 ("To ensure efficient customer service, the installation division is managed from the Knight Enterprise Dispatch Call Center. The call center is in regular contact via radiophone with each installer as to the status of the day's assignments."); Dkt. No. 192-19 at 3-4 (installers use Work Force to indicate status of job or that job is completed), 36-37 (Knight's dispatch center monitors the installers on Work Force).

Knight requires installers to sign an Independent Contractor Services Agreement ("Agreement"). See Order, 4; Dkt. No. 188-2 at ¶ 5. Knight amended the Agreement from time to time. See Order, 5. The Agreement is for a one-year term which automatically renews indefinitely. See id. at 12. Earlier versions imposed non-compete obligations on the installers, although a later version allowed them to work for other companies. See id. at 4-5. Later versions of the Agreement permitted the installers to employ others to assist them in completing their work for Knight. See id. at 5.

2. District Court's Order.

The district court conditionally certified the cable installers' FLSA collective action, and approximately 185 installers (almost all former installers) opted in to the collective action. The court granted Knight's summary judgment motion and ruled that the installers are independent contractors — and not employees — under the FLSA. See Order.

The district court addressed "whether, considering the total circumstances, Plaintiffs are so dependent on Knight Enterprises as a matter of economic reality as to come within the protection of the [FLSA], or sufficiently independent to fall outside the FLSA's protection." Id. at 8. The court applied six "economic realities" factors: (1) the nature and degree of the employer's control of the manner in which the work is performed; (2) the worker's opportunity for profit or loss depending upon managerial skill; (3) the worker's investment in equipment or materials required for the task, or employment of helpers; (4) whether the service rendered requires special skill; (5) the degree of permanency and duration of the working relationship; and (6) the extent to which the service rendered is an integral part of the employer's business. See id. at 9-10 (citing Freund v. Hi-Tech Satellite, Inc., 185 Fed. Appx. 782, 783, 2006 WL 1490154, at *1 (11th Cir. 2006)). Before applying the factors, the court stated that the Agreements between Knight

and the installers that designated them as independent contractors do not control because "[e]conomic reality controls over labels or subjective intent," but that "provisions of the Agreements" are nonetheless "relevant" to applying the factors. Id. at 10.

Applying the first factor, the district court identified ten "aspects of Plaintiffs' working relationship with Knight Enterprises [that] indicate that Knight Enterprises exercises control over Plaintiffs." Order, 22. These included the daily assignment of work and "[c]lose monitoring of Plaintiffs' progress and location" throughout the day, id. at 24, the fact that "Plaintiffs were 'penalized' for leaving early or rejecting work orders," and that "Knight Enterprises withheld work orders and 'downloaded' technician installers without notice when the work orders performed did not meet quality control standards," id. at 25. However, the court attributed these aspects of control to the nature of the business, the need to ensure compliance with technical specifications, and Knight's exercise of its contractual rights under the Agreements or compliance with its contractual obligations to Bright House. See id. at 22-26. According to the court, "[t]he control involved does not necessarily transform Plaintiffs from an independent contractor to an employee." Id. at 25. The court concluded that Knight lacked sufficient control over the installers, thus favoring a

finding that the installers are independent contractors, because they "were responsible for the manner and means of performance of the work, including performing the work free from defects, for assuring compliance with applicable safety standards, for selecting and assigning their employees, supervising their own employees, and paying all required taxes." Id. at 26.

The district court determined that the installers' opportunity for profit and loss "somewhat" favored a finding that they are independent contractors. Order, 28. The court stated that the more jobs completed by an installer and the greater technical proficiency in completing those jobs resulted in higher earnings. See id. at 26-27. The court acknowledged that Knight controlled the jobs assigned and the pay per job and that the installers "are not solely in control of their profits or losses," but it dismissed the restraints on their opportunity for profit or loss as being no different "than any other typical subcontractor/client relationship." Id. at 27. The court also stated that the installers could affect their profits by minimizing the costs of their vehicles and tools and by incorporating as an entity. See id. at 27-28.

The district court further determined that the installers' investment in equipment and right to hire helpers "strongly" favored a finding that they are independent contractors, Order, 28, because they provided their own vehicles, purchased their

own tools and equipment (ranging from $300 to $5,000) and liability and automobile insurance (costing one installer $2,200 per year), paid for uniforms, signs, and their own telephone service (costing one installer $1,200 one year), and paid their own taxes, see id. The court characterized the installers' investment in equipment as "significant" and stated that such costs were "not normally borne by employees." Id. The court further relied on the fact that, although none of the Plaintiffs hired employees, their Agreements with Knight gave them the right to do so. See id.

The district court concluded that the installers' jobs involved special skills comparable to the skills of an electrician or carpenter and that the skills involved in installing high-speed internet and digital telephone service are more technical than the skills involved in installing cable service alone. See Order, 29. The court relied on evidence showing that the installers had varying degrees of skills. See id. According to the court, several Plaintiffs had longer tenures with Knight and received more assignments and more favorable routes and work schedules, indicating that they possessed an advanced degree of skill. See id. The court concluded that this factor favored a finding that the installers are independent contractors. See id.

The district court determined that two factors favored a finding that the installers are employees. First, the permanency and duration of Plaintiffs' working relationship "mildly" favored an employment relationship. Order, 30. The court noted that Plaintiffs worked for Knight "on a regular basis, some for a period of years" and that their Agreements renewed automatically, although either party could terminate the Agreement on 30 days' notice. Id. The court also considered whether the installers worked for other companies and concluded that, although working for other companies was contractually permitted (at least in more recent years), Plaintiffs never did and had no incentive to do so given that they worked full-time for Knight. See id. The court summarized by stating that the parties' working relationship was not permanent, but that the Agreements indicated that the parties expected the working relationship "to be ongoing." Id. Second, the court noted that the installers' installation and repair services were integral to one segment of Knight's business — installation services — thus favoring a finding that they are employees. See id. at 31.

The district court concluded that the factors favoring a finding that the installers are independent contractors "clearly outweigh" the factors favoring a finding that they are employees. Order, 31. According to the court, "[t]he economic realities of Plaintiffs' relationship with Knight Enterprises

support a finding that the relationship is a typical outsourcing arrangement, and is not a sham arrangement entered into to evade the requirements of the [FLSA]." Id.

SUMMARY OF ARGUMENT

The FLSA's definitions, particularly its definition of "employ" as including "to suffer or permit to work," mandate that the scope of employment relationships covered by the Act's protections is extremely broad. To determine whether a worker is an employee covered by the FLSA or an independent contractor who is not covered, the inquiry is whether the worker, as a matter of economic reality, is dependent on the employer who suffers or permits the worker's work (an employee) or is in business for himself (an independent contractor). This Court applies six factors as a guide in resolving this inquiry, and the factors should be applied in a manner that reflects the economic reality of whether the worker is dependent on the employer or in business for himself.

In this case, the district court applied the respective factors in a manner that lost sight of that ultimate inquiry of economic dependence and the reality of the cable installers' relationship with Knight, and thus erred in granting summary judgment for Knight on the ground that the installers are independent contractors. Had the court applied the factors in a manner more consistent with resolving the ultimate issue of

economic dependence, it would not have concluded that the installers are independent contractors. As discussed below, Knight closely monitored the installers' progress and location throughout the workday, set their daily schedules, determined their pay, reduced their pay through chargebacks for poor performance, specified the tools and equipment required to perform the work, denied them work if they left early or rejected assignments, and did not require newly-hired installers to have any skill or experience (Knight trained them). In addition, Plaintiffs generally worked for Knight six days per week, did not work for other companies, did not employ helpers, and could increase their pay only by working more jobs. And tellingly, the installers perform the exact work that Knight is in business to provide — they *are* Knight's workforce (and wear its uniform).

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT KNIGHT'S CABLE INSTALLERS ARE INDEPENDENT CONTRACTORS AS OPPOSED TO EMPLOYEES UNDER THE FLSA

1. The Scope of Employment Relationships Covered by the FLSA Is Extremely Broad.

The FLSA's text provides the basis for determining whether a worker is an employee under the Act. The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29

U.S.C. 203(d), and "employee" as "any individual employed by an employer," 29 U.S.C. 203(e)(1). The FLSA further defines "employ" to "include[ ] to suffer or permit to work." 29 U.S.C. 203(g). These definitions ensure that the scope of employment relationships covered by the FLSA is as broad as possible. See U.S. v. Rosenwasser, 323 U.S. 360, 362-63, 65 S. Ct. 295, 296-97 (1945) ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."). The "suffer or permit" standard does not simply make the scope of employment relationships covered by the FLSA more broad than those covered by the common law control test; the Act's definition of "employee" is "'the broadest definition that has ever been included in any one act.'" Rosenwasser, 323 U.S. at 363 n.3, 65 S. Ct. at 296 n.3 (quoting 81 Cong. Rec. 7657 (statement of Senator Black)); see Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S. Ct. 1344, 1350 (1992) ("employ" is defined with "striking breadth").

The Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' recognizing that broad coverage is essential to accomplish the [Act's] goal . . . ." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296, 105 S. Ct. 1953, 1959 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211, 79 S. Ct. 260, 264 (1959)) (internal

citation omitted); see Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597, 64 S. Ct. 698, 703 (1944); Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996); 29 U.S.C. 202 (congressional policy behind enactment of FLSA was elimination of substandard working conditions).

2. Under the FLSA, the Inquiry to Determine a Worker's Status as Employee or Independent Contractor Is Whether the Worker, as a Matter of Economic Reality, Is Dependent on the Employer or in Business for Himself.

The FLSA's sweeping definitions, based on the "suffer or permit" standard, provide the basis for distinguishing between employees and independent contractors. An "entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity." Antenor, 88 F.3d at 929; see Freund, 185 Fed. Appx. at 782-83, 2006 WL 1490154, at *1; Tony & Susan Alamo, 471 U.S. at 301, 105 S. Ct. at 1961 (test of employment under FLSA is economic reality, and fact that workers were entirely dependent on employer for long periods suggests an employment relationship); Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33, 81 S. Ct. 933, 936 (1961) (economic reality rather than technical concepts is test of employment). Thus, "[t]o determine if a worker qualifies as an employee [and not an independent contractor], we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead

in business for himself." Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008); see Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998) (economic realities of the relationship govern, and focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business . . . or are in business for themselves.").

3. The "Economic Realities" Factors Serve as a Guide to Resolving this Inquiry.

The economic realities factors applied by the district court serve as an aid in resolving the ultimate inquiry whether a worker is economically dependent on the employer or is operating a business of his own. This Court has recognized the role of these factors:

> No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor – economic dependence. The [factors] are aids-tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.

Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 1311 (5th Cir. 1976) (internal citation omitted);[3] see Freund, 185 Fed. Appx. at 783, 2006 WL 1490154, at *1 (factors "guide" the inquiry whether, as a matter of economic reality, worker is an employee or an independent contractor in business for himself). In Pilgrim Equipment, this Court recognized the breadth of employment relationships under the FLSA and, using the economic realities factors as a guide, focused the analysis on the worker's economic reality and dependence on the employer. See 527 F.2d at 1311-15.

Moreover, the distinction between employees and independent contractors must not be the result of a mechanical application of the economic realities factors. Rather, those factors must be applied in a manner that keeps in sight the worker's actual economic relationship with the employer. As a district court recently held in an action by the Secretary on behalf of cable installers who were misclassified as independent contractors:

> These factors are to be considered and weighed against one another in each situation, but there is no mechanical formula for using them to arrive at the correct result. Rather, the factors are simply a tool to assist in understanding individual cases, with the ultimate goal of deciding whether it is economically realistic to view a relationship as one of employment or not.

[3] This Court has adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Cascom, slip op. at 6-7; see Antenor, 88 F.3d at 932-33 (in context of applying economic realities factors in FLSA joint employment case, the inquiry "is not determined by a mathematical formula," and "the factors are used because they are indicators of economic dependence" and should be viewed "qualitatively to assess the evidence of economic dependence").

4. The District Court Applied the Economic Realities Factors without Properly Taking into Account Whether, as a Matter of Economic Reality, the Cable Installers Are Dependent on Knight or in Business for Themselves.

The district court determined that four of the factors favored an independent contractor relationship between Knight and Plaintiffs, and two favored an employment relationship. See Order, 22-31. The court concluded that the four factors "clearly outweigh" the other two and that therefore the installers are independent contractors. Id. at 31. However, the court's analysis of the factors overlooked the reality of the installers' relationship with Knight and failed to use the factors qualitatively as a guide to resolving the ultimate issue — "the degree of dependence of alleged employees on the business with which they are connected." Pilgrim Equip. Co., 527 F.2d at 1311.

a. Nature and Degree of Knight's Control of Manner in Which Work Is Performed.

The district court acknowledged numerous indicia of Knight's control over the installers, see Order, 22, and its

efforts to explain them away were not consistent with determining the economic realities of the relationship. For example, the court dismissed Knight's "[c]lose monitoring of Plaintiffs' progress and location through Work Force Management and communication with dispatch" as merely the product of the "nature of the business and the need to provide reliable service" to customers. Id. at 24. Such close monitoring and communication, however, is particularly indicative of control, and even if it is the "nature of the business," the reality of the monitoring is telling. Moreover, the court's conclusion that the installers had some control over their assignments and schedule, see id., contradicts its finding that "Knight Enterprises controls the route assigned" and that "[o]ther constraints include the scheduled time slots, the drive time between jobs, [and] 'down time' during which Plaintiffs wait for customers to be available," id. at 27.

The court's statement that requiring the installers to comply with Bright House's specifications was typical of a contractor hired to perform technical work, see Order, 23, is similarly unpersuasive. That explanation may be relevant to the nature of Bright House's relationship with Knight, but it has no bearing on the fact that Knight imposed these specifications on the installers. Additional specifications imposed by Knight (cleaning up after working in a customer's home, presenting a

neat and clean appearance to customers, and accounting for equipment) suggest a level of control beyond the typical expectation that an independent contractor perform work with a certain degree of quality and timeliness. See id.

The court was also wrong to dismiss evidence that the installers were penalized for leaving early or rejecting work, and that Knight withheld work and "downloaded" installers without notice if they did not meet quality control standards, as simply Knight's exercise of its contractual rights. See Order, 25. This was further evidence of control even if contractually permitted. See Parrilla v. Allcom Constr. & Installation Servs., LLC, No. 6:08-cv-1967, 2009 WL 2868432, at *3 (M.D. Fla. Aug. 31, 2009). Finally, the court found that Knight did not exercise control because the installers selected, assigned, and supervised their own employees, and paid their own taxes. See Order, 26. In reality, none of the Plaintiffs hired employees even if they were contractually entitled to do so, see id. at 28, and the installers paid their own taxes only because Knight classified them as independent contractors.[4]

[4] This Court's decision in Freund does not support the district court's decision. As an initial matter, Freund was unpublished and thus is not "binding precedent." 11th Cir. R. 36-2. In Freund, the determination that the cable installer was an independent contractor was made after a bench trial, not on summary judgment, and this Court's analysis of the district court's findings was thus deferential. See 185 Fed. Appx. 782, 2006 WL 1490154. Moreover, the "specific details" about how the

b. Opportunity for Profit or Loss Depending on Managerial Skill.

In analyzing the cable installers' opportunity for profit or loss depending upon their managerial skill, the district court focused primarily on the installers' ability to earn more if they worked more and performed their assignments with higher technical proficiency. See Order, 26-28. However, these are not managerial skills and do not demonstrate that the worker operates an independent business. As one court recently said when determining the employment status of cable installers:

> There was no opportunity for increased profit or loss depending upon an alleged employee's managerial skill. While the alleged employees were free to work additional hours to increase their income, they had no decisions to make regarding routes, or acquisition of materials, or any facet normally associated with the operation of an independent business.

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installer in Freund carried out his duties were left to him with the exception that he needed his employer's approval before performing additional services for customers, he had to wear a shirt with the employer's logo, he had to follow certain "minimum specifications" for the installations, and he had to call the employer to confirm that he had completed the installation and report any problems. 185 Fed. Appx. at 783, 2006 WL 1490154, at *1. The degree of control exercised over the installers here was much greater than that exercised over the installer in Freund. This Court in Freund also stated that control is but one factor to consider, and no one factor is "'the final determinant.'" 185 Fed. Appx. at 783, 2006 WL 1490154, at *1 (quoting Pilgrim Equip., 527 F.2d at 1311); see Walling v. Portland Terminal Co., 330 U.S. 148, 150-51, 67 S. Ct. 639, 640 (1947) (FLSA rejected the common law control test that had been prevalent for determining whether employment relationships existed and covers many workers who previously may not have been employees); Antenor, 88 F.3d at 929.

Cascom, slip op. at 10; see Parrilla, 2009 WL 2868432, at *3 (installer's "opportunity for profit or loss did not depend upon his managerial skill"; instead, his "compensation was based simply on the number and type of jobs that Defendant gave him and the quality and pace of [his] work"); see generally Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 1477 (1947). ("While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor."); Reich v. Circle C. Invs., Inc., 998 F.2d 324, 328 (5th Cir. 1993); Martin v. Selker Bros., Inc., 949 F.2d 1286, 1294 (3d Cir. 1991). Other than working more, the installers could not control their schedule and could not negotiate the pay they received per job. See Order, 27 ("Knight Enterprises controls the route assigned, and the pay per job. Other constraints include the scheduled time slots, the drive time between jobs, [and] 'down time' during which Plaintiffs wait for customers to be available."). Contrary to the court's conclusion, this evidence does not suggest that the installers exercised managerial skill and is not indicative of running an independent business. See Dole v. Snell, 875 F.2d 802, 810 (10th Cir. 1989) (fact that workers' "earnings did not depend upon their judgment or initiative, but on the [employer's] need

for their work," refuted finding that they operated as an independent business).

The court secondarily focused on certain costs (e.g., vehicle, gas, maintenance, tools, insurance, and license fees) incurred by the cable installers, as well as on the fact that some installers operated through their own corporation. See Order, 27-28. As an initial matter, courts have looked at the opportunity for profit or loss as the opportunity for gain or loss realized from a business over and above, for example, any capital investment. See Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1050-51 (5th Cir. 1987); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371-72 (9th Cir. 1981). Moreover, neither the installers' classification as independent contractors nor the terms of their relationships with Knight were negotiable. See Order, 4-5; Dkt. No. 188-2 at ¶ 5. There is no indication that the installers came to their relationship with Knight already operating as an incorporated business or already incurring these costs as part of a business. See Order, 7 (no prior cable installation experience was required). The installers incurred these costs not because they were in business for themselves but because they were required to do so in order to work for Knight (or, in the case of vehicle, vehicle insurance, and phone costs, because they were incurring them anyway for personal use, as discussed below).

c. Investment in Equipment or Materials and Employment of Helpers.

The district court concluded that the cable installers' investment in equipment and materials "strongly" favored a finding that they were independent contractors. Order, 28. According to the court, the installers' investment (providing vehicles, paying for gas, purchasing tools, purchasing insurance, paying for uniforms and signs, paying for telephone service, and paying their own taxes) was "significant" and those costs "were not normally borne by employees." Id.

The worker's investment, however, should not be viewed in isolation; rather, it should be considered in relation to the employer's investment. Where the worker's investment does not compare to that of the employer, courts have concluded that the worker is economically dependent on the employer. See, e.g., Hopkins, 545 F.3d at 344 (comparing each worker's individual investment to employer's overall investment in the business); Baker, 137 F.3d at 1442 (rig welders' investments in equipped trucks did not indicate that they were independent contractors when compared to employer's investment in its business); Snell, 875 F.2d at 810 ("[R]elative investment of the decorators in their own tools compared with the investment of the [employer] simply does not qualify as an investment in this business."); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987)

(workers' "disproportionately small stake" in employer's operation indicates that their work is not independent of the employer).

Moreover, a worker's investment in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is in business for himself. See Snell, 875 F.2d at 810 (citing cases); Lauritzen, 835 F.2d at 1537. As discussed above, there is no indication here that the installers purchased the tools and equipment as part of an independent business; instead, Knight required the installers to provide equipment specific to the work for Knight, allowed them to purchase the required equipment from Knight, and deducted the cost from their pay. See supra, pg. 5. Further, the court did not seem to consider that the installers were likely already to have a vehicle,[5] vehicle insurance, and phone service for their own personal use regardless whether they worked for Knight, and therefore those items were not indicative of an installer's operating as an independent business. See, e.g., Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 304 (5th Cir. 1998) (discounting investment in vehicle because vehicle was also used by most drivers for personal purposes). The court did not indicate how the uniforms and signs purchased

[5] Pretty much any vehicle sufficed for the installer to work for Knight. See supra, pg. 5.

by the installers could have played any role in an independent business, as opposed to being a requirement imposed by Knight. And the installers' purchase of insurance and payment of their own taxes simply indicate that Knight engaged them as independent contractors, not that they are actually independent contractors under the FLSA. See Olson v. Star Lift Inc., 709 F. Supp.2d 1351, 1356 (S.D. Fla. 2010) (worker's receipt of 1099 tax form from employer does not weigh in favor of independent contractor status).

The court additionally noted that the Agreements permitted the installers to employ helpers, but none of the Plaintiffs actually did. See Order, 28. Only the reality of the installers' relationship with Knight is relevant to whether they are employees or independent contractors; the fact that they did not actually hire any helpers suggests that they were not in business for themselves. See Parrilla, 2009 WL 2868432, at *5 (discounting fact that employer "ostensibly" permitted workers to hire others because "that option was illusory").

d. Whether Special Skill Is Required.

The district court concluded that the cable installers' work required special skill, focusing on the technical skills required and its determination that some installers' length of service and favorable assignments indicated a more advanced

degree of skill than other installers' skill. See Order, 29.[6] Based on this conclusion, the court found that "[t]his factor favors a finding that Plaintiffs were independent contractors." Id. However, the court again lost sight of the ultimate inquiry as to whether the installers are dependent on Knight or in business for themselves.

"[T]he fact that workers are skilled is not itself indicative of independent contractor status." Superior Care, 840 F.2d at 1060. Even specialized skills do not reflect that the worker is in business for himself, especially if those skills are technical and are used to perform the work. See id.; Express Sixty-Minutes, 161 F.3d at 305 (efficiency in performing work is not initiative that is indicative of independent contractor status); Lauritzen, 835 F.2d at 1537 ("Skills are not the monopoly of independent contractors."). For skills to be indicative of independent contractor status, they should be used in some independent way beyond simply performing the work, such as to demonstrate business-like initiative or locate job

[6] The court also relied on Plaintiffs-Appellants' assertion in their complaint that they are skilled technicians and questioned how they could argue otherwise given that allegation. See Order, 29. However, neither party's labels control; only the installers' actual skills matter. Moreover, regardless of the level of skill, the skill must be related to the operation of an independent business to be indicative of independent contractor status.

opportunities. See Superior Care, 840 F.2d at 1060.[7] Likewise, the fact that the installers have varying degrees of skill does not suggest that the installers are in business for themselves and is not probative of distinguishing between independent contractors and employees.

In any event, even accepting the court's analysis on its own terms, its conclusion that the installers' skill favors a finding that they are independent contractors is contrary to the fact that Knight does not require them to have prior cable television installation experience before engaging them and provides them with as little as two weeks of training before allowing them to work. See Order, 7; see also Cascom, slip op. at 11 (cable installation at issue "did not require a special skill" and could be learned by workers with no experience in the field after six weeks of training); Parrilla, 2009 WL 2868432, at *5 (fact that cable installation skills could be acquired in as little as two weeks of on-the-job training" meant that work

[7] The district court's comparison of the installers' skills to the skills of an electrician or carpenter, see Order, 29 (citing Herman v. Mid-Atlantic Installation Servs., Inc., 164 F. Supp.2d 667 (D. Md. 2000), aff'd, 16 Fed. Appx. 104, 2001 WL 739243 (4th Cir. 2001)), is unremarkable and not probative of whether the installers are employees or independent contractors. Any specialized skills that electricians or carpenters possess to perform their work are not themselves indicative of independent contractor status; only carpenters and electricians who operate as independent businesses, as opposed to those who are economically dependent on an employer, are independent contractors.

"did not require the application of particularly special, or difficult to acquire, skills"); Olson, 709 F. Supp.2d at 1356 (skills involved in forklift technician work "were simple enough to be learned by a few weeks of on-the-job training").

e. The Degree of Permanency and Duration of the Working Relationship.

The district court characterized the cable installers' working relationship with Knight as "ongoing" but not "permanent," and determined that the duration of the relationship "mildly" favored a finding that they are employees. Order, 30. The court correctly concluded that the evidence relating to this factor supports a determination that the installers were employees. As a general matter, a worker who is in business for himself eschews a permanent or indefinite relationship with an employer and the dependence that comes with it. See, e.g., Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1384-85 (3d Cir. 1985) (district court erred by ignoring the fact that workers worked continuously for the employer and thus supported the conclusion that they were employees).

Here, the installers worked for Knight on a regular basis, six days per week, for as long as seven or nine years. See Order, 4-6, 30. Their Agreements with Knight were for successive one-year terms that renewed automatically and could be terminated with or without cause on thirty days' notice. See

id. at 12, 30. Although there was conflicting evidence whether Knight permitted the installers to work for other companies, the reality for Plaintiffs was that they did not work for others because they had "no incentive or time" to do so. Id. at 30. Thus, the evidence demonstrates a full-time, regular, and indefinite relationship, which strongly indicates that the installers are employees. See Cascom, slip op. at 12 (installers who "worked until they quit or were terminated" had relationship "similar to an at-will employment arrangement"); Parrilla, 2009 WL 2868432, at *5 (installer who was not permitted to work for other cable installation companies and who "was expected to show up" at the employer's office "each morning, six days of week," to receive what "typically amounted to a full day's worth of work" had a "high degree of permanence" in his relationship with employer). The evidence cited by the court more than "mildly" favors a finding that the installers are employees.

f. Work Is an Integral Part of Knight's Business.

The district court stated that the cable installers' work was integral to Knight's business and that this factor favors a finding that the installers are employees. See Order, 31. The extent to which the work performed is an integral part of the employer's business is particularly indicative of whether the worker is an employee or independent contractor. If the work

performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself. See Rutherford, 331 U.S. at 729, 67 S. Ct. at 1476 (because work was "part of the integrated unit of production," workers were employees); Superior Care, 840 F.2d at 1061 (nurses are employees because "[t]heir services are the most integral part of Superior Care's operation"); DialAmerica Mktg., 757 F.2d at 1385 ("[W]orkers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to Knight.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,956 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* was served this 7th day of September, 2012, via the Court's ECF system and by pre-paid overnight delivery, on the following:

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Hilda L. Solis, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

Case No. 3:09-cv-257
Judge Thomas M. Rose

Cascom, Inc., and Julia J. Gress,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING LIABILITY

Plaintiff, the Secretary of Labor, brought this cause of action against Defendant, Cascom, Inc., on June 3, 2009, doc. 1, amending the complaint on September 15, 2009 to add Defendant Julia J. Gress, Cascom's President. Doc. 10. The Court will refer to Defendants collectively as "Cascom." The Amended Complaint asserts that Defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1), by failing to pay overtime wages for work in excess of forty hours per week as television cable installers and 29 U.S.C. § 211(c) by failing to maintain records of hours worked. A non-jury trial in this matter was held on July 11 and 12, 2011. Based on the same, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

Defendant Cascom, Inc., had a business that contracted with Time-Warner Cable to install cable in the residences in Southwestern Ohio. Julia J. Gress was the President of Cascom. To fulfill

its contract with Time Warner, Cascom hired cable installers to do the installation. Before commencing with Cascom, the cable installers were required to complete an "employment application." R. at 10, 101. Cascom hired each installer for an indefinite period of time, not allowing the cable installers to hire their own employees without Cascom approval. The installers were paid not hourly, but for each installation performed. The installers were free to work additional hours to increase their income. The contracts entered into between Cascom and the cable installers allowed Cascom to alter the contract at any time.

The cable installation service Cascom performed did not require the skill of an electrician. Several workers had no experience even remotely related to cable installation prior to beginning with Cascom. Doc. 41 at 80. Witnesses went from jobs as simple as sales clerks to Cascom technicians with six weeks of Cascom training.

Cascom would assign work to the cable installers on a day-to-day basis. Conflicting testimony regarding the start time leaves an impression that there was a window during which workers reported to receive their initial morning assignments. R. at 20. Once in the field, workers checked in with the dispatcher after each job, remained on the job until dismissed by Cascom and completed Cascom paper work, including work orders. R. at 88. The workers followed Cascom's instructions for installation methods and work practices. Pl.'s Ex. 6. Workers sometimes attended morning meetings led by Cascom supervisors. R. at 20, 89. At one point, Sunday work was mandatory. R. at 86, ll. 18-25.

In addition, Cascom dictated all of the routes, which installers were required to accept or reject in their entirety. Workers had to wear shirts with the Cascom logo, R. at 24-25, and to display

Cascom's logo on their vehicles. R. at 24. Workers had to submit to inventory counts after business hours. R. at 23, 89. Workers had to request leave, in writing, to take a day off. R. at 24, 96, 280.

Cascom also issued direct written orders to the installers, such as: "Do not clear yourself from the field without speaking to your supervisors. The consequences won't be pretty….." Pl.'s Ex 6, 15. Another directive similarly noted that, "If we find poor workmanship and failed QC's we will have no choice but to release you. We are paying you to do your job properly so do it." Id. at 18. Cascom deducted from installers' pay "back charges" for errors. Though installers were paid for the completion of specific tasks, the back charges were made at a later date, sometimes for reasons beyond the installers' control, R. at 67, and without an opportunity to dispute them. R. at 179.

The installers did not invest in advertising their services or in other respects hold themselves out as independent businessmen. Cascom required installers to purchase their own tools costing $2,000-$5,000 or to purchase them from Cascom via payroll deductions. R. at 63, 168. The installers were also required to provide a vehicle, and those without one could choose to lease one from Cascom. R. at 92, 201, 246, 362 Cascom supplied the inventory of materials, such as modems, which the cable installers had to account for each evening without compensation. Doc. 41 at 23.

The Department of Labor contends that the work arrangement between Cascom and the cable installers amounted to an employer-employee relationship for purposes of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*

II. Applicable Law

Defendant is accused of violating the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* The parties have stipulated that Defendants are "Employers" for purposes of the statute, doc.

30 ¶ VII, hence the only question for the Court to resolve is whether cable installers working for Cascom were "employees" as defined by 29 U.S.C. § 203 (g) & (e). The statutory definition section of the FLSA is notable for how broadly it defines "employee":

> As used in this chapter–
>
> (e)(1) Except as provided in paragraphs (2)[public office holders and their appointees], (3)[immediate family of farmers], and (4)[individuals who volunteer with the government], the term "employee" means any individual employed by an employer.
>
> * * *
>
> (g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203.

Thus, the FLSA defines "employee" in "exceedingly broad" terms, see *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295 (1985). The Supreme Court has noted that there are limitations to the Act's breadth, giving as an example "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the Act." *Id.* (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)). Thus, "[t]he test for employment under the Act is one of economic reality," *Id.* at 301, whether the persons in question undertook the covered activities "in expectation of compensation." *Id.* at 302; see also *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 369 F.3d 797, 798-99 (4th Cir. 2004) (Luttig, J., dissenting).

"Th[e] Act contains...definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

Obviously, the "'to suffer or permit to work,' ... language of the FLSA,...require[s] much less positive action than under the common law." *Frees v. UA Local 32 Plumbers and Steamfitters*, 589 F. Supp. 2d 1221, 1229 (W.D. Wash. 2008) (citing 29 C.F.R. § 825.105(a)). "Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act." *Id.* (See also Department of Labor Field Operations Handbook § 10b01).

The Supreme Court has recognized that the principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 738-39 (1981) (quoting 29 U.S.C. § 202(a)). The FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "'[a] fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay.'" *Id.*; see also *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)). The Court expresses no opinion on the policies underlying the law.

Defendants' position, however, is that the cable installers are not FLSA employees, but independent contractors with whom they have contracted to have work performed. The Supreme Court has emphasized that "putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

Indeed, no party has brought to the Court's attention a statutory basis for the "independent contractor exception," rather, it appears that "independent contractor" is the label applied to a certain category of workers who fall outside of the FLSA's ambit, and one which might better have been called something like "owner/operators of independent businesses."

Several factors have been identified to distinguish an employment relationship from a relationship with an independent business. Some of the factors to be considered are:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanence of the working relationship; and
>
> 6) whether the service rendered is an integral part of the alleged employer's business.

Marshall v. Michigan Power Co., 1981 WL 2341, *1-2 (W.D. Mich. 1981) (citations omitted). There is no exhaustive list of factors, and whether a particular case involves an employment relationship is not to be decided on this basis of any one particular factor, but "upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. at 730. These factors are to be considered and weighed against one another in each situation, but there is no mechanical formula for using them to arrive at the correct result. Rather, the factors are simply a tool to assist in understanding individual cases, with the ultimate goal of deciding whether it is

economically realistic to view a relationship as one of employment or not. Cf. *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979) and *Mednick v. Albert Enterprises, Inc.*, 508 F. 2d 297 (5th Cir. 1975), in which the touchstone of "economic reality" is viewed as dependency, and the analysis of the various factors set forth is considered merely a step towards the determination of the ultimate issue of dependency. "The determination of an individual's status as an employee or an independent contractor has been the subject of numerous decisions. It is settled that...no one facet of the relationship is generally determinative." *Azad v. United States*, 388 F.2d 74, 76 (8th Cir. 1968); see also *Silk*, 331 U.S. at 716.

III. Analysis

The Court will proceed to consider these factors mindful of the "expansive conception of the meaning of the term[] ... 'employee,'" required to effectuate the FLSA. The Court will then consider Cascom's asserted good-faith defense.

A. Whether the Cable Installers were Employees of Cascom

Whether the cable installers were employees of Cascom is determined in light of the factors listed above.

1) Employer's right to control the manner in which the work is performed

The Department of Labor Field Operations Handbook § 10b06 explains that "Where the facts clearly establish that the possible employee is the subordinate party, the relationship is one of employment."[1] The Handbook lists several factors to consider in resolving the Amount of Control

[1] "Because DOL's Wage and Hour Administrator is the primary federal authority entrusted with determining the FLSA's scope, the interpretations of the DOL's Field Operations Handbook, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience

> (1) whether there are restrictive provisions in the contract between the possible employer and possible employee which require that the work must be satisfactory to the possible employer and detailing, or giving the possible employer the right to detail, how the work is to be performed;
>
> (2) whether the possible employer has control over the business of the person performing work for them, even though the possible employer does not control the particular circumstances of the work;
>
> (3) whether the contract is for an indefinite period or for a relatively long period;
>
> (4) whether the possible employer may discharge employees of the alleged contractor;
>
> (5) whether the possible employer may cancel the contract at their discretion, and on how much notice;
>
> (6) whether the work done by the alleged independent contractor is the same or similar to that done by admitted employees.

§ 10b06.

In the instant case, workers were employed for an indefinite period of time, and were not allowed to have employees, or at the very least, the employees or helpers would have had to have been approved by Cascom.[2] Cascom had the authority to alter the contract at any time. Before

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and informed judgment to which the courts and litigants may properly resort for guidance.'" *Reich v. Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191, 1194 (6th Cir. 1994) (citing *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 182 (1946) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

[2] Cascom explained that Plaintiffs were not allowed to hire assistants due to the potential liability to Cascom. While this may be true, it highlights that the job may be one that does not readily lend itself to utilization of independent contractors.

commencing with Cascom, workers were required to complete an "employment application." R. at 10, 101.

The workers were substantially controlled throughout the day. There was a window during which workers reported to receive their initial morning assignments. R. at 20. Workers checked in with the dispatcher after each job, remained on the job until dismissed by Cascom and completed Cascom paper work, including work orders. R. at 88. The workers followed Cascom's detailed instructions for installation methods and work practices. Pl.'s Ex. 6. Workers sometimes attended morning meetings led by Cascom supervisors. R. at 20, 89. Workers had to wear shirts with the Cascom logo, R. at 24-25, and display Cascom's logo on their vehicles. R. at 24. Workers had to submit to inventory counts after business hours. R. at 23, 89. Workers had to request leave, in writing, to take a day off. R. at 24, 96, 280. At one point, Sunday work was mandatory. R. at 86, ll. 18-25. In addition, Cascom dictated all of the routes, which installers were required to accept in their entirety. Cf. *Lewis v. ASAP Land Express, Inc.*, 554 F. Supp. 2d 1217, 1223 (D. Kan. 2008) (finding that a "regimented arrangement" requiring an individual to strictly follow the route dictated by the employer and to check out at the end of the day "suggested" the existence of an employee/employer relationship). Cascom also issued direct written orders to the installers, such as: "Do not clear yourself from the field without speaking to your supervisors. The consequences won't be pretty….." Pl.'s Ex 6, 15. Another directive similarly noted that, "If we find poor workmanship and failed QC's we will have no choice but to release you.." *Id.* at 18. Cascom deducted from installers' pay "back charges" for errors. Such back charges are akin to the deduction of shortages – due to loss or breakage – from hourly wage employees such as waitresses or gas station attendants.

Though installers were paid for the completion of specific tasks, the back charges were made at a later date, sometimes for reasons beyond the installers' control, R. at 67, and without an opportunity to dispute them. R. at 179. Finally, while it cannot be said that the work done by the alleged workers was identical to that performed by Cascom's admitted employees, this is because Cascom had no admitted employees engaged in its core business: cable installation.

Considering the indefinite contractual term of engagement, Cascom's quality control review processes, that Cascom controlled the cable installers ability to hire assistants, that Cascom could cancel the contracts without notice, and that Cascom had no admitted employees performing its core business, the Court finds the first factor weighs in favor finding the cable installers to be FSLA employees.

2) Alleged Employee's Opportunity for Profit or Loss Depending upon Own Managerial Skill

There was no opportunity for increased profit or loss depending upon an alleged employee's managerial skill. While the alleged employees were free to work additional hours to increase their income, they had no decisions to make regarding routes, or acquisition of materials, or any facet normally associated with the operation of an independent business.

3) Alleged Employee's Investment in Equipment or Materials Required for His Task, or His Employment of Helpers

The installers did not invest in advertising their services or in other respects hold themselves out as independent businessmen. Cascom required installers to purchase their own tools costing $2,000-$5,000 or to purchase them from Cascom via payroll deductions. R. at 63, 168. The installers were also required to provide a vehicle, and those without one could choose to lease one

from Cascom. R. at 92, 201, 246, 362. Requiring workers to provide some of their own tools is not inconsistent with an employment relationship, however, neither is this the level of investment in tools solely within the realm of an independent business. Cascom supplied the inventory of materials, such as modems, which the cable installers had to account for each evening without compensation. Doc. 41 at 23. The Court finds that the installers' investment was on the low end of what would be needed to start an independent business, but short of what an electrician might need to invest, an electrician being a businessman who might normally sell his services to perform this job as one aspect of an independent business. The Court would be more inclined to find this factor favoring a finding of the installers being independent businesses if each invested in an inventory of installation materials. The Court finds this factor neutral.

4) Requirement of a Special Skill to Render the Service

Cascom's cable installation did not require a special skill. Several workers had no experience even remotely related to cable installation prior to beginning with Cascom. Doc. 41 at 80. "[T]he skills involved were simple enough to be learned by a few weeks of on-the-job training." *Olson v. Star Lift Inc.*, 709 F. Supp. 2d 1351, 1356 (S.D. Fla. 2010). Witnesses went from jobs as simple as sales clerks to Cascom technicians with six weeks of Cascom training. This factor weighs in favor of finding the cable installers were employees.

5) Degree of Permanence of the Working Relationship

The installers were hired for an indefinite period. While some installers were only with Cascom a few weeks, most of the installers were employed by Cascom for the entire period of his

1.5 year investigation. Each worked until they quit or were terminated by Cascom, similar to an at-will employment arrangement. This factor weighs in favor of finding the installers were employees.

6) How Integral the Services Are to the Employer's Business

More than integral, more than core, cable installation was the entirety of Cascom's business. This factor weighs in favor of finding the cable installers were employees.

B. Conclusion

In a nutshell, considering the above-stated factors, the Court concludes that these specific cable installers undertook their work "in expectation of compensation."

Clearly, given the fact-driven factors relevant to the Court's analysis, whether workers in any case will be employees or independent contractors will depend upon the facts of the individual case. See *Azad v. United States*, 388 F.2d 74, 76 (8th Cir. 1968) (when "determin[ing] of an individual's status as an employee or an independent contractor...[i]t is settled that each case must stand on its own facts."). Indeed, two federal courts have held installers to be independent contractors, but those two cases are distinguishable from the instant one. See *Chao v. Mid-Atlantic Installation Serv.*, 16 Fed. App'x 104 (4th Cir. 2001) and *Dole v. Amerilink Corp.*, 729 F. Supp. 73 (E.D. Mo. 1990). In *Mid-Atlantic* and *Amerilink*, the installers were allowed to choose and manage their own employees, who helped complete the jobs. And in *Amerilink*, the installers wore generic "cable television" logos on their shirts, as opposed to uniforms with the putative employer's logo. Also, the installers possessed the special skills of carpenter-electricians. Finally, in *Amerilink*, there was little permanence in the relationship between the installers and the firm.

In contrast, Cascom forbade its installers from employing their own helpers, asserted control by requiring installers to wear Cascom's logo, and provided training for unskilled installers. Finally, the installers often remained employed with Cascom for substantial periods of time. Simply stated, in this case the factors of control, required skills, and permanence of relationship weigh more heavily toward employee status than in *Amerilink* and *Mid-Atlantic*.

C. Good Faith Defense

Cascom's Proposed Findings of Fact and Conclusions of Law assert that the Court should find that Cascom acted in good faith. Doc. 33 ¶ 4. However, "[t]o establish the requisite subjective 'good faith,' an employer must show that it took 'active steps to ascertain the dictates of the FLSA and then act[ed] to comply with them.'" *Id.* (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d132, 142 (2d Cir. 1999)). Here, Cascom points to its compliance with industry standards as a defense. As for industry standards, "the law...is that 'simple conformity with industry-wide practice' fails to demonstrate good faith under the FLSA." *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); see also *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) ("[G]ood faith cannot be established merely by conforming with industry standards."); *Brock v. Wilamowsky*, 833 F.2d 11, 19-20 (2d Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 465 (D.C. Cir. 1976); *Rogers v. Savings First Mortgage*, LLC, 362 F. Supp.2d 624, 638 (D. Md. 2005); *Chao v. First Nat. Lending Corp.*, 516 F. Supp.2d 895, 903 (N.D. Ohio 2006).

Thus, the Court finds Cascom's installers were "employees" subject to the overtime requirements of section 7 and the record keeping requirements of section 11 of the FLSA.

DONE and **ORDERED** in Dayton, Ohio, this Wednesday, September 21, 2011.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE