No. 11-13835

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAVID OJEDA-SANCHEZ, ET AL.,

Plaintiffs-Appellants,

v.

BLAND FARMS, LLC, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

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

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

LAURA MOSKOWITZ
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-27l6
Washington, DC 20210
(202) 693-5555

OJEDA-SANCHEZ v. BLAND FARMS
CASE NO. 11-13835-EE

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, counsel for the Secretary of Labor certifies that she believes the Certificate of Interested Persons filed by Appellants in their Initial Brief is complete, with the addition of the following persons that have or may have an interest in the outcome of this appeal:

Brand, Jennifer S. (Associate Solicitor, U.S. Department of Labor)

Frieden, Paul L. (Counsel for Appellate Litigation, U.S. Department of Labor)

Moskowitz, Laura M. (Attorney, U.S. Department of Labor)

Smith, M. Patricia (Solicitor, U.S. Department of Labor)

Solis, Hilda L. (Secretary, U.S. Department of Labor, *Amicus Curiae*)

Date: November 9, 2011

LAURA MOSKOWITZ
Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases -- continued

Cases -- continued

Cases -- continued

Statutes:

Fair Labor Standards Act,

No. 11-13835

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* on behalf of the Plaintiffs-Appellants, Mexican farmworkers who worked for Bland Farms ("Bland") under the H-2A agricultural guestworker program. The Secretary administers and enforces the Fair Labor Standards Act ("FLSA" or "Act"), *see* 29 U.S.C. 204, 211(a), 216(c), and 217, and thus has a substantial interest in ensuring adherence to the burden-shifting scheme for proving damages set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that does not deny employees' back

wages where employers fail to keep proper records as required by the FLSA.[1]

The Secretary also has a substantial interest in the proper interpretation of willful violations such that a three-year statute of limitations applies under the FLSA, and in whether an employer has met its burden of establishing that it acted in "good faith" and had "reasonable grounds for believing that" its acts or omissions were not in violation of the FLSA, thereby permitting a court to decline to award otherwise-mandatory liquidated damages. *See* 29 U.S.C. 255(a), 260.

STATEMENT OF THE ISSUES[2]

1. Whether the district court erred by using a "convincing substitute" standard instead of the "just and reasonable

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[1] *Mt. Clemens'* holding as to compensable preliminary activities was superseded by the Portal-to-Portal Act, Pub. L. No. 80-49, 61 Stat. 84 (1947); its establishment of the burden-shifting scheme where employers have not maintained records as required by FLSA section 11(c), 29 U.S.C. 211(c), was unaffected by the enactment of the Portal-to-Portal Act.

[2] Also raised on appeal is the issue whether the district court erred in ruling that Bland was entitled to take a wage credit for housing provided to its H-2A workers. *See* Appellant's Initial Brief at 28-29. This Court recently decided that issue in *Ramos-Barrientos v. Bland*, __ F.3d __, No. 10-131412, 2011 WL 5080363 (11th Cir. Oct. 27, 2011), where the Secretary participated as amicus. It held, consistent with the Secretary's position, that housing for H-2A workers is a business expense primarily for the benefit of the employer that therefore must be borne by the employer, and thus employers may not take a credit under section 3(m), 29 U.S.C. 203(m), of the FLSA for such expenses.

inference" standard set forth in *Mt. Clemens* for evaluating the farmworkers' evidence of hours worked under the FLSA, and by not adequately explaining its failure to draw reasonable inferences from the farmworkers' evidence to approximate the hours worked that were not compensated.

2. Whether the district court erred by concluding that Bland did not willfully violate the FLSA by recklessly disregarding whether its conduct complied with the Act when it did not inquire about its obligations under the FLSA and relied on its foreign guestworkers to complain about errors in pay.

3. Whether the district court erred in denying liquidated damages by concluding that Bland acted in good faith and had a reasonable belief that it was complying with the Act because it gave workers the opportunity to complain about errors in their hours or pay.

STATEMENT OF THE CASE[3]

1. Plaintiffs-appellants are Mexican farmworkers who performed onion planting and harvesting work for Bland from 2004 through 2008 under the H-2A agricultural guestworker program. *See Sanchez v. Bland Farms, LLC*, No. 6:08-cv-96, 2011 WL 2457519 (S.D. Ga. June 16, 2011), slip op. at 1. As the district court stated, "Plaintiffs' central claim is that Defendant's pay

[3] This statement and the legal argument that follows are based on the findings of fact in the district court's opinion.

records are inaccurate and grossly under-represent their true compensable time." *Id.* at 4. The farmworkers alleged that there was an average deficiency in recorded hours of approximately 2.4 hours per day, per worker. *Id.*

2. Following a bench trial, the district court found that the farmworkers had shown that "Defendant's time records are inaccurate." Slip op. at 4. Specifically, the district court found that the evidence at trial showed that Bland's field supervisors counted only the time employees spent actually planting or harvesting onions, but did not count the time at the beginning of their workday when they arrived at the fields and waited until the fields were dry enough to begin work, nor the time at the end of the day spent waiting for the buses to take them home or for the field supervisor to tally each group's production. *Id.* Additionally, the court found that the field supervisors "arbitrarily altered stop times at the end of the day to [account] for unrecorded breaks they thought Plaintiffs took throughout the day." *Id.* In light of the fact that the field supervisors admitted to "numerous shortcuts, omissions, and estimates in their records," the court concluded that these records could not serve as the basis for determining the farmworkers' compensable time. *Id.* at 9.

The district court recognized the burden shifting set out in *Mt. Clemens* that would allow employees to prove the amount of

uncompensated work by a "just and reasonable inference." *See* slip op. at 8 (quoting 328 U.S. at 687-88). The farmworkers argued that, because Bland's time records were inaccurate, the court should use the field working hours recorded for bus drivers who also served as "field walkers" as a proxy for the hours employees worked. *Id.* at 4. These field walkers were intermediate supervisors who drove employees to and from the fields each day in addition to assisting the field supervisors in setting up the fields and monitoring the employees. *Id.* at 4. The field walkers were separately compensated for their bus driving time, *id.*, and the farmworkers contended that the field walkers' average daily hours minus the time identified as bus driver time was the most accurate measure of the farmworkers' actual work hours, *see* Farmworkers' Initial Brief at 9.[4]

The district court, however, refused to accept these hours as indicative of hours worked, stating that the field walkers' hours were not a "convincing substitute" for accurate records of farmworkers' compensable time because the field walkers had

[4] The farmworkers and field walkers lived in labor camps controlled by Bland. *See* Farmworkers' Initial Brief at 9 (citing to the trial transcript). They traveled together to and from the fields each day in buses provided by Bland, which were parked at the labor camps after the work day. *Id.* The field walkers who drove the buses were paid on an hourly basis. *Id.* The field tally sheets included separate entries for field walking time and bus driving time, and the bus driving time was identified as two hours each day. *Id.*

duties that required them to work longer hours than the farmworkers. *See* slip op. at 9, 5. Specifically, the district court found that the field walker/bus drivers' time included preparing the buses for the day, calling employees to tell them when they would arrive, driving employees to and from the fields, and making stops at convenience stores en route. *Id.* at 5. The district court also refused to use the personal time records of two workers, finding them too "inconsistent, self-serving, and anecdotal" to provide a "sound basis" for calculating compensable time. *Id.*

Instead, the court concluded that the farmworkers had provided enough evidence to support a just and reasonable inference that they were entitled to "some" additional compensable time. *See* slip op. at 9. The district court further concluded that Bland "failed to produce any evidence, apart from its inaccurate tally sheets, that could prove the precise amount of Plaintiffs' work or negate their inference." *Id.* at 13. In one portion of the opinion, the court declared without explanation that Bland's records "undercounted Plaintiffs' compensable time by thirty (30) minutes of work time per day," *id.* at 5, while in another section and in its summation of damages it stated without explanation that the farmworkers were entitled to an additional thirty minutes of compensable time *per week* for time worked before and after

Bland's recorded time, *id.* at 10, 17. The thirty minutes were purportedly based on waiting time employees spent when they arrived at the fields and before they left the fields, and time for breaks that were compensable under the Department of Labor's regulations. *Id.* at 10.

3. The district court concluded that despite the inaccuracies in timekeeping, Bland had made a "good faith effort" to record hours properly. *See* slip op. at 6. The court credited the testimony of Bland's staff accountant, Therese Bouwense, regarding the system set up to record workers' hours, which included the field supervisors' records of the employees' hours worked each day, Bouwense's review of these records, and the fact that Bouwense provided employees with a weekly tabulation of their hours and "requested that they review the document for correctness." *Id.* There were two known instances where an employee had complained about his pay, and Bouwense promptly corrected the errors and reimbursed the worker. *Id.* Thus, the district court concluded that Bland "knew its operations were governed by the FLSA," *id.* at 14, and "had a subjective, good faith belief that it had systems in place to abide by its FLSA requirements and any violations were negligent at worst." *Id.* at 6. Based on its conclusion that Bland subjectively believed it was abiding by the FLSA, and that its "safeguards" provided an objectively reasonable basis for this

belief, the court exercised its discretion to withhold liquidated damages. *Id.* at 14.

4. The district court further concluded that the farmworkers "failed to show any reckless disregard" because of the accounting system described by Bouwense and the fact that employees had an opportunity to correct Bland's records. *See* slip op. at 7. The court thus concluded that the FLSA's two-year (rather than three-year) statute of limitations was applicable. *Id.*

SUMMARY OF THE ARGUMENT

The district court's assessment of the farmworkers' hours worked that were not compensated by Bland runs contrary to the burden-shifting scheme established by the Supreme Court in *Mt. Clemens*. Specifically, the district court erred by using a "convincing substitute" standard instead of the more lenient "just and reasonable inference" standard set forth in *Mt. Clemens* for evaluating employees' evidence of hours worked under the FLSA when proper records are not kept by the employer. In addition, even though Bland failed to produce accurate evidence of hours worked or negate the farmworkers' evidence, the district court did not adequately explain its failure to draw inferences from the workers' evidence in arriving at an approximation of hours worked. Further, the district court should not have limited the statute of limitations to two years

for an H-2A employer that failed to inquire about its obligations under the FLSA and relied on its foreign guestworkers to complain about errors in pay. Moreover, the district court erred in denying liquidated damages by concluding that Bland acted in good faith and had a reasonable belief that it was complying with the Act because it gave workers the opportunity to complain about errors in their hours or pay.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY FAILED TO ADHERE TO THE BURDEN-SHIFTING SCHEME ESTABLISHED BY THE SUPREME COURT IN *MT. CLEMENS*

1. The district court erroneously failed to adhere to the burden-shifting scheme established by the Supreme Court in *Mt. Clemens*, which is followed regularly by this Court. *See, e.g., Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278-79 (11th Cir. 2008); *Allen v. Bd. of Educ.*, 495 F.3d 1306, 1315-16 (11th Cir. 2007); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 (11th Cir. 1982). In *Mt. Clemens*, the Supreme Court considered the shifting burdens in an FLSA action where the employer has not kept accurate or adequate records as required under section 11(c) of the FLSA, and the employees have worked uncompensated time. 328 U.S. at 686-87. Specifically, the Court rejected the Sixth Circuit's formulation, which would have required employees to prove by a preponderance of the evidence that they did not receive proper wages and to show this "by

evidence rather than conjecture." *Id.* at 686. The Court concluded that this standard of proof was improper, as it had "the practical effect of impairing many of the benefits of the Fair Labor Standards Act," noting that

> [t]he remedial nature of this statute and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under s[ection] 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. at 687.

The Supreme Court went on to craft a solution that *does not* require employees to offer a "convincing substitute" for the records an employer has failed to maintain, because this would "penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." 328 U.S. at 687. The Court recognized that such a result would reward the employer for failing to "keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated under the Fair Labor Standards Act." *Id.* Therefore, the Supreme Court held

that an employee carries his or her burden in such circumstances when the employee: (1) "proves that he has in fact performed work for which he was improperly compensated"; and (2) "produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* The burden then shifts to the employer to "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88. If the employer fails to do so, "the court may then award damages to the employee, even though the result be only approximate." *Id.* at 688. The Court emphasized that employers cannot object that the damages are uncertain or speculative in this situation, *id.*, and that if the employer cannot provide accurate estimates of hours worked, "it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities . . . ." *Id.* at 693. Payment for work must be made "on the most accurate basis possible under the circumstances." *Id.* at 688.

2. The district court erroneously imposed the "convincing substitute" evidentiary standard disfavored by the Supreme Court in *Mt. Clemens*.[5] As noted *supra,* the Supreme Court stated

[5] The district court thus misinterpreted the Supreme Court's discussion of "convincing substitutes." The Supreme Court

explicitly in *Mt. Clemens* that, where employees cannot offer "convincing substitutes" for the records the employer was obligated to keep, the employees cannot be penalized for this lack of proof regarding the precise extent of uncompensated work. 328 U.S. at 687. Instead, the fact finder must draw reasonable inferences from the employees' evidence. *Id.* at 693. Thus, the district court should not have applied the "convincing substitute" standard, which requires a higher showing than the "just and reasonable inference" standard articulated by the Supreme Court.

3. Although the district court found that the employees produced evidence of "some" uncompensated work by a just and reasonable inference and that Bland failed to produce any evidence that would prove the precise amount of the employees' work or negate the inference, the court failed explain the factual basis for its determination that the farmworkers were entitled to only thirty additional minutes per week. In *Mt. Clemens*, the Supreme Court instructed that, at this third stage of the burden-shifting scheme, the trier of fact must draw

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observed that "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises." 328 U.S. at 687. In resolving this "problem," the Supreme Court determined that employees are held to a lesser standard, whereby they may show the amount or extent of work by reasonable inference, triggering the burden shifting to the employer that ultimately may lead to only an approximation of damages.

reasonable inferences from the employees' evidence in order to arrive at the most accurate estimate possible of damages under the circumstances. 328 U.S. at 688, 693.

Although the district court "certainly has a great deal of discretion in determining the most accurate amount to be awarded," *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 828 (11th Cir. 1988), the court is not free to disregard the employees' evidence and arrive at a determination for which it identifies no factual basis. For example, in *Shultz v. Hinojosa*, 432 F.2d 259, 261 (5th Cir. 1970),[6] the Fifth Circuit reversed a district court's determination regarding hours worked where the employer kept no records of the employee's work, the employee testified that he worked all day and received $25 per week, and the employer did not provide any evidence negating these hours; yet the district court stated that "this work could not possibly have taken more than three hours per day at the most." The Fifth Circuit concluded that there was no evidence or other factual basis for the district court's determination, and reversed the district court's denial of relief to that worker. *See id.* at 261, 267-68. Where "the *fact* of damage is certain" and "[t]he only uncertainty is the *amount* of damage" a

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to September 30, 1981.

district court cannot abdicate its responsibility to ascertain the amount of back wages by drawing reasonable inferences from the employees' evidence. *Brock v. Seto*, 790 F.2d 1446, 1448-49 (9th Cir. 1986); *see Mitchell v. Riley*, 296 F.2d 614, 616 (5th Cir. 1961) (under these circumstances, the fact finder is in effect ordered "to do the best he could in assessing damages").

Because the field walker/bus drivers drove the workers to and from the fields, it would be logical to infer that the time they spent in the fields (but not driving) is a "just and reasonable" estimate of the farmworkers' time spent in the fields. The district court, however, rejected this evidence without drawing such a reasonable inference, on the ground that these records were not a "convincing substitute" because the field walker/bus drivers had extra duties consisting of preparing the buses for the day, calling the employees to tell them when those buses would arrive, driving employees to and from the fields, and making stops at convenience stores en route. All of the duties described, however, are activities that fall outside the time spent in the fields. And the farmworkers had put forward evidence of the field walker/bus drivers' field time *excluding* the driving time.

The district court's failure to address why the field walkers' field time did not provide a "just and reasonable" estimate of the employees' hours worked demonstrates its failure

to adhere to *Mt. Clemens*' mandate that, where an employer fails to keep accurate records and fails to rebut or negate the employees' evidence, reasonable inferences should be drawn from the employees' evidence. *See Arias v. U.S. Serv. Indus., Inc.*, 80 F.3d 509, 512 (D.C. Cir. 1996) (per curiam) (if employees have "establish[ed] an amount and extent of work and wages as a matter of just and reasonable inference as contemplated by *Mt. Clemens*" and the employer cannot present evidence supporting its counter-estimates, judgment must be entered for the employees based on the evidence they presented that warranted a just and reasonable inference); *Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 13 (D.D.C. 2010) (where an employer has not maintained proper records, "a court will give the plaintiff's estimate of damages a strong presumption of validity," drawing reasonable inferences from "oral testimony, sworn declarations, and whatever relevant documentary evidence a plaintiff is able to provide"); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269, 1290 (M.D. Fla. 1999) (court need not accept employees' evidence unquestioningly but its estimate must be based on the totality of the evidence).

In addition, the district court's objection to drawing inferences from two employees' personal time records because they were "inconsistent, self-serving, and anecdotal" is akin to the protestations that the Supreme Court declared impermissible

in *Mt. Clemens*: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of s[ection] 11(c) of the Act." 328 U.S. at 688. The Supreme Court explicitly recognized that employees' time records "may be and frequently are untrustworthy," *id.* at 687, and may not prove uncompensated time "with any degree of reliability or accuracy," *id.* at 693. Nonetheless, "employees cannot be barred from their statutory rights" on such a basis. *Id*. Rather, reasonable inferences are to be drawn from those records in the absence of accurate and adequate records produced by the employer. *See Olivas v. A Little Havana Check Cash, Inc.*, 324 Fed. Appx. 839, 844 (11th Cir. 2009) (per curiam) (rejecting employer's claim that the district court's estimate that utilized admittedly inaccurate employee records lacked sufficient precision, based on *Mt. Clemens'* rule that employers who fail to keep accurate records and cannot provide an alternative calculation to aid the district cannot complain about the use of an approximation based on employee records); *Arias*, 80 F.3d at 510-12 (concluding that the district court erred as a matter of law when it rejected employees' estimate of uncompensated hours worked as "guesses" and failed to either hold the employer to its burden of presenting counter-estimates or enter judgment for employees based on their evidence, as

required by *Mt. Clemens*); *compare Harold Levinson Assoc. v. Chao*, 37 Fed. Appx. 19, 21-22 (2d Cir. 2002) (rejecting a portion of the employees' estimate of unpaid time not because it was too unreliable or imprecise, but for the specific reason that the estimated hours were inconsistent with payroll records).

In sum, the district court should have considered whether the evidence offered by the farmworkers, even if not "convincing substitutes," was nevertheless sufficient under the more lenient "just and reasonable" standard for the court to draw inferences to arrive at the best approximation of damages possible under the circumstances. Where courts fail to apply the proper standards under *Mt. Clemens*, remand is warranted. *See Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721, 726-27 (5th Cir. 1961) (reversing and remanding where district court was "laboring under a misconception of the legal standard to be followed" pursuant to *Mt. Clemens*); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-31 (5th Cir. 1985) (same). Thus, the Secretary urges this Court to remand the case to the district court for the proper application of the *Mt. Clemens* standard to the farmworkers' evidence.

II. THE DISTRICT COURT ERRED IN CONCLUDING BASED ON ITS FACTUAL FINDINGS THAT BLAND DID NOT EXHIBIT RECKLESS DISREGARD BY FAILING TO ASCERTAIN WHETHER ITS PRACTICES VIOLATED THE FLSA, INSTEAD RELYING ON ITS GUESTWORKERS TO COMPLAIN ABOUT ERRORS IN PAY

1. The statute of limitations for FLSA violations is two years "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. 255(a). Violations are willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *see Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1162-63 (11th Cir. 2008). This Court has noted that federal regulations define reckless disregard as the failure to inquire adequately into whether conduct is in compliance with the Act. *See Alvarez Perez*, 515 F.3d at 1163; *see also* 29 C.F.R. 578.3(c)(3). It has instructed that "[t]he three-year statute of limitations may apply even when the employer did not knowingly violate the FLSA; rather, it may apply when it simply disregarded the possibility that it might be violating the FLSA." *Allen*, 495 F.3d at 1324. However, "[i]f an employer acts unreasonably but not recklessly in determining its legal obligation under the FLSA, then its actions should not be

considered willful and the two-year statute of limitations should be applied." *Id.*[7]

2. In concluding that Bland's behavior was not willful, the district court confined itself to the facts to which Bland's accountant, Bouwense, testified regarding how the field supervisors recorded hours (which the court found to be unreliable and inaccurate in terms of compensable hours worked under the FLSA), how those hours were transferred to Bouwense for entry into payroll, and how employees were given the opportunity to correct those hours. The district court, however, made no finding of fact regarding Bouwense's FLSA expertise, and failed to analyze whether Bland fulfilled its duty to ascertain whether its system was in compliance with the Act (setting forth no evidence that it had), despite this Court's emphasis on this component of the reckless disregard prong of willfulness. *See Family Dollar Stores*, 551 F.3d at 1280 (upholding the jury's willfulness finding, relying in part on the legally sufficient evidence that Family Dollar executives never "studied" the key FLSA issue in that case as to whether

[7] The Secretary does not challenge the district court's factual findings regarding the system Bland set up to track employees' hours, as described in the district court decision. However, the Secretary challenges the district court's legal conclusion, based on the facts identified in its opinion, that any violations were negligent and not willful. *See Allen*, 495 F.3d at 1324 (the determination of willfulness is a mixed question of law and fact).

the store managers were exempt executives); *Alvarez Perez*, 515 F.3d at 1167-68 (upholding the jury's willfulness finding even though witnesses testified that the company had consulted an attorney and their payroll company regarding FLSA compliance, as the jury could have concluded that even this was not sufficient); *accord Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) (affirming district court's conclusion that the employer recklessly disregarded the possibility that it was violating the FLSA because the employer was on notice of its FLSA obligations "yet took no affirmative action to assure compliance with them"); *cf. Adm'r v. Home Mortg. Co. of Am., Inc.*, No. 2004-LCA-00040, 2006 WL 6069138, 14 Wage & Hour Case 2d (BNA), 109, 120 (ALJ Mar. 6, 2006) (employer's violations of the H-1B program were deemed willful because the employer's ignorance of the Immigration and Nationality Act's requirements did not excuse a reckless failure to investigate its obligations); *Adm'r v. Prism Enter. of Cent. Fla., Inc.*, 2001-LCA-0008, slip op. at 13 (ALJ June 22, 2001) ("At best, [employer's] conduct constitutes reckless disregard of the program requirements" where employer makes "no showing that [it] attempted to consult anyone as to the H-1B wage requirements or that [it] did [its] own research"), *aff'd,* ARB No. 01-080, 2003 WL 22855211, (Dep't of Labor ("DOL") Admin. Rev. Bd. Nov. 25, 2003).

The district court also failed to observe that this duty is heightened for H-2A employers who take affirmative steps to participate in the H-2A program in order to meet their temporary agricultural labor needs, knowing that "certain regulations w[ill] be imposed on them." *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1241 (11th Cir. 2002). Specifically, the H-2A regulations require that H-2A employers will "'comply with applicable federal, State, and local employment related laws and regulations[.]'" *Id. at* 1235 (noting that the FLSA "indisputably" applies to H-2A farmworkers and quoting then-existing H-2A regulations at 20 C.F.R. 655.103(b); for current obligation *see* 20 C.F.R. 655.135(e)). As an employer electing to bring in foreign workers under the H-2A program, Delbert Bland, the owner of Bland Farms, certified to the Department season after season under penalty of perjury that the "job opportunity's terms, conditions, and occupational environment are not contrary to Federal, State, or local law." Pls.' Tr. Ex. 44, Doc. 1-1 at 12 (2004), Doc. 1-1 at 34 (2005), Doc. 1-2 at 5 (2005), Doc. 1-2 at 33 (2006) (H-2A Employer Attestation on DOL Labor Certification Applications) (Dist. Ct. Dckt. No. 08-cv-96). Thus, Bland's disregard as to whether its practices violated the FLSA was flatly inconsistent with its repeated declarations to the Department that it would not violate applicable federal law.

Indeed, had Bland taken minimal steps to inquire into its obligations under the FLSA as it was required to do, it would have ascertained that its record-keeping and pay practices violated the FLSA. *See IBP*, 339 F.3d at 909 (employer found subject to three-year statute of limitations "could easily have inquired into" the relevant FLSA compliance issues) (internal quotation marks omitted). As demonstrated by the district court's analysis of the waiting time violations at the heart of the dispute regarding compensable time in this case, it is well-established that time spent predominantly for the benefit of the employer, such as time spent by agricultural workers waiting for fields to dry in the morning and waiting for the employer to complete production records in the afternoon, must be included as compensable time for purposes of the FLSA. *See, e.g., Vega v. Gasper,* 36 F.3d 417, 426-27 (5th Cir. 1994); *Vega v. Gasper,* 886 F. Supp. 1335, 1338-40 (W.D. Tex. 1995); *Sedano v. Mercado*, No. CIV-92-0052, 1992 WL 454007, at *3-4 (D.N.M. Oct. 8, 1992); DOL Op. Letter WH-533, 1991 WL 790604 (Dec. 16, 1991); DOL Op. Letter WH-454, 1978 WL 51446 (Feb. 9, 1978); *see generally Mireles v. Frio*, 899 F.2d 1407, 1411-13 (5th Cir. 1990). In such circumstances, employees are engaged to wait. *See* 29 C.F.R. 785.14-.15. Additional guidance on record-keeping, hours worked, waiting time, and compensable time is also readily accessible on the Department's Wage and Hour Division website.

See, e.g., DOL Wage & Hour Division, *Compliance Assistance – Fair Labor Standards Act*, http://www.dol.gov/whd/flsa/ (last visited Nov. 8, 2011); DOL Wage & Hour Division, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), *available at* http://www.dol.gov/whd/regs/compliance/whdfs22.pdf (discussing, *inter alia*, waiting time, and rest and meal periods); DOL Wage & Hour Division, FLSA Handy Reference Guide, *available at* http://www.dol.gov/whd/regs/compliance/hrg.htm ("In general, 'hours worked' includes all time an employee must be on duty, or on the employer's premises[.]").

3. Instead of ascertaining on its own whether it was in compliance, Bland placed the burden of FLSA compliance on its Mexican guestworkers, specifically relying on them to alert the employer regarding any violations. As courts have widely recognized, employees are often reluctant to complain about wage violations or to assert FLSA rights due to fear of retaliation. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, __ F.3d __, No. 10-1884-CV, 2011 WL 4436284, at *6 (2d Cir. Sept. 26, 2011) (noting that employees who fear retaliation or being "blackballed" in their industry

may choose not to opt-in to an FLSA collective action).[8] For temporary guestworkers such as Bland's employees, the fear of complaining is heightened because their H-2A visa is tied exclusively to Bland; if Bland were to look unfavorably on workers who bring complaints, it could terminate the workers, thereby leaving them out of status and without the ability to find other lawful work or remain in the U.S. *See, e.g., United States v. Farrell,* 563 F.3d 364, 374 (8th Cir. 2009) (explaining that workers in the U.S. on temporary work visas sponsored by their employer have "special vulnerabilities" because they are uniquely dependent on that employer); *Arriaga*, 305 F.3d at 1233 n.2 ("The H-2A worker is only admitted into the United States to work for the designated employer . . . . If the employment relationship ends – whether the employee quits or the employer

[8] Congress and the courts have recognized that migrant farmworkers, such as the plaintiffs, are particularly vulnerable, susceptible to exploitation, and fearful of retaliation. *See Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505-07 (11th Cir. 1993) (detailing the history of federal legislation aimed at protecting farmworkers because they "suffer from chronic low wages, long hours, and poor working conditions" and face a "virtually insurmountable wall of economic, social, educational, language, and cultural barriers," in addition to being "excluded from the overtime and collective bargaining rights afforded other types of workers," which means "they *always* are vulnerable to exploitation") (emphasis in original, internal quotation marks omitted); *Beliz*, 765 F.2d at 1332 (legislative history of the Farm Labor Contractor Registration Act notes that "farm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations").

terminates the employment – the H-2A visa expires, and the worker must leave the United States.”). An employer should not be able to gain safe harbor from the three-year statute of limitations by placing the onus on H-2A guestworkers to notify it of FLSA violations, while simultaneously failing to independently ascertain its own obligations.

III. THE DISTRICT COURT ERRED BY CONCLUDING THAT BLAND ACTED IN GOOD FAITH AND IN AN OBJECTIVELY REASONABLE MANNER WHERE BLAND FAILED TO ASCERTAIN ITS OBLIGATIONS UNDER THE FLSA AND RELIED ON FOREIGN GUESTWORKERS TO PUT IT ON NOTICE ABOUT WAGE VIOLATIONS

1. This Court has held that where an employer’s actions have been found to be willful, a district court is precluded from finding that the employer acted in good faith. *See Alvarez Perez*, 515 F.3d at 1165-66; *Family Dollar Stores*, 551 F.3d at 1282-83. However, even if Bland’s actions are not deemed to be willful, they were not taken in good faith and in an objectively reasonable manner.

Liquidated damages are considered compensatory, not punitive. *See Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (citing *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 707 (1945)); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991). They compensate employees for losses suffered because of the failure to receive their lawful wages in a timely manner. *See New England Telecomm.*, 121 F.3d at 71 n.4; *Cooper Elec.*, 940 F.2d at 907. A district court must

generally award liquidated damages that are equal to the amount of actual damages. *See Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1272 (11th Cir. 2008); *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 733 (7th Cir. 1998) ("Doubling is the norm, not the exception[.]"). A district court can, in its discretion, decline to award liquidated damages *only* if the employer demonstrates that it acted in good faith and had reasonable grounds to believe that its actions complied with the FLSA. *See* 29 U.S.C. 260; *Alvarez Perez*, 515 F.3d at 1163; *Spires v. Ben Hill Cnty.*, 980 F.2d 683, 689 (11th Cir. 1993); *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1263 (5th Cir. 1986).[9] That discretion, however, must be exercised in light of the "strong presumption under the statute in favor of doubling." *Galaxie*, 152 F.3d at 733. Because good faith and reasonableness are "dual and specific" requirements that an employer must satisfy to avoid liquidated damages, they are "interpreted strictly[.]" *Lee v. Coahoma Cnty.*, 937 F.2d 220, 227 (5th Cir.

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[9] The Secretary's regulations state that

> [t]he conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act.

29 C.F.R. 790.22(b).

1991). An employer faces a "*substantial burden*" in making this showing. *Vega*, 36 F.3d at 427 (emphasis in original); *see Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987) (the employer's burden of proof is a "difficult one to meet").

The good faith requirement is a subjective standard that requires the employer to show that it had "'an honest intention to ascertain what [the Act] requires and to act in accordance with it.'" *Dybach v. Dep't of Corr.*, 942 F.2d 1562, 1566 (11th Cir. 1991) (quoting *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir. 1987)) (internal quotation marks omitted); *see Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008); *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 469 (5th Cir. 1979) ("[W]e feel that good faith requires some duty to investigate potential liability under the FLSA."). As this Court stated in *Spires*, 980 F.2d at 689: "An employer who knew or had reason to know that the FLSA applied, could not establish good faith as a defense."

The reasonableness requirement is an objective standard that requires the employer to show that its position was objectively reasonable. *See Barbeque Ventures*, 547 F.3d at 942; *Cooper Elec.*, 940 F.2d at 907-08. The employer must show that it had reasonable grounds to believe that its conduct complied with the Act. *See Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d 292, 298 (9th Cir. 1996). An employer may

not rely on ignorance alone as reasonable grounds for believing that its actions were not in violation of the Act. *See Barcellona*, 597 F.2d at 468-69. Further, even if an employer can sufficiently show an honest intention to meet the subjective component of good faith, when the employer cannot show that its actions were objectively reasonable, it cannot, as a matter of law, avail itself of the defense to liquidated damages. *See Dybach*, 942 F.2d at 1567.

2. As noted *supra*, the Secretary does not claim that the district court's factual findings regarding the record-keeping and payroll system utilized by Bland are erroneous. The district court, however, did not explain how Bland had acted in good faith or had objectively reasonable grounds for believing that its actions were in compliance simply by allowing workers to complain that they were improperly paid. Indeed, the absence of evidence showing that Bland consulted the Department or an FLSA expert weighs, at a minimum, against a finding of objective good faith or reasonableness. *See, e.g., Rodriguez*, 518 F.3d at 1273; *Galaxie*, 152 F.3d at 733; *Cooper Elec.*, 940 F.2d at 908-09 (employer's failure to take affirmative steps to ascertain the legality of its pay practices alone warranted remand for an award of liquidated damages).

The district court appears to have found it sufficient that Bland's field supervisors kept records of employees' hours and

that Bland allowed its foreign guestworkers to provide notice regarding any FLSA violations. As an initial matter, the district court's findings that the field supervisors' records were inaccurate because they involved numerous "shortcuts, omissions, and estimates" is inconsistent with its conclusion that there was any reasonable attempt to keep accurate records of hours worked under the FLSA. *See Barcellona,* 597 F.2d at 468-69 (expressing concern about inconsistency between district court's finding of a flagrant violation and denial of liquidated damages). Further, courts have widely held that an employer cannot satisfy its burden under section 260 by suggesting that lower-level employees are responsible for any violations. *See, e.g., Galaxie*, 152 F.3d at 733; *LeCompte*, 780 F.2d at 1263. In addition, it is well-established that allowing employees to raise complaints and showing that employees have not complained does not satisfy the good faith requirement. *See Barbeque Ventures,* 547 F.3d at 942; *New England Telecomm.*, 121 F.3d at 71; *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984) (where the employer's payroll system enabled employees to raise complaints about their pay, the fact that the employer had "broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the statute"); *cf. In re Great W. Drywall*, 1991 WL 494688, at *5, WAB No. 87-57 (DOL Wage App. Bd. Feb. 8, 1991)

("The efforts of Great Western management to present the time cards to the employees with a request to 'verify' the fictitious time records as accurate also detract from any notion that the firm was engaged in a good faith effort to meet the prevailing wage requirements [under the Davis-Bacon Act]."). Similarly, a lack of employee complaints does not prove that the employer had objectively reasonable grounds to believe that its actions complied with the FLSA. *See Martinez v. Food City, Inc.*, 658 F.2d 369, 376 (5th Cir. 1981) (lack of complaints by employees about employer's violations of the FLSA is not the "reasonable ground" contemplated by 29 U.S.C. 260). Thus, placing the onus on vulnerable, low-wage, foreign guestworkers to notify their employer about FLSA violations does not satisfy either of the requisite criteria (subjective good faith and objectively reasonable grounds) for avoiding liquidated damages.

CONCLUSION

For the foregoing reasons, this Court should remand the case for further findings by the district court as to damages in accordance with the well-established principles of *Mt. Clemens*. This Court should further reverse the district court's conclusions that the three-year statute of limitations was not applicable and that liquidated damages were not warranted, based on the facts identified by the district court.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

LAURA MOSKOWITZ
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Room N-27l6
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), I hereby certify that:

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,969 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. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, Courier New 12-point font containing no more than 10.5 characters per inch.

Date: November 9, 2011

LAURA MOSKOWITZ
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, I filed the original and six copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit, and served one copy on the following parties, all via pre-paid overnight delivery:

Timothy Harden, III
Taylor, Odachowski, Schmidt & Crossland, LLC
300 Oak Street, Suite 200
Saint Simons Island, GA 31522

Wiley Wasden, III
William E. Dillard, III
Brennan & Wasden, LLP
411 East Liberty Street
Savannah, GA 31412

Counsel for Appellees

Dawson Morton
Lisa J. Krisher
Georgia Legal Services
104 Marietta Street, Suite 250
Atlanta, GA 30303

Counsel for Appellants

LAURA MOSKOWITZ
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-2716
Washington, DC 20210
202-693-5555
202-693-5689 (FAX)
moskowitz.laura@dol.gov