Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 29, ISSUE 9/ NOVEMBER 25, 2014

EXPERT ANALYSIS

Integrity Staffing Solutions v. Busk: When is Leaving Work 'Work'?

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Integrity Staffing Solutions Inc. provides warehouse space and staffing to clients throughout the United States. In October 2010, two former Integrity employees, Jesse Busk and Laurie Castro, filed a class action against Integrity in the District of Nevada, seeking unpaid wages and overtime under the Fair Labor Standards Act of 1938 for time spent in "off the clock" security screenings after their shifts.

While employed by Integrity, Busk and Castro were assigned to work in warehouses, fulfilling Amazon.com customer orders by pulling items from inventory shelves. Busk and Castro alleged that they and other Integrity employees were routinely required by Integrity to pass through security clearances after the end of their shift and that, including wait time, removal of wallets, keys and belts and passing through metal detectors, these screenings could last up to 25 minutes.

The plaintiffs alleged that the security screening should be compensable because they were "necessary to the employer's task of minimizing 'shrinkage' or loss of product from warehouse theft."

The District Court dismissed the complaint, finding that the time spent in security screenings was not compensable under the FLSA because it was a "postliminary" activity that was not "integral or indispensible to [plaintiffs'] principal activities" as warehouse employees fulfilling online purchase orders.[1]

The 9th U.S. Circuit Court of Appeals reversed the District Court's ruling, holding that, as alleged, the security screenings were necessary to the employees' primary work as warehouse employees, and done for the employer's benefit, and thus the plaintiffs stated a claim under the FLSA.[2]

The 9th Circuit's decision created a split with the 2nd and 11th circuits (which have found security screenings to be non-compensable). The Supreme Court granted *certiorari* and heard oral argument Oct. 8.[3]

Although it is unlikely that the Supreme Court will uphold the 9th Circuit's ruling, if it does, employers will need to re-evaluate not only whether to compensate their employees for time spent in security screenings, but whether to compensate their employees for *any* preliminary or postliminary work that is necessary for their employees' primary work and done for the employer's benefit.

LEGAL FRAMEWORK

The FLSA and the Portal-to-Portal Act

The FLSA sets a minimum hourly wage and requires overtime compensation when a covered employee works more than 40 hours in a "workweek."[4] However, the FLSA does not define "work" or "workweek."

Early cases interpreting the FLSA took an expansive view of what constituted "work," finding that under the FLSA, employees must be compensated for "all time during which an employee is necessarily required to be on the employer's premises."[5]

The Supreme Court's holding in *Anderson v. Mt. Clemens Pottery Co.* resulted in a flood of litigation by plaintiffs seeking back pay for tasks required by their employer on its premises.[6]

In an effort to avoid the "wholly unexpected liabilities, immense in amount and retroactive in operation"[7] triggered by the *Mt. Clemens* decision, Congress responded by enacting the Portal-to-Portal Act of 1947, which excepts from FLSA coverage two activities that the court had found compensable in *Mt. Clemens*: walking on the employer's premises to and from the location of the employee's "principal activity or activities" and activities that are "preliminary or postliminary" to "said principal activity or activities."[8]

The 'integral and indispensable' test

A few years after enactment of the Portal-to-Portal Act, the Supreme Court in *Steiner v. Mitchell* was asked to decide whether workers in a battery plant must be compensated for the time they spent to change into protective gear at the beginning of their shifts and to shower at the end of their shifts to protect themselves and others from contact with caustic battery acid.[9]

Because the 9th Circuit's decision failed to apply the "integral and indispensable" test as articulated by the Supreme Court in IBP v. Alvarez, *it will be surprising if the court upholds the 9th Circuit's decision.*

The court held that although these required activities were preliminary and postliminary to their principal activity of working in the battery plant, the employees must nonetheless be compensated for their time because the protective clothing and showering were "an integral and indispensable part of the principal activities."[10]

Almost 50 years later, in affirming a 9th Circuit decision, the court held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under ... the Portal-to-Portal Act."[11]

Notably, the court in *Alvarez* held that, like the time spent donning special safety gear, time spent by employees of a meat-processing plant walking between locker rooms and production areas *after* donning that gear in the locker rooms was integral and indispensable, but that time spent *waiting* to don the special safety gear at the start of the workday was not integral and therefore was not compensable under the FLSA.[12]

The court explained, "[T]he fact that certain pre-shift activities (*i.e.*, waiting to don safety gear) are *necessary* for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*."[13]

Because of what is known as the "continuous workday" rule, any activity that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of the Portal-to-Portal Act's exception. Therefore, although waiting to don protective gear at the beginning of the day is non-compensable time, waiting to doff the protective gear and doffing the protective gear at the end of the workday is compensable under the FLSA.[14]

The Department of Labor also issued regulations regarding what constitutes compensable preliminary and postliminary activity under the FLSA. Under these regulations, "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks" are not normally compensable.[15]

Other security-screening cases

Both the 2nd and 11th circuits have found that time spent in security screenings is not compensable under the FLSA.

In *Gorman v. Consolidated Edison Corp.*, employees of a nuclear plant who were required to pass through fairly extensive security and radiation testing before entering and leaving the nuclear plant filed an action for unpaid wages and overtime under the FLSA.[16]

The 2nd Circuit held that time spent by nuclear plant employees in "ingress and egress security procedures" was not covered by the FLSA because it was "not integral to principal work activities."[17] The court found security screenings to be more analogous to travel time (*i.e.*, walking) than to activities typically found to be integral to principal activities (*i.e.*, required in order for the employee to perform his or her job, such as knife sharpening for a butcher).[18]

The 2nd Circuit explained: "'Indispensable' is not synonymous with 'integral.' 'Indispensable' means 'necessary.' 'Integral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole.'"[19]

Under this application of the "integral and indispensable" test, the mere fact that an activity is required by the employer and done for the employer's benefit is not sufficient. The activity must also *not* be "segregable from the simultaneous performance of [the] assigned work."[20]

In *Bonilla v. Baker Concrete Construction*, construction workers at Miami International Airport who were required to pass through a security checkpoint to reach their work site inside the airport argued that the time spent doing so should be compensable because it was "necessary" to perform their duties.[21]

The 11th Circuit applied a three-part test in determining whether the security screenings were so integral and indispensible as to be compensable: "whether the activity is required by the employer, whether the activity is necessary for the employee to perform his or her duties, and whether the activity primarily benefits the employer."[22] Because the screening was required by the Federal Aviation Administration and the employer had no discretion as to whether its employees would be screened, the 11th Circuit found that the employer did not benefit from the security screenings and the time spent in the screenings was not compensable.

In the absence of the employer requiring or benefitting from the screenings, the court found the fact that the screenings were "necessary for the employee to perform his or her duties" to be insufficient: "If mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs."[23]

The court will probably find that security screenings are not compensable in this case because they are not "integral," i.e., they are segregable from the employees' principal activity of pulling products from the warehouse.

PROCEEDINGS BELOW

In the Integrity Staffing case, the plaintiffs argued before the District Court that the security screenings should be compensable because the "exercise was a daily requirement and took a significant amount of time."[24]

The District Court disagreed, finding that the plaintiffs failed to survive a motion to dismiss because they could not show that the security screenings were "integral and indispensible to their principal activities as warehouse employees fulfilling online purchase orders." Citing Labor Department regulations codified at 29 C.F.R. § 790.7(g), the court held, "these allegations fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks,' because plaintiffs could perform their warehouse jobs without such daily security screenings."[25]

The court further noted that *Gorman* and *Bonilla* were "difficult hurdles" for plaintiffs to overcome because "the necessity of security screenings in those cases was great, yet it was still not integral and indispensible to the principal activities of employment."[26]

The 9th Circuit reversed the District Court's dismissal of the plaintiffs' complaint, holding that because Integrity required the screenings to prevent employee theft, "a concern that stems from

the nature of the employees' work (specifically, their access to merchandise)" and for the benefit of Integrity, the plaintiffs have stated a plausible claim for relief.[27] In so finding, the appellate court relied on its earlier decision in a donning and doffing case, *Alvarez v. IBP Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005):

> In *Alvarez* we held that putting on and taking off protective gear was necessary to the principal work of employees at a meat packing plant because the gear was required by the employer's rules, by federal regulators, and by the "nature of the work." [Cite omitted.] Moreover the donning and doffing benefited the employer by preventing "workplace injury and contamination."

But, as the Supreme Court held in its *Alvarez* opinion, "the fact that certain [preliminary or postliminary] activities are necessary for employees to engage in their principal activities does not mean that those [preliminary or postliminary] activities are 'integral and indispensable' to a 'principal activity' under *Steiner*."[28] By holding that, as alleged, the security screenings were "necessary" to prevent employee theft without analyzing whether the screenings were integral to the employees' principal job activities, *i.e.,* "not segregable from the simultaneous performance of [the] assigned work," under 29 C.F.R. § 790.7(d), the 9th Circuit disregarded both Labor Department regulations and Supreme Court law.

If the Supreme Court upholds the 9th Circuit's ruling, employers will need to re-evaluate not only whether to compensate their employees for time spent in security screenings, but whether to compensate their employees for any *preliminary or postliminary work that is necessary for their employees' primary work and done for the employer's benefit.*

INTEGRITY'S ARGUMENT

Before the Supreme Court, Integrity argued that time spent in security screenings as part of the egress process is a quintessential postliminary activity that is non-compensable under the Portal-to-Portal Act, and that the 9th Circuit erred when it found the screenings integral and indispensable because they were required and for the benefit of the employer.

In oral argument, Paul Clement arguing for Integrity emphasized that waiting in line for a security screening as part of the employees' egress process is essentially the same as waiting in line to check out, a task that the Labor Department has found to be non-compensable.

Justice Elena Kagan asked Clement to explain how a security screening differs from time-consuming anti-theft measures used when an employee closes out a cash register. Clement answered that security screenings occur during the employee's egress, whereas closing out a cash register generally occurs at the employee's station.

When Justice Kagan changed the hypothetical so that the employee was required to drop off the cash drawer while egressing the building, Clement was unable to distinguish the hypothetical. He did note, however, that there are some "not particularly sensible results under the Portal-to-Portal Act because things do turn on [whether] activities take place vis-à-vis walking time."[29]

Curtis Gannon for the Labor Department participated in the oral argument as an *amici* for Integrity, arguing that the security screenings are non-compensable. Like Clement, he stressed that canonically, the activities exempted from coverage by the Portal-to-Portal Act are activities associated with ingress and egress, and these security screenings should fall under that umbrella.

PLAINTIFFS' ARGUMENT

In its brief in opposition to *certiorari*, the plaintiffs (respondents) initially argued that the court should not grant *certiorari* because the screenings were integral and indispensable to the employees' principal job duties, which included, among other things, "refrain[ing] from putting in their pockets (or otherwise secreting on their persons) merchandise."[30]

The plaintiffs abandoned this argument, however, after *certiorari* was granted. Instead, they argued that the employees' participation in the security screenings is compensable because it is done at the direction of and for the benefit of the employer.[31] That is, the plaintiffs/respondents seemingly abandoned any argument made under the "integral and indispensable" framework

and instead argued that because the screenings are not subject to either of the Portal-to-Portal Act's exceptions (*i.e.,* the screenings are not "walking" and they are not "preliminary or postliminary"), the screenings are just as much "work" as if the employer asked plaintiffs to mow the lawn outside the facility (*i.e.*, not a principal job duty, but nonetheless work done for the employer's benefit).

Justice Samuel Alito asked Mark Thierman, who argued for the respondents, whether they were abandoning the "integral and indispensable" test altogether. Thierman responded that he had "put the argument in a different place" and was adopting the same test as the 9th Circuit.[32]

Given the somewhat unclear nature of the test that the 9th Circuit applied, this answer did not clarify the test urged by the respondents for determining whether preliminary or postliminary activities would be compensable under the FLSA.

POTENTIAL RESULTS AND IMPLICATIONS

Because the 9th Circuit's decision failed to apply the "integral and indispensable" test as articulated by the Supreme Court in *IBP v. Alvarez*, it will be surprising if the court upholds the 9th Circuit's decision.

Application of the 9th Circuit's "necessary and done for the employer's benefit" test to claims for compensation for preliminary or postliminary activities would probably trigger "wholly unexpected liabilities, immense in amount and retroactive in operation" similar to those triggered by *Mt. Clemens*, as Integrity illustrated in the Supreme Court proceedings: Within weeks after the 9th Circuit's decision was published, several class-action lawsuits were filed in California bringing similar claims against other retailers who use security screenings as an anti-theft measure.[33]

Although the court is unlikely to create a per se rule that security screenings are never compensable under the FLSA, as Integrity argued it should, applying its "integral and indispensable" test, the court will probably find that security screenings are not compensable in this case because they are not "integral," *i.e.,* they are segregable from the employees' principal activity of pulling products from the warehouse to fill online orders. Justice Stephen Breyer went so far as to comment, "I'd say go with the Labor Department. They are the ones who are in charge of this. And they are saying you (plaintiffs/respondents) lose."[34]

NOTES

1 *Busk v. Integrity Staffing Solutions*, 2011 WL 2971265, *3-4 (D. Nev. July 19, 2011).

2 *Busk v. Integrity Staffing Solutions*, 713 F.3d 525 (9th Cir. Apr. 12, 2013).

3 *Integrity Staffing Solutions v. Busk*, No. 13-433.

4 29 U.S.C. §§ 206 and 207.

5 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

6 *See* Ray A. Brown, *Vested Rights and the Portal-To-Portal Act*, 46 MICH. L. REV. 723, 728 (1947-1948), citing Report of Senate Judiciary Committee, S. Rep. 48, 80th Cong., 1st sess., p. 2 (1947) (reporting that after the *Mt. Clemens* case was decided in June 1946, "between July 1, 1946, and Jan. 31, 1947, 1,913 [portal] suits were brought for an aggregate amount of $5,785,000,000.").

7 29 U.S.C. § 251(a).

8 29 U.S.C. 254(a).

9 *Steiner v. Mitchell*, 350 U.S. 247 (Jan. 30, 1956).

10 *Id.* at 253.

11 *IBP Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

12 *Id.*

13 *Id.* at 40-41 (emphasis added).

[14] *Id.* at 37. *See also Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (for slaughterhouse employees, knife sharpening was "an integral part of an indispensable to the various butchering activities for which [the workers] were principally employed"); *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 717–18 (2d Cir. 2001) (powering up and testing an X-ray machine was integral and indispensable to taking X-ray films).

[15] 29 C.F.R. § 790.7(g).

[16] 488 F.3d 586 (2d Cir. May 30, 2007).

[17] *Id.* at 593-594.

[18] *Id.*

[19] *Gorman*, 488 F.3d at 592.

[20] *Id.*, *citing* 29 C.F.R. § 790.7(d).

[21] *Bonilla v. Baker Concrete Constr.*, 487 F.3d 1340, 1344 (11th Cir. May 30, 2007).

[22] *Id.*

[23] *Id.*

[24] *Busk*, 2011 WL 2971265, *4.

[25] *Id.* (internal citations omitted).

[26] *Id.*

[27] *Busk,* 713 F.3d at 531.

[28] *IBP,* 546 U.S. at 40-41.

[29] *Integrity Staffing,* No. 13-433, oral argument transcript 7:1-6.

[30] *Integrity Staffing Solutions v. Busk*, 2014 WL 173167, *brief in opposition to certiorari*, at 20 (Jan. 13, 2014).

[31] *Integrity Staffing Solutions v. Busk*, 2014 WL 3866627, *brief for respondents,* at 15-19 (Aug. 4, 2014).

[32] *Integrity Staffing,* No. 13-433, oral argument transcript, 28:14-29:17.

[33] *See Frlekin v. Apple Inc.*, No. 3:13-cv-3451, 2013 WL 3833851 (N.D. Cal. July 25, 2013); *Ceja-Corona v. CVS Pharmacy*, No. 1:12-cv-1868, 2013 WL 7703661 (E.D. Cal. July 15, 2013).

[34] *Integrity Staffing,* No. 13-433, oral argument transcript, 35:2-9.

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