No. 04-66

IN THE
Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

GRAYDON G. STEVENS
KELLY, REMMEL & ZIMMERMAN
53 Exchange Street
Portland, Maine 04112-0597
(207) 775-1020

Counsel for Respondent

195762

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Barber Foods is a privately held corporation. It has no parent company and there are no publicly held companies owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES

REGULATIONS

Cited Authorities

Cited Authorities

STATEMENT OF THE CASE

1. This is a collective action pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), brought by a group of current and former employees of Barber Foods seeking compensation for alleged unrecorded and uncompensated work in the form of certain pre- and post-shift activities performed by them. Partial summary judgment was granted in favor of Barber Foods, Pet. App. 20a-50a, and judgment was entered in favor of Barber Foods on the remaining claims after a jury trial. Petitioners appealed the judgment to the Court of Appeals for the First Circuit which, after rehearing, affirmed the judgment in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. Petitioners filed a petition for a writ of certiorari on July 8, 2004. This Court granted the petition in part on February 22, 2005.

2. Barber Foods is a further processor of poultry-based products. It has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. The Petitioners fall within four general job classifications: rotating associates who staff the production lines, set-up operators who tend the various machines on the line, meatroom associates who work where the raw product is blended with ingredients, and shipping and receiving associates. J.A. 39-40. All associates are required to wear a lab coat, hairnet, earplugs, and safety glasses while on the production floor. There are other items of clothing or equipment worn by some associates for comfort, sanitary, or safety reasons. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, and safety boots. J.A. 43.

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coat, hairnet, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and doffed before punching out. J.A. 45, 50-51. Set-up operators must wear lab coats, hairnets, earplugs, safety glasses, safety boots, bump hats, and back belts. Any other items they choose to wear may be donned after punching in and doffed before punching out. J.A. 45, 51-52. Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, safety boots, backbelts, aprons and vinyl gloves. Many also choose to wear sleeve covers. The apron, gloves and sleeve covers can be donned after punching in and before punching out. J.A. 45-46, 52. Shipping and receiving associates are required to wear safety boots, hard hats and backbelts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must don and doff a lab coat, hairnet, and earplugs briefly to enter the production floor to punch in and out. J.A. 46, 52-53.

Lab coats and cotton glove liners are obtained by associates in the hallway between the entranceway and the equipment cage. The lab coats are on hanger racks and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are dispensed once and then replaced as needed. J.A. 43-44.

Lab coats and cotton glove liners are laundered and reused. Laundry bins are located along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant . Vinyl gloves, sleeve covers and aprons are disposable. Trash bins are located on the production floor and along the hallways from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are retained by associates and may be stored in their locker or taken home. J.A. 47.

Associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized time-keeping system. Each associate has a swipe card. Time clocks are located at the entrances to the production floor. Rotating associates, set-up operators, and meatroom associates punch in at a clock in the area where they will be working and punch out on clocks which are located next to the two primary exits from the production floor. Shipping and receiving associates punch in and out on the plant office clock located on the production floor by the shipping and receiving office. Associates are paid from the moment they punch in. They are allowed twelve minutes of "swing time", meaning that they can punch in up to six minutes early and get paid from that time or up to six minutes late without incurring an attendance violation. J.A. 42, 48.

There is a great deal of flexibility and personal discretion among associates as to when and where they don and doff their clothing and gear. Pre-shift, some associates arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some

after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others don them right before entering the production floor, and others don them along the way. The only requirement is that they be on the line ready to go when the shift starts. Post-shift, associates doff their clothes at various points en route to the exits. Some items may be thrown in the trash on the production floor before punching out. After punching out there are trash receptacles and laundry bins all along the hallway from the production floor exit to the plant exit. Some associates drop their items in the first available bin off the production floor while others use the last one before the plant exit. J.A. 49-52.

3. Petitioners brought this collective action contending that they were entitled to compensation for the following activities: (1) donning and doffing of all clothing and equipment required by Barber Foods or government regulation as well as any optional gear "necessitated by working conditions"; (2) time spent walking to and from their work stations on the production floor after donning and before doffing such gear; and (3) time spent waiting to obtain any clothing and equipment from the equipment cage or other distribution station and time spent waiting to punch in at the time clocks after donning such clothing and equipment.

Barber Foods moved for summary judgment in its favor on all claims. In a recommended decision affirmed by the district court, the magistrate judge made two rulings central to the present appeal. With respect to donning and doffing, the court concluded that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant" and thus "are

not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities." *Tum v. Barber Foods Inc*., 2002 WL 89399, at *9, 10 (D. Me. 2002); Pet App. 36a-37a, 40a. With respect to walking and waiting time, the court ruled that Barber Foods

> is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

Id. at *8; Pet. App. 33a-34a.

A trial was held on the amount of time reasonably spent engaged in donning and doffing the required clothing and equipment in the relevant job categories and whether that time was *de minimis*. The jury found that the combined donning and doffing times ranged from one minute for rotating associates to two minutes sixteen seconds for set-up operators and determined that this time was *de minimis*. Petitioners appealed.

The First Circuit affirmed. 331 F.3d 1 (1st Cir. 2003). A petition for rehearing was granted, the original judgment was vacated, and a new opinion issued, again affirming the district court in all respects. *Tum v. Barber Foods, Inc*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. The court of appeals agreed that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and, in the absence of the jury's *de minimis* finding, would have been compensable, *Id*. at 279, Pet. App. 7a, but concluded that all of the other activities at issue in the case, including the donning and doffing of non-required gear, time

spent waiting to obtain required clothing and gear and to punch in at time clocks after donning such gear, and time spent walking to and from the employees' work stations after donning and before doffing required gear, were preliminary and postliminary activities exempted from compensation by the Portal-to-Portal Act. *Id*. at 280-82; Pet App. 8a-12a. Petitioners filed a petition for certiorari which was granted in part.

SUMMARY OF ARGUMENT

1. Barber Foods' employees are paid from the time they punch in at time clocks at the beginning of the shift until they punch out at time clocks at the end of the shift. The time clocks are located on the production floor, which is on the second floor of the facility, in close proximity to the work areas. Before entering the production floor all employees must have on certain safety and sanitary equipment. This clothing and equipment is obtained from distribution stations or retrieved from lockers, both of which are located on the first floor.

2. The First Circuit held that the time employees spend walking to and from the time clocks after obtaining required clothing and equipment and before doffing the same is noncompensable preliminary and postliminary activity. This ruling is clearly correct. It is a straightforward application of the plain terms of the statute, and achieves a result most consistent with the underlying purpose and intent of the Portal Act.

Section 4(a)(1) of the Act provides that employers are not obligated to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" where such walking "occur[s] either

prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(1). The principal activity that the employees are "employed to perform" is processing chicken, not donning and doffing clothing and equipment. The "actual place of performance" of this activity is the production floor, not the distribution stations or locker rooms. Thus, by a straightforward application of the plain and ordinary meaning of the language of the statute, the time spent walking to and from the time clocks after obtaining required clothing and equipment and before doffing that gear is not compensable.

The interpretive regulations confirm this reading of section 4(a)(1). They state that "[t]he 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'", 29 C.F.R § 790.8(a), and define the 'workday' as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Id*. § 790.6(b). The regulations also describe the 'workday' as the period "from whistle to whistle", *id*., § 790.6(a), and state that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time his 'workday' commences at the time he reports there." *Id*. § 790.6 (b). There is a great deal of flexibility and personal discretion among employees as to when they arrive at the plant and when they don and doff their gear. The only specific requirement is that they be on the line ready to go when the shift starts and even as to that requirement there is a 12-minute 'swing period'. "From whistle to whistle" in this case is the start and stop of the scheduled shift, from the time the employees punch the clock in the production area until they punch it to leave, when they are performing the principal

activity – processing chicken – which they are "employed to perform." Section 4(a)(1) expressly exempts from mandatory compensation all walking to and from that point.

Petitioners argue that the First Circuit's decision violates the 'continuous workday' rule. The Portal Act does not affect the computation of hours worked within the workday. In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that ". . . activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id*. at 256. In this case, it has been determined that the donning and doffing of required gear is an integral and indispensable part of the principal activities. Pet. App. 7a. Therefore, Petitioners argue, the workday must be bounded by these activities and any walking that occurs after donning and before doffing occurs during the workday and is outside of the scope of Section 4(a)(1). They contend that this conclusion is compelled by the regulations and the *Steiner* decision.

There are several flaws in this argument. First, it reads too much into the *Steiner* decision. *Steiner* involved the application of the provisions of Section 4(a)(2) and did not address the issue of when the workday commences for purposes of determining the compensability of pre- and post-shift walking under Section 4(a)(1). This Court expressly stated that its holding concerning the compensability of pre- and post-shift activities which are "an integral and indispensable part of the [employees'] principal activities" did not include activities which are "specifically excluded by Section 4(a)(1)." *Id*. at 256. Second, the First Circuit

decision neither rejects nor violates the 'continuous workday' principle; it simply disagrees with Petitioners as to when that workday commences under the circumstances of this case. Petitioners argue that once it was determined that donning and doffing of required gear is an integral and indispensable part of the principal activities, it necessarily must follow that the workday is bounded by the donning and doffing activities. However, the interpretive regulations clearly contemplate that walking to and from "the actual place of performance of the specific work the employee is employed to perform" may be noncompensable even if it occurs between compensable donning and doffing. 29 C.F.R. § 790.7(g) n.49. Third, to include the walking involved in this case within the compensable workday would undermine the primary purpose of the Portal Act, which was to exempt from compensation the time spent walking from the plant entrance to an employee's workstation. As Judge Boudin observed in his concurring opinion, "the situation does bear an uncanny resemblance to that which prompted the Portal-to-Portal Act." Pet. App. 19a.

3. The First Circuit also determined that the time employees may spend in line to obtain required clothing and gear is noncompensable preliminary activity. "If an employee is required to report at the actual place of performance of his principal activity at a certain specific time", his compensable workday commences at that time and place. 29 C.F.R. § 790.6(b). The only requirement in this case is that the employees be on the line at their workstations ready to go when the shift starts and even as to that requirement they are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. Depending upon when they arrive at the plant, some may experience a short wait to obtain their gear while others

do not have to wait at all. The interpretive regulations clearly contemplate that some pre-shift waiting time is to be regarded as noncompensable preliminary activity. *Id*. §§ 790.7(g), 790.8(c). Consistent with the intent of the regulations and the underlying purpose of the Portal Act which, in addition to its specific exemption for walking and traveling time, was "intended to relieve employers from liability for preliminaries, most of them relatively effortless, that were thought to fall outside the conventional expectations and customs of compensation," *Reich v. New York City Transit Authority*, 45 F.3d 646, 649 (2nd Cir. 1995), the First Circuit correctly concluded that time spent waiting to obtain required clothing and gear is noncompensable preliminary activity.

ARGUMENT

I. Scope and Coverage of the Portal Act

The Fair Labor Standards Act requires an employer to compensate employees for all of the time which the employer requires or permits employees to work. 29 U.S.C. § 201 *et seq*. "Work" under the FLSA has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Waiting time may also be work when an employee is "engaged to wait" instead of "wait[ing] to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Generally, work under the FLSA includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

In *Mt.Clemens*, the Court held that walking to and from time clocks located near the plant entrance to the employees' workstations before and after the regular shift was compensable work. 328 U.S. at 690-91. *Mt. Clemens* also held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal work activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id*. at 692-93.

The Portal Act was enacted in response to the *Mt. Clemens* decision. Under Section 4 of the Act, employers are not obligated to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," § 4(a)(1), or for "activities which are preliminary or postliminary to said principal activity or activities," § 4(a)(2), where such traveling or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a).

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court held that activities performed either before or after the regular shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)," *Id*. at 256. As an activity "specifically excluded by Section 4(a)(1)," walking to and from the actual place of performance

of the principal activity an employee is employed to perform is expressly excluded from the scope of the *Steiner* holding.

With respect to activities other than walking or traveling which are performed before or after the regular shift, an activity may be a noncompensable preliminary or postliminary activity under section 4(a)(2) even though it is compensable work in the absence of the Portal Act. In other words, the fact that an activity may constitute "work" under the *Tennessee Coal* definition does not necessarily mean that the activity must be either a principal activity or integral and indispensable to a principal activity. A primary objective of section 4 was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable "should [they] continue to be tested solely by existing criteria for determining compensable worktime," 29 C.F.R. § 790.4(a)(1), and the only possible reason such activities would be otherwise be compensable is if they constituted "work". *See also, id*. § 790.2(a) (Section 4 "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to which they might otherwise be subject under the [FLSA]"); *Id*. § 790.4(a)(Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA]"). Thus, with respect to activities taking place before and after the regular shift, the concepts of "work" and noncompensable preliminary or postliminary activities are not mutually exclusive.

II. The Time that Employees Spend Walking to and From the Production Floor after Obtaining Required Clothing and Equipment and before Doffing that Gear is Not Compensable under Section 4(a)(1) of the Portal Act.

A. Nature of the Walking Time at Issue

Barber Foods' employees are paid from the time they punch in at time clocks at the beginning of the shift until they punch out at time clocks at the end of the shift. The time clocks are located on the production floor, which is on the second floor of the facility, in close proximity to the work areas. Before entering the production floor, all employees must have on certain safety and sanitary equipment. This clothing and equipment is obtained from distribution stations or retrieved from lockers, both of which are located on the first floor.[1] Petitioners contend that they are entitled to compensation for the time spent walking from the first distribution station to the time clocks at the beginning of the shift and from the time clocks to the point where the last item of required gear is doffed at the end of the shift, including any walking to or from the locker rooms. Before discussing the compensability of this walking time, it is necessary to correct a misconception concerning the nature of the walking time at issue in this case.

Petitioners repeatedly refer to the donning and doffing 'process', describe the walking at issue as part of that 'process', and assert that the walking is necessitated by and undertaken "solely in order to complete the required donning

1. The physical layout of the production floor and the first floor with production areas, entrances and exits, time clocks, equipment cage, and other referenced locations identified, is set forth in Trial Exhibits 1 and 2.

and doffing." Pets. Br. 13, 37. This is not so. The walking in this case is necessitated by the fact that the plant entrance is on the first floor and the production area is on the second floor. Some of the walking may take place after donning and before doffing, but the same path to and from the production floor must be traversed in any event and the walking is in no way necessitated by or undertaken in order to complete any required donning or doffing.

There are two hallways and sets of stairs by which employees may proceed from the plant entrance to the production floor. The so-called distribution stations, which consist of coat racks, tubs, and an equipment cage are located in one hallway.[2] The stairwell to the production floor is right beside the equipment cage window, which is right around the corner from the coat racks and tubs. The laundry and trash bins into which discarded items are placed post-shift are located along both hallways. An employee who obtains items from the coat racks, tubs and cage on his way to the floor before his shift and who discards items in the laundry and trash bins on his way from the floor after his shift has not walked any further then someone who walked to and from the floor without obtaining, donning, doffing or discarding anything. An employee who uses a locker does make a slight detour from these paths, but the detour is truly slight and, in any event, the lockers are provided for the convenience of the employees and their use is optional. The walking in this case may follow donning and precede doffing, but it is not necessitated by or undertaken in order to complete any required donning or doffing.

---

2. Items such as gloves, sleeve covers, and aprons, optional for all employees except those who work in the meatroom, are also available from tubs located in the production areas, but the employees are already punched in and on the clock at that point.

B. The Plain Language of Section 4(a)(1) Expressly Excludes the Walking Time at Issue from Compensable Working Time.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1944). Section 4(a)(1) of the Portal Act provides that employers are not obligated to compensate employees for "walking . . . to and from the *actual place of performance* of the principal activity or activities which such employee is *employed to perform*," 29 U.S.C. § 254(a)(1), where such walking "occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, *such* principal activity or activities." *Id*. § 254(a)(emphasis supplied). A straightforward application of the plain and ordinary meaning of this statutory language excludes from compensable working time the walking at issue in this case.

To be exempted from compensable working time, the walking must occur before the employee commences or after he ceases "such" principal activity or activities. The adjective "such" is clearly referring to the "principal activity or activities" described earlier in the section, those which the employee is "employed to perform." The term "principal" is not defined in the statute, but its most common definition is "chief" or "most important." *See*, *Webster's New Universal Unabridged Dictionary* 1430 (2nd Ed. 1983). Giving the term its common definition, the principal activity that the employees are "employed to perform" is processing chicken, not donning and doffing clothing and equipment. The "actual place of performance" of this principal activity is the production floor, not the coat racks or equipment cage. Thus,

by its plain and ordinary terms, section 4(a)(1) expressly exempts from compensable working time, the time that employees spend walking from the plant entrance to and from the production floor, where they punch in to start their compensable workday and punch out to end it.

C. The Interpretive Regulations Confirm that the Primary Purpose of Section 4(a)(1) Was to Exclude from Compensable Working Time an Employee's Travel between the Plant Entrance and the Workstation Where He Performs the Specific Work He Is Employed to Perform, Prior to the Beginning and Subsequent to the End of His Scheduled Shift.

The interpretive regulations confirm that the primary purpose of Section 4(a)(1) is to exempt from compensable working time an employee's travel at the beginning and end of the shift between the plant entrance and the location in the plant where he engages in the specific work he is employed to perform. They provide that "[t]he 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'," 29 C.F.R. § 790.8(a), and define the workday as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Id.* § 790.6(b). The regulations also describe the 'workday' as the period "from whistle to whistle", *id*. § 790.6(a), and state that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there." *Id*. § 790.6(b). The inclusion of the phrase "actual place of performance" in section 4(a)(1):

> thus *emphasizes* that the ordinary travel at the beginning and end of the workday to which this

> section relates includes the employee's *travel on the employer's premises until he reaches his workbench* or other place where he commences the performance of the principal activity or activities, *and the return travel from that place at the end of the workday.*

Id. § 790.7(e)(emphasis supplied). Another regulation notes that both the statutory language and the legislative history indicate that the walking to which Section 4(a)(1) refers "is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and *the actual place where he does what he is employed to do*." *Id.* § 790.7(c)(emphasis supplied). *See also, id*. § 790.7(f)(1).

Petitioners contend that where, as in this case, it has been determined that the donning and doffing of required clothing and equipment is an integral and indispensable part of the employee's principal activities, the workday must invariably commence with the performance of those activities and the "actual place of performance" of those activities are the locations where employees don and doff required gear, thus excluding from section 4(a)(1)'s reach any walking that occurs after donning and before doffing.[3] However, the interpretive regulations clearly contemplate that Section 4(a)(1) may exempt walking to and from "the actual place of performance of the specific work the employee is employed to perform" even if it occurs between compensable donning and doffing. *Id*. § 790.7(g) n.49. Section 4(a)(1) refers to walking to and from "the actual place of performance of the *principal activity or activities* which such employee is employed to perform." Footnote 49 refers to "the actual place

3. A more extensive response to this 'continuous workday' argument is contained in Section II.E of the brief, *infra* at 24-32.

of performance of the *specific work* the employee is employed to perform." By paraphrasing the statutory language and substituting the words "specific work" for the term "principal activity or activities", the regulation clearly equates "principal activity or activities," as used in section 4(a)(1), with the "specific work" the employee is employed to perform and distinguishes that "specific work" from compensable donning and doffing, thus recognizing that donning and doffing of required clothing, even if integral and indispensable to the principal activity, is not necessarily the principal activity or activities to which section 4(a)(1) refers, and that the "actual place of performance" referred to in that section is the place where the employee performs the specific work he is employed to perform, not the location where he dons and doffs required clothing. Section 4(a)(1) was intended to exempt from compensable working time the walk to and from that place at the beginning and end of the workday.

There is a great deal of flexibility and personal discretion among employees as to when they arrive at the plant and when and where they don and doff their gear. The only specific requirement is that they be on the line ready to go when the shift starts and even as to that requirement there is a 12-minute 'swing period'. The workday in this case is the period "[f]rom whistle to whistle," from the time the employees punch in to start the shift until they punch out to end it, *id*. § 790.6(a), when they are required to be on the line ready to work. *Id*. § 790.6(b). Their principal activity, the specific work they are employed to perform, is processing chicken, and the actual place of performance of that principal activity is the production floor. *Id*. § 790.7(c), (e), (f)(1), (g) n.49. Section 4(a)(1), as confirmed by the interpretive regulations, exempts from compensable working time the walk to and from that place at the beginning and end of the workday.

D. The Legislative History of the Portal Act Confirms that the Primary Purpose of Section 4(a)(1) was to Exclude from Compensable Working Time an Employee's Travel Between the Plant Entrance and the Workstation where He Performs the Specific Work He is Employed to Perform, Prior to the Beginning and Subsequent to the End of his Scheduled Shift.

In *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946), the Court held that walking to and from time clocks located near the plant entrance and the employees' workstations before and after the regular shift was compensable work. *Id*., at 690-91. Observing that "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and that the employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business," the Court reasoned that it necessarily followed that the time spent walking to and from the employees' workstations constituted compensable work under the definition enunciated by the Court in the *Tennessee Coal* case. *Id*. at 691. The Court also held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id*. at 692-93.

The Portal Act was enacted in response to the *Mt. Clemens* decision. The immediate impetus for the Act was the need to address the flood of litigation prompted by

the decision that if allowed to proceed would create "wholly unexpected liabilities, immense in amount and retrospective in operation." 29 U.S.C. § 251(a). In response to an inquiry as to whether "the purpose of the legislation is to set aside the decision of the United States Supreme Court . . . as to what constitutes compensable work," Senator Donnell, one of the primary sponsors of the legislation, responded:

> The occasion was that in the Mount Clemens case various activities, including walking time and preliminary time, have been held by the Court to be compensable, notwithstanding contrary custom or contract as to the walking time . . . It was exactly as the Senator has said, in order to set aside, annul, and forever cancel and make void these suits which have been filed based upon that decision of the Supreme Court, that this legislation is before us.

93 Cong. Rec. 2306 (1947). Section 2 of the Act dealt with existing claims. It relieved employers from all liability under the FLSA for any activity that occurred before the enactment of the Portal Act unless the activity was compensable pursuant to contract or custom. 29 U.S.C. § 252. The sponsors felt that "the best way and the only practicable way . . . to legislate out of existence these portal-to-portal claims was to make the part of our bill which applies to existing claims applicable to the entire 24 hours of the day." 93 Cong. Rec. 2132 (statement of Sen. Donnell). With respect to those claims, "if the activity for which the worker claims compensation was not compensable under a custom or contract, the employee cannot recover minimum wages, cannot recover overtime compensation, cannot recover liquidated damages," *id*. at 2295 (statement of Sen. Cooper), no matter when that activity was performed.

The sponsors of the Act also recognized that "it was necessary to legislate as to the future. If we did not, the same conditions which prevail today would occur again, with all the resulting uncertainty, with all the resulting litigation." *Id*. at 2293 (statement of Sen. Cooper). Thus, they decided to "recommend legislation, addressing itself to the future, the prospect of which would be to prevent a recurrence of the conditions which now confront the country; and . . . to establish for the first time some standards or criteria . . . in determining what activities should be compensable under the act." *Id*. at 2296 (statement of Sen. Cooper). Section 4 of the Act addresses future claims. Unlike Section 2, which applied to all activities throughout the 24 hour period, Section 4 applies "only to the period preceding the beginning of the normal workday and subsequent to the end of the normal workday." *Id*. at 2132 (statement of Sen. Donnell). Within the scheduled workday itself, "[e]very right that a worker has secured under the [FLSA] up to the Mount Clemens decision is preserved to him." *Id*. at 2297 (statement of Sen. Cooper).

There is little question that the primary target of Section 4 was the activity that triggered the perceived crisis in the first place – the compensability under *Mt. Clemens* of the walk from the plant entrance to and from the employee's workstation, where he performs the work he is employed to perform, at the beginning and end of his scheduled shift. Congress clearly intended to exclude that walk from compensable working time in the future. The very fact that walking time is dealt with in a separate subsection apart from all other preliminary and postliminary activities is evidence of its primacy among Congressional objectives. The Senate Report expressly states that the Act excludes "[t]he following

activities outside the workday" from compensable working time:

> [w]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out, [including] walking . . . from the plant gate to the employee's lathe, workbench, or other actual place of performance of his principal activity or activities.

S. Rep. No. 80-48, at 47. Senator Cooper, one of the principal proponents of the bill on the floor of the Senate, stated that "[w]alking, riding or traveling time to the place where the principal activities are performed has been eliminated as a principal activity," 93 Cong. Rec. 2297, and emphasized that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or travel time to the *actual* place of performance where he begins his *actual* activities." *Id*. (emphasis supplied). The inclusion of the phrase "actual place of performance" in Section 4(a)(1) was meant to emphasize that the walking to which the section refers is the employee's walk to and from "the actual place where he does what he is employed to do." 29 C.F.R. § 790.7(c). The actual place where a Barber Foods employee does what he is employed to do is his workstation on the production floor. Section 4(a)(1) was intended to exempt from compensable working time the walk to and from that point.

Section 4(a)(1) was intended to exclude from compensable working time all walking on the employer's premises before and after "the workday proper, as generally understood in common parlance." 93 Cong. Rec. 2182 (statement of Sen. Donnell) (Section 4 "does not legislate at all with respect to the period of the workday proper, as generally understood in common parlance . . . It does apply to the time spent in walking or traveling up to that point, or after leaving that point.") Numerous references in the legislative history demonstrate that Congress understood the "workday proper, as generally understood in common parlance" to mean an employee's regular, scheduled shift, the period "from whistle to whistle", when he is required to be at his workstation ready to work. *See, id*. at 2132 (Section 4 applies to the period "preceding the beginning of the normal workday and subsequent to the end of the normal workday – what might be termed the whistle-to-whistle period.") (statement of Sen. Donnell); *id.* at 2181 ("the regular working day period, the time from the whistle in the morning to the time of the whistle in the afternoon.") (statement of Sen. Donnell); *id*. at 2299 ("in the period of the scheduled workday the committee did not legislate.") (statement of Sen. Cooper); *id*. at 2362 (Section 4 "leaves untouched the workday proper, or what I may roughly term the time between whistle time in the morning and whistle time in the afternoon.") (statement of Sen. Donnell). The "workday proper" in this case, the "normal" workday, the "scheduled" workday, the "whistle-to-whistle period", is the time between when the employees clock in to start their scheduled shift until they clock out to end it. Section 4(a)(1) was intended to exempt from compensable working time "the time spent in walking or traveling up to that point, or after leaving that point." *Id*. at 2182.

E. The First Circuit's Decision is not Contrary to the Continuous Workday Principle.

1. Petitioners argue that the First Circuit's decision is contrary to the 'continuous workday' principle. The argument is as follows: The Portal Act does not affect the computation of hours worked within the workday, during which an employee's compensable time runs uninterrupted except for bona fide breaks. The workday is bounded by the employees' first and last principal activities. Principal activities include all activities which are an integral and indispensable part of those activities. The First Circuit held that the donning and doffing of the clothing involved in this case is an integral part of the employees' principal activities. Therefore, the workday is bounded by these activities and any walking that occurs after donning and before doffing takes place during the workday. Since the walking occurs within the workday, it is outside the scope of the Portal Act and is compensable in accordance with the general principle that once the workday has begun, an employee's compensable time runs continuously throughout that workday except for bona fide breaks.

2. Petitioners contend that this conclusion is compelled by the Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956). This argument would extend *Steiner* far beyond its limited scope. In *Steiner*, the Court held that activities performed either before or after the regular shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)." *Id.* at 256. *Steiner* involved the application of the provisions of section 4(a)(2), which deals with preliminary and postliminary activities other than walking. The Court did not address the issue of when the workday commences for

purposes of determining the compensability of pre- and post-shift walking under Section 4(a)(1). Indeed, the Court expressly stated that its holding concerning the compensability of pre-and post-shift activities that are "an integral and indispensable part of the [employees'] principal activities" did not include activities which are "specifically excluded by Section 4(a)(1)." To argue, as Petitioners do, that *Steiner* necessarily means that the performance of an employee's first integral and indispensable activity, no matter where or when performed or how long it takes, invariably removes any subsequent walking to the employee's actual workstation before the start of his regular shift from the scope of Section 4(a)(1)'s exemption is to ascribe to the *Steiner* Court an intent to overturn by implication and without discussion the primary purpose of the Portal Act – to exempt from compensable working time an employee's travel between the plant entrance and his workstation, where he performs the specific work he is employed to perform, at the beginning and end of his scheduled shift – even though the Court never mentioned walking time and expressly excluded activities covered by Section 4(a)(1), *i.e.*, walking and traveling, from the scope of its ruling.

3. Petitioners argue that "integral and indispensable" activities and "principal" activities are one and the same for any and all purposes. As the Department of Labor puts it in its *amicus* brief:

> An activity that is an integral and indispensable part of a principal activity is either a "principal activity" under the Portal Act or it is not. It cannot be a principal activity for purposes of determining the compensability of that activity and not a

> principal activity for purposes of determining the compensability of *subsequent* walking.

DOL Br., at 15 (emphasis in original). However, the principle is not as absolute as Petitioners and the Department would have it. The Department's own interpretive regulations clearly contemplate that Section 4(a)(1) may exempt walking to and from "the actual place of performance of the specific work the employee is employed to perform" even if it occurs between compensable donning and doffing. 29 C.F.R. § 790.7(g) n.49. By paraphrasing the language of Section 4(a)(1), while substituting the words "specific work" for the term "principal activity or activities," the regulation clearly equates "principal activity or activities", as used in Section 4(a)(1), with the "specific work" the employee is employed to perform and distinguishes that "specific work" from compensable donning and doffing, thereby acknowledging that donning and doffing of required clothing, even if considered an integral and indispensable part of the employee's principal activities, is not necessarily the principal activity to which Section 4(a)(1) refers, and that the "actual place of performance" referred to in that subsection is the place where the employee performs the specific work he is employed to perform, not the location where he dons and doffs required clothing. In other words, donning and doffing may be an integral part of the principal activity for purposes of determining the compensability of the donning and doffing and not a principal activity for purposes of determining the compensability of subsequent walking under Section 4(a)(1). The Department responds that "[a]t most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking

time falls outside the Portal Act." DOL Br., at 20. If this case is not one of those circumstances, it is hard to imagine one that is. The employees must traverse the same path from the plant entrance to the production floor in any event. Normally, that walk would be noncompensable. S. Rep. No. 80-48, at 47 (1947); 29 C.F.R. § 790.7(e), (f)(1). It is difficult to discern why it should be rendered otherwise simply because the employees have picked up and donned some clothing along the way, especially where the time actually spent donning the clothes is minimal.

In *Reich v. IBP*, 38 F.3d 1123 (10th Cir. 1994), the Tenth Circuit upheld a ruling that walking to and from employees' principal work stations was not a compensable activity even though it occurred between compensable donning and doffing. Citing the "considerable flexibility and personal discretion" with regard to when, how, and where employees donned their gear and then proceeded to their work stations, the Tenth Circuit agreed that the donning and doffing activities, even though compensable, did not constitute the first and last principal activities for purposes of determining the parameters of the compensable workday. *Id*. at 1127. *Contra*, *Alvarez v. IBP, Inc.*, 339 F.3d 894, 906-07 (9th Cir. 2003).

Courts have also recognized in other contexts that the performance of the first and last compensable activities of the day do not invariably form the boundaries of the 'continuous workday', within which everything is compensable. In a series of cases involving law enforcement canine unit personnel, courts have almost uniformly denied compensation for commuting time to and from work with trained police dogs even though the commute occurs after the performance of the officers' first compensable activities of the day and before the performance of their last

compensable activities of the day. *See*, *e.g.*, *Reich v. New York City Transit Authority*, 45 F.3d 646, 650-51 (2nd Cir. 1995); *Bobo v. United States*, 136 F.3d 1465, 1467-68 (D.C. Cir. 1998); *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999). In these cases, the plaintiffs typically spent several hours each day pre-and post- shift at their homes caring for their assigned dogs. Every case has found these activities to be integral and indispensable to the plaintiffs' principal activities as law enforcement officers and thus compensable. *See*, *Reich*, 45 F.3d at 651 ("walking, feeding, training, grooming, and cleaning up are integral and indispensable parts of the handler's principal activities and are compensable work."). Despite finding that these activities are compensable, the courts, with few exceptions, have rejected the argument that these compensable activities necessarily form the boundaries of the compensable workday so as to render the commute compensable because it follows the first and precedes the last compensable activities of the day. The explanation of the court in *Andrews v. DuBois*, 888 F. Supp. 213 (D. Mass. 1995) is typical:

> Although this reasoning makes sense temporally - the transportation of the dogs takes place after the officers have begun their principal duties and ends before they complete them – it nevertheless defies both the plain language of the statute and common sense . . . [T]he Act explicitly states that commuting time is not compensable . . . Moreover, common sense tells us that employees should not be compensated for doing what they would have to do anyway – getting themselves to work.

Id. at 218. Likewise, Section 4(a)(1) expressly excludes from compensable working time the walk to and from the employee's actual place of performance of the principal

activity he is employed to perform at the beginning and end of the day. In this case, the employees would have to walk from the plant entrance to the production floor where they perform this work even if they were not required to wear anything other than their normal street clothes. Common sense dictates that they do not have to be compensated for doing what they would have to do anyway – walk to the production floor – even if that walk may be preceded by compensable donning.

Petitioners will no doubt argue that the canine unit cases are distinguishable because they involve travel between home and work while the present case involves walking entirely on the employer's premises. However, under the logic of their continuous workday argument, this is a distinction without a difference. Petitioners' argument is that the first and last compensable activities of the day invariably form the bounds of the continuous workday, within which everything is compensable. Under this logic, it should make no difference where the activity takes place as long as it is compensable. If one starts to make such distinctions, it is an acknowledgment that the principle is not, in fact, as absolute and invariable as Petitioners would have it. As the canine unit cases illustrate, the first and last compensable activities do not necessarily and invariably, regardless of context, form the boundaries of the compensable workday.

4. The Department of Labor itself has long recognized that the 'continuous workday' does not invariably begin and end with the performance of the first and last compensable activities, regardless of context or circumstances. This recognition is reflected not only in its interpretive regulations, *see* § 790.7(g) n.49, but also in an opinion of the Administrator of the Wage and Hour Division issued long

before the enactment of the Portal Act. *See, Report on Hours Worked in Underground Metal Mining,* U.S. Department of Labor, Wage and Hour Division (March 15, 1941), *reprinted in A Bill to Exempt Employers from Liability for Portal-to-Portal Wages in Certain Cases, and for Other Purposes: Hearings on S.70 Before the Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 1st Sess. 517 (1947).[4] In that opinion, the Administrator took the position that a miner's compensable workday started when he reported for duty as required at the collar of the mine even though he had previously engaged in compensable work activities at a different location on the employer's premises, explaining as follows:

> [B]efore the miner reports at the collar ready to descend into the mine he may pick up tools, carbide, or a lamp, and he may receive instructions from his superior as to the day's work . . . There appears to be no doubt that the time spent in each of these activities should be construed as "hours worked." However, each of them normally is extremely minor and takes only a moment or two and the total seldom exceeds 2 or 3 to 5 minutes . . .[B]ecause of the extremely minor nature of these operations it would appear unwarranted to state that the working day actually begins with the first such activity and includes all time thereafter . . . It would therefore appear proper to hold that the total time consumed in performing these operations should be considered within hours worked but that the total elapsed time

4. This opinion is referenced in both the majority and dissenting opinions in *Tennessee Coal*, 321 U.S. at 592-3 n.3, 613.

> from the first such operation should not normally be so considered.

Id., at 523. Thus, the Department itself has long rejected the absolute, bright-line rule urged by Petitioners that the continuous workday must necessarily and invariably, under any and all circumstances, begin and end with the performance of the first and last compensable activities.

5. Petitioners argue that the First Circuit's decision would "create a markedly *discontinuous* workday", Pets. Br. 24 (emphasis in original), and raise the specter that "employees' right to compensation would start and stop repeatedly through the workday as, for example, they walked from one chicken processing station to the next." *Id*., at 11. Their concern is unwarranted. The decision neither rejects nor violates the 'continuous workday' principle; it simply disagrees with Petitioners as to when that workday begins. The primary purpose of Section 4(a)(1) of the Portal Act was to exempt from compensable working time an employee's travel between the plant entrance and his work station, where he performs the specific work he is employed to perform, at the beginning and end of his scheduled shift. The decision recognizes and furthers that intent. On the other hand, as the First Circuit observed, Petitioners' expansive view of the 'continuous workday' principle – that the workday, for all purposes, invariably begins and ends with the first and last compensable activities, under any and all circumstances and regardless of context – "pushes so far that it threatens to undermine the Portal-to-Portal Act." Pet. App. 10a. This position is contradicted by the express language of the statute, relevant case law, the interpretive regulations, and a long-standing opinion of the Administrator of the Wage and Hour Division. The First Circuit correctly rejected it.

This expansive view of the 'continuous workday' principle would also lead to absurd results. In the absence of any donning, walking from the plant entrance to the production area on the second floor is noncompensable. 29 C.F.R. § 790.7(e), (f)(1). In order for an employee to get to his work station, that path must be traversed in any event. It is difficult to discern why that noncompensable walk should become compensable merely because the employee has donned some required clothing. According to the Petitioners, the first and last compensable activities, no matter how minimal or when or where performed, form the boundaries of the "workday" within which the provisions of the Portal Act do not apply. Under this view, an employee who is required to wear only a hardhat and who picks that hardhat up and dons it at the plant entrance must be paid for his walk to his workstation while another employee who works right beside him but is not required to wear a hardhat need not be paid for that same walk. Post-shift, Barber Foods' employees doff their clothing at various points en route from the production floor to the plant exit. Some employees drop their items in the first bin right outside the production floor while others use the last bin before the plant exit. Under the rule urged by Petitioners, the employee who drops her items in the first bin ends her compensable workday at that point while the employee who walks by her and does not discard her items until the last bin next to the plant exit gets paid for the entire walk. What if the maintenance personnel place the first or last bin 50 feet further up or down the hall on any particular day? Has the compensable workday lengthened or shortened by that amount? Such distinctions make no sense. As the First Circuit recognized, the position advanced by Petitioners "threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability." Pet. App. 10a.

F. The Walking Time at Issue is not Integral and Indispensable to the Employees' Principal Activities

The previous section discussed the flaws in Petitioners' argument that the walking time in this case is compensable because it is part of the 'continuous workday'. Petitioners also argue that the walking time is integral and indispensable to the employees' principal activities and thus is compensable regardless of whether it occurs during the workday.

The walking in this case is necessitated by the fact that the plant entrance is on the first floor and the production area is on the second floor. Some of the walking may take place after donning and before doffing, but the same path to and from the production floor must be traversed in any event. In the absence of any pre-shift donning, the walk from the plant entrance to the work stations on the production floor clearly would be noncompensable. 29 C.F.R. § 790.7(e), (f)(1). It does not make any difference that the walk is necessary in order to be able to perform the employees' principal activities or undertaken solely for the employer's benefit. Those are the reasons that the walk from the plant entrance to the work stations was held to be compensable work in *Mt. Clemens* and that holding was the precise target of Section 4(a)(1) of the Portal Act. "Walking, riding, or traveling time to the place where the principal activities are performed has been eliminated as a principal activity." 93 Cong. Rec. 2297 (statement of Sen. Cooper)

The only possible argument in favor of the compensability of any portion of this walk is that the "actual place of performance of the principal activity or activities which such employee is employed to perform" is located someplace before the employees' work stations. Petitioners

argue that is the case here. According to Petitioners, donning is the first principal activity and the place of performance of that activity is the initial distribution station. Even so, the walk from the plant entrance to that location is clearly excluded by Section 4(a)(1). With respect to the walk from that point to the production floor, its compensability depends entirely upon the premise that the donning activities are the "principal activity or activities which [the] employee is employed to perform," referred to in Section 4(a)(1), the performance of which starts the compensable workday and following which everything is compensable. If they are not, the actual place of performance of the principal activities is the production floor – it cannot be elsewhere – and walking to that point "has been eliminated as a principal activity" by Section 4(a)(1). In other words, although differently labeled, Petitioners' 'integral and indispensable' argument is virtually indistinguishable from and entirely dependent upon their 'continuous workday' argument, the flaws of which have already been discussed.

III. The Time that Employees May Spend Waiting in Line to Obtain Required Clothing and Equipment is not Compensable under Section 4(a)(2) of the Portal Act

The First Circuit ruled that the time that employees may spend in line waiting to obtain their clothing and equipment is not compensable. Observing that "the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary", the court of appeals held that "a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." Pet. App. 12a. This holding was correct.

1. The interpretive regulations clearly contemplate that a reasonable amount of waiting time was intended to be noncompensable preliminary activity. Examples include "checking in and out and waiting in line to do so" and "waiting in line to receive paychecks." 29 C.F.R. § 790.7(g). Another regulation specifically states that "checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." *Id*. § 790.8(c). The examples given in the interpretive regulations are meant to be illustrative, not exclusive. As the First Circuit stated, "while the Code does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary." Pet. App. 12a.

The Department reads the regulations to mean only that when the wait is connected with a preliminary activity, rather than with a principal activity, the wait itself is generally considered preliminary as well. DOL Br. 29. However, there is no meaningful distinction in fact or logic between waiting in line to check in and punch a time clock and waiting in line to obtain required clothing and equipment. Both occur before the employee proceeds to the production floor where he performs the work he is employed to perform and in either case, if there is a wait, the time is generally not spent primarily for the convenience of the employee. In Petitioners' view, this would be enough to make them both integral and indispensable to the principal activity. Yet, the regulations provide that waiting in line to check in should normally be considered preliminary activity. Consistent with the general intent evidenced by the regulations, that a reasonable amount of waiting time may be considered noncompensable preliminary activity, there is no reason to treat waiting in line to obtain clothing and equipment any differently.

2. Petitioners contend that any waiting involved in obtaining clothing and equipment is compensable because the employees are "engaged to wait." Waiting time is compensable work under the FLSA when an employee is "engaged to wait" rather than waiting to be engaged. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Generally, an employee is considered to be engaged to wait when the "time is spent predominantly for the employer's benefit," *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944), and cannot be used effectively for the employee's own purposes. 29 C.F.R. § 785.15. The 'engaged to wait' principle recognizes that although work generally had been defined as including "physical or mental exertion", an employer could also hire an employee to be on call or to be available on the worksite at a specific time to wait for work. This principle has little application to the facts of the present case. Barber Foods employees are not required to arrive at any specific time *before* the start of their scheduled shift. The only requirement is that they be at their workstations wearing the required gear when the shift begins[5] and even this requirement is flexible, with employees being allowed a twelve-minute 'swing period' to clock in. Depending upon when they arrive at the plant and when they decide to obtain their gear, some employees may experience a short wait to obtain their gear while others do not have to wait at all.

In any event, it is not enough to say that the waiting time is compensable work under the FLSA. An activity may be considered "work" and still be a noncompensable preliminary or postliminary activity. The categories of "work" and noncompensable preliminary activities are not mutually exclusive. In other words, the fact that an activity may

5. Barber Foods does not question that any waiting time after this point would be compensable.

constitute "work" under the *Tennessee Coal* definition does not mean that the activity must be either a principal activity or integral to a principal activity. The explicit purpose of Section 4(a) of the Portal Act was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable and the only reason they would otherwise be compensable is if they constituted "work." *See* 29 C.F.R. § 790.4(a)(1):

> The primary Congressional objectives in enacting section 4 [were] to minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the [FLSA] of such preliminary or postliminary activities should continue to be tested solely by existing criteria for determining compensable worktime.

Id. § 790.2(a) (The Act "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to which they might otherwise be subject under the [FLSA]"). *Id*. § 790.4(a) (Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA]"). Thus, even if the minimal waiting time involved in this case can be considered "work", it can still be a noncompensable preliminary activity.

The First Circuit agreed, stating that "[e]ven if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act." Pet. App. 11a. Petitioners argue that the waiting time must be an integral and indispensable activity because, according to them, it is necessary, is

controlled by and directly benefits the employer, and is closely related to the donning activities. Pets. Br. 37-38. Leaving aside whether all of these characterizations are accurate given the considerable flexibility and personal discretion built into the process, the fact that certain pre-shift activities are necessary and benefit the employer does not automatically transform those activities from noncompensable preliminary activities into compensable integral and indispensable activities. Inherent in the very nature of preliminary activities is that they are a necessary prerequisite to the performance of the principal activities and are obviously of some benefit to the employer. To say that any activity which is necessary to the performance of the principal activity and done for the benefit of the employer, which is the *Tennessee Coal* definition of work, cannot be a preliminary activity but must necessarily be an integral and indispensable part of the principal activity, is in effect to transpose the criteria for determining "work" under the FLSA onto the criteria for determining the compensability of preliminary activities under the Portal Act, even though an express purpose of Section 4 of the Act was to create a category of noncompensable preliminary activities that would not be governed by the "existing criteria for determining compensable worktime." 29 C.F.R. § 790.4(a)(1). It would also ensure that every activity that qualifies as "work" must also be deemed integral and indispensable to the principal activity leaving the preliminary category to cover only those activities which do not qualify as "work" in the first place. Congress did not need to enact the Portal Act to accomplish that result, because if the activity is not "work", it is not compensable under the FLSA in any event. Petitioners' argument, which would render Section 4(a)(2) of the Portal Act superfluous, should be rejected.

3. The reality of the workplace is that except for the smallest of employers, it is impossible for all employees to arrive at the place of employment, punch a time clock, and be at their workstations ready to work at exactly the same time, without varying degrees of waiting time. Depending upon when they arrive at the plant, some may have to wait at the time clock and others may not. The situation is similar in this case with regard to obtaining required clothing and equipment. Some employees arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, some don them in the cafeteria, others don them right before entering the production floor, others don them along the way. Some arrive at the plant early and some arrive at the last possible minute. Depending upon when they arrive and the order in which they engage in these activities, some may wait in line to obtain their gear while others do not wait at all. The only requirement is that they be on the line ready to go when the shift starts, and even as to that requirement the employees are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. It was circumstances such as these, where employees have considerable flexibility and personal discretion in their personal routines and may vary individually, and from day to day, in the order in which they engage in these activities, and in which the time spent on such activities itself varies from one day to the next, that led the court in *Reich v. IBP, Inc*. to deny the compensability of waiting and walking time associated with compensable

donning and doffing. 38 F.3d at 1127. As this Court stated in *Mt. Clemens*, in addressing waiting time at time clocks:

> [I]t would have been impossible for all members of a particular shift to be checked in at the same time in view of the rate at which the time clocks were punched . . . It would be manifestly unfair to credit the first person with . . . more working time than credited to the last person due to the fortuitous circumstances of his position in line.

328 U.S. at 690. Similarly, it is impossible for all employees to pick up their gear at the exact same time, and it would be manifestly unfair to credit employees with more or less working time due to the fortuitous circumstance of their position in line. It is in recognition of these realities of the workplace that a reasonable amount of pre-shift waiting time is considered noncompensable preliminary activity.

4. Petitioners respond that the employer is in control of how it organizes its operations and can avoid these uncertainties and potential liabilities by moving the distribution stations to a location beyond the time clocks. True, if necessary, Barber Foods could do that. But how would that benefit anyone? This option would necessarily entail establishing a clock-in time as close to the start of production as possible and prohibiting employees from clocking-in early[6], inevitably resulting in more time waiting in line to punch the time clocks than is now spent waiting in line to obtain gear. The walk would be the same – from the plant entrance to the time clocks at the entrance to the

6. Petitions acknowledge that "[n]othing prevents an employer such as respondent from requiring employees to arrive at the donning area at a specific time shortly before the start of the shift, don their equipment, and proceed immediately to the floor." Pets. Br. 33.

production floor – and would clearly be noncompensable. 29 C.F.R. § 790.7(e), (f)(1). Any waiting time would be at least as much, and likely more, than is presently the case, the only difference being that any waiting time would be concentrated at the time clocks, which is clearly noncompensable, *id.* §§ 790.7(g); 790.8(c), rather than at the distribution stations. The employees would lose much of the flexibility and discretion they now enjoy without any discernible effect on the total walking and waiting time involved, and that walking and waiting time would clearly be noncompensable.

Applying Petitioners' reasoning, the company could make slight adjustments affecting the compensability of any waiting time without making any difference in the total time it takes an employee to punch the time clock and obtain his gear. Take, for example, rotating associates, who comprise the bulk of the workforce. A rotating associate is required to war a lab coat, hairnet, earplugs, and safety glasses. The earplugs and safety glasses are dispensed once and replaced as needed. The same could easily be done with hairnets, dispensing a couple weeks supply in one handful. The earplugs, safety glasses and hairnet could be taken home, carried to work in the employee's pocket, and required to be put on only after donning the lab coat. This leaves the lab coat as the only item that would have to be obtained every day at the plant. The coat racks could then be moved to immediately in front of the time clocks or immediately behind them. The difference in placement would be a matter of a few feet at most. The total time spent waiting in line to either first take a coat off the rack and then punch the time clock, or to first punch the time clock and then take a coat off the rack is virtually the same. The waiting time, if any, is occasioned by the bottleneck created when employees queue

up to perform the first activity in the sequence. According to Petitioners, the waiting time in the first scenario is compensable because it is integral to the principal activity of obtaining required clothing while the waiting time in the second scenario is noncompensable because the employee is waiting to punch a time clock. Such distinctions make no sense.

Barber Foods can restructure its operations to avoid uncertainties and potential liabilities. However, as noted by IBP in the companion case (No. 03-1238), "these decisions would be driven not by a legitimate concern for efficiency, but by an artificial effort to avoid liability for walking [and waiting] time Congress never intended to make compensable." IBP Br. 33. Through years of experimentation and trial and error, the company has arrived at a process that best meets the needs of the employer and the wishes and convenience of the employees. Upsetting this balance that has been mutually arrived at over time would benefit neither the employees nor the employer.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GRAYDON G. STEVENS
KELLY, REMMEL & ZIMMERMAN
53 Exchange Street
Portland, Maine 04112-0597
(207) 775-1020

Counsel for Respondent