

To: Associates  
From: Kimberly Kirkland  
Date: April 27, 2007  
Re: Final Exam

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I met this morning with a prospective client, Rebecca Kang. I'd like you to tell me whether you think we should represent her. Please write me a memo setting forth your analysis of the law and judgment about the viability of a potential lawsuit, **the likely recovery and our ability to recover for our time**. There is no need to provide a separate fact section in your memo.

I describe the facts as I understand them below and I have attached the cases I want you to review. You will also need to consult the Fair Labor Standards Act about damages and recoverability of legal fees. It is available on the casefile.com website or on Westlaw or Lexis. **DO NOT DO ANY OTHER LEGAL RESEARCH. DO NOT CONSULT ANY OTHER RESOURCES.**

Your memo should not exceed five pages, double-spaced, using 12-point font, and at least 1-inch margins. Please put your exam number on each page of your memo. You have 24 hours from the time you pick up the exam to complete it and return it to the Registrar. Any questions should be directed to the Registrar. Do not discuss the contents of this final exam or your answer with anyone until after May 11, 2007. Students are taking this exam at various times throughout the exam period, so others may not have taken the exam when you complete yours.

It has been a pleasure working with all of you this semester. For those of you graduating, congratulations and keep in touch. For those who'll be back next year, have a great summer.

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Rebecca Kang was accepted into a training program at Athleta Adventures, a women's outdoor adventure company. Athleta runs one and two week long outdoor adventure trips all over the world. All trips are specially designed for women. Athleta offers a Surf Safari Adventure in Mexico, rock climbing adventures in the Rockies, biking adventures in Tuscany and Alpine backpacking and canoeing trips in Montana. The Alpine trips in Montana are relevant here.

Athleta's Alpine trips offer women ten-day expeditions through the northern Rocky Mountains of Montana. The "adventurers" (the clients who buy the trips) travel to Butte Montana where they are picked up at the airport and taken to one of three small towns at the base of one of three mountain ranges, the Pioneer Range, the Bitterfoot Range or the Beartooth Wilderness range. From there the adventurers are driven to

approximately 7,000 feet where the adventures begin. The adventurers hike through the selected ranges, backpacking across some "walkup" peaks of about 10,000 feet. The adventurers carry their own camping gear and food supplies. They learn to navigate, make and break camp and prepare food. Each expedition is limited to 20 adventurers and is supervised by 3 guides. The guides must know the mountain ranges well, teach navigation skills and low impact camping principles, and provide first aid services when necessary. The adventurers are encouraged to make a choices about routes and goals each day but the guides must prevent them from making costly mistakes that would result in the trip running beyond the allotted time frame. Because the adventurers often don't know one another, the guides are also trained in team building exercises, which they use at their discretion early on to promote a cohesive group.

Rebecca Kang applied for a position as a guide with Athleta in April of last year. Rebecca was an experienced backpacker and was already certified in CPR and first aid. After an interview, a check of recommendations, a physical and a physical conditioning test, Rebecca was admitted to and participated in Athleta's guide training program. The training program is a month long. The guide trainees are trained by experienced guides. During this time the guide trainees backpack extensively through one of the ranges so they become very familiar with one of the three ranges. The guide trainees also receive training in low impact camping, navigation, first aid, mountain rescue and team building. Athleta does not pay guide trainees participating in the training program.

Athleta offers the guide trainees who successfully complete the program positions as guides. Rebecca thinks that about 60% of those who enter the training program stay for the month and become guides. The other 40% drop out before the end of the 30 days. Rebecca says there are a number of companies that offer similar outdoor adventures, though Athleta is the only company that offers adventures in the Beartooth Wilderness where Rebecca trained.

After completing the training program, Rebecca was hired as a guide assigned to the Beartooth Wilderness range. She has been working for Athleta since that time. All of her trips begin in the town of Blackwater at the base of the Beartooth Wilderness range.

Guides are paid by the day. They spend 10 days "on," leading a trip and then have 3 days "off" before they begin their next trip. After 3 trips, the guides get a week off. Guides are not paid for any of their "off" days. During the 3 off days between trips, the guides are required to stay in the town located at the base of the range where the trips begin so they are available for rescues if needed. They wear beepers and carry cell phones at all times while they are off. Athleta maintains an ATV packed with supplies for emergencies in each base town. Rebecca says she is called upon to participate in a rescue once out of every three or four 3 day "off" periods."

Rebecca is required to stay in Blackwater, a town of 1,000 people. When I asked her what she does on her off days in Blackwater she told me "Nothing much. I fish and sunbathe and hang out. There is nothing to do in Blackwater. No movie theater, no library, just a general store with a magazine rack and a fishing outfitter."

Since she was hired she has also become a certified Red Cross CPR and first aid instructor. Rebecca did this on her own time.

Recently, Athleta has asked Rebecca to begin training prospective guides in first aid and meal preparation, training that goes on in Blackwater. Rebecca is paid by the hour not the day when she does this training. When she is training the guide trainees in meal preparation she is paid for her lunch hour. When she is training prospective guides in first aid, she is not paid for lunch though she is required to stay at the training site and eat what others prepare.

Rebecca has raised three issues:

Should she have been paid for the month she spent as a trainee?

Now that she is a guide-

Is she entitled to payment for her on-call "off" days?

Is she entitled to be paid for her lunch hour when she trains prospective guides?

The federal minimum wage is \$5.15 per hour. Time and one half must be paid for hours worked over 40 hours in excess of a 40-hour week.

**Important assumptions:** Assume that Athleta is subject to the requirements of the FLSA. Also assume that the Statute of Limitations has not run on any of Rebecca's potential claims.

## REICH v. PARKER FIRE PROTECTION DISTRICT

992 F.2d 1023

United States Court of Appeals, Tenth Circuit, 1993

LOGAN, J.

... In 1983, defendant began hiring career firefighters to replace its volunteer force. Prospective firefighters seeking employment with defendant had to submit applications and pass an initial screening before taking a written test. High scorers on the written examination were then tested physically. Candidates who performed satisfactorily on the physical test were further screened by oral interviews. Finally, a limited number of interviewees were selected to attend the firefighting academy. Permanent employment as a firefighter was conditioned upon satisfactory completion of the ten week long training period. Because only the number expected to be hired were sent to the academy, those who successfully completed the course had every reasonable expectation of being hired, as in fact they were in this case. Trainees understood that although they could obtain loans from defendant during this time, they were not entitled to wages for the time they spent at the academy.

Defendant required attendance at its academy not only to ensure that its fire fighters knew basic fire science and defendant's standard operating procedures, but also to build a sense of teamwork and cooperation among the incoming firefighters. Even certified and experienced firefighters had to complete instruction at the academy before going to work for defendant. The academy curriculum included classroom lectures, tours of the district, demonstrations, physical training, and simulations. Trainees also maintained defendant's equipment. During the final weeks of the 1989 academy, the four trainees in question staffed a truck that had previously been attended by volunteers. Although they were never called into service, they maintained the truck and its equipment in a state of readiness. On one occasion, while returning from a training exercise, the trainees responded to a car accident and provided paramedical services. . . .

The FLSA itself provides little guidance in distinguishing between trainees and employees. The Act defines employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). To "[e]mploy" includes to suffer or permit to work." To give content to this very broad statutory language, using factors first articulated in the Supreme Court's landmark decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Department of Labor's Wage and Hour Division has developed a test listing six criteria for determining whether trainees are employees within the meaning of FLSA. Both parties agree that this test is the proper standard to apply here. It provides:

Whether trainees are employees under the Act, according to the WH Administrator, will depend upon all the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees within the meaning of the Act:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school[.]
- The training is for the benefit of the trainee[.]
- The trainees do not displace regular employees, but work under close observation[.]
- The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded[.]
- The trainees are not necessarily entitled to a job at the completion of the training period[.]
- The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Wage & Hour Manual (BNA) 91:416 (1975). The parties disagree, however, over how this test is to be applied. At oral argument counsel for the Secretary denied that we are bound absolutely to an all or nothing standard. Nevertheless, the essence of the Secretary's argument is that unless all six criteria are met, the trainees are employees for purposes of FLSA. Defendant argues that, as a true "totality of the circumstances" test, this determination should not turn on the presence or absence of one factor in the equation.

Neither the six factor test nor the Secretary's understanding of how it is to be applied are to be given the high level of deference accorded to agency regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Proper judicial treatment of non-regulatory guidelines, recently reaffirmed in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), was first articulated in a wage and hour case under FLSA:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Skidmore v. Swift & Co.*, 323 U.S. 134, 140.

The six criteria in the Secretary's test were derived almost directly from *Portland Terminal* and have appeared in Wage and Hour Administrator opinions since at least 1967. Several courts have referred to this test and conducted their analyses of employment status according to its standards. See *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127 (5th Cir. 1983); *Donovan v. American*

Airlines, Inc., 686 F.2d 267, 273 n. 7 (5th Cir. 1982); *Marshall v. Baptist Hospital, Inc.*, 473 F.Supp. 465, 478 (M.D.Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981). Other courts have used elements of this test in applying *Portland Terminal* directly. See *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 n. 2 (4th Cir. 1989); *Wirtz v. Wardlaw*, 339 F.2d 785, 787-88 (4th Cir. 1964); *Bailey v. Pilots' Ass'n for the Bay and River Delaware*, 406 F.Supp. 1302, 1306 (E.D.Pa.1976). Similarly, numerous letter opinions of the Wage and Hour Administrator indicate that the Department of Labor has consistently responded to inquiries concerning trainees' employment status by applying this test.

Nevertheless, following *Skidmore* we find little support for as strict an application of this test as the Secretary urges before us. Although we do not doubt that the Secretary thoroughly considered her position, we believe that the position she urges upon us is inconsistent with prior Wage and Hour Division interpretations and opinions. Moreover, there is nothing in *Portland Terminal* to support an "all or nothing" approach. The prefatory language to the Secretary's test itself makes clear that the six factors are meant as an assessment of the totality of the circumstances. . . .

We are satisfied that the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA, that the interpretation the Secretary urges is unreasonable, and that the district court applied the proper legal standard. . . .

Plaintiff disputes whether the training provided by defendant's academy is similar to the training provided by a vocational school. Plaintiff argues that because the only vocational school in the country using substantially the same curriculum as defendant's academy is located in Orlando, Florida, and because there are no vocational schools for firefighters in Colorado, defendant's academy therefore must not be similar to vocational school. We do not agree. Although defendant did emphasize its own policies and practices, and trained its firefighters using some unusual equipment, it is uncontradicted that defendant's training curriculum overlapped significantly with what would be taught in any fire fighting academy. There are fire fighting academies sponsored by other fire protection districts and private employers throughout the region, as well as associate degree programs at several Colorado community colleges, all of which offer training comparable to defendant's academy. . . . In this respect, defendant's academy is indistinguishable from American Airlines' Learning Center,<sup>1</sup> see *American Airlines*, 686 F.2d at 269-70, and significantly more substantive than the week-long orientation conducted by the employer in *McLaughlin*, 877 F.2d at 1210. A training program that emphasizes the prospective employer's particular policies is nonetheless comparable to vocational school if the program teaches skills that are fungible within the industry. There is no disagreement that defendant's academy teaches such skills.

Next, we consider whether the training was for the benefit of the trainees, and whether defendant derived an immediate advantage from the activities of the trainees. A number of courts have considered these two factors together, weighing the relative benefits to each party, and we are persuaded that conducting the inquiry in this fashion is both permissible and helpful. In addition, the educational validity of the training program may enter into the calculus of relative benefits.

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<sup>1</sup> American Airlines required its flight attendant and reservation agent trainees to attend its Learning Center for up to five weeks of unpaid instruction. Like defendant here, American screened its applicants extensively and attempted to train only those individuals it anticipated it could hire at the completion of the course. The Learning Center, like defendant's academy, taught vocational skills transferable within the industry, but strongly emphasized American's particular practices. Were it not for the larger trainee classes in American's program and the longer training program required by defendant here, the two cases would be practically indistinguishable.

There is no question but that, in acquiring skills transferable within the industry and required by defendant for its career firefighters, the trainees benefited from their training. Plaintiff argues, however, that defendant received the greater benefit because the training was in some measure duplicative of skills some trainees already had, defendant tailored the training to meet its particular needs, and trainees incurred costs by participating in the training. Plaintiff also argues that the trainees performed productive work for defendant while they were in training. We have already determined that defendant's academy was educationally valid, and we are not persuaded by the fact that some of the trainees were familiar with portions of the academy curriculum, or that defendant prepared its trainees to operate its equipment and follow its procedures. Nor is it dispositive that the trainees made financial sacrifices in order to attend the academy. A vocational or associate degree program in fire science would have entailed similar burdens. Furthermore, although we agree that defendant derived an ultimate advantage by creating a pool of prospective employees trained in its operations, this is the intended result of any employer sponsored training program.

As to whether the trainees performed productive work for defendant, the courts have found trainees to be employees when the employers' training consists merely of supervising trainees as they carry out employees' duties. See *McLaughlin*, 877 F.2d at 1210 (training for snack food distribution route driver positions consisted simply of helping a driver service an existing route for one week); *Marshall*, 473 F.Supp. at 473-77 (X-ray technician trainees performed all the duties of regular employees and were minimally supervised by qualified personnel); *Balley*, 406 F.Supp. at 1307 (apprentice river pilot performed tasks necessary to functioning of pilot boat, with most of his training taking place on his own time). But substantial uncontroverted evidence in the case before us supports the conclusion that defendant was not immediately benefitted by the trainees' activities in this manner. Although the trainees maintained certain equipment and manned a truck near the end of their academy training, these activities were a supervised portion of their training. Trainees did not assume the duties of career firefighters. They were not assigned to shifts; they did not conduct inspections or engage in public education; they did not maintain any equipment other than training equipment. The trainees did perform paramedical services at one accident scene they encountered while returning from a training exercise. However, their response did not obviate the need for qualified firefighters and emergency medical technicians also to respond, and in that respect defendant received no benefit. Insofar as the trainees did perform productive work for defendant during their training, the benefit to defendant was de minimis. . . .

The record is clear that the career firefighter trainees did not displace any current employees. Their maintenance of one of defendant's trucks and their availability to respond to calls near the time their program ended did not relieve any employed firefighter of his or her duties. We recognize that defendant was conducting this academy in order to expand its forces, and that it was replacing volunteers with career firefighters. However, staffing one vehicle with unpaid trainees instead of unpaid volunteers as part of the trainees' preparation for positions as career firefighters did not yield any net benefit to the defendant

As to the last two of the six criteria, the documentary evidence establishes that the trainees fully expected to be hired upon successful completion of their training, but also fully understood that they would not be paid until that time.

We agree with the district court that there is no genuine issue of material fact that prevents summary judgment in this case. Except for one area—the expectation of employment upon successful completion of the course—application of the six factor test indicates that the trainees were not employees. Because that single factor cannot carry the entire weight of an inquiry into the totality of the circumstances, the district court was correct in granting judgment in favor of defendant.

# MARTIN v. OHIO TURNPIKE COMN.

968 F.2d 606

United States Court of Appeals, Sixth Circuit, 1992

PER CURIAM.

The plaintiffs are 125 highway maintenance workers employed by the defendant, the Ohio Turnpike Commission (Turnpike). The Turnpike employs approximately 300 maintenance workers, each assigned to one of eight maintenance buildings situated along the highway. Each employee works an eight-hour shift five days a week. The shift starts at 8:00 a.m. during the winter and 7:00 a.m. during the summer.

The Turnpike requires the employees to work overtime as needed and pays one and one-half times the regular hourly rate for overtime work. The Turnpike schedules much of the overtime work in advance. Unscheduled overtime work becomes necessary when an emergency, such as an accident or severe weather, occurs after normal working hours.

Before 1986, employees could exempt themselves from unscheduled overtime work. Under a new collective bargaining agreement that went into effect in 1986, the Turnpike required employees to perform unscheduled overtime work when called. Employees could excuse themselves from unscheduled overtime only by taking a vacation day or by obtaining permission from the foreman in advance. The parties disagree as to whether the foremen readily granted such permission.

The Turnpike developed a procedure for summoning workers for emergency overtime work. The Turnpike divided workers into two crews. One crew would be "on" and the other crew would be "off" at all times. When an emergency occurred, the foreman would determine how many workers were needed. The custodian would then call employees from the "on" crew, beginning with the employee who had worked the least number of overtime hours to date. The custodian would summon employees from the "off" crew only if the "on" crew could not provide sufficient manpower.

The custodian would attempt to call each employee three times at five-minute intervals. If the employee answered the call, the custodian would ask the employee to leave for work immediately. If an employee failed to answer by the third attempt or refused to report, the custodian would call the next name on the roster.

Employees could take certain steps to reduce the chances of missing a call for emergency work. First, an employee could call the Turnpike collect and leave a number where he or she could be reached. Second, if someone remained at the employee's home, the employee could tell that person how to contact him or her in the event of an emergency. Third, an employee could call the foreman and ask whether he or she was likely to be needed for emergency work that night. Fourth, an employee could consult the overtime roster and the "on" and "off" rotation schedule to determine whether he or she would be among the first to be called in the event of an emergency. Fifth, the employee could carry an electronic pager.

If an employee was in the "on" crew and failed to answer a call or refused to report, he or she would be subject to discipline. The Turnpike did not take disciplinary action against any employees in the "off" crew who failed to answer a call. Two instances of discipline within one year would result in a written reprimand. The third and fourth occurrences would lead to suspensions, and a fifth would result in termination. From 1986 to 1989, the Turnpike took disciplinary action 69 times but apparently did not terminate any employees under the policy.

When an employee performed unscheduled overtime work, he or she received overtime compensation for travel time to and from the Turnpike as well as for the time actually worked. The Turnpike did not compensate employees, however, for time spent "on call" away from the Turnpike.

Fourteen of the plaintiffs filed this action in June 1987 for overtime compensation for time spent on call. . . .

We begin our analysis by examining the law applicable to the plaintiffs' claim. The Fair Labor Standards Act (FLSA) provides that employees must be compensated at one and one-half times their regular rate for overtime work. Although the FLSA does not state whether time spent on call is working time, the Supreme Court has held that, under some circumstances, waiting time is compensable. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944).

In both *Armour* and *Skidmore*, the plaintiffs were private firefighters hired to work at the defendants' factories. In both cases, the plaintiffs worked regular hours, but were required to spend approximately half of their "time off" in the company dormitories so that they could respond quickly to alarms. In *Armour*, the Seventh Circuit had upheld a finding in favor of the firefighters, but in *Skidmore* the district court and the Fifth Circuit had held that waiting time was not compensable.

The Court declined to issue a firm rule as to whether on-call time is working time. Instead, the Court held that the result turns on whether an employee's time "is spent predominantly for the employer's benefit or for the employee's," a question "dependent upon all the circumstances of the case." The Court affirmed the judgment for the firefighters in *Armour* and reversed and remanded in *Skidmore* for a determination as to whether, considering the facts in that case, the firefighters' waiting time was compensable.

Although the employers' requirement that the employees spend their "time off" in the employers' dormitories was an important factor in both *Armour* and *Skidmore*, the Court did not limit its holding to waiting time spent on company premises. Therefore, an employee may be entitled to compensation even though he or she is on call at home or elsewhere. Although we have not decided such a case before today, at least three other circuits have considered claims for compensation for time spent on call while away from the employer's premises. Since the Court emphasized in *Skidmore* and *Armour* that the outcome in each case depends on the specific circumstances, we shall examine the facts in these other cases in some detail.

The Turnpike relies on several cases in which the Fifth Circuit has rejected employees' claims for off-premises, on-call overtime. In *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991 (1992)), the Fifth Circuit, sitting *en banc*, affirmed a grant of summary judgment against a biomedical repair technician who was on call 24 hours a day, 365 days a year. While off duty, his employer required him to remain sober, carry a pager at all times, and be able to arrive at work within approximately 20 minutes. The employer paged him an average of four to five times a week. The court concluded that, although these conditions were oppressive, the fact that the technician could use the time for his own pursuits so long as he stayed near the hospital precluded compensation under the FLSA.

Similarly, in *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989), the court reversed a judgment obtained by an ambulance dispatcher who was required to remain at home to answer calls from 5:00 p.m. to 8:00 a.m. The court held that she was not entitled to compensation because

she was free to "visit friends, entertain guests, sleep, watch television, do laundry, and babysit." The Fifth Circuit also reversed a judgment in favor of on-call employees in *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987). The employees in that case rotated the duty to stay home and answer alarm calls from the employer's pumping station. The court, noting that the alarms were infrequent, concluded that the employees were "relatively free to use on-call time however they desire."

The plaintiffs in this case concede that their claim would not succeed in the Fifth Circuit. They maintain, however, that the Fifth Circuit has adopted an overly restrictive view of on-call compensation.

The plaintiffs contend that their claim would succeed under the approach taken by the Eighth and Tenth Circuits. In *Cross v. Arkansas Forestry Commission*, 938 F.2d 912 (8th Cir. 1991), the employer required its employees to monitor hand-held radios 24 hours a day during on-call periods and respond immediately to emergencies. The court found that this requirement restricted the employees' travel, prevented them from participating in activities that would prevent them from hearing the radio, forced them to concentrate on the radio at all hours, and prevented them from going places, such as theaters, where radio noise is unwelcome. Accordingly, the court reversed the district court's grant of summary judgment against the employees' claim for compensation and remanded the case for trial.

The Tenth Circuit affirmed a grant of summary judgment in favor of an employees' claim for compensation for on-call time in *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991). In *Renfro*, the plaintiff firefighters were on call for 24-hour periods, during which they were required to carry pagers and return to work within 20 minutes when called. The court, placing heavy emphasis on the undisputed fact that the employer called back each firefighter an average of three to five times per 24-hour period, concluded that the firefighters could not use the time effectively for personal pursuits.

The *Renfro* court distinguished two earlier Tenth Circuit cases. In *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989), the court held that the trial court should have directed a verdict against the plaintiff linemen's claim for on-call compensation. The policy challenged in *Boehm* required the linemen to respond to one-third of callback requests and allowed the linemen to carry pagers or leave alternative telephone numbers. In *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988), the employer required van drivers to answer calls to transport railroad crews. The court affirmed the district court's dismissal of the drivers' claim for on-call compensation, finding that the drivers were free to pursue personal pursuits and use a pager if they needed to be away from a telephone.

The plaintiffs also point to the unpublished decision in *Owens v. ITT Rayonier*, No. C88-533T, 1990 WL 302889 (W.D. Wash. Sept. 26, 1990), appeal docketed, No. 91-35409 (9th Cir. 1991). In *Owens*, the court entered judgment against a pulp mill that promulgated a policy that imposed discipline against any mechanic who missed an unspecified number of call-in attempts. The court concluded that the mechanics' obligation to respond to pages prevented them from using the time for their own purposes. As the Turnpike points out, the *Owens* decision cites no cases and contains no legal analysis to support its decision.

Finally, the Department of Labor, the executive department charged with administering the FLSA, has promulgated regulations concerning the compensability of on-call periods. The regulations provide:

An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

The Department of Labor's interpretation of the FLSA is entitled to deference.

From our survey of the law in this area, we conclude that on-call time spent at home may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits. The mere fact that an employer requires employees to leave word where they can be reached will not be sufficient to make the on-call time compensable. Instead, the employees must show that the on-call policy imposes additional burdens that seriously interfere with their ability to use the time for personal pursuits.

For example, the employees may be able to show, like the employees in *Renfro*, that the employer calls them back so frequently as to make effective use of the time impractical. Alternatively, the employees could show, like the plaintiffs in *Cross*, that the employer's on-call system is so distracting or cumbersome as to seriously inhibit personal activities. We do not hold that these two examples are the only ways that employees could meet their burden, but we do find them to be representative of the type of showing that an employee must make to survive a motion for summary judgment. . . .

The plaintiffs have not provided any evidence to show how frequently they are called back. Without such evidence, a jury could not find that they are called back so frequently as to make effective use of their time impractical. The plaintiffs also have not established that the Turnpike's on-call system is unusually onerous. Unlike the employees in *Cross*, the plaintiffs need not listen to a radio all night. They need only respond to a telephone call or pager. If they need to leave home, they can call the Turnpike and give a number where they can be reached. Unlike the employees in *Cross*, *Renfro*, *Bright*, and several of the other on-call cases, the Turnpike does not require its employees to arrive within a certain time after being called. Thus, the plaintiffs' travel is not severely restricted. . . .

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## ARMITAGE v. CITY OF EMPORIA, KANSAS

982 F.2d 430

United States Court of Appeals, Tenth Circuit, 1992

KELLY, J.

In 1987 the city implemented a flextime policy which allowed detectives to schedule their own eight hour work shift. Detectives were required to take a lunch break of at least one-half hour, for which they were not paid. The break could not be the first or last half hour of the shift. Detectives were allowed to eat where they chose, including at home. They were paid for the time going to and coming from lunch, and were required to notify dispatch of their location in case they were needed. They were not allowed to consume alcohol during lunch. They were required to respond to

questions from the public if approached during lunch. When detectives were called back to duty during lunch, they were paid at the overtime rate.

The detectives also rotated standby duty and each detective was on call one week out of six. The standby detective was paid \$30 per week, plus overtime for the time actually worked. The standby detective was provided with a pager so he did not have to remain near a phone, although he was required to stay in the vicinity in order to call in within ten minutes of being paged, and report to the station within twenty minutes if necessary. The detectives were called back, on average, less than two times per week of on call duty.

The detectives brought suit for backpay under the Fair Labor Standards. Following a bench trial, the district court awarded backpay for plaintiffs' lunch periods and time spent on call.

### **I. The lunch period issue**

Relying on two prior district court decisions, the district court held that the detectives should be compensated for their lunch periods because they "were not completely relieved of duty." *Wahl v. City of Wichita, Kansas*, 725 F.Supp. 1133 (D.Kan. 1989); *Nixon v. City of Junction, Kansas*, 707 F.Supp. 473 (D.Kan. 1988). However, we recently decided *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992) which sets forth the correct standard and requires a different outcome under these facts.

In *Lamon*, the city police officers were also on a flextime schedule and were required to check out when taking their lunch break and provide a location and phone number where they could be reached. An officer's half hour lunch began when the officer arrived at a lunch location and checked out with the dispatcher. The officers could not conduct personal errands during lunch, and were required to respond to citizen inquiries and act in a professional manner. We held that the proper standard for determining compensability of a meal period is whether the officer is "primarily . . . engaged in work-related duties during meal periods." "That a police officer is on-call and has some limited responsibilities during meal periods does not perforce mean the officer is working." In the instant case the district court erred by applying the wrong standard for compensability of meal periods. The facts as found by the district court indicate that the detectives were not primarily engaged in work-related duties during meal periods. We reverse the award of backpay for meal periods.

### **II. The "on call" issue**

In determining whether time spent on-call should be compensable under the FLSA we look to the facts and circumstances of each case. The district court relied on *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991) in awarding compensation to detectives for standby status. *Renfro* involved firefighters who, while on call, were required to be at the station within twenty minutes, fully dressed in protective gear. They received on average three to five calls per day. We held that the district court did not err in granting the firefighters' motion for summary judgment, because the firefighters could not use on call time for personal pursuits or other employment due to the quick response time and frequency of calls per day. The instant case is distinguishable from *Renfro* because of differences in the nature of the duties and frequency of the calls.

On call time is compensable if the on call requirements are so restrictive that they interfere with employees' personal pursuits. *Renfro*, 948 F.2d at 1537 (citing 29 C.F.R. § 553.221(d)). However, an employee who is "merely required to leave word at his home or with company officials where he may be reached is not working while on call." *Norton*, 839 F.2d at 655 n. 3 (quoting 29 C.F.R. §

785.17 (1985)). In both *Norton* and *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989), we held that the FLSA did not require compensation for on-call time where the employees were allowed to leave the employer's premises and were able to pursue personal activities, even though the activities were somewhat restricted because they had to be accessible by pager.

On similar facts, the Eleventh Circuit recently held that detectives' on call time was not compensable. *Birdwell v. City of Gadsden, Alabama*, 970 F.2d 802 (11th Cir. 1992). The *Birdwell* court distinguished *Renfro*, reasoning that firefighters, as opposed to detectives, spent their on call time predominantly for the benefit of the employer because the firefighters could expect several emergency calls per day.

In the instant case, the detectives were allowed to do as they pleased while on call, as long as they remained sober, could be reached by beeper and were able to report to duty within twenty minutes of responding to the page. They were called in on average less than two times per week, as opposed to the twenty to thirty times per week for the firefighters in *Renfro*. The firefighters were required to report within twenty minutes of a call, in full gear, and subject to discipline if late. Furthermore, the detectives were called in to investigate crimes which had been committed, as opposed to responding to emergencies in progress. The firefighters were "lying in wait for emergencies [which was] a benefit to the employer and thus compensable under FLSA." (distinguishing *Norton* and *Boehm*, where the employees were not waiting to respond to emergencies). Although the detectives' services are certainly beneficial to the public, to require compensation under these facts would require that all on call employees be paid for standby time. This would be a major change in the law of the FLSA. See *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606 (6th Cir. 1992) (no compensation for standby time of highway department employees); *Owens v. Local No. 169, Ass'n of W. Pulp and Paper Workers*, 971 F.2d 347 (9th Cir. 1992) (no compensation for standby time of mechanics); *Bright v. Houston N.W. Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (no compensation for standby time of medical technician) (1992). As such, we also reverse the award of back pay for time spent on call.

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## REICH v. SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORP.

121 F.3d 58

United States Court of Appeals, Second Circuit, 1997

WALKER, J.

... SNET, based in New Haven, Connecticut, provides telephone and other services to consumers throughout the state. The company employs workers who spend a significant portion of their time on-site, out-of-doors ("outside craft employees"). From sometime in 1990 until February 1994, SNET categorized these workers into three groups: outside plant technicians ("OPTs"), who install and replace telephone poles and cables, generally in crews from two to six; assistant supervisors of construction ("ASCs"), who supervise the work of OPTs; and communication facilities technicians ("CFTs"), who work both indoors and outdoors in cable splicing and repair and in telephone installation and maintenance. In approximately February 1994, SNET eliminated the CFT category and redesignated those workers into three separate categories: network deployment technicians (formerly cable splicers), network delivery technicians (formerly cable repair workers), and service delivery technicians (formerly installation and maintenance workers).

Outside craft employees, with the exception of those performing installation and maintenance tasks indoors, routinely work on the lines strung between telephone poles, in trenches (usually located in new housing developments), and in manholes. However, some of the work of outside craft employees is performed inside, in controlled environmental vaults at central office locations. Installation and maintenance workers, who install and repair telephone equipment in homes and businesses, do some work at outside locations, such as connecting links from buildings to nearby terminal poles; however, the Secretary conceded that the lunch periods of these workers would not be compensable given the general flexibility of their work schedules.

The specific work assignments of outside craft employees vary in duration from as brief as 45 minutes to a day or more. Outside craft employees use valuable company equipment including trucks (with extendable ladders or buckets for aerial work), fresh air ventilation systems, water pumps, gas testing and fiber optic devices, cable and wire, as well as numerous hand held tools. It is also their responsibility throughout their shift to maintain and protect this equipment from theft and, at times, the elements.

SNET's outside craft employees are so-called "lunch carrying employees." Although these workers are not paid by SNET for the time they spend on lunch break and SNET does not record this time as part of their compensable employment hours, their employer requires them to bring their lunch to work and, generally, to stay at the work site during lunch. The workers are allotted thirty minutes for lunch. The company instructs them to take their lunch break between 12:00 and 12:30 p.m., if possible; however, there is sufficient unpredictability in the work that a noon break is not always possible, and frequently the workers are unable to plan the precise time and place of the break. Whenever the lunch break occurs at an open outdoor site, SNET requires the craft workers to stay at the site to secure the area and its equipment and to prevent possible harm to the public. Leaving an open work site during the shift without specific permission is sanctionable conduct. As a consequence, outside craft employees at open sites take their lunch break at or near the work site, often in the cab of a truck or near a manhole, trench, or telephone pole.

The district court concluded that SNET's restrictions on outside craft employees resulted in their performance of substantial duties predominantly for the benefit of the SNET. The district court found (1) that the company violated the record keeping provisions of the FLSA in failing to account for the duties that outside workers performed during their lunch break and (2) that, when such duties cause outside craft employees to work more than forty hours per week, SNET violated the overtime compensation provision of the Act. The district court entered judgment in favor of the Secretary, awarding back overtime pay as well as liquidated damages and enjoining further violations of the FLSA.

## **II. Discussion**

SNET argues that the district court erred in finding liability for unpaid wages for the on-site lunch break taken by SNET's outside craft employees. The company contends that the district court misapplied the appropriate standard (the "predominant benefit" standard) for determining whether company-imposed restrictions on employees' mealtime require compensation under the FLSA. SNET also challenges several further conclusions of the district court. First, even assuming that some lunch breaks were compensable within the meaning of the FLSA, SNET maintains that the district court committed factual error in finding too many to be compensable. Second, SNET argues that the district court reached an inaccurate damage award. Finally, the company contends that the district court lacked jurisdiction to enter an award of liquidated damages, and, in any event, abused its discretion in making the award.

## A. Liability for Unpaid Wages.

The FLSA requires compensation at one and a half times the regular rate when employers cause their employees to work more than forty hours a week. See 29 U.S.C. § 207(a)(1). The Secretary contends that SNET systematically undercompensated its outside craft employees by failing to pay them overtime wages for activities performed during their lunch break. Such work, according to the Secretary, caused the outside craft workers to be employed for more than forty hours per week. Thus, the crux of this dispute is whether the restrictions imposed by SNET on its outside craft workers transform an otherwise uncompensable meal break into one that is compensable under the FLSA. This is an issue of first impression in the Second Circuit.

In aid of its enforcement authority under the FLSA, the Department of Labor ("DoL") has issued interpretive regulations, in effect at all times relevant to this appeal, that specifically address compensability of employees' mealtimes.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. . . . The employee must be completely relieved from duty for the purposes of eating regular meals. . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

29 C.F.R. § 785.19. SNET's liability would not be in doubt if we were to apply this regulation as written. It is not open to reasonable question that SNET did not completely relieve its outside craft employees from duty during their lunch break. However, the Secretary concedes that the test is not so rigid. Rather, the Secretary contends that § 785.19 should be construed in a "practical manner" and points us to certain agency constructions of the regulation.

In a Wage-Hour Opinion Letter, dated August 25, 1980, the DoL's then-Deputy Administrator found that postal employees responsible for the safekeeping of their mail during lunch break generally were not entitled to compensation under the FLSA. In so construing § 785.19, the DoL's representative commented that a broad reading of the phrase "relieved of all duty" . . . would extend the requirement of compensation to 24 hours of the day in the case of outside workers who are required to take their employer's tools or materials home with them or who drive home in the company's vehicles, so as to have them available for going directly to the work site the following morning. Secretary of Labor's Supplemental Appendix at 6 (Letter of Henry T. White, Jr., Deputy Administrator, U.S. Dep't of Labor (Aug. 25, 1980)). The Wage-Hour letter continues: "compensation would be required for a letter carrier only if the postal material in his possession were of such quantity or of such nature that the carrier's mealtime was substantially impeded in the free disposition of the time for his own beneficial use."

In a DoL letter of July 29, 1985, construing § 785.19 in the context of law enforcement employees' meal break, the DoL's representative commented: we would not consider the fact that [law enforcement employees] remain in uniform [during meals] as meaning that they are on duty while eating a meal. Moreover, we would not consider infrequent interruptions of short duration which may occur when a citizen compliments, or asks the law enforcement employee a simple question, as nullifying the exclusion of an otherwise bona fide meal period from compensable hours of work. *Id.* at 9 (Letter of Susan R. Meisinger, Deputy Under Secretary, U.S. Dep't of Labor (July 29, 1985)). Although this letter also states that a meal break must be an "uninterrupted period during which the employee has no duties whatsoever to perform," and thus suggests a broader

view of compensability of meal periods under the FLSA, the Secretary in its brief cites both letters as examples of the DoL's "practical," and thus implicitly flexible, approach to construing § 785.19. This flexible approach to determining compensability of meal break activity is consistent with the reasoning of various courts.

The central issue in mealtime cases is whether employees are required to "work" as that term is understood under the FLSA. Although the FLSA itself does not define "work," the Supreme Court has attempted to do so. In *Tennessee Coal, Iron & R. Co. v. Museoda Local No. 123*, 321 U.S. 590, 598 (1944), the Court held that "work" under the FLSA means "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." At about the same time, the Court counseled that the determination of what constitutes work is necessarily fact-bound. For example, time spent waiting for an event to occur, such as a fire, may constitute work if an employer hired an employee for that function.

To be consistent with the FLSA's use of the term "work" as construed in *Armour* and *Skidmore*, we believe § 785.19 must be interpreted to require compensation for a meal break during which a worker performs activities predominantly for the benefit of the employer. See *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1155 (10th Cir. 1992) (compensation required during meal periods except "when the employee's time is not spent predominantly for the benefit of the employer"); see also *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984) (meal periods not compensable unless activities "could be characterized as substantial"). But see *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473, 1477 (11th Cir. 1990) ("essential consideration . . . is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal"); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n. 1 (4th Cir. 1985) (adopting, without comment, § 785.19's completely-removed-from-duty standard). In our view, this "predominant benefit" standard "sensibly integrates developing case law with the regulations' language and purpose," *Alexander*, 994 F.2d at 337, and more importantly, with the language of the FLSA itself.

To the extent that the Secretary advocates a literal reading of § 785.19, similar to that adopted by the Fourth Circuit in *Bel-Loc Diner*, 780 F.2d at 1115 n. 1, we decline to follow this construction. Section 785.19, as with other interpretive regulations issued by the Secretary under the FLSA, does not have the force of law. Although not controlling on courts, such regulations do "constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance," *Skidmore*, 323 U.S. at 140, and should be viewed as persuasive authority. However, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140 Here, § 785.19, as literally construed, fails to persuade us primarily because the completely-removed-from-duty standard is inconsistent with controlling Supreme Court precedent defining "work." Thus, we believe that the district court was correct in holding that meal periods are compensable under the FLSA when employees during a meal break perform duties predominantly for the benefit of the employer. . . .

SNET does not dispute the applicability of the predominant benefit standard but argues that the district court ignored this standard and effectively applied the completely-removed-from-duty standard. We disagree.

SNET argues that the lunch breaks predominantly benefit the workers, and not the employer, because during their lunch break the workers' safety and security roles are wholly passive, leaving them free to eat their meal. This argument, whatever its superficial appeal, misses the point. Dur-

ing their lunch break, the workers are restricted to the site for the purpose of performing valuable security service for the company. The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers' lunch break. To be sure, the workers perform different services during meal breaks than throughout the rest of the day, but the workers' on-site presence is solely for the benefit of the employer and, in their absence, the company would have to pay others to perform those same services. By not compensating these workers, SNET is effectively receiving free labor.

SNET's second argument invokes policy and economic concerns. The company contends that a finding of liability would require payment for meals in any industry in which the nature of the work compels employees to remain at or near an outdoor work site, not because they are required to work during their meal periods, but solely because a complex set-up or a particular location makes it impractical to shut down and leave the job site. This argument, however, fails to acknowledge that the workers are not compelled by "the nature of their work" to remain at the job site but are required to do so by their employer, on pain of discipline, for the purpose of providing important (albeit non-taxing) security, maintenance and safety services. Thus, SNET's argument begs the question at issue in this case: whether outside craft workers were "working" within the meaning of the FLSA during their constrained mealtimes. . . .