WALK THIS WAY[1]: *IBP, INC. V. ALVAREZ* OPENS THE ROBERTS COURT ERA

*BY BETSY K. DORMINEY**

On November 8, 2005, a unanimous Supreme Court, per Justice Stevens, held that employees must be compensated for time spent waiting or walking to the work station after donning "unique or specialized gear." IBP, Inc. v. Alvarez, No. 03-1238, 546 U.S. __, 126 S. Ct. 514 (2005). This eagerly-anticipated decision heralded the beginning of a new era for the Court under the leadership of Chief Justice John Roberts. If this decision is any indication, those anticipating momentous change should curb their enthusiasm. *Stare decisis* is under no immediate threat.

I. Background

It was judicial activism that started this in the first place. In 1938 Congress passed the Fair Labor Standards Act (FLSA),[2] the last big brick of the New Deal edifice, requiring minimum wages and overtime pay. In short order, the Supreme Court, guided by ambitious plaintiffs' lawyers, found that activities hitherto considered noncompensable by employers, such as riding from the entrance of a mine to the mine face[3] or greasing up one's arms prior to making pottery,[4] were compensable under the FLSA. That was an expensive surprise for employers. There were class actions galore, with verdicts and settlements in the millions (in 1940's dollars). Feeling the heat, Congress soon passed the Portal-to-Portal Act[5] in 1947, specifically to undo much that the Court had done by expansively interpreting the FLSA.

The Portal-to-Portal Act excluded from compensable hours time spent "(1) 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, and (2) activities which are preliminary to or postliminary to said principal activity or activities which 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."[6] Preliminary and postliminary activities, such as clothes-changing and walking to the work station, were henceforth excluded from compensable time.

Of course, this was hardly the end of the matter. Portal-to-Portal Act regulations provided that the compensable workday would begin and end with the employee's performance of a "principal activity,"[7] and the battle shifted to that definitional terrain. Although normal clothes-changing had been defined as a preliminary or postliminary activity in the Portal-to-Portal Act, in 1956 the Court held that, for employees in a battery plant who worked with caustic chemicals, clothes-changing at the beginning of a shift and showering at the end were "integral and indispensable" to their principal activities and therefore time spent in those activities and walking that occurred thereafter was compensable under the FLSA.[8] Thus, the territory covered by the FLSA was expanded by accretion to include activities "indispensable and integral" to the employee's "principal activity" under the "continuous workday rule."[9] Regulations were adopted institutionalizing the "continuous workday" rule, which held that once the real work of the day commenced, the employer could not "stop the clock" except for *bona fide* rest or meal breaks.[10]

Plaintiffs' lawyers, still tantalized by the prospect of discovering compensable time that employers might have overlooked, continued to file suit, now using the "opt-in" collective action procedures that the Portal-to-Portal Act had tacked onto the FLSA.[11] Large employers whose employees had to engage in some sort of preparation before commencing work were attractive targets: the food processing industry, in which the U.S. Department of Agriculture prescribed smocks and hairnets, and workers traditionally were compensated based on "line time" rather than individual time card entries, were especially appealing targets for litigation. The U.S. Department of Labor did its part as well, conducting an enforcement blitz in that industry starting in the late 1990's that produced a $10 million settlement from one poultry processor (although the Department won none of the cases actually litigated).

II. The Cases Before The Court

Alvarez was filed by Washington beef and pork processing plant workers who sought compensation for time they spent walking to their work stations after donning "unique and specialized" gear. As the Supreme Court recited, all workers had to wear "outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots"; many, especially those who used knives, also wore a variety of protective equipment, including "chain link metal aprons, vests, Plexiglas armguards, and special gloves."[12] The District Court held, and the Ninth Circuit Court of Appeals affirmed, that donning such elaborate equipment was "integral and indispensable" to the principal activity of slaughtering pigs and cows, and that *Steiner* required pay for post-donning and pre-doffing walking time. In contrast, the Court of Appeals observed that "the time employees spent donning nonunique protective gear was '*de minimis*' as a matter of law.'"[13]

Tum v. Barber Foods, Inc. (331 F.3d 1 (1st Cir. 2003)) was filed in Maine and involved similar issues, but in a chicken processing plant. Chicken is lighter than pork or beef, in many ways. In contrast to the virtual body-armor the beef packers wear, workers in a chicken plant mostly wear smocks, hairnets, earplugs, and, occasionally, boots, gloves, arm guards and sleeves. The District Court granted partial summary judgment for the employer. It held that donning and doffing clothing and equipment that was required by the employer or the Department of Agriculture, as opposed to clothing and equipment which the employees chose to wear, was an integral part of their work and therefore rang the compensability bell.[14] However, the time employees spent waiting to receive the gear to be donned was held to be preliminary, and thus noncompensable.[15] The case

proceeded to a jury trial on the issues not disposed of on summary judgment, and the jury found in favor of the employer, specifically finding that much of the donning and doffing time was *de minimis* and therefore noncompensable under the FLSA. The employees appealed, arguing *inter alia* that the District Court had erred in finding noncompensable time spent walking to the production floor after donning gear. The First Circuit affirmed the District Court's grant of partial summary judgment in favor of the employer and the subsequent defense verdict.[16]

III. The Court's Decision

IBP sought certiorari, as did the employees in *Tum*, and the Supreme Court decided to hear the cases together, granting the petitions to address the narrow question of the compensability of post-donning, pre-doffing walking time.[17] The Supreme Court, invoking *Steiner*, held that time spent walking between changing and production areas was compensable. *IBP, Inc.* was affirmed and *Tum* affirmed in part, reversed in part, and remanded.

The Court began its analysis with IBP, listing the various items of gear worn by the production workers in the plant. It noted that the employer already paid the employees for four minutes of clothes-changing time daily, but that the workers generally were compensated only for "line time," which starts when the first piece of meat enters the production line and ends when the last piece exits the line. The District Court and Court of Appeals had held that donning and doffing protective gear that was unique to the jobs at issue were compensable under the FLSA because they were integral and indispensable to the work of the employees who wore the equipment. Those courts reasoned from there that walking time after the donning and before the doffing of that "unique protective gear" therefore was compensable because it occurred during the "continuous workday" decreed by the FLSA's regulations. The District Court had denied as *de minimis*, and therefore noncompensable under the FLSA, time required to don and doff "nonunique" gear such as hard hats, ear plugs, safety glasses, boots and hairnets. The Supreme Court tested these conclusions against a three-part analysis of the text, purpose, and regulations of the Portal-to-Portal Act and concluded that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under §4(a) of the Portal-to-Portal Act," and that the continuous workday theory made all walking that occurred after such activities compensable under the FLSA.

Turning to *Tum*, the Court, in passing, noted that those employees, like the production workers in *IBP, Inc.*, wore various combinations of sanitary and protective gear, but were paid on the basis of individualized time cards they punched at the production floor entrances. The Magistrate Judge had concluded that donning and doffing of required clothing and equipment (as opposed to optional items the employees could choose) was integral and indispensable and therefore compensable, but that time they spent waiting to collect clothing and equipment was excluded under the Portal-to-Portal Act. The question of the compensability of the actual donning and doffing time had been submitted to a jury, which concluded that actual donning and doffing time was *de minimis* and therefore noncompensable. The Supreme Court concluded that time spent waiting to doff such gear was compensable because part of the continuous workday, but that time spent waiting to don was not.

As so often is the case, what the Court did not say in its decision has caused more controversy than any of its pronouncements. Although the Court appears to hold that donning and doffing activities that are "integral and indispensable" to the employee's "principal activities" are compensable, it left employers to guess what makes an item of sanitary or protective gear "integral and indispensable." The Supreme Court did not directly address this issue in the *IBP, Inc.* portion of the decision, instead apparently assuming that the District Court and Court of Appeals got it right when they ruled that time employees spent donning and doffing nonunique protective gear was "*de minimis*" as a matter of law."[18] However, the Ninth Circuit had found that time required to don and doff certain items—boots, hairnets, and earplugs, to name only three—was *de minimis* and therefore excluded from compensable time under the FLSA, not the Portal-to-Portal Act. So, is a smock, which nearly all food processing workers are required by the U.S. Department of Agriculture to don prior to entering the production floor, more like a hairnet and therefore noncompensable as *de minimis*, or more like a protective sleeve and therefore 'integral and indispensable' enough to trigger compensability? Inquiring minds want to know, but will not necessarily find an answer within the Court's opinion. Plaintiffs' lawyers certainly will argue for compensability.

The situation is complicated by policies and practices that may vary from state to state, even plant to plant: in some plants the veterinarians employed by the U.S. Department of Agriculture allow employees to don smocks at home, and it seems unlikely that at-home donning would trigger compensability. Different rules may prevail in unionized workplaces, where §203(o) of the FLSA allows employers and employee unions to settle preliminary and postliminary pay issues through collective bargaining.[19]

Another looming question is what the U.S. Department of Labor will do about this decision. The Solicitor of Labor has pursued poultry processors in the past, notably winning a $10 million dollar settlement against Perdue Farms,[20] but all the donning and doffing cases that have actually been litigated, up to and including *Tum* in the First Circuit, were won by the employers.[21]

IV. Conclusion

As far as prognostication about future Supreme Court trends goes, this case seems to say mainly that the principle of *stare decisis* remains in robust good health. *Steiner*'s holding that "integral and indispensable" activities start the clock seems to have guided the Court here. One could have wished for a few more bright lines to guide compliance, and

one can certainly anticipate continued debate about what constitutes "integral and indispensable" activities and "unique" and "nonunique" gear, but on the whole the Supreme Court seems to be sticking to precedent when it comes to statutes and regulations. How it will approach Constitutional questions remains to be seen.

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Footnotes

[1] Young Frankenstein (1974, Mel Brooks, Producer). Igor (pronounced "Eye-gore") to Dr. Frankenstein ("Fronken-steen"), upon leaving Transylvania Station: "Walk this way." (Observing, then indicating, by hunched limp), "No, *this* way."

[2] 29 U.S.C. § 201 *et seq*.

[3] Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

[4] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

[5] 29 U.S.C. §§ 216(b), 251-262.

[6] 29 U.S.C. § 254(a).

[7] 29 C.F.R. § 790.6(a).

[8] Steiner v. Mitchell, 350 U.S. 247 252-53 (1956).

[9] 29 C.F.R. § 790.6(b).

[10] 29 C.F.R. § 790.6(b); 12 Fed. Reg. 7658 (1947).

[11] 29 U.S.C. § 216(b).

[12] IBP, Inc., 126 S. Ct. at 521.

[13] *Id*. at 522, citing IBP, Inc. v. Alvarez, 339 F.3d 894, 904 (9th Cir. 2003).

[14] *IBP, Inc*., 126 S. Ct. at 525.

[15] *Id*.

[16] Tum v. Barber Foods, 360 F.3d 274 (1st Cir. 2003).

[17] The question upon which the Court granted certiorari in *Tum* was "Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations?" Tum v. Barber Foods, Inc., 125 S. Ct. 1295 (2005) (granting petition for certiorari). In *IBP, Inc.*, the question was "Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking. . .to and from the actual place of performance of the principal activity" within the meaning of Section 4(a)" of the Portal-to-Portal Act. IBP, Inc. v. Alvarez, 2004 WL 424055 (petition for certiorari).

[18] 126 S. Ct. at 523, quoting Alvarez v. IBP, Inc., 339 F.3d at 904.

[19] 29 U.S.C. § 203(o); *see also* Bejil v. Ethicon, 269 F.3d 477 (5th Cir. 2001), Turner v. City of Philadelphia, 262 F.3d 222 (3d Cir. 2001); Anderson et al. v. Cagle's et al., No. 1:00-CV-166-2 (WLS) (Order of December 8, 2005 granting summary judgment to the employer, possibly the first post-*IBP, Inc.* case decided by a District Court).

[20] News Release, U.S. Department of Labor, Perdue Farms Agrees to Change Pay Practices and Pay Millions in Back Wages to 25,000 Poultry Workers (May 9, 2002).

[21] *See, e.g.,* Anderson v. Pilgrim's Pride, 147 F. Supp.556 (E.D. Tx. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); Pressley v. Sanderson Farms, 2001 WL 850017 (S.D. Tx. 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); Tum v. Barber Foods, 360 F. 3d 274 (1st Cir. 2004); Anderson et al. v. Cagle's et al., No. 1:00-CV-166-2 (WLS).