No. 18-5942

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL HEIMBACH, *et al.*,
Plaintiffs-Appellants,
v.

AMAZON.COM, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Kentucky
Honorable David J. Hale
Master File No. 14-md-2504-DJH
MDL Docket No. 2504
Case No. 3:14-cv-204-DJH

APPELLANTS' MOTION FOR CERTIFICATION OF QUESTION TO THE PENNSYLVANIA SUPREME COURT

Plaintiffs-Appellants Neal Heimbach and Karen Salasky ("Plaintiffs"), pursuant to Pennsylvania Rule of Appellate Procedure 3341(a)(2), respectfully ask this Court to certify the following question to the Pennsylvania Supreme Court:

> Whether time associated with workplace security screenings conducted at the end of a warehouse employee's shift can be compensable under the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq.*, even though, in *Integrity Staffing Solutions, Inc. v. Busk*, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 41 (2014), the United States Supreme Court

deemed such time non-compensable "postliminary" activities under the federal Portal-to-Portal Act, 29 U.S.C. §§ 251, *et seq*.

Plaintiffs' certification request is not too surprising. In the underlying opinion, Judge Hale acknowledges that his holding conflicts with that of a "Pennsylvania trial court" and "further observes that the Pennsylvania Rules of Appellate Procedure do not allow federal district courts to certify questions to the Pennsylvania Supreme Court." Page ID # 2360 n. 3 (citing Pa. R. App. P. 3341(a)).[1] We cannot know what Judge Hale had in mind when he drafted this language. But the language suggests that, if permitted, he might have certified the question to the Pennsylvania Supreme Court.

Leaving aside any "tea leaves" to be read from Judge Hale's footnote, Plaintiffs are now procedurally able to ask this Court to certify the question to the Pennsylvania Supreme Court. They do so for the reasons described below:

A. From the outset, Plaintiffs have wanted a Pennsylvania state court to decide their PMWA claim.

Unlike other Amazon warehouse employees who have arrived at this Court from the underlying MDL proceeding, *see Busk v. Integrity Staffing Solutions, Inc.*, __ F.3d __, 2018 U.S. App. LEXIS 26634 (6th Cir. Sept. 19, 2018) (Arizona and

[1] The underlying district court opinion is attached as Appendix A.

Nevada employees); *Vance v. Amazon.com,, Inc.*, 852 F.3d 601 (6th Cir. 2017) (Kentucky employees), the instant Plaintiffs ***never*** asserted an FLSA claim. Rather, from the very beginning of this litigation, Plaintiffs have relied exclusively on their PMWA claim as the sole grounds for relief. *See* Page ID # 38-48 (complaint); 71-81 (amended complaint).[2]

Moreover, Plaintiffs originated their lawsuit in ***state court***. In particular, they filed the original and amended complaints in the Philadelphia Court of Common Pleas. *See* Page ID # 38-48 (complaint); 71-81 (amended complaint). The only reason Plaintiffs find themselves in the federal court system is because Amazon.com, Inc. and other defendants (collectively "Amazon") removed the state court action to the U.S. District Court for the Eastern District of Pennsylvania pursuant to the Class Action Fairness Act. *See* Page ID # 1-34. A few months later, the Judicial Panel on Multidistrict Litigation transferred Plaintiffs' action to the Western District of Kentucky so it could be coordinated with other lawsuits addressing Amazon's security screening policies. *See* Page ID # 188-89.

---

[2] Because the underlying proceedings fall within an MDL, the filed documents appear in both the "Master File" docket (Civil Action No. 3:14-md-2504-DJH) and in the *Heimbach* docket (Civil Action No. 3:14-cv-204-DJH). All Page ID references in this motion are from the *Heimbach* docket.

B. The district court's underlying opinion rests entirely on its holding that, as a matter of law, the Pennsylvania legislature intended for the PMWA to be interpreted in a manner that is consistent with the federal Portal-to-Portal Act and the U.S. Supreme Court's *Integrity Staffing* opinion.

The underlying opinion represents at least the fourth time the district court has held that, as a matter of law, a state's wage statute must be read in accordance with the federal Portal-to-Portal Act and the U.S. Supreme Court's *Integrity Staffing* decision. In the *Vance* litigation, the holding under Kentucky law was affirmed. *See* 852 F.3d 601. In the *Busk* litigation, the holdings under Arizona and Nevada law were reversed. *See* __ F.3d __, 2018 U.S. App. LEXIS 26634.

In the instant litigation – as in *Vance* and *Busk* – the district court read the Pennsylvania legislature's silence regarding the applicability of Portal-to-Portal principles to the PMWA as indicating that the legislature did not intend to "expose employers to liability foreclosed by the Portal-to-Portal Act." Page ID # 2360. The district court reasoned:

> The Pennsylvania legislature need not have separately adopted the Portal-to-Portal Act in order for it to inform the Court's interpretation of the PMWA. The Pennsylvania legislature passed the PMWA in 1968, twenty-one years after Congress passed the Portal-to-Portal Act amending the FLSA. Thus, "[a]s long as [Pennsylvania] has had an FLSA analogue, there has been a federal Portal-to-Portal Act." If the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, "one may reasonably assume it would have done so affirmatively."

> Following from the above discussion, the Court concludes that it is proper to consider the Portal-to-Portal Act amendments, and the Supreme Court's interpretation thereof, in construing and applying the PMWA. The Supreme Court has held that post-shift security screenings are not compensable work under the FLSA as amended by the Portal-to-Portal Act. And the Court may rely on that law in order to interpret the PMWA here. The Court therefore finds that time spent undergoing or waiting to undergo security screenings is compensable under the PMWA. As a result, Plaintiffs no longer have a viable claim under Pennsylvania law, and the Court will grant the defendants' motion for summary judgment.

Page ID # 2359-2360 (internal citations and footnotes omitted).

C. The Pennsylvania Supreme Court has demonstrated an interest in exploring alleged differences between the FLSA and the PMWA.

Generally speaking, the Pennsylvania Supreme Court has demonstrated an interest in exploring differences between the FLSA and PMWA. For example, in *Bayada Nurses, Inc. v. Dept. of Labor and Industry*, 8 A.3d 866 (Pa. 2010), the Supreme Court unanimously held that the PMWA entitled home health workers employed by third-party agencies to overtime premium pay even though these same employees were "exempt" under the FLSA. *See id.* at 876-85. In so holding, the Court observed:

> [T]he FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees; and it is not mandated that state regulation be read identically to, or *in pari materia* with, the federal regulatory scheme.

Bayada, 8 A.3d at 883; *see also Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012) (observing that FLSA "evinces a clear intent to preserve rather than supplant state law" and recognizing "states' lengthy history of regulating employees' wages and hours"); *Verderame v. Radioshack Corp.*, 31 F. Supp. 3d 702, 709 (E.D. Pa. 2014) ("state and federal courts in Pennsylvania have often interpreted the PMWA's regulations to be more expansive than the baseline federal regulations").[3]

More recently, the Pennsylvania Supreme Court granted an employer's petition for appeal in *Chevalier v. General Nutrition Centers, Inc.*, Nos. 22/23 WAP 2018. See Appendix B. In *Chevalier*, the Superior Court held that the PMWA – unlike the FLSA – prohibits employers from calculating salaried employees' overtime pay under a "half-time" or "fluctuating workweek"

---

[3] Pennsylvania's lower state courts have similarly been willing to expand the PMWA beyond the FLSA's confines. For example, in *LeClair v. Diakon Lutheran Social Ministries*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Pa. Com. Pl., Lehigh Cty. Jan. 14, 2013), *Bordel v. Geisinger Medical Center*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 37 (Pa. Com. Pl., Northumberland Cty. May 6, 2013), and *Turner v. Mercy Health System*, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Pa. Com. Pl., Philadelphia Cty. March 10, 2010), the Common Pleas Courts ruled that the FLSA's employer-friendly "8-80 Method" of calculating hospital workers' overtime pay was unavailable under the PMWA. And, in *Dept. of Labor v. Whipple*, 6 Pa. D. & C. 4th 418 (Pa. Com. Pl., Lycoming Cty. 1989), the Common Pleas Court held that agricultural workers could assert PMWA overtime claims even though they were exempt under the FLSA.

methodology. *See Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280, 283-84 (Pa. Super. 2017). Because the half-time methodology is clearly permitted under the FLSA, *see id.* at 290-92 (discussing 29 CFR § 778.114 and *Overtime Motor Transportation Co. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942)), this appeal reflects the Supreme Court's continued willingness to explore the extent to which the PMWA extends beyond the FLSA's confines. The *Chevalier* appeal is fully briefed. Various Pennsylvania organizations have filed *amici curiae* briefs weighing in on the issue. *See* Appendix C.

D. The district court's underlying opinion directly conflicts with an opinion issued by the Pennsylvania Court of Common Pleas.

The district court's application of Portal-to-Portal principals and *Integrity Staffing* to Plaintiffs' PMWA claim directly conflicts with a recent opinion issued by the Pennsylvania Court of Common Pleas in *Bonds v. GMS Mine Repair & Maintenance, Inc.* The *Bonds* litigation is summarized below:

Bonds started out as a hybrid class/collective action in federal district court. *See Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2014 U.S. Dist. LEXIS 89181 (W.D. Pa. July 1, 2014). The plaintiffs were coal miners who sought to be paid under the FLSA and PMWA for various pre-shift activities such as attending mandatory safety meetings. *See id.* at *15. After discovery, the employer moved for summary judgment, and the district court set out to determine "whether the

time that the underground mine workers spend attending pre-shift meetings is compensable under the FLSA, as amended by the Portal-to-Portal Act of 1947." *Id.* at *21. In answering this question, the district court undertook an extensive analysis of the FLSA, the Portal-to-Portal Act, and the U.S. Supreme Court decisions applying the Portal-to-Portal Act. *See id.* at *21-35. The district court then granted summary judgment against the miners, reasoning that the pre-shift safety meetings were not compensable under the Portal-to-Portal Act. *See id.* at *35-40.

Next, the district court turned to the miner's PMWA claim. *See Bonds*, 2014 U.S. Dist. LEXIS 89181, at *40-41. The district court observed that "'the Pennsylvania General Assembly has not in any way adopted the federal Portal-to-Portal Act.'" *Id.* at *40 (quoting *Ciarelli v. Sears, Roebuck & Co.*, 46 A.3d 643, 648 (Pa. 2012) (McCafferty, J. dissenting from dismissal of appeal as being improvidently granted)). The district court then reasoned that, because the Portal-to-Portal Act's applicability to the miners' PMWA claim was a "novel issue of state[] law," it would refrain from exercising supplemental jurisdiction over the PMWA claim. *See id.* at *40-41.

In the wake of the district court's ruling, the miners pursued their PMWA claim in the Pennsylvania Court of Common Pleas. *See Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com.

Pl., Washington Cty. Dec. 12, 2017) (attached as Appendix D). Once again, the employer moved for summary judgment, arguing that the PMWA – like the FLSA – rendered the miners' pre-shift activities non-compensable. *See id.* at *6-11.

The Common Pleas Court rejected the employer's argument. *See Bonds*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622, at *6-11. After explaining that the PMWA often provides Pennsylvania employees with greater protections than the FLSA, *see id.* at *9-10, the Common Pleas Court explained that the FLSA's Portal-to-Portal limitations and the U.S. Supreme Court's *Integrity Staffing* opinion were irrelevant to the miners' claim:

> Although the *Integrity Staffing* case significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, the case ultimately has no impact on Plaintiff's [P]MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA. The standard set forth in *Integrity Staffing* is inapplicable to plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgment is DENIED.

Id. at *11.[4]

---

[4] *Bonds* finds support in *In re Cargill Meat Solutions Wage and Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008), which observed: "The provisions of the Portal Act and § 203(o) indicate Congress's intent to better define the liability of employers under the FLSA. They do not, however, supplant the traditional power of the state to more generously regulate wage and hours via th[eir] own state regulations." *Id.* at 394 (internal quotations omitted). The holding also finds support in *Lugo v. Farmer's Pride, Inc.*, 967

Obviously, *Bonds* cannot be reconciled with Judge Hale's underlying determination that "it is proper to consider the Portal-to-Portal amendments, and the Supreme Court's interpretation thereof [in *Integrity Staffing*], in construing and applying the PMWA." Page ID # 2360. Indeed, Judge Hale explicitly acknowledged his disagreement with *Bonds*. *See* Page ID # 2360 n. 3.

E. Certification of the question is appropriate under Pennsylvania Rule of Appellate Procedure 3341.

Pennsylvania Rule of Appellate Procedure 3341(a) permits the United States Supreme Court or any United States Court of Appeal to "file a petition for certification [of a question] with the Prothonotary of the Supreme Court." Under the Rule, the Supreme Court will not accept certification unless three requirements are satisfied: (1) "all facts material to the question of law to be determined are undisputed;" (2) "the question of law is one that the petitioning court has not previously decided;" and (3) "there are special and important reasons" for certification. Pa. R. App. P. 3341(c). As discussed below, each of these requisites is satisfied here:

A.2d 963 (Pa. Super. 2009), wherein the Pennsylvania Superior Court makes no mention of Portal-to-Portal principles in addressing food processing workers' claim that pre-shift donning and doffing activities – precisely the types of activities covered by the Portal-to-Portal Act in FLSA lawsuits – were compensable under the PMWA. *See id.* at 967.

1. "[A]ll facts material to the question of law to be determined are undisputed."

This requirement is easily satisfied. It is undisputed that Plaintiffs were not paid for time associated with security screenings and that such time is not compensable under the FLSA due to the Portal-to-Portal Act and *Integrity Staffing*. *See* Page ID # 2356. The district court's underlying summary judgment opinion – which, per Fed. R. Civ. P. 56, is necessarily based on undisputed facts – rests entirely on his purely *legal* analysis and conclusion that "it is proper to consider the Portal-to-Portal Act amendments, and the Supreme Court's interpretation thereof [in *Integrity Staffing*], in construing and applying the PMWA." Page ID # 2360.

2. "[T]he question of law is one that the petitioning court has not previously decided"

This requirement is easily satisfied because this Court has never addressed the interplay between the PMWA and the FLSA, the Portal-to-Portal Act, or *Integrity Staffing*.

3. "[T]here are special and important reasons" for certification.

Rule 3341 lists three non-exclusive circumstances that present "special and important reasons" for certification. *See* Pa. R. App. P. 3341(c)(1)-(3). One circumstance arises where "***[t]he question of law is one with respect to which***

there are conflicting decisions in other courts." *Id.* at 3341(c)(2) (emphasis supplied). Such is the case here. As already discussed, the district court's underlying opinion stands in direct conflict with the Pennsylvania Common Pleas Court's *Bonds* opinion. Judge Hale acknowledges this conflict and, in the same footnote, explains that he is prohibited from certifying the question to the Pennsylvania Supreme Court. *See* Page ID # 2360 n. 3.[5]

The conflict between *Bonds* and the district court's underlying opinion, ***standing alone***, constitutes a "special and important reason[]" for certification of the question.[6]

Notwithstanding, it seems notable that this litigation also falls within Rule 3341's other examples of "special and important reasons" for certification. Most obviously, "the question of law concerns an unsettled issue of the . . . construction, or application of a statute of this Commonwealth." Pa. R. App. P. 3341(c)(3). In this regard, the district court's construction of the PMWA fits the bill.

Likewise, "the question of law is one of first impression and is of such substantial public importance as to require prompt and definitive resolution by the

---

[5] Moreover, even if this Court were to affirm, the conflict would still persist. Pennsylvania lawyers and jurists would be called upon to choose between *Bonds* and this Court's opinion, neither of which would be binding.

[6] In this regard, the instant appeal is distinguishable from *Vance* and *Busk*, neither of which involved district court opinions that contradicted existing authority.

Supreme Court." Pa. R. App. P. 3341(c)(1). Although two justices of the Pennsylvania Supreme Court have suggested that the Portal-to-Portal Act has no impact on PMWA claims, *see Bonds*, 2014 U.S. Dist. LEXIS 89181, at *40 (quoting *Ciarelli*, 46 A.3d at 648), the issue remains one of first impression at the Pennsylvania Supreme Court. And, as reflected in the *amici* briefs filed in the pending *Chevalier* appeal, *see* Section C *supra* and Appendix C, Pennsylvania employers, employees, and advocates are extremely interested in determining the extent to which the PMWA extends beyond the FLSA. The importance of this appeal cannot be understated. "Portal-to-Portal" scenarios touch upon almost every job that entails pre-shift and post-shift work duties. Pennsylvania's law enforcement officers (who often attend pre-shift meetings and engage in other pre-shift activities), steel, coal, and food processing workers (who gather, don, and doff safety and protective gear at the beginning of the workday), and construction and landscaping workers (who often report to the shop before heading out to the job site) all have an interest in the instant appeal's outcome. And, of course, Pennsylvania employees subject to security screenings (including the thousands of employees working in Amazon warehouses) have an obvious interest.

In sum, certification of the question is warranted under Pennsylvania Rule of

Appellate Procedure 3341.[7]

F. Conclusion.

For all of the above reasons, Plaintiffs respectfully request that this Court certify the following question to the Pennsylvania Supreme Court:

> Whether time associated with workplace security screenings conducted at the end of a warehouse employee's shift can be compensable under the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq.*, even though, in *Integrity Staffing Solutions, Inc. v. Busk*, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 41 (2014), the United States Supreme Court deemed such time non-compensable "postliminary" activities under the federal Portal-to-Portal Act, 29 U.S.C. §§ 251, *et seq.*

Date: October 30, 2018

Respectfully submitted,

/s/ Peter Winebrake
Peter Winebrake
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491
Counsel for Plaintiffs-Appellants

---

[7] This Court would not be alone in granting such relief. The Ninth Circuit Court of Appeals has certified to the California Supreme Court the general question of whether the Portal-to-Portal Act and *Integrity Staffing* are controlling under California wage law. *See Frlekin v. Apple, Inc.*, 870 F.3d 867 (9th Cir. 2017). The California Supreme Court has agreed to resolve the issue. *See Frlekin v. Apple, Inc.*, 2017 Cal. LEXIS 7496 (Cal. Sept. 20, 2017).

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION

Master File No. 3:14-md-2504-DJH
MDL Docket No. 2504

THIS DOCUMENT RELATES TO:
Heimbach, et al., v. Amazon.com, Inc., et al.,

Case No. 3:14-cv-204-DJH

* * * * *

MEMORANDUM OPINION AND ORDER

Plaintiffs Neal Heimbach and Karen Salasky bring this class-action lawsuit against Amazon.com, Inc., Amazon.com.DEDC, LLC (collectively, "Amazon"), and Integrity Staffing Solutions, Inc. ("Integrity") seeking compensation under the Pennsylvania Minimum Wage Act (PMWA) for time spent undergoing security screenings at the Amazon facility where they worked. Amazon has moved for summary judgment (Docket No. 59), and Integrity has moved to join in Amazon's motion. (D.N. 61) The defendants argue that the PMWA aligns with the United States Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014), which held that time spent waiting for and undergoing security screenings is not compensable under the Fair Labor Standards Act (FLSA). (*See* D.N. 59-1, PageID # 1690, 1717) The plaintiffs disagree, arguing that *Busk* does not control here because the PMWA defines compensable work in accordance with traditional FLSA principles. (*See* D.N. 74, PageID # 1905, 1916) Having concluded that the *Busk* holding provides appropriate guidance, the Court will grant the defendants' motion for summary judgment.

I.

Plaintiffs worked at an Amazon warehouse in Breinigsville, Pennsylvania. (D.N. 74-2, PageID # 1949-50; D.N. 74-3, PageID # 1961-62) At the end of each work shift, Amazon required employees working at the warehouse to go through an anti-theft screening process. (D.N. 74-2, PageID # 1950; D.N. 74-3, PageID # 1962) According to Plaintiffs, the screening process generally took between ten and twenty minutes as workers waited to pass through a metal detector. (D.N. 74-2, PageID # 1951) Plaintiffs allege that they were not compensated for the time spent waiting for and going through the screening process, and they seek to recover unpaid wages for that time under the Pennsylvania Minimum Wage Act (PMWA). (*Id.*, PageID # 1951, 1955-56) Plaintiffs have moved to certify a class of all individuals who have been employed by Amazon or Integrity as hourly warehouse workers at the Breinigsville location since September 27, 2010. (D.N. 56)

The Supreme Court held in *Busk* that time spent passing through security clearance is not compensable under the FLSA. 135 S. Ct. at 519. Amazon seeks summary judgment on Plaintiffs' claims, arguing that such time is not compensable under the PMWA either. (D.N. 59-1, PageID # 1690-91) Integrity has moved to join Amazon's motion for summary judgment, asserting that the "reasoning, defenses and arguments asserted by Amazon . . . are wholly applicable" to Integrity. (D.N. 61) Plaintiffs and Amazon have also moved to seal various exhibits to their motions for class certification and summary judgment, respectively, because the documents allegedly contain proprietary business information that should not be available to the public. (D.N. 55; D.N. 58) The motion for joinder and motions to seal are unopposed.

II.

A. Motion for Summary Judgment

Summary judgment is required when the moving party shows, using evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see* 56(c)(1). For purposes of summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). However, the Court "need consider only the cited materials." Fed. R. Civ. P. 56(c)(3); *see Shreve v. Franklin Cty., Ohio*, 743 F.3d 126, 136 (6th Cir. 2014). If the nonmoving party "fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)," the fact may be treated as undisputed. Fed. R. Civ. P. 56(e). To survive a motion for summary judgment, the nonmoving party must establish a genuine issue of material fact with respect to each element of each of her claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (noting that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

"When the PMWA 'substantially parallels' the FLSA, Pennsylvania and federal courts have used FLSA law for interpretative guidance because the statutes have similar purposes." *Espinoza v. Atlas R.R. Constr., LLC*, 657 F. App'x 101, 105 (3d Cir. 2016). "However, the courts look to the FLSA to construe and apply the PMWA only where the state and federal provisions are similar to each other or where there is a need to fill in a gap missing in the state law." *Id.*

Plaintiffs and Defendants agree that the state and federal definitions of compensable time are similar to each other. (*See* D.N. 59-1, PageID # 1690, 1703, 1706-07; D.N. 74, PageID # 1917-18, 1930) Indeed, the definitions are nearly identical. The PMWA requires employers to pay employees wages "for all hours worked." 43 Pa. Cons. Stat. § 333.104(a). Pennsylvania regulations define "hours worked" as "time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place." 34 Pa. Code § 231.1(b). The Supreme Court has defined the compensable "statutory workweek" under the FLSA as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Busk*, 135 S. Ct. at 516; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). Because the state and federal definitions are similar to each other, the Court will look to the FLSA to construe and apply the PMWA in this case. *See Espinoza*, 657 F. App'x at 105.

In *Busk*, the Supreme Court held that time spent undergoing and waiting to undergo security screenings was not compensable under the FLSA. 135 S. Ct. at 519. The *Busk* Court's decision rested upon its interpretation of the Portal-to-Portal Act, which amended the FLSA to exempt employers from liability for "activities which are preliminary to or postliminary to [the] principal activity or activities." 29 U.S.C. § 254(a)(2); *see Busk*, 135 S. Ct. at 517, 519. Because time spent undergoing security screenings was not a "principal activity," the Court reasoned that such time was not compensable under the FLSA. *See Busk*, 135 S. Ct. at 517, 519.

Plaintiffs argue that *Busk* has no bearing on this case because the Portal-to-Portal Act amendments do not apply to the PMWA.[1] (D.N. 74, PageID # 1916) In support, they cite *Bonds*

[1] Plaintiffs also assert that Defendants "do not even attempt to argue" that the Portal-to-Portal Act applies to their PMWA claims. (D.N. 74, PageID # 1905) But in Defendants' response to Plaintiffs' notice of supplemental authority, they urge the Court to look to the FLSA, as clarified

v. GMS Mine Repair & Maintenance, Inc. (*Id.*) But in *Bonds*, the court merely observed that the Pennsylvania General Assembly had not adopted the Portal-to-Portal Act. No. 2:13-cv-1217, 2015 WL 5602607, at *11 (W.D. Pa. Sept. 23, 2015). Plaintiffs also cite *In re Cargill Meat Solutions Wage & Hour Litigation*, where the court noted, in the context of a preemption analysis, that the Portal-to-Portal Act did not "supplant the traditional power of the state to more generously regulate wage[s] and hours via [its] own state regulations." 632 F. Supp. 2d 368, 394 (M.D. Pa. 2008) (quoting *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *36 (E.D. Wash. May 16, 2005)). Thus, neither case supports Plaintiffs' argument that this Court is foreclosed from considering federal law, including the Portal-to-Portal Act amendments, in interpreting the PMWA.

The Portal-to-Portal Act *amended* the FLSA. *Busk*, 135 S. Ct. at 515; *Vance v. Amazon.com, Inc.*, No. 3:14-md-2504, 2016 WL 1268296, at *3 (W.D. Ky. Mar. 31, 2016), *aff'd*, 852 F.3d 601 (6th Cir. 2017). As this Court explained in *Vance*, those amendments are not separate and distinct from the FLSA. *See* 2016 WL 1268296, at *3. Rather, "[t]he Portal-to-Portal Act is simply a clarifying amendment that carves out 'preliminary [and] postliminary' activities from the aegis of compensable work." *Id.* "It does not alter the FLSA's construct or make substantive changes to the FLSA's concepts about work, overtime, or the like. It simply clarifies that some activities do not count as 'work.'" *Id.*

The Pennsylvania legislature need not have separately adopted the Portal-to-Portal Act in order for it to inform the Court's interpretation of the PMWA. *Cf. Vance v. Amazon.com, Inc.*, 852 F.3d 601, 611 (6th Cir. 2017) (distinguishing between "an express, *affirmative departure*

---

by the Portal-to-Portal Act, in applying the PMWA. (*See* D.N. 83, PageID # 2322) Moreover, in Defendants' most recent filing, they urge the Court to "follow federal jurisprudence that time spent passing through security is not 'hours worked'" because "the definitions of 'hours worked' under the FLSA and the PMWA are the same." (D.N. 85, PageID # 2351)

from the FLSA" and a "state legislature's failure to explicitly incorporate certain Portal-to-Portal Act terms"). The Pennsylvania legislature passed the PMWA in 1968, twenty-one years after Congress passed the Portal-to-Portal Act amending the FLSA. *See* 29 U.S.C. § 254; 43 Pa. Cons. Stat. § 333.102; *see also Vance*, 2016 WL 1268296, at 3. Thus, "[a]s long as [Pennsylvania] has had an FLSA analogue, there has been a federal Portal-to-Portal Act." *Vance*, 2016 WL 1268296, at 3. If the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, "one may reasonably assume it would have done so affirmatively." *Vance*, 852 F.3d at 612.

Following from the above discussion, the Court concludes that it is proper to consider the Portal-to-Portal Act amendments, and the Supreme Court's interpretation thereof, in construing and applying the PMWA.[2] The Supreme Court has held that post-shift security screenings are not compensable work under the FLSA as amended by the Portal-to-Portal Act. *See Busk*, 135 S. Ct. at 515, 517, 519. And the Court may rely on that law in order to interpret the PMWA here.[3] *See Espinoza*, 657 F. App'x at 105; *cf. Livi v. Hyatt Hotels Corp.*, No. 15-5371, 2017 WL 5128173, at *10 (E.D. Pa. Nov. 6, 2017) (citing *Bayada Nurses, Inc. v. Commonwealth, Dep't of Labor & Indus.*, 8 A.3d 866, 882 (Pa. 2010)) ("[T]he Pennsylvania Supreme Court's underlying assumption . . . is that when the federal and state exemptions parallel one another, the state exemption should be read in light of federal interpretation of the federal exemption."). The Court therefore finds that time spent undergoing or waiting to undergo security screenings is not

[2] In light of this conclusion, the Court finds it unnecessary to address Defendants' additional arguments regarding judicial estoppel, exertion, and the de minimis doctrine.

[3] Plaintiffs recently filed a supplemental brief informing the Court of an unpublished, Pennsylvania trial court case holding that *Busk* was inapplicable to their PMWA claims. (D.N. 84, PageID # 2334) Although the case is not binding, the Court has considered it and finds it unpersuasive. The Court further observes that the Pennsylvania Rules of Appellate Procedure do not allow federal district courts to certify questions to the Pennsylvania Supreme Court. *See* Pa. R. App. P. 3341(a).

compensable under the PMWA. As a result, Plaintiffs no longer have a viable claim under Pennsylvania law, and the Court will grant the defendants' motion for summary judgment.

B. Motions to Seal

Plaintiffs have filed a motion to seal various exhibits to their motion for class certification. (D.N. 55) The exhibits include job descriptions, an attendance policy, photographs of the security-screening area, security-screening standards, a "post order" pertaining to the screening process, a physical-security policy for exit screening, and a security-screening audit form. (*Id.*) As grounds for their motion, Plaintiffs state that Amazon labeled these documents as confidential during discovery, which means that Amazon presumably believes the documents contain proprietary business information. (*Id.*) Amazon has filed its own motion to seal exhibits to its motion for summary judgment. (D.N. 58) These exhibits include the same job descriptions and photographs that were the subject of Plaintiffs' motion, as well as a map depicting portions of the facility. (*Id.*) In support of its motion, Amazon states that the documents were labeled confidential during discovery based on its good-faith belief that they contained or comprised proprietary information, the public disclosure of which could competitively disadvantage or be otherwise detrimental to Amazon.[4] (*Id.*)

By Order entered June 21, 2016, the Court sealed a rounding and grace-period policy, an attendance policy, photographs of the screening area, security-screening standards, a post order, a physical-security policy for exit screening, and a security-screening audit form. (D.N. 75; D.N.

[4] The Court again notes that both motions to seal are unopposed. But neither the law of the Sixth Circuit nor the rules of this Court permit sealing of court records based on an agreement between parties. *See* LR 5.7(c) ("Reference to a stipulation that allows a party to designate certain documents as confidential is not sufficient grounds to establish that a document, or portions thereof[,] warrants filing under seal."); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016) ("A court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody.").

77) Thus, the attendance policy, photographs, security-screening standards, post order, physical-security policy, and audit form have previously been sealed. On July 27, 2016, however, the Sixth Circuit clarified the standard for sealing, explaining that sealing court records "should be done only if there is a 'compelling reason why certain documents or portions thereof should be sealed.'" *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (quoting *Shane Grp., Inc.*, 825 F.3d at 305). Seals "must be narrowly tailored to serve that reason" and should "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.* at 593-94 (quoting *Shane Grp., Inc.*, 825 F.3d at 305-06). Having reviewed the previously sealed records, as well as the records sought to be sealed in the current motions, the Court concludes that they likely should not remain sealed in light of the Sixth Circuit's decision in *Rudd*. The Court will therefore deny the motions to seal without prejudice and allow the parties fourteen days to submit renewed motions to seal explaining why sealing each document—including those previously sealed—is warranted. *See Shane Grp., Inc.*, 825 F.3d at 305-06 (quoting *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002)) ("The proponent of sealing therefore must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'"). The parties are advised that if they do not file renewed motions to seal, then the exhibits described above will be unsealed in the record of this matter.

III.

For the reasons explained above, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Defendant Integrity Staffing Solutions, Inc.'s motion for joinder (D.N. 61; MDL D.N. 168) is **GRANTED**.

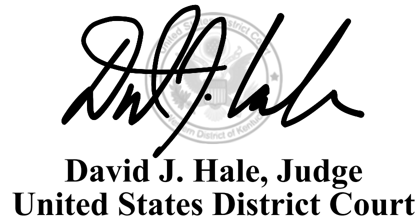
(2) Defendants Amazon.com, Inc. and Amazon.com.DEDC, LLC's motion for summary judgment (D.N. 59; MDL D.N. 166) is **GRANTED**.

(3) Plaintiffs' motion for class certification (D.N. 56; MDL D.N. 163) is **DENIED** as moot.

(4) Plaintiffs' and Defendants' motions to seal (D.N. 55; MDL D.N. 162; D.N. 58; MDL D.N. 165) are **DENIED** without prejudice. The parties shall have **fourteen (14) days** from the date of entry of this Order to submit renewed motions to seal as set forth above.

(5) A separate judgment will be entered this date.

August 30, 2018



David J. Hale, Judge
United States District Court

Appendix B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Respondents v. GENERAL NUTRITION CENTERS, INC. AND GENERAL NUTRITION CORPORATION, Petitioners	:	No. 32 WAL 2018 Petition for Allowance of Appeal from the Order of the Superior Court
TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Respondents v. GENERAL NUTRITION CENTERS, INC., AND GENERAL NUTRITION CORPORATION, Petitioners	:	No. 33 WAL 2018 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 16th day of July, 2018, the Petition for Allowance of Appeal is **GRANTED.** The issue as stated by petitioners is:

When an employee's weekly salary is paid as compensation for all hours worked in a week, and the employee's "regular rate" is determined by dividing the employee's salary by all hours worked in the week, does an employer satisfy its obligation under Section 4(c) of the Pennsylvania Minimum Wage Act of 1968 by paying the employee an additional one-half times the employee's regular rate for all hours worked in excess of 40, in addition to the employee's salary?

Appendix C

10:04 A.M.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

CAPTION

Tawny L. Chevalier and Andrew Hiller, on behalf of themselves and all others similarly situated, Appellees

v.

General Nutrition Centers, Inc. and General Nutrition Corporation, Appellants

CASE INFORMATION

Initiating Document: Order Granting Petition for Allowance of Appeal

Case Status: Active

Journal Number:

Case Category: Civil

Case Type(s): Assumpsit

CONSOLIDATED CASES

Docket No / Reason	Type
23 WAP 2018 Lower Court	Consolidated

RELATED CASES

COUNSEL INFORMATION

Attorney: Pritchard, Robert William

Address: Littler Mendelson, P.C.
625 Liberty Ave 26th Fl
Pittsburgh, PA 15222

Phone No: (412) 201-7600 x:7628

Representing: General Nutrition Centers, Inc., Appellant

Pro Se: No

IFP Status:

Representing: General Nutrition Corporation, Appellant

Pro Se: No

IFP Status:

Attorney: Roe, Adrian Nathaniel

Address: Roe & Simon LLC
428 Boulevard of the Allies
5th Floor
Pittsburgh, PA 15219

Phone No: (412) 856-8107

Representing: Chevalier, Tawny L., Appellee

Pro Se: No

IFP Status:

Representing: Hiller, Andrew, Appellee

Pro Se: No

IFP Status:

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

10:04 A.M.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

COUNSEL INFORMATION

Attorney:	Simon, Michael D.
	Roe & Simon LLC
Address:	2520 Mosside Blvd
	Monroeville, PA 15146-3539
Phone No:	(412) 856-8107
Representing:	Chevalier, Tawny L., Appellee
Pro Se:	No
IFP Status:	
Representing:	Hiller, Andrew, Appellee
Pro Se:	No
IFP Status:	

Attorney:	Bibikos, George A.
	GA BIBIKOS LLC
Address:	5901 Jonestown Rd # 6330
	Harrisburg, PA 17112
Phone No:	(717) 580-5305
Representing:	National Federation of Independent Business, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	Pennsylvania Chamber of Business and Industry, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	Pennsylvania Manufacturers' Association, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	Pennsylvania Restaurant and Lodging Association, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	Pennsylvania Retailers' Association, Amicus Curiae
Pro Se:	No
IFP Status:	

Attorney:	Elzer, Christine Teresa
	Elzer Law Firm, LLC
Address:	100 First Ave Ste 1010
	Pittsburgh, PA 15222
Phone No:	(412) 230-8436
Representing:	NELA Eastern Pennsylvania, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	Western Pennsylvania Employment Lawyers Association, Amicus Curiae
Pro Se:	No
IFP Status:	

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

10:04 A.M.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

COUNSEL INFORMATION

Attorney:	Winebrake, Peter David Winebrake & Santillo, LLC
Address:	Winebrake & Santillo LLC 715 Twining Rd Ste 211 Dresher, PA 19025-1833
Phone No:	(215) 884-2491
Representing:	Community Legal Services Inc., Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	PathWays PA, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	The Keystone Research Center, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	The National Employment Law Project, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	The Pennsylvania AFL-CIO, Amicus Curiae
Pro Se:	No
IFP Status:	
Representing:	The Women's Law Project, Amicus Curiae
Pro Se:	No
IFP Status:	

SUPREME COURT INFORMATION

Appeal From: the Order of the Superior Court entered December 22, 2017 at No. 1437 WDA 2016, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Allegheny County entered December 29, 2016 at No. GD 13-017194.

Probable Jurisdiction Noted:		Docketed Date:	July 16, 2018
Allocatur/Miscellaneous Granted:	July 16, 2018	Allocatur/Miscellaneous Docket No.:	32 WAL 2018

Allocatur/Miscellaneous Grant Order: AND NOW, this 16th day of July, 2018, the Petition for Allowance of Appeal is GRANTED. The issue as stated by petitioners is:

When an employee's weekly salary is paid as compensation for all hours worked in a week, and the employee's "regular rate" is determined by dividing the employee's salary by all hours worked in the week, does an employer satisfy its obligation under Section 4(c) of the Pennsylvania Minimum Wage Act of 1968 by paying the employee an additional one-half times the employee's regular rate for all hours worked in excess of 40, in addition to the employee's salary?

FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

INTERMEDIATE APPELLATE COURT INFORMATION

Court Name: Superior
Docket Number: 1437 WDA 2016
Date of Order: December 22, 2017
Rearg/Recon Disp Date:
Rearg/Recon Disposition:

Judge(s): Moulton, Geoffrey
Solano, Carl A.
Musmanno, John L.

Intermediate Appellate Court Action: Affirmed, Reversed and Vacated. Case Remanded.
Referring Court:

AGENCY/TRIAL COURT INFORMATION

Court Below: Allegheny County Court of Common Pleas
County: Allegheny
Division: Allegheny County Civil Division
Date of Agency/Trial Court Order: September 6, 2016
Docket Number: G.D. 13-017194
Judge(s): Wettick, R. Stanton, Jr.
OTN:
Order Type: Judgment

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content/Description

Record Remittal:

BRIEFING SCHEDULE

Amicus Curiae

Community Legal Services Inc.
Brief
Due: October 1, 2018 Filed: September 26, 2018

National Federation of Independent Business
Brief
Due: August 27, 2018 Filed: August 27, 2018

NELA Eastern Pennsylvania
Brief
Due: October 1, 2018 Filed: September 25, 2018

PathWays PA
Brief
Due: October 1, 2018 Filed: September 26, 2018

Pennsylvania Chamber of Business and Industry
Brief
Due: August 27, 2018 Filed: August 27, 2018

Pennsylvania Manufacturers' Association
Brief

Appellee

Chevalier, Tawny L.
Brief
Due: October 1, 2018 Filed: September 26, 2018

Hiller, Andrew
Brief
Due: October 1, 2018 Filed: September 26, 2018

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

BRIEFING SCHEDULE

Amicus Curiae

Pennsylvania Manufacturers' Association

Brief

Due: August 27, 2018 Filed: August 27, 2018

Pennsylvania Restaurant and Lodging Association

Brief

Due: August 27, 2018 Filed: August 27, 2018

Pennsylvania Retailers' Association

Brief

Due: August 27, 2018 Filed: August 27, 2018

The Keystone Research Center

Brief

Due: October 1, 2018 Filed: September 26, 2018

The National Employment Law Project

Brief

Due: October 1, 2018 Filed: September 26, 2018

The Pennsylvania AFL-CIO

Brief

Due: October 1, 2018 Filed: September 26, 2018

The Women's Law Project

Brief

Due: October 1, 2018 Filed: September 26, 2018

Western Pennsylvania Employment Lawyers Association

Brief

Due: October 1, 2018 Filed: September 25, 2018

Appellant

General Nutrition Centers, Inc.

Brief

Due: August 27, 2018 Filed: August 27, 2018

Reply Brief

Due: October 15, 2018 Filed: October 15, 2018

Reproduced Record

Due: August 27, 2018 Filed: August 27, 2018

General Nutrition Corporation

Brief

Due: August 27, 2018 Filed: August 27, 2018

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

10:04 A.M.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

BRIEFING SCHEDULE

Appellant

General Nutrition Corporation

Reply Brief

Reproduced Record

Due: August 27, 2018 Filed: August 27, 2018

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
July 16, 2018	**Allocatur Granted**		Per Curiam

Comments:
AND NOW, this 16th day of July, 2018, the Petition for Allowance of Appeal is GRANTED. The issue as stated by petitioners is:

When an employee's weekly salary is paid as compensation for all hours worked in a week, and the employee's "regular rate" is determined by dividing the employee's salary by all hours worked in the week, does an employer satisfy its obligation under Section 4(c) of the Pennsylvania Minimum Wage Act of 1968 by paying the employee an additional one-half times the employee's regular rate for all hours worked in excess of 40, in addition to the employee's salary?

Filed Date	Docket Entry / Representing	Participant Type	Filed By
July 16, 2018	**Superior Court Record Received**		Superior Court of Pennsylvania
July 27, 2018	**Designation of Contents of Reproduced Record**	Appellant	General Nutrition Corporation
		Appellant	General Nutrition Centers, Inc.
August 27, 2018	**Appellant's Brief**	Appellant	General Nutrition Corporation
		Appellant	General Nutrition Centers, Inc.
August 27, 2018	**Appellant's Reproduced Record Filed**	Appellant	General Nutrition Corporation
		Appellant	General Nutrition Centers, Inc.
August 27, 2018	**Amicus Curiae Brief**	Amicus Curiae	Pennsylvania Chamber of Business and Industry
		Amicus Curiae	National Federation of Independent Business
		Amicus Curiae	Pennsylvania Restaurant and Lodging Association
		Amicus Curiae	Pennsylvania Manufacturers' Association
		Amicus Curiae	Pennsylvania Retailers' Association
September 25, 2018	**Amicus Curiae Brief**	Amicus Curiae	Western Pennsylvania Employment Lawyers Association
		Amicus Curiae	NELA Eastern Pennsylvania

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

10:04 A.M.

Supreme Court of Pennsylvania

Appeal Docket Sheet

Docket Number: 22 WAP 2018

October 30, 2018

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
September 25, 2018	**Praecipe for Appearance**		
	NELA Eastern Pennsylvania	Amicus Curiae	Elzer, Christine Teresa
	Western Pennsylvania Employment Lawyers Association	Amicus Curiae	Elzer, Christine Teresa
September 26, 2018	**Appellee's Brief**		
		Appellee	Hiller, Andrew
		Appellee	Chevalier, Tawny L.
September 26, 2018	**Amicus Curiae Brief**		
		Amicus Curiae	The Pennsylvania AFL-CIO
		Amicus Curiae	The National Employment Law Project
		Amicus Curiae	Community Legal Services Inc.
		Amicus Curiae	The Women's Law Project
		Amicus Curiae	The Keystone Research Center
		Amicus Curiae	PathWays PA
October 15, 2018	**Appellant's Reply Brief**		
		Appellant	General Nutrition Centers, Inc.

CROSS COURT ACTIONS

Docket Number:	1437 WDA 2016
Docket Number:	32 WAL 2018

Neither the Appellate Courts nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on the docket sheets.

Appendix D

No *Shepard's* Signal™
As of: October 29, 2018 5:31 PM Z

Bonds v. Gms Mine Repair & Maint.

Common Pleas Court of Washington County, Pennsylvania, Civil Division

December 12, 2017, Decided

Civil Action No. 2015-6310

Reporter
2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 *

JOSEPH A. BONDS, individually and on Behalf of all others similarly situated, Plaintiffs, vs. GMS MINE REPAIR & MAINTENANCE, INC., Defendant.

Judges: [*1] Damon J. Faldowski, J.

Opinion by: Damon J. Faldowski

Opinion

The matter presently before the Court pertains to the Motion for Partial Summary Judgment and Supplemental Motion for Summary Judgment filed on behalf of Defendant, GMS Mine Repair & Maintenance, Inc. (hereinafter "GMS" or "Defendant"). Plaintiffs filed a Motion for Class Certification on June 24, 2016, and Defendant filed a Motion for Partial Summary Judgment on September 16, 2016. The Court decided to delay argument on Defendant's Motion until the Court disposed of Plaintiffs' Motion for Class Certification. The Court granted Plaintiffs' Motion for Class Certification on January 30, 2017, and Defendant subsequently filed a Supplemental Motion for Summary Judgment. The Plaintiffs filed responses to the Motions and the Court held argument on August 2, 2017.

I. Statement of the Case

GMS provides underground maintenance and contracting services at the Enlow Fork Mine (hereinafter " the Mine") located in East Finley, Pennsylvania, which is owned and operated by Consol Energy (hereinafter "Consol"). Plaintiffs are former GMS employees who worked at the Mine. The putative class includes current and former GMS employees who work or have worked at the **[*2]** Mine from April 27, 2012 until April 14, 2014. GMS miners were assigned to work 8:00 A.M. to 4:00 P.M., 4:00 P.M. to 12:00 A.M., or 12:00 A.M. to 8:00 A.M. All shifts were paid for eight (8) hours of work. Sometime in 2012, Consol informed GMS that contractor employees, including those from GMS, would have to park in a satellite lot approximately one quarter mile away and take a shuttle to the Portal.

Before the policy change in 2012, GMS employees were permitted to park in a lot adjacent to the Pleasant Grove Portal (hereinafter "the Portal"). Initially, the shuttle was to run continuously up until fifteen minutes before the start of a shift, or longer. At some point, this practice was later changed by the site coordinator so that the shuttle would stop running approximately 30 minutes prior to the start of the shift. All GMS employees, who were transported to the Portal by shuttle at the start of their shift, would also be transported back to the parking lot via the shuttle at the end of the shift. GMS employees were not compensated for the time spent waiting to be transported to or from the Portal via the shuttle.

Prior to beginning their shifts, GMS employees would often have discussions **[*3]** about safety and, on some occasions, individual employees would be selected for random drug tests. Some GMS employees were randomly drug tested after their shift had ended. GMS employees were not compensated for the time spent in the safety meetings, nor were they paid for the time spent taking random drug tests before their shift started or after their shift ended.

Plaintiffs initially filed suit in the United States District Court for the Western District of Pennsylvania. The Honorable Terrence F. McVerry granted Defendant's Motion for Summary Judgment on Plaintiffs' federal wage and hour claims, but declined to exercise supplemental jurisdiction over Plaintiffs' state law claims under the Pennsylvania Minimum Wage Act (hereinafter "MWA") and the Pennsylvania Wage Payment and Collection Law (hereinafter "WPCL"). On October 1, 2015, Plaintiffs filed a praecipe to transfer the MWA and WPCL claims to this Court.

II. Standard of Review

Pursuant to Pa.R.C.P. No. 1035.2, a motion for summary judgment may be filed by any party once the relevant pleadings are closed and:

> 1. Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established **[*4]** by additional discovery or expert report, or
> 2. If, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2.

In the case presently before the Court, Defendant is seeking summary judgment under Pa.R.C.P. No. 1032.2. A motion for summary judgment may only be granted when the moving party is entitled to judgment in its favor as a matter of law. *Lance v. Wyeth, 85 A.3d 434, 449 (Pa. 2014)*. Additionally, "facts and reasonable derivative inferences are generally considered in the light most favorable to the non-moving party, and doubts are resolved against the moving party." *Id.*

III. Discussion and Analysis

A. Breach of Contract Claim

According to Defendant, Plaintiffs' claim for breach of contract must fail as a matter of law because Defendant never manifested the intent to enter into any agreement to pay GMS employees for the pre- and post-shift activities described in the pleadings. Defendant further claims that Plaintiffs undermined the breach of contract claim by their own admissions. Specifically, **[*5]** Defendant argues that Plaintiffs' deposition testimony is evidence that the contract claim is based on their own subjective impressions and assumptions, rather than a uniform understanding between Defendant and the GMS miners. Conversely, Plaintiffs claim that there exists an oral contract for employment between Defendant and GMS employees and, since employment contracts need not be in writing, this oral agreement is sufficient to maintain the breach of contract claim.

It is obvious that the issue of whether a contract exists between the parties is material to Plaintiffs' claim for breach of contract. "When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery." *Swords v. Harleysville Ins. Companies, 883 A.2d 562 (Pa. 2005)*(citing *Fine v. Checcio, 870 A.2d 850 (Pa.2005))*. At this time, there remain genuine issues of material fact as to whether a contract existed between the parties. Therefore, Defendant's Motion for Summary Judgment, as to Plaintiffs' breach of contract claim, is DENIED.

B. Pennsylvania Wage Payment and Collection Law

The parties agree that the WPCL is a vehicle for enforcing the rights under a contract, **[*6]** and therefore if Plaintiffs' contract claim fails then so must the claim under the WPCL. *See* *Oxner v. Cliveden Nursing & Rehab. Ctr. PA, L.P., 132 F. Supp. 3d 645 (E.D. Pa. 2015)*; *Bootel v. Verizon Directories Corp., No. 03-1997, 2004 WL 1535798, at *1 (E.D. Pa. June 25, 2004)*; *McIntyre v. Philadelphia Suburban Corp., 90 F.Supp.2d 596 (E.D. Pa. 2000)*. The Court has already determined that Plaintiffs' breach of contract claim survives summary judgment, therefore it follows that the WPCL claim also survives. Defendant's Motion for Summary Judgment as to Plaintiffs' WPCL claim is hereby DENIED.

C. Pennsylvania Minimum Wage Act of 1968

1. Doctrine of Collateral Estoppel

Defendant argues that the doctrine of collateral estoppel precludes Plaintiffs from pursuing their claim under the MWA. Specifically, Defendant claims that Plaintiffs had the opportunity to fully litigate the MWA claim when the case was initially filed in federal court and, since Defendant's Motion for Summary Judgment was granted by Judge McVerry, Plaintiffs cannot relitigate this claim before this Court.

In Pennsylvania, the doctrine of collateral estoppel applies when the following circumstances are present: (1) the issue decided in a prior proceeding is identical to

Case: 18-5942 Document: 12 Filed: 10/30/2018 Page: 39

the one presented in a later action; (2) there exists a final judgment on the merits; (3) the party defending the suit was a party or is in privity with a party to the prior proceeding; and (4) the party asserting **[*7]** the claim has had a full and fair opportunity to litigate the issue in the prior proceeding. *Murphy v. Duquesne University of The Holy Ghost, 777 A.2d 418 (Pa. 2001)*. It is undisputed that the parties in the matter presently before the Court are the same parties that participated in the proceedings in the Federal Court. However, it is clear to this Court that Plaintiffs did not have the opportunity to fully litigate the MWA claim.

On September 23, 2017, Judge McVerry issued an Opinion and Order granting Defendant's Motion for Summary Judgment. Judge McVerry determined that the pre- and post-shift safety meetings were not compensable under the Federal Labor Standards Act (hereinafter "FLSA"). Importantly, Judge McVerry only decided the issues under the federal law and expressly declined to exercise supplemental jurisdiction over the remaining state law claims under the WPCL and MWA. In fact, and in support of his decision to decline jurisdiction, Judge McVerry reasoned that Plaintiffs' WPCL *and* MWA claims raise novel issues of state law.[1]

Although Judge McVerry's decision constitutes a final judgment on the merits with respect to Plaintiffs' claims through the lens of the federal law, his decision is not of any consequence to Plaintiffs' state law claims. **[*8]** Plaintiffs have yet to have the opportunity to fully litigate the MWA claim since Judge McVerry refused to exercise jurisdiction over the state claims. Therefore, the doctrine of collateral estoppel is inapplicable and Defendant's Motion for Summary Judgment as to Plaintiffs' PMWA claim is DENIED.

2. "Hours Worked"

Defendant claims that the pre- and post-shift activities performed by Plaintiffs do not constitute activities that are included in the legal definition of "hours worked." In Pennsylvania, the phrase "hours worked" is explicitly defined under the MWA as the following:

> Hours worked -- The term includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in travelling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work [. . .]
>
> *34 Pa. Code §231.1(b)*

In *Lugo v. Farmers Pride, Inc., 967 A.2d 963 (Pa.Super.2009)*, the Superior Court of Pennsylvania decided that the phrase "hours worked" is a term of art, that "includes all time that the worker is required to be on the employer's premises." In the instant case, whether or not the pre- and post-shift activities fall within this **[*9]** definition is integral to Plaintiffs' MWA claim, thus there remains issues of material fact that preclude summary judgment. Therefore, Defendant's Motion for Summary Judgment as to Plaintiffs' claim under the MWA is DENIED.

3. Federal Fair Labor Standards Act of 1938

According to Defendant, since Plaintiffs' claim under the FLSA failed at the federal level, Plaintiffs' MWA claim should also fail. Plaintiffs, on the other hand, argue that Pennsylvania has explicitly refused to adopt the FLSA, and the MWA and FLSA are not interchangeable. For the following reasons, the Court agrees with Plaintiffs.

The United States District Court of the Eastern and Middle Districts of Pennsylvania have interpreted and compared the FLSA and the MWA. In doing so, both Courts have determined that the purpose of the FLSA is "to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." See *Verderame v. RadioShack Corp., 31 F. Supp. 3d 702 (E.D. Pa. 2014)*; *In re Cargill Meat Solutions Wage and Hour Litigation, 632 F. Supp. 2d 368 (M.D. Pa. 2008)*; *Lehman v. Legg Mason, 532 F. Supp. 2d 726 (M.D. Pa. 2007)*. Moreover, the Court in the *In re Cargill* case discussed extensively that, in enacting the FLSA, it was not the intent of Congress to "interfere with a state's police powers with respect **[*10]** to wages and hours more generous than the federal standards." *In re Cargill Meat Solutions Wage and Hour Litigation, 632 F. Supp. 2d 368 (M.D. Pa. 2008)*. The Court goes on to discuss how the laws in Pennsylvania are more "employee-protective" than the FLSA, thus establishing a distinct difference between the two laws. *Id.*

Since Pennsylvania has not fully adopted the provisions of the FLSA, and since Pennsylvania law, in general, offers stronger protections for employees, the Court

[1] *See* Memorandum Opinion and Order of Court filed September 23, 2017 by Judge McVerry in the United States District Court for the Western District of Pennsylvania.

finds that it would be inappropriate to see the MWA and FLSA as interchangeable. The law under the FLSA and Pennsylvania's MWA are substantively different, therefore Plaintiffs' MWA claim does not fail simply because the FLSA claim has already been disposed of by the federal court. Defendant's Motion for Summary Judgment as to Plaintiffs' MWA claim is DENIED.

4. Integral and Indispensable Duties

Defendant argues that the pre- and post-shift activities outlined in the pleadings do not meet the standard of "integral and indispensable duties" as determined by the Supreme Court of the United States (hereinafter "SCOTUS"), therefore these activities are not compensable under the law. In *Integrity Staffing Solutions, Inc., v. Busk, 135 S. Ct. 513 (2014)*, SCOTUS considered whether certain postliminary activities were "integral and indispensable" and therefore compensable **[*11]** under the FLSA. The Court held that employees could only be compensated for pre- and post-shift activities under the FLSA if "it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.*

Although the *Integrity Staffing* case significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, this case ultimately has no impact on Plaintiffs' MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA. The standard set forth in *Integrity Staffing* is inapplicable to Plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgement is DENIED.

ORDER

AND NOW, this 12th day of December, 2017, upon consideration of the briefs and arguments of counsel, it is hereby ORDERED that Defendant's Motion for Partial Summary Judgment and Supplemental Motion for Summary Judgment are DENIED.

BY THE COURT,

/s/ Damon J. Faldowski

Damon J. Faldowski, J.

End of Document