



**SUPREME COURT ADDRESSES** When The Work Day Starts



**Mike Jones**

... employees must be compensated for time spent waiting or walking to and from the work station after donning and before doffing . . .

The U.S. Supreme Court in a November, 2005 unanimous ruling, addressed the question of whether workers should get paid for working time under the federal wage-hour laws for the time it takes them to dress and get to work and then,

to undress and leave. This process is called “donning and doffing.” The basic holding of the case is that employees must be compensated for time spent waiting or walking to and from

the work station after donning and before doffing equipment found as integral and indispensable to the employees’ principal activities. *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005).

The specific issue for the justices was whether the time spent on the walk between the locker room of meat and chicken processing plants - where employees were required to dress in protective and safety gear - and the plant floor should be compensated or whether the official start of the work day for wage-hour work purposes was when the employees began their jobs on the plant floor. “We conclude that the locker rooms where the special safety gear is donned and doffed are the relevant place of performance of the principal activity that the employee was employed to perform . . .” Justice Stevens explained. “Under those regulations, the few minutes spent walking

between the locker rooms and the production area are similar to the time spent walking between two different workplaces on the assembly line.” However, the Court did agree with the employers that the time spent by employees waiting in line before obtaining their first piece of safety gear is not compensated. The Court held that the wage-hour law “. . . excludes from the scope of the FLSA the time employees spend waiting to don their first piece of gear that marks the beginning of the continuous work day.”

**Why the Ruling Is So Important**

The monetary ramifications of the ruling are quite significant. If employees are due 10 more minutes a day at \$12.00 an hour times 5,000 employees, that total would range between \$50,000 to \$75,000 a week. In some cases it is possible for the statute of limitations to go as far back as 3 years in the case of willful violations. Monies involved for each individual employee could quickly add up to \$500.00 to \$1,000.00 a year. One poultry processing employer recently settled such a case with Wage and Hour for \$10 million.

There are further monetary ramifications to the issue as well. If more time is to be compensated, this additional time may be on an overtime basis at time and a half. Also, Wage and Hour considers that a non-compensated meal period must be at least 30 minutes and a non-compensated break

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## KNOW YOUR ATTORNEY

Celeste Watson



Celeste is an associate in the Knoxville, Tennessee office of the firm, which she joined in 2004. Her law practice includes an emphasis in workers' compensation defense litigation. She received her Bachelor of Science degree in Psychology from Virginia Polytechnic Institute and State University, and her law degree from the University of Tennessee. Celeste is a member of the Knoxville and Tennessee Bar Associations, the Mid-South Workers' Compensation Association and the Tennessee and East Tennessee Trial Lawyers Associations for Women. She is also a member of the National Society of the Daughters of the American Revolution, and is a First Lieutenant in the Virginia Militia, inactive status.

**ANITA PATEL** To Present at American Immigration Lawyers Association Conference



We are proud to announce that Anita Patel has been chosen to present at the 2006 National American Immigration Lawyers Association (AILA) conference in San Antonio in June. The mission of AILA is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA is comprised of over 8,000 immigration attorneys.

Anita is of counsel with our firm and her law practice exclusively focuses on immigration and nationality law. In addition to her membership in AILA, she is a member of the Knoxville Bar Association, the East Tennessee Law Association for Women (ETLAW) and a Board Member of the Legal Aid of East Tennessee.

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must be at least 20 minutes. Thus, if some of this "work" extends into these periods making them less than the necessary time for the break to be deemed non-compensated, Wage and Hour may contend that the entire 20 minutes or 30 minutes should be compensated, probably at overtime rates. The results can be quite substantial in terms of monetary obligations.

These facts are not lost on plaintiffs' lawyers. The wage-hour laws allow for a plaintiff's attorney to receive reasonable attorney fees as part of prosecuting a successful case and these cases are often easy to prosecute. As a result, over the last couple of years wage-hour collective actions have exceeded the number of class actions brought under the discrimination laws. These cases have in essence become quite lucrative for plaintiff's lawyers.

### Other Potential Ramifications of the Ruling

The Alvarez ruling will encourage plaintiffs to bring more wage-hour lawsuits and they will attempt to stretch the law to apply to other situations. For example, the plaintiffs' lawyer who argued the Alvarez case on behalf of the employees has already suggested that the decision will apply to many workplaces where there has been an uncertainty about what is compensable, suggesting that the Court's language could apply beyond donning and doffing cases to include other workplaces - like telemarketing - where employees perform significant activities prior to the official start of the work day. Other plaintiffs' lawyers are even suggesting a step further, that an employee required to don certain equipment at home might deserve to be compensated for the travel time to work, although the Court's decision did not appear to go that far.

### Are There Unanswered Questions in the Court's Ruling?

In almost every case, the answer is "yes," and Alvarez is no exception. One question, for example, is whether the donning of any type of employer or government-required equipment is sufficient to start the work day. The lower courts in the Alvarez case had held that donning and doffing protective equipment 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, and reasoned that walking time after the donning and before the doffing of that "unique protective gear" therefore was compensable because it occurred during the "continuous work day" decreed by the FLSA regulations. However, the Ninth Circuit Court of Appeals had observed that "the time employees spend donning non-unique protective gear was de-minimis as a matter of law." The question becomes whether the time required to don and doff arguably "non-unique" gear such as hard hats, ear plugs, and safety glasses is deemed to start the work day. A separate but a closely related issue is that the Supreme Court ruling in Alvarez did not address the de-minimis rule, which for decades has excluded from

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hours worked under the FLSA some activities that take only trivial amounts of time. There remains an argument that at least some donning and doffing activities still fall within this rule and would not “start the clock” for FLSA purposes.

### What Should Employers Do in Light of the Alvarez Ruling?

Obviously, the Alvarez ruling is a “wake-up” call to employers whose work practices require employees to put on any type of gear as part of beginning work, particularly if the gear must be put on at the employer’s premises. There actually should be a broader analysis of any type of required activities prior to the start of the official work day to determine whether they are compensable. Changes can be made in these work practices to lessen employers’ liabilities significantly. For example, employees can be given the option to put on such gear at home, rather than requiring them to put on the gear on the premises, or the gear can be moved closer to the production line. There is no need to announce to employees that employer is guilty of anything, as the changes can be introduced as a plan to benefit employees or to simply make everyone’s life easier. Some employers are adding so-called “add-on” time of several minutes a day, intended to compensate employees for any time that might later be deemed compensable. Sometimes these additional times can be instituted as a benefit to employees as part of or in lieu of annual pay adjustments.

Adjustments become even more necessary if employees are working 40 hours or more a week, as the overtime issues come into play. Even when working less than 40 hours a week, however, the employees, in theory, have a contract claim for the regular hourly rate for time actually worked and employees could argue that the wage-hour rules constitute the definition of working time.

As usual, advice of counsel is recommended. The reasons for the advice of counsel in the wage-hour area are even greater because securing an opinion on the advice of counsel can guarantee employers a maximum of a 2-year back pay period, rather than a 3-year back pay period under the statute of limitations, as well as substantial probability of avoiding paying “liquidated damages” or double back wages which can apply in the case of willful violations.

## DISCHARGE OF EMPLOYEE FOR LYING During Harassment Investigation



**Joe Lynch** .....  
The holding was that the plaintiff was not a victim of hostile environment harassment, but that his discharge for lying during the investigation was referred to a jury as a potential issue of retaliation.

A recent Eighth Circuit ruling in Gilooly v. Missouri Department of Health and Senior Services, (C.A. 8, 2005),

addresses a number of interesting lessons for employers as to discrimination or harassment investigations and the potential for disciplining an employee for lying during such investigations. The holding was that the plaintiff was not a victim of hostile environment harassment, but that his discharge for lying during the investigation was referred to a jury as a potential issue of retaliation.

The plaintiff was a male who complained that two female employees hung around his desk and made advances and unannounced visits to his home. He did not allege any sexual harassment per se but he complained that these matters interfered with his work and he requested a transfer. He was later suspended for a rule violation and complained that he was retaliated against because he reported harassment in the form of distraction from work by inappropriate advances, inappropriate conduct such as hugging, and the making of unannounced visits to his home. An investigator with the Office of Civil Rights investigated the plaintiff’s claims and denied them and the employer, relying on a letter from the state agency investigator who stated that the plaintiff had lied during the investigation, subsequently fired the plaintiff based upon the conclusion that he had made false statements during the investigation. Specifically, the employer concluded that the plaintiff had

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falsely denied relationships with several former co-workers, and that the plaintiff's allegation that two co-workers had distracted him from doing his work was false because both had actually been doing his work at the times they were alleged to be distracting him. Further, the employer noted that eye witness accounts of particular events contradicted the plaintiff's version of events.

The plaintiff then brought a federal court suit for hostile environment discrimination and retaliation. On the hostile environment discrimination claim, the court concluded that the plaintiff offered no evidence of sufficiently severe or pervasive conduct by the women to maintain a hostile work environment claim. While the plaintiff may have had a belief that such conduct constituted sexual harassment, the court found that it was not sufficient as a matter of law, granting summary judgment to the employer on this issue.

The court reached a different result on the retaliation claim, however. On this issue, the court found that there was no evidence that indicated the plaintiff had been caught in a clear, unequivocal lie, but rather the evidence showed that the investigator had found the plaintiff to be less credible than the other witnesses. The court reasoned that it "cannot be the case that any employee who files a Title VII claim and is disbelieved by his or her employer can be legitimately fired. If such were the case, every employee could be deterred by filing their action and the purposes of Title VII in regard to such a harassment would be defeated. However, it also cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis and fact." The reasons for the firing must be "sufficiently independent" from the filing of the discrimination complaint to constitute a non-retaliatory basis for discharge.

In this case, the investigator's belief that the plaintiff was lying was the basis for the employer's decision to fire the plaintiff. According to the termination letter, the belief that the plaintiff was lying was founded solely on the statements of other employees and witnesses. The letter contained no independently verifiable

evidence that contradicted the plaintiff's allegations. Without such additional corroboration, the statements in the termination letter amounted to little more than a description of conflicting stories with the employer disbelieving the plaintiff's version of the events. The court therefore concluded that the plaintiff's alleged lies to the investigator could not serve as a basis for his discharge. "Had the investigator found a clearer record of deception and detailed the basis for such findings, the court could find that the firing was not for protected conduct. However, in this case, the question is largely undeveloped and best left to a fact-finder to decide." Thus, the court left to the jury the issue of whether the firing was for the independent reason of lying or in retaliation for the making of an harassment complaint.

*Editor's Note - This case is very interesting and instructive for a number of reasons. Thus, it shows that an employee who subjectively believes he or she has been a victim of hostile environment harassment does not necessarily state a cause of action unless objectively speaking, the situation is serious enough to constitute sexual harassment as a matter of law. The case also involves a sexual harassment complaint by a male involving female employees and too often employers look upon such claims as ludicrous, rather than conducting a good-faith investigation. Similar issues arise concerning claims of sexual harassment by males against other males, or women against other women, or harassment claims involving race, age, religion, national origin, etc.*

*Next, the case is instructive because employers are increasingly finding out that retaliation claims are probably more dangerous than discrimination claims. Judges and juries are more and more requiring extensive proof of discrimination to maintain a claim, as in this day and time they are less willing to attribute discriminatory motives to others' actions. On the other hand, in the case of sexual harassment and retaliation, judges and juries are a little quicker to find a violation. Also, some employers are simply not sufficiently educating their managers and supervisors on the concepts of retaliation.*

*Finally, the case states an important and logical resolution of the circumstances in which an employer can lawfully terminate an employee for making a false sexual harassment or discrimination allegation or lying during such an investigation. In order to keep an harassment or discrimination complaint from being "retaliation" by subsequent discipline, the courts indicate that an employer must have an extremely strong factual basis for concluding that the claimant was lying about discrimination or harassment.*