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INTRODUCTION

Integrity Staffing Solutions, Inc. v. Busk,[1] which the Supreme Court decided in December 2014, raises the question of whether employees can be compensated under the Fair Labor Standards Act (FLSA) of 1938 for time spent undergoing antitheft screenings after work. But the case raises the even bigger question of what constitutes work under federal law.

In *Busk*, a unanimous Court reversed the Ninth Circuit and declared that post-work security checks did not count as compensable time because (1) they were not the primary activity the workers were employed to perform, and (2) they were not "integral and indispensable"[2] to the primary activity, which was packing items in a warehouse.[3] The *Busk* ruling has generated much discussion in employment law circles and has given rise to further questions about what constitutes compensable work. For example, even if an employee need not undergo screenings in order to perform his or her job effectively, could such screenings nevertheless be considered part of the job because the employer mandates them? Further, what role does employee autonomy play in what is (or is not) compensable time under the FLSA?

This Comment strives to address these questions and untangle the implications of *Busk* for the American workplace. In Part I, it describes the

1. 135 S. Ct. 513 (2014).
2. *Id.* at 514 (quoting Steiner v. Mitchell, 350 U.S. 247, 252–53 (1956)).
3. *Id.* at 515.

background and procedural history of the case, from the District of Nevada to the Ninth Circuit to the Supreme Court. In Part II, this Comment discusses in detail the Court's opinion and Justice Sotomayor's concurrence. In Part III, it argues that the Supreme Court's view of what is compensable time under the FLSA and the related Portal-to-Portal Act needs revisiting in light of constraints on employee autonomy and issues of workplace fairness. Finally, this Comment concludes by offering some predictions for the future of wage and hour law in the wake of *Busk*.

I.
THE CASE

A. Factual Background

Integrity Staffing Solutions ("Integrity"), a temporary employment agency, employed hourly workers Jesse Busk and Laurie Castro at two of its Nevada warehouse locations to retrieve goods ordered by Amazon.com customers and to package them for shipment.[4] Every day before leaving the warehouse, the employees were required to undergo a security screening.[5] Employees were required to remove personal items from their pockets and then pass through a metal detector.[6] The process took approximately twenty-five minutes.[7]

Plaintiff Busk argued that, because the purpose of the screening was to prevent employee theft—and therefore was only for the company's benefit—the employees should have been paid overtime.[8] Further, Busk claimed that because Integrity could have reduced the time employees spent undergoing security checks to a *de minimis* amount, the time was compensable under the FLSA.[9]

B. Procedural History

Busk, believing that he was due compensation from Integrity for time spent waiting for and undergoing security checks, initiated a class action suit on behalf of similarly situated employees in Nevada warehouses.[10] He alleged violations of both the FLSA and Nevada law.[11] The federal district court in Nevada dismissed the suit for failure to state a claim, explaining that because the screenings were "postliminary" (i.e., taking place after work) and were not

4. *Id.* at 515.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 515–16.
9. *Id.* at 515.
10. *Id.*
11. *Id.*

"integral and indispensable" to the job, they were noncompensable under the FLSA.[12]

The Ninth Circuit reversed, in relevant part, the decision of the district court.[13] Accepting as true that Integrity required Busk and his fellow employees to undergo security checks at the end of their shifts to prevent employee theft, the court reasoned that such postliminary activities were necessary to the principal work done for the benefit of the employer.[14] Therefore, the security checks were compensable under the FLSA.[15] The case then went to the Supreme Court on a writ of certiorari.[16]

II.
DISCUSSION

A. Historical Development of Labor Law: From the FLSA to the Portal-to-Portal Act

Labor law was shaped by a combination of legislative action, court interpretation, and reactions from employers in the workforce. In 1938, Congress passed the FLSA to establish a minimum wage and to ensure that workers were fairly compensated for any hours worked in excess of forty hours each workweek.[17] The Supreme Court interpreted the terms "work" and "workweek" broadly, defining "work" in the 1944 case *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*[18] as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[19] Under such a broad definition, the Court found that time in transit between work areas, and time spent walking from workbenches to the time clock, were compensable under the FLSA.[20] A flood of lawsuits ensued from unions demanding backpay and liquidated damages from employers who had denied pay to employees for such activities.[21] In 1947, Congress responded by enacting an emergency measure, the Portal-to-Portal Act, which exempted

12. *Id.* at 516.
13. *Id*.
14. *Id.*
15. Busk v. Integrity Staffing Solutions, 713 F.3d 525, 531 (9th Cir. 2013), *rev'd*, 135 S. Ct. 513 (2014).
16. *Busk*, 713 F.3d 525, *cert. granted*, 134 S. Ct. 1490 (2014).
17. *Busk*, 135 S. Ct. at 516.
18. 321 U.S. 590 (1944).
19. *Busk*, 135 S. Ct. at 516 (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)).
20. *Id.*
21. *Id.*

employers from liability for future claims based on "activities which are preliminary to or postliminary to said principal activity or activities."[22]

In subsequent cases, such as *Steiner v. Mitchell*[23] in 1956, the Supreme Court began defining "principal activity or activities" as all activities that are "integral and indispensable" to the principal.[24] The test for whether an activity is integral and indispensable to the principal is "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."[25] Some activities that have passed this test include washing off toxic chemicals in a battery plant and sharpening knives in a meatpacking plant.[26] Preliminary or postliminary activities, on the other hand, are not "integral and indispensable" to the primary activity—for example, checking in and out, changing clothes, or waiting in line to receive a paycheck.[27] As such, they are noncompensable under the FLSA by way of the Portal-to-Portal Act.[28]

B. Integrity Staffing Solutions, Inc. v. Busk

1. The Majority Opinion

The Supreme Court unanimously reversed the Ninth Circuit and declared that the security screenings that Busk and his fellow employees underwent were postliminary activities that were noncompensable under the FLSA.[29] Because Integrity did not hire its workers to undergo security screenings but rather to package inventory for shipment, the screenings could not be considered principal activities.[30] The screenings also could not be considered integral and indispensable to the employees' work because they were not an "intrinsic element" of packaging and shipping goods.[31] Justice Thomas, writing for the majority, reasoned that the employer could have done away with the screenings altogether without affecting the employees' principal activities.[32]

Further, in the crucial part of his argument, Justice Thomas claimed that the Ninth Circuit erred by focusing on the activities that an employee is *required* to perform rather than those that he or she is *employed* to perform, which is the essence of the "integral and indispensable" test.[33] Were the test to

22. *Id.* at 517 (quoting 29 U.S.C. § 254(a)(2) (2012)). All further references in this Comment to the Portal-to-Portal Act concern 29 U.S.C. § 254(a).
23. 350 U.S. 247, 252–53 (1956).
24. *Busk*, 135 S. Ct. at 517.
25. *Id.*
26. *Id.* at 518.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 519.

center on whether an employer "required" an activity, the purpose of the Portal-to-Portal Act would be defeated.[34] All activities would be subsumed under "principal activities," and thus be compensable under the FLSA, precisely what the Portal-to-Portal Act was designed to avoid.[35]

2. The Concurrence

Justice Sotomayor, joined by Justice Kagan, concurred briefly to explain and elaborate on the test set forth by the Court.[36] First, Justice Sotomayor agreed with the Court's point that the security screenings were not "integral and indispensable" to another principal activity that the warehouse workers were hired to perform, because the workers could skip the screenings and still do their work safely and efficiently.[37] Second, she concurred with the Court that the security screenings were not the "principal activities" for which the workers were hired to perform.[38] Rather, per the Portal-to-Portal Act—which defines the beginning and end of the workday—the screenings fell squarely within preliminary/postliminary activities, similar to checking in and out of the workplace, and were thus noncompensable under the FLSA.[39]

III.
ANALYSIS

There is little doubt that the Court's opinion makes sense under a traditional interpretation of the Portal-to-Portal Act. The Act's "integral and indispensable" test focuses not on required activities but rather on the precise activities that employees are hired to perform. If an activity is not an intrinsic part of the principal activities, then it is not integral and indispensable, and it is not compensable under the FLSA.

This Comment argues, however, that the Court should have taken a different view of the security screenings under the Act. Not only should the Justices have considered the mandatory screenings as part of the warehouse employees' principal work, but the Court also missed a golden opportunity to reconsider the relevance of the Act in light of modern-day workplace realities. Although the Ninth Circuit may have focused on the wrong factor for the test (*required* to perform versus *employed* to perform), it nevertheless highlighted the right issue that the judiciary needs to ponder in order to ensure workplace fairness.

34. *See id.*
35. *Id.*
36. *Id.* at 520 (Sotomayor, J., concurring).
37. *Id.*
38. *Id.*
39. *Id.*

A. The Majority Failed to Consider the Realities of the Modern Workplace

An amendment to the FLSA, the Portal-to-Portal Act was designed with the employer—not the employee—in mind. As noted earlier, the Act was introduced as an emergency measure to counteract judicial interpretation of the FLSA that created "wholly unexpected liabilities"[40] and put employers in danger of "financial ruin."[41] The Act exempts employers from liability for failure to pay employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," as well as "activities which are preliminary to or postliminary to said principal activity or activities."[42] The *Busk* Court, therefore, asked the correct question in determining whether the security screenings were compensable under the FLSA: Were the warehouse workers *employed* to undergo security screenings?[43] The answer, of course, is no; they were employed to pack merchandise for shipment. Integrity's lawyer, Paul C. Clement, successfully argued that the screenings were the same as "egress," or leaving the workplace at the end of the day, and were noncompensable under the FLSA.[44]

What the Court did not consider were the realities of the modern workplace, and whether the Portal-to-Portal Act is still a necessary amendment to the FLSA. The reality is that employees—particularly low-level, temporary employees in a warehouse—have little to no control over their time, and, should they wish to keep their jobs, have no choice but to undergo the screenings. Because of their compulsory nature, the screenings have become inextricably linked to the work that the employees are hired to perform, and should be compensated in the same fashion as, for example, washing chemicals off one's body after work at a battery plant. "In reality, the 'principal activity' is the job as defined by the employer," writes Noah Feldman, a professor of constitutional and international law at Harvard University.[45] "Amazon need not define the job to require security screening, because of course you can work at a warehouse without stealing anything. But once the employer says that the job can only be performed if you get screened, it's redefining the principal activity from 'warehouse work' to 'warehouse work including screening.'"[46] Feldman underscores an important point: while Integrity employees *can* perform their jobs without the screenings, they *may not*, pursuant to Integrity's antitheft

40. 29 U.S.C. § 251(a) (2012).
41. *Id.* § 251(a)(1).
42. *Id.* § 254(a)(1)–(2).
43. *See Busk*, 135 S. Ct. at 519.
44. Lyle Denniston, *Argument Analysis: What* is *Work, Anyway?*, SCOTUSBLOG (Oct. 18, 2014, 4:31 PM), http://www.scotusblog.com/2014/10/argument-analysis-what-is-work-anyway.
45. *Supreme Court Doesn't Understand Wage Labor*, BLOOMBERGVIEW (Dec. 9, 2014, 1:41 PM), http://www.bloombergview.com/articles/2014-12-09/supreme-court-doesnt-understand-wage-labor.
46. *Id.*

policy. Hence, because employees have no choice in the matter, they might as well have been employed to undergo screenings. Therefore, the screenings should be included in "principal activities" for FLSA purposes.

Further, in choosing to stick to the letter of the Portal-to-Portal Act, the Court missed a chance to reexamine a nearly seventy-year-old federal statute. By reinforcing the provisions of the Act that pertain to pre- and postliminary activities, the *Busk* decision is likely to encourage employers to take advantage of employees' time. Because there is no bright-line rule for the length of security screenings, employers are free to implement security screenings that last twenty-five minutes or longer. Such practices are already taking shape in other industries, including the technology industry; for example, Apple recently became embroiled in litigation over the bag checks required of sales employees at Apple retail stores.[47]

B. The Implications of Integrity Solutions, Inc. v. Busk

Pending cases—such as *Frlekin v. Apple, Inc.*,[48] mentioned above—may come out differently now that *Busk* has been decided. *Frlekin* is a class action suit in which hourly retail employees sued Apple under the FLSA for uncompensated time spent undergoing antitheft bag checks lasting around fifteen minutes at the end of every workday.[49] Currently, the case is pending in the Northern District of California; and, while early developments looked promising for Amanda Frlekin and her fellow employees,[50] Apple may be able to use the *Busk* decision to its advantage as the case progresses. For instance, the company may later argue that the bag checks are similar to the security screenings in *Busk*, which the Supreme Court held to be noncompensable under the FLSA. As Judge Alsup of the Northern District writes, "the Supreme Court's ruling in *Busk* might control the outcome of all claims in . . . *Frlekin* . . . except for the California state-law claims."[51]

Additionally, the *Busk* decision may shape employees' expectations with regard to pre- and postliminary activities. In other words, after *Busk*, employees should not expect to be compensated for time spent doing things that are not part of their regular work. During the Court's deliberations, Justice Kagan posed the following hypothetical scenario: a federal judge orders his law clerks to come to work early, to cut his grapefruit and prepare the rest of his breakfast. Should the clerks get extra pay?[52] Probably not, one might argue, because the clerks were not hired to prepare the judge's breakfast but rather to perform

47. *See* Frlekin v. Apple, Inc., Nos. C 13-03451 WHA, C 13-03775 WHA, C 13-04727 WHA, 2014 WL 2451598 (N.D. Cal. May 30, 2014).

48. *Id.*

49. *Id.* at *1.

50. *Id.* at *5 (Apple's summary judgment motion was denied in May 2014).

51. *Id.* at *4.

52. Denniston, *supra* note 44.

legal research and assist in the drafting of opinions. The Integrity employees, similarly, were not hired to undergo security screenings and should not expect to be paid for them. Also, the more an activity looks like a security check and less like donning and doffing (e.g., putting on protective equipment or washing off chemicals), the less likely it is that the activity will be compensable under the FLSA.[53]

In the abstract, the security checks are neither integral nor indispensable to the work that the Integrity employees were hired to perform. But in reality, it is difficult to consider them noncompensable, postliminary activities when the employees cannot refuse the security checks without serious consequences—disciplinary action or even termination. Further, Justice Kagan's grapefruit example is not quite on point, as law clerks are highly educated, salaried employees with a general expectation of workplace autonomy. Hourly employees, however, are at the mercy of their employers, who make security screenings and bag checks mandatory. Such activities are part of the employees' principal activities and should be compensable under the FLSA.

CONCLUSION

The Supreme Court was unanimous in holding that security screenings are a type of postliminary activity that should not be compensated under the FLSA by way of the Portal-to-Portal Act. While the Court had a prime opportunity in *Busk* to revisit the Act, it declined to do so in favor of an old fiction of the American workplace. From the employees' perspective, *Busk* is likely to have an adverse impact on the landscape of wage and hour law, as employers may now more easily implement lengthy security checks. As future cases like *Frlekin v. Apple* move through the judicial system, federal courts should think carefully about the continued relevance of the Act, and, more importantly, whether "required to perform," as opposed to "employed to perform," might be the more salient factor in defining what is compensable work under the FLSA.

53. *See 4 Key Lessons from* Integrity Staffing Solutions v. Busk, LATHAM & WATKINS (Dec. 17, 2014), www.lw.com/thoughtLeadership/lw-key-lessons-integrity-staffing-v-busk.