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No. 79815-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

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DAVID STEVENS, DONALD A. GOINES AND  
JEFFREY R. PORTER, on behalf of all others similarly situated,  
Plaintiffs/Respondents,

v.

BRINK'S HOME SECURITY, INC.,  
Defendant/Appellant.

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**STATEMENT OF ADDITIONAL AUTHORITY OF APPELLANT  
BRINK'S HOME SECURITY, INC.**

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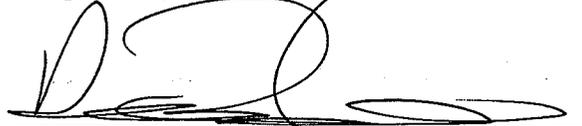
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Attorneys for Defendant/Appellant  
BRINK'S HOME SECURITY, INC.

Pursuant to RAP 10.8, Appellant Brink's Home Security, Inc., hereby submits this statement of additional authority. Attached hereto is a decision from the United States Court of Appeals for the Federal Circuit, *Adams v. United States*, 471 F.3d 1321 (Fed. Cir. 2006), which was rendered after the parties' briefing in this case was completed. This decision affirmed *Adams v. United States*, 65 Fed. Cl. 217 (2005), which Brink's cited in its Brief of Appellant at page 21.

Dated: May 16, 2007

Respectfully submitted,



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STATEMENT OF ADDITIONAL AUTHORITY OF APPELLANT  
BRINK'S HOME SECURITY, INC.  
Case No. 58039-6-1

471 F.3d 1321, \*, 2006 U.S. App. LEXIS 31065, \*\*;  
153 Lab. Cas. (CCH) P57,988; 12 Wage & Hour Cas. 2d (BNA) 231

STEPHEN S. ADAMS, ET AL., Plaintiffs-Appellants, v. UNITED STATES, Defendant-Appellee.

06-5040, 06-5041

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

471 F.3d 1321; 2006 U.S. App. LEXIS 31065; 153 Lab. Cas. (CCH) P57,988; 12 Wage & Hour  
Cas. 2d (BNA) 231

December 18, 2006, Decided

**SUBSEQUENT HISTORY:** Rehearing denied by, Rehearing, en banc, denied by Adams v. United States, 2007 U.S. App. LEXIS 7728 (Fed. Cir., Mar. 14, 2007)

**PRIOR HISTORY:** [\*\*1] Appealed from: United States Court of Federal Claims. Judge Lynn J. Bush. Adams v. United States, 65 Fed. Cl. 195, 2005 U.S. Claims LEXIS 113 (2005)

**DISPOSITION:** AFFIRMED.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff law enforcement officers appealed a summary judgment granted by the U.S. Court of Federal Claims to defendant United States on their claims for compensation for commuting time spent in government-owned police vehicles. At issue was whether commuting time constituted compensable work under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., as amended by the Portal-to-Portal Act (PTPA), 29 U.S.C.S. § 251 et seq.

**OVERVIEW:** After defendant settled other claims by agreeing that plaintiffs were non-FLSA exempt, the parties reserved, for trial, issues concerning plaintiffs' commuting time. Plaintiffs claimed that they were required to drive government vehicles, to have their weapons and other law enforcement-related equipment available, and to monitor communication equipment. They also were prohibited from running personal errands or making other stops. The federal claims court had granted summary judgment to defendant. On plaintiffs' appeal, the court affirmed. After rejecting, on the merits, a defense claim that the notice of appeal was defective in that it did not include the names of all plaintiffs, the court reviewed the FLSA and the PTPA and ruled that mere commuting in a government-owned vehicle was insufficient to trigger compensation for commuting time. Rather, the issue was whether requirements and restrictions placed on plaintiffs' commutes rose to the level of "legally cognizable work." The court held that they did not because while the commuting requirements placed burdens on plaintiffs, those burdens in fact were relatively de minimis and thus were properly disregarded for FLSA purposes.

**OUTCOME:** The court affirmed the judgment of the federal claims court in favor of defendant.

**CORE TERMS:** compensable, commute, Portal Act, commuting, summary judgment, notice of

appeal, custom, driving, dog, burden of proof, settlement, exemption, walking, handlers, exempt, travel, Fair Labor Standards Act, time spent, government-owned, transportation, postliminary, non-exempt, notice, spent, notice of appearance, retail establishment, principal activity, law enforcement, final judgment, matter of law

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**HN1**  The U.S. Court of Appeals for the Federal Circuit has jurisdiction to review a final judgment of the U.S. Court of Federal Claims under [28 U.S.C. § 1295\(a\)\(3\)](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Appellate Jurisdiction](#)  
[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Notice of Appeal](#) 

**HN2**  [Fed. R. App. P. 3\(c\)\(1\)](#) states that a notice of appeal must specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." [More Like This Headnote](#)

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[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 

**HN3**  The U.S. Court of Appeals for the Federal Circuit reviews a grant of summary judgment by the Court of Federal Claims de novo, drawing justifiable factual inferences in favor of the party opposing the judgment. [More Like This Headnote](#)

[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#)   
[Governments](#) > [Courts](#) > [Courts of Claims](#) 

**HN4**  The U.S. Court of Federal Claims applies the same summary judgment standard as do federal district courts: summary judgment is proper if the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. Ct. Fed. Cl. R. 56(c); [Fed. R. Civ. P. 56\(c\)](#). [More Like This Headnote](#)

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**HN5**  See [29 U.S.C.S. § 254\(a\)](#).

[Labor & Employment Law](#) > [Wage & Hour Laws](#) > [Coverage & Definitions](#) > [Overtime & Work Period](#)   
[Labor & Employment Law](#) > [Wage & Hour Laws](#) > [Statutory Application](#) > [Portal-to-Portal Act](#) 

**HN6**  Merely commuting to and from work in a government-owned vehicle is an insufficient basis on which a government employee may claim additional pay; the employee must perform additional legally cognizable work while driving to her or her workplace in order to compel compensation under the Fair Labor Standards Act, [29 U.S.C.S. § 201](#) et seq., as amended by the Portal-to-Portal Act, [29 U.S.C.S. § 251](#) et seq. for time spent driving. [More Like This Headnote](#)

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[Labor & Employment Law](#) > [Wage & Hour Laws](#) > [Coverage & Definitions](#) > [Overtime & Work Period](#)   
[Labor & Employment Law](#) > [Wage & Hour Laws](#) > [Statutory Application](#) > [Portal-to-Portal Act](#) 

**HN7**  An employee who brings suit for unpaid minimum wages or unpaid overtime compensation under the Fair Labor Standards Act, [29 U.S.C.S. § 201](#) et seq., as amended by the Portal-to-Portal Act, [29 U.S.C.S. § 251](#) et seq. has the burden of

proving that he performed work for which he was not properly compensated. The burden to prove that such work was performed necessarily includes the burden to demonstrate that what was performed falls into the category of compensable work. [More Like This Headnote](#)

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**HNS** The more the preliminary (or postliminary) activity is undertaken for an employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable under federal law such as the Fair Labor Standards Act, [29 U.S.C.S. § 201](#) et seq., as amended by the Portal-to-Portal Act, [29 U.S.C.S. § 251](#) et seq. The ability of the employer to maintain records of such time expended is a factor. Where the compensable preliminary work is truly minimal, however, it is the policy of the law to disregard it. [More Like This Headnote](#)

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**HN9** [31 U.S.C.S. § 1344](#) is a money allocation provision that prohibits federal funds from being spent on transportation for other than official purposes. It makes clear that transportation between the residence of an officer or employee and various locations that is essential for the safe and efficient performance of criminal law enforcement duties is transportation for an official purpose. [31 U.S.C.S. § 1344\(a\)\(2\)](#). The fact that the commutes are not an illegal expenditure of government resources does not change the result: commuting that is done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is de minimis. [More Like This Headnote](#)

**COUNSEL:** [Jules Bernstein](#), Bernstein & Lipsett, P.C., of Washington, DC, argued for plaintiffs-appellants. With him on the brief was [Linda Lipsett](#). Of counsel on the brief was [Edgar James](#), James & Hoffman, P.C. of Washington, D.C.

[Shalom Brilliant](#), Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were [Peter D. Keisler](#), Assistant Attorney General; and [David M. Cohen](#), Director.

**JUDGES:** Before LOURIE, SCHALL, and GAJARSA, Circuit Judges.

**OPINION BY:** GAJARSA

**OPINION:**

[\*1323] GAJARSA, Circuit Judge.

The plaintiffs-appellants ("plaintiffs") in this case are several thousand federal law enforcement officers who seek compensation from the government for the time they spend commuting to and from work in government-owned police vehicles. The United States Court of Federal Claims issued summary judgment in favor of the government, holding that the driving time was not compensable under the Fair Labor Standards Act ("FLSA"), [29 U.S.C. §§ 201-219](#), as amended [**\*\*2**] by the Portal-to-Portal Act, [29 U.S.C. §§ 251-262](#). We affirm.

## I. BACKGROUND



The notice of appeal must . . . specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X."

Fed. R. App. P. 3(c)(1). All of the appellants are represented by the same counsel, and the notice of appeal is of the form contemplated by the new Rule 3(c). The Notes of the Advisory Committee on the 1993 amendments state that "[t]he test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal." We accept that formulation of the test. Here, all of the appealing plaintiffs are listed in an appendix to their lead counsel's notice of appearance, which was duly served on the government soon after the notice of appeal. It is objectively clear to us and to the government that the plaintiffs listed on that appearance form intended to appeal. Since the present version of **[\*\*6]** Rule 3(c) has been satisfied by appellants, we take jurisdiction over all plaintiffs named in the appearance of counsel. Therefore, each appellant so listed shall be bound by our decision here. n3

----- Footnotes -----

n2 The case is not structured as a class action.

n3 Counsel for appellants agreed at oral argument that everyone listed on his notice of appearance would be so bound.

----- End Footnotes -----

## B. Standard of Review

<sup>HN3</sup> We review a grant of summary judgment by the Court of Federal Claims de novo, drawing justifiable factual inferences in favor of the party opposing the judgment. Winstar Corp. v. United States, 64 F.3d 1531, 1539 (Fed. Cir. 1995) (en banc). <sup>HN4</sup> The Court of Federal Claims applies the same summary judgment standard as do federal district courts: summary judgment is proper if the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Cl. R. 56(c); cf. Fed. R. Civ. P. 56(c).

## C. The Portal-to-Portal Act

A few years after the enactment of FLSA, the Supreme Court decided **[\*1325]** Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). **[\*\*7]** That case involved industrial workers who punched in at a time clock, but were not credited for the time they spent walking from the clock to their posts. Id. at 682-84. The Supreme Court ruled that "the time spent in walking to work on the employer's premises, after the time clocks were punched, involved '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.'" Id. at 691-92 (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944)).





to maintain records of such time expended is a factor. And, where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it.

Id. at 650, quoted in Bobo, 136 F.3d at 1467. We concluded that though "the restrictions placed upon the INS Agents' commutes are **[\*\*14]** compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities . . . the burdens alleged are insufficient to pass the de minimis threshold." Bobo, 136 F.3d at 1468 (citing Anderson, 328 U.S. at 692 ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.")). Bobo is not identical but very similar to the case before us. The primary difference between the commuting conditions in Bobo and those in this case militates against plaintiffs, who do not make uncompensated dog-walking stops. Under the Portal-to-Portal Act, plaintiffs' driving time is not compensable.

Some of the plaintiffs in this case argue that, unlike in Bobo, there was a "custom or practice" of compensating them for their commuting time. If such a "custom or practice" existed, the Portal-to-Portal Act could be read not to allow the employer to cease compensating for the activity. See 29 U.S.C. § 252(a)(2). Those plaintiffs are correct that under Federal Personnel Manual System Letter No. 551-10, FLSA non-exempt officers **[\*\*15]** were indeed compensated for their commute time. Prior to this litigation, though, the plaintiffs and other officers in the positions and grades at issue were classified as exempt from FLSA and were therefore not paid for their commutes. That exemption status has been changed by the settlement agreement, in which the government stipulated for the purpose of this case that the plaintiffs were non-exempt. Plaintiffs seize on this provision of the settlement to argue that, had the government not wrongly classified them as exempt, it would have applied Letter 551-10 and thus a "custom or practice" of compensation would have existed. However, hypothetical customs or practices do not suffice. In reality, the government did not compensate the plaintiffs for their commuting time; the plaintiffs cannot now rely on the settlement to rewrite history.

The plaintiffs also argue that 31 U.S.C. § 1344 should alter the outcome of this case. <sup>HN9</sup> That statute is a money allocation provision that prohibits federal funds from being spent on transportation for other than official purposes. It makes clear that "transportation between the residence of an officer or employee and various **[\*\*16]** locations that is . . . essential for the safe and efficient performance of . . . criminal law enforcement duties[] is transportation for an official purpose." Id. § 1344(a)(2). While the statute defines the commutes at issue here to be essential to the agencies for budgetary purposes, it does not follow that those commutes constitute compensable work by the officers. The fact that the commutes are not an **[\*1328]** illegal expenditure of government resources does not change the result: Bobo still teaches that commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is de minimis. That is the case here.

Neither these distinctions nor others advanced by the plaintiffs are persuasive, and so the holding in Bobo controls the legal conclusion in this case.

### III. CONCLUSION

Because Bobo entitles the government to judgment as a matter of law on the facts advanced by the plaintiffs, the Court of Federal Claims correctly granted summary judgment to the government. Its decision is therefore

AFFIRMED.

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2007 MAY 16 P 3: 50

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BRINK'S HOME SECURITY, INC.**

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STATEMENT OF ADDITIONAL AUTHORITY OF APPELLANT  
BRINK'S HOME SECURITY, INC.

Case No. 58039-6-1

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Kathleen Welter  
Kathleen Welter