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SUPREME COURT
OF THE STATE OF WASHINGTON

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No. 635182

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Petitioner.

**RESPONDENTS' STATEMENT OF
ADDITIONAL AUTHORITIES**

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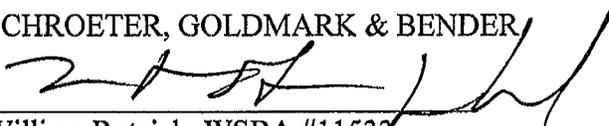
ORIGINAL

Pursuant to RAP 10.8, and with respect to the Brief of Appellants in the Court of Appeals (at page 31), Amici Curiae Briefs of the Department of Labor and Industries (at pages 11-13) and Washington Employment Lawyers Association (at pages 12-15), Respondents submit the following additional authority:

1. *Walling v. American Needles Crafts, Inc.*, 139 F.2d 60, 62 (6th Cir. 1943);
2. *Walling v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir. 1947);
3. *McComb v. Homeworkers' Handicraft Cooperative*, 176 F.2d 633, 637 (4th Circ. 1949);
4. *Mitchell v. Nutter*, 161 F.Supp. 799, 801 (D.Me 1958); and
5. *Silent Woman, Ltd., v. Donovan*, 585 F.Supp. 447, 450 (E.D. Wisc. 1984).

Respectfully submitted this 3rd day of February, 2012.

SCHROETER, GOLDMARK & BENDER



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DECLARATION OF SERVICE

I, Rhonda Moretz, a resident of the County of King, declare under penalty of perjury under the laws of the State of Washington that on February 3, 2012, I caused to be e-mailed (per agreement) and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this document addressed to the following counsel of record:

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DATED at Seattle, Washington this 3rd day of February, 2012.



RHONDA MORETZ
Paralegal

EXHIBIT 1

139 F.2d 60
(Cite as: 139 F.2d 60)

▽

Circuit Court of Appeals, Sixth Circuit.
WALLING, Adm'r of Wage and Hour Division, U.S.
Dept. of Labor,
v.
AMERICAN NEEDLECRAFTS, Inc.

No. 9455.
Nov. 30, 1943.

Appeal from the District Court of the United States for the Western District of Kentucky; Shackelford Miller, Jr., Judge.

Action by Phillip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, against American Needlecrafts, Inc., to enjoin defendant from violating provisions of the Fair Labor Standards Act, wherein L. Metcalfe Walling, Administrator, was substituted as plaintiff, and defendants filed a counterclaim and intervening petitions were filed by Eleanor Beard and others. From an adverse judgment, 46 F.Supp. 16, the Administrator appeals.

Reversed and remanded.

West Headnotes

[1] Labor and Employment 231H ↻2217(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2217 Purpose
231Hk2217(2) k. Fair Labor Standards Act. Most Cited Cases
(Formerly 232Ak1102 Labor Relations, 255k69 Master and Servant)

The Fair Labor Standards Act is designed to im-

plement a public social or economic policy through remedies unknown to, and often in derogation of, the common law. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[2] Labor and Employment 231H ↻2225

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2225 k. Employment Relationship. Most Cited Cases
(Formerly 232Ak1121 Labor Relations, 255k69 Master and Servant)

If Fair Labor Standards Act expressly or by necessary implication brings within its scope certain workers, court is not concerned with question whether a master-servant relationship exists under otherwise applicable common-law rules. Fair Labor Standards Act of 1938, Sec. 1 et seq., 29 U.S.C.A. 201 et seq.

[3] Labor and Employment 231H ↻2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2237 k. Homeworkers and Pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations, 255k69 Master and Servant)

Homeworkers, who performed handwork on bedspreads and similar articles distributed in interstate commerce by defendant corporation, were "employees" within Fair Labor Standards Act, notwithstanding homeworkers performed their services under contract calling for a completed job according to specifications without supervision over their work while it was being performed, and furnished their own tools and determined their own hours of employment. Fair

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Labor Standards Act of 1938, §§ 3, 6, 7, 11(c), 29 U.S.C.A. §§ 203, 206, 207, 211(c).

[4] Labor and Employment 231H ↪ 2343

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)5 Administrative Powers and Proceedings

231Hk2343 k. Industry Committees.

Most Cited Cases

(Formerly 232Ak1435 Labor Relations, 255k69 Master and Servant)

A corporation engaged in manufacture of needlework products could not claim that studio employees covered by Fair Labor Standards Act did not come within the Embroidery Textile or Apparel Codes on ground that no representative of particular industry was selected upon the board charged with administration in view of impossibility in regulation of an industry to give representation to every specialized branch thereof. Fair Labor Standards Act of 1938, §§ 3, 6, 7, 11(c), 29 U.S.C.A. §§ 203, 206, 207, 211(c).

*61 Morton Liftin, of Washington, D.C. (Douglas B. Maggs and Bessie Margolin, both of Washington, D.C., Jeter S. Ray, of Nashville, Tenn., and Mortin Liftin and Faye Blackburn, both of Washington, D.C., on the brief), for appellant.

Allen P. Dodd, of Louisville, Ky. (J. R. Layman, of Elizabethtown, Ky., and Allen P. Dodd, of Louisville, Ky., on the brief), for appellee.

Before SIMONS, MARTIN, and McALLISTER, Circuit Judges.

SIMONS, Circuit Judge.

The appellant, Administrator of the Wage and Hour Division of the United States Department of Labor, challenges the decision below in a trial to the court without a jury (46 F.Supp. 16), which, on the principal issue here involved, held certain needleworkers in Kentucky, engaged in processing materials furnished by the appellee and compensated therefor on a piece basis, to be independent contractors and so not subject to the provisions of the Fair Labor Standards

Act of 1938, 29 U.S.C.A. § 201 et seq., which deal with minimum wages, maximum hours, and the keeping of records. Other parties, engaged in activities similar to those of the appellee, intervened in the District Court, praying that their status likewise be adjudicated in the action. A judgment dismissing the appellant's petition was ordered but jurisdiction was retained for the entry of such orders and judgments as may become necessary to dispose of the rights of the intervenors.

As found by the District Judge, the appellee is a New York Corporation, having branch offices or studios in Kentucky, employing there directly some 40 persons and dealing with approximately 500 others who are, for descriptive purposes, referred to as homeworkers. These persons are engaged in appliqueing, quilting, and other needlework performed on comforters, bedspreads, pillow slips, robes, housecoats, and articles of kindred nature, which are manufactured and, after processing, are sold by the appellee in interstate commerce. The material used in manufacturing the products is purchased in New York and sent to the Kentucky studios, for the most part already cut and stamped with the design for the required needlework. It is then delivered by the studios, in convenient bundles, to the homemaker, and when returned and accepted as satisfactory, is either shipped to the New York office or directly to customers.

The appellee secures its homeworkers through local newspaper advertising, personal solicitation, and through the homeworkers themselves. The work upon which these persons are engaged is skilled, and it is claimed that ability to perform it is present nowhere except in certain counties of Kentucky. The persons possessing such skill are women living in the rural districts of such counties, and consist almost entirely of wives, widows, and daughters of farmers, their craftsmanship passing generally from one generation to another. The native art is, however, in some instances, supplemented by instruction on the part of the appellee, either in the studio or the home, such instruction supplementing*62 in detail the basic skill already possessed. Homeworkers are required to prove their qualifications before work is entrusted to them.

Material which is distributed for appliqueing, bears upon it a stamped pattern, and monogramming is done from a paper model. Instructions as to kind or

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color of thread are given to the worker when the arrangement is entered into, and the worker is required to comply strictly with the pattern and specifications so furnished. During performance there is no supervision or inspection of the work, the studio looking exclusively to the finished article in determining whether it has been satisfactorily processed. The date on which the work is to be performed is sometimes entered on a ticket accompanying the material, and at other times indicated to the worker orally. So with the amount of compensation. It also is entered on the ticket in some instances, and in others is stated to the worker upon the return and inspection of product. When new designs are adopted compensation is sometimes the result of discussion and agreement with consideration given to the skill, effort, and time involved in previous work on comparable articles. There is no obligation on the part of the homemaker to undertake any work, and no discrimination practices against one who declines to take particular kinds of work, or who discontinues work at any time. The workers are entirely free agents in respect to the amount of time put upon the work from day to day, being limited in that respect only by the date set for completion and return. In seasons of the year when work on the farm is heavy, little time is available and little work undertaken. It is generally done at odd times as farm duties and housework permit. The simple equipment necessary to performance, consisting of a frame and clamps, needles, thimbles, and wooden horses, are provided by the worker at her own expense.

It frequently happens that the person to whom the work is issued and charged, will turn it over to other members of the family or to neighbors, and sometimes she will do but a part and let others do the rest. In some instances one person will come to the studio and receive, in her own name, bundles for both herself and neighbors. The studio keeps a record only of those who receive the material and such persons are paid for the completed work when it is delivered. The studio reserves the right to inspect the completed article upon its return, and to reject it and decline to pay for the work if not satisfactorily done according to pattern and specifications. There is no restriction against persons working both for the appellee and its competitors during the same period of time, and in instances workers have done so. Occasionally the appellee has rush orders which require delivery at a date earlier than usual. Some workers accept such rush orders which require long hours of work per day, but they are

not required to do so nor are they discriminated against because of refusal.

Work is paid for on a piece basis when it is returned to the studio. The appellee is not advised as to the time given to the completion of any piece of work, and keeps no record thereof. In most instances the worker herself keeps no record, and some consider the activity merely a pastime from which additional income may be obtained to supplement farm income. A few, however, devote practically all their time to it and consider it regular employment from which they earn their living. In cases where data has been kept, workers have earned an average of 8 to 15 cents an hour, and in some instances as little as 50 cents for a day of 8 to 10 hours, the rate of compensation varying by reason of differences in skill, physical ability, and effort expended.

It is conceded that the persons engaged in the activities thus described are in commerce or engaged in the production of goods for commerce, and that the appellee, in respect to the homeworkers, did not comply with the provisions of Secs. 6, 7, or 11(c) of the Act in that it failed to pay the designated minimum wage, to comply with limitations upon hours, or to keep records in respect to wages or hours. The defense was that the homeworkers are not employees as defined by the Act, but are independent contractors and so not covered. The Administrator contended that the homeworkers are not only employees but that even if classed as independent contractors under the common law are yet within the protection of the Act.

The court, basing its reasoning upon the lack of supervisory control over the manner in which, or the time when the work was to be done by the homeworkers, and the absence of power reserved or exercised by the appellee to terminate employment before completion, and upon the inference *63 that the Congress in enacting the Fair Labor Standards Act did not intend to destroy long-established rules affecting the relationship of employer and employee, concluded that neither at common law nor under the statutory definition were the homeworkers employees subject to the provisions of the Act.

[1][2] It will avail us little to consider whether the master-servant relationship existed between the appellee and its homeworkers under the common law, and we may assume that the well-considered opinion

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of the District Judge was, in that respect, sound, even though there are cases, both state and federal, which hold that an employer-employee status may exist when there is no continuous supervision as the nature of the work requires. Out decision in Western Express Company v. Smeltzer, 6 Cir., 88 F.2d 94, 112 A.L.R. 74, is sufficiently illustrative of such line of authority. We are dealing, however, with a specific statute which, like the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., is of a class of regulatory statutes designed to implement a public social, or economic policy through remedies not only unknown to the common law but often in derogation of it. N.L.R.B. v. Colten, 6 Cir., 105 F.2d 179; Agwilines, Inc. v. N.L.R.B., 5 Cir., 87 F.2d 146, 150, 151; Consumers Power Co. v. N.L.R.B., 6 Cir., 113 F.2d 38. If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common law.

The Fair Labor Standards Act, Sec. 203, Title 29 U.S.C.A., provides:

'(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * * .

'(e) 'Employee' includes and individual employed by an employer. * * * .

'(g) 'Employ' includes to suffer or permit to work.'

Much has been written concerning the meaning of subsection (g). It was said by the court of the Fifth Circuit in Bowman v. Pace Company, 119 F.2d 858, 860, so greatly relied upon by the appellee: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.' This statement of principle is, however, illuminated by the illustration which immediately follows. 'If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.' There would seem to follow from this negation, an affirmation that if one does suffer or permit another to work under circumstances

where an obligation to pay him will be implied, they are employer and employee under the Act. The problem in the Pace case was not to determine whether a master-servant relationship existed at all, but whether it existed between the employee and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law. The same was true in our case of Walling v. Sanders, 6 Cir., 136 F.2d 78, 81, where we said 'in so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment,' and pointed out that to so construe it as to include not only those who work for an accused employer but also those who work for anybody else, such construction would 'encompass all employed humanity.' Neither the Pace case nor others like Fleming v. Gregory, D.C., 36 F.Supp. 776; Thompson v. Daugherty, D.C., 40 F.Supp. 279; David v. Boylan's Private Police, D.C., 34 F.Supp. 555, and Maddox v. Jones, D.C., 42 F.Supp. 35, which concern themselves primarily not with the existence of a master-servant relationship but with determining who is the master and who the servant, all fail to reach the problem here presented. Nor are cases relied upon by the appellant, such as Fleming v. Palmer, 1 Cir., 123 F.2d 749, dispositive of the issue when they hold that intermediate contractors, interposed between those who do the work and those who receive its benefit, do not destroy the employer-employee relationship when they are but the instrumentalities or agents of the employer created or availed of for the purpose of evading the law. The distinctions heretofore noted were clearly perceived by Judge McDuffie in the excellent analysis of Maddox v. Jones, supra, which is so urgently pressed upon us.

*64 Were there doubt that the statutory definition of the word 'employ' brings within the purview of the regulatory and remedial provisions of the Act, workers who perform for an industry under circumstances which create an obligation on the part of the industry receiving the benefit of such work, to pay compensation directly to them, and when the situation is freed from the problem which arises out of the presence of an intermediate contractor who may, in some cases, be a good-faith, independent contractor, and in others a mere instrumentality of the industry, it is to be resolved by the legislative history of the Fair Labor Standards Act. Section 6(a) provides as follows: 'Every employer shall pay to each of his employees *

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* * wages at the following rates * * * (5) If such employee is a homemaker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order. * * * ' So it is persuasively reasoned that the permissible relaxation by the Administrator of statutory standards in the case of homeworkers in Puerto Rico and the Virgin Islands, carries with it an inescapable implication that homeworkers generally are included in the statutory definition of 'employee.' The inference is strengthened by the fact that when the Black-Connery Bill was first considered it contained a provision in Sec. 6(a) giving the Board power to define, by regulation or order, the determination of the number of employees employed by any employer through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees. This provision was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting, in reporting out the Bill on July 8, 1937, that the purpose of original Sec. 6(a) was sufficiently served by the expanded definition of the word 'employ' now incorporated as sub-section (g) of the Act, a definition to which Senator (now Mr. Justice) Black referred as 'the broadest definition that has ever been included in any one Act.' (81 Cong. Rec. 7657.) Subsequent history gives added clarification to Congressional intention. Several bills were introduced in the House in 1939 proposing that the Act should be amended to authorize the Administrator to permit the employment of rural homeworkers at wage rates lower than the statutory minimum. The proposals failed, - the Committed on Labor of the House reporting its view that 'The Act at the present time treats homeworkers just as any other type of employee.' It is apparent from the debates that the purpose of the Congress was not to open the door to the return of the sweatshop system of unpleasant memory.

[3] The then Assistant Attorney General (now Mr. Justice) Robert H. Jackson, pointed out in testimony before the legislative committee, that the Black-Connery Bill was clearly designed to authorize control over industrial homework practices; 'the factory which sends out and makes use of people in their homes are not exempt just because they are using premises they do not pay rent for. ' While he was careful to indicate that probably not all persons designated as homeworkers would be reached by the Bill, in saying that, 'the family that engages in some little commodity which is a homecraft, as you might call it, on its own, would probably not be reached by the

Bill,' it was manifest that he had in mind crafts other than those by which articles are processed for manufacturing industries, which furnish the material, instruction and design, and market broadly the completed product. We find it unnecessary to determine whether all homeworkers come within the purview of the Act, but are compelled by the scope of its definition of the term 'employee' to hold that the workers here considered are within its protection.

[4] A minor issue remains to be determined. The court held that the studio workers of the appellee were employees as defined by the Act. It is conceded that they are, although the appellee urges that such employees do not come within the Embroidery, Textile or Apparel Codes, on the ground that no representative of the particular industry was selected upon the Board charged with administration. The argument is without merit. Clearly it would be neither convenient nor possible in the regulation of an industry generically considered, to give representation to every specialized branch thereof. The court was asked to make specific findings, but failed to do so. The issue in respect to violation was never adequately tried. Since the case must be reversed it is to be assumed that the Administrator will be permitted to develop, if he can, such further facts concerning the wages and hours of the studio employees as are required to sustain the allegations of the pleadings.

Reversed and remanded for further proceedings consistent herewith.

C.A.6 1943.
Walling v. American Needlecrafts
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EXHIBIT 2

158 F.2d 944
(Cite as: 158 F.2d 944)

H

Circuit Court of Appeals, Second Circuit.
WALLING
v.
TWYEFFORT, Inc.

No. 127, Docket No. 20415
Jan. 16, 1947.

Appeal from the District Court of the United States for the Southern District of New York.

Action under the Fair Labor Standards Act by L. Metcalfe Walling, administrator of the Wage and Hour Division, United States Department of Labor, against Twyeffort, Inc., to enjoin defendant from alleged violations of the Act. From a decree for the plaintiff, 65 F.Supp. 920, the defendant appeals.

Affirmed.

West Headnotes

[1] Labor and Employment 231H ↪ 2312

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)4 Operation and Effect of Regulations

231Hk2311 Working Time
231Hk2312 k. In general. Most Cited

Cases

(Formerly 232Ak1281.1 Labor Relations, 255k69 Master and Servant, 232Ak1281)

In absence of collusion between employers, a particular employer is required to pay overtime under the Fair Labor Standards Act only if the employee works more than 40 hours a week for the particular employer. Fair Labor Standards Act of 1938, §§ 1 et seq., 15(a)(1, 2, 5), 29 U.S.C.A. §§ 201 et seq., 215(a)(1, 2, 5).

[2] Labor and Employment 231H ↪ 2387(7)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)6 Actions

231Hk2383 Evidence

231Hk2387 Weight and Sufficiency

231Hk2387(7) k. Persons and employments within regulations in general. Most Cited Cases

(Formerly 232Ak1522 Labor Relations, 255k80(9) Master and Servant)

Evidence that outside tailors who did work for corporation, received a regular stipend from corporation to cover expense of maintaining their shops, so that corporation in effect, paid the rent for premises on which work was done by outside tailors, that tailors employed others to do various incidental jobs such as sweeping and pressing, that they sometimes shared shops with one another, or that they employed an apprentice to help them, did not indicate that they were not corporation's "employees" within meaning of the Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 15(a)(1, 2, 5), 29 U.S.C.A. §§ 201 et seq., 215(a), (1, 2, 5).

[3] Labor and Employment 231H ↪ 2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)2 Persons and Employments

Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in particular employments. Most Cited Cases

(Formerly 232Ak1126 Labor Relations, 255k69 Master and Servant)

Outside tailor who employed 14 other tailors in his shop, was not an "employee" of corporation for which he did work, within meaning of Fair Labor Standards Act, but was an "independent contractor."

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Fair Labor Standards Act of 1938, § 1 et seq., 15(a)(1, 2, 5), 29 U.S.C.A. §§ 201 et seq., 215(a)(1, 2, 5).

[4] Federal Courts 170B ↪ 901.1

170B Federal Courts

170BVIII Courts of Appeals,

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)6 Harmless Error

170Bk901 Exclusion of Evidence

170Bk901.1 k. In general. Most Cited

Cases

(Formerly 170Bk901, 106k406(15/8), 106k406, 106k406.6(9))

Witnesses 410 ↪ 392(1)

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k390 Competency of Evidence of Inconsistent Statements in General

410k392 Written Statements or Instruments

410k392(1) k. In general. Most Cited

Cases

In action to enjoin alleged employer from violating the Fair Labor Standards Act wherein an alleged employee testified against alleged employer, written statement by alleged employee to Wage and Hour Division was admissible with respect to his credibility but its exclusion was harmless error, where alleged employee's testimony was not in dispute. Fair Labor Standards Act of 1938, § 1 et seq., 15(a)(1, 2, 5), 29 U.S.C.A. §§ 201 et seq., 215(a), (1, 2, 5).

[5] Injunction 212 ↪ 127

212 Injunction

212III Actions for Injunctions

212k124 Evidence

212k127 k. Admissibility. Most Cited Cases

Labor and Employment 231H ↪ 2432(3)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)7 Injunctions

231Hk2426 Proceedings

231Hk2432 Evidence

231Hk2432(3) k. Admissibility.

Most Cited Cases

(Formerly 232Ak1614 Labor Relations)

In action to enjoin alleged employer from violating the Fair Labor Standards Act, exclusion of statement from files of Wage and Hour Division concerning alleged employer's previous record with respect to its attempts to comply with the act, was not error, where violations by alleged employer of the act were continuing up to commencement of the suit and alleged employer was asserting that the act was not applicable. Fair Labor Standards Act of 1938, § 1 et seq., 15(a)(1, 2, 5), 29 U.S.C.A. §§ 201 et seq., 215(a), (1, 2, 5).

*945 Appeal from the District Court of the United States for the Southern District of New York.

Action under the Fair Labor Standards Act by L. Metcalfe Walling, administrator of the Wage and Hour Division, United States Department of Labor, against Twyeffort, Inc., to enjoin defendant from alleged violations of the Act. From a decree for the plaintiff, 65 F.Supp. 920, the defendant appeals.

Affirmed.

This is an appeal from a judgment enjoining defendant from violating Sec. 15(a)(1), (a)(2) and (a)(5) of the Fair Labor Standards Act of 1938, 29 U.S.C.A. 201 et seq. The pertinent portions of the statute are set out in the footnote.^{FN1} The facts, not seriously disputed at the trial, were found by the court below as follows:

'The defendant, a Delaware corporation, has its principal place of business in New York City. It is engaged in the business of custom tailoring, making men's and women's clothes to individual order. Approximately sixty-five to seventy-five per cent of its output is shipped to points outside the State of New York. Its premises in New York City comprise a showroom and a bushel or alteration room containing sewing and pressing equipment. Of the eight employees at present working on the premises, all do clerical work, except a designer, a cutter and three bushelmen or men who make alterations. The premises cannot accommodate more than an additional tailor

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(Cite as: 158 F.2d 944)

and shipping-clerk. After the employees on the premises cut material in accordance with patterns made there for each customer, the material, together with linings, thread, buttons and other trimmings, is sent to tailors working off the premises, to be sewed according to specific instructions contained on an accompanying tag, these being sufficiently detailed to direct the tailors exactly how to sew and complete the garments and obviating any need of further control, supervision or instructions or the exercise of judgment on their part. One licensed homemaker and approximately sixteen other outside tailors working on premises rented or built by them do the sewing. Another licensed homemaker does some of the repair and alteration work for the defendant. Most of the outside tailors who sewed for defendant's predecessor (before defendant corporation's reorganization) worked in their homes until 1936 when industrial homework in the trade was prohibited (except for certain specially licensed person). Thereupon defendant's predecessor ordered its outside tailors to obtain work places apart from their homes. Two of these tailors, who still sew for the defendant, complied by building shops in the yards of their homes. Once a month, defendant, in accordance with its promise to do so, pays the outside tailors a stipulated sum to cover rent and possibly other expenses incurred in the maintenance of their outside *946 shops.' Some of the tailors employ errand boys, sweepers and pressers. Their wages are paid by the tailors without reimbursement by defendant. 'Several of the outside tailors at times make alterations on garments for defendant, of exactly the same kind as are made by the inside bushelmen, and are compensated therefor at a fixed hourly rate. Sometimes the tailors come for work and at other times defendant sends it to them. There is not any express contract between the tailors and defendant. The defendant is not required to give work to the tailors, nor the tailors required to work for the defendant.'

'The outside tailors use, maintain and replace their own sewing machines, needles, irons and other similar equipment, just as was formerly done by such of them as did homework. Generally, the outside tailors work for defendant exclusively, but in the past a few also worked for others. It is stated that one tailor (Goldberg) at present also works for at least four others and employs about fourteen people in his shop. This appears to be an exceptional case.' Another, Stigliani, employs a single helper or apprentice. Others who have done so in the past, testified that they no

longer employ any such helpers. Some of the outside tailors share their shops with partners or business associates who bear a portion of the expense of maintaining the shop.

'Upon completion and return of each part of a garment sewed by him, the outside tailor is paid at piece rates which have been established by defendant. The payrolls of the outside as well as the inside tailors and other employees are made up every Monday.

'The outside tailors are at liberty to work when it please them. They take vacations, but generally at a time when business is slack and at the convenience of the defendant. Several of the outside tailors testified that they worked sixty-five and more usually seventy-five hours a week without receiving any overtime compensation and that they earned at times not more than \$800, \$1200 and \$2500 a year.'

Defendant also employs two licensed homeworkers who do exactly the same kind of work as the tailors who work in outside shops. They maintain their own equipment, and are compensated at piece rates in the same way as the outside tailors.

On October 21, 1938, the Administrator of the Wage and Hour Division of the Department of Labor, pursuant to his authority under Sec. 11(c) of the Act, 29 U.S.C.A. 211(c), issued regulations requiring employers subject to the Act to keep records of persons employed by them, and of the wages, hours and other conditions of work of those employees. The trial court concluded that the outside tailors were employees of defendant within the meaning of the Fair Labor Standards Act, and that the defendant had violated the provisions of the Act by failing to keep records as prescribed by the regulations, by failing to pay overtime wages for hours worked in excess of 40 hours a week, and by shipping in interstate commerce the products made by these employees.

On the basis of these conclusions, the court issued na injunction which permanently enjoined the defendant from violating the provisions of the Act in the above-named respects. Defendant appeals, alleging error in the decision that the outside tailors are employees, and in the issuance of the injunction pursuant thereto.

During the course of the trial, Margolin, an out-

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side tailor and the plaintiff's principal witness, testified that he had given to a representative of the plaintiff, a signed statement relating to the instant case. Defendant's counsel asked that the statement be produced for his inspection. On objection by plaintiff to its production on the grounds that the statement was confidential, the trial court, without examining the statement, ruled that it need not be produced. The court also sustained the plaintiff's objection to the defendant's examination at the trial of a statement taken from the files of the Wages and Hours Division of the Department of Labor. This statement related to the Twyeffort Corporation's past efforts to comply with the Act in connection with its inside employees. William S. Tyson and Morton Liftin, both of Washington, D.C., Irving Rozen, of New York City, George M. Szabad and *947 Helen Grundstein, both of Washington, D.C., for plaintiff-appellee.

Davis, Polk, Wardwell, Sunderland & Kiendl, of New York City (William H. Timbers, Rufus D. McDonald, and Cleveland C. Cory, all of New York City, of counsel), for defendant-appellant.

Before L. HAND, CHASE and FRANK, Circuit Judges.

FRANK, Circuit Judge.

[1][2] The principal issue in this appeal is whether the trial court correctly classified the outside tailors as defendant's employees within the meaning of the Act which contains the following definitions:

'(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *

'(e) 'Employee' includes any individual employed by an employer * * *

'(g) 'Employ' includes to suffer or permit to work.'

Homeworkers have been held to be employees within these definitions. Guiseppi v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921; Walling v. American Needlecrafts, 6 Cir., 139 F.2d 60; indeed defendant admits that the homeworkers it employs come within the protection of the Act. We see no valid distinction between homeworkers and outside tailors;

their work and their conditions of employment (except as to location) are identical. Defendant argues that the outside tailors must be excluded because they are free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish. But all these arguments, applicable equally to homeworkers, have already been considered and rejected. The fact that the outside tailors may, and sometimes do, work for more than one employer creates no problem except as it affects the payment of overtime wages. Only if an employee works more than 40 hours a week for a particular employer is the latter required to pay overtime. Absent collusion between employers, a tailor could conceivably work 80 hours a week without being entitled to overtime pay, if he divided his time equally between two employers. That the outside tailors receive a regular stipend to cover the expense of maintaining a shop, so that the defendant thus, in effect, pays the rent for the premises on which the work is done, does not indicate that the outside tailors are not his employees, but rather that they are. ^{FN2}

We find no difficulty in classifying as employees those of the outside tailors who employ others to do various incidental jobs, such as sweeping and pressing. As the tailors themselves perform the task for which they are paid, it cannot reasonably be argued that, because they delegate some of the minor chores, they are transformed into independent contractors. Nor do we find any merit in defendant's contention that we must exclude from the classification of 'employee' those tailors who share their shops with other tailors- partners or business associates, as they have been variously called. As New York State law ^{FN3} prohibits homework in the clothing industry, these tailors must maintain shops outside their homes. Their status as employees is not altered merely because they find it more desirable or convenient to share the use of a shop and the cost of its maintenance with another tailor similarly situated.

With respect to the tailor, Stigliani, who employs an apprentice to help him with the actual tailoring, defendant poses a problem which may be stated thus: Does a tailor, who would otherwise clearly be classified as an employee, lose his employee status because he himself employs a single helper? To state the problem is, in effect, to dispose of it. We are here dealing with a remedial statute whose declared purpose is to eradicate the evils attendant upon low

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wages, long hours, and sub-standard labor conditions. United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430; Missel v. Overnight Motor Transportation Co., 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682. Drawing the line between employees and independent contractors*948 cannot be done mechanically; it calls for rational judgment as the facts vary, but that need not terrify us. (Chitty, J., said that 'courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail' at some time.')FN4 We think that the mere fact of hiring a single helper clearly does not suffice to put a tailor on the independent-contractor side of the line. For the fact does not relieve that tailor from exposure 'to the evils the statute was designed to eradicate'^{FN5} nor make less appropriate the remedies the statute affords.

[3] We do not think that Goldberg, who employs some 14 other tailors in his shop, does come within the scope of the injunction, which relates only to 'employees.' Whether or not he personally performs any of the actual tailoring work is not decisive, for it seems to us that a man who employs 14 men to do the work that he has contracted to do cannot reasonably be classified as anything but an independent contractor. Appellant claims that there are others in the same position as Goldberg. However, there is no finding to that effect, and the record is extremely fragmentary on this point. If there actually are others, then they too are independent contractors, and of course the injunction does not apply to them.

Defendant contends that the injunction order errs because it includes within its scope the defendant's obligations to the employees of those tailors who themselves come within it. But that issue is not before us, since the order does not mention those sub-employees, and since plaintiff advises us that he has no intention of ever asserting that it relates to them.

[4] Defendant, relying on United States v. Andolschek, 2 Cir., 142 F.2d 503, and United States v. Beekman, 2 Cir., 155 F.2d 580, 584, alleges error in the exclusion of the Margolin statement. We agree that the doctrine of those cases applies in civil as well as in criminal cases. And, no doubt, the statement might have been relevant, with respect to Margolin's credibility. But the error was harmless, since the facts to

which he testified, so far as relevant, were not in dispute. The experienced trial judge unquestionably ignored Margolin's testimony that he considered himself an employee; for, as his status constituted an issue for the judge's decision, Margolin's opinion was of no comment.

[5] The exclusion of the statement concerning Twyeffort's previous record was not error. While the question of general good faith in compliance with the Act is relevant where the violations have ceased before the Administrator begins an action, it has no bearing on the issuance of an injunction where the violations have continued up to the commencement of the suit, and where the employer still asserts that the Act does not apply. See Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705; cf. Walling v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29.

Affirmed.

FN1. Title 29, Sec. 215. '(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person-

'(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulations or order of the Administrator issued under section 214 of this title * * *

'(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title; * * *

'(5) to violate any of the provisions of section 211(c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a

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material respect.'

Note: Sec. 206 prescribes minimum wages and provides for overtime pay; Sec. 207 prescribes maximum hours, and Sec. 211(c) provides for the keeping of proper records.

FN2. See Walling v. American Needlecrafts, 6 Cir., 139 F.2d 60, 64.

FN3. By order of the Industrial Commissioner, pursuant to New York Labor Law, Consol. Laws, c. 31, Art. 13, Secs. 350, 351.

FN4. Lavery v. Pursell, 1888, 39 Ch.D. 508, 514.

FN5. N.L.R.B. v. Hearst Publications, 322 U.S. 111, 127, 64 S.Ct. 851, 88 L.Ed. 1170.

C.A.2 1947.
Walling v. Twyeffort, Inc.
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EXHIBIT 3

176 F.2d 633, 17 Lab.Cas. P 65,308
(Cite as: 176 F.2d 633)

H

United States Court of Appeals Fourth Circuit.
McCOMB
v.
HOMEWORKERS' HANDICRAFT COOPERATIVE et al.

No. 5888.
Argued June 29, 1949.
Decided Aug. 22, 1949.

William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, sued the Homeworkers' Handicraft Cooperative, Millhiser Bag Company, Inc., and Chase Bag Company to enjoin violation of wage provisions of Fair Labor Standards Act of 1938.

The defendant bag manufacturers contended that Homeworkers, to whom defendant Cooperative distributed bags owned by manufacturers for insertion of draw strings, and who were paid by Cooperative, were not 'employees' of bag manufacturers within the act, but were 'independent contractors.'

The United States District Court for the Middle District of North Carolina, at Greensboro, Johnson J. Hayes, J., dismissed complaint and plaintiff appealed.

The Court of Appeals, Parker, Chief Judge, affirmed judgment in part, reversed in part, and remanded case with directions, holding inter alia, that the homeworkers were employees of the bag manufacturers. It further held that dismissal was discretionary where the employer had ceased the complained of practices.

West Headnotes

[1] Labor and Employment 231H  **30**

231H Labor and Employment
231HI In General
231Hk28 Independent Contractors and Their Employees

231Hk30 k. Particular cases. Most Cited Cases
(Formerly 255k5 Master and Servant)

Where cooperative, paid by bag manufacturers and composed of homeworkers, distributed to homeworkers, bags owned by manufacturers, for insertion of draw strings, and paid homeworkers on piece work basis, and shipped out finished bags as directed by manufacturers, homeworkers were "employees" of bag makers under common law, and were not "independent contractors" although their work was not supervised and was done in their homes and away from premises of manufacturers.

[2] Labor and Employment 231H  **2217(2)**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2217 Purpose
231Hk2217(2) k. Fair Labor Standards Act. Most Cited Cases
(Formerly 232Ak1102 Labor Relations, 255k69(4) Master and Servant)

The purposes of Fair Labor Standards Act are to make effective Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labor conditions. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 231H  **2298**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2297 Contracts

176 F.2d 633, 17 Lab.Cas. P 65,308
(Cite as: 176 F.2d 633)

231Hk2298 k. In general. Most Cited Cases
(Formerly 232Ak1262.1, 232Ak1262 Labor Relations, 255k69(67) Master and Servant)

The Fair Labor Standards Act was a recognition of fact that due to unequal bargaining power as between employer and employee, certain segments of population required federal compulsory legislation to prevent private contracts on their part which endangered national health, and efficiency and, as a result, the free movement of goods in interstate commerce. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[4] Labor and Employment 231H ↻ 2235

231H Labor and Employment
231HXIII Wages and Hours
Pay
231HXIII(B) Minimum Wages and Overtime
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2234 Independent Contractors
231Hk2235 k. In general. Most Cited

Cases
(Formerly 232Ak1125.1, 232Ak1125 Labor Relations, 255k69(33) Master and Servant)

Common law rules as to distinctions between servants and independent contractors throw but little light on who are to be deemed "employees" within Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[5] Labor and Employment 231H ↻ 2237

231H Labor and Employment
231HXIII Wages and Hours
Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2237 k. Homeworkers and pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations, 255k69(34) Master and Servant)

Where cooperative paid by bag manufacturers and composed of homeworkers, distributed to ho-

meworkers bags owned by bag manufacturers for insertion of draw strings, and paid homeworkers on piece work basis, and shipped out finished bags as directed by manufacturers, homeworkers were "employees" of bag manufacturers within wage provisions of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[6] Labor and Employment 231H ↻ 2217(2)

231H Labor and Employment
231HXIII Wages and Hours
Pay
231HXIII(B) Minimum Wages and Overtime
231HXIII(B)1 In General
Provisions
231Hk2215 Constitutional and Statutory
231Hk2217 Purpose
231Hk2217(2) k. Fair Labor Standards Act. Most Cited Cases
(Formerly 232Ak1102 Labor Relations, 255k69(4) Master and Servant)

The purpose of Fair Labor Standards Act as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wages. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[7] Labor and Employment 231H ↻ 2301

231H Labor and Employment
231HXIII Wages and Hours
Pay
231HXIII(B) Minimum Wages and Overtime
231HXIII(B)4 Operation and Effect of Regulations
231Hk2297 Contracts
231Hk2301 k. Compliance with or violation of regulations. Most Cited Cases
(Formerly 232Ak1266 Labor Relations, 255k69(69) Master and Servant)

The wage provisions of Fair Labor Standards Act cannot be avoided by an agreement to pay workers collectively instead of individually. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

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[8] Labor and Employment 231H ⚡2366

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)6 Actions

231Hk2364 Defenses

231Hk2366 k. Reliance on administrative ruling or policy. Most Cited Cases

(Formerly 232Ak1476 Labor Relations, 255k69(81) Master and Servant)

Provision of Portal-to-Portal Act that no employer shall be subject to liability for failure to comply with requirements of Fair Labor Standards Act, where he proves that his action was in good faith in reliance upon an administrative ruling of federal agency, protects only as to conduct occurring prior to enactment of Portal-to-Portal Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 2, 29 U.S.C.A. § 252.

[9] Injunction 212 ⚡89(2)

212 Injunction

212II Subjects of Protection and Relief

212II(F) Public Welfare, Property, and Rights

212k89 Protection of Public in General

212k89(2) k. Particular restraints to protect the public. Most Cited Cases
(Formerly 212k89)

Labor and Employment 231H ⚡2419

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)7 Injunctions

231Hk2417 Grounds and Subjects of Relief

231Hk2419 k. Intention to violate.

Most Cited Cases

(Formerly 232Ak1606 Labor Relations)

Provision of Portal-to-Portal Act that no employer shall be subject to liability or punishment for failure to comply with requirements of Fair Labor Standards Act, where he proves that his action was in

good faith in reliance upon an administrative ruling of federal agency, did not preclude court from enjoining an employer from violating in the future, the wage provisions of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 2, 29 U.S.C.A. § 252.

[10] Estoppel 156 ⚡62.1

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.1 k. In general. Most Cited

Cases

(Formerly 156k62(1))

Officers and Public Employees 283 ⚡103

283 Officers and Public Employees

283III Rights, Powers, Duties, and Liabilities

283k102 Authority and Powers

283k103 k. In general. Most Cited Cases

Laches and estoppel may not be relied upon to deprive public of protection of a statute because of mistaken action or lack of action on part of public officials.

[11] Injunction 212 ⚡113

212 Injunction

212III Actions for Injunctions

212k113 k. Limitations and laches. Most Cited

Cases

(Formerly 212k13)

Labor and Employment 231H ⚡2427

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)7 Injunctions

231Hk2426 Proceedings

231Hk2427 k. In general. Most Cited

Cases

(Formerly 232Ak1607 Labor Relations)

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(Cite as: 176 F.2d 633)

Delay of administrator of Wage and Hour Division in instituting suit to enjoin employers from violating wage provisions of Fair Labor Standards Act did not bar relief on ground of laches nor estoppel. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[12] Federal Civil Procedure 170A 1741

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)2 Grounds in General

170Ak1741 k. In general. Most Cited

Cases

Dismissal of suit to enjoin employer from violating wage provisions of Fair Labor Standards Act was discretionary where employer had ceased the complained of practices, had not engaged in them for nearly a year, and had no intention of engaging in them in the future. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

*634 Bessie Margolin, Asst. Solicitor, U.S. Department of Labor, Washington, D.C. (William S. Tyson, Solicitor, William A. Lowe and Helen Grundstein, all of Washington, D.C., Attorneys, and Beverley R. Worrell, Regional Attorney, U.S. Department of Labor Birmingham, Ala., on the brief), for appellant.

Thornton H. Brooks, of Greensboro, N. Car., Robert G. Cabell, of Richmond, Va., and Morris E. Lasker, New York City (Brooks, McLendon, Brim & Holderness, of Greensboro, N. Car., and Battle, Fowler, Neaman, Stokes & Kheel, New York City, on the brief), for appellees.

Before PARKER, Chief Judge, and SOPER, and DOBIE, Circuit Judges.

PARKER, Chief Judge:

This is an appeal by the Administrator of the Wage and Hour Division from adverse decrees in a suit instituted against the Millhiser Bag Company, the Chase Bag Company and the Homeworkers Handicraft Cooperative, to restrain violations of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. § 201 et seq. The complaint alleged that

Millhiser and Chase were bag manufacturers who employed homeworkers on a piece work basis to insert draw strings in bags of their manufacture at a wage rate below that allowed by the statute, and that these homeworkers were members of the cooperative, which was not a true cooperative but a mere agency for dealings between Millhiser and Chase and these homeworking employees. The District Judge denied relief and dismissed the complaint as *635 against Millhiser and the cooperative on the ground that the homeworkers were not employees of the bag companies but independent contractors functioning through the cooperative. Additional grounds given for the dismissal were that the defendants had acted in good faith, relying upon rulings of the Bureau of Internal Revenue, and that the administrator had been guilty of laches and delay in instituting the proceedings. As to Chase, the suit was dismissed on the ground that that company had ceased using homeworkers in the stringing of bags several months before the hearing and had no intention of using them in the future.

The facts are that the insertion of draw strings is an essential step in the manufacture of tobacco bags and other bags of the sort manufactured by Millhiser and Chase. The insertion of the strings is a simple operation requiring little or no skill and no supervision. After the bags are finished except for the insertion of draw strings, these are inserted by a handworker with a needle. The bags are taken to the homes of the workers for this to be done and they are paid for the labor on a piece work basis of so much per thousand bags. The evidence shows that the workers realize between 5 and 13 cents per hour at the rate allowed them. Between 1800 and 2000 women are engaged in the work, which they perform at their homes in Virginia and Western North Carolina.

Prior to the passage of the Fair Labor Standards Act in 1938, there was little complication in the dealings of the bag companies with these women workers. The relationship was a simple one of homework done for the companies and compensated on a piece work basis without any attempt to camouflage its true nature. Agents of the company distributed the unfinished bags to the women workers and collected them after they had been strung, paying to the workers the piece rate compensation allowed. Shortly after the passage of the act, in an effort to avoid its application, a corporation was organized to deal with these workers. They were paid for stringing

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the bags as formerly; but payment was made by the corporation, which was allowed by the companies 15c per thousand bags above the amount paid to the workers. The corporation merely did what the bag companies had formerly done through their agents, who were employed by it after its organization; and, so far as the workers were concerned, the business went forward in the same way as before.

In 1941, the attorney who had organized the corporation for the handling of the bags, becoming fearful that it might be held subject to the provisions of the act, proceeded to dissolve it and to organize the cooperative, composed of the homeworkers, to take over its function. The cooperative is now doing what the agents of the bag companies did in distributing and collecting bags and paying the workers prior to the organization of the corporation and what the corporation did thereafter. It receives the bags from the companies, distributes them to and collects them from the workers and ships them out as the companies direct. It contracts with the companies for the stringing of the bags at a rate in excess of what it pays the workers; but any excess over the cost of its operations is distributed among the workers, not per capita, but in accordance with the amounts which have been paid them for work done. There is evidence to the effect that the cooperative is controlled, not by its members, but by certain salaried employees who were formerly connected with the bag companies; that the salaries of these employees have been raised while the compensation paid the workers was allowed to remain at the same rate until after this suit was instituted, notwithstanding the rise in the cost of living and of wages in all other lines of industry; and that the cooperative functions as a mere instrumentality of the bag companies. It is not necessary to go into this, however, as we are satisfied that the homeworkers are employees of the bag companies within the meaning of the Fair Labor Standards Act and that their status as employees has not been affected by the organization of the cooperative, whatever view be taken as to who exercises the real control over it.

*636 Four questions are presented for our consideration: (1) whether the homeworkers are employees of Millhiser and Chase within the meaning of the Fair Labor Standards Act; (2) whether their status as employees has been affected by the organization of the cooperative; (3) whether relief should be denied because of a ruling of the Bureau of Internal Revenue

under the Social Security Act, 42 U.S.C.A. § 301 et seq., or on the ground of laches or estoppel; and (4) whether the suit was properly dismissed as to Chase.

[1] As to the status of the homeworkers, we think it perfectly clear that, under common law concepts, they are employees and not independent contractors. They are not engaged in an independent calling but are performing unskilled manual labor, which constitutes a single step in the manufacturing process in which the bag companies are engaged. The bags on which the labor is performed never become their property in any sense, but remain the property of the companies by whom they are sold when the stringing operation is completed. It is true that there is no supervision of their work; but it is so simple that it requires no supervision. They are manifestly mere laborers compensated on a piece work basis and are not converted into independent contractors because they are allowed to do the work in their own homes and away from the premises of those who employ them. As we said in United States v. Vogue, Inc., 4 Cir., 145 F.2d 609, 611, the law of independent contractors has an important place in the law, but surely it was never intended to apply to humble employees of this sort.

[2][3][4] Whether or not the homeworkers are employees within the meaning of the Fair Labor Standards Act, however, is to be determined, not by common law concepts, but by a consideration of the purpose which Congress had in mind in the passage of the act, which defines 'employ' as including 'to suffer or permit to work'. 52 Stat. 1060, 29 U.S.C.A. § 201. This definition of employment has been called by Senator, now Mr. Justice, Black the 'broadest definition that has ever been included in any one act'. 81 Cong.Rec. 7659; United States v. Rosenwaser, 323 U.S. 360, 362, 65 S.Ct. 295, 89 L.Ed. 301, 'The motive and purpose' of the legislation, as said by the Supreme Court in United States v. Darby, 312 U.S. 100, 115, 61 S.Ct. 451, 457, 85 L.Ed. 609, 132 A.L.R. 1430, are 'plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *'. As pointed out in a later case, 'The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered na-

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tional health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided.' Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 706-707, 65 S.Ct. 895, 902, 89 L.Ed. 1296. Such being the purpose of the statute, common law rules as to distinctions between servants and independent contractors throw but little light on who are to be deemed employees within its meaning. This was clearly stated by the Supreme Court in National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 855, 88 L.Ed. 1170, brought under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., a companion piece of legislation, where the court said:

'The principal question is whether the newsboys are 'employees.' Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view 'common-law standards' are those the courts have applied in distinguishing between 'employees' and 'independent contractors' when working out of various problems unrelated to the Wagner Act's purposes and provisions.

*637 'The argument assumes that there is some simple uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others, fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as 'the test' for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

'It will not do, for deciding this question as one of uniform national application, to import wholesale the

traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's (broad terms and purposes).

"Technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants' have been rejected in various applications of this Act both here * * * and in other federal courts * * * . There is no good reason for invoking them to restrict the scope of the term 'employee' sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. 'Where all the conditions of the relation require protection, protection ought to be given.'"

[5] When the rule thus stated is applied, there can be little question that the homeworkers here involved require the protection of the act and that the protection should be given them. They are unskilled and unorganized manual laborers performing a necessary service in the manufacture of bags, and they are paid at a rate which brings them the ridiculously low wage of from 5 to 13 cents per hour for their labor. It is well settled that the fact that they are paid on a piece work basis does not take them from under the act. United States v. Rosenwasser, 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 301; United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757; Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772. We think it equally clear that they are not taken from under it by reason of the fact that the work is done in their own homes without the supervision and direction of the bag companies. Cases directly in point in support of this proposition are Gemsco, Inc. v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921; Walling v. American Needlecrafts, 6 Cir., 139 F.2d 60; Walling v. Twyeffort, Inc., 2 Cir., 158 F.2d 944; Fleming v. Palmer, 1 Cir., 123 F.2d 749; and Walling v. Wolff, D.C., 63 F.Supp. 605; Fleming v. Demeritt Co., D.C., 56 F.Supp. 376. The American Needlecrafts and the Twyeffort cases were cited with approval by the Supreme Court in Rutherford Food Corp. v. McComb, supra, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772.

A case on 'all fours' with the case here, except as to the effect of the intervention of the cooperative, is the carefully considered decision of Walling v. American Needlecrafts, supra (139 F.2d 64), where

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the Court of Appeals of the Sixth Circuit, in an opinion by Judge Simons, went carefully into the matter of homework such as is here involved. In the course of his opinion, Judge Simons clearly demonstrated the intent of Congress that homeworkers should be covered by the legislation, saying as to the legislative history of the act: 'Section 6(a) (29 U.S.C.A. § 206(a)) provides as follows: 'Every employer *638 shall pay to each of his employees * * * wages at the following rates * * * (5) If such employee is a homeworker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order. * * * ' So it is persuasively reasoned that the permissible relaxation by the Administrator of statutory standards in the case of homeworkers in Puerto Rico and the Virgin Islands, carries with it an inescapable implication that homeworkers generally are included in the statutory definition of 'employee.' The inference is strengthened by the fact that when the Black-Connery Bill was first considered it contained a provision in Sec. 6(a) giving the Board power to define, by regulation or order, the determination of the number of employees employed by any employer through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees. This provision was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting, in reporting out the Bill of July 8, 1937, that the purpose of original Sec. 6(a) was sufficiently served by the expanded definition of the word 'employ' now incorporated as subsection (g) of the Act,- a definition to which Senator (now Mr. Justice) Black referred as 'the broadest definition that has ever been included in any one Act.' (81 Cong.Rec. 7657.) Subsequent history gives added clarification to Congressional intention. Several bills were introduced in the House in 1939 proposing that the Act should be amended to authorize the Administrator to permit the employment of rural homeworkers at wage rates lower than the statutory minimum. The proposals failed,- the Committee on Labor of the House reporting its view that 'The Act at the present time treats homeworkers just as any other type employee.' It is apparent from the debates that the purpose of the Congress was not to open the door to the return of the sweatshop system of unpleasant memory.

'The then Assistant Attorney General (now Mr. Justice) Robert H. Jackson, pointed out in testimony before the legislative committee, that the Black-Connery Bill was clearly designed to authorize

control over industrial homework practices; 'the factory which sends out and makes use of people in their homes are not exempt just because they are using premises they do not pay rent for.' While he was careful to indicate that probably not all persons designated as homeworkers would be reached by the Bill, in saying that, 'the family that engages in some little commodity which is a homecraft, as you might call it, on its own, would probably not be reached by the Bill,' it was manifest that he had in mind crafts other than those by which articles are processed for manufacturing industries, which furnish the material, instruction and design, and market broadly the completed product.'

Fleming v. Palmer, supra, 1 Cir., 123 F. 2d 749, to which we shall refer later in dealing with the cooperative, is also on 'all fours' in holding that homeworkers are to be treated as employees under the act. So also is Walling v. Twyeffort, supra, 2 Cir., 158 F.2d 944, in which the Court of Appeals of the Second Circuit held that outside tailors who did piece work for a corporation engaged in custom tailoring, off its premises and without supervision or direction, were employees within the meaning of the act. In Gemsco, Inc. v. Walling, supra, 324 U.S. 244, 65 S.Ct. 605, 607, 89 L.Ed. 921, and Walling v. Wolff, supra, D.C., 63 F.Supp. 605, 607, homeworkers were held subject to the act's provisions, and injunctions forbidding homework in the embroidery trade contrary to a regulation of the administrator were sustained. In the case last cited, Judge Kennedy referred to our statement in the Vogue case that the law of independent contractors was never intended to apply to humble employees of this sort, and added what is manifestly sound: 'I would go further to say that the 'law of independent contractors,' so far as the Fair Labor Standards Act is concerned, cannot nullify the will of Congress, and take away the benefits of the statute from pieceworkers in the needlework*639 trades, even in the absence of a showing of domination and control.'

[6] There is nothing to the contrary in Walling v. Portland Terminal Co., 330 U.S. 148, 67 S.Ct. 639, 640, 91 L.Ed. 809, upon which appellees rely. That case merely held that learners or apprentices taking a training course under an agreement that compensation should not be paid them were not to be deemed employees within the meaning of the act; but the court made it very clear that all whose employment contemplated compensation were protected by the act,

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saying: 'This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category. * * * The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of 'employ' and of 'employee' are broad enough to accomplish this.' (*Italics supplied.*)

Glenn v. Beard, 6 Cir., 141 F.2d 376, upon which appellees rely, was decided under the Social Security Act, not the Fair Labor Standards Act; and, as we pointed out in United States v. Vogue Inc., 4 Cir., 145 F.2d 609, 613, the decision was rendered prior to the decision of the Supreme Court in the Hearst Publications case. *supra*. We stated in the Vogue opinion that we are more impressed by the soundness of the decision in the American Needlecrafts case, *supra*, from which we quoted at length than by that in Glenn v. Beard. Subsequently the Vogue case, along with the American Needlecrafts case and the Twyeffort case were cited with approval by the Supreme Court in the Rutherford Food Corp. case, *supra*. See 331 U.S. at 729, 67 S.Ct. at page 1476.

There is nothing in the Joint Resolution of June 14, 1948, ch. 468, sec. 2(a), 62 Stat. 438, 42 U.S.C.A. § 1301(a)(1), which sustains the position of appellees. That resolution had relation to the Social Security Act and the definition of employee as contained in that act. The fact that no reference was made to the Fair Labor Standards Act or to the decisions thereunder would clearly indicate that no change in that law as applied by the courts under that act was intended. The same may be said as to the change in definition of employee made by the Labor Management Relations Act of June 23, 1947, 29 U.S.C.A. § 141 *et seq.*, over that contained in the National Labor Relations Act. For the reasons heretofore stated, however, we do not think that employees of the sort here involved, who merely do unskilled, manual labor as a part of a manufacturing process carried on by another, could properly be held to be independent contractors under the rules of the common law, in any event.

[7] We come, then, to the question as to whether these homeworkers are taken from under the act by reason of the part played by the cooperative. We do

not think so. The work done by the homeworkers benefits, not the cooperative, but the bag companies. The cooperative has no other interest in it than the dissolved corporation formerly had or than the agents of the bag companies had before the corporation was organized, i.e. it merely handles the distribution and collection of the bags and the payment of the workers for work which benefits the bag companies. The fact that the companies pay the cooperative for stringing the bags instead of making payment direct to the workers themselves is immaterial, since it is understood all around that what is paid to the cooperative shall go to the workers in proportion to the work done; and manifestly the act may not be avoided by an agreement to pay workers collectively instead of individually. Directly in point is the decision in Rutherford Food Corp. v. McComb, *supra*, 331 U.S. 722, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772, where employees were held not to be taken from under the act because of an agreement to pay them collectively for work done. Answering the contention that they were independent contractors as to such work, *640 the court said: 'While profits to the boners depended upon the efficiency of their work, it was more like piece work than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.' The cooperative merely assists the workers in their dealings with the bag companies and its intervention should no more affect their status as employees than if it were a labor union bargaining collectively in their behalf.

Very much in point, also, is our decision in McComb v. Southern Weighing & Inspection Bureau, 4 Cir., 170 F.2d 526, where we held that employees who performed weighing and inspection services for railroads were employees of the railroads within the meaning of the Fair Labor Standards Act, notwithstanding that their wages were paid through a joint bureau maintained by the railroads. The fact that the cooperative is maintained by employees instead of by the employers does not seem to be any just ground of distinction. The determining factor is that the work is done for the employer and that the compensation, although paid through the cooperative, is in reality paid by the employer. See also, Walling v. Western Weighing & Inspection Bureau, 7 Cir., 160 F.2d 47.

In point also, when properly considered, is Fleming v. Palmer, 1 Cir., 123 F.2d 749, which held that members of an embroidery cooperative, who did

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embroidery work for the Palmers, were their employees notwithstanding that they were paid by the cooperative which contracted for the work. It is true that in that case it was held that the cooperative was controlled by the Palmers; and this is thought to be a ground of distinction. If appears, however, as above stated, that the cooperative here was admittedly organized to avoid the application of the statute, that its most highly paid employees are persons who were formerly employed by the bag companies, that it does nothing which agents of the bag companies did not formerly do, and that its sole function is to distribute and collect the bags and pay the workers with money which the bag companies furnish. Without finding that it is controlled by the bag companies, we think it is clearly nothing more than an agency for the dealings had between them and the homeworkers. Whether it be regarded as an agency of the companies or of the homeworkers seems immaterial, since the economic fact is that the latter are working for the companies, and the control of the agency through which dealings are had cannot change the fact. The case of Walling v. Plymouth Mfg. Corp., 7 Cir., 139 F.2d 178, where there was a partnership of the workers in a small manufacturing plant with a profit sharing agreement, does not support the position of appellees. There the workers were clearly engaged in manufacturing on their own account; here they are merely performing labor for the companies.

[8][9] Defendants contend that injunction was properly denied because of a ruling by the Commissioner of Internal Revenue in 1946 to the effect that the relationship between the workers and the bag companies was not that of employer and employee subject to the social security tax. They rely upon the provision of the Portal-to-Portal Act, 61 Stat. 84, 29 U.S.C.A. § 252, that 'no employer shall be subject to any liability or punishment' for failure to comply with the requirements of the Fair Labor Standards Act, where he proves that his action was in good faith in reliance upon an administrative ruling of an agency of the United States. They say that the ruling of the Commissioner was a ruling of an agency of the United States within the meaning of this provision, even though not made with respect to the Fair Labor Standards Act, but a companion statute. The answer to this is two-fold. In the first place, the provisions of the Portal-to-Portal Act upon which reliance is placed protect only as to conduct occurring prior to the enactment of that statute, and the conduct here sought to be enjoined continued after the passage of the sta-

tute and until the institution of the action and, in the case of Millhisser, is still continuing. In the second place, it is perfectly clear that the provisions relied on protect against liability or punishment for past action and were *641 never intended to preclude the granting of an injunction against future violations of the law. McComb v. Robert W. Hunt. Co., 7 Cir., 172 F.2d 751, 754; Western Union Tel. Co. v. McComb, 6 Cir., 165 F.2d 65, 73; Northwestern Hanna Fuel Co. v. McComb, 8 Cir., 166 F.2d 932, 939.

[10][11] Contention is made that plaintiff is barred of relief by laches and estoppel; but it is too well settled to admit of argument that these may not be relied upon 'to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials'. National Labor Relations Board v. Baltimore Transit Co., 4 Cir., 140 F.2d 51, 55; United States v. City and County of San Francisco, 310 U.S. 16, 32, 60 S.Ct. 749, 84 L.Ed. 1050; Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S.Ct. 387, 61 L.Ed. 791.

[12] It follows that the injunction prayed should be granted against Millhisser and also against the cooperative, since the latter is assisting Millhisser in violating the act. It would be granted against Chase also, but for the fact that the District Judge dismissed the suit as to that corporation on the ground that it had ceased the practices complained of, had not engaged in them for nearly a year and had no intention of doing so in the future. Under these circumstances it was clearly within the judge's discretion to deny the injunction and dismiss the suit as to Chase, and there is nothing to indicate that the discretion was abused. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705; Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754; United States v. U.S. Steel Corp., 251 U.S. 417, 445, 40 S.Ct. 293, 64 L.Ed. 343, 8 A.L.R. 1121; Walling v. Clinchfield Coal Corp., 4 Cir., 159 F.2d 395, 399; McComb v. Goldblatt Bros., 7 Cir., 166 F.2d 387, 390. The case is entirely different from that presented in Walling v. Haile Gold Mines, Inc., 4 Cir., 136 F.2d 102, where there was admitted likelihood of defendant renewing operations in violation of the act.

As to Millhisser and the Cooperative, therefore, the decree appealed from will be reversed and the cause will be remanded with direction to grant the

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injunction. As to Chase, the order dismissing the suit
will be affirmed.

Affirmed in part, reversed in part and remanded
with directions.

C.A.4 1949.
McComb v. Homeworkers' Handicraft Cooperative
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END OF DOCUMENT

EXHIBIT 4

Westlaw.

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C
United States District Court, D. Maine, Northern
Division.
James P. MITCHELL, Secretary of Labor, United
States Department of Labor
v.
Pearl L. NUTTER.

Civ. No. 1039.
April 28, 1958.

Action by the Secretary of Labor to permanently enjoin defendant from violating provisions of the Fair Labor Standards Act. The United States District Court, District of Maine, Northern Division, Gignoux, J., held, inter alia, that homeworkers who knitted and crocheted infants' outerwear for defendant distributor at piece work rate were under the facts 'employees' of defendant within Fair Labor Standards Act and hence 'industrial homeworkers' within meaning of application regulation.

Judgment for plaintiff in accordance with opinion.

West Headnotes

[1] Labor and Employment 231H  2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations
231Hk2237 k. Homeworkers and
Pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations)

The test to be applied in determining whether homeworkers are 'employees' within Fair Labor Standards Act is not the traditional test of the master-servant relationship under the common law, but whether or not such homeworkers are employees in light of the history, terms and purpose of the act,

and in determining that question test is whether as a matter of 'economic reality' a worker is an employee within meaning of the act itself, and not whether he is a servant according to technical concepts pertinent to employer's legal responsibility to third persons for acts of his servants. Fair Labor Standards Act of 1938, §§ 3(e, g), 6(a) as amended 29 U.S.C.A. §§ 203(e, g), 206(a).

[2] Labor and Employment 231H  2217(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2217 Purpose
231Hk2217(2) k. Fair Labor
Standards Act. Most Cited Cases
(Formerly 232Ak1102 Labor Relations)

The purposes of the Fair Labor Standards Act are to exclude from interstate commerce goods produced under conditions detrimental to maintenance of minimum standards of living necessary for health and the general well being, and to make effective the congressional policy that interstate commerce should not be made instrument of competition in distribution of goods produced under substandard labor conditions. Fair Labor Standards Act of 1938, § 1 et seq. as amended 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 231H  2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations
231Hk2237 k. Homeworkers and
Pieceworkers. Most Cited Cases

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In addition to the broad statutory definition of the word 'employee', evident Congressional intent to include homeworkers within scope of Fair Labor Standards Act is evidenced by provision prescribing minimum wage rates to be paid by every employer to each of his employees and providing that if such employee is a homemaker in Puerto Rico or Virgin Islands the employer shall pay not less than the minimum piece rate prescribed by regulation or order, implication of authority granted administrator to relax its statutory standards for homeworkers in Puerto Rico and Virgin Islands being that homeworkers generally are included in statutory definition of 'employee'. Fair Labor Standards Act of 1938, §§ 3(e, g), 6(a) as amended 29 U.S.C.A. §§ 203(e, g), 206(a).

[4] Labor and Employment 231H ↻2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2237 k. Homeworkers and Pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations)

The legislative history of the Fair Labor Standards Act and the judicial decisions interpreting and applying the act demonstrate intent to include industrial homeworkers within its coverage. Fair Labor Standards Act of 1938, §§ 3(e, g), 6(a) as amended 29 U.S.C.A. §§ 203(e, g), 206(a).

[5] Labor and Employment 231H ↻2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2237 k. Homeworkers and Pieceworkers. Most Cited Cases

(Formerly 232Ak1127 Labor Relations)

Homeworkers who knitted and crocheted infants' outerwear for defendant distributor at piece work rate were under the facts 'employees' of defendant within Fair Labor Standards Act and hence "industrial homeworkers" within meaning of applicable regulation. Fair Labor Standards Act of 1938, §§ 1 et seq., 3(e, g), 6(a), 11(c, d), 15(a)(1, 2, 5) as amended 29 U.S.C.A. §§ 201 et seq., 203(e, g), 206(a), 211(c, d), 215(a)(1, 2, 5).

[6] Labor and Employment 231H ↻2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2237 k. Homeworkers and Pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations)

Alleged fact that effect of Fair Labor Standards Act's application to distributor of infants' knitted outerwear knitted and crocheted by homeworkers would be to put distributor out of business in view of alleged fact that distributor's operation could not support payment of required minimum wage to the homeworkers, was immaterial in determining whether homeworkers were employees covered by the act since the construction and interpretation of statutes cannot extend to any amendment or legislation nor can considerations of apparent hardship justify a strained construction of the law as written. Fair Labor Standards Act of 1938, §§ 1 et seq., 3(e, g), 6(a), 11(c, d), 15(a)(1, 2, 5) as amended 29 U.S.C.A. §§ 201 et seq., 203(e, g), 206(a), 211(c, d), 215(a)(1, 2, 5).

*800 Thomas L. Thistle, Regional Atty., U.S. Dept. of Labor, Wage & Hour Divn., Robert J. Nye, Boston, Mass., for plaintiff.

David A. Nichols, Camden, Me., for defendant.

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GIGNOUX, District Judge.

This is an action brought by the Secretary of Labor under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. § 201 et seq., to permanently enjoin defendant, a distributor of infants' knitted outerwear, from violating the provisions of the Act. Jurisdiction is conferred by § 17 of the Act. 29 U.S.C.A. § 217.

The complaint, filed August 13, 1957, as amended November 6, 1957, alleges violation by defendant of the provisions of §§ 15(a)(1), 15(a)(2), and 15(a)(5) of the Act, in paying wages to approximately 150 women (hereinafter descriptively called homeworkers) producing infants' knitted and crocheted outerwear which is sold by defendant in interstate commerce, at rates less than the minimum wage rates established by § 6 of the Act; and in failing to keep certain records, and to obtain special homework certificates with respect to such homeworkers as required by the regulations issued by the Administrator of the Wage and Hour Division, Department of Labor, under §§ 11(c) and 11(d) of the Act.^{FNI}

At a pre-trial conference on November 6, 1957, it was conceded by defendant that the workers are engaged in the production of goods for interstate commerce and that, with respect to these workers, she has violated the minimum wage, record keeping, and homework certificate provisions of the Act, if the Act is applicable. It was further stipulated by the parties that the only issues for determination by this Court are whether the homeworkers producing the infants' knitted and crocheted outerwear sold by defendant*801 are 'employees' of defendant within the meaning of the Act and 'industrial homeworkers' within the meaning of the applicable regulation. Defendant agrees that if these homeworkers are 'employees' and 'industrial homeworkers,' she has violated the Act and the injunction must issue.

Evidence upon the issues as thus limited was heard by the Court on February 5 and 6, 1958. Extensive briefs were submitted by the parties on

March 7, 1958, and reply briefs were filed on March 21, 1958.

The facts concerning defendant's business and her relationship to the homeworkers involved are as follows:

Since prior to November 20, 1954, defendant has been engaged at Troy, Maine, in the business of handling, selling and distributing handmade infants' knitted and crocheted outerwear, viz., bonnets, booties, sacques and sets consisting of all three items. The infants' outerwear handled by defendant is obtained by her from approximately 150 ladies, who either knit or crochet the garments from wool or orlon yarn. All the ladies do their work in their homes, most of which are on farms in the vicinity of Troy, and usually mail the finished garments to defendant when they have exhausted the supply of yarn they have on hand. Defendant exercises no direct supervision or control over the manner in which, or the time when, their work is performed. The ladies regard their work as 'pick up' or spare-time work. The amount of business done by any one lady with defendant is small and depends upon the amount of spare time she has available from her normal household or farm duties. Defendant sets the prices which she pays for the finished garments on a piece-rate basis. Payment has been prompt, by check, and confirmed by a small card indicating the price paid, less the cost of yarn furnished by defendant, and the State of Maine sales tax deducted therefrom. It has been defendant's practice voluntarily to raise the prices paid by her when the cost of yarn has increased.

Until shortly before the trial of this case, the ladies obtained their yarn directly from defendant. It was the practice for them to order the yarn from defendant, who charged the cost against their accounts and deducted it from the price of the finished items when they were mailed in. Following the filing of the complaint in the instant action, and approximately two months before the trial, defendant notified the ladies that she would no longer be furnishing the yarn and that they could purchase

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yarn in the future from defendant's sister in East Corinth, Maine.

In many instances, defendant has supplied the ladies with samples of the work she desires. In other instances, the ladies have followed patterns obtained by them from magazines or other sources, but in such cases defendant's approval of the pattern to be used has been obtained. Defendant has not hesitated to suggest changes in a particular lady's work, such as the use of a different size needle or hook, a tighter or looser stitch, and sometimes the color of trim to be used, and the ladies have complied with these suggestions if they were able. Defendant is at all times free to reject any proffered work, but none has ever been rejected by her.

The ladies who deal with defendant have only a nominal investment, never exceeding \$10, in equipment and materials, which consist solely of knitting needles or crochet hooks and the yarn. The ladies do not keep books or records, advertise, carry a line of samples or pictures of their work, have business stationery or cards, maintain an inventory, guarantee delivery at specified times, or have employees working for them. No one of them has ever sustained or expects to sustain a loss in connection with her work. All state that they enjoy their relationship with defendant and wish it to continue. Most of them have sent their goods exclusively to defendant since they first began dealing with her, although some have knitted or crocheted garments for persons other than defendant, including in one instance *802 some retail stores. Further, the ladies consistently testified that they regard the yarn they utilize as their own, that they do not decide to whom they will dispose of the finished garments until they have finished working on them and that defendant is under no obligation to accept finished garments shipped by them.

At her place of business in Troy, defendant employs one helper to add ribbon or embroidery to the garments received by her from the homeworkers, to assemble the garments in sets, and to package and ship the garments to her retail outlets. Defendant

also maintains an inventory of goods, which varies in amount from season to season, keeps complete books and records, and engages a commission broker to sell the garments. Defendant concedes that the homeworkers are an essential part of her business.

As indicated, the issues reserved for determination by this Court are whether defendant's homeworkers are 'employees' within the meaning of the Act and 'industrial homeworkers' within the meaning of the applicable regulation.^{FN2} On the foregoing facts it is clear that these homeworkers are industrial homeworkers as defined in the regulation if they are 'employees' of defendant within the meaning of the Act, since the regulation incorporates the statutory definition and is otherwise conceded to be applicable to the operations of defendant's homeworkers.^{FN3} The only substantial issue before this Court, therefore, is whether these homeworkers are 'employees' of defendant within the meaning of the Act itself

[1] Since the decision of the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.*, 1944, 322 U.S. 111, 128-129, 64 S.Ct. 851, 88 L.Ed. 1170, it has been settled that the test to be applied in the determination of the question here at issue is not the traditional test of the master-servant relationship under the common law, but whether or not these homeworkers are employees in the light of the history, terms and purposes of the Fair Labor Standards Act. *Walling v. American Needlecrafts, Inc.*, 6 Cir., 1943, 139 F.2d 60, 63. See *Walling v. Portland Terminal Co.*, 1947, 330 U.S. 148, 150-151, 67 S.Ct. 639, 91 L.Ed. 809; *Rutherford Food Corp. v. McComb*, 1947, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772. And in determining that question the test is whether as a matter of 'economic reality' a worker is an employee within the meaning of the Act itself, and not whether he is a servant according to the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' *United States v. Silk*, 1947, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468, 91 L.Ed.

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1757.

[2] As stated by the Supreme Court in *United States v. Darby*, 1941, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, the purposes of the Fair Labor Standards Act, as set forth in the declaration of policy contained in § 2(a), are 'to exclude from interstate commerce goods produced * * * under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being' (312 U.S. at page 109, 61 S.Ct. at page 455) and 'to make effective the Congressional * * * policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions' (312 U.S. at page 115, 61 S.Ct. at page 457). Such being the purposes of the statute, its terms and history must be *803 examined to determine whether Congress intended to permit the interstate shipment of goods produced under substandard labor conditions in a home, when such goods would be excluded from interstate commerce if produced in a factory. *McComb v. Homeworkers' Handicraft Cooperative*, 4 Cir., 1949, 176 F.2d 633, 636.

The Act itself in § 3(e) defines 'employee' as 'any individual employed by an employer.' 29 U.S.C.A. § 203(e). And 'employ' is defined in § 3(g) as including 'to suffer or permit to work.' 29 U.S.C.A. § 203(g). At the time the Act was passed, Senator (now Mr. Justice) Black described this language as 'the broadest definition that has ever been included in any one Act,' 81 Cong. Record 7657, and in *United States v. Rosenwasser*, 1945, 323 U.S. 360, 362, 65 S.Ct. 295, 296, 89 L.Ed. 301, the Supreme Court stated in respect to this statutory language: 'A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.' Certainly this statutory definition provides no real basis for excluding homeworkers from the coverage of the Act.

[3] In addition to the broad statutory definition of the word 'employee', the evident Congressional intent to include homeworkers within the scope of the Act is evidenced by § 6(a) of the Act (29

U.S.C.A. § 206(a)), which prescribes the minimum wage rates to be paid by every employer to each of his employees and provides that 'if such employee is a home worker in Puerto Rico or the Virgin Islands' the employer shall pay 'not less than the minimum piece rate prescribed by regulation or order.' The inescapable implication of the authority thus granted the Administrator to relax statutory standards for homeworkers in Puerto Rico and the Virgin Islands is that homeworkers generally are included in the statutory definition of 'employee.' *United States v. Rosenwasser*, supra, 323 U.S. 363, footnote 4, 65 S.Ct. 297; see *Gemsco, Inc., v. Walling*, 1945, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921.

[4] Were there doubt that the terms of the Act itself are broad enough to bring homeworkers within its scope, the legislative history of the Act gives added clarification to the Congressional intent. Thus, the original Black-Connery bill, progenitor of the present Act, contained a provision in § 6(a) giving the Board the power to define by regulation or order the determination of the number of employees employed by any employer to prevent the circumvention of the Act through the use of agents, independent contractors, subsidiary or controlled companies or 'home or off-premise employees.' S. 2475, 75th Cong., 1st Sess., 1937. This provision was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting, in reporting out the bill on July 8, 1937, that the purpose of the original § 6(a) was sufficiently served by the expanded definition of the word 'employ' now incorporated as § 3(g), and that the words 'suffered or permitted to work' then introduced for the first time, were designed to comprehend all of the classes of relationship which previously had been designated individually, and 'to include all employees with the exception of persons employed in a bona-fide * * * executive capacity.' S.Rept. 884, 75 Cong., 1st Sess., 1937, at p. 6. Assistant Attorney General (later Mr. Justice) Jackson testified before the Congressional Committees that the Black-Connery Bill was clearly de-

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signed to sanction control over industrial homework, saying that '* * * the factory which sends out and makes use of people in their homes are not exempted just because they are using premises they do not pay rent for.' Joint hearings before the Senate Committee on Education and Labor, and the House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st Sess. (1937), p. 77.

The subsequent legislative history provides additional evidence that the Act, as passed, contemplated coverage of homeworkers as employees. In 1939 several bills were introduced in the House proposing that the Act be amended*804 to authorize the Administrator to permit the employment of homeworkers at wage rates lower than the statutory minimum. H.R. 5435; H.R. 7133; and H.R. 7349 (1939). Such amendments were obviously based on the assumption that homeworkers were then covered by the Act. In fact, the House Committee on Labor in its report accompanying the proposed amendments stated, 'The Act at the present time treats home workers just as any other type of employee.' H.R. 522, April 27, 1939, p. 10. The proposals failed, Congress thereby emphasizing its intent that the Act's protection extend to homeworkers.

Again in 1949, when the legislation which became the Fair Labor Standards Act Amendments of 1949 was pending in the Congress, an amendment was proposed to exclude homeworkers from the coverage of the Act. H.R. 5856 (1949). Its sponsor, Congressman Cooper of Tennessee, stated that the proposed amendment would exempt housewives in his part of the country 'who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anybody who might want to purchase them.' 95 Cong. Record 11209. Although adopted in the House, the amendment was rejected in the Senate and did not survive in conference. The conference report makes it clear that the omission was not unintentional. House Rept.No. 1453, 95 Cong. Record 14933. On the contrary, the conference agreement added the

present § 11(d) of the Act, specifically authorizing the Administrator to make regulations and orders regulating, restricting or prohibiting industrial homework and continuing in full force and effect all then existing regulations or orders of the Administrator relating to industrial homework. One of the orders then in effect was the Second Wage Order for the Knitted Outerwear Industry. 29 C.F.R. Chapter 5, Part 617, effective April 20, 1942.

The legislative history subsequent to the enactment of the Fair Labor Standards Act Amendments of 1949 is similarly compelling evidence of the original and continuing intention of Congress to include industrial homeworkers within the scope of the Act. Since 1949 the attempt to specifically exempt homeworkers from the minimum wage and overtime requirements of the Act has not ceased, although Congress has consistently failed so to restrict the scope of the Act. See H.R. 4661, 82d Cong., 1st Sess., June 29, 1951, introduced by Congressman Cooper; H.R. 237, 83d Cong., 1st Sess., January 3, 1953, introduced by Congressman Cooper; S. 1950, 83d Cong., 1st Sess., May 20, 1953, introduced by Senator Kefauver; H.R. 84, 84th Cong., 1st Sess., January 5, 1955, introduced by Congressman Cooper; S. 2963, 84th Cong., 2d Sess., January 18, 1956, introduced by Senator Payne; H.R. 8809, 84th Cong., 2d Sess., January 25, 1956, introduced by Congressman McIntire; H.R. 2818, 85th Cong., 1st Sess., January 14, 1957, introduced by Congressman McIntire; and S. 1160, 85th Cong., 1st Sess., February 11, 1957, introduced by Senator Smith.

Just as the legislative history of the Act compels the conclusion that Congress intended to include industrial homeworkers within its coverage, so have the judicial decisions interpreting and applying the Act consistently held that it is applicable to homeworkers engaged in activities substantially such as those of the homeworkers who are dealing with the defendant in this case. *Fleming v. Palmer*, 1 Cir., 1941, 123 F.2d 749, certiorari denied sub nom., *Caribbean Embroidery Cooperat-*

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ive, Inc., v. Fleming, 1942, 316 U.S. 662, 62 S.Ct. 942, 86 L.Ed. 1739; Tobin v. Edward S. Wagner Co., 2 Cir., 1951, 187 F.2d 977, approved in Mitchell v. Edward S. Wagner Co., 2 Cir., 1954, 217 F.2d 303, certiorari denied, 1955, 348 U.S. 964, 75 S.Ct. 524, 99 L.Ed. 752; McComb v. Homeworkers Handicraft Cooperative, 4 Cir., 1949, 176 F.2d 633, certiorari denied, 1949, 338 U.S. 900, 70 S.Ct. 250, 94 L.Ed. 553; Walling v. Twyefort, Inc., 2 Cir., 1947, 158 F.2d 944, certiorari denied, 1947, 331 U.S. 851, 67 S.Ct. 1727, 91 L.Ed. 1859; *805 Walling v. American Needlecrafts, Inc., 6 Cir., 1943, 139 F.2d 60; Mitchell v. Northwestern Kite Co., D.C.Minn.1955, 130 F.Supp. 835; Durkin v. Shone, D.C.E.D.Tenn.1953, 112 F.Supp. 375; McComb v. Edward S. Wagner Co., D.C.E.D.N.Y.1950, 89 F.Supp. 304, reversed on other grounds sub nom. Tobin v. Edward S. Wagner Co., 2 Cir., 1951, 187 F.2d 977; Walling v. Freidlin, D.C.M.D.Pa.1946, 66 F.Supp. 710; Walling v. Wolff, D.C.E.D.N.Y.1945, 63 F.Supp. 605; Fleming v. Demeritt Co., D.C.Vt.1944, 56 F.Supp. 376. Probably the only case holding that homeworkers are not employees within the scope of the Act is Walling v. Todd, D.C.M.D.Pa.1943, 52 F.Supp. 62, which was expressly overruled in Walling v. Freidlin, supra, as based on the false assumption that the traditional common law definition of master and servant was the controlling consideration.

Fleming v. Palmer, supra, a controlling decision in this circuit, although the Court was there concerned primarily with the effect of the intervention of a cooperative, is substantially on 'all fours' with the present case in holding that homeworkers are to be treated as employees under the Act. So also are Walling v. American Needlecrafts, Inc., supra, and McComb v. Edward S. Wagner Co., supra, both involving homeworkers in the needlework trades. In Wagner, 89 F.Supp. 304, supra, Kennedy, J., found homeworkers in the knitted outerwear industry, whose relationship with the Edward S. Wagner Company was almost identical to the relationship of the homeworkers with the de-

fendant in the present case, to be employees under the Act. See further the decision of the United States District Court for the Western District of Tennessee in Mitchell v. Law, 161 F.Supp. 795, in which homeworkers producing infants' knitted outerwear were held to be employees under the Act.

It has been suggested in this, as in the Wagner case, that six criteria for determining whether or not an employment relationship exists may be drawn from the leading Supreme Court decisions on employment relationships under this Act and the related Social Security and National Labor Relations Acts. 42 U.S.C.A. § 301 et seq.; 29 U.S.C.A. § 141 et seq. These suggested criteria are: (1) the extent to which the services in question are an integral part of the 'employer's' business; (2) the amount of the 'employee's' investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the 'employer'; (4) the 'employee's' opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. Rutherford Food Corp. v. McComb, 1947, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772; United States v. Silk, 1947, 331 U.S. 704, 716-719, 67 S.Ct. 1463, 91 L.Ed. 1757; Bartels v. Birmingham, 1947, 332 U.S. 126, 130, 67 S.Ct. 1547, 91 L.Ed. 1947; N.L.R.B. v. Hearst Publications, Inc., 1944, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170.

While recognizing that no single factor or group of factors can be controlling, the Court in Wagner applied the foregoing criteria to answer the defendant's contention that the ladies supplying knitted outerwear for Wagner were independent contractors and not employees. In a carefully considered opinion the Court there said in language which is equally applicable to the case at bar (89 F.Supp., at page 306):

* * * There is no question at all that those who supply Wagner products are an integral part of the business. Nor is there any doubt that the investment

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in facilities and equipment on the part of these suppliers is negligible in amount. Again, the opportunity for profit or loss arising from sound management, or the risk undertaken is negligible or nearly so. The suppliers in this case, as in the case of ordinary pieceworkers under the coverage of the act will be compensated in proportion not to their sound management but to the number of pieces *806 they turn out, because they must take Wagner's price or leave it. And for the same reason initiative, judgment, and energy play a very minor role in the 'enterprise' which the suppliers conduct.'

The employment relationship involved in Wagner was identical to the instant one. In fact, one of the present defendant's witnesses testified that she formerly supplied the same type articles to Wagner.

In Wagner, as in the instant case, the defendant also contended that an employment relationship was negated by the impermanency of the defendant's relationship with the homeworkers and by the defendant's lack of control over the homeworkers. In response to this contention, the Court said (89 F.Supp. at pages 307-308):

'The defendants are constrained to admit that the very existence of their business depends upon the products of their suppliers. They point out, however, that they are free to reject any or all of the goods, or to vary prices as they wish. But common sense requires one to postulate that having created and organized their business and presumably developed a market for their goods, the defendants are not going to reject articles sent to them to the point where they have no goods to supply (although they could do this 'legally'), nor will they be foolish enough to slash prices to the point where they kill their source of supply (although they could also do this 'legally'). One would rather expect that they will accept goods on a scale commensurate with their demands, and will pay prices which will insure a reasonably steady supply. And if they adopt this very sensible procedure they must necessarily follow what the plaintiff calls a 'course of conduct', under which they 'suffer' the suppliers to 'work' for

them. And there is surely upon them a continuing 'obligation' to pay for the goods they receive and retain at reasonable prices and with reasonable promptness.'

[5] Upon the record in the instant case this Court can find no substantial basis for distinguishing the relationship of the homeworkers with this defendant from that which the Court in Wagner found to be an employment relationship within the scope of the Fair Labor Standards Act. Nor does the present record disclose any exception to usual homework practice, which has been uniformly held to be subject to the Act.

[6] The defendant argues finally that the effect of the Act's application to her will be to put her out of business, since her operation cannot support payment of the required minimum wage to these homeworkers. This cannot, however, alter the fact that 'the construction and interpretation of statutes cannot extend to amendment or legislation * * * nor can considerations of apparent hardship justify a strained construction of the law as written * * *'. 'The remedy,' if any be required, 'is in Congress.' *Ladew v. Tennessee Copper Co.*, C.C.S.D.Tenn.1910, 179 F. 245, 252, affirmed, 1910, 218 U.S. 357, 31 S.T. 81, 54 L.Ed. 1069.

It is the conclusion of this Court that the statutory language, the legislative history and purposes, and the judicial decisions interpreting and applying the Fair Labor Standards Act establish beyond question that defendant's homeworkers are her employees within the meaning of the Act, and hence 'industrial homeworkers' within the meaning of the applicable regulation. Since it has been stipulated by defendant that she concedes violation of the minimum wage, record keeping and homework certificate provisions of the Act if the Act be found applicable to her, it follows that plaintiff is entitled to judgment in accordance with the relief demanded in his complaint.

Judgment will be entered accordingly, and plaintiff will submit a proposed form of judgment.

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FN1. The records required under authority of Section 11(c) of the Act are prescribed in Regulations, Part 516, Subparts A and B, 29 C.F.R. 516.1-516.24.

The pertinent regulations issued by the Administrator under authority of Section 11(d) of the Act are Part 617, Employment of Homeworkers in the Knitted Outerwear Industry, 29 C.F.R. 617.1-617.12.

FN2. Part 617, supra, fn. 1.

FN3. 29 C.F.R. 617.1 contains the following definitions: '(b) 'Industrial homewor-ker' and 'homeworker', as used in this part, mean any employee employed or suffered or permitted to perform industrial home-work for an employer.'

'(c) 'Industrial homework', as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or per-mits such production, regardless of the source (whether obtained from an employ-er or elsewhere) of the materials used by the homemaker in such production.'

D.Me. 1958.
Mitchell v. Nutter
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END OF DOCUMENT

EXHIBIT 5

Westlaw

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(Cite as: 585 F.Supp. 447)

C

United States District Court,
E.D. Wisconsin.

The SILENT WOMAN, LTD., Mary Joan Mollet,
Georgette Vershure, Noreen J. Lipton, Mary Clem-
ent, Leona Keipe, Cynthia Mullowney, Annagene
Schultz, Diane Krauss, Leah Kielmann, Sandra Ac-
terberg, Plaintiffs,

v.

Raymond J. DONOVAN, Secretary of Labor,
United States Department of Labor, Defendant.

No. 83-C-261.
April 30, 1984.

Wholesaler of women's and children's outerwear and nine individual seamstresses who worked for manufacturer in their homes brought action for declaratory relief seeking a declaration that their business relationship was not subject to the Fair Labor Standards Act. Upon cross motions for summary judgment on issues as to whether plaintiffs were covered by the Act and as to whether defendant's application of the Act to them constituted a violation of due process, the District Court, Myron L. Gordon, Senior District Judge, held that: (1) seamstresses working at home at their own pace and on their own machines for a wholesaler of women's and children's outerwear were "employees" and therefore protected by Fair Labor Standards Act, and (2) even assuming that seamstresses' interests in working at home were protected by due process clause, and assuming that government determined the seamstresses to be employees subject to Fair Labor Standards Act by applying an irrebuttable presumption, there could be no due process violation because Department of Labor had no power to effect a deprivation of the claimed interest since Department was required to bring an action in federal district court in order to restrain FLSA violations allegedly committed by the seamstresses' employer.

Plaintiffs' motion denied and defendant's motion granted.

West Headnotes

[1] Statutes 361 ↪ 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act.

Most Cited Cases

Where statutory definitions are inadequate, social welfare legislation is to be construed to achieve its purposes.

[2] Labor and Employment 231H ↪ 2235

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)2 Persons and Employments Within Regulations
231Hk2234 Independent Contractors
231Hk2235 k. In General. Most

Cited Cases

(Formerly 232Ak1121 Labor Relations)
Five factors which might be useful in determining whether a worker is an employee or an independent contractor for purposes of Fair Labor Standards Act are: degree of control which employer exercises over the manner in which the work is performed, opportunities for profit or loss, investment in facilities, permanency of the relationship, and skill required in the claimed independent operation. Fair Labor Standards Act of 1938, § 3(g), 29 U.S.C.A. § 203(g).

[3] Labor and Employment 231H ↪ 2237

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime

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Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2237 k. Homeworkers and
Pieceworkers. Most Cited Cases
(Formerly 232Ak1127 Labor Relations)

Seamstresses working at home at their own
pace and on their own machines for a wholesaler of
women's and children's outerwear were
"employees" and therefore protected by Fair Labor
Standards Act. Fair Labor Standards Act of 1938, §
15, 29 U.S.C.A. § 215.

[4] Constitutional Law 92 4179

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applica-
tions

92XXVII(G)7 Labor, Employment, and
Public Officials

92k4176 Regulation of Employment

92k4179 k. Wage and Hour Regula-
tion. Most Cited Cases

(Formerly 92k275(3))

Even assuming that seamstresses' interests in
working at home were protected by due process
clause, and assuming that government determined
the seamstresses to be employees subject to Fair
Labor Standards Act by applying an irrebuttable
presumption, there could be no due process viola-
tion because Department of Labor had no power to
effect a deprivation of the claimed interest since
Department was required to bring an action in fed-
eral district court in order to restrain FLSA viola-
tions allegedly committed by the seamstresses' em-
ployer. Fair Labor Standards Act of 1938, §§ 11,
17, 29 U.S.C.A. §§ 211, 217; U.S.C.A.
Const.Amends. 5, 14.

*448 Quarles & Brady by W. Stuart Parsons, Mil-
waukee, Wis., for plaintiffs.

Joseph P. Stadtmueller, U.S. Atty. by Jan E. Kear-
ney, Asst. U.S. Atty., Milwaukee, Wis., for defend-
ant.

DECISION AND ORDER

MYRON L. GORDON, Senior District Judge.

The plaintiffs brought this action for declarat-
ory relief pursuant to 28 U.S.C. § 2201, seeking a
declaration that their business relationship is not
subject to the Fair Labor Standards Act of 1938
(FLSA), 29 U.S.C. § 201 et seq. Alternatively, the
plaintiffs claim that the defendant's application of
the FLSA to them constitutes a violation of due
process. The defendant, who seeks to enforce the
FLSA against the plaintiffs, has counterclaimed to
recover backpay. This court's jurisdiction is based
on 28 U.S.C. §§ 1331 and 1337(a). The parties have
filed cross-motions for summary judgment on the
issue whether the plaintiffs are covered by the
FLSA and on the due process issue. The defendant's
motion will be granted, the plaintiffs' denied.

FACTS

The parties have stipulated to the relevant
facts. The corporate plaintiff, Silent Woman, is or-
ganized under the laws of Wisconsin and has its
principal place of business in Ripon, Wisconsin. Si-
lent Woman is engaged in the wholesale and retail
sale of women's and children's outerwear. *449 The
firm operates retail shops in Ripon and in Boca
Raton, Florida. Silent Woman has wholesale cus-
tomers across the United States.

The nine individual plaintiffs are seamstresses
who sew and embroider for Silent Woman in their
homes. Since most of them have minor children, the
women do needlework for Silent Woman only
when their household duties allow. All nine of the
women are accomplished seamstresses. They own
their own sewing machines which cost an average
of \$700.00. Except for one woman who had been a
factory seamstress, none of the women had sewn
for money before working for Silent Woman, other
than a relatively insignificant amount of work for
neighbors, family or friends.

All of the seamstresses except one have sewn
for Silent Woman since at least 1981. All have
worked regularly on a part-time basis since their re-
lationship with Silent Woman began, except on the

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few occasions when a seamstress was sick, or when there was not enough work. Since beginning to sew for Silent Woman, none of the seamstresses, with one exception, has attempted to find other customers. The one seamstress who has actively sought to expand her commercial activities began doing so after this suit was filed. In the 1981-mid-1983 period, none of the women had total earnings greater than \$350.00 from non-Silent Woman sources. The women's total earnings from Silent Woman since 1981 ranged from \$1,932.00 to about \$15,000.00, with the seven in the middle all earning from \$3,000.00 to \$5,500.00.

Most of the seamstresses found work with Silent Woman through ads which the firm had placed in local newspapers. Silent Woman accepted applicants only after inspecting sample needlework. All qualified seamstresses were offered the same contract, drafted by Silent Woman. Although the contract is entitled "Employment Contract," the seamstresses are referred to as "independent contractors" throughout the text. Under the contract, seamstresses were permitted to sew professionally for others, but could not use designs created by Silent Woman for other work. The duration of the contract was to be indefinite, but either party could terminate on five days notice.

The terms of the seamstresses' compensation were also set out in the contract. Silent Woman paid according to piece rates which applied equally to all seamstresses. The piece rate was based loosely on the minimum wage. Each time it created a new article of clothing or design, Silent Woman asked one of four seamstresses to sew the garment and carefully record the total completion time. This time was multiplied by the minimum wage to yield the piece rate. Occasionally, Silent Woman has increased a piece rate based on a discussion with one or more of the seamstresses.

The seamstresses did not buy their cloth or other sewing materials. These were provided by Silent Woman in kits. The cloth was pre-cut for each garment. Specifications and designs, including ap-

plique designs, were provided, and Silent Woman reserved the right to reject any garment which did not strictly conform.

The seamstresses worked at home and set their own working hours. Silent Woman imposed no quotas or deadlines. The seamstresses could generally choose the garment they wished to sew. Silent Woman never inspected the seamstresses' homes or attempted to control the manner in which the work was done, insisting only that the finished product conform to specifications.

The defendant concluded from these facts that the seamstresses were Silent Woman's employees and, therefore, protected by the FLSA which applies to employers engaged in interstate commerce. 29 U.S.C. § 215; *Dickenson v. United States*, 353 F.2d 389 (9th Cir.), cert. denied 384 U.S. 908, 86 S.Ct. 1345, 16 L.Ed.2d 360 (1965). The defendant alleges that Silent Woman has violated the Act by failing to pay the seamstresses the minimum wage, contrary to 29 U.S.C. §§ 206 and 215(a)(2), and by failing to keep wage, hour and *450 condition records, contrary to 29 U.S.C. §§ 211 and 215(a)(5). The plaintiff argues that the FLSA is inapplicable because the plaintiff seamstresses are not Silent Woman employees, but rather are independent contractors.

FAIR LABOR STANDARDS ACT

[1] The FLSA definition of employ, "to suffer or permit to work," 29 U.S.C. § 203(g), is too broad to be useful in distinguishing an employee from an independent contractor. Where statutory definitions are inadequate, social welfare legislation is to be construed to achieve its purposes. *United States v. Silk*, 331 U.S. 704, 712, 67 S.Ct. 1463, 1467, 91 L.Ed. 1757 (1947); *Usery v. Pilgrim*, 527 F.2d 1308, 1309, 1311 n. 6 (5th Cir.1976). New Deal legislation such as the National Labor Relations Act, the Social Security Act and the Fair Labor Standards Act was intended to aid those whose ability to provide for themselves depended largely on forces beyond their control. Thus, the courts have defined "employee" in these Acts with the protected class

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in mind: "... [I]n the application of social legislation, employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947); Accord, *Goldberg v. Whitaker House Corp.*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961).

[2] In *Bartels* and *Silk*, cases construing the Social Security Act, the Court listed five factors which might be useful in determining whether a worker is an employee or an independent contractor: (1) degree of control which the employer exercises over the manner in which the work is performed, (2) opportunities for profit or loss, (3) investment in facilities, (4) permanency or the relationship, and (5) skill required in the claimed independent operation. *Silk*, 331 U.S. at 716, 67 S.Ct. at 1469; *Bartels*, 332 U.S. at 130, 67 S.Ct. at 1549. As the *Silk* Court said of these factors, "No one is controlling nor is the list complete." *Silk*, 331 U.S. at 716, 67 S.Ct. at 1469. In *Rutherford v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), a case construing the FLSA decided the same day as *Silk*, the Court emphasized that the determination of the relationship depends on "the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477.

[3] Because the parties have based their arguments on it and because it is a useful means of orientation, I shall consider the five-part test of *Silk*. This test will not, however, be allowed to obscure the ultimate test of the seamstresses' status, which involves the economic realities under all the circumstances.

The plaintiffs argue that the seamstresses' independent contractor status is strongly indicated by the fact that Silent Woman exercises no control over the manner in which the seamstresses perform their work. The seamstresses have complete freedom in setting their working hours and may use any needlework technique they choose. I agree with the plaintiff that this factor is in their favor, but I also

believe that it cannot be accorded significant weight in light of the relevant case law.

While Silent Woman exercises no control over the seamstresses' manner of performance, the same can be said of almost all employers of homeworkers. Nevertheless, it is established that Congress intended the FLSA to apply to employees working at home. For a short period after enactment of the FLSA in 1938, the Department of Labor attempted to enforce the Act's child labor, overtime, and minimum wage provisions in the homework setting. When this proved to be difficult, the Department conducted a study and determined that evasion of the FLSA by employers of homeworkers was so simple and widespread that enforcement was impractical. *Wage & Hour Div., Dept. of Labor, Findings and Opinion of the Administrator* 13 (1942), reprinted in I Joint Appendix 79. In 1943, the Department banned homework in certain industries, including the women's outerwear industry. In *Gemsco, Inc. v. Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945), *451 the Supreme Court upheld the ban as a proper exercise of the Department's authority to enforce the FLSA.

As the *Gemsco* Court noted, homeworkers "generally are part-time pieceworkers." 324 U.S. at 252, 65 S.Ct. at 611. It is in the nature of homework that the workers set their hours and work unsupervised, yet the Court upheld a ban on homework notwithstanding the possibility that homework was per se outside the scope of the FLSA. The *Gemsco* decision does not mean that all homeworkers are employees under the FLSA, but it does indicate that the plaintiff cannot successfully rely on the control factor to demonstrate that they are independent contractors.

The second of the five factors listed in *Silk* is the worker's opportunity for profit or loss. The plaintiffs argue that seamstresses have an opportunity to profit because the amount they earn depends upon the speed and skill with which they can complete items for Silent Woman. It is clear, however, that the concept of profit is not relevant here.

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"Profit" is the gain realized from a business over and above its expenditures. *Citizens National Bank v. Corl*, 225 N.C. 96, 33 S.E.2d 613, 616 (1945); *Fairchild v. Gray*, 136 Misc. 704, 242 N.Y.S. 192, 196 (1930). The only "expenditure" for which the plaintiff seamstresses obtain a return is their own labor; in my opinion this return is properly denominated "wages," not "profit."

The fact that the women have purchased sewing machines is not a cogent factor because Silent Woman compensates its seamstresses only for their labor at uniform rates. There is no bargaining through which a seamstress might obtain compensation sufficient to recover the cost of her sewing machine.

The third factor to be considered under the *Silk* test is the worker's investment in the claimed independent operation. The plaintiffs point out that all of the seamstresses own sewing machines, costing an average of \$700.00. The plaintiffs have also deducted heat, telephone, electricity and mileage costs as business expenses. Moreover, one of the plaintiff seamstresses claims to have spent thousands of dollars on an addition to her home in order to accommodate her sewing activities.

The named expenditures are not persuasive on the issue of the plaintiffs' status. Almost all homeworkers incur heating, electricity and telephone expenses. The significance of the sewing machines is diminished by the fact that the seamstresses owned their sewing machines before beginning to sew professionally.

Next, the plaintiffs argue that their independent status is indicated by the fact that the seamstresses' relationship with Silent Woman is not permanent in nature. The plaintiffs cite their contract, which allows either party to terminate the relationship on five days notice and permits the women to perform work for others.

While the contract gives the seamstresses the right to terminate their contract on five days notice,

all of the plaintiff seamstresses have actually worked steadily for Silent Woman over a period of two years. It is obvious that the parties regard their relationship as a continuing one; work done for outside parties does not undermine the permanency of the Silent Woman work. Earnings from this outside work, generally performed sporadically for family and acquaintances, have been relatively insignificant.

The final consideration in the *Silk* analysis is skill. The plaintiffs point out that embroidery and applique are skilled crafts. This is undoubtedly true, but it is not particularly relevant to the issue whether the seamstresses are independent contractors. The skills indispensable to an independent operator such as organizational, management, and financial skills are not required of the plaintiffs. While the five-part *Silk* test strongly suggests that the plaintiff seamstresses are employees rather than independent contractors, a common-sense examination of the total situation removes any unresolved doubt.

When one is an employee, his livelihood depends immediately upon others. The *452 qualities that tend to distinguish the independent contractor in the economy are those essential to his individual success: initiative, judgment and foresight. The latter three words were used in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947), an FLSA case wherein the Supreme Court explicitly disassociated these qualities from piecework: "While profits to the boners depended upon the efficiency of their work, it was more like piecework than an interprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor."

Silent Woman designs clothes based upon its assessment of the public taste, finds wholesale and retail buyers for its merchandise and sets prices for its garments at a level which must cover the cost of carrying inventory, maintaining retail outlets, advertising and a payroll, including the quasi-minimum wage rate payments to the plaintiff seam-

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stresses. Commission of serious errors with respect to any of these matters could be fatal to Silent Woman. Precisely this element of risk marks the independent economic agent. *United States v. Silk*, 331 U.S. at 719, 67 S.Ct. at 1471 (1947).

By contrast, the plaintiff seamstresses' arrangement is quite uncomplicated. When a seamstress wants to earn money, she simply obtains pre-cut, pre-designed garments from Silent Woman. For her work, she receives approximately the minimum wage. The initiative in establishing the homework opportunity lay in Silent Woman's placement of advertisements. The seamstresses' earnings do not depend upon their judgment or foresight. It is apparent, in fact, that the plaintiff seamstresses do not undertake any of the risks inherent in independent status. They are occupied with family responsibilities and are satisfied with the opportunity to earn supplemental income in their spare time.

The seamstresses' dependence on Silent Woman is also shown by their lack of bargaining power. Rather than treat its seamstresses as independent agents, Silent Woman offers all the same terms, a piece rate designed to yield the minimum wage. It is a "take it or leave it" proposition. Silent Woman does not negotiate with anyone individually. That the firm occasionally increases the piece rate for all seamstresses may demonstrate fair dealing but it does not demonstrate that the seamstresses are independent contractors.

In assessing the plaintiff seamstresses' dependence, it is relevant to ask how they might fare if Silent Woman failed. In fact, the women are extremely ill-prepared to find new markets for their needlework, and almost none had attempted to do so at the time the facts were stipulated. Since this lawsuit began, one of the plaintiffs has put together her own catalog and price list and has begun to seek other buyers for her needlework. This individual woman's initiative, design judgment, customer diversity and bargaining power may make her an independent contractor relative to her new buyers, but these factors are absent from her relationship with

Silent Woman, and she remains its employee.

The issue decided here is not new. Almost identical fact situations arose in *Walling v. American Needlecrafts*, 139 F.2d 60 (6th Cir.1943), and *Mitchell v. Nutter*, 161 F.Supp. 799 (N.D.Me.1958). Both courts found that women doing needlework in their spare time at home were employees under the FLSA. In both cases, the women worked for one major employer who paid uniform piece rates at or below the minimum wage equivalent, and determined, or at least approved, all designs. In neither case had the women taken any significant steps to develop alternative buyers for their work. My decision today is consistent with these decisions. See also *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961), (home part-time needleworkers held employees of their cooperative under the FLSA), and *Walling v. Twyeffort*, 158 F.2d 944 (2d Cir.1947), (tailors with shops at home held to be employees under the FLSA).

*453 DUE PROCESS

[4] Finally, the plaintiffs charge that the defendant has deprived them of property without due process of law. Specifically, the plaintiffs contend that their right to work at home is a property interest protected by the due process clause, that they were entitled to a hearing before being deprived of this property interest, and that the defendant's use of an irrebuttable presumption that homeworkers are employees deprived them of their right to be heard.

Assuming that the plaintiffs' interest in working at home is protected by the due process clause, and assuming that the government determined the seamstresses to be employees by applying an irrebuttable presumption, there can still be no due process violation because the defendant has no power to effect a deprivation of the claimed interest. The FLSA grants the defendant broad investigative powers, 29 U.S.C. § 211, but no power to close down any enterprise it determines to be in violation of the Act.

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In order to restrain FLSA violations such as those allegedly committed by Silent Woman, the defendant must bring an action in federal district court. 29 U.S.C. § 217. Any presumptions entertained by the defendant are irrelevant in an enforcement proceeding because the district court is bound to determine an individual's status solely according to Supreme Court and other federal court decisions construing the FLSA or related legislation. It is thus apparent that the plaintiffs are provided with due process.

This decision and order resolves the plaintiffs' claims entirely. The parties should continue their trial preparations on the defendant's counterclaim alleging that Silent Woman owes its seamstresses back wages.

Therefore, IT IS ORDERED that the plaintiffs' motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendant's motion for summary judgment be and hereby is granted.

D.C.Wis.,1984.

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