

FILED
SUPREME COURT
STATE OF WASHINGTON
1/29/2018 3:45 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
2/7/2018
BY SUSAN L. CARLSON
CLERK

NO. 94860-7

SUPREME COURT OF THE STATE OF WASHINGTON

TIFFANY HILL,

Plaintiff-Appellee,

v.

XEROX BUSINESS SERVICES, LLC; LIVEBRIDGE, INC., an Oregon corporation; AFFILIATED COMPUTER SERVICES INC., a Delaware corporation; AFFILIATED COMPUTER SERVICES LLC, a Delaware limited liability company,

Defendants-Appellants,

***AMICUS CURIAE* BRIEF OF THE WASHINGTON
WAGE CLAIM PROJECT**

David N. Mark, WSBA No. 13908
Beau Haynes, WSBA No. 44240
WASHINGTON WAGE CLAIM PROJECT
810 Third Avenue, Suite 500
Seattle, WA 98104
Telephone: (206) 340-1840
david@wageclaimproject.org
beau@wageclaimproject.org
Attorneys for Amicus Curiae

TABLE OF CONTENTS

I. IDENTITY OF INTEREST OF AMICUS CURIAE.....1

II. ISSUE ADDRESSED BY AMICUS CURIAE1

III. STATEMENT OF THE CASE1

IV. ARGUMENT1

 A. The ABC Plan Divides Work Into Paid Minutes and Unpaid Non-Production Minutes, With Xerox Arguing Workweek Averaging Compensates for The Non-Production Minutes.....1

 B. If the ABC Plan Is Not a Piece-Rate Plan, Then It Violates the MWA By Its Use of Workweek Averaging.3

 C. *Douglas v. Xerox Business Services* Supports Hill’s Arguments Because (1) It Rejects the District Court’s Reliance on Contract Provisions and (2) It Is Based Entirely on the FLSA History of Allowing Workweek Averaging.....10

 D. The ABC Plan Is Based on Minute/Hourly Compensation and Thus Is Not a Piece-Rate Plan.....12

 1. Hourly pay.....13

 2. Piece-Rate Pay.....14

 3. Piece-Rate Pay Often Needs to Be Calculated On a Weekly Basis – There is No Other Reasonable Alternative.14

 4. Dictionary Definitions of “Piece Rate” and “Piecework” Are Either Neutral, e.g., Pay-By-Item Produced, or Support the Workers by Distinguishing between Pay Based on Items Produced and Time-Based Pay.16

E. Non-Production Work Warrants Protection Under the MWA, Regardless of Any Emerging Industry Practice or Custom.	21
V. CONCLUSION	24

Appendices A and B.

TABLE OF AUTHORITIES

Cases

<i>Alvarez v. IBP, Inc.</i> , 2001 WL 34897841 (E.D. Wash.), <i>aff'd</i> , 339 F.3d 894 (9th Cir. 2003), <i>aff'd on other issues sub nom IBP v. Alvarez</i> , 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005).....	passim
<i>Carranza v. Dovex Fruit Co.</i> , No. 94229-3 (Wash.Supr.Ct.).....	12
<i>Chavez v. IBP, Inc.</i> , 2005 WL 6304840 (E.D. Wash. May 16, 2005).....	20
<i>Davies v. Seattle</i> , 67 Wash. 532, 121 P. 987 (1912).....	21
<i>Douglas v. Xerox Business Services, LLC</i> , 875 F.3d 884 (9th Cir. 2017).....	5, 11, 12
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291, 966 P.2d 582 (2000).....	8
<i>Lillehagen v. Alorica, Inc.</i> , 2014 WL 698230 (C.D. Cal. 2014).....	23
<i>Lopez Demetrio v. Sakuma Bros. Farms, Inc.</i> , 183 Wn.2d 649, 355 P.3d 258 (2015).....	14
<i>Mitchell v. Greinetz</i> , 235 F.2d 621 (10th Cir. 1956).....	20
<i>Robertson v. Alaska Juneau Gold Mining Co.</i> , 157 F.2d 876 (9th Cir. 1946).....	10
<i>Secretary of Labor v. American Future Systems, Inc.</i> , 873 F.3d 420 (3d Cir. 2017).....	22, 23
<i>Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123</i> , 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944).....	22
<i>United States v. Rosenwasser</i> , 323 U.S. 360, 65 S. Ct. 295, 89 L.Ed. 301 (1945).....	17

<i>Washington v. Miller</i> , 721 F.2d 797 (11th Cir. 1983)	18
---	----

Statutes

29 U.S.C. §§201-218	4
29 U.S.C. §206.....	8
RCW 49.46.020	8
RCW 49.46.090	10

Other Authorities

Cambridge English Dictionary (U.S. dictionary) at www.dictionary.cambridge.org/us/dictionary/english/piecework.....	17
DLI Administrative Policy ES.A.8.2	19
DLI’s Administrative Policy ES.C.2 (rev’d 2008)	14
MacMillan Dictionary (American definition) at www.macmillandictionary.com/us/dictionary/american/piece-rate.	17
<i>United States v. Rosenwasser</i> , 323 U.S. 360, 65 S. Ct. 295, 89 L.Ed. 301 (1945).....	17

Regulations

WAC 296-126-021.....	1, 9
WAC 296-126-092(8).....	23
WAC 296-128-550.....	22

I. IDENTITY OF INTEREST OF AMICUS CURIAE

The Washington Wage Claim Project (“WWCP”) is a non-profit corporation founded in 2015 whose goal is to promote access to justice for low-wage workers. Many WWCP clients are not fully compensated for non-production work, such as pre-shift, post-shift and break time work.¹ Many WWCP clients are immigrant construction workers who piece-rate workers who are paid by the square foot for their framing, siding or drywall work.

II. ISSUE ADDRESSED BY AMICUS CURIAE

Whether an employer’s compensation plan, which includes as a metric an employee’s “production minutes,” qualifies as a piecework plan under WAC 296-126-021?

III. STATEMENT OF THE CASE

The WWCP does not address the parties’ statements of the case.

IV. ARGUMENT

A. The ABC Plan Divides Work Into Paid Minutes and Unpaid Non-Production Minutes, With Xerox Arguing Workweek Averaging Compensates for The Non-Production Minutes.

The Certification Order to the Washington Supreme Court (“Certification Order” or “CO”) frames the question as involving a

¹ The primary author of this brief was also plaintiff counsel in the *Alvarez v. IBP* litigation, along with the Seattle firm of Schroeter Goldmark & Bender. *Alvarez*, which is cited by the Ninth Circuit and the parties, applied an hour-by-hour rule of minimum wage compliance under Washington law. See *infra*.

“compensation plan, which includes as a metric an employee’s ‘production minutes.’” CO at 4. It then describes the material facts that it states are not in dispute. CO at 5. Xerox’s plan divides the workday into three categories of minutes. First, “ABC Pay” compensates for “‘production minutes,’” which are minutes attributable to work on incoming telephone calls.² Second, “Additional Pay” compensates for certain discrete non-production minutes, to wit: “(1) training, (2) meeting/coaching, (3) work shortages, (4) system down time, (5) non-ABC Pay tasks or special projects, and (6) break pay.” CO at 6. In this brief, the *amicus curiae* refers to this work as Additional Pay minutes. The third category includes the remaining minutes during the work day, which are best referred to as general non-production work. This includes pre-production work (starting up the computer and setting up the workplace), post-production work (shutting down the computer and cleaning up the workplace for the next worker) and the interstitial minutes during the workday when production work or Additional Pay work is not performed, *e.g.*, minutes or seconds between a call, a communication with a co-worker (whether work related or not), dealing with a computer or supply issue, using a toilet, getting up to stretch.

The “production minutes” were paid at rates between \$9.00 and

² Incoming call minutes includes minutes “on an incoming call, on hold during an incoming call, or completing after-call work related to an incoming call.” Certification Order at 5.

\$15.00 per hour, which can also be expressed as 15¢ to 25¢ per minute. *See* CO at 6. The “production minute” pay rate varied based on (1) evaluations, (2) success in resolving issues and (3) keeping average calls shorter than an employer-determined length. *Id.* Additional Pay minutes were paid at the state minimum wage (CO at 6), which in 2011 was \$8.67 per hour (or 14.45¢ per minute) and in 2012 was \$9.04 per hour (or 15.67¢ per minute).

General non-production work was not directly compensated. Xerox appears not to dispute that general non-production minutes were work under the Minimum Wage Act (“MWA”). Instead, it argues it complied with the MWA by using a workweek averaging formula to pay for these otherwise uncompensated minutes. Under this formula, weekly pay is divided by the total hours and minutes worked, including general non-production minutes. Xerox asserts it has complied with the MWA if the result of this division equals or exceeds the MWA minimum wage. To the extent that the weekly average rate was below the minimum wage, Xerox filled the gap with what it called Subsidy Pay. The ABC plan indisputably is premised on a workweek averaging approach. If workweek averaging is not allowed for workers paid by the hour and minute, then the plan violates the MWA.

B. If the ABC Plan Is Not a Piece-Rate Plan, Then It Violates the MWA By Its Use of Workweek Averaging.

In *Alvarez v. IBP, Inc.* 2001 WL 34897841 (E.D. Wash.), *aff'd*, 339

F.3d 894 (9th Cir. 2003), *aff'd on other issues sub nom IBP v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), Pasco, Washington slaughterhouse workers sought damages under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§201-218, and Washington state law, alleging unpaid pre-shift, post-shift and meal period non-production work. The trial court and Ninth Circuit held that the workers were engaged in a variety of compensable pre-shift, post-shift and meal period work.³ 339 F.3d at 900-13. The employer’s production pay system – known as “gang time” pay -- was based “entirely on the times during which employees are actually cutting and bagging meat,” *i.e.*, production time. 339 F.3d at 900. Non-production time pre-shift, during the meal period, and post-shift was not separately paid. The production minutes were paid differently in the plant’s processing and slaughter divisions. In processing, the workers were paid a fixed hourly rate based on their production time (expressed in hours and minutes). In slaughter, the workers were paid for their hours and minutes of production work but also could get a productivity bonus to the extent that they completed the kill in less than the time allowed for the kill.⁴ Slaughter

³ The non-production work included pre-production donning of protective gear, walking between the locker rooms and plant floors, meal break doffing and donning and post-shift washing, walking and doffing. 339 F.3d at 902-04.

⁴ 2001 WL 34897841 at *2 & *24. The slaughter division plan was known as “Sunshine Pay,” meaning the workers could leave the plant and go outside in the sun to the extent they could complete the kill before the allotted time. *See id.*

division workers were therefore hourly-paid employees who could receive productivity pay based on quick and efficient work.

Although the *Alvarez* plaintiffs pled FLSA and MWA claims, they recovered minimum wage damages entirely under the MWA. Adverse FLSA law supported measuring minimum wage compliance based on workweek averaging for all workers, including hourly-paid workers. The *Alvarez* plaintiffs successfully argued in the trial court and the Ninth Circuit that the MWA required they be paid the MWA minimum wage for each hour worked – without weekly averaging. 339 F.3d at 912. The minimum wage distinction in *Alvarez* should guide the present case.

The Ninth Circuit’s *Alvarez* opinion recognized FLSA authority that “an employee’s right to recover minimum wage accrues each workweek, not by an individual hour.” 339 F.3d at 912.⁵ However, the Ninth Circuit affirmed the trial court’s ruling that the MWA provides hourly-paid employees a “per-hour right to minimum wages under Washington law,” rather than “minimum wages based on a work-week standard.” 339 F.3d at 912. On remand, the *Alvarez* plaintiffs recovered \$7.3 million dollars entirely under state law, including \$905,028 in MWA minimum wage

⁵ The FLSA weekly averaging rule was not adopted by the Ninth Circuit until *Douglas v. Xerox Business Services, LLC*, 875 F.3d 884 (9th Cir. 2017), discussed *infra*.

damages.⁶ The per-hour rule applied to processing division workers who were paid strictly by production time and to slaughter division workers whose production time pay was supplemented on days when they beat the time allowance for the day's kill. *Alvarez* is empirical data that workers suffer when non-production minutes and hours are not separately paid. The IBP workers were deprived of over \$900,000 in MWA minimum wages because pre-shift, post-shift and meal break minutes were not treated as hours worked in non-overtime weeks.⁷

In *Alvarez*, if a worker had 10 minutes of pre-shift work from 9:00:00 a.m. to 9:09:59 a.m., she recovered damages based on 10 minutes at the state minimum wage, even though she received greater-than-minimum wage rate pay from 9:10:00 a.m. to 9:59:59 a.m. IBP was not allowed to average paid and unpaid work during a clock hour. In that way, minimum wages for each hour, as opposed to the workweek, is actually minimum wages for all time worked – whether it be a minute or an hour – without any averaging.

The Ninth Circuit's *Alvarez* opinion was authored by Judge Sidney

⁶ A copy of the *Alvarez* post-remand judgment, downloaded on the US Pacer system, is attached hereto as Appendix A.

⁷ Workers in general suffer by workweek averaging. For example, consider a fast food team leader who is paid 60¢ per hour above minimum wage. With weekly averaging, an employer can require that worker to perform up to 1½ hours of additional work in a 30 hour-paid-hour workweek, without additional pay. This happens to real workers and they are injured by it – absent the right to be paid by the hour for all of their work time.

R. Thomas, who (now as Chief Judge) authored the Certification Order that distinguishes between employees “paid on a piecework basis, as opposed to an hourly basis.” Chief Judge Thomas opined that under the MWA, piece-rate plan minimum wage compliance may be “on the basis of a work-week period.” CO at 3. He continued, “[o]n the other hand, if an employee is an hourly employee, he ‘retain[s] a per-hour right to minimum wage under Washington law,’ and weekly averaging is not permitted. *Alvarez v. IBP, Inc.* 339 F.3d 894, 912 (9th Cir. 2003).” CO at 3.

The Ninth Circuit’s conclusion about MWA hour-by-hour compliance was correct in *Alvarez* and in the Certification Order. Indeed, Xerox told the Ninth Circuit, in its Petition Seeking Permission to Appeal under 28 U.S.C. §1292(b), that “[u]nder Washington law, minimum wage compliance for hourly employees is calculated on a per-hour basis.”⁸ Washington has a long history of requiring hour-by-hour compliance with the MWA for hourly-paid workers. Declarations from the Department of Labor & Industries’ Employment Standards Program Managers describe that policy in the 1990s and early 2010s.⁹ There is different language in

⁸ Xerox’s Pet. Seeking Permission to Appeal 7 (relevant portions attached as Appendix B).

⁹ These declarations posit that each hour must be paid at the minimum wage or above for hourly workers – rejecting weekly averaging. See SER 169-171 (Mowat Dec. ¶4, Program Manager stating in 2000 that since at least 1991 DLI required that “hourly paid employees be paid at least the statutory minimum wage for *each* hour worked”, emphasis in original); ER 305-306 (Buchanan Dec. ¶4, Program Manager Buchanan stating in 2013 that “employers must pay employees no less than the minimum rate of pay for each hour of work” and that “[t]he requirements of the Washington Minimum Wage Act will be violated

the MWA and FLSA minimum wage sections – the latter referring to the “workweek.” 339 F.3d at 912. WAC 296-126-021 only refers to the workweek as the basis of compliance for commission and piece-rate pay. *Id.* *Alvarez* correctly rejected workweek averaging for slaughterhouse workers who had unpaid non-production minutes and greater-than-minimum-wage production-minute pay.¹⁰

Xerox’s ABC plan and IBP’s gang time plan are similar. Both paid for production minutes and did not separately compensate each hour (and minute) of non-production work. Each tried to rely on weekly averaging.

Xerox tries to distinguish *Alvarez* in its opening brief as follows:

Alvarez dealt with a very different situation from the present case because the defendants [sic] in *Alvarez* sought to credit a portion of the pay employees received for recorded hours at their contractually set per-hour rate to off-the-clock work, thereby reducing their per-hour compensation below the amount set in the contract. Here, Hill received the pay provided for in her contract, in the way provided for in her contract, and it is undisputed that here weekly pay was

if any hours of work go uncompensated, regardless of whether the total wages paid for a workweek divided by the total number of hours worked during that week yields an average greater than the minimum hourly rate. Each hour worked must be paid at a rate of not less than the minimum hourly rate.” (emphasis is original)). Buchanan gave a second declaration at ER 296-297 to the effect that per hour compliance applies to hourly workers, rather than piece-rate or commission workers. All of the evidence is consistent with DLI never allowing workweek averaging for hourly-paid workers.

¹⁰ In *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 305-06, 966 P.2d 582 (2000), this Court declined to adopt an FLSA “window of correction” safe harbor in salary cases even though the statutory language in the FLSA and MWA was the same and there were long-standing United States Department of Labor regulations allowing a “window of correction.” Here, the FLSA’s minimum wage provision references workweeks and the MWA’s does not. *Compare* 29 U.S.C. §206 with RCW 49.46.020. Moreover, the federal and state agencies have conflicting histories on the issue. The *Alvarez* trial court and Ninth Circuit were correct in their views that the MWA requires minimum wage payment for each hour.

never less than if she was paid the minimum wage on an hourly basis.

Opening Brief at 45 n. 48. However, *Alvarez* does not contain any suggestions of a contract claim or any contract-based arguments.¹¹ The issue was whether statutory minimum wages under the MWA should be decided on an hourly-basis or a workweek basis. The Ninth Circuit held the *Alvarez* workers had a right to MWA minimum wages using a per-hour test, rather than the FLSA weekly averaging test. The *Alvarez* workers would have lost their MWA minimum wage claim if weekly averaging was allowed under the MWA. Whether their union would have had a breach of collective bargaining agreement claim is nowhere discussed in the Ninth Circuit or trial court opinions. Chief Judge Thomas correctly described the *Alvarez* holding in the Certification Order, to wit: an hourly employee “retain[s] a per-hour right to minimum wage under Washington law.” *Alvarez* reached this conclusion based entirely on the MWA, having nothing to do with collective bargaining agreement provisions or claims. Xerox’s attempt to distinguish *Alvarez* fails.¹²

¹¹ *Alvarez* was unionized by the Teamsters, who were not party to the litigation. See 339 F.3d at 898. The workers eschewed contract claims so as to avoid issues of federal labor law preemption.

¹² Xerox argues that the “history of the Federal Way ABC plan demonstrates that is a piecework plan.” Opening Br. at 3-5. According to Xerox, the plan at one time treated each incoming call as a separate work unit, but the workers wanted to be paid based on their hours and minutes spent on incoming calls – not on the number of calls. As a result, they are paid based on hours and minutes, not the number of calls. That is hourly work.

Xerox argues that there is “no evidence that the ABC Plan did not pay legally on an hourly basis.” Reply 14-16. However, the Certification Order describes the ABC Plan as doing weekly averaging for minimum wage compliance. Certification Order at 5. As is discussed *supra*, payment for each hour at the minimum wage requires that all work be compensated at the minimum wage. Xerox seems to be arguing at Reply 14-16 that a plaintiff needs to average paid and unpaid work during each clock hour to prove damages. The *amicus curiae* disagrees. In *Alvarez*, the slaughterhouse workers got minimum wage for all unpaid minutes, without having to first average the above-minimum-wage paid work in the same clock hour. As explained below, employees in Washington are entitled to be paid for all time worked. Any increment of work that goes unpaid, whether a full hour or less, results in a violation of the MWA.

C. *Douglas v. Xerox Business Services* Supports Hill’s Arguments Because (1) It Rejects the District Court’s Reliance on Contract Provisions and (2) It Is Based Entirely on the FLSA History of Allowing Workweek Averaging.

Douglas v. Xerox Business Services, LLC, 875 F.3d 884 (9th Cir.

Xerox implies it should receive some equitable consideration because the workers allegedly wanted hourly and minute pay. However, employers are liable for statutory wage violations even if workers or their union force an unlawful work arrangement on an unwilling employer. *E.g., Robertson v. Alaska Juneau Gold Mining Co.*, 157 F.2d 876, 879-80 (9th Cir. 1946); *see* RCW 49.46.090 (no waiver by agreement). Here, there is nothing illegal about paying for hours and minutes worked. Presumably the workers would also have wanted to be paid for their non-production work.

2017) involved a different panel than the Ninth Circuit panel herein. *Douglas* described Xerox’s ABC plan as “mind-numbingly complex.” *Id.* at 885. It stated that its decision was “a pure question of statutory interpretation,” to wit: Does the FLSA minimum-wage requirement allow use of “the workweek as a unit of measure?” *Id.* 886. The Ninth Circuit held a workweek analysis was permissible, relying on ambiguous FLSA language, the agency’s longstanding per-workweek construction, and “the steady stream of circuit cases.” *Id.* at 886.

Douglas expressly rejected “the district court’s resort to Xerox’s contract to determine compliance with the FLSA”, *e.g.*, the contract’s reference to the workweek as the standard for determining Subsidy Pay and minimum wage compliance. “Not only does the minimum-wage provision nowhere mention the underlying employment contracts, but such an approach would wreak havoc by tying compliance to the whims of employers and obligating courts to parse through complicated payment schemes.” *Id.* at 889. *Douglas* describes Xerox’s “convoluted payment plan” as “alternat[ing] between per-hour and per-minute pay” – Hill’s position herein.¹³ Under *Douglas*, the workweek averaging rule is now

¹³ At page 889 n. 3, the court notes that the parties “hotly contest” whether the ABC plan is hourly, piecerate or commission-based,” citing the certified question in the present case. While not deciding this issue, the Court’s description of the ABC plan as “alternat[ing] between per-hour and per-minute pay” is exactly how the *amicus curiae* and the *Hill* plaintiff view the plan.

adopted in the Ninth Circuit for FLSA minimum wage compliance, even for hourly-paid workers. *Douglas* in no way supports Xerox’s position herein. Indeed, *Douglas*’ express rejection of the trial court’s “‘contract measuring rod’” approach undermines Xerox’s numerous attempts to rely on contract-based arguments.¹⁴ An employer’s efforts to describe a plan as piece-rate pay or weekly-based pay does not matter. As *Douglas* held, the FLSA issue it decided was a pure question of law concerning whether FLSA minimum wage compliance could be measured using workweek averaging. The MWA, however, rejects workweek averaging for hourly and minute compensation.

D. The ABC Plan Is Based on Minute/Hourly Compensation and Thus Is Not a Piece-Rate Plan.

The present case turns at least in the first instance on the answer to the Ninth Circuit’s certified question.¹⁵ The issue is whether a compensation scheme based on a distinction between production minutes

¹⁴ See e.g., Xerox Opening Brief at 15-18, 21-22 and 25-26, & 33.

¹⁵ The parties are arguing whether Xerox might have to pay separately for certain non-production work even if the ABC plan was a piece-rate plan. The WWCP recognizes that the subject of hourly pay for non-production work by piece-rate workers is before the Court in *Carranza v. Dovex Fruit Co.*, No. 94229-3. The WWCP filed an *amicus* brief in *Carranza* supporting hourly pay for non-production time by piece-rate workers. If piece-rate workers have a right to pay for minutes or hours when they are not generating piece rate wages, then the Xerox workers may have a claim independent of the hourly vs. piece-rate compensation issue.

and non-production minutes is an hourly/minute time-based system or a piece-rate plan.

1. Hourly pay.

Hourly pay is time-based pay. Workers are paid for their time engaged in work. It makes no difference whether the work is described in minutes or in hours – it is pay for time.¹⁶ Xerox’s plan is based on time – hours and minutes. Xerox takes the full workday and slices out non-production minutes comprised of pre-production minutes, post-production minutes and the interstitial gaps between production minutes. To be sure, many employers have similarly tried to limit pay to production work, but courts, such as *Alvarez*, have required that non-production work also be paid. Xerox is paying time-based compensation. By excluding certain non-production minutes, Xerox has not converted its time-based compensation system to piece-rate pay.

Xerox argues that “‘hourly’ means pay by the hour as a unit (as opposed to by the second, minute, day, week or month)” citing a dictionary definition of “hourly”, to wit: “By the hour as a unit: *hourly pay*.” Xerox

¹⁶ It might be a different question for a day laborer, who gets a flat rate per day. That type of pay might arguably allow for day-by-day averaging – dividing the total amount of compensation for the day by hours worked that day. Even then, the issue could be informed by questions as to whether the day laborer had a set number of hours or certain activities improperly treated as not part of the workday.

Certain weekly pay may allow for workweek averaging. Weekly salary might require looking at the workweek as a unit. There, too, the specifics could affect the outcome.

Opening Brief at 46-47. While “hourly” may properly distinguish different time periods in certain situations – *e.g.*, the bus runs hourly has a definite meaning – minimum wage rates apply to hours and subparts thereof, such as minutes. DLI’s Administrative Policy ES.C.2 (rev’d 2008) makes this point by stating: “‘Hours worked’ includes all time worked regardless of whether it is a full hour or less.” Thus, for example, 13 minutes of pre-shift work is “hours worked.” As demonstrated *supra*, for purposes of this case, pay stated by the minute is no different than hourly pay, *i.e.*, both are time-based and conversion between the two is a matter of simple arithmetic.

2. Piece-Rate Pay.

There is a common public understanding of piece-rate pay. Here are three examples of industries with a history of piece rate work. Agricultural laborers may get paid based on the number of bushels or weight of produce picked.¹⁷ Factory workers may get paid by the number of widgets produced. Construction workers may get paid by square footage for framing, drywall or siding. This is commonly understood as piece rate pay.

3. Piece-Rate Pay Often Needs to Be Calculated On a Weekly Basis – There is No Other Reasonable Alternative.

The weekly-pay approach to piece-rate and commission pay exists for a reason. These types of payments are typically not amenable to an

¹⁷ *E.g., Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015).

hour-by-hour calculation of money earned. An apple picker and grower cannot be expected to weigh apples every hour. A subcontractor and its immigrant construction crew have enough difficulty calculating square footage piece-rate pay on a weekly basis, let alone an hourly basis.¹⁸ A car salesperson, who is paid a commission, may sell a few units a week. It would be difficult, perhaps impossible, to tie amounts earned to specific work hours. Weekly-pay-averaging is necessary in these piece-rate and commission-paid workplaces. DLI's piece-rate policy is driven by the realities and limitations of these types of compensation. It is not a free pass or a loophole for an employer who imaginatively tries to describe hourly and minute pay as a form of piece rate compensation.

The ABC plan is eminently suitable to hour-by-hour compliance. ABC knows how to calculate hours worked and amounts earned per hour. "Hours worked" start when the worker enters the work area and begins the work day and end when the worker leaves the work area at the end of the workday, with a possible deduction for a meal break of at least 30 minutes. *See e.g., Alvarez, 339 F.3d at 902 & 913-14.* That is exactly how hours worked applies to every other hourly worker. The ABC plan goes to great

¹⁸ Immigrant work crews in Washington are often paid by the piece. A single project can involve weeks of work, and it is often impossible to make hourly calculations. It is even difficult to determine exactly how much work has been completed during any given workweek, since work involves multiple passes over the same area and touch up work.

lengths to subtract non-productive seconds and minutes from the workday. That is no reason to call this hours-and-minutes-based pay plan a piece-rate plan. It is a plan for hours and minutes pay that subtracts certain hours and minutes.

Xerox should pay the minimum wage on an hourly basis for all hours and minutes worked, *e.g.*, 15.67¢ per minute for 2012 (or \$9.04 per hour). It is free to pay higher rates for productive minutes, if it so chooses. This approach assures that employees are earning at least the minimum wage for each minute and hour worked, each work day and each workweek. There is no reason to allow Xerox to engage in weekly averaging sometimes allowed for piece-rate and commission-pay plans usually out of necessity.

4. Dictionary Definitions of “Piece Rate” and “Piecework” Are Either Neutral, e.g., Pay-By-Item Produced, or Support the Workers by Distinguishing between Pay Based on Items Produced and Time-Based Pay.

Xerox seeks support in dictionary definitions that simply define piecework as pay “by the piece or job”, “by the piece or quantity” or “the number of units turned out.” Xerox Opening Brief at p. 35 & n. 36. These definitions are consistent with how piecework is used for apple workers, construction workers and factory workers. It defines pay by a piece of work, *e.g.*, an apple, a square foot of drywall or manufacturing a widget. These definitions do not embrace hourly or minute pay to workers who are

not paid for each non-production hour and minute.

There are more informative definitions that contrast piecework with hourly work or other types of work. One such definition defines “piece rate” as “a rate of pay by which you get a particular amount of money for each piece of work that you complete rather than for the amount of time it takes to do it.”¹⁹ Another defines “piecework” as: “work for which the amount of pay depends on the number of items completed rather than the time spent making them.”²⁰ These support the workers’ arguments herein, to wit: pay based on the time it takes to perform a task is pay by the minute or hours, and not piecework pay.

United States v. Rosenwasser, 323 U.S. 360, 364, 65 S. Ct. 295, 89 L.Ed. 301 (1945), similarly distinguishes between piece-rate pay and time-based pay. It not surprisingly held that the FLSA applies to piecework even though the minimum wage is expressed as in terms of hourly pay and an hourly pay rate. The Court reasoned that it could not “rightly use these standards [hourly pay and an hourly pay rate] as a basis for cutting off the benefits of the Act from employees paid by other [*i.e.*, non-hourly] units of time or by the piece.” *Id.* Xerox’s Reply Brief, at 6, argues that

¹⁹ MacMillan Dictionary (American definition) at www.macmillandictionary.com/us/dictionary/american/piece-rate.

²⁰ Cambridge English Dictionary (U.S. dictionary) at www.dictionary.cambridge.org/us/dictionary/english/piecework.

“*Rosenwasser* does not state that compensation by any ‘unit of time’ means hourly compensation.” The import of *Rosenwasser* is that it distinguishes between hourly pay, “other units of time or by the piece.” 323 U.S. at 364. Stated differently, pay by “other units of time” – such as by the minute – is something other than “by the piece.” This should be obvious and unremarkable, but it is a distinction that undermines Xerox’s strained argument that “by the piece” can be the same as pay for hours and minutes. Minutes and seconds are components of hours – they are a fraction of an hour. That is hourly pay.

Washington v. Miller, 721 F.2d 797, 802 (11th Cir. 1983), likewise distinguishes between time basis pay and piece-rate pay. Records “for workers employed on a time basis, [must have] the number of units of time employed and the rate per unit of time . . . , and for workers employed on a piece-rate basis, the number of units of work performed and the rate per unit . . .” *Id.* Units of time unquestionably includes hours and minutes, which stand in distinction to piece rate. Xerox’s Reply brief, at 6, argues *Washington* “merely quotes a statutory provision requiring different record keeping for hourly work and piecework.” That is not quite accurate. The statute distinguishes between pay based on units of time and piece-rate pay. It supports the common-sense notion that paying someone by production hours or minutes is time-based compensation – akin to hourly

pay – not piece-rate pay. It therefore informs the certified question.

DLI’s piecework regulation is consistent with piecework being contrasted to time-based work. The regular rate of pay regulation draws the contrast between “[e]mployees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate.” WAC 296-128-550 (emphasis added). DLI’s How to Compute Overtime policy, DLI Administrative Policy ES.A.8.2, likewise draws distinctions between time-based or hourly pay and piece-rate pay. There are no examples or suggestions that payment by the minute for production work is a species of piece-rate work.

Xerox relies on a dictionary definition of “work” to argue that a “production minute is a unit of work.” Xerox Opening Brief at 41. “Work” is defined as “[p]hysical or mental effort or activity directed towards the production or accomplishment of something.” *Id.* at 41. It argues a production minute is a unit of work because it fits the definition of work. But it is time-based work. Moreover, the non-production work also fits within the definition of work. Starting up the computer, readying the workplace, shutting down the computer, clearing the workplace and the interstitial non-production periods during a workday are all part of hours

worked. Xerox has never argued otherwise, nor could it.²¹ The call center workers are working from the time they clock in until they clock out, but for meal breaks of at-least 30 minutes when they are completely relieved from duty. These are hourly workers whose MWA rights are violated when their employer does not separately pay for minutes of work and attempts to rely on workweek averaging as part of its time-based pay system. Mid-shift “breaks” are compensable as hours worked unless employees are completely relieved from duty long enough to use the time for their own purposes – with a fact-specific gray area for breaks lasting between ½ and 2 hours.²² Interstitial gaps in active production mid-shift – that are measured in several minutes and seconds -- are hours worked.

Chief Judge Thomas is correct when he observed “defining a unit of

²¹ *E.g., Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956) (factory floor breaks of 15 minutes mutually benefit the employee and employer and must be included in the workday as hours worked, even though employees agreed to have two uncompensated 15-minute breaks); *accord, Alvarez*, 339 F.3d at 914 (unlike FLSA, Washington has a bright-line rule under which breaks of less than 30 minutes must be fully compensated). *See also* WAC 296-126-092(8) (“‘Hours worked’ shall be considered all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.”).

²² Under the “continuous workday rule,” all time is compensable that occurs between the start of the workday and the end of the workday, subject to the *bona fide* meal break rule or longer periods of time (longer than 30 minutes) where employees are completely relieved from duty mid-shift and able to use the time for their own benefit. *See Alvarez v. IBP*, 546 U.S. at 31; *accord* 29 C.F.R. §785.16. In *Chavez v. IBP, Inc.*, 2005 WL 6304840, at *16-19 (E.D. Wash. May 16, 2005), follow up litigation to *Alvarez*, the court held that the Pasco plant workers who had 45 minutes gaps when they volunteered to work double shifts had a right to be paid for the 45-minute gap because the gaps were not long enough for the workers to use the time for their own purposes under the circumstances present at the plant. *Id.*

production as a minute is clearly based on a measurement of time.” CO at

9. Work paid by the hour and minute is hourly pay, even if that also coincides with how the employer is paid under its service work contract.²³

E. Non-Production Work Warrants Protection Under the MWA, Regardless of Any Emerging Industry Practice or Custom.

The tension between production and non-production minutes goes back to the earliest days of our state’s wage and hour laws. In *Davies v. Seattle*, 67 Wash. 532, 121 P. 987 (1912), an 8-hour workday statute case, this Court held that hours worked included non-production work by road construction crews, consisting of harnessing horses, driving the team to the road site and performing the reverse at shift’s end. *Seattle* argued that throughout the state “a custom has obtained, since the enactment of this law, requiring teamsters to work eight hours a day ‘on the job’, *i.e.*, at the road construction site.” *Id.* at 534 (underlining added). This Court held pre-and post-production work was “work” and had to be included in the workday, regardless of any emerging industry custom.

In Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321

²³ In the 21st Century, outsourcing is becoming increasingly common. Security guards, janitors, warehouse workers are often supplied to work shifts under subcontract. Pay to these subcontractors is increasingly based on the individual worker’s hours and minutes worked. That does not convert the workers’ hourly pay into piece-rate compensation, even though it may coincide with how the subcontractor employer is paid. Nor does it support workweek averaging of hourly pay for work that should be paid at the minimum wage for each hour worked under long-standing DLI policy and practice.

U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), the United States Supreme Court held that work may include non-production activity in a case involving miners who traveled underground to and from the areas in the mine where coal was being extracted. The Court wrote:

[T]hese provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade, but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

321 U.S. at 597. The Court defined work – including non-production work – “as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” 321 U.S. 598. Moreover, the Court rejected the argument that industry custom could supersede a proper construction of the FLSA, stating that the FLSA “was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee’s time while compensating him for only a part of it.” 321 U.S. at 602.

In *Secretary of Labor v. American Future Systems, Inc.*, 873 F.3d 420, 423 (3d Cir. 2017), the Third Circuit held that magazine sales personnel had a right to be paid for all breaks of twenty minutes or less when they were logged off their computers. Under a “flexible time” policy, the company treated as an unpaid break any period of greater than 90

seconds when an employee was logged off of his or her computer. It applied to “breaks” of 91 seconds or more for bathroom or coffee runs “or to any break an employee may decide to take after a particularly difficult sales call to get ready for the next call.” *Id.* at 423. The court ruled that these non-production minutes and seconds had to be compensated and that failing to do so was “absolutely contrary to the FLSA,” which is “humanitarian and remedial legislation.” *Id.* at 426. The court agreed with the district court that “it is readily apparent that by safeguarding employees from having their wages withheld when they take breaks of twenty minutes or less ‘to visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work,’ the Department of Labor is protecting employee health and general well-being “by not dissuading employees from taking such breaks when they are needed.” *Id.* at 428-29; *accord, Lillehagen v. Alorica, Inc.*, 2014 WL 698230 (C.D. Cal. 2014) (call center violated FLSA by subtracting periods of less than 20 minutes where employees logged out and were unavailable to accept calls).

In *American Future*, the Third Circuit said the workers were “paid an hourly wage.” 873 F.3d at 420. In *Lillehagen*, the court said the employer “pays them by the hour.” 2014 WL 698230 at *2. Neither court described the employers’ plans as piece rate plans, even though each of these employers subtracted non-production minutes from the workers’

hours worked. Similarly, Xerox workers are paid an hourly wage, even though general non-production minutes are excluded from that hourly wage.

In the present case, the ABC plan should be held to standards applicable to workers paid by the hour and minute – not piece-rate workers. The MWA exists to protect the workers against developing customs that would deprive time-based-paid workers of hour-by-hour pay for non-production minutes, especially of the mid-shift interstitial variety. There is no reason to hold the plan to anything other than minimum wage compliance for each hour worked.²⁴

V. CONCLUSION

The *amicus curiae* respectfully submits that the certified question be answered by holding paying by the metric of “production minutes” does not qualify as piecework plan under WAC 296-126-021.

////

////

////

////

////

²⁴ To the extent the Certified Order suggests that “production minutes” is becoming a common measure in the call center industry (*see* CO at p. 10), that does not mean (1) that it is a piecework compensation plan or (2) that industry custom of refusing to pay for non-production time is deserving of *any* deference. It is not.

RESPECTFULLY SUBMITTED this 29th day of January, 2018.

WASHINGTON WAGE CLAIM PROJECT

By: 

David N. Mark, WSBA No. 13908

Beau C. Haynes, WSBA No. 44240

WASHINGTON WAGE CLAIM PROJECT

810 Third Avenue, Suite 500

Seattle, WA 98104

Tel. (206) 340-1840

david@wageclaimproject.org

beau@wageclaimproject.org

Attorneys for Amicus Curiae

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court by using its electronic filing system on January 29, 2018. I further certify that all participants in the case are registered users and that service will be accomplished through the Supreme Court's electronic filing system.



David N. Mark, WSBA No. 13908

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

HON. ROBERT H. WHALEY

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEC 20 2005

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GABRIEL ALVAREZ et al., individually and
in a representative capacity,

Plaintiffs,

v.

IBP, INC.,

Defendant.

No. CT-98-5005-RHW

AMENDED JUDGMENT

This action having been tried before the Court, the Honorable Robert H. Whaley, United States District Judge, presiding, and having been remanded from appellate proceedings before the Ninth Circuit Court of Appeals and the United States Supreme Court;

IT IS ORDERED AND ADJUDGED:

The original judgment in this action entered on September 14, 2001, the order of November 27, 2001 taxing costs and including them in the original

AMENDED JUDGMENT -- 1

LAW OFFICE OF
DAVID N. MARK
CENTRAL BUILDING, SUITE 500
810 THIRD AVENUE
SEATTLE, WA 98104
(206) 340-1840 FAX (206) 340-1846

1 judgment, and the order of December 14, 2001 on plaintiffs' motion for fees,
2 are each vacated and this Amended Judgment shall be substituted nunc pro tunc
3 for each of them.

4 The Plaintiffs Gabriel Alvarez, *et al*, recover of the Defendant, IBP, inc.
5 (currently known as Tyson Fresh Meats, Inc.), the sum of \$ 7,297,517, plus
6 interest at 3.43% per year compounded annually from September 14, 2001 for
7 damages calculated through May 14, 2000 and comprised of \$ 5,487,561 in
8 MWA overtime damages, \$ 905,028 minimum wage damages, and \$ 904,928 in
9 rest break damages under Washington law;

10 That Plaintiffs Gabriel Alvarez, *et al*, recover of the Defendant IBP, inc.
11 their costs of action through November 27, 2001 in the amount of \$ 41,816.96
12 plus interest at 2.35% per year compounded annually from November 27, 2001.
13

14 That Plaintiffs Gabriel Alvarez, *et al*, recover of the Defendant IBP, inc.
15 their reasonable attorney fees through December 5, 2001 in the amount of
16 \$1,974,394 plus interest at 2.21% per year compounded annually from
17 December 14, 2001;
18

19 That Plaintiffs Gabriel Alvarez, *et al*, recover of Defendant IBP, inc. their
20 fees and costs of action on appeal to the Ninth Circuit and before the United
21 States Supreme Court in the amount of \$ 365,000, which shall be deemed to
22

23 AMENDED JUDGMENT -- 2

LAW OFFICE OF
DAVID N. MARK
CENTRAL BUILDING, SUITE 500
810 THIRD AVENUE
SEATTLE, WA 98104
(206) 340-1840 FAX (206) 340-1846

1 compensate them for all such fees and expenses through December 19, 2005;

2 That the distribution plan jointly proposed by the parties is Approved and
3 is hereby incorporated into this Amended Judgment;

4 That the Court retains jurisdiction to supervise the distribution of
5 judgment proceeds to the class;

6 That this judgment is a final decision and is subject to appellate review
7 under 28 U.S.C. § 1291.

8
9 **The District Court Executive is directed to enter judgment forthwith**
10 **and to provide copies to counsel.**

11 Dated this 20 day of December, 2005.

12
13 
14 ROBERT H. WHALEY
15 Chief United States District Judge

16
17 Presented by:

18 /s/
19 William J. Rutzick
20 Kathy Goater
21 Schroeter Goldmark & Bender

22 /s/
23 David N. Mark
Attorneys for Plaintiffs

AMENDED JUDGMENT -- 3

LAW OFFICE OF
DAVID N. MARK
CENTRAL BUILDING, SUITE 500
810 THIRD AVENUE
SEATTLE, WA 98104
(206) 340-1840 FAX (206) 340-1846

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Approved as to Form by:

/s/

Michael J. Mueller

Joel M. Cohn

Akin Gump Strauss Hauer & Feld, LLP

Attorneys for Defendant

AMENDED JUDGMENT -- 4

LAW OFFICE OF
DAVID N. MARK
CENTRAL BUILDING, SUITE 500
810 THIRD AVENUE
SEATTLE, WA 98104
(206) 340-1840 FAX (206) 340-1846

APPENDIX B

NO. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XEROX BUSINESS SERVICES, LLC; LIVEBRIDGE, INC.;
AFFILIATED COMPUTER SERVICES, INC.; AND
AFFILIATED COMPUTER SERVICES, LLC,

Defendants/Petitioners,

v.

TIFFANY HILL,

Plaintiff/Respondent.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
HONORABLE JOHN C. COUGHENOUR
CASE NO. C12-00717-JCC

PETITION SEEKING PERMISSION TO APPEAL

PATRICK M. MADDEN
TODD L. NUNN
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158
(206) 623-7580
Attorneys for Defendants/Petitioners

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	ii
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	2
A. The ABC Plan.	4
B. Washington Law.....	7
C. The July 10 Order Made Incorrect Determinations on Several Novel Issues of First Impression.....	9
III. QUESTION PRESENTED AND RELIEF SOUGHT	14
IV. REASONS WHY APPEAL SHOULD BE ALLOWED	15
A. The July 10 Order Involves a Controlling Question of Law.	15
B. There Are Substantial Grounds for Difference of Opinion.....	17
C. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation.	19
V. CONCLUSION.....	20

calculate pay and that it tracked time that did not count as productive minutes and was not directly compensated through Additional Pay. Hill claims this means that employees are not being paid for time they are working. This argument depends on requiring a “per-hour” measure of pay rather than the “work-week” measure.

B. Washington Law.

Under Washington law, minimum wage compliance for hourly employees is calculated on a per-hour basis. But employees compensated under the ABC plan, as described by the district court, are not hourly employees. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912-13 (9th Cir. 2003), makes clear that a “per-hour standard” applies only to “hourly workers,” which is a separate employment type. The Court goes on to discuss the regulations covering other employment types:

Regulations interpreting the WMWA are similarly telling in this regard. Repeatedly listing “hourly” employment as a separate employment type, these regulations permit use of the work-week measure only for particular employment categories. See, e.g., Wash. Admin. Code § 296-128-550 (1999); *id.* § 296-126-021 (1999); *id.* § 296-126-010 (1999). Were the Washington legislature disposed to apply the workweek measure to hourly employees, it could have done so as expressly as it did vis-à-vis other employment types. And were the workweek measure to be generally and necessarily applicable, the Washington legislature’s specification of the workweek standard for, e.g., commissioned employees would be both extraneous and redundant.

Alvarez, 339 F.3d at 912-13. The Court makes clear that, while the work-week measure is not appropriate for “hourly” employees, it is appropriate for other

WASHINGTON WAGE CLAIM PROJECT

January 29, 2018 - 3:45 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94860-7
Appellate Court Case Title: Tiffany Hill v. Xerox Business Services, LLC, et al

The following documents have been uploaded:

- 948607_Briefs_20180129154239SC928074_4340.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Final WWCP Hill Amicus Brief with Appendices.pdf
- 948607_Motion_20180129154239SC928074_2306.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was WWCP Motion Re Leave to File Amicus Brief and Page Limit FINAL.pdf

A copy of the uploaded files will be sent to:

- beau@wageclaimproject.org
- david@wageclaimproject.org
- djohnson@bjtlegal.com
- hohaus@frankfreed.com
- jtelegin@bjtlegal.com
- kathy.wheat@klgates.com
- macleodlaw1@gmail.com
- mcote@frankfreed.com
- patrick.madden@klgates.com
- tmarshall@terrellmarshall.com
- todd.nunn@klgates.com

Comments:

Leave to file amicus curiae brief and request for leave to file 25 page brief

Sender Name: David Mark - Email: david@wageclaimproject.org
Address:
810 3RD AVE STE 500
SEATTLE, WA, 98104-1619
Phone: 206-340-1840

Note: The Filing Id is 20180129154239SC928074