

FILED
SUPREME COURT
STATE OF WASHINGTON
2/26/2018 3:35 PM
BY SUSAN L. CARLSON
CLERK

No. 94860-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT 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.

**DEFENDANTS-APPELLANTS ANSWER TO *AMICUS CURIAE*
BRIEF OF WASHINGTON WAGE CLAIM PROJECT**

K&L GATES LLP
Patrick M Madden, WSBA #21356
Todd L. Nunn, WSBA #23267
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: 206 623 7580
patrick.madden@klgates.com
todd.nunn@klgates.com

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

| | Page |
|--|-------------|
| I. INTRODUCTION | 1 |
| II. ARGUMENT | 3 |
| A. The Ninth Circuit has already determined facts relevant to the certified question: WWCP’s misstatements should be ignored | 3 |
| B. WWCP’s discussion of Alvarez is irrelevant and wrong | 5 |
| C. Douglas v. XBS does not support Hill’s arguments | 11 |
| D. The ABC plan is production based and is therefore a piecework plan and not hourly..... | 12 |
| 1. The ABC plan is not hourly | 13 |
| 2. The ABC plan meets the definition of piecework..... | 14 |
| 3. The ABC plan is consistent with the purpose of piecework compensation plans..... | 16 |
| 4. WWCP’s rehash of Hill’s arguments that a unit of time cannot be a unit of work is still wrong | 17 |
| E. WWCP’s arguments regarding non-production work are not relevant to the certified question and do not apply to the ABC plan..... | 20 |
| III. CONCLUSION | 20 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Alvarez v. IBP, Inc.</i> , 2001 WL 34897841 (E.D.Wash. 2001), <i>judgment aff'd</i> <i>in part, rev'd in part</i> , 339 F.3d 894 (2003), <i>aff'd</i> , 546 U.S. 21 (2005)..... | 5, 7, 9 |
| <i>Alvarez v. IBP, Inc.</i> , 339 F.3d 894 (9th Cir. 2003) | <i>passim</i> |
| <i>Ballaris v. Wacker Siltronic Corp.</i> , 370 F.3d 901 (9th Cir. 2004) | 8 |
| <i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007)..... | 10 |
| <i>Chavez v. IBP, Inc.</i> , 2005 WL 6304840 (E.D.Wash. 2005) | 20 |
| <i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992)..... | 10 |
| <i>Danny v. Laidlaw Transit Services, Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008)..... | 3 |
| <i>Demetrio v. Sakuma Bros. Farms, Inc.</i> , 183 Wn.2d 649, 355 P.3d 258 (2015)..... | 2, 15, 17 |
| <i>Douglas v. Xerox Business Services</i> , 875 F.3d 884 (9th Cir. 2017) | 8, 9, 11, 20 |
| <i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)..... | 15 |
| <i>Inniss v. Tandy Corp.</i> , 141 Wn.2d 517, 7 P.3d 807 (2000)..... | 10 |
| <i>Mitchell v. Greinetz</i> , 235 F.2d 621 (10th Cir. 1956) | 20 |

| | |
|--|---------------|
| <i>U.S. v. Rosenwasser</i> , 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 301 (1945)..... | 17, 18 |
| <i>Washington v. Miller</i> , 721 F.2d 797 (11th Cir. 1983) | 18 |
| Statutes | |
| 7 U.S.C. § 2045(e) | 19 |
| Farm Labor Contractor Registration Act | 18 |
| FLSA..... | 8, 11, 20 |
| Other Authorities | |
| WAC 296-128-550..... | 15, 17, 19 |
| Washington Administrative Code Section 296-126-021 | <i>passim</i> |

I. INTRODUCTION

The question certified to this Court by the Ninth Circuit is a narrow one: “whether an employer’s payment plan, which includes as a metric an employee’s ‘production minutes,’ qualifies as a piecework plan under Washington Administrative Code Section 296–126–021?” It is framed by the findings of law and fact articulated by the Ninth Circuit in its Certification Order (“Cert. Order”):

- “Piecework employees...are entitled to a minimum wage based on a work-week period.” Cert. Order at 7.
- “[I]f [employees under the ABC plan] were pieceworkers, Hill’s claim fails.” *Id.* at 8.
- “[P]iece rate payment is usually a price paid per unit of work.” *Id.* at 7.
- “[P]ay [at] a set hourly rate [is] known as an hourly wage.” *Id.*
- “ABC Pay was an incentive-based model rewarding agents who were efficient at dealing with customer issues.” *Id.* at 5.
- “To determine an individual’s ABC Pay for the week, Xerox took the total ‘production minutes’ per week and multiplied it by the employee’s per-minute rate. All other logged ABC time—i.e., non-‘production minutes’—were not given a rate, but were tracked and appeared on an agent’s pay statements.” *Id.* at 6.
- “[S]imply stating that the ABC Plan is not a piecework compensation system because it is novel in its application of units of time as production units is an overly simplistic analysis that ignores how the plan actually functions.” *Id.* at 9.
- “To some extent, that characterization elevates the form of the production unit—time—over how it functions—as a compensable

unit of production being sold. Xerox is paid by Verizon on the basis of ‘production minutes’ that its employees spend in assisting Verizon customers.” *Id.*

- “As a result, just like a fruit-seller trying to maximize the amount of fruit he has to sell by incentivizing his employees to pick more through a piecework system, Xerox sought to maximize the amount of minutes it could charge Verizon by incentivizing its agents to generate more ‘production minutes.’” *Id.*
- “It is not the total hours worked, but the total minutes spent on incoming calls, that determines an employee’s pay. So, even though two employees may work the same number of total hours, one will earn more money if, during those hours, he spends more time than the other agent on incoming calls—just like a person who picks more strawberries.” *Id.* at 9 n.6.

In *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 652, 355 P.3d 258 (2015), this Court defined a piece rate as one that “is tied to the employee’s output...and is earned only when the employee is actively producing.” Considering the ruling in *Demetrio* and the Ninth Circuit’s findings of fact that the production minute functioned as a unit of work in an incentive plan that paid employees based on their productivity (not on their time at work), this Court should answer the certified question, “yes.”

The arguments offered by the Washington Wage Claim Project (“WWCP”) are mostly irrelevant to the certified question and do not impact the Ninth Circuit’s legal or factual findings in framing that question. Indeed, the WWCP seems to be trying to confuse, rather than clarify, the issues in this case. It does so by:

- Mischaracterizing the findings of fact by the Ninth Circuit (without providing citations for the facts it asserts);
- Misstating the facts and ruling of *Alvarez v. IBP*;
- Mischaracterizing the ABC plan as paying by the minute, when it instead uses production minutes as a unit of production;
- Repeating arguments already made by Hill to this Court and the Ninth Circuit.

This Court should reject the arguments made by the WWCP as irrelevant, redundant and unhelpful.

II. ARGUMENT

A. **The Ninth Circuit has already determined facts relevant to the certified question: WWCP’s misstatements should be ignored**

WWCP makes numerous misstatement of fact throughout its brief.

For example, WWCP misstates that following (at 2-3):¹

- WWCP’s asserts (at 2) that the ABC plan “divides the workday into three categories of minutes.” False. Only one of the ABC plan’s three sources of compensation used production minutes to calculate pay. Cert. Order at 5-6. ABC Pay paid for all time an employee was at work that was not compensated by Additional Pay, and was calculated using the “production minute” as a unit of work. *Id.* Additional Pay was paid on an hourly basis. *Id.* at 6. Subsidy Pay was a lump sum amount paid for the week. *Id.*
- WWCP asserts (at 2-3) that production minutes had an associated hourly rate. False. Production minutes were paid at a flat rate per production minute and weekly pay was determined by multiplying production minutes for the week by that rate. Cert. Order at 5-6.

¹ The factual findings in the Certification Order provide the context for this Court to answer the certified question. Fact finding is the province of the federal court. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008) (federal court “must undertake” “factual inquiries”).

- WWCP asserts (at 3) that “[g]eneral non-production work was not directly compensated.” False. ABC Pay and Additional Pay, along with Subsidy Pay if needed, compensated employees for all time at work. Cert. Order at 5-6.

The Court should further note WWCP’s efforts to turn any discussion of “hourly pay” into pay by the minute. One example is its mischaracterization of Additional Pay (found by the Ninth Circuit to be hourly, Cert. Order at 6) as “Additional Pay minutes.” Another example (discussed below) is when WWCP mischaracterizes the hourly pay in *Alvarez v. IBP* as pay by the minute. All of this is to confuse the established legal definition of hourly pay (pay at “a set hourly rate,” Cert. Order at 7) as a way to promote the argument that use of production minutes somehow makes ABC Pay “hourly pay” instead of piecework.

The absurdity of this position is revealed when WWCP admits (at 10) that it is not seeking to apply the “per-hour” measure of the Washington Minimum Wage Act (“MWA”) compliance for hourly employees discussed in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003), but a new “per-minute” measure it wants to create from whole cloth. In response to XBS’s argument that under a “per-hour” measure, Hill would have to prove that she was paid less than the minimum wage

for particular hours,² WWCP responds (at 10) that it disagrees that “a plaintiff needs to average paid and unpaid work during each clock hour to prove damages.” So, WWCP opposes not only workweek averaging for hourly employees, but even averaging within an hour, requiring courts to conduct a minute-by-minute, indeed second by second,³ inquiry into an employee’s activities and pay. WWCP fails to identify a statute or regulation that requires analysis or recordkeeping of pay by the minute. This Court should ignore its mischaracterizations.

B. WWCP’s discussion of *Alvarez* is irrelevant and wrong

WWCP seeks to confuse the issues further by misrepresenting the facts and holdings of *Alvarez v. IBP, Inc.*, 2001 WL 34897841 (E.D.Wash. 2001), *judgment aff’d in part, rev’d in part*, 339 F.3d 894 (2003), *aff’d*, 546 U.S. 21 (2005). WWCP’s discussion of *Alvarez* has no relevance to the certified question (whether a pay plan based on a unit of work called a production minute is a piecework plan) and deals with an issue (the measure of compliance under the MWA for hourly employees) that was already decided by the Ninth Circuit. Cert. Order at 7-8.

In any event, WWCP’s discussion of *Alvarez* is not helpful to this

² If a per-hour measure is applied, Hill must prove she was not paid at the minimum wage per hour. However, Hill has failed to introduce any evidence that there was a single hour for which she was paid less than the minimum wage. XBS Reply Brief at 14.

³ Under the reasoning of WWCP there is nothing to distinguish averaging within a minute from averaging within an hour, a day or a week.

Court. *Alvarez* is nothing like the present case. The employees in *Alvarez* were hourly employees and were paid at a set hourly rate. *Id.* at *20 (“[t]he class members were employed by IBP on an hourly basis”). WWCP’s references (at 4) to “production time,” “production minutes,” and “non-production time” are pure fabrication. *Alvarez* does not use those terms or discuss those concepts. *Alvarez* is a straightforward “off-the-clock” “donning and doffing” case in which IBP paid a set hourly rate for the employees’ scheduled shift but required donning and doffing of equipment before and after that shift, neither tracking nor paying that time:

The representative evidence establishes that class members performed off-the-clock work, *i.e.*, unrecorded and uncompensated work, pre-shift, post-shift, and during uncompensated meal breaks. Moreover, IBP failed to keep and maintain records of this off-the-clock work.

Id. at *22. The certified question involves no issues of off-the-clock work. The issue is whether the ABC plan legally compensates employees for on-the-clock time, and the Ninth Circuit has already determined that it did if it is a piecework compensation plan. Cert. Order at 7-8.

WWCP argues (at 8) that “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.” Not true. WWCP’s description of “gang time” and its description of the ABC plan are false and misleading. “Gang time pay” was simply the practice of only

paying hourly employees for the hours when the slaughter line was operating. Because these were hourly employees paid for their time at work, if they were at work and not being paid their hourly rate, they were not being paid.⁴ There was no concept of “production minutes” involved in “gang time pay,” it was payment on a set hourly rate. IBP argued in litigation that hourly pay for other hours should be applied to off-the-clock donning and doffing time.⁵ The court held that a per-hour measure must be applied to hourly employees and that off-the-clock hours, untracked and unpaid, violated the MWA. 2001 WL 34897841, *22.

In contrast, under the ABC plan, the employees track all of the time they work and are paid at least the minimum wage for each and every hour on the clock. The rates for production minutes are designed to pay for all tasks associated with generating the “production minute” piece. And, the ABC plan includes Subsidy Pay to assure minimum wage compliance.

⁴ To the extent that WWCP is arguing that gang time pay was provided at a flat rate, where employees received the pay based on the end production (rather than an hourly rate), *Alvarez* supports XBS’s position in this case. In *Alvarez*, the district court, Ninth Circuit, and U.S. Supreme Court reviewed the matter and never found any violation or awarded any damages for on-the-clock time that was non-productive. The violations were focused on off-the-clock work time. Thus, nothing in *Alvarez* supports WWCP’s assertion that pay for on-the-clock time must be dissected.

⁵ WWCP (at 9) argues that the fact that the employees’ contracts provided for set hourly rates is irrelevant to distinguishing *Alvarez* from the present case, because “*Alvarez* does not contain any suggestions of a contract claim or any contract based arguments.” But this misses the point. The employment contract determines the type of compensation method that is used, either hourly or other than hourly. The court in *Alvarez* would not take pay already due to an employee for an hour of work under the contract to apply it to another hour that was not tracked or paid. This is the per-hour measure applied to hourly employees. That is very different from a compensation method, like the ABC plan, that calculates pay for all hours at work based on production metrics for the workweek.

The Ninth Circuit, in a case considering the same ABC plan and many of the same employees, explained why a case involving hourly employees claiming off-the-clock work is not relevant to pay under the ABC plan. *See Douglas v. Xerox Business Services*, 875 F.3d 884, 890 (9th Cir. 2017). *Douglas* illustrates the difference between this case and *Alvarez* through its discussion of how *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), was different from the *Douglas* case. *Ballaris* is very similar to *Alvarez* in that both involve employees paid at a fixed hourly rate claiming pay for off-the-clock work, and in each case the employer sought to apply ““money already due an employee for some other reason against the wage he is owed.”” *Douglas*, 875 F.3d at 890 (quoting *Ballaris*, 370 F.3d at 914). In *Ballaris*, the employer sought to use meal break pay to compensate for off-the-clock donning and doffing time; in *Alvarez*, the employer sought to use pay for on-the-clock hours to compensate for off-the-clock donning and doffing time. *Id. Douglas* summarized how the argument regarding ABC pay is entirely different:

Xerox is not asserting that it can take money already due and apply it against unpaid hours to avoid an FLSA violation. Instead, Xerox’s payment plan compensates employees for all hours worked by using a workweek average to arrive at the appropriate wage. *Id.*

WWCP makes the odd assertion (at 6) that “*Alvarez* is empirical data that workers suffer when non-production minutes and hours are not

separately paid.”⁶ False. Plaintiffs’ proof of damages under the specific facts of *Alvarez* (already established to be very different from the facts here) is not “empirical data” and is irrelevant to this case. As the district court stated, the damages were “estimated” based on evidence at trial that hourly employees worked off-the-clock for untracked and unpaid periods of time. 2001 WL 34897841, *22. That has nothing to do with payment under the ABC plan. Indeed, considering the same ABC plan and some of the same employees, *Douglas* held that there is “no empirical evidence that broad application of the workweek standard disadvantages employees so long as they ultimately receive the stipulated hourly rate” and, under a weekly measure, “employees receive compensation for every hour worked at a rate no less than the congressionally prescribed minimum hourly wage to guarantee the bare necessities of life.” 875 F.3d at 887, 889.

WWCP argues (at 7 n.9) that a 21-year-old declaration used in *Alvarez* from former DLI employee, Greg Mowat, should be considered by this Court as evidence that the per-hour measure should be applied in this case. Even assuming Mr. Mowat’s declaration states anything more than that hourly employees use a per-hour measure, the declaration is

⁶ WWCP argues (at 6 n.7) that “[w]orkers in general suffer by workweek averaging.” False. The example given is of an hourly worker who loses their contractual pay above minimum wage by being required to work (presumably off-the-clock) for additional unpaid hours. This could not happen under the ABC plan which pays the contractual amount for all hours worked.

entitled to no weight because it pre-dates the DLI Administrative Policies,⁷ is not a formal policy statement or investigative determination of DLI, and conflicts with the sworn testimony of Lynne Buchanan, a later DLI program manager for wage issues.⁸ In any event, if Mr. Mowat's testimony is read as stating that Washington law requires hourly pay or a per-hour measure for all compensation methods, it contradicts *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 533-34, 7 P.3d 807 (2000), *Alvarez*, and DLI regulations and policies.⁹

WWCP also cites (at 7 n.9) the initial Declaration of Lynne Buchanan, but Ms. Buchanan's Second Declaration clarifies:

[t]he comments [she] included in [her] First Declaration were intended to be a brief synopsis of the law regarding hourly-paid employees, [were] not intended to address other compensation methods such as commissions or piecework, and must be read in the context of the Department's regulations and the Department's detailed interpretations as set forth in Administrative Policies ES.C.3 and ES.A.3, and WAC 296-126-021.

ER 296. Ms. Buchanan's testimony contradicts Mr. Mowat and is

⁷ The DLI administrative policies, adopted in 2002 and revised in 2014, make no explicit mention of a per-hour measure and provide that workweek measures apply to non-hourly employees. *See* ES.A.3 at 2

⁸ As this Court has held, a DLI "employee's subjective understanding of the agency's intent is not a formal administrative decision entitled to any weight." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716 n.7, 153 P.3d 846 (2007); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

⁹ These cases and DLI regulations specifically allow workweek measures of compliance for non-hourly compensation. For example, this Court held that a measure based on total weekly compensation meets the MWA's stated purpose. *Inniss*, 141 Wn.2d at 533-34 ("Respondent does not violate a stated purpose of the [MWA] because the actual weekly compensation for each Petitioner was never less than the total weekly compensation based upon the minimum hourly wage").

consistent with applying the workweek measure to the non-hourly ABC plan.¹⁰ Indeed, DLI applied the workweek measure when it investigated and evaluated claims about the ABC plans. ER 56-58; ER 21-22.

C. *Douglas v. XBS* does not support Hill's arguments

WWCP asserts (at 10-12) that *Douglas* somehow supports Hill's argument. In fact, it is just the opposite. As noted above, *Douglas* (at 887) rejected Hill's argument that there is "unpaid" time under the ABC plan, holding that the plan "compensates employees for all hours worked" on a workweek basis.¹¹ WWCP argues (at 11-12) that *Douglas* supports Hill by rejecting the "contract measure" as a permissible measure under the FLSA, and argues (at 12) that this "approach undermines Xerox's numerous attempts to rely on contract-based arguments." What WWCP mischaracterizes as "contract-based arguments" is XBS describing how compensation under the ABC plan operates as piecework pay and not hourly pay. The holding in *Douglas* regarding the contract measure is irrelevant to this question under the MWA. As WWCP concedes, *Douglas*

¹⁰ Somewhat ironically, if WWCP's argument based on *Alvarez*, Mr. Mowat, and Ms. Buchanan were accepted, this simply means that minimum wage compliance is determined by the hour. That is not the position (any increment of unpaid time violates the MWA, e.g., minutes, seconds) for which WWCP is advocating. In addition, Hill failed to provide any proof that she was denied minimum wage for any particular hour. *Alvarez*, Mr. Mowat, and Ms. Buchanan provide no support for a minute-by-minute compliance requirement.

¹¹ Moreover, also as discussed above, *Douglas* rejected the argument by Hill and WWCP that the hourly measure is more protective of employees than the workweek measure. 875 F.3d at 887, 889.

holds that the FLSA applies the workweek measure regardless of the employer's compensation method. But under the MWA, the method of compensation (hourly v. piecework and other non-hourly methods of pay) decides the measure applied. ES.A.3; ES.C.3. When the compensation method must be determined, the court must examine the provisions of the employment contract. Cert. Order at 7 (the "distinction in how employees are paid is critical"). Indeed, examining the employment agreement is inherent in the Ninth Circuit's certified question, asking "whether an employer's compensation plan . . . qualifies as a piecework plan." Cert. Order at 11. This question cannot be answered without looking at the "compensation plan" and resolving "contract-based arguments."

D. The ABC plan is production based and is therefore a piecework plan and not hourly

WWCP misstates the issue in this case as: "whether a compensation scheme based on a distinction between production minutes and non-production minutes is an hourly/minute time based system or a piece-rate plan."¹² Production minutes under the ABC plan are units of work, that are the product that XBS sells to its client Verizon. Employees

¹² WWCP also erroneously states (at 12) that the case turns on the answer to the certified question only "in the first instance" because of issues regarding separate pay for certain non-production work. False. This Court should decide only the certified question and does not have authority to decide questions that were not certified, or were already decided by the Ninth Circuit. In any event, the issues being decided in *Carranza* are under a different regulation, as the question certified is under WAC 296-126-021. *See* XBS Reply at 18-20.

are compensated by a combination of production based pay (through weekly counting of production minutes paid at a flat rate) and hourly pay for some tasks. Employees are not paid “by the minute” for time at work.

1. The ABC plan is not hourly

WWCP (at 13) recycles Hill’s argument that any compensation that uses time in its calculation must be hourly compensation. As discussed in XBS’s Opening Brief (at 22-26, 38-45) and Reply (at 6-12), this is incorrect. WWCP’s argument regarding the definition of “hourly” pay ignores that the Ninth Circuit has already defined hourly pay: “employers can pay their employees a set hourly rate for their work, otherwise known as an hourly wage.” Cert. Order at 7. WWCP cites and critiques (at 13-14) the dictionary definition cited by XBS but offers no alternative, and that definition remains undisputed. WWCP’s argument (at 14) that hourly employees are entitled to be paid for fractions of an hour based on that hourly rate is both self-evident and irrelevant. The ABC plan does not pay “by the minute.” It calculates ABC pay using “production minutes,” which do not measure time at work but are a product (measures of productivity) defined by the XBS-Verizon contract and paid for by Verizon. This issue has already been determined as a fact by the Ninth Circuit. While, as the WWCP notes (at 20-21), the Ninth Circuit observes that “defining a unit of production as a minute is clearly based on a

measurement of time,” it goes on to find that a production minute functions as a unit of production under the ABC plan. Cert. Order at 9 (“it functions—as a compensable unit of production being sold”).

This distinguishes production minutes from “minutes” that would be a component of an hourly pay system. As WWCP concedes (at 13), “[h]ourly pay is time-based pay...[and] [w]orkers are paid for their time engaged in work.” But that is different from production minutes which are a measure of productivity. As the Ninth Circuit found, two employees can spend the same time at work, but one will earn more money for that time if that employee spends more time on incoming calls, and therefore generates more production minutes. WWCP’s assertions (at 13) that the ABC plan pays by “hours and minutes” and is therefore “hourly pay” contradict the facts as found by the Ninth Circuit and should be rejected.

2. The ABC plan meets the definition of piecework

WWCP argues (at 14) that there is “a common public understanding of piece-rate pay.” This assertion cites to no authority and is simply a conclusory statement of opinion. WWCP’s asserted “common understanding” (which is just a few random examples of piecework chosen by WWCP) would exclude entire industries from using piecework compensation (such as trucking, accounting, and call centers) that have historically utilized piecework compensation. There is not a scintilla of

authority in the case law or the regulations that limit piecework to particular industries, or particular types of work.¹³ See WAC 296-128-550; WAC 296-126-021. General application is consistent with the Ninth Circuit’s definition: “‘Piece rate payment is usually a price paid per unit of work.’” Cert. Order at 7 (quoting Department of Labor and Industries’ website). Indeed, this Court’s definition of piecework can apply to any work that ties compensation to production:

A piece rate is tied to the employee’s output (for example, per pound of fruit harvested) and is earned only when the employee is actively producing. Thus for employees paid a piece rate, the clock stops during periods of inactivity however brief.

Demetrio, 183 Wn.2d at 652. As discussed in XBS’s Opening Brief (at 32-37) and Reply (at 4-9), the ABC plan meets these definitions because the ABC plan compensates employees based on productivity not on hours at work (except for certain activities that are paid hourly).¹⁴

WWCP’s discussion (at 16) of dictionary definitions of “piece rate” similarly ignores the above definitions by this Court and DLI.

¹³ Such restrictions would be inconsistent with freedom of contract. See *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004).

¹⁴ WWCP asserts (at 10 n.11) that XBS “implies it should receive some equitable consideration because workers allegedly wanted hourly and minute pay.” False. This is a reference to XBS’s discussion (Op. Br. at 3-4, 22-23) that the ABC plan previously used a call as a unit of work, and there is no dispute that it was a piecework plan. WWCP does not dispute a call based plan is piecework. The plan was changed because of employee preference and because the contract with Verizon changed to pay by the production minute. A plan that incentivized calls was not needed. The plan was changed to incentivize production minutes. But it functions in exactly the same way by using the production minute as a unit of work instead of calls.

WWCP quotes and critiques the dictionary definitions (“by the piece or quantity” and “the number of units turned out”) used by XBS in its Opening Brief (at 35). WWCP argues that the plan does not meet these definitions because they do not apply to “hourly or minute pay.” As discussed above, the plan does not pay hourly or by the minute, it is production based and therefore meets these definitions of piecework.

The additional “more informative” definitions of “piecework” quoted by WWCP (at 17) are just as applicable to the ABC plan. For example, “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,” and, “work for which the amount of pay depends on the number of items completed rather than the time spent making them,” both describe the ABC plan. As the Ninth Circuit found, “[i]t is not the total hours worked, but the total minutes spent on incoming calls, that determines an employee’s pay.” Cert. Order at 9 n.6. Thus, employees are paid for the work they complete, not the amount of time it takes to do it.

3. The ABC plan is consistent with the purpose of piecework compensation plans

WWCP argues (at 14) that piece-rate pay often needs to be calculated on a weekly basis because there is no other reasonable alternative. Apparently, production based work, fruit picking is its

example, is hard to track on an hour-to-hour basis and so weekly calculation is necessary. This is a truism that is not in dispute in this case and offers nothing to the debate. It is well-established Washington law, reaffirmed in this case by the Ninth Circuit, that MWA compliance for piecework is decided on a workweek basis. Cert. Order at 7; WAC 296-128-550; WAC 296-126-021. WWCP then argues (at 15-16) that, unlike fruit picking, there is no need for the ABC plan to be piecework and it should instead be hourly. This is nothing more than the personal opinion of WWCP and should be ignored by this Court.¹⁵

4. WWCP’s rehash of Hill’s arguments that a unit of time cannot be a unit of work is still wrong

WWCP misstates the holding in *U.S. v. Rosenwasser*, 323 U.S. 360, 364, 65 S.Ct. 295, 89 L.Ed. 301 (1945). WWCP argues (at 17-18) that *Rosenwasser* distinguishes between “other units of time” and “by the piece,” and that it therefore holds that piecework plans cannot use units of time as a unit of work. The actual quote from *Rosenwasser* demonstrates that WWCP’s assertion is false:

¹⁵ To the extent that WWCP is claiming that fruit picking could not be compensated on an hourly basis, they are wrong. Fruit pickers could be, and often are, paid by the hour. But pickers may not pick fruit as efficiently if compensated based on their production. And that is ultimately the reason for piecework. It is not because employers could not pay hourly, or have trouble tracking production. It is because it ties the employee’s compensation to their production and thereby incentivizes more productivity. This is precisely the reason that the ABC plan is designed the way it is, to increase the number of production minutes available to be sold to the client (while simultaneously increasing the earnings of the most productive employees), clearly meeting this Court’s definition of piecework: “A piece rate is tied to the employee’s output.” *Demetrio*, 183 Wn.2d at 652.

These hourly standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. Nor can a court rightly use these standards as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece.

Id. at 364. This passage contrasts “employees working on an hourly wage scale” with “employees paid by other units of time or by the piece.” It has the opposite meaning from that asserted by WWCP. In the view of the Supreme Court, hourly employees are distinct from employees paid through all other methods (including by “other units of time”).¹⁶ *Rossenwasser* and ES.A.3 both stand for the proposition that minimum wage compliance for pay based on production minutes (which is not hourly) is determined on a workweek basis.

WWCP argues (at 18) that *Washington v. Miller*, 721 F.2d 797, 802 (11th Cir. 1983), supports the “notion that paying someone by production hours or minutes is time-based compensation-akin to hourly pay-not piece-rate pay.” This is another repeated (and erroneous) Hill argument. *Miller* does not support that “notion” at all. *Miller* merely quoted a section of the (since-repealed) Farm Labor Contractor

¹⁶ This is consistent with Washington law. *See, e.g.*, DLI Admin. Policy ES.A.3 at 2 (2014) (stating that “to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated **on other than an hourly basis**” “the employee’s total weekly earnings are divided by the total weekly hours worked”) (emphasis added).

Registration Act that dealt with recordkeeping.¹⁷ All the statute said was that hourly workers and piece rate workers must have adequate records of their hours and their pay rate to determine what they should be paid. It says nothing about what is a permissible piece rate, and is not on point.

WWCP argues (at 19) that WAC 296-128-550 supports its argument. False. This regulation simply contrasts an “hourly wage rate” with a list of other compensation methods (“[e]mployees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate”), and it applies the workweek measure to those pay systems that are not hourly (“the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week”).¹⁸ *Id.*

WWCP’s arguments (at 19-20) regarding the definition of “work” are a red herring. It mischaracterizes XBS’s argument that production minutes are units of work as an argument about whether XBS employees’ non-productive time meets the definition of work. XBS has never argued

¹⁷ Farm Labor contractors are required by 7 U.S.C. § 2045(e) to keep payroll records which “show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece-rate basis, the number of units of work performed and the rate per unit shall be recorded.” *Id.*

¹⁸ DLI Admin. Policy ES.A.8.1 at 1 (2014) elaborates on this regulation and highlights the distinction between employees that are “paid hourly” and those paid in “some other manner, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate).”

that employee on-the-clock activity while at the call center does not meet the definition of work, and, as held in *Douglas*, the ABC plan compensates employees for all hours at work.¹⁹

E. WWCP’s arguments regarding non-production work are not relevant to the certified question and do not apply to the ABC plan

WWCP’s argument (at 21-24) regarding non-production work has no relevance to the certified question.²⁰ WWCP cites several cases involving hourly employees that state that all time at work must be paid.²¹ None of these cases have any applicability to the ABC plan, which tracks and pays for all hours at work at the minimum wage or higher using hourly and incentive piecework pay.

III. CONCLUSION

WWCP arguments are irrelevant to the certified question, misleading, and wrong. This Court should disregard the arguments. This Court should answer the certified question, “yes.”

¹⁹ WWCP’s citation (at 20 n. 21) to *Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956), is inapposite as it deals with paid breaks and there is no issue regarding paid breaks raised in this appeal. Similarly, its citation (at 20 n. 22) to *Chavez v. IBP, Inc.*, 2005 WL 6304840, at *16-19 (E.D.Wash. 2005), is irrelevant because there is no issue of unpaid gaps between double shifts (or any other off-the-clock issue) in this appeal.

²⁰ WWCP erroneously claims (at 12 n.15) that “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.” False. XBS objects to this topic being argued at all. Reply at 16.

²¹ *Davies v. Seattle* (which deals with a day laborer under a day labor statute in Seattle in 1912) and *Tennessee Coal, Iron & RR Co. v. Muscoda Local No. 123* simply hold that work before and after a scheduled shift are “work” and therefore should be compensated, and *Secretary of Labor v. American Future Sys., Inc.* and *Lillehagen v. Alorica, Inc.* both deal with whether breaks under 20 minutes are counted as ‘work hours’ under the FLSA.

RESPECTFULLY SUBMITTED this 26th day of February, 2018.

K&L GATES LLP

By s/ Patrick M. Madden

Patrick M Madden, WSBA #21356

Todd L. Nunn, WSBA #23267

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court for the State of Washington by using the Supreme Court's electronic filing system on February 26, 2018.

I further certify that all participants in the case are registered users and that service will be accomplished by the Supreme Court electronic filing system.

By s/ Patrick M. Madden

Patrick M Madden, WSBA #21356
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158

Attorneys for Defendants-Appellants

K&L GATES LLP

February 26, 2018 - 3:35 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_Answer_Reply_20180226152810SC533109_5698.pdf
This File Contains:
Answer/Reply - Other
The Original File Name was Defs-Appellants Answer to WWCPs Amicus Curiae Brief.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
- macleodlaw1@gmail.com
- mcote@frankfreed.com
- tmarshall@terrellmarshall.com
- todd.nunn@klgates.com

Comments:

Defendants'-Appellants Answer to Amicus Curiae Brief of Washington Wage Claim Project

Sender Name: Patrick Madden - Email: patrick.madden@klgates.com

Address:

925 4TH AVE STE 2900
SEATTLE, WA, 98104-1158
Phone: 206-623-7580

Note: The Filing Id is 20180226152810SC533109