

to be genuine, supervisors cannot ignore workers starting work early, staying late, or coming in on scheduled days off. Nor should employees be assigned work and given deadlines that effectively require them to work late or take work home. Similarly, employees should not be pressured or allowed to underreport hours worked. The amount of time actually spent performing work duties—not norms or expectations (e.g., “it usually takes an hour to clean up after the restaurant closes”)—determines compensable time. Taking “too long” to carry out some task might need to be addressed as a performance issue, but it is not an excuse for withholding pay from the employee in violation of the FLSA. A staffing firm that supplied RN’s to hospitals violated the FLSA when it withheld overtime pay for nurses who did not follow its rule that they obtain prior authorization to work overtime.¹⁸ In this case, the staffing firm had actual knowledge of the overtime hours worked because they were reported by the nurses—albeit after the fact. The staffing firm failed to convince the court that it had done all that it could to enforce its no unauthorized overtime policy and it was not free to withhold the overtime premium for known overtime work as a sanction against the offending nurses.

In *Kellar v. Summit Seating*, the court must decide whether an employee was entitled to be paid for preshift work of which the employer claimed to be unaware.

Kellar v. Summit Seating

664 F.3d 169 (7th Cir. 2011)

OPINION BY CIRCUIT JUDGE WILLIAMS:

Susan Kellar contends that she is entitled to overtime under the Fair Labor Standards Act for work performed prior to the official start of her work shift. The district court granted summary judgment in favor of her employer, Summit Seating, because it found that Kellar’s pre-shift activities were “preliminary,” that any work Kellar performed before her shift was “*de minimis*,” and that Summit did not know that Kellar was engaging in pre-shift work. While we disagree with the district court’s conclusions regarding the “preliminary” and “*de minimis*” nature of Kellar’s pre-shift work, we affirm because we conclude that Summit did not know or have reason to know that Kellar was working before her shift.

Summit Seating (“Summit”) is a small company that manufactures seating for buses, trucks, and vans. . . . Susan Kellar . . . was promoted to sewing manager. In that capacity, she was responsible for supplying sewers with their sewing products, tracking supplies, ensuring that work was completed on schedule, and training junior employees. Kellar managed between seven and eight employees, and was paid on an hourly basis.

. . . Kellar claimed that she regularly arrived at Summit’s factory between 15 and 45 minutes before the start of her 5:00 a.m. shift. When she arrived before or at the same time as her sister and co-worker, Mamie Spice, Kellar spent about 5 minutes unlocking doors, turning on lights, turning on the compressor, and punching in on the time clock. Then she prepared coffee for the rest of Summit’s employees, which took her about 5 minutes. Depending on her workload, she spent 5 to 10 minutes (or longer) reviewing schedules and gathering and distributing fabric and materials to her subordinates’ workstations, “so that they could go straight to work, rather than waiting for [her] to bring [fabric] to them.” For another 5 minutes, she drank coffee and smoked a cigarette. The remaining time was spent performing “prototype work” (preparing models for production), cleaning the work area, or checking patterns. According to Kellar, no one told her that she needed to come in before her shift, but she arrived early because it would have been “a hassle” to show up at 5:00 a.m. and still get her subordinates up and running close to the start of their 5:00 a.m. work shifts. Kellar’s time cards reflect that she often punched in early, although on those days when she forgot to clock in, Kellar would write the official start time of her shift on her time card.

¹⁸*Chao v. Gotham Registry*, 514 F.3d 280 (2d Cir. 2008).

Spice, who is still employed at Summit, tells a different story. In an affidavit, Spice claimed that Kellar never performed any work before the start of her shift. Rather, after clocking in, she and Kellar would chat and drink coffee until their shifts began. Kellar acknowledged . . . that many Summit employees would clock in early and socialize until the start of their shifts. * * * Nevertheless, Kellar insists that, excluding a five-minute smoking and coffee break, she spent her pre-shift time at Summit working, not socializing.

If Kellar arrived early in order to work, her supervisors, Ray and Sue Fink, who were the owners and the president and vice-president of Summit, respectively, never personally observed it. They typically arrived at the factory after Kellar, between 7:00 and 8:00 a.m. Kellar testified that she had a good relationship with the Finks and felt “comfortable going to them with problems.” Kellar was also aware that Summit had a policy (outlined in its employee handbook) requiring employees to request pre-approval to work overtime. Even so, Kellar never told the Finks that she was working before the start of her shift. She also never reported errors with her paychecks, requested overtime pay, or mentioned during the weekly production meetings she attended with the Finks that her schedule needed to be adjusted to account for her pre-shift work.

In February 2009, Kellar voluntarily resigned and later sued Summit, claiming that she was not paid overtime wages in violation of the Fair Labor Standards Act (“FLSA”). * * *

A. Kellar’s Pre-Shift Activity Was Non-Preliminary Work

The district court found that Kellar’s pre-shift activities were non-compensable “preliminary” activities under the Portal-to-Portal Act of 1947. The Portal-to-Portal Act, in relevant part, amended the FLSA to eliminate employer liability “on account of . . . activities which are preliminary to or postliminary to [principal activities,] which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal [activities].” * * * The Portal-to-Portal Act provides that activities that are “preliminary” to principal activities are not compensable. The Act does not purport to define “preliminary” activities further. But the Supreme Court has held that activities that are “an integral and indispensable part of [an employee’s] principal activities,” are not “preliminary,” but are also “principal activities,” and are compensable even

if they occur before the beginning of an employee’s shift.

Kellar testified that she began her day (after unlocking doors and making coffee for employees) reviewing work schedules and gathering and distributing fabric and materials to her subordinates’ workstations. Such activities are surely “integral and indispensable” to the work that Kellar performed in her capacity as a sewing manager, such as supplying sewers with their sewing products, tracking supplies, and making sure that work was completed on schedule. Work activities that Kellar performed afterward would be covered by the “continuous workday rule,” which provides that the Portal-to-Portal Act does not apply “to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday.”

The district court reached a different conclusion because it credited Mamie Spice’s affidavit to the effect that Spice and Kellar spent their pre-shift time socializing instead of working. The court acknowledged that Kellar’s deposition testimony directly contradicted Spice’s affidavit, but it did not accept Kellar’s version of the events in question because Kellar “offer[ed] no evidence other than her own testimony to support her argument.” This was error. * * * Kellar’s deposition testimony created a factual dispute, and the court was not free to resolve it in Summit’s favor.

On appeal, Summit argues that the district court properly disregarded Kellar’s testimony because it was inconsistent and conclusory. But Kellar discussed her pre-shift activities in a fair amount of detail. And any inconsistencies in her testimony were minor. For example, Summit faults Kellar for first testifying that she regularly arrived between 30 and 45 minutes before her shift, but then acknowledging that she also sometimes arrived 15 minutes early and sometimes arrived late. There is no serious inconsistency in this testimony. Kellar worked for Summit for eight years. It is understandable that she would have arrived late on some occasions during her eight-year tenure. When Kellar was confronted with the possibility that she might have arrived later on some occasions, she corrected herself. This correction does not necessarily mean that she was lying, nor that it was proper for the district court to disregard the rest of her testimony about working before her shift.

Summit also contends that even if the court erred in discrediting Kellar’s testimony, it correctly found that the Portal-to-Portal Act applies because

Kellar performed her pre-shift activities primarily for her “own convenience.” Summit points to Kellar’s deposition testimony in which she stated that she arrived early because it would be a “hassle” to show up at 5:00 a.m. and get her subordinates up and running close to the start of their 5:00 a.m. work shifts.

The Portal-to-Portal Act exempts those activities that are “predominantly . . . spent in [the employee’s] own interests,” meaning those activities that are undertaken “for [the employee’s] own convenience, not being required by the employer and not being necessary for the performance of [the employee’s] duties for the employer.” The Portal-to-Portal Act, however, does not relieve employers from liability for any work of consequence performed for an employer from which the employer derives significant benefit. Here, Summit conceded . . . Kellar performed pre-shift “work.” * * * Kellar’s subjective reasons for arriving early simply do not matter for purposes of determining whether her pre-shift activities primarily benefited her or Summit.

B. Kellar’s Pre-Shift Work Was Not *De Minimis*

The *de minimis* doctrine allows employers to disregard otherwise compensable work when only a few seconds or minutes of work beyond the scheduled working hours are in dispute. Summit bears the burden to show that the *de minimis* doctrine applies. When evaluating whether work performed by an employee is *de minimis*, courts typically consider the amount of time spent on the extra work, the practical administrative difficulties of recording additional time, the regularity with which the additional work is performed, and the aggregate amount of compensable time.

Summit contends that Kellar’s work was *de minimis* in large part because it would have been administratively difficult to determine how much of Kellar’s pre-shift time is compensable. There is some merit to this argument. Kellar’s time cards do not indicate which tasks Kellar performed or for how long. Some of the activities she performed, such as making coffee and taking a smoking break, may not be compensable, while others, such as distributing fabric and preparing schedules, likely would be. But these were not insurmountable hurdles. Since Kellar testified that she typically performed the same kinds of activities every day, it would have been possible to compute how much time Kellar spent on compensable activities.

Moreover, at least as claimed, the amount of pre-shift work at issue here, both per day and in the aggregate, is

substantial. Kellar testified that she worked between 15 and 45 minutes before her shift, excluding a 5-minute break. She contends that she spent between 10 and 40 minutes working every day before her shift. Summit does not point to any cases that have found that work exceeding between 10 and 15 minutes in duration is *de minimis*. Kellar’s pre-shift work would therefore not be *de minimis* under FLSA law.

C. Summit’s Lack of Knowledge

Although Kellar’s work activities were neither preliminary nor *de minimis*, her claimed work is nevertheless noncompensable. To state a claim under the FLSA, Kellar must show that Summit had actual or constructive knowledge of her overtime work. The district court found that Summit neither knew nor should have known, that Kellar was working overtime. We agree.

The FLSA imposes an obligation on the employer “to exercise its control and see that work is not performed if it does not want it to be performed.” The employer “cannot sit back and accept the benefits without compensating for them.” “[The employer’s] duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.” The mere promulgation of a rule against overtime work is not enough. Nor does the fact that the employee performed the work voluntarily necessarily take her claim outside of the FLSA.

However, the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about. “‘Employ’ includes to suffer or permit to work.” “[A]n employer’s knowledge is measured in accordance with his duty . . . to inquire into the conditions prevailing in his business. . . . [A] court need only inquire whether . . . [the employer] had the opportunity through reasonable diligence to acquire knowledge.”

Kellar points to her time cards, which reflect that she clocked in early, and argues that Summit should have known that she was performing pre-shift work. But Kellar’s clocking in early would not necessarily have alerted Summit that Kellar was performing pre-shift work. Kellar conceded that most Summit employees were in the habit of punching in early and then socializing until their work shifts began. Nothing in the record suggests that Ray and Sue Fink, who were aware of this practice and who arrived several hours after everybody else, had reason to believe that Kellar was arriving early in order to work.

We recognize that “an employer is not relieved of the duty to inquire into the conditions prevailing in his business because the extent of the business may preclude his personal supervision.” But in this case, the Finks had no reason to suspect Kellar was acting contrary to the conditions prevailing in their business generally. Kellar’s behavior raised no flags. When Kellar forgot to punch in, she would simply write in her time card that she arrived at the beginning of her scheduled work shift. Over the course of eight years, Kellar never told the Finks that she was working overtime. Indeed, there is no indication that anyone else knew Kellar was performing pre-shift work.

On the contrary, every week, Summit’s management had meetings to discuss the following week’s schedule. Kellar, who was herself a manager, never mentioned during any of those meetings that she was working before her shift began or that she was not being properly compensated, even though she claims to have had a good relationship with the Finks. Kellar was also aware of Summit’s policy prohibiting overtime work absent express permission—once, she even reprimanded another employee for clocking in early.

Given these circumstances, the Finks had little reason to know, or even suspect, Kellar was acting in direct contradiction of a company policy and practice

that she herself was partially responsible for enforcing. Accordingly, no reasonable trier of fact could conclude that Summit had reason to know that Kellar was working before her shift, and the district court must be affirmed.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. What uncompensated work did the plaintiff claim she performed? What should the district court have done with the statement of another employee—the sister of the plaintiff, no less—that the plaintiff did not engage in work prior to her official start time?
3. Why does the appeals court find that the work in question was nonpreliminary? More than *de minimis*?
4. Why does the appeals court find for the employer even though it failed to pay the plaintiff for compensable time?
5. Do you agree with the decision in this case? Why or why not? What if she had told the owners that she was doing this extra work, they told her not to do so, but she continued coming in early because it was the only way to get started on time? Would the outcome of the case be different? Why or why not?

Many questions about compensable time hinge on whether the time in question was or was not spent “predominantly for the benefit of the employee.” In cases involving periods of waiting during work hours, courts focus on whether waiting periods were sufficiently long and the surrounding circumstances (e.g., was the employee out somewhere without a vehicle or next door to a mall?) conducive to employees using the time for their own benefit. Employees of an insulation contractor successfully argued that their employer failed to pay them for time spent waiting for assignments and loading the trucks they used to travel to work assignments.¹⁹ The time was compensable because there was evidence that the owner expected them to show up before the official starting time, that they needed to be there to get work assignments and meet up with other members of the work crews, and that at least part of the time was spent loading trucks with equipment. That they also drank coffee and socialized with one another during this time did not negate the fact that it was spent primarily for the employer’s benefit. Situations in which employees are required to remain on call raise the same issue. In one such case, nurses required to be on call while at home were not entitled to compensation for that time because they remained largely free to pursue their own interests.²⁰ Calls were relatively infrequent. The nurses did not have to remain in their homes provided that they could be contacted and report to the hospital within twenty minutes. The primary restriction on their activities was that they could not use alcohol.

¹⁹*Chao v. Akron Insulation & Supply Inc.*, 184 Fed. Appx. 508 (6th Cir. 2006).

²⁰*Reimer v. Champion Healthcare*, 258 F.3d 720 (8th Cir. 2001).