No. 11-

IN THE

Supreme Court of the United States

APPLEBEE'S INTERNATIONAL, INC.
Petitioner,

v.

GERALD A. FAST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act permits employers to take a "tip credit" toward their minimum-wage obligations for "tipped employees" such as waiters and bartenders who are engaged in an "occupation" in which they customarily and regularly receive more than $30 a month in tips. 29 U.S.C. § 203(m), (t).

The questions presented are:

1. Whether an employer loses the benefit of the tip credit if a tipped employee spends more than 20% of his time performing duties that are related to his occupation but are not by themselves directed toward producing tips.

2. Whether the deference the Eighth Circuit paid to the Department of Labor's informal interpretation of its regulation conflicts with the decisions of this Court and other courts of appeals and impermissibly allowed the agency to issue *de facto* a new regulation under the guise of interpreting an earlier one.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Applebee's International, Inc., Gerald A. Fast, Talisha Cheshire, and Brady Gehrling.

RULE 29.6 STATEMENT

Applebee's International, Inc. is a wholly owned subsidiary of DineEquity, Inc., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Applebee's International, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 638 F.3d 872 and reproduced at Pet. App. 1a–19a. The Eighth Circuit's unpublished order denying rehearing en banc is reproduced at Pet. App. 62a–63a. The May 3, 2007 opinion of the United States District Court for the Western District of Missouri is reported at 502 F. Supp. 2d 996 and reproduced at Pet. App. 41a–61a. The district court's March 4, 2010 opinion is unpublished (2010 WL 816639) and is reproduced at Pet. App. 20a–40a.

JURISDICTION

The Eighth Circuit entered judgment on April 21, 2011, and denied rehearing and rehearing en banc on July 6, 2011 (with four judges voting to rehear the case en banc). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The "tip-credit" provision of the Fair Labor Standards Act is codified as amended at 29 U.S.C. § 203(m), which provides in relevant part:

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and
>
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.
>
> The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

The definition of "tipped employee" is codified at 29 U.S.C. § 203(t):

> "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

The Department of Labor's "dual-jobs" regulation is codified at 29 C.F.R. § 531.56(e):

> *Dual jobs.* In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as

> a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

INTRODUCTION

The Fair Labor Standards Act (FLSA) and its implementing regulations permit employers to take a "tip credit" toward their minimum-wage obligations for employees who work in an "occupation" in which they customarily and regularly receive more than $30 a month in tips, regardless of whether each of the various duties performed by the employees in that occupation is directed toward producing tips. In the decision below, the Eighth Circuit, deferring to an interpretation contained in an internal Department of Labor handbook, held that an employer loses the benefit of the tip credit if a tipped employee spends more than 20% of his time performing duties that are related to his occupation but are not themselves directed toward producing tips. In other words, the court of appeals held, remarkably, that a waiter ceases to be a waiter if he spends more than 20% of his time on duties that are related to the duties of a waiter but do not themselves produce tips.

The Eighth Circuit's decision is badly misguided and should be reversed. It conflicts directly with the decision of the Eleventh Circuit, which emphatically rejected the 20% rule endorsed by the court below, as well as with the reasoning of the Sixth Circuit as to the proper interpretation of the FLSA's tip-credit provision. It further conflicts with this Court's cases and decisions of numerous other circuits regarding deference to an agency's interpretation of its regulations. And it adopts an amorphous and unworkable standard that will upend decades of industry practice, impose crippling burdens on restaurants and other employers, and unjustifiably grant tipped employees a right to receive more than the minimum wage for their work. The Court should grant certiorari and reverse the decision below.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq*., establishes a national minimum wage, currently $7.25 per hour. 29 U.S.C. § 206(a)(1)(C). As originally enacted, the FLSA exempted restaurants and other food-service establishments whose business was primarily intrastate. FLSA, ch. 676, § 13(a)(2), 52 Stat. at 1067. In 1966, Congress significantly narrowed this exemption, extending the Act's minimum-wage requirements to 425,000 restaurant employees. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 201, 80 Stat. 830, 833; S. Rep. No. 89-1487, at 10 (1966).

At the same time, Congress enacted what has come to be known as the "tip-credit" provision, which allows employers to count employees' tips toward satisfaction of the minimum wage. Fair Labor

Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. at 830. Specifically, the tip-credit provision allows an employer to pay a "tipped employee" a reduced direct wage of $2.13 per hour as long as the employee receives at least the minimum wage in wages and tips combined. 29 U.S.C. § 203(m). Thus, employers are entitled to take a "credit" against their minimum-wage obligations to account for the fact that tipped employees receive non-wage compensation in the form of tips. If tips do not make up the difference between the direct wage paid by the employer and the full minimum wage, the employer must supplement wages so that the employee receives no less than the full minimum wage for all hours worked. *Id.*; 29 C.F.R. § 531.59.

The statute defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). To be entitled to the tip credit, the employer must inform the tipped employee of the tip-credit provision and the employee must retain all tips other than those contributed to a valid tip pool. *Id.* § 203(m). These are the only requirements the statute imposes. The statute does not draw any distinction between "tip-producing" and "non-tip-producing" duties or otherwise restrict the kinds of duties an employer may assign to an employee who customarily and regularly earns more than $30 per month in tips in his "occupation."

2. In 1967, the Department of Labor (DOL) promulgated regulations implementing the tip-credit provision. See Wage Payments under the Fair Labor Standards Act of 1938, 32 Fed. Reg. 13575 (Sept. 28, 1967). Consistent with the statute, the regulations provide that an employee's status as a "tipped employee" turns on whether he receives the requisite

amount of tips in his "occupation": "An employee who receives tips, within the meaning of the Act, is a 'tipped employee' under the definition in section 3(t) when, in the occupation in which he is engaged, the amounts he receives as tips customarily and regularly total 'more than $30 a month.'" 29 C.F.R. § 531.56(a). An "employee employed in an occupation in which the tips he receives meet this minimum standard is a 'tipped employee' for whom the wage credit provided by section 3(m) may be taken in computing the compensation due him under the Act for employment in such occupation." *Id.*

Recognizing that there may be unusual situations in which an employee has more than one "occupation" for the same employer, DOL also issued a "dual-jobs" regulation explaining how the tip credit applies in that situation. *Id.* § 531.56(e). The regulation provides that when "an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter," he "is a tipped employee only with respect to his employment as a waiter." *Id.* In other words, the employee "is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man." *Id.*

At the same time, DOL was careful to distinguish the dual-jobs scenario from the much more common situation in which a tipped employee is assigned duties related to his occupation that are not themselves directed toward producing tips. In that event, the tip credit is available because the employee remains employed in a single "occupation":

> Such a [dual jobs] situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or

> glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. *Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.*

Id. (emphasis added).

3. The dual-jobs regulation has remained unchanged since it was issued in 1967. In the intervening years, DOL has issued several opinion letters addressing the availability of the tip credit under the dual-jobs regulation, and has further construed the regulation through an internal agency handbook. As DOL itself recently acknowledged, its guidance on the meaning of the dual-jobs regulation has been confusing and inconsistent, to say the least.

In 1969, DOL was asked to clarify whether the tip credit could be taken for taxicab drivers who also worked as dispatchers and supervisors. Opinion Letter No. 981 (Apr. 16, 1969), Pet. App. 66a. Consistent with the statute and regulations, DOL's analysis focused on whether the duties of dispatching and supervising were related to a taxicab driver's duties or whether instead they were duties of a separate occupation. Concluding that the duties were "unrelated for purposes of section 531.56(e) of Part 531, so that the subject employees may be regarded as being employed in dual jobs," DOL advised that such an employee is "employed in two occupations"; that he is "a tipped employee only with respect to his employment as a taxicab driver"; and that "no tip credit can be taken for his hours of employment in his occupation of dispatcher and/or supervisor." *Id.*

In 1980, DOL addressed the availability of the tip credit for restaurant servers who performed various duties after the restaurant closed. Opinion Letter No. WH-502 (Mar. 28, 1980), Pet. App. 67a–68a. The servers would "clean the salad bar, place the condiment crocks in the cooler, clean and stock the waitress station, clean and reset the tables (including filling cheese, salt and pepper shakers) and vacuum the dining room carpet." *Id.* at 67a. Citing the dual-jobs regulation, DOL explained that "related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips," but that "where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties, no tip credit may be taken for the time spent by a waitress performing maintenance duties." *Id.* at 67a–68a. Insofar as the after-hours duties were "assigned generally to the waitress/waiter staff," DOL concluded that "such duties constitute tipped employment within the meaning of the regulation," but cautioned that it "might have a different opinion if the facts indicated that specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming." *Id.* at 68a.

In 1985, DOL addressed the availability of the tip credit for restaurant servers who performed various duties before the restaurant opened. Opinion Letter No. FLSA-854 (Dec. 20, 1985), Pet. App. 69a–73a. The server with opening responsibilities was required to report 1.5 to 2 hours before opening and perform various tasks to prepare the restaurant such as setting tables, stocking the waitress station, checking supplies, and preparing the salad bar. *Id.* at 69a–70a. DOL advised that while the tip credit could be taken for preparatory work if such duties were incidental to

the servers' regular duties and were generally assigned to the waitstaff, the tip credit could not be taken if "the facts indicate that specific employees are routinely assigned to maintenance-type work or that tipped employees spend a substantial amount of time in performing general preparation work or maintenance." *Id.* at 72a. Citing the facts that only one server was assigned to perform all preparatory activities on a given day, that those activities consumed 30%–40% of the server's five-hour shift, and that the responsibilities extended to the entire restaurant rather than to specific areas or customers, DOL opined that no tip credit could be taken for the hours spent by the assigned server performing opening responsibilities. *Id.* at 72a–73a.

In 1988, DOL issued its Field Operations Handbook, which serves as a compilation of guidelines for DOL enforcement personnel and "is not used as a device for establishing interpretative policy." http://www.dol.gov/whd/FOH/index.htm. The Handbook serves purely an internal function, and has not always been publicly available. See *Murray* v. *Stuckey's, Inc.*, 50 F.3d 564, 569 n.5 (8th Cir. 1995).

Like the dual-jobs regulation itself, the Handbook provides that "[w]hen an individual is employed in a tipped occupation and a non-tipped occupation (dual jobs), the tip credit is available only for the hours spent in the tipped occupation." § 30d00(d), Pet. App. 64a–65a. The Handbook, like the dual-jobs regulation, also recognizes that the tip credit may be taken for time tipped employees spend performing duties related to their occupations that are not directed toward producing tips. § 30d00(e), Pet. App. 65a. Without explanation or citation of authority, however, the Handbook purports to impose a 20% cap on such duties:

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e., maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Id.

More recently, in January 2009, DOL issued an opinion letter addressing whether "barbacks" are tipped employees. Opinion Letter No. FLSA2009-12 (Jan. 15, 2009), Pet. App. 74a–79a. A barback is a bartender's assistant whose primary job is to restock the bar and ensure that it remains clean and organized. *Id.* at 74a. Although the barback works in the bar area in view of customers, he does not receive tips from customers but instead receives a share of the bartender's tips. *Id.* at 74a–75a. Without mentioning the Handbook or its 20% rule, or specifying which, if any, of a barback's duties are directed toward producing tips, DOL concluded that a barback "qualifies as a tipped employee" for whom the tip credit is allowed. *Id.* at 76a–78a.

Finally, in March 2009, DOL issued and simultaneously withdrew an opinion letter from January 2009 that expressly disavowed the Handbook's 20% cap on related but non-tip-producing duties. Opinion Letter No. FLSA2009-23 (Jan. 16, 2009), Pet. App. 80–87a. Recognizing that the Handbook had produced "confusion and inconsistent application" and that "clarity" was necessary to "allow employers to determine up front whether their actions are in compliance with the Act," *id.* at 81a, the January 2009 opinion letter would have provided new guidance to "supersede" DOL's statements in Handbook § 30d00(e), *id.* at 86a. In that letter, DOL acknowledged that the 20% rule "benefits neither employees nor employers," and stated that it did "not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met." *Id.* at 84a. DOL indicated that a "revised [Handbook] statement will be forthcoming." *Id.* at 86a.

Since withdrawing its January 2009 opinion letter, DOL has provided no additional guidance on the dual-jobs regulation and has instead reverted to the 20% rule. In the Eighth Circuit, DOL filed an *amicus* brief contending that under the dual-jobs regulation, as construed by the Handbook, an employer cannot take the tip credit for time spent by a tipped employee in duties related to the tipped occupation that do not produce tips when the employee spends more than 20% of his time in such related duties. DOL Br. 1–2.

B. Proceedings Below.

1. Applebee's International, Inc. and its affiliates own and operate casual dining restaurants under the

name Applebee's Neighborhood Grill & Bar. Plaintiffs are current and former Applebee's servers and bartenders who claim they spent more than 20% of their work time performing general preparation, maintenance, and other non-tipped work and were not paid the full hourly minimum wage for that time. It is undisputed that plaintiffs' total compensation in wages and tips combined at least equaled, and often exceeded, the minimum wage for all hours worked. Pet. App. 2a–3a.

The named plaintiffs are Gerald Fast, Talisha Cheshire, and Brady Gehrling. Plaintiff Fast complains that he was required to devote time as a bartender to activities such as wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers, and otherwise preparing for customers or cleaning up after the restaurant closed. Pet. App. 3a. Similarly, all three plaintiffs allege that as servers they were required to perform non-tipped work such as cleaning, sweeping, stocking service areas, rolling silverware into napkins, preparing the restaurant to open, and cleaning up after it closed. *Id*.

Although plaintiffs concede that they received at least the minimum wage in wages and tips combined for all hours worked, they claim that Applebee's owes them additional wages because these duties did not produce tips and consumed more than 20% of their work time.

2. Applebee's moved for summary judgment, contending that the duties plaintiffs performed were part of their occupations as servers and bartenders and that Applebee's was thus entitled to take the tip credit for the time plaintiffs spent performing those duties, regardless of whether the duties produced tips. As Applebee's explained, neither the statute nor

the dual-jobs regulation draws any distinction between duties that produce tips and those that do not; nor do they limit the amount of non-tip-producing duties that may be assigned to a tipped employee. Instead they require only that the employee customarily and regularly receive more than $30 a month in tips in his "occupation" and that the employee's duties relate to that occupation. Accordingly, Applebee's contended that the Handbook's 20% cap on related but non-tip-producing duties was inconsistent with both the statute and the dual-jobs regulation.

The district court disagreed. Adopting the Handbook's 20% rule, the court held that if a tipped employee spends more than 20% of his time performing duties that are incidental to his occupation but are not themselves tip-producing, "then the employer may not take the tip credit for any of the employee's time spent on [those] duties." Pet. App. 50a. Because there were disputed issues of fact as to whether Applebee's had taken the tip credit when plaintiffs spent more than 20% of their time performing incidental but non-tip-producing duties, the court denied summary judgment. *Id*. at 54a.

Shortly thereafter, the court certified the tip-credit claim as a collective action under 29 U.S.C. § 216(b). The potential class included 43,000 current and former Applebee's servers and bartenders, and more than 5,500 ultimately opted in to the class. Given the scope of the collective action and the uncertainty in the law, Applebee's moved the court to certify its summary-judgment ruling for interlocutory appeal. The court initially denied Applebee's request, but later agreed that interlocutory appeal of the tip-credit issue was appropriate, vacated its earlier summary-

judgment ruling, and directed the parties to submit additional briefing on the issue.

After additional briefing, the district court again denied summary judgment and simultaneously certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 39a–40a. The court recognized that both the statute and the dual-jobs regulation permit an employer to take the tip credit "[s]o long as a tipped employee is doing related work *in his or her tipped occupation*," but concluded that the Handbook's 20% cap was a "persuasive and practical" guideline "for determining how much non-tipped work can be assigned to the employee before the employee has moved into a non-tipped occupation and becomes a dual employee." *Id.* at 23a, 34a. Concluding that "Congress must have assumed that the tip credit would be applicable when an employee was doing primarily tip producing work," the court deferred to the Handbook, even though it puts tipped employees "in a position to potentially earn higher than minimum wage." *Id.* at 28a–29a.

3. The Eighth Circuit affirmed. It concluded that the statute is ambiguous because it does not define the term "occupation" or address the possibility of an employee working more than one occupation for the same employer. Pet. App. 10a–11a. Likewise, it concluded that the dual-jobs regulation is ambiguous because it does not address whether the tip credit is available when a tipped employee performs related but non-tip-producing duties more than part of the time or occasionally. *Id.* at 12a.

Given these perceived ambiguities, the court of appeals deferred to the Handbook's "interpretation" of the dual-jobs regulation under *Auer* v. *Robbins*, 519 U.S. 452 (1997). Pet. App. 12a–16a. Ignoring both DOL's acknowledged inconsistency on the issue and

the immense practical difficulties the 20% rule would create for restaurants and other employers of tipped employees, the court concluded that the Handbook's 20% cap on "related but nontipped duties" was "a reasonable interpretation of the regulation" and therefore controlled. *Id*. at 15a.

Having thus construed the dual-jobs regulation to incorporate the Handbook's 20% rule, the court never returned to consider whether the regulation, so construed, was consistent with the statute. It simply asserted—without explanation and before even determining what the regulation meant—that it "owe[d] *Chevron* deference" to the regulation. Pet. App. 13a. Nor did the court specify those duties to which the 20% rule applies, *i.e.*, "which specific duties are subject to the 20 percent limit for related duties in a tipped occupation and which duties are the tip-producing part of the server's or bartender's tipped occupation itself." *Id*. at 16a. Leaving this issue for the district court on remand, the court of appeals held "only that . . . the Handbook's interpretation of [the dual-jobs regulation] governs this case." *Id*. at 17a.

The court of appeals denied rehearing en banc, but four judges on that court dissented and voted to rehear the case. Pet. App. 63a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and reverse the court of appeals' erroneous interpretation of the FLSA's tip-credit provision. The decision below implicates an important and recurring question of federal law, resolves it in a way that conflicts with this Court's cases and decisions in other circuits, and adopts an utterly unworkable standard that has no basis in the text or purpose of the FLSA and that will impose crushing administrative and financial

burdens on restaurants and other employers of tipped employees.

The Eighth Circuit's decision adopting the Handbook's 20% rule conflicts with the decisions of two other circuits, which have correctly held that the availability of the tip credit turns on whether the duties a tipped employee performs are related to his occupation, not whether the duties are directed toward producing tips. One of those decisions flatly rejected the Handbook's 20% rule as unsound and unworkable. This Court's guidance is necessary to resolve the conflict among the circuits and ensure that employers and employees are not subject to different rules based on the jurisdictions in which they do business.

The decision below also conflicts with this Court's cases and decisions of other circuits regarding the deference owed to an agency's interpretation of its regulations. In deferring to the Handbook, the court of appeals (1) effectively allowed DOL to rewrite the dual-jobs regulation to incorporate the Handbook's 20% rule; (2) failed to determine whether the regulation as construed by the Handbook was consistent with the statute; and (3) ignored DOL's avowedly inconsistent positions as to the propriety of the 20% rule. In each respect, the decision below disregards this Court's binding precedent and creates a conflict with the decisions of other circuits.

Finally, the decision below adopts a wholly unworkable standard that will severely burden restaurants and other employers of tipped employees. To comply with the 20% rule, employers will have to classify the duties performed by tipped employees as either "tip-producing" or "non-tip-producing" and somehow track and record the amount of time each employee spends performing non-tip-producing duties to determine

whether it exceeds the 20% limit. If it does, the employer will then have to make an additional wage payment to compensate the employee at the full minimum wage for the time spent performing non-tip-producing duties, even though the employee was already paid at least the minimum wage in wages and tips combined for all hours worked. No policy of the FLSA justifies these enormous administrative and financial burdens, which will upset decades of settled industry practice and force employers to choose between forgoing the tip credit altogether, raising their prices, or closing their doors. The Court should grant certiorari to address this exceptionally important issue.

I. THE COURTS OF APPEALS ARE DIVIDED AS TO THE PROPER INTERPRETATION OF THE FLSA'S TIP-CREDIT PROVISION.

Review should be granted to resolve the conflict among the circuits as to the proper interpretation of the FLSA's tip-credit provision. Contrary to the Eighth Circuit's decision in this case, which is the first and only appellate decision to endorse the Handbook's 20% rule, and contrary to a recent Fifth Circuit decision holding that the tip credit is not available when a tipped employee spends an entire shift performing related but non-tip-producing duties, the Eleventh and Sixth Circuits have correctly held that the relevant question under both the statute and the dual-jobs regulation is whether the duties the tipped employee performs are related to his occupation, not whether they are directed toward producing tips. This Court's review is necessary to resolve the conflict and ensure that tipped employees and their employers throughout the country are subject to the same nationally uniform rule.

1. The decision below conflicts directly with the Eleventh Circuit's decision in *Pellon* v. *Business Representation International, Inc.*, 291 F. App'x 310 (11th Cir. 2008) (per curiam). In that case, a group of airport employees commonly known as "skycaps" alleged that their employers had improperly taken the tip credit for the time they spent performing non-tipped duties such as transporting luggage to screening locations, collecting and reconciling baggage fees, assisting disabled passengers, and keeping the baggage-claim area and check-in areas clean. See *Pellon* v. *Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007).

The district court, whose decision the Eleventh Circuit affirmed "on the basis of the district court's well-reasoned order," *Pellon*, 291 F. App'x at 311, held that because all of these non-tipped duties were related to a skycap's occupation, "they 'need not by themselves be directed toward producing tips'" under the dual-jobs regulation. *Pellon*, 528 F. Supp. 2d at 1313 (quoting 29 C.F.R. § 531.56(e)). Relying on the district court's initial decision in this case, the skycaps had contended that "an employee's duties incidental to direct tipped duties may not exceed 20% of their time without the employee being compensated with at least minimum wage for that period of time." *Id.* (citing *Fast* v. *Applebee's Int'l, Inc.*, 502 F. Supp. 2d 966, 1002–03 (W.D. Mo. 2007)). The court emphatically rejected the 20% rule as "infeasible," "impractical," and "impossible":

> Permitting Plaintiffs to scrutinize every day minute by minute, attempt to differentiate what qualifies as a tipped activity and what does not, and adjust their wage accordingly would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit

> for employers. First of all, ruling in that manner would present a discovery nightmare. Of greater concern is the fact that under the reasoning proffered by Plaintiffs, nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts.

Id. at 1314.

The Eighth Circuit's decision in this case embracing the 20% rule is thus directly at odds with the Eleventh Circuit's decision in *Pellon*. Indeed, in its January 2009 opinion letter repudiating the 20% rule, DOL acknowledged the conflict between the decision in this case and *Pellon*. See Pet. App. 84a (contrasting the district court's decision in this case, which "prohibit[s] the taking of a tip credit for duties related to the tip producing occupation if they exceed 20 percent of the employee's working time," with the decision in *Pellon*, which held that "the 20 percent limitation does not apply to related duties"). Unlike the Eighth Circuit, the Eleventh Circuit correctly recognized that the availability of the tip credit turns on whether the duties at issue are related to the tipped employee's "occupation," not on whether the duties are directed toward producing a tip.[1]

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[1] Other courts, too, have rejected the 20% rule and recognized that the relevant question is whether the duties at issue are related to the tipped employee's occupation. *See Driver* v. *AppleIllinois, LLC*, 265 F.R.D. 293, 311 (N.D. Ill. 2010) (rejecting the Handbook's "20% limit on related but non-tipped work" as "not workable" and recognizing that the only relevant question is "whether a particular duty is part of a tipped occupation"); *Townsend* v. *BG-Meridian, Inc.*, No. 04-1162, 2005

2. The decision below also conflicts with the Sixth Circuit's reasoning in *Myers* v. *Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999), which likewise recognized that a tipped employee's status depends on whether the duties at issue are related to the employee's tipped occupation or whether instead they pertain to a different occupation. In *Myers*, each server was required to prepare the salads that his or her customers ordered; but on certain busy days, one server was assigned to a "salad shift," during which the employee had no customer-service duties and instead spent the entire shift preparing salads for the other servers. *Id.* at 548.

The issue before the Sixth Circuit was whether the servers qualified as tipped employees on days when they worked the salad shift. *Id.* Although there was no dispute that the servers were tipped employees on days when they waited tables, the court held that they were not "engage[d] in a customarily 'tipped' occupation" during their salad shifts because their "duties more closely resembled those of non-tipped kitchen staff than tipped table service personnel." *Id.* at 550; see also *id.* (during salad shifts the servers "solely performed duties traditionally classified as food preparation or kitchen support work").

Thus, unlike the Eighth Circuit in the decision below, the Sixth Circuit did not ask whether the servers' non-tipped salad work consumed more than 20% of their work time, but instead properly focused on whether the duties at issue related to the occupation of a server. Cf. Pet. App. 72a (DOL opinion

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WL 2978899, at *7 (W.D. Okla. Nov. 7, 2005) (holding that restaurant was permitted to take tip credit for time waitress spent performing non-tip-producing duties because "a tipped employee's status does not change simply because she is called upon to perform non-tipped duties related to her job").

letter advising that no tip credit can be taken for time servers spend preparing food for salad bar because "salad preparation activities are essentially the activities performed by chefs"). In other words, unlike the Eighth Circuit, and like the Eleventh Circuit, the Sixth Circuit recognized that the relevant question is whether the tipped employee is engaged in more than one "occupation," not whether he spends more than 20% of his time performing duties related to his occupation that do not produce a tip.

3. Contrary to the Eleventh and Sixth Circuits' decisions in *Pellon* and *Myers*, the Fifth Circuit recently ruled that an employer may not take the tip credit for the time servers spend performing "quality assurance" duties, if those duties are performed for an entire shift, even though the evidence in the case established that those duties were related to the servers' occupation. *Roussell* v. *Brinker Int'l, Inc.*, Nos. 09-20561, 10-20614, 2011 WL 4067171, at *10 (5th Cir. Sept. 14, 2011) (unpublished per curiam) (agreeing with the Eighth Circuit that "'even when the nontip-producing duties are related to a tipped occupation, if they are performed for an entire shift, the employee is not engaged in a tipped occupation and is not subject to the tip credit for that shift'"). The Fifth Circuit did not endorse the 20% rule, and its approach adds another wrinkle to the already confusing application of the statute and regulations governing tips. But in so doing, the Fifth Circuit embraced the erroneous notion, underlying the Eighth Circuit's decision here, that the dual-jobs regulation places a "temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation." Pet. App. 13a.

The petition should be granted to resolve the conflict between the Eighth and Fifth Circuits on the one hand and the Eleventh and Sixth Circuits on the other as to the proper interpretation of the FLSA's tip-credit provision. It is simply intolerable for an employer, such as Applebee's, to face fundamentally different rules on minimum wage for two identically situated employees solely because one works in a restaurant in Des Moines, Iowa, and the other in Savannah, Georgia. Only this Court can bring uniformity that the FLSA demands.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES AND DECISIONS OF OTHER CIRCUITS REGARDING *AUER* DEFERENCE.

In addition to creating a circuit split as to the FLSA's tip-credit provision, the decision below conflicts with this Court's cases and decisions of other circuits regarding the deference owed to an agency's interpretations of its regulations, or "*Auer* deference." The court of appeals' deference analysis conflicts with this Court's precedents and other circuits' decisions in three respects. *First*, the court gave *Auer* deference to the Handbook's interpretation of the dual-jobs *regulation*, but failed to consider the ultimate question whether the regulation as construed by the Handbook is consistent with the *statute*. *Second*, the court improperly permitted DOL to create *de facto* a new regulation under the guise of interpreting the dual-jobs regulation. *Third*, the court deferred to DOL's current interpretation of the dual-jobs regulation despite the agency's inconsistent positions. The Court should grant certiorari to correct the Eighth Circuit's misapplication of this Court's precedents and to restore uniformity in the circuits on these

important and recurring questions of administrative law.

1. The crux of the court of appeals' decision is its extension of *Auer* deference to the Handbook's "interpretation" of the dual-jobs regulation. For the reasons discussed below, the court's *Auer* deference analysis is deeply flawed on its own terms. More fundamentally, the court erred in treating *Auer* deference as dispositive without asking the ultimate question whether the regulation, as construed, is a permissible interpretation of the statute under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court concluded that the dual-jobs regulation was entitled to *Chevron* deference *before* it even decided what the regulation meant. Pet. App. 8a ("The parties do not dispute that § 531.56(e) is entitled to *Chevron* deference. They do disagree as to its meaning."). That is backwards: A court cannot decide if a regulation is a permissible interpretation of the statute until it first decides what the regulation means.

In failing to ask whether the dual-jobs regulation as construed by the Handbook was consistent with the statute, the court of appeals deviated from this Court's precedents, which make clear that when an agency's interpretation of its regulation potentially conflicts with the underlying statute, *Auer* deference is merely the beginning of the inquiry, not the end. In *United States* v. *Larionoff*, 431 U.S. 864 (1977), for example, this Court deferred to the agency's interpretation of its regulations, but then proceeded to invalidate the regulations as construed because they conflicted with the underlying statute. *Id.* at 873 ("[W]e accept the Government's reading of those regulations as correct. . . . This, however, does not end our inquiry. For regulations, in order to be valid,

must be consistent with the statute under which they are promulgated."). Likewise, in the seminal precursor to *Auer* itself, this Court clearly recognized that the process for determining the proper interpretation of a regulation is "quite a different matter" from the "legality of the result reached by this process." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *id.* at 418–19 (directing lower court to determine the "statutory validity of the regulation as we have construed it"); *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 95–96 (1995) (first deferring to agency's interpretation of regulation, then assessing whether regulation as construed was consistent with statute).

Consistent with these decisions, other circuits have held that when an agency's interpretation of a regulation is challenged as conflicting with both the regulation and the underlying statute, the court must first "determine what the regulation actually means" applying the principles set forth in *Auer*, and then "move on to the second step of *Chevron*, and decide whether the regulation is based on a reasonable construction of the statute." *United States* v. *Deaton*, 332 F.3d 698, 709 (4th Cir. 2003) (citation omitted); accord *United States* v. *Johnson*, 437 F.3d 157, 177–78 (1st Cir.) ("the actual meaning of the regulation must be determined before moving to the second step of *Chevron*"), *vacated on other grounds*, 467 F.3d 56 (1st Cir. 2006); see also Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 73 (2000) (*Auer* inquiry is a "prelude" to *Chevron* step two because "the output of applying

[*Auer*] deference is an input in the application of *Chevron* deference").[2]

The decision below conflicts with these authorities. The court of appeals deferred to the Handbook's interpretation of the dual-jobs regulation under *Auer*, but never determined whether the regulation, as construed by the Handbook, was a permissible construction of the statute under *Chevron*. This error was critical. Had the court properly proceeded to test its interpretation of the dual-jobs regulation against the statutory definition of "tipped employee," it could not have concluded that "the Handbook's interpretation of § 531.56(e) governs this case." Pet. App. 17a. The availability of the tip credit under the statute depends on whether an employee is "engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Thus, the relevant question is what "occupation" the employee is engaged in and whether the duties he is required to perform are part of, or related to, that occupation, not whether those duties produce tips.

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[2] The Ninth Circuit has taken a different approach, holding that a "court need not accept an agency's interpretation of its own regulations if that interpretation is . . . inconsistent with the statute under which the regulations were promulgated." *Mines* v. *Sullivan*, 981 F.2d 1068, 1070 (9th Cir. 1992); *accord Simpson* v. *Hegstrom*, 873 F.2d 1294, 1299 (9th Cir. 1989). Under this approach, when an agency's interpretation of its regulation conflicts with the statute, the court will reject the agency's interpretation of the regulation rather than invalidate the regulation as interpreted. Compared to the Eighth Circuit's approach, the Ninth Circuit's rule at least recognizes that consistency with the statute is the ultimate criterion. In all events, this further split of authority only underscores the need for this Court's guidance.

Accordingly, although the duties an employee performs may be relevant in determining what "occupation" he is engaged in, nothing in the statute requires that a tipped employee primarily perform tip-producing duties in his "occupation." Rather, Congress specified the amount of tip-producing duties a tipped employee must perform—enough to customarily and regularly earn more than $30 a month in tips, and enough to ensure that the employee receives full minimum wage in wages and tips combined. By engrafting a further requirement that a tipped employee spend at least 80% of his time performing tip-producing duties, the court of appeals improperly deviated from the occupation-based analysis the statute requires and reached a result that defies both common sense and the ordinary meaning of the language Congress used in the statute. Under the court's decision, a waiter is no longer a waiter if he spends more than 20% of his time performing duties that are related to his job as a waiter but do not produce tips. And the tip-credit provision, which was designed to reduce the wage obligations for employers of tipped employees, becomes a mechanism for increasing the wages of such employees. That is not a reasonable interpretation of the statute.

2. The court of appeals' decision also conflicts with decisions of this Court and other circuits holding that *Auer* deference cannot be used to permit an agency to adopt *de facto* a new regulation under the guise of interpreting an existing one. This Court so held in *Christensen* v. *Harris County*, 529 U.S. 576 (2000). The issue there was whether the FLSA permits states to compel employees to use their accrued compensatory time in lieu of cash compensation for overtime work. DOL had promulgated a regulation

providing that an agreement regarding overtime pay could include provisions governing use of compensatory time. *Id.* at 587–88. DOL had also issued an opinion letter taking the position that an employer could compel use of compensatory time only if the employee had agreed in advance to such a practice. *Id.* at 586. DOL argued that its opinion letter interpreting the regulation as forbidding compelled use of compensatory time should be given *Auer* deference. *Id.* at 588.

This Court rejected DOL's plea for *Auer* deference because the regulation "[did] not address the issue of compelled compensatory time." *Id.* at 587. Noting that the regulation's text was permissive, not mandatory, the Court concluded that the regulation was not ambiguous because "[n]othing in the regulation even arguably require[d] that an employer's compelled use policy *must* be included in an agreement." *Id.* at 588. The Court accordingly held that *Auer* deference was unwarranted: "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*

Other circuits have likewise held that deference is inappropriate when an agency attempts to use an informal interpretation effectively to promulgate a new rule that is not supported by the statute or regulation at issue. In *Kilgore* v. *Outback Steakhouse of Fla., Inc.*, 160 F.3d 294 (6th Cir. 1998), for example, the Sixth Circuit refused to defer to DOL opinion letters purporting to impose a 15% cap on the amount of tips employers may require tipped employees to "tip out" to a tip pool because "neither the statute nor its regulations mention this requirement." *Id.* at 302–03. See also *Hardy Wilson Mem'l Hosp.* v. *Sebelius*, 616 F.3d 449, 458–61 (5th Cir.

2010); *Boose* v. *Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009); *City of Cleveland* v. *Ohio*, 508 F.3d 827, 847–48 (6th Cir. 2007); *In re Sealed Case*, 237 F.3d 657, 669 (D.C. Cir. 2001).

The decision below conflicts with these authorities. As in *Christensen* and *Kilgore*, nothing in the dual-jobs regulation even arguably places a 20% cap on the amount of related but non-tip-producing duties employers may assign to tipped employees and still take the tip credit. Rather, the regulation unambiguously provides that "related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips." 29 C.F.R. § 531.56(e). Contrary to the court of appeals' conclusion, the regulation does not purport to impose a "temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation." Pet. App. 13a. By manufacturing ambiguity where there is none, the court effectively permitted DOL to promulgate a new regulation without notice and comment, contrary to this Court's decision in *Christensen* and decisions of other circuits holding that *Auer* deference is inappropriate in such circumstances.

3. The decision below also disregards this Court's repeated instruction that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) (internal quotation marks omitted); see also *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993); *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991). In accord with these decisions, other circuits have held that an inconsistent agency position "does not merit the usual deference we would

reserve for an agency's interpretation of its own regulations." *Am. Fed'n of State, Cnty. & Mun. Employees* v. *Am. Int'l Grp., Inc.*, 462 F.3d 121, 129 (2d Cir. 2006); see also *Gose* v. *U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006); *Oregon* v. *Ashcroft*, 368 F.3d 1118, 1130 & n.11 (9th Cir. 2004), *aff'd*, 546 U.S. 243 (2006); *Malcomb* v. *Island Creek Coal Co.*, 15 F.3d 364, 369 (4th Cir. 1994); *Valley Camp of Utah, Inc.* v. *Babbitt*, 24 F.3d 1263, 1267–68 (10th Cir. 1994).

Contrary to these decisions, the Eighth Circuit gave no weight to DOL's inconsistent interpretations of the dual-jobs regulation. The inconsistency could hardly be more stark: Less than three years ago, DOL officially repudiated the Handbook's 20% rule, concluding that it "benefits neither employees nor employers."[3] Pet. App. 84a. Yet the Eighth Circuit completely disregarded DOL's repudiation of the 20% rule and gave full deference to DOL's resurrection of the 20% rule in its *amicus* brief, citing this Court's decision in *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865, 872 & n.7 (2009). But *Kennedy* involved conflicting interpretations by two separate agencies, not a situation in which a single agency had taken conflicting positions over time. *Id.* *Kennedy* certainly did not overrule this Court's precedents holding that inconsistent agency views are entitled to considerably less deference. The Court should grant certiorari to reaffirm that principle and resolve the conflict among the circuits created by the decision below.

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[3] Although DOL withdrew its January 2009 opinion letter "for further consideration" after the change in presidential administration, the letter nonetheless represents an "official rulin[g] of the Wage and Hours Division." Pet. App. 80a.

III. THE DECISION BELOW ADOPTS AN UNWORKABLE STANDARD THAT WILL SEVERELY BURDEN THE NATION'S EMPLOYERS.

Finally, the Court should grant review because the 20% rule is utterly unworkable and will impose significant and unjustified burdens on restaurants and other employers of tipped employees. If allowed to stand, the decision below will require employers in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota—as well as risk-averse employers elsewhere—to radically restructure the way in which they have traditionally done business or face liability under the FLSA for failing to pay their tipped employees the minimum wage, even when those employees, like plaintiffs here, earn more than the minimum wage in wages and tips combined.

The court of appeals' 20% rule will severely burden employers in the restaurant industry, as well as other employers of tipped employees such as hotels, taxicab companies, and airlines. The administrative burden alone will be overwhelming. To comply with the 20% rule, employers would first have to divide the various duties performed by tipped employees into "tip-producing" and "non-tip-producing" categories. These categories are hardly self-defining, and the court of appeals made no attempt to define them. Pet. App. 16a (declining to address "which specific duties are subject to the 20 percent limit for related duties in a tipped occupation and which duties are the tip-producing part of the server's or bartender's tipped occupation itself").

Of course, a wide range of duties performed by tipped employees are tip-producing in the sense that they contribute to a clean and efficient environment that enhances the customers' experience and thus

makes them more likely to leave a generous tip. But does that render a duty tip-producing for purposes of the 20% rule, or must the duty instead involve direct customer service? Needless to say, no statute or regulation defines the terms "tip-producing" and "non-tip-producing," and no body of case law exists to guide employers. These categories will have to be worked out case by case, with different courts (or perhaps juries) reaching different conclusions, and with employers in the meantime facing potential liability for guessing wrong.

But this is only the beginning. After somehow determining which duties are tip-producing and which are not, employers would next have to devise a system to track and record the amount of time tipped employees spend performing various duties throughout the day to determine whether the non-tip-producing duties consume more than 20% of their work time. See Pet. App. 19a (requiring employers to "maintain sufficient records from which the employees can differentiate between when they performed tipped duties and when they performed related but nontip-producing duties"). As the court in *Pellon* observed, this would be impractical in the extreme and would force employers either to keep tipped employees under "perpetual surveillance" or to require them, like lawyers or accountants, "to maintain precise time logs accounting for every minute of their shifts." 528 F. Supp. 2d at 1314. That simply is not feasible.

Then, of course, there is the added financial burden of paying tipped employees the full minimum wage for time spent performing non-tip-producing duties, which would significantly increase payroll costs. Particularly in the highly competitive restaurant industry, which is already characterized by low

operating margins, the court of appeals' decision will almost certainly lead to shuttered windows, increased menu prices, or both, as employers struggle to comply with the 20% rule going forward while at the same time potentially facing retrospective liability for failing to comply with the 20% rule in the past. Thus, the impact of the ruling below will ultimately be felt by consumers and employees who will see higher prices and fewer employment opportunities.

Nothing in the FLSA justifies these burdens. The FLSA establishes a uniform national minimum wage, not a tiered minimum wage that privileges some occupations over others. There is no reason to believe that Congress intended to grant waiters, bartenders, and other tipped employees a special dispensation that allows them to earn more than employees in other occupations who do not receive tips. As long as tipped employees receive at least the minimum wage in wages and tips combined for all hours worked—as the tip-credit provision requires and as it is undisputed plaintiffs did here—no policy of the FLSA requires employers to provide additional compensation above and beyond the minimum wage simply because an employee spends more than 20% of his time performing duties that are not directed toward producing tips. Certainly the court of appeals identified none.

In short, the decision below will dramatically and adversely affect the way restaurants and other employers of tipped employees do business, and thus raises a question of exceptional importance that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Nos. 10–1725, 10–1726.

GERALD A. FAST; TALISHA CHESHIRE; BRADY GEHRLING,
Appellees / Cross–Appellants,

v.

APPLEBEE'S INTERNATIONAL, INC.,
Appellant / Cross–Appellee.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION;
SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR,
Amici on Behalf of
Appellees / Cross–Appellants,

NATIONAL COUNCIL OF CHAIN RESTAURANTS;
NATIONAL RESTAURANT ASSOCIATION,
Amici on Behalf of
Appellant / Cross–Appellee.

Submitted: Jan. 13, 2011.
Filed: April 21, 2011.

Rehearing and Rehearing En Banc
Denied July 6, 2011.[*]

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[*] Judges Riley, Loken, Gruender, and Shepherd would grant the petition for rehearing en banc.

Before MURPHY, HANSEN, and MELLOY, *Circuit Judges.*

HANSEN, *Circuit Judge*.

Applebee's International, Inc. (Applebee's) brings this interlocutory appeal from the district court's[1] denial of summary judgment in this employment wage dispute. Gerald A. Fast, Talisha Cheshire, and Brady Gehrling represent a class of 5,543 individuals (collectively "the employees") who are current and former servers and bartenders at Applebee's restaurants. They brought suit under the Fair Labor Standards Act (FLSA) based on Applebee's use of the "tip credit" to calculate their wages for purposes of meeting the minimum wage requirements of the FLSA. In denying Applebee's motion for summary judgment, the district court concluded that the Department of Labor (DOL)'s interpretation of the FLSA as contained in the Wage and Hour Division's Field Operations Handbook (Handbook) was reasonable, persuasive, and entitled to deference. Applebee's challenges that conclusion as inconsistent with the relevant statutes and the related regulations. The employees cross-appeal the district court's allocation of the burden of proof. We affirm the district court's order.

I

The fighting issue in this case is how to properly apply the "tip credit" to employees whom both sides agree are "tipped employees" as that term is defined in the FLSA. The FLSA allows employers to pay a

[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri, who certified the appeal pursuant to 28 U.S.C. § 1292(b).

minimum cash wage of $2.13 per hour to employees in a "tipped occupation" as long as the employee's tips make up the difference between the $2.13 hourly cash wage and the current federal minimum wage, presently $7.25 per hour. *See* 29 U.S.C. § 203(m); 29 U.S.C. § 206(a)(1). The plaintiff servers and bartenders claim that Applebee's requires them to perform nontip-producing duties for significant portions of their shift while compensating them at the lower $2.13 tipped rate. The plaintiff bartenders claim that they were required to perform such duties as wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers, and cleaning up after closing hours. The servers claim that they performed such duties as cleaning bathrooms, sweeping, cleaning and stocking serving areas, rolling silverware, preparing the restaurant to open, and general cleaning before and after the restaurant was open. Applebee's counters that servers and bartenders are in tipped occupations, so that any incidental duties they perform as part of that occupation are subject to the tip credit and can be paid at the $2.13 hourly rate, regardless of the amount of time spent performing these duties, as long as each employee's tips make up the difference between $2.13 per hour and the full minimum wage rate. While the employees dispute its relevancy, both sides agree that the plaintiffs received in employer cash payments and tips a sum at least equal to the required minimum wage per hour for all hours worked.

The DOL regulations recognize that an employee may hold more than one job for the same employer, one which generates tips and one which does not, and that the employee is entitled to the full minimum wage rate while performing the job that does not generate tips. *See* 29 C.F.R. § 531.56(e). The DOL's

1988 Handbook provides that if a tipped employee spends a substantial amount of time (defined as more than 20 percent) performing related but nontipped work, such as general preparation work or cleaning and maintenance, then the employer may not take the tip credit for the amount of time the employee spends performing those duties. (Appellant's Add. at 32, DOL Handbook § 30d00(e).) The district court deferred to the DOL's interpretation contained in the DOL Handbook to deny summary judgment to Applebee's.

The parties also disputed the proper burden of proof. The employees argued that they needed to establish only that Applebee's paid them $2.13 per hour for a period of time and then the burden shifted to Applebee's to prove that it was allowed to take the tip credit by presenting evidence of the number of hours the employees worked in a tipped occupation. The district court disagreed, concluding that the employees had to do more than show that they were paid $2.13 per hour because the employees did not dispute that they were subject to the tip credit for at least some of their work. The district court concluded that the employees had to "make a prima facie showing which hours were not properly paid" (Dist. Ct. Mar. 4, 2010 Order at 19), and if there were no records of the time spent on specific duties, then the burden would shift to Applebee's to show that the employees' calculations were not reasonable.

Applebee's filed this interlocutory appeal, arguing, as noted above, that the Handbook is contrary to the express language of the statute and regulations. The employees cross-appeal the district court's allocation of the burden of proof to the employees to prove they were not properly compensated. Both issues are

included in the district court's certification permitting an interlocutory appeal, and we address them in turn.

II.

A. Engaged in a Tipped Occupation

In this interlocutory appeal, we conduct a *de novo* review of the district court's summary judgment ruling and its statutory interpretation. *See Haug v. Bank of Am., N.A.*, 317 F.3d 832, 835 (8th Cir.2003). The FLSA requires employers to pay a minimum hourly wage, which is currently $7.25 per hour. *See* 29 U.S.C. § 206(a)(1). The "wage" paid to a "tipped employee" is defined as the sum of (1) the cash wage paid to the employee, which must be at least the minimum cash wage that was required to be paid to tipped employees on August 20, 1996 ($2.13 per hour), and (2) an additional amount based on the tips received by the employee that is equal to the difference between the amount stated in paragraph (1) and the current rate required by § 206(a)(1). *See* 29 U.S.C. § 203(m) (defining "wage"). The amount required by paragraph (2) is commonly referred to as the "tip credit" because it allows the employer to avoid a larger cash payment to the employee as long as the employee's tips make up the difference between $2.13 per hour and the current minimum wage.

A "tipped employee" as used in § 203(m) is defined as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." § 203(t). The tip credit does not apply to just any employee who ever received a tip. It applies only to employees engaged in an occupation where the employee "customarily and regularly receives more than $30 a month in tips." The parties

do not dispute that the servers and bartenders involved in this case are engaged in an occupation in which they customarily and regularly receive at least $30 per month in tips and are "tipped employees" under the statute. The dispute revolves around whether the servers and bartenders are "engaged" in those occupations when Applebee's requires them to perform duties that do not directly result in a tip. Applebee's argues that the statute is focused on the occupation, not the specific duties performed, such that it can take the tip credit for the entirety of a server's or bartender's shift, as long as the employee receives sufficient tips during the shift to make up the difference between $2.13 per hour and $7.25 per hour, regardless of how much time the employee spends performing tip-producing duties. The employees argue that Applebee's requires them to perform duties outside of the server and bartender occupations for significant parts of their shifts, such that they are entitled to full minimum wage rates when they are not "engaged" in the duties of those occupations.

As noted previously, an employee is a tipped employee if two things occur: 1) he is engaged in an occupation, and 2) the occupation is one in which he regularly and customarily receives at least $30 in tips per month. § 203(t). "Occupation" is not defined in the FLSA. The DOL has promulgated regulations to implement the tip credit. *See* 29 C.F.R. §§ 531.50–531.60. Where a statute does not define a term, and "Congress has delegated authority to an agency to implement an ambiguous statute, we are required to accept the agency's statutory interpretation, so long as it is reasonable." *Eisenrich v. Minneapolis Retail Meat Cutters & Food Handlers Pension Plan*, 574 F.3d 644, 649 (8th Cir.2009) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844,

104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). If Congress's intent is clear, we need not defer to a regulation that is contrary to that clear intent. *See Senger v. City of Aberdeen*, 466 F.3d 670, 672 (8th Cir.2006). "But when Congress's intent is unclear and the statute contains an explicit or implicit gap, we will defer to the agency's regulation so long as it is not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id*. (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778).

The DOL's regulations recognize that an employee may be engaged in dual jobs. *See* 29 C.F.R. § 531.56(e) (entitled "dual jobs"); *see also* 29 C.F.R. § 516.28(a)(4) & (5) (requiring employers to keep records for its tipped employees of "[h]ours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours," and "[h]ours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours"). Section 531.56(e) states that if an employee works two jobs, one in which his work customarily and regularly produces tips and one in which it does not, the employee must be considered to be employed in two occupations, such that the tip credit may not be taken for hours of employment worked in the occupation not subject to tips. *See* § 531.56(e). The regulation gives the example of a hotel employee who works both as a bartender and as a maintenance man. "He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man." *Id*. It distinguishes that situation from "a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing

dishes or glasses," and "from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group." *Id*. "Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips." *Id.*

The parties do not dispute that § 531.56(e) is entitled to *Chevron* deference. They do disagree as to its meaning. While the regulation does provide the example of the waiter/maintenance man and distinguishes those dual jobs from a waitress or counterman performing related duties in their occupations, it does not further explain how to determine if an employee is engaged in dual jobs. The regulation recognizes that an employee may perform "related duties in . . . a tipped occupation" that are not themselves tip producing "part of [the] time" and "occasionally," and that the time spent performing these related duties is subject to the tip credit, but it does not address the impact of an employee performing related duties more than "part of [the] time" or more than "occasionally." Nor does it define "related duties" or address a tipped employee who performs duties unrelated to his tipped occupation. The regulation's failure to address these questions makes it ambiguous. *See Barnhart v. Walton*, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) ("[S]uch silence, after all, normally creates ambiguity. It does not resolve it.").

The DOL has further interpreted its dual jobs regulation through opinion letters, its 1988 Handbook, and in an amicus brief filed in this appeal. In its 1988 Handbook, the DOL recognized and repeated the distinctions made in the regulation between the waiter who also worked as a maintenance man and a waitress who performed some related nontip-producing

work. The Handbook states that an employer can take "the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities)," including the examples of a waiter "who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses." (Appellants' Add. at 32, DOL Handbook § 30d00(e).) The Handbook goes on and makes clear however, that such duties must be "incidental to the regular duties of the server" and must be "generally assigned to the servers." (*Id*.) The Handbook concludes that "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." (*Id*.) The Handbook incorporates answers provided in prior opinion letters, including that: a waitress assigned to general after-hours cleaning duties was performing tipped work as long as the duties were assigned generally to all wait staff and not specific employees, (Appellant's Add. at 22, Dep't of Labor, Wage & Hour Div., Op. Letter WH–502, 1980 WL 141336 (Mar. 28, 1980)); and a waiter assigned to perform opening preparatory work, where that waiter was the only one so assigned and spent 30 percent to 40 percent of his shift performing the preparatory work, was not performing tipped work, (Appellant's Add. at 25, Dep't of Labor, Wage & Hour Div., Op. Letter WH–FLSA–854 (Dec. 20, 1985)).

These types of agency interpretations (opinion letters and handbooks) of its own regulation are not entitled to *Chevron* deference because they are not

subject to notice and comment rule making procedures. *See Gonzales v. Oregon*, 546 U.S. 243, 255–56, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). Where the rule to be interpreted "is a creature of the Secretary's own regulations, [however, its] interpretation of it is, under [Supreme Court] jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (internal marks omitted). This type of *Auer* deference is appropriate for DOL interpretations of its own regulations, where the regulations "g[i]ve specificity to a statutory scheme the Secretary [of the DOL] [i]s charged with enforcing and reflect[ ] the considerable experience and expertise the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales*, 546 U.S. at 256–57, 126 S.Ct. 904. Less deference is due an agency when, "instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language," *id*. at 257, 126 S.Ct. 904, in which case an agency's interpretation is "entitled to respect" to the extent it has the "power to persuade," *id*. at 256, 126 S.Ct. 904 (discussing *Skidmore v. Swift & Co*., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). Nonetheless, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

The regulation at issue here is of the former type. Congress added the tip provisions to § 203(m) and added the definition of "tipped employee" to § 203(t) in 1966, but it did not define occupation or address the possibility of an employee working more than one occupation for the same employer. *See* Pub.L. 89–601, § 101, 80 Stat. 830, 830 (Sept. 23, 1966). The follow-

ing year, the Secretary of Labor promulgated the dual jobs regulation in an attempt to further define when an employee is engaged in a tipped occupation, adding subsection (e) to § 531.56. *See* Wage Payments Under the Fair Labor Standards Act of 1938, 32 Fed.Reg. 13,575, 13,580–81 (Sept. 28, 1967). Thus, the dual jobs regulation is not a regulation in which the agency merely parroted the terms of the statute such that the lesser *Skidmore* deference should apply. *See Gonzales*, 546 U.S. at 256–57, 126 S.Ct. 904.

The Supreme Court has accorded *Auer* deference to agency interpretations of ambiguous regulations with regular frequency in recent years. The Supreme Court relied on *Auer* in deferring to the Federal Reserve System Board's interpretation of Truth In Lending regulations as revealed in the Board's amicus brief filed with the Court where the regulation was silent on the issue at hand, making it ambiguous, and the Board's stated position was consistent with its past views. *See Chase Bank USA, N.A. v. McCoy*, ––– U.S. ––––, 131 S.Ct. 871, 880–81, 178 L.Ed.2d 716 (2011). It also cited Auer in "accept[ing] as correct" the Environmental Protection Agency's internal memorandum interpreting the Clean Water Act where the statute did not speak to the precise question at issue and the regulation was likewise ambiguous. *See Coeur Alaska, Inc. v. SE Alaska Conservation Council*, ––-U.S. ––––, 129 S.Ct. 2458, 2469–70, 174 L.Ed.2d 193 (2009). The Supreme Court gave *Auer* deference to the Treasury Department's interpretation of anti-alienation regulations even though the Department's interpretation had changed over time where there was "'simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question.'" *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*,

555 U.S. 285, 129 S.Ct. 865, 872 & n. 7, 172 L.Ed.2d 662 (2009) (quoting *Auer*, 519 U.S. at 462, 117 S.Ct. 905).

We conclude that the DOL's interpretation of § 531.56(e) is entitled to *Auer* deference. The regulation at issue in *Auer* adopted a salary basis test to interpret 29 U.S.C. § 213(a)(1) for purposes of the FLSA's overtime pay requirements. *See Auer*, 519 U.S. at 456–57, 117 S.Ct. 905. Likewise, the regulation here created the dual jobs test to further interpret § 203(t), a statute which the Department of Labor is "charged with enforcing," and the regulation "reflect[s] the considerable experience and expertise the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales*, 546 U.S. at 256–57, 126 S.Ct. 904. Section 203(t) of the FLSA does not define when an employee is "engaged in an occupation," and the DOL promulgated the dual jobs regulation to further clarify that phrase. The regulation is not a mere recitation of the words used by Congress in the statute, which itself does not even recognize the possibility of an employee performing more than one occupation for the same employer, let alone during the same shift. Thus, the dual jobs test set forth in the regulation is "a creature of the [DOL's] own regulations." *Auer*, 519 U.S. at 461, 117 S.Ct. 905 (internal marks omitted). Section 531.56(e) is itself ambiguous because it does not address an employee performing related duties more than "part of [the] time" or more than "occasionally," which further supports granting *Auer* deference to the agency's interpretation. *See Christensen*, 529 U.S. at 588, 120 S.Ct. 1655. The DOL's interpretation of § 531.56(e) is therefore "controlling unless plainly erroneous or

inconsistent with the regulation." *Auer*, 519 U.S. at 461, 117 S.Ct. 905 (internal marks omitted).

Applebee's argues that neither the statute nor the regulation places a quantitative limit on the amount of time a tipped employee can spend performing duties related to her tipped occupation (but not themselves tip producing) as long as the total tips received plus the cash wages equal or exceed the minimum wage. The regulation, to which we owe *Chevron* deference, makes a distinction between an employee performing two distinct jobs, one tipped and one not, and an employee performing related duties within an occupation "part of [the] time" and "occasionally." § 531.56(e). By using the terms "part of [the] time" and "occasionally," the regulation clearly places a temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation. "Occasionally" is defined as "now and then; here and there; sometimes." *Webster's Third New Int'l Unabridged Dictionary* 1560 (1986); *see also United States v. Hackman*, 630 F.3d 1078, 1083 (8th Cir.2011) (using dictionary to determine ordinary meaning of a term used in the commentary to the United States Sentencing Guidelines). The term "occasional" is also used in other contexts within the FLSA, such as in § 207, which allows a government employee to work "on an occasional or sporadic basis" in a different capacity from his regular employment without the occasional work hours being added to the regular work hours for calculating overtime compensation. *See* 29 U.S.C. § 207(p)(2). The DOL's regulation defines occasional or sporadic to mean "infrequent, irregular, or occurring in scattered instances." 29 C.F.R. § 553.30(b)(1). Thus, the DOL's regulations consis-

tently place temporal limits on regulations dealing with the term "occasional."

A temporal limitation is also consistent with the majority of cases that address duties related to a tipped occupation. The length of time an employee spends performing a particular "occupation" has been considered relevant in many cases. For example, even when the nontip-producing duties are related to a tipped occupation, if they are performed for an entire shift, the employee is not engaged in a tipped occupation and is not subject to the tip credit for that shift. *See, e.g., Myers v. Copper Cellar Corp.*, 192 F.3d 546, 549–50 (6th Cir.1999) (noting that 29 C.F.R. § 531.56(e) "illustrat[es] that an employee who discharges distinct duties on diverse work shifts may qualify as a tipped employee during one shift" but not the other and holding that servers who spent entire shifts working as "salad preparers" were employed in dual jobs, even though servers prepared the very same salads when no salad preparer was on duty, such that including salad preparers in a tip pool invalidated the pool); *Roussell v. Brinker Int'l, Inc.*, No. 05–3733, 2008 WL 2714079, *12–13 (S.D.Tex.2008) (employees who worked entire shift in Quality Assurance (QA) were not tipped employees eligible to be included in tip pool even though servers performed QA duties on shifts when no QA was working; court "agrees that such work likely can be considered incidental to a server's job when performed intermittently," but distinguished full shifts). The same is true of nontipped duties performed during distinct periods of time, such as before opening or after closing. *See Dole v. Bishop*, 740 F.Supp. 1221, 1228 (S.D.Miss.1990) ("Because [the] cleaning and food preparation duties [performed for substantial periods of time before the restaurant opened] were not

incidental to the waitresses' tipped duties, the waitresses were entitled to the full statutory minimum wage during these periods of time."). Conversely, where the related duties are performed intermittently and as part of the primary occupation, the duties are subject to the tip credit. *See, e.g., Pellon v. Bus. Representation Int'l, Inc.*, 528 F.Supp.2d 1306, 1313 (S.D.Fla.2007) (rejecting skycap employees' challenge to use of the tip credit where "the tasks that allegedly violate the minimum wage are intertwined with direct tip-producing tasks throughout the day"), *aff'd*, 291 Fed.Appx. 310 (11th Cir.2008).

Because the regulations do not define "occasionally" or "part of [the] time" for purposes of § 531.56(e), the regulation is ambiguous, and the ambiguity supports the DOL's attempt to further interpret the regulation. *See Auer*, 519 U.S. at 461, 117 S.Ct. 905. We believe that the DOL's interpretation contained in the Handbook—which concludes that employees who spend "substantial time" (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of the regulation. It certainly is not "clearly erroneous or inconsistent with the regulation." *Id*. The regulation places a temporal limit on the amount of related nontipped work an employee can do and still be considered to be performing a tipped occupation. The DOL has used a 20 percent threshold to delineate the line between substantial and non-substantial work in various contexts within the FLSA. For example, an "employee employed as seaman on a vessel other than an American vessel" is not entitled to the protection of the minimum wage or overtime provisions of the FLSA. *See* 29 U.S.C. § 213(a)(12). The DOL recognized that seamen serving

on such a vessel sometimes perform nonseaman work, to which the FLSA provisions do apply, and it adopted a regulation that provides that a seaman is employed as an exempt seaman even if he performs nonseaman work, as long as the work "is not substantial in amount." 29 C.F.R. § 783.37. "[S]uch differing work is 'substantial' if it occupies more than 20 percent of the time worked by the employee during the workweek." *Id*. Similarly, an employee employed in fire protection or law enforcement activities may perform nonexempt work without defeating the overtime exemption in 29 U.S.C. § 207(k) unless the nonexempt work "exceeds 20 percent of the total hours worked by that employee during the workweek." 29 C.F.R. § 553.212(a). And an individual providing companionship services as defined in 29 U.S.C. § 213(a)(15) does not defeat the exemption from overtime pay for that category of employee by performing general household work as long as "such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked." 29 C.F.R. § 552.6. The 20 percent threshold used by the DOL in its Handbook is not inconsistent with § 531.56(e) and is a reasonable interpretation of the terms "part of [the] time" and "occasionally" used in that regulation.

We note that the parties dispute which specific duties are subject to the 20 percent limit for related duties in a tipped occupation and which duties are the tip-producing part of the server's or bartender's tipped occupation itself. The regulation lists activities such as "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" as "related duties in . . . a tipped occupation." § 531.56(e). The Handbook repeats these examples and states that the 20 percent limit applies to "general preparation work or maintenance." (Appellant's Add.

at 32, DOL Handbook § 30d00(e).) Although the district court stated that "it was for the Court to decide what duties comprise the occupation of a server or bartender" (Dist. Ct. Order at 6 n. 3), the order under review did not do so and concluded only that "[e]mployees may be paid the tipped wage rate for performing general preparation and maintenance duties, so long as those duties consume no more than twenty percent of the employees' working time" (*id*. at 15). To the extent that questions remain concerning which duties the 20 percent rule applies to, those issues are beyond the scope of this interlocutory appeal, and we do not address them. We hold only that the district court properly concluded that the Handbook's interpretation of § 531.56(e) governs this case.

B. Burden of Proof

"[A]n employee who brings suit . . . for unpaid minimum wages . . . has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 686–87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), superceded by statute on other grounds, Portal–to–Portal Act of 1947, Pub.L. No. 49–52, § 5, 61 Stat. 84, 87 (May 14, 1947) (codified at 29 U.S.C. § 216(b)). Noting that it is the employer's duty to keep employment records, the Court in *Mt. Clemens* stated that as long as "the employer has kept proper and accurate records [,] the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises." *Id*. at 687, 66 S.Ct. 1187. Penalizing the employee in that situation would only encourage

employers to fail to keep proper records, so the Court held "that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id*. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id*. at 687–88, 66 S.Ct. 1187. By contrast, an exemption under the FLSA is an affirmative defense, and the employer bears the burden of proof to establish that an exemption applies. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

We have applied the *Mt. Clemens* burden shifting framework in FLSA cases concerning overtime wages, requiring the plaintiff employees to present evidence that they worked more than their scheduled hours without compensation. *See Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 783–84 (8th Cir.2009) (requiring employees to establish they were not relieved of their duties during mealtime, such that it was compensable time, and distinguishing other circuits that classified mealtimes as an exemption under the FLSA). Like mealtimes, the tip credit is not contained in the exemptions listed in 29 U.S.C. § 207(e), where the burden does shift to the employer to prove, as an affirmative defense, that the exemption applies. Thus, following *Hertz*, the *Mt. Clemens* standard places the initial burden on the employees to establish they worked hours for which they were not properly paid. Like the employees in *Hertz* who carried the burden of establishing "that their actions during their scheduled mealtimes were for the bene-

fit of the employer and thus not part of a bona fide meal period," 566 F.3d at 784, the employees here must establish that they spent a substantial amount of time performing nontip-producing duties such that they were not performing a tipped occupation for at least portions of their shifts. If Applebee's did not maintain sufficient records from which the employees can differentiate between when they performed tipped duties and when they performed related but nontip-producing duties within the meaning of the dual jobs regulation, then the employees can use the relaxed *Mt. Clemens* standard by "produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687, 66 S.Ct. 1187. The district court properly applied the *Mt. Clemen*s burden of proof.

III.

The district court's order is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT,
W.D. MISSOURI, CENTRAL DIVISION.

No. 06-4146-CV-C-NKL.

GERALD A. FAST, TALISHA CHESHIRE,
AND BRADY GEHRLING,
Plaintiffs,

v.

APPLEBEE'S INTERNATIONAL, INC.,
Defendant.

March 4, 2010.

ORDER

NANETTE K. LAUGHREY, *District Judge*.

Plaintiffs are current and former servers and bartenders at Applebee's restaurants. They claim that Applebee's violated the Fair Labor Standards Act ("FLSA") by paying less than the minimum wage for their work. To understand the gravaman of Plaintiffs' complaint requires an understanding of how the FLSA permits an employer to calculate the wages of a "tipped employee."

The FLSA generally requires employers to pay a minimum wage of $7.25 per hour. "Every employer shall pay to each of his employees who in any work week is engaged in commerce . . . not less than . . . [$7.25 per hour]." 29 U.S.C § 206(A)(1)(c). Employees

working in a "tipped occupation" are required to receive at least that minimum wage; however, their employers are permitted to pay a direct wage of $2.13 per hour, 29 U.S.C. § 203(m),[1] and then take a "tip credit" to meet the $7.25 per hour minimum wage requirement. A tip credit is the amount of the employee's tips that the employer can use to make up the difference between $2.13 per hour and the $7.25 minimum wage. So long as the tips received by the employee make up the difference between the tipped wage rate of $2.13 per hour and the full minimum wage rate of $7.25 per hour, an employer has satisfied the FLSA. The tip credit is found in a definitional section of the FLSA and states in relevant part:

> (m) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—
>
> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and
>
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The tip credit only applies to "tipped employees." A "tipped employee" is "any employee engaged in an

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[1] 29 U.S.C. § 203(m) sets the tipped wage at one half the minimum wage on August 20, 1996. On that date the minimum wage was $4.25 per hour; one half of that wage was $2.13 per hour.

occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t).

If an employee is engaged in both a tipped occupation and a non-tipped occupation, then the tip credit can only be taken for the time worked in the tipped occupation. An employer is specifically directed by the Department of Labor to keep separate records for tipped and non-tipped occupations.

> (a) With respect to each tipped employee whose wages are determined pursuant to section 3(m) of the Act, the employer shall maintain and preserve payroll or other records containing . . . . :
>
> > (4) Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.
> >
> > (5) Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

29 C.F.R. § 516.28.

The Department of Labor has adopted a regulation to deal with employees who work in dual occupations. It provides that:

> (b) Dual Jobs. In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least [$30] a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as

> a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning, and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R § 531.56(e). Thus, according to the regulation, just because an employee is not doing work that directly produces tips does not mean that a tip credit cannot be taken. So long as a tipped employee is doing related work *in his or her tipped occupation,* a tip credit is permitted.

The Department of Labor, however, has also developed guidelines for determining how much non-tipped work can be assigned to the employee before the employee effectively has moved into a non-tipped occupation and becomes a dual employee. Section 30d00(e) of the Department of Labor's Field Operations Handbook states:

> (e) Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes

> or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

So the Handbook indicates that employees who spend more than twenty percent of their time on general preparation and maintenance work cannot be considered tipped employees at least for the amount of time doing general preparation and maintenance.

Plaintiffs contend that Applebee's routinely assigned its servers and bartenders substantial general preparation and maintenance work. According to Plaintiffs, they regularly spent more than twenty percent of their time on general preparation and maintenance. For example, there is evidence that Applebee's required its servers and bartenders to clean and set up the restaurant before it was opened and after it was closed. It required servers to clean bathrooms during their shifts, to sweep the restaurant, to clean and stock service areas, roll silverware, and to do other duties not directed to specific customers. Applebee's took a tip credit for all work performed by its servers and bartenders, including this general preparation and maintenance work even when it amounted to more than twenty percent of the employee's work. Plaintiffs contend that this is a violation of the FLSA and that Applebee's was not

entitled to take the tip credit under these circumstances and, therefore, owes additional wages to the Plaintiffs.

Applebee's contends that it has not violated the FLSA. It claims that all work done by its servers and bartenders was part of their tipped occupation because anything that contributes to their customer's enjoyment is related to the occupation of server or bartender. Alternatively, Applebee's has argued that the tip credit is permitted even when a server or bartender works outside his or her occupation, so long as the work outside the tipped occupation does not exceed twenty percent of the employee's time. Applebee's has also suggested that the Department of Labor's dual occupation regulation only applies when the employee clocks in as a janitor instead of as a server or bartender. Therefore, unless the server actually clocks in as a janitor when they clean the restrooms, the employee would still be in the occupation of a server. Applebee's primary argument, however, is that the twenty percent rule contained in the Department of Labor's Handbook is contrary to the terms of the FLSA. Applebee's argues that the FLSA focuses not on the duties performed by the employee but rather on the occupation of the employee. According to Applebee's, once a server or bartender is classified as a server or bartender, they are only paid the tipped wage and a tip credit can be taken for all work performed, regardless of the duties assigned.

In an earlier order [Doc. 73], the Court determined that the Plaintiffs' interpretation of the FLSA was correct. It also determined that Applebee's was not entitled to summary judgment because there was

evidence from which a reasonable fact finder[2] could conclude that Applebee's had violated the FLSA by taking a tip credit when its servers and bartenders spent more than twenty percent of their time on general preparation and maintenance.

While preparing for trial, both the parties and the Court concluded that an interlocutory appeal on the proper standard for applying the tip credit to Applebee's servers and bartenders, as well as the allocation of the burden of proof, would materially advance the ultimate termination of the litigation. Therefore, the Court permitted the parties to submit additional briefing on these subjects.[3]

Having now considered the additional briefing submitted by the parties, the Court affirms its conclusion that Applebee's is not entitled to summary judgment on Plaintiffs' FLSA claim. The Court finds the Department of Labor's Regulation 531.56(e) and the Department of Labor's Handbook section 30d00(e), draw a persuasive line between when a tipped employee is engaged in a tipped occupation and when the employee is no longer working in that occupation. The Court also reaffirms its conclusion that the Plaintiffs have the burden of proof to show that class members performed work for which they have not been properly compensated and must present "suffi-

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[2] The parties have waived their right to a jury trial and, therefore, this case will be tried to the Court.

[3] The parties also addressed whether the definition of the occupation of a server or bartender was a question of law or fact. Both parties agreed that it was a question of law. Therefore, it is for the Court to decide what duties comprise the occupation of a server or bartender. What duties were actually performed by class members is a question of fact. *See, e.g., Wirtz v. Tyson's Poultry, Inc.,* 355 F.2d 255 (8th Cir.1966).

cient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mount Clemens Pottery Co.,* 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). If Applebee's has failed to maintain records to show the amount of time Plaintiffs spent on specific duties, the burden of proof shifts to Applebee's to show that Plaintiffs' calculation is unreasonable. *Id.*

I. Discussion

A. Tip Credit

The question before the Court is how to define the occupation of server and bartender for purposes of calculating the tip credit under the FLSA. As always, the starting point is the language of Congress.

Congress has stated that employees engaged in commerce shall be paid a minimum wage of $7.25 per hour. As for "tipped employees" further guidance is provided by Congress in 29 U.S.C. § 203(m). That section permits the employer to use the employee's tips to satisfy part of the employer's minimum wage obligation. Congress defines a "tipped employee" as one who engages "in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). The parties all agree that bartending and serving are tipped occupations. However, the parties disagree on what duties are properly assigned to the occupation of bartender and server. The FLSA does not specifically define the term "occupation."

Having considered the language, context and history of the FLSA, the Court concludes that Congress intended for the tip credit to be taken when employees are primarily engaged in tip producing duties. There would be no reason for Congress to

carve out a special rule for tip producing occupations if an employee was not regularly in a position to generate tips. If Congress had only intended to say that tips could be used to satisfy the minimum wage, it would have said simply that. Instead, Congress said that the employee's work must be within the "tipped occupation." Thus, Congress must have assumed that the tip credit would be applicable when an employee was doing primarily tip producing work. The history of the FLSA also supports that conclusion.

Originally, the FLSA did not address tips, and employers often required employees to surrender tips to their employers. *The Fair Labor Standards Act* § 9.VII.A at 549 (Ellen C. Kearns, et al. eds.1999) (citing *Williams v. Jacksonville Terminal Co.,* 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914 (1942) (allowing red caps' employer to keep tips and use them to meet minimum wage requirements)). In 1966, the FLSA was amended to allow employers to elect whether (a) to take credit for tips received and kept by a "tipped employee" by up to fifty percent of the minimum wage, or (b) to require employees to relinquish tips and be paid the full minimum wage (known as the "hourly wage method"). *Id.* at 550. In 1974, the FLSA was again amended "to make it clear that 'an employer could not use the tips of a tipped employee to satisfy more than 50 percent of the [FLSA's] . . . minimum wage and to ensure that" employees retained all tips, except where there were tip pooling arrangements. *Id.* at 551 (citation and internal quotation marks omitted). This movement toward allowing employees to retain tips—and away from allowing employers to merely pay the straight minimum wage using the employee's tips—indicates Congress' intent that employees be in a position to potentially earn higher than minimum wage by being

in a tipped occupation while permitting employers to use tips from that tipped occupation to make up part of the minimum wage.

The Court, as well as the Department of Labor, however, has recognized that defining an occupation at its margins is difficult, and it is also difficult to say what is and is not tip producing work. It would not be practical for an employer to keep track each time a server clears and wipes a table or pushes down a toaster or makes coffee either as assigned or because the cook was too busy and the customer needed a cup of coffee. Thus, the Department of Labor in 29 C.F.R. § 531.56(e) says that "related duties *in an occupation* that is a tipped occupation need not by themselves be directed toward producing tips."[4] The regulation gives an example of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes and glasses. This suggests that as long as the waitress is doing work generally assigned to waitresses, the tip credit can be taken even if there is not a direct link between the work and the tips. However, "where the facts indicate . . . that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." Field Operations Handbook § 30d00(e). "Because [the Department of Labor] . . . is the primary federal authority entrusted with determining the FLSA's scope, [the Handbook] 'while not controlling upon the courts by reason of [its] authority, [does] constitute a body of experience and informed judgment to which the courts and litigants may properly resort for

[4] The Department of Labor here refers to related duties in an occupation. It does not say duties related to the occupation.

guidance.'" *Reich v. Miss Paula's Day Care Center, Inc.,* 37 F.3d 1191, 1194 (6th Cir.1994) (citing *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 182, 66 S.Ct. 511, 90 L.Ed. 607 (1946); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)); *Brennan v. Ace Hardware Corp.,* 495 F.2d 368, 371 (8th Cir.1974); *Morgan v. Family Dollar Stores, Inc.,* 551, F.3d 1233, 1275 (11th Cir.2008) (noting that the Handbook is persuasive, though not entitled to *Chevron* deference).[5]

The Department of Labor's twenty percent cushion ensures that employers will not lose the tip credit until they assign substantial work that is not tip producing; i.e., general preparation and maintenance instead of work directed to specific customers, the source of all tips. Having already opined that the tip credit could be taken for work before and after a restaurant is open, *see* Dep't of Labor, Wage & Hour Div., Op. Letter WH-502, 1980 WL 141336 (March 28, 1980) (stating that cleaning work done after hours in a dining area was subject to tip credit), the Department of Labor recognized that a reasonable limit had to be placed on the amount of work that could be assigned that was not customer specific.

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[5] A twenty percent buffer is commonly used by the Department of Labor to give firm guidance to employers by quantifying what is perceived by the Department to be substantial. *See* 29 C.F.R. § 783.37 (stating that employees may be considered seamen so long as they spend less than twenty percent of their time on nonseaman's work); 29 C.F.R. § 553.212 (stating that employees may be subject to firefighter and law enforcement exemptions so long as no more than twenty percent of their time is spent on nonexempt work); 29 C.F.R. § 552.6 (stating that employees may be considered to be providing companionship services so long as they spend less than twenty percent of their time on general household work).

Otherwise, an employer could effectively use servers and bartenders as janitors and cooks both during and outside business hours when no customers were present.

In its 1985 opinion letter (Dep't of Labor, Wage & Hour Div., Op. Letter FLSA854 (Dec. 20, 1985)), the Department of Labor raised this very concern when it stated that the tip credit could be taken for "preparation work or after hours clean up if such duties are incidental to the waiter or waitress's regular duties and are assigned generally to the waiter/waitress staff. However, where the facts indicate that specific employees are routinely assigned to maintenance work *or* that tipped employees spend a substantial amount of time performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities." (Emphasis added.) By 1988, the Department of Labor's Handbook contained the twenty percent rule which defined when general preparation or maintenance work had become substantial.[6]

In contrast, Applebee's theory stretches the FLSA's tipped wage provision, the regulations, and the Handbook so far that they become meaningless. Under Applebee's reading of the FLSA, it can have its servers and bartenders perform an unlimited amount

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[6] The Department of Labor also submitted an opinion letter on January 16, 2009, which appears to have been triggered by this litigation. (Dep't of Labor, Wage & Hour Div., Op. Letter FLSA2009-023 (Jan. 16, 2009) (Published and simultaneously withdrawn, March 2, 2009), *available at* http://www.dol.gov/whd/opinion/FLSA/2009/2009-01-16-24-FLSA.htm (Last accessed March 2, 2010)). That opinion letter was withdrawn on March 2, 2009, and the Department of Labor stated it cannot be relied on as a statement of agency policy.

of non-tipped duties while Applebee's pays them the tipped wage, so long as those non-tipped duties are related in some amorphous or ever changing way to the occupation of servers or bartenders. For example, Applebee's has consistently claimed that cleaning bathrooms is related to the occupation of servers and bartenders.[7]

Though Applebee's argues that the Department of Labor's twenty percent limitation on general preparation and maintenance is impossible to enforce, Department of Labor guidance indicates that employers are capable of monitoring the work performed by their tipped employees. The regulations corresponding to § 203(m) anticipate that employers will separately track time spent by tipped employees on work within particular occupations—suggesting that the Department of Labor believes such tracking is possible. *See* 29 C.F.R. § 516.28.

Applebee's own history with FLSA enforcement in this case indicates that it is capable of enforcing the twenty percent limitation. It is undisputed that, in 2005, the Department of Labor charged several Applebee's restaurants with failing to comply with the Handbook's twenty percent limitation. Applebee's

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[7] While it is true that § 30d00(e) of the Department of Labor's Field Operations Handbook discusses "duties related to the tipped occupation" in contrast to 29 C.F.R. § 531.56(e) which refers to "related duties in an occupation," the Court concludes this is a matter of semantics and not substance. It is clear that the Handbook is discussing § 531.56(e) and is using the same examples of the Regulation. So the difference in language was not intended to expand the application of the tip credit. There is no reasonable argument that cleaning bathrooms is related to occupations where food and beverages are handled even if both the bathroom and the food promote a customer's enjoyment of the restaurant.

agreed to audit other locations to assure that this noncompliance was not systemic. Applebee's has emphasized that, in response to the investigation, it stopped paying the tipped wage to employees who were performing the non-tipped duties questioned by the Department of Labor (salad portioning and dishwashing). [*See* Doc. # 235 at 10.] Applebee's human resources representative testified that Applebee's understood that it was subject to the twenty percent limitation in the Handbook. Recently, Applebee's argued that the twenty percent limitation could be applied to situations where tipped employees perform work unrelated to their tipped occupation, such as a server performing purely janitorial duties like cleaning bathrooms. This argument and Applebee's response to the Department of Labor's investigation indicate that it is capable of assigning the work of its employees in order to either comply with the twenty percent limitation or pay its workers at the minimum wage for time spent on general preparation and maintenance.[8]

Applebee's relies on *Pellon v. Business Representation Int'l, Inc.,* 528 F.Supp.2d 1306 (S.D.Fla.2007), for the proposition that the Department of Labor's twenty percent limitation is unworkable. It is true

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[8] In fact, an employer is responsible to keep track of work assigned as well as work actually done by its employees. *See* 29 C.F.R. § 785.13:

> [I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

that the *Pellon* court commented that the Department of Labor's twenty percent rule was infeasible; however, that finding is inconsistent with 29 C.F.R. § 785.13 and 29 C.F.R. § 516.18, which require the employer to exercise control over work performed by an employee and to keep records of work done in tipped and non-tipped occupations. Both regulations are subject to *Chevron* deference. Further, the *Pellon* court ultimately found that the sky caps in question had not presented sufficient evidence to satisfy the twenty percent rule even if it were applied. Here, Plaintiffs have presented evidence from which a reasonable fact finder could conclude that Plaintiffs spent more than twenty percent of their time on general preparation and maintenance. *Pellon* is, therefore, factually distinguishable.

The Court finds the Handbook's twenty percent limitation persuasive and practical. The Department of Labor is charged with enforcing the FLSA on the ground level, and has expertise in the field that the Court lacks. In an area where reasonable minds may disagree about the meaning of the relevant statute and regulations, adopting the Department of Labor's position on this issue provides notice, continuity, and certainty throughout the industry. The twenty percent limitation allows employers some cushion in assigning and tracking non-tipped work while still assuring application of the tip credit only to employees who primarily perform customer specific duties. This approach also complies with the intent of Congress when it carved out a special rule for "tipped occupations." A more restrictive interpretation of "waitress" could be argued; *i.e.,* the occupation of a waitress only involves serving food and drinks, handing out menus, taking orders, presenting a bill and setting and cleaning their individual customer's tables. However,

given the difficulty of defining an occupation at its margins, the Department of Labor's more generous standard is entitled to deference. Employees may be paid the tipped wage rate for performing general preparation and maintenance duties, so long as those duties consume no more than twenty percent of the employees' working time.

B. Burden of Proof

As the Court has previously ruled, Plaintiffs have the burden of proving that they performed work for which they have not been properly compensated. [*See* Doc. # 252 at 6-7.] Plaintiffs argue that their only burden on their tipped wage claim is to establish that Applebee's "took the tip credit for the opt-in Plaintiffs for at least one work week during the relevant period." [Doc. # 301 at 15.] They argue that they need only show that Applebee's paid them the tipped wage for "an amount of time"—*i.e.,* that at some point they were paid $2.13 per hour rather than the minimum wage of $7.25 per hour. Plaintiffs contend that the burden then shifts to Applebee's to affirmatively show that it properly paid them the tipped wage. *Id.*

Placing the entire burden of proof on Applebee's in this case would be consistent with authority that says that the burden of proof is on employers to show that they are entitled to take the tip credit. *See generally Ash v. Sambodromo, LLC*, No. 09-20406-CIV, 2009 WL 3856367, at *6 (S.D.Fla. Nov.17, 2009) ("Unless the employer satisfies its burden of showing the applicability of the tip credit, the employee is entitled to the full minimum wage for every hour worked.") (citation and internal punctuation omitted); *Bernal v. Vankar Enterp., Inc.,* 579 F.Supp.2d 804, 808 (W.D.Tex.2008) (stating that employers bear the burden of proving that they are entitled to take tip

credits); Department of Labor Handbook § 30d00b ("Since [29 U.S.C. § 203(m)] is not an exemption from the [minimum wage], but merely allows the employer to claim up to 40 percent of the [minimum wage] as tip credit, the employer is responsible for ascertaining that the [minimum wage] provisions are complied with in compensating 'tipped employees.'").

Though "there is not and cannot be any one general" test for allocating burden of proof, 9 Wigmore, Evidence § 2486 (Chadbourn Rev.1981), placing the burden of proof on Applebee's in this case would be consistent with the "doctrine that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *United States v. Dixon,* 548 U.S. 1, 9, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006) (considering the burden of proof for a duress defense under criminal law) (citing 2 J. Strong, McCormick on Evidence § 337, p. 415 (5th ed.1999)) (original punctuation omitted); *see also* 9 Wigmore, Evidence § 2486 (Chadbourn Rev.1981) (stating that, among the tests for allocating burden of proof is the notion that, in certain cases, "the burden is upon the party who presumably has peculiar means of knowledge"). The FLSA requires employers to maintain employee payroll and scheduling records. *See* 29 C.F.R. § 516.28. In FLSA collective actions which depend for proof on those records—including records of tipped wage payments—the peculiar means of knowledge rests with employers. Placing the burden of proof on employers who seek to be excused from paying the standard minimum wage also corresponds with the common law rule that "all circumstances of justification, excuse or alleviation rest[ ] on the defendant." *See Dixon,* 548 U.S. at 9. (discussing burden of proof as to affirmative defenses). *Cf.* Wigmore, Evidence

§ 2486 (Chadbourn Rev.1986) (stating other tests for allocating the burden of proof such as "the burden is upon the party having in form the affirmative allegation" and "the burden is upon the party to whose case the fact is essential"); *see generally* 2 J. Strong, McCormick on Evidence § 337, pp. 411-412 (5th ed.1999) ("[L]ooking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The . . . burdens do not invariably follow the pleadings.") (cited in *Alaska Dep't of Environmental Conservation v. E.P.A.,* 540 U.S. 461, 494 n. 17, 124 S.Ct. 983, 157 L.Ed.2d 967) (considering the burden in an EPA case)).

Nevertheless, the Court has not located a single case in which a court actually required an employer to prove the number of hours for which an employee was properly paid the tipped wage. Instead, courts interpreting FLSA claims such as Plaintiffs' routinely allocate the burden of proof under the method suggested by *Anderson v. Mount Clemens Pottery Co.,* 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), superseded by statute on other grounds as stated in *IBP, Inc. v. Alvarez,* 546 U.S. 21, 41, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). Under *Mount Clemens,* "[a]n employee who brings suit . . . for unpaid minimum wages. . . has the burden of proving that he performed work for which he was not properly compensated." *Id.* at 686-87. The *Mount Clemens* court recognized that employers are charged with keeping records showing that employees have been properly paid, and found that employees should not be penalized for failing to produce convincing substitutes for those records where employers fail to keep them. *Id.* at 687. Therefore, "[i]n such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly

compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.*

The tension between the way burdens are traditionally allocated and the way courts have been allocating the burden of proof in FLSA cases is perhaps best displayed in *Myers v. Copper Cellar Corp.,* 192 F.3d 546 (6th Cir.1999). There, the court acknowledged:

> Because Congress designed the FLSA to remedy disparities in bargaining power favorable to employers, the courts narrowly construe the provisions of that statutory scheme, including its exemptions, in the employee's favor. Accordingly, an employer who invokes a statutory exemption from minimum wage liability bears the burden of proving its qualification for that exemption.

Id. at 549 n. 4 (citations omitted) (considering whether salad preparers were properly paid at the tipped wage rate and included in a tip pool). But the *Copper Cellar* court then went on to apply the analysis set out in *Mount Clemens,* requiring the employees to prove "by a preponderance of evidence that [they] 'performed work for which [they were] not properly compensated.'" *Id.* at 551 (quoting *Mount Clemens,* 328 U.S. at 686-87)). The *Copper Cellar* court found that the employees there failed to meet the burden of proving damages when they introduced payroll records showing the total number of hours worked that were subject to the tip credit calculation. *Id.* at 552-53. The *Copper Cellar* court affirmed the lower court's finding that this was insufficient. *Id.* at 553. *See also, e.g., Bernal,* 579 F.Supp.2d at 808 (W.D.Tex.2008) (stating that employers bear the burden of proving that they are entitled to take tip credits but then relying on

evidence of underpayment presented by the plaintiffs before considering whether the defendants had rebutted that evidence).

The United States Court of Appeals for the Eighth Circuit has indicated that it would apply a similar *Mount Clemens* approach to Plaintiffs' claims. In *Murray v. Stuckey's Inc.,* 939 F.2d 614, 620-21 (8th Cir.1991), the court considered whether employees worked unpaid overtime hours without overtime pay because their managers pressured the employees into falsifying their time records. *Id.* at 621. The Eighth Circuit held that the employees had the burden to "present a prima facie case as to the unpaid overtime hours before the burden of proof shifts to the defendant." *Id.* (citing *Mount Clemens,* 328 U.S. 680, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946)).

Under this precedent, the Court believes that Plaintiffs must do more than show they were paid at the tipped wage rate of $2.13 per hour. Plaintiffs do not contend that Applebee's was never entitled to pay them at the tipped wage rate, such that every hour they worked was underpaid. Before the burden shifts to Applebee's, Plaintiffs must make a prima facie showing which hours were not properly paid "as a matter of just and reasonable inference." *See Mount Clemens,* 328 U.S. at 687. Then, if there are no records as to the precise amount of time Plaintiffs spent on specific duties, the burden of proof will shift to Applebee's to show that Plaintiffs' calculation is not reasonable.

1. Conclusion

Accordingly, it is hereby ORDERED that Applebee's motion for summary judgment [Doc. # 29] is denied with regard to Plaintiffs' tipped work claim; this

Order supplements the Court's earlier ruling [Doc. # 252] on Plaintiffs' motion for summary judgment.

This Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 29 U.S.C. § 1292(b).[9] This case is stayed in the District Court pending the parties' interlocutory appeal to the Eighth Circuit Court of Appeals.

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[9] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

APPENDIX C

UNITED STATES DISTRICT COURT,
W.D. MISSOURI, CENTRAL DIVISION.

No. 06-4146-CV-C-NKL.

GERALD A. FAST, TALISHA CHESHIRE AND BRADY GEHRLING ON BEHALF OF THEMSELVES AND AS CLASS REPRESENTATIVES FOR ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

APPLEBEE'S INTERNATIONAL, INC. D/B/A APPLEBEE'S NEIGHBORHOOD GRILL & BAR,
Defendant.

May 3, 2007.

ORDER

LAUGHREY, *District Judge*.

Plaintiff Gerald A. Fast has filed a two count complaint against Applebee's International, Inc. ("Applebee's"), alleging that Applebee's violated provisions of the Fair Labor Standards Act ("FLSA") by not paying him at least the hourly minimum wage for his non-tipped work or for work he did that was not incidental to his duties as a tipped employee. Fast also claims that Applebee's violated the FLSA by not paying him for the entire time that he was at work.

Pending before the Court are Fast's Motion for Leave to File Second Amended Complaint [Doc. # 44] and Applebee's Motion for Summary Judgment [Doc. # 29]. Also pending before the Court is Fast's Alternative Rule 56(f) Motion for Additional Time to Conduct Discovery to fully and completely respond to Applebee's Motion for Summary Judgment [Doc. # 40].

Plaintiff's Motion for Leave to File Second Amended Complaint

Pursuant to the Court's September 14, 2006 Scheduling and Jury Trial Order [Doc. # 20], any motion to amend the pleadings must be filed on or before February 2, 2007. On February 2, 2007, Plaintiff filed his Second Amended Complaint [Doc. # 37], which added Plaintiffs Cheshire and Gehrling and modified and added to the allegations contained in Plaintiff Gerald Fast's First Amended Complaint. Six days later, Fast filed a Motion for Leave to File Second Amended Complaint [Doc. # 44]. Fast represents, and Applebee's does not dispute, that Applebee's "was well aware that an additional amended complaint was contemplated and intended in that counsel for Defendant specifically inquired about an additional amended complaint when counsel for the Defendant and counsel for the Plaintiffs discussed an extension of time for Plaintiff, Gerald A. Fast, to respond to Defendant's Motion for Summary Judgment." (Doc. # 44, ¶ 3). The Court finds that the delay in filing Plaintiff's Motion for Leave to File a Second Amended Complaint was de minimis and Applebee's is not prejudiced by the amendment. Therefore, Plaintiff's Motion for Leave to File Second Amended Complaint is granted.

Applebee's Motion for Summary Judgment

Applebee's has moved for summary judgment as to Plaintiff Gerald Fast's claims. For the reasons stated herein, Applebee's motion is granted in part and denied in part.

I. Facts[1]

Fast was employed at Applebee's restaurants in Columbia and Jefferson City, Missouri, from May 1998 through May 2001. Since March 2002, Fast has been employed at the Applebee's restaurant in Columbia, Missouri.

Fast has performed a number of different functions at the restaurants. Fast was a cook and server at the Jefferson City restaurant from May 1998 to August 1999 and at the Columbia restaurant from August 1999 to February 2000. From February 2000 to May 2001, he was a server, bartender and cook at the Jefferson City restaurant. Finally, from March 2002 to the present, Fast has been employed as a server, bartender, host and expediter at the Columbia restaurant. Fast has worked almost exclusively as a bartender since May 23, 2005.

Prior to May 23, 2005, the Columbia restaurant was owned by Ozark Apples, Inc. ("Ozark"), which is an Applebee's franchisee. After May 23, 2005, the Columbia restaurant was owned by Gourmet Systems, Inc. ("GSI"), an Applebee's subsidiary.

A. Fast's Tipped Work Claim

When Fast works as a bartender, he earns $4.75 per hour plus at least $30 per month in tips. His overall compensation exceeds the minimum wage.

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[1] The facts are viewed in the light most favorable to the non movant.

In addition to serving customers during his bartending shift, Fast is expected to perform certain pre- and post-shift duties including keeping the bar area clean and stocked. Fast is unable to earn tips while performing these duties.

In addition to traditional bartending duties, Fast is required to perform other duties during his bartending shift. These other duties include the following:

> stock the bar with garnishments and alcohol, manage the money drawer, clean up restaurant area by picking up napkins and straightening chairs, mop the floor, clean the blender, clean the drink machine, clean the [bar's] dishwasher, clean the drink station, clean alcohol bottles and the bottle rack, stock the straw caddies, take inventory and stock the bar, cut fruit and stock, clean the beer cooler, work on the drain pipe of the hand sink, answer phone, take out mats and the trash, and fix machines.

(Sugg. in Opp. at 27) (citations omitted).

On several occasions, these duties accounted for more than 20 percent of Fast's bartending time.

B. Fast's Appletime Claim

While Ozark owned the Columbia restaurant, employees were expected to report to work 15 minutes prior to their scheduled shift. This process of arriving 15 minutes early was known at Ozark as "Appletime" and was included in the Ozark employee handbook. Applebee's approved Ozark's Appletime policy. In fact, Ozark needed approval from Applebee's before its employee handbook could be printed. When GSI took over the Columbia restaurant in May 2005,

an Applebee's representative told the employees that all policies would remain the same and that the only thing that would change was the name of the entity paying the employees.

When Fast arrives at work he usually does a visual assessment of the restaurant, which may then lead to picking up trash or straightening chairs prior to his clocking in. Fast testified that from January 1 to May 1, 2005, he usually arrived at work early, but that he usually clocked in "right away." (Fast Depo. at 56). In addition, Fast testified as follows:

Q: A little earlier you described for us your routine when you arrived at work prior to May 1 of 2005. Could you describe for us now your routine when you arrive at work today?

A: My routine is the same today as it was [prior to May 1, 2005]. I walk in the door. I check to see how things are. I just do a visual summary of the restaurant to see if things need to be straightened up. I straighten up chairs on my way back to my area. I pick up trash. I would generally then clock in at that time . . . .

Q: How much time passes from the moment you walk in the door to the moment you clock in?

A: That varies.

Q: From what to what?

A: I mean if I just walk straight into the door and just go straight back to the computer probably 30 seconds to a minute but if there—if there are regular customers that I see somewhere, then I will stop and talk to them. If there's trash I have to pick up[,] I pick it up. If there's people at the door that need to be sat when I walk in the door, I will go ahead and take

care of them right away. So that's kind of some of the ways it varies . . . .

Q: Did anyone at any time at an Applebee's restaurant tell you that you should start working before you clocked in?

A: No.

. . . . .

Q: Would it be fair to say that on a typical day you're clocked in within a couple of minutes of when you arrive?

A: Yes.

(Fast Depo. at 98-100).

In May 2005, GSI changed the computer system used to account for employee time. Under the new system, an employee must have managerial approval in order to clock in before the start of his shift. Alternatively, the employee may choose the "clock in as scheduled" option. If the employee chooses that option, then the computer reminds the employee not to start working until his scheduled shift time begins. Once the shift begins, the computer automatically clocks in the employee. If an employee is not clocked in, then he is unable to operate the restaurant's computer system. In other words, unless the employee is clocked in, he cannot enter an order or complete a transaction. But, if the employee has chosen the "clock in as scheduled" option, then the computer allows the employee to enter orders and complete transactions even if the employee's shift has yet to begin. Fast testified that, since May 1, 2005, he is usually clocked in within a couple of minutes of when he arrives at the restaurant. However, on more than one occasion, Fast chose the "clock in as scheduled"

option and then worked without pay until his shift began. On other occasions, Fast clocked in early with a manager's approval. Fast testified that in December 2005, a manager instructed all employees that if they arrive to work early, they should have a manager clock them in immediately.

Applebee's time records dating from May 23, 2005 to September 18, 2006, indicate that Fast clocked in at his scheduled start time 34 percent of the time, which means that Fast either clocked in at exactly his scheduled start time or he chose the "clock in as scheduled" option. During the same period, Fast clocked in after his scheduled start time 51 percent of the time and clocked in before his scheduled start time with manager approval 15 percent of the time.

II. Discussion

Fast raises two claims in his Second Amended Complaint. In Count I, Fast claims that Applebee's violated the FLSA by not paying him at least the hourly minimum wage for his non-tipped work or for work he did that was not incidental to his duties as a tipped employee. In Count II, Fast claims that Applebee's violated the FLSA by not paying him for the entire time that he was at work. Specifically, Fast claims that he was expected to arrive early, but was not paid until his shift started.

A. Fast's Tipped Employee Claim

Applebee's employees must receive at least the $5.15 per hour minimum wage. 29 U.S.C. § 206(a)(1). But, if an employee routinely earns more than $30 in tips each month, then he is a "tipped employee," and his tips are calculated into the hourly wage paid by the employer. 29 U.S.C. § 203(m); 29 U.S.C. § 203(t);

29 C.F.R. § 531.51. Thus, Applebee's is only required to directly pay a fraction of the minimum wage ($2.13 per hour) to a tipped employee, so long as the employee's wages and tips together equal at least the minimum wage. 29 U.S.C. § 203(m).

The difference between the amount an employee must be paid under the minimum wage law and the amount directly paid to a tipped employee is commonly referred to as a "tip credit." *See generally* 29 U.S.C. § 203(m); 29 C.F.R. § 531.59. Applebee's may only take a tip credit "for hours worked by [an] employee in an occupation in which he qualifies as a 'tipped employee.'" 29 C.F.R. § 531.59.

Fast concedes that, as a bartender, he is a tipped employee. Also undisputed is the fact that Fast received direct compensation in excess of $2.13 per hour for the hours he worked as a bartender and that his overall compensation exceeded the minimum wage. Fast, however, claims that he should have received direct compensation equal to minimum wage for the time he spent performing duties that were unrelated to his tip producing bartending duties. In addition, Fast claims that he should have received direct compensation equal to minimum wage for the time he spent performing duties that were incidental to his tip producing bartending duties because the incidental duties required greater than 20 percent of his time.

A tipped employee's status does not change simply because the employee is required to perform non-tip producing duties related to his job. 29 C.F.R. § 531.56(e). Regulation 531.56(e) describes the difference between an employee working dual jobs, only one of which is tipped, and a tipped employee required to perform some non-tip producing duties:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least [$30] a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

The United States Department of Labor's Field Operations Handbook ("Handbook") attempts to clarify 29 C.F.R. § 531.56(e). Though not binding on the Court, the Handbook is a persuasive authority. *Myers v. The Copper Cellar Corporation,* 192 F.3d 546, 554 (6th Cir.1999). It states as follows:

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses

> may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

(Handbook § 30d00(e) (Dec. 9, 1988).)

Thus, FLSA regulations and the Handbook indicate that a tipped employee's duties must fall into one of three categories. The first category includes all tip producing duties. An employer may take the tip credit for any employee time that falls within the first category. If an employee's duty is not tip producing, then it must be incidental to one of the employee's tip producing duties (the second category), or it must be a duty that is unrelated to any of the employee's tip producing duties (the third category). If the duty falls within the second category, then the employer may take the tip credit for the time the employee spent on incidental duties so long as the incidental duties do not exceed 20 percent of the employee's overall duties. If the employee's second category duties exceed 20 percent of the employee's overall duties, then the employer may not take the tip credit for any of the employee's time spent on second category duties. Finally, an employer may not take the tip credit for any employee time that falls within the third category because third category duties are treated as separate and distinct occupations.

Fast argues that, in addition to his tip producing bartending duties, he performed duties that were neither tip producing nor incidental to his tipped employment as a bartender. Therefore, Fast believes he should have been paid full minimum wage directly from Applebee's for the time he spent on the following duties:

> stock the bar with garnishments and alcohol, manage the money drawer, clean up restaurant area by picking up napkins and straightening chairs, mop the floor, clean the blender, clean the drink machine, clean the [bar's] dishwasher, clean the drink station, clean alcohol bottles and the bottle rack, stock the straw caddies, take inventory and stock the bar, cut fruit and stock, clean the beer cooler, work on the drain pipe of the hand sink, answer phone, take out mats and the trash, and fix machines.

(Sugg. in Opp. at 27) (citations omitted). Alternatively, Fast argues for the same relief on the ground that the duties described above are incidental to his tip producing duties and exceed 20 percent of his time.

On the other hand, Applebee's advocates a restrictive interpretation of the applicable FLSA regulations. According to Applebee's, Fast's claim fails because he meets the statutory definition of a tipped employee and because each of the duties described above falls within a bartender's job description.[2] (Reply at 8, 10).

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[2] Applebee's has submitted evidence that a bartender's core duties include: "balance cash receipts; clean glasses, utensils, and bar equipment; clean bars, work areas, and tables; order or requisition liquors and supplies; slice and pit fruit for garnishing drinks; and arrange bottles and glasses to make attractive displays." (Reply, Ex. 2.)

The [sic] ". . . is not whether Fast performed 'non-tipped' work, because the regulation plainly states 'related duties in an occupation need not by themselves be directed toward producing tips.' Rather, the question is whether the work in question was part of an occupation for which the employee received tips." (Reply at 12 (emphasis omitted).) Thus, Applebee's argues that it should be allowed to take a tip credit for all of Fast's time so long as all of Fast's duties were incidental to his tip producing duties. Applebee's argues that it may take the tip credit for any hours Fast worked as a bartender regardless of how much of Fast's time was spent performing non-tip producing bartending duties.

Applebee's contends that an occupation-based analysis is the only appropriate analysis, and that the Handbook supports this conclusion. The Court disagrees. Applebee's argues that the Handbook's 20 percent limit on "general preparation work or maintenance" should "be construed to mean tasks that are not part of the regular duties of the 'tipped employee' occupation, but instead are general tasks performed as part of a distinct, non-tipped occupation." (Reply at 12 (emphasis omitted).) Applebee's interpretation, however, would render the Handbook's 20 percent limit superfluous. It is well established that an employer may not take a tip credit for any employee time if that time is devoted to a non-tipped occupation. 29 C.F.R. § 531.56(e). Thus, the amount of time an employee spends in a non-tipped occupation is irrelevant to the question of whether the employer may take a tip credit for that time. Therefore, the Handbook's phrase "general preparation work or maintenance" must refer to work that is incidental to an employee's tip producing duty. Otherwise, the 20 percent limit would be meaningless.

Applebee's also argues that case law—*Dole v. Bishop,* 740 F.Supp. 1221 (S.D.Miss.1990); *Hodgson v. Frisch's Dixie, Inc.,* 1971 WL 837 (W.D.Ky.1971); *Myers v. The Copper Cellar Corp.,* 192 F.3d 546 (6th Cir.1999); and *Townsend v. B.G.-Meridian, Inc.,* 2005 WL 2978899 (W.D.Okla.2005)—supports its occupation-based analysis. Again, the Court disagrees.

In *Dole,* the court, after a bench trial, found that certain cleaning and food preparation duties performed by waitresses before the restaurant opened were not incidental to the waitresses' tipped duties. 740 F.Supp. at 1228. Because the *Dole* court held that the waitresses' pre-opening duties were not incidental to their tipped duties, it had no reason to address the Handbook's 20 percent limit on incidental duties. Similarly, the *Hodgson* court, after a bench trial, found as a matter of fact that "waitresses and carhops were frequently required to work in 'non-tipped' occupations." 1971 WL 837, *3. The *Hodgson* court, without addressing duties incidental to tip producing duties, held that the defendant employer could not take a tip credit for the hours waitresses and carhops spent in non-tipped occupations during their shifts. *Id.* at *5. Therefore, neither *Dole* nor *Hodgson* provide support for Applebee's argument.

In *Myers,* the defendant employer required its wait staff to prepare a house salad for each of the staff member's patrons. During peak times, management would designate one member of the wait staff to prepare house salads for all patrons in the restaurant. This salad preparer designation precluded the individual from personal contact with diners and prevented the individual from receiving customer gratuities. 192 F.3d at 548. The *Myers* court held that, under these circumstances, the salad preparer

could not be considered a tipped employee. *Id.* at 550. The *Myers* court did not address the applicability of the Handbook's 20 percent limit and provides no support for Applebee's argument.

Finally, in *Townsend,* the plaintiff waitress argued that her employer could not take the tip credit for those times when she performed non-tip producing duties, such as operating the cash register and taking telephone orders. The court disagreed with the plaintiff and held that her activities were incidental to her tip producing waitress duties. 2005 WL 2978899, *7. The court did not address what percentage of the plaintiff's time was consumed by incidental duties or the applicability of the Handbook's 20 percent limit. Accordingly, *Townsend* provides no support for Applebee's argument.

To resolve this claim, the Court must first determine which of Fast's bartending duties were tip producing, and then, which, if any, of Fast's duties are incidental to his tip producing duties. According to 29 C.F.R. § 531.52, a "tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him." Which of a bartender's duties may prompt a customer to tip is a question of fact upon which reasonable finders of fact could disagree. (Handbook § 30d00(e)). Without knowing which of Fast's duties are tip producing, the Court cannot conduct the subsequent analysis as to which, if any, of Fast's duties are incidental to his tip producing duties and how much time Fast spent on incidental duties. Because these factual matters are material and in dispute, summary judgment is denied as to Count I.

B. Fast's Appletime Claim

In his Second Amended Complaint, Fast claims that "because of training, encouragement, and/or environment [he] arrived at work prior to the beginning of [his] paid shift and/or began work off the clock without being compensated for said time." (Second Amended Complaint, ¶ 58.) This pre-shift time was commonly known as "Appletime."

An employer is obligated to compensate employees for work it knows the employees are performing. 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time."). Furthermore, it is the employer's responsibility "to see that work is not performed if it does not want it to be performed." *United States Dep't of Labor v. Cole Enterprises, Inc.,* 62 F.3d 775, 779 (6th Cir.1995).

Applebee's argues that it should not be held liable for any violations that occurred prior to May 23, 2005—the date when Applebee's International, Inc.'s subsidiary, GSI, assumed control of the restaurant. According to Applebee's, prior to May 23, 2005, the restaurant was owned and controlled by Ozark, its franchisee. A franchisor is not ordinarily liable for the actions of its franchisee. *Howell v. Chick-Fil-A, Inc.,* 1993 WL 603296, *2 (N.D.Fla.1993). But, a franchisor may be held liable for the actions of its franchisee if the actual relationship between them is that of principal and agent. *Miles v. Century 21 Real Estate LLC,* 2007 WL 92795, *3 (E.D.Ark.2007). Applebee's has submitted no evidence detailing its relationship to Ozark. On the other hand, Fast has submitted an affidavit from Mike Donnelly, a former Applebee's Area Director, in which Donnelly swears that Applebee's approved the printing of the Ozark employee handbook before Ozark was allowed to have

the manual printed. At this early stage of discovery, Applebee's relationship with Ozark remains a disputed issue of fact.

Applebee's also argues that summary judgment should be granted on Fast's Appletime claim because Fast's "deposition testimony establishes that he was not required to work without compensation, and that he did not work without compensation." (Reply at 1.) Fast contends that he was required to report to work 15 minutes prior to his scheduled shift time and that he was not compensated for this pre-shift time. At his deposition, Fast testified that, since GSI began operating the Columbia restaurant, he had not seen anything in writing that states that employees are expected to be at work 15 minutes early. Furthermore, Fast was also unable to testify that a GSI manager instructed him to arrive to work before his scheduled shift time. It is undisputed, however, that Ozark required its employees to arrive at work 15 minutes prior to the beginning of their scheduled shift time. And, after GSI acquired the Columbia restaurant, an Applebee's representative told Fast and the other Ozark employees that the only thing that would change about their employment was who would be paying the employees. The Applebee's representative indicated that everything else, including Ozark's policies, would stay the same.

Fast's argument that he was required to report to work early is supported by the fact that GSI's computerized clock-in system only allows employees to clock in early with a manager's approval, but allows an employee to "clock in as scheduled" and then work prior to the start of the employee's paid shift. Although an employee opting to "clock in as scheduled" is instructed by the computer not to work until

the employee's scheduled shift time, the intent of any such directive is called into question by the fact that an employee, after choosing the "clock in as scheduled" option, is allowed to enter customer orders and complete transactions. By way of contrast, an employee who has not clocked in is prevented by the computer from entering customer orders or completing transactions.

An employer "cannot sit back and accept the benefits [of an employee's labor] without compensating for them." *Cole Enterprises,* 62 F.3d at 779-780 (quoting 29 C.F.R. § 785.13). Whether Applebee's required or allowed Fast to work off the clock is a disputed issue of material fact.

Applebee's argues that even if Fast was required to work off the clock, summary judgment should be granted on Count II because Fast cannot establish that he has performed any work off the clock.

Fast claims two categories of uncompensated time: (1) the time between when he walks in the door of the restaurant and when he clocks in, and (2) the time he spends working prior to his shift beginning but after choosing the "clock in as scheduled" option.

With respect to the first category of uncompensated time, Fast described his pre-clock in routine as follows: "I walk in the door. I check to see how things are. I just do a visual summary of the restaurant to see if things need to be straightened up. I straighten up chairs on my way back to my area. I pick up trash. I would generally then clock in at that time." (Fast Depo. at 98.) Fast also testified that on a typical day he is clocked in within a couple of minutes of arriving at the restaurant. As to the second category of uncompensated time, Fast submitted evidence that

on more than one occasion he has opted to "clock in as scheduled," but has then worked on Applebee's behalf as evidenced by computer transactions showing that he entered customer orders prior to the beginning of his scheduled shift. Accordingly, Fast has submitted evidence that he worked without compensation.

Applebee's argues that, even if Fast did work off the clock, Fast should not be compensated because any such work is de minimis. *Anderson v. Mount Clemens Pottery Co.,* 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."). In determining whether Fast's uncompensated work is de minimis, the Court assesses "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Bobo v. United States,* 136 F.3d 1465, 1468 (Fed.Cir.1998) (quoting *Lindow v. United States,* 738 F.2d 1057, 1063 (9th Cir.1984)).

The Court finds that Fast's first category of uncompensated time is de minimis. The practical difficulty of recording the amount of time Fast spends each day straightening chairs or picking up trash between the time he walks in the door and the time he clocks in is substantial. And, though Fast regularly performs this work, he testified that on a typical day he is clocked in within a couple of minutes of arriving at the restaurant. Accordingly, the aggregate amount of compensable time is low. Because the aggregate amount of time is low and the practical difficulty of recording the time is immense, Fast's first category of time worked is de minimis and need not be com-

pensated. Therefore, Applebee's Motion for Summary Judgment is granted as to the amount of time between when Fast arrives at the restaurant and clocks in.

Fast's second category of uncompensated time—the time between when he chooses the "clock in as scheduled" option and the beginning of his scheduled shift—is not de minimis and should be compensated. Pursuant to 29 U.S.C. § 211(c), Applebee's is required to make and keep records of employees' wages and hours. In this case, Applebee's allowed Fast to clock in by choosing the "clock in as scheduled" option on the computer. By making this choice, Fast was able to input customers' orders and complete transactions even though he was not being paid by Applebee's at that time. In contrast, if Fast were not clocked in, the computer would not allow him to input orders or complete transactions. Although the computer informs any employee choosing the "clock in as scheduled" option that he or she should not work until his or her shift time, the simple fact that the computer allows the employee to work necessitates an inference that it is expected that employees will work between the time they clock in and the time their shift begins. Fast testified that he has worked while off the clock but after choosing the "clock in as scheduled" option on more than one occasion, which Fast claims is evidenced by the fact that he entered orders on the computer prior to the beginning of his compensated shift time. The Court is unable to conclude that Fast performed such work regularly or that the aggregate amount of time worked was high. But, even if the amount of time is small, it could easily be measured by recording when Fast enters orders on the computer and, if such orders were entered while Fast is off the clock, compensating Fast for that time.

Alternatively, Applebee's could simply eliminate the "clock in as scheduled" option from its computer system and treat employees as having clocked in whenever they arrive at the restaurant and begin working. Thus, the Court finds that the time Fast worked between clocking in as scheduled and the beginning of his paid shift was not de minimis.

Finally, Applebee's argues that even if Fast did perform work off the clock, Fast has submitted no evidence that Applebee's knew that Fast was working off the clock.[3] In this case, the finder of fact could conclude that Applebee's had actual or constructive knowledge that Fast was working off the clock because Fast, on more than one occasion, entered customer orders prior to the beginning of his paid shift. Therefore, Applebee's Motion for Summary Judgment is denied as to Fast's claim that he worked without compensation between the time he chose the "clock in as scheduled" option and the time his paid shift began.

III. Fast's Motion for Additional Time to Conduct Discovery

Fast filed an Alternative Rule 56(f) Motion for Additional Time to Conduct Discovery to fully and completely respond to Defendant's Motion for Summary Judgment [Doc. # 40]. In his suggestions in support, Fast indicates that his motion for additional time is submitted as an alternative to the Court denying Applebee's summary judgment motion.

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[3] Applebee's concedes that "an employer generally has an obligation to compensate employees for work that it knows employees are performing." (Reply at 4.)

The Court denied Applebee's summary judgment motion in every respect except as to Fast's claim that he should be compensated for the time between when he first arrives at the restaurant and when he clocks in. The Court's decision to grant Applebee's summary judgment on that aspect of Fast's claim is based on Fast's own testimony that the time between when he arrives and when he clocks in is typically only a couple of minutes. (Fast Depo. at 100.) Additional discovery cannot refute Fast's own testimony.

Therefore, Fast's Motion for Additional Time is denied.

IV. Conclusion

Accordingly, it is hereby ordered that

(1) Fast's Motion for Leave to File Second Amended Complaint [Doc. # 44] is GRANTED;

(2) Applebee's Motion for Summary Judgment [Doc. # 29] is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Fast's claim that he should be compensated for the time between when he first arrives at the restaurant and when he clocks in. The motion is DENIED in all other respects; and

(3) Fast's Alternative Rule 56(f) Motion for Additional Time to Conduct Discovery to fully and completely respond to Defendant's Motion for Summary Judgment [Doc. # 40] is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1725

GERALD A. FAST, *et al*.,
Appellees

v.

APPLEBEE'S INTERNATIONAL, INC.
Appellant

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Amici on Behalf of Appellee

NATIONAL COUNCIL OF CHAIN RESTAURANTS AND NATIONAL RESTAURANT ASSOCIATION
Amici on behalf of Appellant

No: 10-1726

GERALD A. FAST, *et al*.,
Appellants

v.

APPLEBEE'S INTERNATIONAL, INC.
Appellee

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
Amici on behalf of Appellant

NATIONAL COUNCIL OF CHAIN RESTAURANTS
Amicus on Behalf of Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:06-cv-04146-NKL)
(2:06-cv-04146-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judges Riley, Loken, Gruender, and Shepherd would grant the petition for rehearing en banc.

July 06, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

30d TIPS AND TIPPED EMPLOYEES

30d00 General.

(a) A "tipped employee", as defined in section 3(t) of FLSA, is any employee engaged in an occupation in which the individual customarily and regularly receives more than $30.00 a month in tips.

(b) Section 3(m) of FLSA makes clear the intent of Congress to place *on the employer* the burden of proving the amount of tips received by "tipped employees", and the amount of tip credit, if any, which the employer may claim. Since Sec 3(m) is not an exemption from the MW, but merely allows the employer to claim up to 40 percent of the MW as tip credit, the employer is responsible for ascertaining that the MW provisions are complied with in compensating "tipped employees".

(c) (1) The tip provision applies on an individual employee basis. Thus, an employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others.

(2) In establishments where employees perform a variety of different jobs, an employee's status as one who "customarily and regularly receives tips" will depend on the total fact situation and will be determined on the basis of such employee's activities over the entire w/w.

(d) When an individual is employed in a tipped occupation and a non-tipped occupation (dual

jobs), the tip credit is available only for the hours spent in the tipped occupation. Also, such employee must customarily and regularly receive at least $30 a month in tips.

(e) Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

* * * *

APPENDIX F

Opinion Letter of
Wage-Hour Administrator.

Opinion Letter No. 981. April 16, 1969.

Fair Labor Standards Act

Wage Payment—Tipped Employees—Dual Jobs as Cab Drivers and Dispatchers and/or Supervisors—Since cab, driving and dispatching and/or supervising are unrelated activities for purposes of Section 531.56(e) of the Regulations, no tip credit may be taken for hours of employment of cab drivers as dispatchers and/or supervisors. Such employment constitutes dual employment and the cab drivers who qualify as tipped employees do so only with regard to employment as drivers. FLSA, Section 3(m) and (t). Back reference—¶ 25,480.755.

This is in further reference to your letter asking whether taxicab drivers, who also serve in the capacity of dispatchers and/or supervisors, can be considered as "tipped employees" it all of their activities for the purposes of sections 3(m) and 3(t) of the Fair Labor Standards Act and section 531.56(e) of Regulations, Part 531.

It is our opinion that the activities of driving and dispatching and/or supervising are unrelated for the purposes of section 531.56(e) of Part 531, so that the subject employees may be regarded as being employed in dual jobs. Therefore, if the employee customarily and regularly receives at least $20 a month in tips for his work as a taxicab driver, he is a tipped employee only with respect to his employment as a taxicab driver. Since he is employed in two occupations, no tip credit can be taken for his hours of employment in his occupation of dispatcher and/or supervisor.

APPENDIX G

Wage and Hour Division
United States Department of Labor

Opinion Letter Fair Labor Standards Act (FLSA)

WH-502

March 28, 1980

* * *

This is in reply to your letter of October 30, 1979, asking if certain duties performed by tipped employees in a restaurant after closing hours are considered to be tipped employee duties under the Fair Labor Standards Act.

You state the tipped employees clean the salad bar, place the condiment crocks in the cooler, clean and stock the waitress station, clean and reset the tables (including filling cheese, salt and pepper shakers) and vacuum the dining room carpet, after the restaurant is closed. It is your position that since the dining area is the domain of the waitresses and waiters, they are responsible for the duties described above. Accordingly, you believe the employer may use the tip credit provision when compensating the tipped employees for the time expended performing these duties.

As you know, section 531.56(e) of 29 CFR Part 531, deals with tipped employees who are performing dual jobs. This section explains that a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses is not employed in two occupations. Further, such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips. As

indicated, however, where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties, no tip credit may be taken for the time spent by a waitress performing maintenance duties.

Insofar as the after-hours clean-up you describe are assigned generally to the waitress/waiter staff, we believe that such duties constitute tipped employment within the meaning of the regulation. We might have a different opinion if the facts indicated that specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.

Sincerely,

Henry White
Deputy Administrator

APPENDIX H

FLSA-854

December 20, 1985

This is in response to your letter of June 20 in which you request an opinion as to whether salad bar and dining room set-up are duties related to a tipped occupation within the meaning of section 3(m) of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

As outlined in your letter and in a conversation with a member of my staff on November 26, *** owns and operates several *** restaurants throughout the United States. *** regularly open to the public at 11 a.m. Generally, you state, two to four waiters or waitresses work each day in each restaurant. One waiter or waitress is assigned with opening responsibilities from 9:00 or 9:30 a.m. to 11:00 a.m. These opening responsibilities are as follows:

(1) Inspect dining room including windows and sills.

(2) Check dining room lights.

(3) Set thermostat.

(4) Check tables and align table bases.

(5) Check high chairs/booster seats.

(6) Set tables.

(7) Set table arrangers.

(8) Clean and fill shakers.

(9) Clean/replace ashtrays.

(10) Stock waitress station with glasses, cups, mugs, and pitchers.

(11) Check supplies of napkins, sugar, straws, etc.

(12) Check supply and cleanliness of plates, salad plates and silverware.

(13) Set up three (3) compartments, glass washing sink.

(14) Check beverage dispensers.

(15) Prepare tea.

(16) At opening, prepare coffee.

1. Cut and clean vegetables for salad bar.

2. Clean and sanitize sneeze shield on salad bar.

1. (19) Fill salad bar crocks with refrigerated and dry items.

(20) Place vinegar and oil cruets at end of salad bar.

(21) Place parmesan shaker on salad bar.

(22) If iced salad bar, fill ice bin.

You state that typically the waiter or waitress with opening responsibilities works until 2 p.m. Any other waitresses working the lunch shift do not report until 10:30 or 11:00 a.m.

You state that a small portion of the 1.5 to 2 hour set-up time is spent in preparing vegetables for the salad bar. You state that the salad bar preparation is a related duty in a tipped occupation. You cited Opinion Letter No. 1554 (WH-502) in which the Administrator of the Wage and Hour Division found that duties such as cleaning and restocking the waitress station, refilling shakers, cleaning and resetting tables and vacuuming the carpet as performed by

waitresses after hours constitute tipped employment within the meaning of Regulations 29 CFR Part 531.

In support of your position you also cite section 531.56(e) of 29 CFR Part 531. You compare the preparation of the salad bar to the preparation of short orders as performed by counter persons.

The FLSA is the Federal law of most general application concerning wages and hours of work. Under FLSA all covered and nonexempt employees must be paid not less than the minimum wage rate of $3.35 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

As explained in section 3(m) of FLSA, tips received by tipped employees may be counted by an employer in an amount up to 40% of the applicable minimum wage. A "tipped employee" is defined in section 3(t) of FLSA as an employee engaged in an occupation in which he or she regularly receives not less than $30 a month in tips.

Section 531.56(e) deals with tipped employees who are performing dual jobs. As explained in this section, when an individual is involved in a tipped occupation and a nontipped occupation, the tip credit is available only for the hours spent in the tipped occupation. For example, when a maintenance person in a hotel also serves as a waiter or waitress, the tip credit is available only for the hours worked as a waiter or waitress.

The legislative history of the 1974 amendments of FLSA (in particular, page 43 of Senate Report No. 93-960, February 22, 1974) indicates that employees who "customarily and regularly" receive tips are waiters, waitresses, bell persons, counter persons,

bus help, and service bartenders. It also indicates that janitors, dishwashers, chefs, and laundry room attendants are not tipped employees. It is our opinion that salad preparation activities are essentially the activities performed by chefs and no tip credit may be taken for the time spent in preparing vegetables for the salad bar. Enclosed is a copy of an opinion letter which contains a detailed discussion of this position.

Also as explained in section 531.56(e), the tip credit may be taken for time spent in duties related to the tipped occupation even though such duties need not by themselves be directed toward producing tips. For example, a waiter or waitress who spends part of his or her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though the duties listed above are not tip-producing. Therefore, tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the waiter or waitress regular duties and are assigned generally to the waiter/waitress staff. However, where the facts indicate that specific employees are routinely assigned to maintenance-type work or that tipped employees spend a substantial amount of time in performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities.

In the situation you describe, only one waiter or waitress is assigned to perform all preparatory activities. The opening waiter or waitress' responsibilities extend to the entire restaurant rather than to the specific area or customers which they serve. Furthermore, the activities performed prior to the opening of the restaurant consume a substantial portion of

the waiter or waitress' workday. Although you have stated that a waiter or waitress may work an eight-hour shift, typically they work a five-hour shift from 9 a.m. to 2 p.m. The 1.5 to 2 hours of preparatory time constitutes 30% to 40% of the employee's workday.

Therefore, based on the information you have provided, it is our opinion that no tip credit may be taken for the hours spent by an assigned waiter or waitress in opening responsibilities.

We trust that the above is responsive to your inquiry.
Sincerely,

Herbert J. Cohen
Deputy Administrator

Enclosure

APPENDIX I

[Logo] U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-12

January 15, 2009

Dear Name*:

This is in response to your request for an opinion regarding whether employees known as "barbacks" qualify as tipped employees for the minimum wage tip credit under the Fair Labor Standards Act (FLSA).[1] We believe a barback, as you describe the position, would qualify as a tipped employee, and be eligible for a tip credit, provided the FLSA requirements for this provision are met.

You state that your client is a restaurant and bar that employs both bartenders and a barback on a nightly basis. You also state that the term "barback" refers to a bartender's assistant who learns the profession of bartending under the tutelage of a bartender and whose primary job duty is to support the bartender. The barback typically works the same hours as the bartender and is responsible for restocking the bar and ensuring that the bar area remains clean and organized. You indicate that the barback may also bus the service counter, clean empty glasses sitting on the bar, take out the trash from behind the bar and clean the floor of the bar area. You state that the barback works primarily in

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov

the bar area, in front of and around customers, and has the opportunity to occasionally interact with customers.

You further state that your client currently pays the barback the minimum wage, but the barback also receives over $30 in tips per month from the bartenders that he or she supports. Moreover, you state that a barback is an occupation that regularly and customarily receives tips from bartenders for providing services. For purposes of this letter, we assume that your description of this tip sharing arrangement between the barback and the bartenders reflects common practice in the locality in this type of establishment. *See* FOH § 30d04(d); Wage and Hour Opinion Letter October 26, 1989 (copy enclosed) (custom in the locality and industry is considered in determining whether employees regularly receive tips themselves or share in tip pools). You want to know whether the barback in this case may qualify as a tipped employee under the FLSA when the only tips received by this employee are those obtained from the bartenders under this tip sharing arrangement.

Pursuant to section 3(m) of the FLSA, an employer may take a credit towards the minimum wage for a "tipped employee" provided the employer informs the employee of the provisions of this section of the law and the tipped employee retains all the tips received. The latter requirement does not prohibit "the pooling of tips among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m). Section 3(t) of the FLSA defines the term "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Tips actually received by tipped employees may be counted as

wages for purposes of the FLSA, but the employer must pay not less than $2.13 an hour in direct wages.[2]

The legislative history of the 1974 FLSA Amendments indicates that the tip pooling exception in 29 U.S.C. § 203(m) applies to "the practice of pooling, splitting or sharing tips with employees who customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (1974); FOH § 30d04(a). On the other hand, "the employer will lose the benefit of this exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips—*e.g.*, janitors, dishwashers, chefs, laundry room attendants, etc." *Id.* The use of the words "*e.g.*" and "etc.," indicates that the occupations in these two lists are examples, and that the lists are not intended to be exhaustive.

The legislative history includes bus persons ("busboys") in the list of occupations that may participate in tip pools, although they do not receive tips directly from the customers. *See id*. at 43. These employees customarily and regularly receive tips from their participation in tip pooling or tip sharing arrangements with the servers. "Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t)." 29 C.F.R § 531.54.

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[2] "If an employee's tips combined with the employer's direct wages of at least $2.13 an hour do not equal the minimum hourly wage of $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009; the employer must make up the difference." Wage and Hour Fact Sheet No. 15.

It does not matter that in this case the barback receives his or her tips exclusively from the bartenders, rather than directly from the customers. As indicated above, the legislative history and the Department's regulations provide that some employees, *e.g.*, bus persons, who derive their qualifying tip income exclusively from tip sharing or tip pooling arrangements can nonetheless qualify as tipped employees, provided they meet the other requirements of the law. *See Kilgore v. Outback Steakhouse of Fla.,* 160 F.3d 294, 301-2 (6th Cir. 1998) (upholding a tip pool in which certain employees derive their tip income solely from the tip pool); *Marshall v. Krystal Co.,* 467 F. Supp. 9, 13 (E.D. Tenn. 1978) (finding that waiters, bus persons, and bartenders are permitted to derive their tip income from the tip pool); *see also* FOH § 30d04:

> It is not required that all employees who share in tips must themselves receive tips from customers. The amounts *retained* by the employees who actually receive the tips, and those given to other pool participants are considered the tips of the individuals who retain them, in applying the provisions of sections 3(m) and 3(t).

FOH § 30d04(a); Wage and Hour Opinion Letter March 26, 1976 (copy enclosed) ("It is not required that the particular busboys and others who share in tips must themselves receive tips from customers.")

We believe that the barback you describe qualifies as a tipped employee within the meaning of section 3(t) of the FLSA, because he or she is engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips. Therefore, the barback is also a "tipped employee" within the meaning of section 3(m), and the employer can

take a tip credit for that employee provided that the FLSA requirements are met, including the proviso that a tipped employee must receive at least the minimum hourly wage through the employer's cash wage payment and tips received. This conclusion is consistent with the legislative history of the Act, which included employees who do not receive tips directly from customers, such as busboys and service bartenders, within the categories of employees who were eligible to participate in a tip pool because they "customarily and regularly" received tips, whether through tip pools or tip sharing arrangements with other employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).

APPENDIX J

[Logo] U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear Name*:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-23. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Wage and Hour Opinion Letter FLSA2009-23 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement

[Logo] U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-23

This Opinion Letter is withdrawn.
January 16, 2009

Dear Name*:

This is in response to your request that we clarify our Field Operations Handbook (FOH) section 30d00(e),[1] which explains the Wage and Hour regulation at 29 C.F.R. § 531.56(e) interpreting the definition of a "tipped employee" in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. § 203(t). We agree that the current FOH sections addressing the tip credit have resulted in some confusion and inconsistent application and, as a result, may require clarification. It is our intent that FOH § 30d00(e) be construed in a manner that ensures not only consistent application of the Act and a level of clarity that will allow employers to determine up front whether their actions are in compliance with the Act, but also the paramount goal that all affected workers receive the full protections of the Act.

The tip credit provision in section 3(m) of the FLSA, 29 C.F.R. § 203(m), permits an employer to pay its tipped employees not less than $2.13 per hour in cash wages and take a "tip credit" equal to the difference between the cash wages paid and the federal minimum wage, which is currently $6.55 per hour. The tip

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

credit may not exceed the amount of tips actually received and under the current minimum wage may not exceed $4.42 per hour ($6.55 — $2.13).[2] A "tipped employee" is defined in FLSA section 3(t) as any employee engaged in an *occupation* in which he or she customarily and regularly receives not less than $30 a month in tips (emphasis added).

Recognizing that there are situations in which employees have more than one occupation, some of which may meet the tip credit requirements and some of which may not, the regulations provide that in such "dual jobs," the tip credit may only be applied with respect to the time spent in the tipped job.

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $20 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man.

29 C.F.R. § 531.56. The regulations further recognize that some occupations require both tip-generating and non-tip-generating duties, but do not constitute a dual job that necessitates the allocation of the tip credit to the tipped occupation only.

> Such a situation [i.e. one involving a dual job] is distinguishable from that of a waitress who

[2] Section 3(m) also requires that an employer that elects the tip credit (1) inform its tipped employees of the tip credit provisions in FLSA section 3(m), and (2) that all tips received by such employees be retained by the employees.

> spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

Id.

The dividing line between "dual job" and "related duties" is not always clear, however. To give enforcement guidance on this issue, we issued FOH § 30d00(e), which states:

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Section 30d00(e) attempts to ensure that employers do not evade the minimum wage requirements of the Act simply by having tipped employees perform a myriad of non-tipped work that would otherwise be done by non-tipped employees. Admittedly, however, it has created some confusion. For instance, in *Fast v. Applebee's Int'l, Inc.*, 502 F.Supp.2d 996 (W.D. Mo. 2007), the court construed § 30d00(e) to not only prohibit the taking of a tip credit for duties unrelated to the tip producing occupation, but also to prohibit the taking of a tip credit for duties related to the tip producing occupation if they exceed 20 percent of the employee's working time. Moreover, the court determined that what constitutes a related and non-related duty is a jury determination.

In contrast, in *Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the court rejected the *Fast* court's reading of FOH § 30d00(e), holding, in part, that the 20 percent limitation does not apply to related duties. The court further held that under the *Fast* ruling, "nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon*, at 1314. Such a situation benefits neither employees nor employers.

We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met. We also believe that guidance is necessary for an employer to determine on the front end which duties

are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act. Accordingly, we believe that the determination that a particular duty is part of a tipped occupation should be made based on the following principles:

- Duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation.[3] No limitation shall be placed on the amount of these duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.[4]

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[3] WHD recognizes that there will be certain unique or newly emerging occupations that qualify as tipped occupations under the Act, but for which there is no O*NET description. *See e.g.*, Wage and Hour Opinion Letter FLSA2008-18 (Dec. 19, 2009) (itamae-sushi chefs and teppanyaki chefs). For such tipped occupations for which there is no O*NET description, the duties usually and customarily performed by employees in that specific occupation shall be considered "related duties" so long as they are consistent with the duties performed in similar O*NET occupations. For example, in the case of unique occupations such as teppanyaki chefs, the related duties would be those that are included in the tasks set out in O*NET for counter attendants in the restaurant industry.

[4] *See* Wage and Hour Opinion Letter WH-502 (Mar. 28, 1980) (concluding that a waitperson's time spent performing related

- Employers may not take a tip credit for time spent performing any tasks not contained in the O*NET task list. We note, however, that some of the time spent by a tipped employee performing tasks that are not listed in O*NET may be subject to the *de minimis* rule contained in Wage and Hour's general FLSA regulations at 29 C.F.R. § 785.47.

These principles supersede our statements in FOH § 30d00(e). A revised FOH statement will be forthcoming.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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duties (vacuuming) after restaurant was closed was subject to tip credit).

* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).