

***Bamonte v. City of Mesa*, --- F.3d ----, (Ninth Circuit, March 25, 2010)**

Police officers in Mesa, Arizona filed suit in federal district court for compensation under the Fair Labor Standards Act (“FLSA”) related to time spent donning and doffing their uniforms and protective gear. Mesa provided each officer with a locker at the police station along with facilities to change into and out of their uniforms and gear, but did not require them to use those facilities. The officers asserted that changing into their uniforms and gear on site at the station was necessary (and thus the time spent doing so was subject to FLSA) for a number of reasons. These included the risk of loss/theft when their uniforms and gear are at home, safety concerns with performing firearm checks at home and the increased risk of being identified as a police officer while off-duty.

The district court granted the city’s motion for summary judgment because the officers had the option and ability to don and doff their uniforms and gear wherever they chose, and held that the specific activity of donning and doffing at the workplace in this instance was not compensable. The officers appealed to the Ninth Circuit.

The Ninth Circuit’s analysis relied heavily on *Alvarez v. IBP, Inc.*, 339 F3d 894 (9<sup>th</sup> Cir. 2003). In *Alvarez*, the court held that “it is axiomatic, under the FLSA, that employers must pay employees for all hours worked.” *Id.* at 902. As such, the issue in *Bamonte* was whether donning and doffing uniforms and equipment is considered “work” for FLSA purposes if it could be done at home.

The Ninth Circuit established a three-part inquiry in *Alvarez* and primarily relied on it to resolve the issue presented in *Bamonte*. The court asked:

- 1) Does the activity constitute “work”?
- 2) Is the activity “an integral and indispensable” duty?
- 3) Is the activity *de minimis*?

The court defined work as physical or mental exertion required by the employer and performed primarily for the employer’s benefit. *Alvarez* at 902. In this case, the court gave the officers the benefit of the doubt and assumed that the donning and doffing of uniforms constituted “work.” However, the court stated that “the officers’ claims for compensation fatally falter[ed]” under the second part of the *Alvarez* test.

In previous cases including *Alvarez*, employees were *required* by the employer to don and doff on the employer’s premises. This fact led the court to conclude that donning and doffing in those instances was an “integral and indispensable” duty. Because the *Bamonte* officers could dress at home, this fact was not present. In addition to *Alvarez*, the court relied on a 2006 Department of Labor (“DOL”) memorandum that advised:

“donning and doffing of required gear is within the continuous workday only when the employer of the nature of the job mandates that it take place on the employer’s premises. It is our longstanding position that if employees have the option and

ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.”

The DOL memorandum, coupled with the *Alvarez* decision, lead the court to the conclusion that donning and doffing uniforms and protective gear was not compensable, provided that officers had the option to change at home or at the station. The court therefore affirmed the district court’s grant of summary judgment in Mesa’s favor.