

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued March 1, 2007 Decided January 24, 2008)

Docket No. 06-2432-cv

Elaine L. Chao, Secretary of Labor,
Plaintiff-Appellant,

v.

Gotham Registry, Inc., Gotham Per Diem, Inc.,
Defendants-Appellees.

Before:

JACOBS, Chief Judge,
CARDAMONE, and SOTOMAYOR, Circuit Judges.

Plaintiff Elaine L. Chao, Secretary of Labor, appeals from an order dated March 20, 2006 of the United States District Court for the Southern District of New York (Stanton, J.) denying her petition for adjudication of civil contempt against defendant Gotham Registry, Inc., and its president, Caroline Barrett.

Affirmed.

Chief Judge Jacobs concurs in a separate opinion.

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MARIA VAN BUREN, Washington, D.C. (Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, U.S. Department of Labor, Office of the Solicitor, Washington, D.C., of counsel), for Plaintiff-Appellant.

STEVEN KAPUSTIN, Blue Bell, Pennsylvania (Barry A. Furman, Kaplin, Stewart, Meloff, Reiter & Stein, P.C., Blue Bell, Pennsylvania, of counsel), for Defendant-Appellee.

1 CARDAMONE, Circuit Judge:

2 In 1937 America was in the depths of a depression and
3 employment was scarce. President Franklin Roosevelt introduced
4 a measure to address this problem in a bill that became the Fair
5 Labor Standards Act. The bill aimed to raise the pay of the
6 underpaid and reduce the hours of the overworked or, as stated
7 in the Presidential message accompanying the proposed
8 legislation, to obtain "a fair day's pay for a fair day's work."
9 81 Cong. Rec. 4983 (1937) (message of President Roosevelt).

10 Today, things are different, particularly in the nursing
11 profession where there are not enough nurses to meet the demand
12 for their services. This shortage and the frequent resort to
13 overtime to compensate for it precipitated the instant action.

14 The litigation before us was initiated in 1992 in the
15 United States District Court for the Southern District of New
16 York before Judge Louis L. Stanton by the Secretary of Labor
17 against defendants Gotham Registry, Inc. and its affiliate
18 Gotham Per Diem, Inc. Suit was brought under the provisions of
19 the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA or
20 Act), and resulted on June 6, 1994 in a consent judgment against
21 Gotham, requiring it to pay its nurses time and one-half wages
22 for overtime in compliance with the Act. On December 29, 2004
23 plaintiff Elaine L. Chao, the current Secretary of Labor
24 (Secretary or plaintiff), filed a petition for adjudication of
25 civil contempt against Gotham Registry, Inc. and its president,
26 Caroline Barrett (collectively, Gotham, employer or staffing

1 agency), for their alleged failure to abide by the terms of the
2 consent judgment. The Secretary sought an order requiring
3 Gotham to pay back wages plus interest from January 1, 1999
4 through the present. On January 19, 2005 Gotham filed a
5 response and counterclaim to the petition denying any violation
6 of the consent decree and requesting the district court to
7 vacate the decree's injunctive provision because of changed
8 circumstances.

9 Judge Stanton, who had maintained jurisdiction over this
10 matter since its inception, conducted an evidentiary hearing on
11 March 20, 2006. At the close of plaintiff's case, Gotham moved
12 for judgment in its favor pursuant to Fed. R. Civ. P. 52(c).
13 Judge Stanton granted that motion from the bench and held Gotham
14 not in contempt of the consent judgment. In an order entered
15 March 23, 2006 the district court denied the Secretary's
16 petition. From this order the Secretary appeals.

17 BACKGROUND

18 We turn to the facts. A typical Gotham placement begins
19 when one of its client hospitals requests a nurse to fill a
20 temporary vacancy or to support hospital personnel during a peak
21 period. Gotham then offers the assignment to a nurse on its
22 register, and the nurse who accepts the position reports
23 directly to the hospital. The nurse is required to sign in and
24 out on daily time sheets, which are compiled and reviewed by the
25 hospital and forwarded to Gotham each week. Gotham is not
26 permitted to go on hospital premises to verify the nurse's hours

1 or otherwise supervise his or her performance. The hospital
2 pays Gotham an hourly fee multiplied by the number of hours
3 worked by the nurse and Gotham pays most of this money to the
4 nurse.

5 Until the early 1990s, Gotham did not pay its nurses
6 overtime wages for hours worked in excess of 40 hours in any
7 workweek because it viewed the nurses as independent
8 contractors. After the Department of Labor commenced an
9 enforcement action in 1992 against the staffing agency asserting
10 that its practice of paying nurses straight-time wages for
11 overtime hours violated the Act, Gotham consented to treat the
12 nurses on its register as employees for purposes of the Act.
13 Specifically, the 1994 consent judgment included a prospective
14 injunction requiring Gotham to comply with 29 U.S.C. § 207(a) by
15 paying its nurses time and one-half wages for time worked over
16 40 hours in any week.

17 As Gotham's clients do not pay Gotham a premium for
18 overtime hours in all cases, Gotham's promise to abide by the
19 Act quickly proved expensive. After seeking advice of counsel,
20 the staffing agency adopted a policy designed to check
21 unauthorized overtime or, failing that, insulate itself from
22 claims for time and one-half compensation for unauthorized
23 hours. Gotham's overtime policy is printed on the time sheets
24 completed by its nurses and reads: "You must notify GOTHAM in
25 advance and receive authorization from GOTHAM for any shift or
26 partial shift that will bring your total hours to more than 40

1 hours in any given week. If you fail to do so you will not be
2 paid overtime rates for those hours."

3 In the course of their assignments at client hospitals,
4 Gotham nurses are sometimes asked to work overtime by hospital
5 staff. Nurses who agree to work an unscheduled shift will on
6 occasion contact Gotham first to request approval in compliance
7 with Gotham's rule. If Gotham authorizes an assignment, the
8 nurse is guaranteed premium wages for any resulting overtime.
9 But three out of four approval requests are denied. At other
10 times, nurses accept unscheduled shifts without obtaining the
11 staffing agency's approval. When these nurses report their
12 overtime for the preceding week, Gotham attempts to negotiate
13 with the hospital to procure an enhanced fee for the overtime
14 hours already worked. If Gotham succeeds -- as it does ten
15 percent of the time -- it pays the nurse time and one-half wages
16 for the unauthorized overtime hours. Otherwise, the nurse
17 receives straight-time wages for the extra hours worked.

18 It is this scenario that gives rise to the Secretary's
19 contention that Gotham's overtime practices violate 29 U.S.C.
20 § 207(a) and, by extension, the 1994 consent judgment. The
21 plaintiff's petition seeks back wages in excess of \$100,000 plus
22 pre-judgment interest for the period from January 1999 through
23 June 2002 and calls for an accounting of Gotham's wage
24 obligations from 2002 to the present. After a one-day trial in
25 March 2006, Judge Stanton granted Gotham's motion for judgment
26 based on partial findings at the conclusion of the Secretary's

1 case. He denied the Secretary's petition to hold defendants in
2 contempt. The district court also denied the Secretary's claim
3 concerning record-keeping violations and Gotham's counterclaim
4 to dissolve the injunction, but neither of these latter two
5 rulings have been appealed.

6 The Secretary challenges that portion of the district
7 court's March 20, 2006 judgment that denies her petition for
8 civil contempt against Gotham. That court believed the
9 unauthorized hours did not constitute work under the Act or, if
10 these were working hours, the legal question was too much in
11 doubt to warrant civil contempt. On this appeal the Secretary
12 presents us with two questions: first, whether Gotham's
13 overtime practices violate the Act; and second, if so, whether
14 the violation provides an adequate basis for civil contempt.

15 We think the trial court erred in labeling the nurses'
16 overtime hours as anything other than work and answer the first
17 question in the affirmative. But because we believe Gotham
18 acted on a reasonable interpretation of then unsettled law, we
19 answer the second question in the negative, and affirm the
20 district court's judgment on the alternative ground that the
21 Secretary did not meet her burden to prove contempt.

22 DISCUSSION

23 I Standard of Review

24 We review the denial of a petition for civil contempt under
25 the abuse of discretion standard. Dunn v. N.Y. State Dep't of
26 Labor, 47 F.3d 485, 490 (2d Cir. 1995). While we uphold the

1 district court's factual findings unless they are clearly
2 erroneous, the ultimate legal question of whether an employee is
3 entitled to overtime pay under the FLSA is subject to plenary
4 review. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450
5 U.S. 728, 743 (1981); Holzapfel v. Town of Newburgh, 145 F.3d
6 516, 521 (2d Cir. 1998). Further, where a party challenges a
7 principle of law relied on by the district court in making a
8 discretionary determination, we review de novo its choice and
9 interpretation of such principles. Scalisi v. Fund Asset Mgmt.,
10 380 F.3d 133, 137 (2d Cir. 2004).

11 II Violation of the Act's Overtime Provisions

12 Our first question is whether Gotham's failure to pay time
13 and one-half wages to its nurses for unauthorized overtime
14 violated the Act's overtime provisions. The Act provides that
15 "no employer shall employ any of his employees . . . for a
16 workweek longer than forty hours unless such employee receives
17 compensation for his employment in excess of the hours above
18 specified at a rate not less than one and one-half times the
19 regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

20 "Employ" is defined in the Act as including "to suffer or
21 permit to work," 29 U.S.C. § 203(g), but Congress did not define
22 the word "work." See IBP, Inc. v. Alvarez, 546 U.S. 21, 25
23 (2005). The broad meaning that has emerged from Supreme Court
24 cases describes work as exertion or loss of an employee's time
25 that is (1) controlled or required by an employer, (2) pursued
26 necessarily and primarily for the employer's benefit, and (3) if

1 performed outside the scheduled work time, an integral and
2 indispensable part of the employee's principal activities.
3 Holzappel, 145 F.3d at 522; see Tenn. Coal, Iron & R.R. Co. v.
4 Muscoda Local No. 123, 321 U.S. 590, 598 (1944); see also Armour
5 & Co. v. Wantock, 323 U.S. 126, 133 (1944) (clarifying that
6 exertion is not required to satisfy definition of work); Steiner
7 v. Mitchell, 350 U.S. 247, 252-53 (1956) (addressing exertion
8 outside of scheduled working time).

9 The Supreme Court has explained that the Act's overtime
10 provisions were aimed not only at raising wages but also at
11 limiting hours. Overnight Motor Transp. Co. v. Missel, 316 U.S.
12 572, 576-78 (1942). In other words, these provisions were
13 designed to remedy the "evil of overwork" by ensuring workers
14 were adequately compensated for long hours, as well as by
15 applying financial pressure on employers to reduce overtime.
16 Id. at 577-78; see also United States v. Rosenwasser, 323 U.S.
17 360, 361 (1944). In service of the statute's remedial and
18 humanitarian goals, the Supreme Court consistently has
19 interpreted the Act liberally and afforded its protections
20 exceptionally broad coverage. See, e.g., Tony & Susan Alamo
21 Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985); Rosenwasser,
22 323 U.S. at 362, 363 & n.3; Tenn. Coal, 321 U.S. at 597 ("Such a
23 statute must not be interpreted or applied in a narrow, grudging
24 manner.").

25 A. The Unauthorized Overtime Is Work

1 Gotham argues it neither benefits from nor controls the
2 nurses' unauthorized overtime and, accordingly, such time does
3 not constitute work under the Tennessee Coal test (as extended
4 in subsequent cases and elaborated in Holzapfel). Tenn. Coal,
5 321 U.S. at 598; Holzapfel, 145 F.3d at 522. Gotham seeks
6 support for this proposition in the trial court's findings that
7 (1) Gotham lacks primary control over the nurses' performance of
8 unscheduled shifts; (2) the decision to engage in overtime is
9 made by nurses and hospitals acting in furtherance of their own
10 interests; (3) the income generated by these unauthorized hours
11 is offset by the administrative burdens of operating Gotham's
12 overtime arrangement; and (4) Gotham does not desire the
13 overtime to be performed. Although we detect no clear error in
14 these factual findings, the legal conclusion drawn from them --
15 that the nurses' overtime is not work under the Act -- we think
16 is wrong.

17 Whether a nurse is working a morning, afternoon or night
18 shift in emergency care, an operating room, or on a hospital
19 floor, the overtime hours are indistinguishable from the
20 straight-time hours. Such work from the nurses' standpoint is
21 fungible. Work is work, after all. Nurses who work overtime,
22 at the hospitals' request, often continue doing the same kind of
23 work they were doing on their regular shifts. In that respect
24 we believe the district judge mischaracterized the Act when he
25 commented that the extra or overtime work is not "work" under
26 the statute.

1 As a threshold matter, application of the Tennessee Coal
2 test to the facts of this case is something of a red herring.
3 Contrary to the district court's belief, the Supreme Court's
4 definition (with roots in Webster's Dictionary, see Tenn. Coal,
5 321 U.S. at 598 n.11) does not purport to establish a "special
6 meaning" for work, but simply to guide the courts in applying
7 the word as it is commonly used and understood, id. at 598.
8 Further, if an activity fails the Tennessee Coal test, we
9 understand that result to mean the activity is not work and is
10 not compensable. Here, no party disputes that the performance
11 of overtime at least entitled the nurses to compensation at a
12 regular rate of pay. What Gotham implies is that the nurses'
13 overtime belongs to a new category of exertion, call it quasi-
14 work, that was not contemplated by the drafters of the Act and
15 is subject to its own compensation rules.

16 Gotham conceded in the 1994 consent judgment and again in
17 its appellate brief that it "employs" its nurses for purposes of
18 the Act. The classification of the nurses' regularly scheduled
19 activities as work within the meaning of the Act follows from
20 this concession. See, e.g., 29 U.S.C. § 203(g) (defining
21 "employ" to include suffering or permitting work). It is
22 significant, therefore, that there seems to be no distinction
23 between the exertion of Gotham's nurses during unauthorized and
24 authorized hours. In the typical case, by contrast, the
25 Tennessee Coal test is applied to ascertain whether an activity
26 that is markedly different from an employee's primary activities

1 may yet qualify as work. See, e.g., Tenn. Coal, 321 U.S. at 592
2 (travel time to ore mines); Holzapfel, 145 F.3d at 519 (dog
3 grooming and care by K-9 police officers); Leone v. Mobil Oil
4 Corp., 523 F.2d 1153, 1154 (D.C. Cir. 1975) (accompaniment of
5 federal occupational safety investigators during plant
6 inspection).

7 Turning to the specific elements of the test for purposes
8 of the case at hand, the staffing agency's contention that the
9 overtime is not work because it does not benefit Gotham is
10 unpersuasive. It is plain that if Gotham were not bound to
11 comply with the Act and instead paid its nurses straight-time
12 wages for overtime without administrative inconvenience, all
13 hours clocked by the nurses would satisfy the benefit prong of
14 the Tennessee Coal test. It is only by subtracting from
15 Gotham's benefit the costs of its attempted adherence to federal
16 law that the nurses' overtime ceases to benefit Gotham. Hence,
17 Gotham finds itself in a situation that we suppose quite common
18 in the business world in which the revenues gained from overtime
19 fall short of the costs incurred. Gotham's implication that
20 unprofitable labor is not work under the Act leads us to a
21 number of untenable conclusions; most pertinent here, an
22 employer would be permitted to avoid the Act whenever the
23 overtime provisions threaten success in achieving Congress' goal
24 of curtailing overtime by bringing its cost above its benefit to
25 the employer.

1 Gotham also insists that it lacks the degree of control
2 over the nurses' unauthorized shifts contemplated in the
3 definition of work. We note, however, that Gotham is not
4 permitted to supervise its nurses on hospital grounds at any
5 time, including regular scheduled shifts, and possesses no less
6 control over a nurse's activities during unauthorized shifts
7 than at other times. The only discernible difference suggested
8 by Gotham relates to the decision -- reached by the hospital and
9 nurse without Gotham's participation -- that unauthorized work
10 be performed. Gotham's limited control over a nurse's decision
11 to work overtime does not change the nature of the exertion that
12 follows and thus does not bear on whether such exertion is work.
13 Such circumstances may be relevant to the separate question
14 whether Gotham suffered or permitted such work, the inquiry to
15 which we now turn.

16 B. The Suffer or Permit Standard

17 Gotham is liable for the nurses' compensation for the
18 overtime hours only if it employed the nurses during this time,
19 that is, if it suffered or permitted the nurses to work. See 29
20 U.S.C. § 203(g).

21 1. Gotham's Knowledge

22 It is clear an employer's actual or imputed knowledge that
23 an employee is working is a necessary condition to finding the
24 employer suffers or permits that work. See, e.g., Holzapfel,
25 145 F.3d at 524; Davis v. Food Lion, 792 F.2d 1274, 1276 (4th
26 Cir. 1986); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d

1 413, 414 (9th Cir. 1981) (explaining that knowledge affords
2 employer the opportunity to comply with the Act).

3 Information that Gotham's nurses regularly worked overtime
4 was communicated to Gotham each week on the nurses' time sheets.
5 Gotham's insistence that it acquired its knowledge only after
6 the fact misses the point. We have never suggested that an
7 employer's knowledge need arise concurrently with the
8 performance of overtime, for good reason. The Act's overtime
9 provisions apply to work performed off premises, outside of the
10 employer's view and sometimes at odd hours, where an employer's
11 concurrent knowledge of an employee's labor is not the norm.
12 See 29 C.F.R. § 785.12. It would appear impractical, for
13 example, to require a K-9 officer to report to his supervisor
14 before and after grooming his dog. See Holzapfel, 145 F.3d at
15 524; see also Reich v. Dep't of Conservation & Natural Res., 28
16 F.3d 1076, 1079-80, 1084 (11th Cir. 1994) (requiring overtime be
17 paid to officers who worked in field and often at night with
18 infrequent contact with supervisors). Moreover, a requirement
19 of concurrent knowledge would allow employers to escape their
20 obligations under the Act by purposefully eschewing knowledge as
21 to when such work was performed.

22 We regard Gotham's knowledge as sufficient to afford it the
23 opportunity to comply with the Act. See Forrester, 646 F.2d at
24 414. An employer who has knowledge that an employee is working,
25 and who does not desire the work be done, has a duty to make
26 every effort to prevent its performance. Reich v. Stewart, 121

1 F.3d 400, 407 (8th Cir. 1997); Forrester, 646 F.2d at 414 ("An
2 employer who is armed with this knowledge cannot stand idly by
3 and allow an employee to perform overtime work without proper
4 compensation"); Mumbower v. Callicott, 526 F.2d 1183,
5 1188 (8th Cir. 1975) ("The employer who wishes no such work to
6 be done has a duty to see it is not performed."); 29 C.F.R.
7 § 785.13. This duty arises even where the employer has not
8 requested the overtime be performed or does not desire the
9 employee to work, or where the employee fails to report his
10 overtime hours. See Kosakow v. New Rochelle Radiology Assocs.,
11 274 F.3d 706, 718 (2d Cir. 2001); Holzapfel, 145 F.3d at 524; 29
12 C.F.R. §§ 785.11-.12.

13 2. Gotham's Rule Against Unauthorized Overtime

14 Gotham endeavored to reduce unwanted overtime by
15 promulgating a rule requiring its employees to obtain prior
16 approval for any work that would result in overtime and
17 informing them that, absent such approval, they would be paid
18 straight-time wages for the ensuing overtime. We do not agree
19 with the Secretary's interpretation of Gotham's rule as one that
20 disclaims liability for unauthorized overtime without barring
21 its performance outright. A straightforward reading indicates
22 the rule serves as both a prohibition and a warning as to the
23 consequence of its violation.

24 Whether Gotham's pre-approval rule satisfied its legal
25 obligation to prevent unwanted overtime involves a question of
26 first impression in this Circuit, complicated by Gotham's

1 limited control over the nurses. Our starting point is the
2 Department of Labor (Department) regulation addressing such
3 rules.

4 In all such cases it is the duty of the
5 management to exercise its control and see
6 that the work is not performed if it does
7 not want it to be performed. . . . The mere
8 promulgation of a rule against such work is
9 not enough. Management has the power to
10 enforce the rule and must make every effort
11 to do so.
12

13 29 C.F.R. § 785.13 (emphasis added); accord Reich v. Dep't of
14 Conservation, 28 F.3d at 1084; Wirtz v. Bledsoe, 365 F.2d 277,
15 278 (10th Cir. 1966) ("It has long been established that the
16 purpose of the [FLSA] cannot be frustrated by an employer's
17 instructions or even a contract not to work overtime.").
18 Although courts are responsible for final decisions concerning
19 interpretation of the Act, see 29 C.F.R. § 785.2; A.B.
20 Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942), the
21 Department's explanations bearing on the meaning of "suffer or
22 permit" and "work" in §§ 785.11-.13 are entitled to our respect.
23 Cf. Kavanagh v. Grand Union Co., 192 F.3d 269, 272 (2d Cir.
24 1999). The long-standing regulations in Part 785 reflect the
25 Department's expertise on interpretive questions that are
26 essential to the administration of the Act. Cf. Barnhart v.
27 Walton, 535 U.S. 212, 222 (2002); Leary v. United States, 395
28 U.S. 6, 25 (1969).

29 In Reich v. Dep't of Conservation, the Eleventh Circuit
30 adopted the position laid out in 29 C.F.R. § 785.13 and held

1 liable an employer that, like Gotham, had limited concurrent
2 control over its employees' work schedules. 28 F.3d at 1083-84.
3 The case involved a state agency charged with enforcing game and
4 fish laws, which employed enforcement officers posted throughout
5 the state. Id. at 1078. The officers, whose job it was to
6 answer citizen complaints around the clock, worked from home
7 under minimal supervision. Id. at 1078-79. The state agency
8 promulgated a rule forbidding officers to work more than 40
9 hours per week, but had actual and constructive knowledge that
10 some officers continued to work overtime without reporting the
11 extra hours. Id. at 1079-80. The Eleventh Circuit concluded
12 the agency could not avoid overtime compensation simply by
13 adopting a policy against overtime and issuing periodic
14 warnings. Id. at 1084.

15 Gotham's efforts to distinguish Reich v. Dep't of
16 Conservation do not convince us. The staffing agency points out
17 that the majority of employees involved in the Eleventh
18 Circuit's case were unable to perform their duties within a 40
19 hour workweek, id. at 1081 & n.12, while Gotham nurses can
20 fulfill their obligations -- at least to Gotham -- without
21 incurring overtime. Given this difference, Gotham urges us
22 instead to follow Lindow v. United States, 738 F.2d 1057, 1061-
23 62 & n.3 (9th Cir. 1984), where the Ninth Circuit held an
24 employer may insulate itself from overtime claims by notifying
25 its employees that overtime is not expected, so long as the

1 employees can complete their duties within regular hours and are
2 under no pressure to perform overtime.

3 In Lindow, employees of the Army Corps of Engineers were in
4 the habit of arriving fifteen minutes early to exchange
5 information with their colleagues working the earlier shift,
6 review the log book, drink coffee, and socialize. Id. at 1059,
7 1061. A portion of this time was classified by the court as
8 working time. Id. at 1059-61. The Corps issued a letter
9 informing its employees that they were not required to arrive
10 early, but some employees continued to do so. Id. at 1060-61.
11 The Ninth Circuit held that the letter relieved the Corps of
12 liability for overtime compensation because the Corps did not
13 require or pressure the employees to work overtime and the work
14 could have been performed during regular hours. Id. at 1061 &
15 n.3.

16 In the instant case, the district court found the
17 unauthorized shifts were controlled and required by the
18 hospitals and by the employees. It is not obvious to us that
19 the nurses do not on occasion work overtime because they feel
20 unable to satisfactorily perform their duties to hospital
21 supervisors or patients within their scheduled hours. It is
22 plain that Lindow's rationale does not extend to employees whose
23 jobs require them on occasion to work beyond regular hours,
24 whether the requirement is enforced by the employer or inherent
25 in the nature of the work. See id.

1 Even setting aside this concern and assuming that the
2 nurses elect to work overtime without any compulsion to do so,
3 we decline to follow Lindow. First, the Supreme Court has
4 rejected the argument that an employer may avoid its obligations
5 under the Act upon proof that its employees voluntarily engage
6 in inadequately compensated work. See Tony & Susan Alamo
7 Found., 471 U.S. at 302 ("[T]he purposes of the Act require that
8 it be applied even to those who would decline its
9 protections."); Barrentine, 450 U.S. at 740. More generally, as
10 the Eleventh Circuit recognized in Reich v. Dep't of
11 Conservation, "[t]he reason an employee continues to work beyond
12 his shift is immaterial; if the employer knows or has reason to
13 believe that the employee continues to work, the additional
14 hours must be counted." 28 F.3d at 1082 (citing 29 C.F.R.
15 § 785.11). In other words, once it is established that an
16 employer has knowledge of a worker's overtime activities and
17 that those activities constitute work under the Act, liability
18 does not turn on whether the employee agreed to work overtime
19 voluntarily or under duress.

20 Second, Lindow's holding was premised on the finding that
21 the duties carried out during overtime could have been completed
22 within the regular workday. 738 F.2d at 1061. We previously
23 explained that this fact alone does not excuse an employer from
24 the FLSA's overtime provisions. Holzapfel, 145 F.3d at 522. In
25 addition, the scenario presented to us differs from Lindow
26 inasmuch as the nurses who were asked to work overtime provided

1 services in addition to those performed during their regular
2 hours and so by definition were unable to complete their work
3 within those regular hours. Application of the Act's overtime
4 provisions in this case would put to Gotham and its client
5 hospitals the choice to either pay a premium for overtime or
6 engage other nurses to provide the additional services. This
7 choice -- which was not implicated in Lindow where the Corps
8 presumably could have barred overtime without altering its
9 demand for labor or budget -- plays an important role in the
10 FLSA's incentive structure to reduce overtime, spread employment
11 and compensate workers for the burden of long hours. See
12 Missel, 316 U.S. at 577-78.

13 We are of course aware that the conditions prevailing in
14 the present market for nurses in the United States influence the
15 options open to Gotham and its client hospitals. We have
16 identified nothing in these conditions to recommend carving an
17 exception to the Act's overtime provisions, however, and will
18 not ask nurses to shoulder the burden of the nation's nursing
19 shortage by denying them their rights under the Act. On our
20 reading, the FLSA presumes that employers, not employees, are in
21 the best position to address the evils of overwork and underpay.
22 This presumption is no less true in the nursing profession than
23 in any other. Finally, the Supreme Court instructs that
24 employees cannot waive the overtime protections granted them in
25 the FLSA without nullifying the Act's purposes and setting aside

1 the legislative goals it wanted effectuated. Barrentine, 450
2 U.S. at 740.

3 3. Gotham's Duty to Prevent Unwanted Overtime

4 In an ordinary employer-employee relationship, management
5 is believed to have ready access to a panoply of practical
6 measures to induce compliance with its formal rule against
7 overtime. In such cases, a presumption arises that an employer
8 who is armed with knowledge has the power to prevent work it
9 does not wish performed. Where this presumption holds, an
10 employer who knows of an employee's work may be held to suffer
11 or permit that work. We suppose that this presumption explains
12 why several cases and Department regulations seem to treat an
13 employer's knowledge as not only necessary, but also sufficient,
14 to establish its liability under the Act. See, e.g., 29 C.F.R.
15 §§ 785.11-.12; Holzapfel, 145 F.3d at 524; Doe v. United States,
16 372 F.3d 1347, 1360-61 (Fed. Cir. 2004) (collecting cases).

17 Gotham seeks to rebut this presumption on the basis that
18 its power to control the nurses is severely constrained by the
19 nature of its business and the labor market in which it deals.
20 Gotham portrays its role as nothing more than an employment
21 agency matching the requirements of hospitals with the
22 qualifications of nurses and maintains that it has no ability to
23 control nurses who violate its rule.

24 We recognize that Gotham does not have at its disposal all
25 the instruments of control available to ordinary employers.
26 That said, the law does not require Gotham to follow any

1 particular course to forestall unwanted work, but instead to
2 adopt all possible measures to achieve the desired result. See
3 28 C.F.R. § 785.13. Gotham has not persuaded us that it made
4 every effort to prevent the nurses' unauthorized overtime: for
5 example, it did not explain why it could not keep a daily,
6 unverified tally of its nurses' hours and reassign shifts later
7 in the week that would result in overtime; or refuse to assign
8 any shifts to nurses who habitually disregard Gotham's overtime
9 rule. Notably, Gotham admitted at trial that a nurse who
10 disregards its pre-approval rule faces no adverse consequences
11 beyond straight-time wages for the ensuing overtime, while one
12 who disregards Gotham's other policies is subject to contractual
13 penalties. If Gotham were serious about preventing unauthorized
14 overtime, it could discipline nurses who violate the rule. It
15 could also entirely disavow overtime hours, announcing a policy
16 that it does not, under any circumstances, employ a nurse for
17 more than 40 hours in a week. Any hours over the limit would
18 not be billed to the hospital and would not result in any
19 compensation for the nurse (as opposed to the current policy of
20 regular pay). Alternatively, Gotham could simply contract in
21 advance with the hospitals to charge a higher fee when nurses
22 are working overtime, thus shifting the decision to those best
23 placed to judge when overtime is cost-effective and avoiding the
24 need for an anti-overtime policy to begin with.

25 We confess we are skeptical whether an employer with full
26 knowledge respecting the activities of its employees ever lacks

1 power, at the end of the day, to require those it retains to
2 comply with company rules that implicate federal law. Gotham in
3 any event has not overcome the presumption here that it
4 possessed such power. It follows that Gotham suffered or
5 permitted the nurses' overtime and, by failing to compensate
6 them in accordance with 29 U.S.C. § 207(a), violated the Act and
7 the 1994 consent judgment.

8 III Denial of Petition for Contempt Affirmed

9 We turn now to whether that violation subjects Gotham to
10 being held in contempt. A federal court has the authority to
11 punish contempt of a consent decree. United States v. Int'l
12 Bhd. of Teamsters, 899 F.2d 143, 146 (2d Cir. 1990). However,
13 the judicial power of contempt is circumscribed and "[t]he
14 failure to meet the strict requirements of an order does not
15 necessarily subject a party to a holding of contempt." Dunn, 47
16 F.3d at 490. A party may be held in civil contempt only where a
17 plaintiff establishes (1) the decree was clear and unambiguous,
18 and (2) the proof of non-compliance is clear and convincing.
19 Id. Although the defendant's conduct need not be willful, a
20 plaintiff must also prove that (3) the defendant has not been
21 reasonably diligent and energetic in attempting to comply. City
22 of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n, 170
23 F.3d 279, 283 (2d Cir. 1999); Dunn, 47 F.3d at 490; see also
24 Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002)
25 (noting plaintiff's burden of proof). While we disagreed with
26 the district court's determination that the unauthorized work

1 was not compensable as overtime, we now affirm its alternative
2 holding that the Secretary did not carry her burden to prove
3 contempt.

4 A. The Decree Was Ambiguous with Respect to Gotham's Conduct

5 The Supreme Court has cautioned that contempt is a powerful
6 weapon under any circumstance and, when founded on a decree that
7 the defendant could not comprehend, it can be a ruinous one.
8 Int'l Longshoremen's Ass'n v. Phil. Marine Trade Ass'n, 389 U.S.
9 64, 76 (1967). To ensure fair notice to the defendant, the
10 decree underlying contempt must be sufficiently clear to allow
11 the party to whom it is addressed to ascertain precisely what it
12 can and cannot do. King v. Allied Vision Ltd., 65 F.3d 1051,
13 1058 (2d Cir. 1995); N.Y. State Nat'l Org. for Women v. Terry,
14 886 F.2d 1339, 1351-52 (2d Cir. 1989); see also Fed. R. Civ. P.
15 65(d) (requiring injunctive orders to be "specific in terms" and
16 "describe in reasonable detail . . . the act or acts sought to
17 be restrained"); Phil. Marine, 389 U.S. at 74-76 (reversing
18 contempt based on injunctive decree that did not satisfy the
19 specificity and clarity requirements set forth in Rule 65);
20 Int'l Bhd. of Teamsters, 899 F.2d at 146.

21 We agree with the Secretary that the incorporation into the
22 consent judgment of certain provisions of the FLSA does not, by
23 itself, render the decree ambiguous. McComb v. Jacksonville
24 Paper Co., 336 U.S. 187, 191-92 (1949). The proper measure of
25 clarity, however, is not whether the decree is clear in some
26 general sense, but whether it unambiguously proscribes the

1 challenged conduct. Perez v. Dansbury Hosp., 347 F.3d 419, 424
2 (2d Cir. 2003). If, as we believe to be the case here, the law
3 relied on by the party seeking contempt is ambiguous in its
4 application to the challenged conduct, contempt will not lie.
5 See, e.g., Rajah Auto Supply Co. v. Grossman, 207 F. 84 (2d Cir.
6 1913) (per curiam) (affirming denial of contempt motion where
7 plaintiff's case was too doubtful on the facts and the law to
8 warrant contempt); United States ex rel. IRS v. Norton, 717 F.2d
9 767, 774 (3d Cir. 1983) ("[A]ny ambiguity in the law should be
10 resolved in favor of the party charged with contempt."); Project
11 B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991) (stating
12 prudential rule that ambiguities in court orders should be read
13 in light favorable to party charged with contempt); cf. Vertex
14 Distrib. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th
15 Cir. 1982) (explaining that party should not be held in contempt
16 if his actions appear based on a good faith and reasonable
17 interpretation of the order).

18 It should be apparent that the novel question addressed
19 above, whether employees must be paid overtime wages for work
20 that their employer has prohibited and does not desire, was not
21 the subject of an obvious answer. On the contrary, when the
22 Secretary brought its petition for contempt to the district
23 court, there was a substantial question as to the legality of
24 Gotham's overtime arrangement and "fair ground of doubt as to
25 the wrongfulness of the defendant's conduct." Cal. Artificial

1 Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885); King, 65
2 F.3d at 1058.

3 From another angle, it seems unreasonable that Gotham be
4 required, on pain of contempt, to arrive at a correct answer to
5 such a difficult question of first impression. See Radio Corp.
6 of Am. v. Cable Radio Tube Corp., 66 F.2d 778, 782-83 (2d Cir.
7 1933) (noting potential unfairness to defendant where contempt
8 proceedings used to resolve substantial dispute); United States
9 v. Acetturo, 842 F.2d 1408, 1416 n.4 (3d Cir. 1988) (suggesting
10 trial court consider relief from contempt in circumstances of
11 case of first impression). But cf. Apple Computer, Inc. v.
12 Formula Int'l, Inc., 594 F. Supp. 617, 623 (C.D. Cal. 1984)
13 (issuing contempt order despite novel nature of underlying legal
14 issue after finding defendant's alleged interpretation was a
15 "mere pretext" to avoid an injunction).

16 B. Gotham Was Reasonably Diligent in Attempting to Comply

17 Additionally, Gotham's efforts to comply with the consent
18 judgment were adequate to warrant relief from contempt. We have
19 noted already that the staffing agency's legal obligations were
20 difficult to discern and its managerial role vis-à-vis the
21 nurses made compliance more challenging than would be the case
22 in an ordinary employment context. See Dunn, 47 F.3d at 490
23 (affirming trial court's denial of petition for contempt where
24 situation faced by defendant was complex and largely outside its
25 control). Against that backdrop, Gotham sought the advice of
26 counsel before adopting its overtime policy; it made its nurses

1 DENNIS JACOBS, Chief Judge, concurring in part and
2 concurring in the judgment:

3
4 The district court entered a consent decree requiring
5 Gotham Registry, a staffing agency for healthcare
6 professionals, to comply with the overtime requirements of
7 the Fair Labor Standards Act ("FLSA") for nurses it
8 "employ[s]." The only question presented on this appeal is
9 whether we should affirm the ruling by the district court,
10 which is presumed to know its own injunction, that Gotham is
11 not in contempt. See JTH Tax, Inc. v. H & R Block Eastern
12 Tax Svcs., Inc., 359 F.3d 699, 705 (4th Cir. 2004).

13 The majority agrees that Gotham is not in contempt. I
14 concur in that result, because it is obvious to me that
15 Gotham was not in violation of the FLSA when it refused to
16 pay overtime to employees whom it forbid to work overtime,
17 and (when they violated their employer's instructions) were
18 not acting as employees under the relevant Tennessee Coal
19 test. I cannot sign the majority opinion because it holds
20 that Gotham's practice violates the FLSA--though Gotham
21 could not be expected to know this until so advised by the
22 majority's ambitious, consequential and dubious rulings.

23 The correct test for whether Gotham must pay overtime
24 is set out in Tennessee Coal: whether the work was

1 "controlled or required by the employer and pursued
2 necessarily and primarily for the benefit of the employer
3 and his business." Tenn. Coal, Iron & RR. Co. v. Muscoda
4 Local No. 123, 321 U.S. 590, 598 (1944). The majority
5 recites the test, duly records the district court's findings
6 as to each prong, and concedes that "we detect no clear
7 error in these factual findings" Maj. Op. at 9,
8 supra. It would seem that if this Court were going to
9 transcend the question presented and gratuitously answer an
10 underlying question (Were the nurses acting as employees
11 when they did what the employer forbid?), it might content
12 itself with the formulation of the Supreme Court and
13 findings of an experienced district judge. The
14 justification offered by the majority opinion is that
15 "application of the Tennessee Coal test to the facts of this
16 case is something of a red herring." Maj. Op. at 10, supra.
17 I do not find this ichthyological approach useful.

18 Tennessee Coal prescribes a two-part definition of
19 "work" under the FLSA: an employee's efforts (1) must be
20 "controlled or required by the employer" and (2) "pursued
21 necessarily and primarily for the benefit of the employer
22 and his business." Tenn. Coal, 321 U.S. at 598 (emphasis
23 added).

1 As to control: the district court found that Gotham
2 lacked control over the nurses' performance of unscheduled
3 shifts, that nurses and hospitals decide whether overtime
4 will be performed based on their own interests, and that
5 Gotham does not desire the performance of overtime. Q.E.D.
6 Though conceding that a nurse's decision to work overtime is
7 "unauthorized work" that is "reached by the hospital and
8 nurse without Gotham's participation," Maj. Op. at 12,
9 supra, the majority argues that such "limited control [sic]
10 . . . does not change the nature of the exertion that
11 follows and thus does not bear on whether such exertion is
12 work." Id. This is an extreme simplification--and useless,
13 because the necessary analytical tools are readily available
14 in Tennessee Coal and in Labor Department regulations.

15 The applicable regulation requires that an employer
16 "exercise its control and see that the work is not performed
17 if it does not want it to be performed": "[t]he mere
18 promulgation of a rule against such work is not enough." 29
19 C.F.R. § 785.13. To this we owe Chevron deference.
20 Gotham's preauthorization rule bars the performance of
21 unauthorized overtime and refuses compensation at overtime
22 rates for such unauthorized hours. Of course a rule is
23 insufficient unless it is applied and enforced. But Gotham
24 has enforced this rule conscientiously, as the findings of

1 the district court confirm: 75 percent of preauthorization
2 requests are turned down, and unauthorized overtime shifts
3 are reimbursed at the overtime rate only on the rare
4 occasions (about ten percent of the time) when Gotham
5 persuades the hospital to agree retroactively to an overtime
6 rate. Gotham should not be pressed to more oppressive
7 measures. Suspension would be ineffective because the
8 nurses are professionals in great demand who can (and often
9 do) work for multiple staffing agencies: there are at least
10 25 in competition with Gotham in the New York area alone.
11 Gotham should not be required to rely on undercover agents
12 to obtain advance knowledge of an unauthorized overtime
13 shift, or on enforcers to drag nurses from the bedside of
14 the sick. See Davis v. Food Lion, 792 F.2d 1274, 1277 (4th
15 Cir. 1986) (holding that if required work could be performed
16 within 40 hours, and if the employer enforced its 40-hour
17 rule, employer lacked actual or constructive knowledge of
18 the overtime work). The nurses' overtime efforts are
19 therefore neither controlled nor required by Gotham.

20 As to the second Tennessee Coal consideration--whether
21 the activity is "pursued necessarily and primarily" for the
22 employer's benefit--the Secretary has demonstrated no error
23 in the trial court's finding that the additional shifts do
24 not necessarily benefit Gotham. The district court found

1 that the documented administrative costs alone would wipe
2 out any remaining profit if Gotham were to pay an overtime
3 rate on shifts reimbursed at a straight-time rate. This
4 finding is amply supported by the record: Gotham's CEO
5 testified that unauthorized overtime triggers additional
6 costs such as time spent tracking, confirming, and
7 negotiating rates for overtime hours with hospitals. No
8 wonder Gotham forbids overtime. It cannot be said that such
9 shifts are "pursued necessarily and primarily" for Gotham's
10 benefit.

11 Under Tennessee Coal, the shifts in question were not
12 performed in Gotham's "employ" within the meaning of the
13 FLSA, and Gotham therefore did not violate the consent
14 decree. In lieu of undertaking the prescribed analysis
15 under Tennessee Coal, the majority announces the tautology
16 that "[w]ork is work, after all." Maj. Op. at 9, supra.

17 The majority complains that "Gotham has not persuaded
18 us that it made every effort to prevent the nurses'
19 unauthorized overtime," Maj. Op. at 21, supra (emphasis
20 added), and goes on to speculate as to how Gotham might
21 (within the law) effectively stop it. For example, the
22 majority cites Gotham's supposed failure to explain (though
23 never asked) "why it could not keep a daily, unverified
24 tally of its nurses' hours and reassign shifts later in the

1 week that would result in overtime." Maj. Op. at 20, supra.
2 I do not understand this formulation and I would be
3 surprised if Gotham or the nurses did. Moreover, the
4 majority ignores the fact that nurses often work for more
5 than one agency. The majority also taxes Gotham for its
6 supposed failure to explain why it does not "refuse to
7 assign any shifts to nurses who habitually disregard
8 Gotham's overtime rule." Maj. Op. at 20, supra. In other
9 words, Gotham could fire them. Perhaps: maybe an employer
10 can discipline an employee for habitually staying in the
11 operating room or on a ward. I say "maybe" because I don't
12 know, and the reason I don't know is because this argument
13 has not been made to us and has not been briefed by the
14 parties and input has not been solicited from the members of
15 the nursing profession who have the largest stake in this
16 question. I am compelled to add that the majority does not
17 know either, for the same reasons.

18 The majority next posits that "Gotham could simply
19 contract in advance with the hospitals to charge a higher
20 fee when nurses are working overtime." Maj. Op. at 21,
21 supra. That of course begs the (not "simple") question of
22 what happens when a nurse working for Gotham works at more
23 than one hospital or when a nurse works at one or more
24 hospitals for multiple agencies.

1 Finally, the majority opinion says that an agency can
2 "entirely disavow overtime hours, announcing a policy that
3 it does not, under any circumstances, employ a nurse for
4 more than 40 hours in a week." Maj. Op. at 21, supra. Thus
5 the majority holds that an employer can enforce its overtime
6 restriction by paying the employee nothing at all for such
7 hours. That may be. And this certainly will solve Gotham's
8 problem and ensure that a staffing agency can comply with
9 the labor laws (at least those applicable in the Second
10 Circuit) and avoid contempt. But this holding may come as a
11 surprise to the Secretary of Labor. And it runs counter to
12 the position of every party; as the majority concedes, "no
13 party disputes that the performance of overtime entitled the
14 nurses to compensation at the regular rate of pay at least."
15 Maj. Op. at 10, supra. My strong view is that this
16 appellate panel should affirm the denial of contempt without
17 reaching and deciding large underlying questions of labor
18 law. Maybe a staffing agency can and should pay nurses zero
19 dollars per overtime hour worked. But though as a panel-
20 member I am drawn into a critique of the majority's
21 unnecessary analysis, I would not decide that question on
22 this appeal because we lack the benefit of input from the
23 parties (and amici) and we lack findings by a district judge
24 made on the basis of a developed record.

1 The majority opinion affirms the denial of the contempt
2 motion, on the ground of the "then unsettled law" prevailing
3 when Judge Stanton made his ruling. Maj. Op. at 6, supra.
4 I agree that the law was then unsettled (though I think it
5 is little good we have now done in that department). It is
6 obvious that the agency system in which Gotham and many
7 nurses operate is a preferred market mechanism of a
8 profession whose services are much in demand. The majority
9 has upended the way in which many nurses elect to make a
10 living. Nurses evidently have the bargaining power to sell
11 their services to individual hospitals without becoming
12 employees, without joining unions, and without submitting
13 themselves to the work schedules of wage slaves. In short,
14 nurses use agencies to create for themselves the freedom and
15 profit opportunities available to other professionals whose
16 services are in great demand. The majority opinion
17 unsettles these market arrangements.