

No. 13-20081

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VERA CHAPMAN and KRYSTAL HOWARD,
Plaintiffs-Appellees,

v.

A.S.U.I. HEALTHCARE & DEVELOPMENT CENTER and DIANN SIMIEN,
Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Texas

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

SARAH KAY MARCUS
Attorney

U.S. Department of Labor
Office of the Solicitor, Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5696

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INTEREST OF THE SECRETARY

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor (“Secretary”) submits this brief as *amicus curiae* in support of Vera Chapman and Krystal Howard. The Secretary has a substantial interest in the proper judicial interpretation of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (“FLSA” or “Act”), because he administers and enforces the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217.

STATEMENT OF ISSUES

1. Whether the district court correctly granted summary judgment to workers who provided residential assistance to individuals with disabilities on the issue of their status as employees under the FLSA.
2. Whether the district court correctly concluded that the Vice-President of the company that employed those workers is individually liable for violations of the Act.
3. Whether the district court properly awarded liquidated damages to the employees.

BACKGROUND

A. Factual Background

A.S.U.I. Healthcare and Development Center (“A.S.U.I.”) contracts with the Texas Department of Aging and Disability Services (“DADS”) to provide home- and community-based services to individuals with disabilities. *Chapman v. A.S.U.I. Healthcare of Tex., Inc.*, Civil Action No. H-11-3025, 2012 WL 3614187, at *1 (S.D. Tex. Aug. 21, 2012) (“*Chapman I*”).¹ These services include “case management,” “nursing care,” “residential assistance,” and “dayhabilitation.” *Id.* A.S.U.I. operates ten to twenty group homes in which its clients live, as well as a

¹ For purposes of this brief, the Secretary relies on the district court’s factual findings, many of which are undisputed.

Dayhabilitation Center that its clients attend weekdays from 9:00 a.m. to 3:00 p.m. *Id.* When a person with a disability selects A.S.U.I. as a service provider, A.S.U.I. assists the new client in choosing a group residence. *Id.*

While they are at their residences, A.S.U.I.'s clients receive assistance from "direct care specialists." *Id.* Direct care specialists, who are not required to have training before beginning work, provide services such as washing, cooking, cleaning, and interacting with clients. *Id.* Direct care specialists are required to purchase their own uniforms. *Id.* at *1, 6. A.S.U.I. classifies direct care specialists as independent contractors rather than as employees. *Id.* at *1.

Diann Simien, A.S.U.I.'s Vice-President, Program Manager, and Director, hired Vera Chapman and Krystal Howard to be direct care specialists for A.S.U.I. *Id.*; *Chapman v. A.S.U.I. Healthcare & Dev. Ctr.*, Civil Action No. H-11-3025, 2013 WL 487032, at *5 (S.D. Tex. Feb. 6, 2013) ("*Chapman II*"). Simien told Chapman and Howard in which residences they would work and on what days. *Chapman I*, 2012 WL 3614187, at *4; *Chapman II*, 2013 WL 487032, at *3, 6. Chapman worked for A.S.U.I. from Fall 2008 to December 2010; Howard worked for A.S.U.I. between Fall 2005 and December 2010. *Chapman I*, 2012 WL 3614187, at *1. During those times, neither Chapman nor Howard worked for any other similar business. *Id.* at *6.

Throughout their employment with A.S.U.I., Chapman and Howard typically worked three to four overnight shifts per week. *See id.* at *1. For each shift, they were instructed to sign in to work, and were paid, from 3:00 p.m. to 10:00 p.m. and from 6:00 a.m. to 9:00 a.m. *Chapman II*, 2013 WL 487032, at *5. Although Chapman and Howard remained in the residences between 10:00 p.m. and 6:00 a.m., A.S.U.I. did not pay them for those hours. *Id.* For compensated hours, Chapman received \$7.25 per hour and Howard \$8.00 per hour, including for hours worked over 40 in a week. *Id.*

B. Procedural History

In August 2011, Chapman and Howard (collectively “plaintiffs”) filed suit in the District Court for the Southern District of Texas against A.S.U.I. and Simien (collectively “A.S.U.I.”) under the FLSA for unpaid minimum wage and overtime compensation. Pls.’ Complaint. In June 2012, plaintiffs filed a motion for summary judgment asserting that they were entitled to the protections of the FLSA because they were A.S.U.I.’s employees, as opposed to independent contractors, and because the companionship services exemption from the FLSA’s requirements did not apply to their work. Pls.’ Mot. for Final Summ. J.²

² A.S.U.I. had previously filed a motion to dismiss plaintiffs’ case, arguing that the application of the companionship services exemption defeated plaintiffs’ claims. Defs.’ Rule 12(b)(6) Motion to Dismiss. The district court denied A.S.U.I.’s motion, concluding that because plaintiffs’ allegations supported a conclusion that their work did not occur in private homes, which if true precludes the application

On August 21, 2012, the district court issued an opinion granting plaintiffs' motion as to FLSA liability. *Chapman I*, 2012 WL 3614187, at *1. The determination of whether a worker is an employee or an independent contractor, the court explained, calls for assessing “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” *Id.* at *3 (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)). The court considered five factors in its “economic realities” analysis: “(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.” *Id.* at *3-7 (quoting *Hopkins*, 545 F.3d at 343).

The court concluded that all five factors weighed in favor of employee status. As to the first factor, “ASUI controlled the meaningful aspects of its community and home healthcare business.” *Id.* at *4. Specifically, “ASUI received clients from [a county authority], assisted those clients in choosing a

of the exemption, plaintiffs’ complaint sufficiently stated a plausible claim for relief. Order (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A.S.U.I. filed a motion for reconsideration, Defs.’ R. 60(b)(6) Mot. for Recons., which the district court also denied, Order.

residence, hired direct care specialists for the residences and staff for its Dayhabilitation Center, contracted with DADS for funding, . . . distributed those funds to direct care specialists and staff[,] . . . and . . . controlled [plaintiffs'] opportunities for hours.” *Id.* Furthermore, “Simien assigned [plaintiffs] to houses, told them they were scheduled to work every other day, and called them to cover the absences of other specialists.” *Id.* Concerning the second factor, plaintiffs’ purchase of uniforms was “‘negligible’ compared to ASUI’s investment” in assigning caregivers to homes, contracting with DADS, managing clients, and maintaining payroll. *Id.* at *5. With regard to the third factor, plaintiffs’ “opportunity for profit was almost entirely determined by their hours and rate of pay provided by ASUI.” *Id.* Addressing the fourth factor, plaintiffs’ positions “do not require specialized skills,” prior experience was not a prerequisite for the job, and “washing, cooking, cleaning, interacting with clients, and working on the clients’ ‘training goals’ . . . are not [skills] unique to the profession.” *Id.* at *6. Finally, as to the fifth factor, “Howard worked continuously for ASUI for close to four years, and Chapman worked for ASUI for almost two years,” and the record contained “no evidence to indicate that either Howard or Chapman worked in a similar capacity for another business while working for ASUI.” *Id.* The court thus concluded that plaintiffs had “proffered sufficient summary-judgment evidence to establish that they were employees of ASUI as a matter of law.” *Id.* at *7.

Because undisputed evidence showed that plaintiffs were not paid for hours worked between 10:00 p.m. and 6:00 a.m. and were not paid one and a half times their hourly rates for hours worked over 40 in a workweek, the court concluded that A.S.U.I. had violated the FLSA's minimum wage and overtime requirements. *Id.* at *7. In addition, the court noted that A.S.U.I. had not argued in its response to plaintiffs' motion for summary judgment that the affirmative defense of the companionship service exemption applied. *Id.* Because "[t]he burden of proving exempt status lies with the employer" and "ASUI failed to show there was a genuine issue of material fact regarding" the exemption's application, the court granted summary judgment to plaintiffs as to liability. *Id.*

The district court held a trial on the issues remaining in the case, at which plaintiffs and Simien testified. *Chapman II*, 2013 WL 487032, at *1; *see generally* Tr. On February 6, 2013, the court issued an opinion resolving the various motions made by the parties and awarding damages to plaintiffs. *Chapman II*, 2013 WL 487032. In relevant part, the court ruled against A.S.U.I. on the issue of Simien's individual liability for plaintiffs' backwages because "she exercised substantial control over the operational management of plaintiffs' employment," made "ultimate employment decisions" such as hiring plaintiffs, set plaintiffs' schedules, "set the rate of pay for plaintiffs," "personally reviewed their hours and compensation," and was "involved in the day-to-day operations of ASUI." *Id.* at

*2, 3, 6. In addition, the court concluded that an award of liquidated damages was appropriate because “defendants have not presented sufficient evidence that they made a concerted effort to comply with federal wage law, and the court cannot find that defendants’ belief that the plaintiffs were independent contractors was reasonable and the product of a good-faith investigation.” *Id.* The court awarded Chapman and Howard backwages in the amounts of \$15,311.82 and \$27,182.56, respectively, as well as an equal amount of liquidated damages. *Id.* at *6-7, 9.

ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT AS A MATTER OF ECONOMIC REALITY PLAINTIFFS WERE EMPLOYEES UNDER THE FLSA RATHER THAN INDEPENDENT CONTRACTORS

1. The FLSA applies to an extremely broad scope of employment relationships, and only workers in business for themselves are excluded from its coverage as independent contractors.

The FLSA applies to a wide range of employment relationships. The Act’s text is expansive; it defines “employer” to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee,” “employee” as “any individual employed by an employer,” and “employ” to “include[] to suffer or permit to work.” 29 U.S.C. 203(d), (e)(1), (g). The Supreme Court and this Court have explicitly and repeatedly recognized that this language demonstrates Congress’s intent for the FLSA to apply broadly. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (noting that “employ” is defined with

“striking breadth” (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)); *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (“A broader or more comprehensive coverage of employees . . . would be difficult to frame.”); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 665 (5th Cir. 1983) (“The term ‘employee’ is thus used ‘in the broadest sense ‘ever . . . included in any act.’” (quoting *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982))). This breadth reflects Congress’s intent for the Act to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. 202(a), (b); see *Rosenwasser*, 323 U.S. at 361-62; *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (“Given the remedial purposes of the legislation, an expansive definition of ‘employee’ has been adopted by the courts.”).

The determination of whether a worker is covered by the Act must be made in the context of these sweeping definitions and the courts’ expansive reading of the Act’s scope. The “particularly broad” definition of “employee” encompasses all workers who are, “as a matter of economic reality, . . . economically dependent upon the alleged employer.” *Hopkins*, 545 F.3d at 343 (citing *Darden*, 503 U.S. at 326; *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998)). Only a worker who “is instead in business for himself” is an independent contractor not covered by the Act. *Id.* (citing *Express Sixty-Minutes*,

161 F.3d at 303). The “focus” and “ultimate concept” of the determination of whether a worker is an employee or independent contractor, then, is “the *economic dependence* of the alleged employee.” *Id.*; see *Pilgrim Equip. Co.*, 527 F.2d at 1311-12 (“[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.”).

2. The district court correctly concluded that plaintiffs were not in business for themselves but instead were economically dependent on A.S.U.I.

In assessing whether particular workers are economically dependent on their alleged employer, this Court “consider[s] five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.” *Hopkins*, 545 F.3d at 343 (citing *Express Sixty-Minutes*, 161 F.3d at 303). Importantly, “[n]o one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.” *Pilgrim Equip. Co.*, 527 F.2d at 1311 (citing *Mednick v. Albert*

Enters., Inc., 508 F.2d 297 (5th Cir. 1975)); accord *Hopkins*, 545 F.3d at 343 (explaining that “[n]o single factor is determinative” and “each factor is a tool used to gauge the *economic dependence* of the alleged employee, and each must be applied with this ultimate concept in mind” (citing *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043-44 (5th Cir. 1987)); *Scantland v. Jeffry Knight, Inc.*, --- F.3d ---, 2013 WL 3585635, at *3 (11th Cir. July 16, 2013) (“We view the subsidiary facts relevant to each factor through the lens of ‘economic dependence.’”).

a. A.S.U.I., not plaintiffs, controlled the meaningful aspects of the business.

The “degree of control” factor calls for consideration of whether “an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.” *Hopkins*, 545 F.3d at 343 (quoting *Mr. W Fireworks*, 814 F.2d at 1049) (internal quotation marks omitted). The “meaningful” aspects of a business include personnel decisions, such as hiring, promotions, and firing; setting the wages, hours, and assignments of workers; advertising or otherwise obtaining business; acquiring merchandise; and price-setting. See, e.g., *Hopkins*, 545 F.3d at 343-44; *Mr. W Fireworks*, 814 F.2d at 1047-49. Importantly, “the lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.” *Mr. W Fireworks*, 814 F.2d at 1049 (quoting *Pilgrim Equip.*, 527 F.2d at 1312-13).

Here, the district court correctly determined that plaintiffs did not control the meaningful aspects of the business of caring for clients in their residences. *See Chapman I*, 2012 WL 3614187, at *4. The court considered relevant facts, including that A.S.U.I. “received clients,” “assisted those clients in choosing a residence,” “hired direct care specialists for the residences,” “contracted with DADS for funding,” “distributed those funds to direct care specialists and staff,” and, with regard to plaintiffs, “controlled their opportunities for hours,” “assigned them to houses,” “told them they were scheduled to work every other day,” and “called them to cover the absences of other specialists.” *Id.* These circumstances show that plaintiffs did not exercise the type of control over the business or their own work indicative of being in business for themselves rather than being A.S.U.I.’s employees.

b. Plaintiffs’ investment in the business was negligible compared to A.S.U.I.’s investment.

This Court instructs that workers’ “relative investment must be compared with the investment of [the alleged employer] in order to determine the degree of economic dependence.” *Mr. W Fireworks*, 814 F.2d at 1052 (citing, *inter alia*, *Pilgrim Equip.*, 527 F.2d at 1314). “[F]ew, minor purchases . . . do not indicate legally significant investment by” workers “when the overwhelming majority of the risk capital is supplied by” the alleged employer. *Id.* (citing, *inter alia*, *Pilgrim Equip.*, 527 F.2d at 1314).

As the district court correctly explained, in this case, plaintiffs' only investment was the purchase of uniforms, whereas A.S.U.I. funded a staff, had a contract with DADS, took on clients, arranged for caregivers to work in residences, and maintained a payroll. *See Chapman I*, 2012 WL 3614187, at *5. Without A.S.U.I., plaintiffs would have had uniforms but no clients, residences in which to provide services, or support staff to manage these arrangements; they were therefore economically dependent on A.S.U.I. This factor thus weighs strongly in favor of categorizing plaintiffs as employees. *See Scantland*, 2013 WL 3585635, at *7 (explaining that even where workers must purchase tools and equipment, "these expenditures seem to detract little from the worker's economic dependence on [the alleged employer], which is the lens through which we evaluate each of the several factors").

c. Plaintiffs did not have the opportunity to profit or incur losses from their work with A.S.U.I.

To assess whether a worker is in business for herself, a court is also to consider "whether the worker or the alleged employer controlled the 'major determinants of the amount of profit which the [worker] could make.'" *Hopkins*, 545 F.3d at 344 (quoting *Pilgrim Equip.*, 527 F.2d at 1313) (alteration in original). These determinants include setting prices and controlling advertising. *See Mr. W Fireworks*, 814 F.2d at 1050. Profits are "'gain realized from a business over and above its [capital] expenditures'" rather than returns from labor, which are "more

properly ‘classified as wages.’” *Id.* (quoting *Brock v. Lauritzen*, 624 F. Supp. 966, 969-70 (E.D. Wis. 1985)) (alteration in original); see *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 334 (5th Cir. 1993) (including as a fact “weigh[ing] in favor of employee status” that the workers’ “compensation while working for [the alleged employer] depended on the hourly rate and number of hours worked, both of which [the alleged employer] controlled”); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (concluding that workers whose alleged employer controlled the volume of business “are far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments” (quoting *Mr. W Fireworks*, 814 F.2d at 1051)). This factor also includes consideration of whether it is possible for the workers to “suffer a loss in their alleged independent contractor operations.” *Pilgrim Equip.*, 527 F.2d at 1313.

Plaintiffs had no opportunity for profit or loss. As the district court found, A.S.U.I. set plaintiffs’ “hours and their hourly rate of pay.” *Chapman I*, 2012 WL 3614187, at *5. Therefore, plaintiffs received wages rather than engaging in business that could generate a return on investment. See *Mr. W Fireworks*, 814 F.2d at 1050. The district court also correctly noted that plaintiffs could not make more or less money by reducing costs or obtaining more work because “their only costs were uniforms and they worked full-time for ASUI.” *Chapman I*, 2012 WL

3614187, at *5. Furthermore, it is clear from the record that plaintiffs had no risk of loss because they had not invested capital in the business of providing residential assistance to A.S.U.I.'s clients. For these reasons, this factor indicates that plaintiffs were economically dependent on A.S.U.I. *See Scantland*, 2013 WL 3585635, at *6 (concluding that because workers' ability to make more money arose largely from their ability to perform additional work, their situation was "little different from the usual path of an employee" and therefore "suggests economic dependence, and points strongly toward employee status").

d. Plaintiffs' work did not require specialized skills, nor did it allow for the exercise of initiative.

Another relevant factor in determining economic dependence is "whether the worker exhibits the type of skill and initiative typically indicative of independent-contractor status." *Hopkins*, 545 F.3d at 345 (citing *Pilgrim Equip.*, 527 F.2d at 1314). This Court has explained that "routine work which requires industry and efficiency is not indicative of independence and nonemployee status." *Express Sixty-Minutes*, 161 F.3d at 305 (quoting *Pilgrim Equip.*, 527 F.2d at 1314). Instead, a worker in business for herself would have "some unique skill set" or "some ability to exercise significant initiative within the business." *Hopkins*, 545 F.3d at 345 (citing *Carrell*, 998 F.2d at 333; *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983)).

The district court properly analyzed the facts relevant to this factor. As direct care specialists, plaintiffs “[did] not need prior experience to be qualified for the job” and used only skills, such as “washing, cooking, cleaning, [and] interacting with clients,” that “are not unique to their profession.” *Chapman I*, 2012 WL 3614187, at *6. These tasks do not require specialized skills that would suggest economic independence. *See Brennan v. Partida*, 492 F.2d 707, 709, 710 (5th Cir. 1974) (including the fact that workers who opened, closed, and cleaned a Laundromat performed tasks that were “routine and uncomplicated, requiring no special skills or training” as a reason the workers were properly classified as employees). Additionally, plaintiffs “[could] not build new business because the clients come to ASUI through [a county authority], which provides clients the opportunity to select a care agency from a preexisting list.” *Chapman I*, 2012 WL 3614187, at *6. Plaintiffs therefore could not exercise initiative as direct care specialists. For these reasons, plaintiffs’ work was not indicative of economic independence.

e. Plaintiffs worked exclusively for A.S.U.I. for extended periods of time.

Courts consider the permanency of the relationship between workers and an alleged employer because a lengthy relationship “indicates dependence.” *Pilgrim Equip.*, 527 F.2d at 1314. This Court’s opinions consider the duration and exclusivity of the relationship in assessing this factor. *See, e.g., Hopkins*, 545 F.3d

at 346 (holding that “the permanency factor weighs in favor of employee status” for workers who “worked exclusively for [the alleged employer] for several years” and could not “easily . . . take their ‘business organization’ elsewhere” (citing *Hickey*, 699 F.2d at 752)); *Pilgrim Equip.*, 527 F.2d at 1314 (holding that workers with one-year contracts who “have nothing to transfer [to a company similar to their alleged employer] but their own labor” are “dependent upon [the alleged employer]’s continued employment”).

The district court found that Chapman and Howard worked for A.S.U.I. for almost two and almost four years, respectively, and that there was no indication in the record that they worked “in a similar capacity for another business.” *Chapman I*, 2012 WL 3614187, at *6. Furthermore, had plaintiffs left A.S.U.I. and sought work with another home- and community-based services provider, they would have had “nothing to transfer but their own labor.” *Pilgrim Equip.*, 527 F.2d at 1314. These facts suggest that plaintiffs were economically dependent on A.S.U.I. rather than in business for themselves.

f. Plaintiffs’ work was an integral part of A.S.U.I.’s business.

In determining whether plaintiffs were A.S.U.I.’s employees, it would also be helpful and appropriate for the Court to consider “the extent to which the service rendered is an integral part of the alleged employer’s business.” *Scantland*, 2013 WL 3585635, at *3. This Court has not taken this factor into account in

every case raising the issue of employment status, but the five-factor list is explicitly “non-exclusive.” *See, e.g., Thibault v. Bellsouth Telecomm., Inc.*, 612 F.3d 843, 845 (5th Cir. 2010) (citing *Hopkins*, 545 F.3d at 343). Moreover, some opinions of this court have taken this factor into account. *See Mednick*, 508 F.2d at 300-01 (weighing against employee status was the fact that a worker who operated rooms for playing card games at a hotel performed tasks that were “not an integrated part of the business of [the hotel]”); *Shultz v. Hinojosa*, 432 F.2d 259, 265 (5th Cir. 1970) (“If a specific individual regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business, the Act will ordinarily regard him as an employee.” (quoting *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961))); *Fahs v. Tree-Gold Co-op Growers of Fla., Inc.*, 166 F.2d 40, 41-42, 44 (5th Cir. 1948) (explaining that workers who prepared fruit boxes for transport were employees of a company “engaged in the business of producing, harvesting, packing, and marketing citrus fruits” in part because “the services in question constituted a part of an integrated economic unit devoted to the packing of citrus fruit and fruit products”).

This factor is particularly useful in making a determination of employee status because if a worker performs tasks that are an integral part of, rather than being distinct from, the alleged employer’s business, it is unlikely that she is in

business for herself; rather, she is likely to be economically dependent on the business of which her work is an integral part. Companies typically do not outsource core components of their business. *See Scantland*, 2013 WL 3585635, at *8. Significantly, the Supreme Court held that workers who deboned meat for a slaughterhouse were employees because their work was “a part of the integrated unit of production” and therefore they “follow[ed] the usual path of an employee.” *Rutherford Food*, 331 U.S. at 729. Similarly, the Eleventh Circuit has explained that “[t]his factor is probative of . . . employment because a worker who performs a routine task that is a normal and integral phase of the [alleged employer]’s production is likely to be dependent on the [alleged employer]’s overall production process.” *Antenor v. D & S Farms*, 88 F.3d 925, 927 (11th Cir. 1996) (citing *Rutherford Food*, 331 U.S. at 729-30; *Tree-Gold Co-op Growers*, 166 F.2d at 43-44).³

³ Nearly every other circuit court has considered this factor in analyzing employee status, and some include it in their lists of standard factors to consider each time the issue arises. *See, e.g., Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991); *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006); *Donovan v. Brandel*, 736 F.2d 1114, 1119-20 (6th Cir. 1984); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *Hodgson v. Taylor*, 439 F.2d 288, 290 (8th Cir. 1971); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Scantland*, 2013 WL 3585635, at *2-3; *Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

Plaintiffs here plainly performed work that was integral to A.S.U.I.'s business. A.S.U.I. provides home- and community-based services to individuals with disabilities, including "residential assistance." *Chapman I*, 2012 WL 3614187, at *1. As direct care specialists, plaintiffs performed services for those individuals in their residences; in other words, they did the work of providing residential assistance. *Id.* This factor weighs in favor of concluding that plaintiffs were not in business for themselves but rather were employees of A.S.U.I. *See, e.g., Scantland*, 2013 WL 3585635, at *1, 6, 8 (concluding that "this factor points strongly toward employee status" where the workers, who installed and repaired cable, internet, and digital phone services, do work that is the "backbone" of the business of the alleged employer, an installation and repair service contractor); *Lauritzen*, 835 F.2d at 1537-38 (approving a district court's conclusion that "picking the pickles is a necessary and integral part of the pickle business" in determining that workers were employees).

g. The totality of the circumstances indicates that as a matter of economic reality plaintiffs were employees, not independent contractors.

As explained, "the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit." *Robicheaux*, 697 F.2d at

666 (quoting *Pilgrim Equip.*, 527 F.2d at 1311-12); see *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981) (holding that a worker was an employee because “[t]he totality of the circumstances convinces us that [the worker] was not an independent businessman in any meaningful sense”).

Taking all of the relevant facts into consideration, it is apparent that plaintiffs were employees, not independent contractors. They depended on A.S.U.I. for work providing residential assistance to individuals with disabilities and were not in business for themselves. Specifically, they worked during hours A.S.U.I. selected and for the rate of pay A.S.U.I. set without exercising control over the management of the business; they made essentially no investment in the business; they had no opportunity for profit or loss; they performed work that did not require special skills; they provided residential assistance exclusively on behalf of A.S.U.I. for significant periods of time; and they performed work integral to A.S.U.I.’s business. Therefore, the district court correctly held that plaintiffs were

entitled to the protections of the FLSA as employees.⁴

⁴ As noted above, the district court concluded that A.S.U.I. failed to show that there was a genuine issue of material fact regarding the applicability of the companionship services exemption. *See Chapman I*, 2012 WL 3614187, at *7. The FLSA exempts from its minimum wage and overtime compensation requirements “any employee employed in *domestic service employment* to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).” 29 U.S.C. 213(a)(15) (emphasis added). Pursuant to this statutory delegation of authority, the Department has defined “domestic service employment” as “services of a household nature performed by an employee in or about a *private home* (permanent or temporary) of the person by whom he or she is employed.” 29 C.F.R. 552.3 (emphasis added). Numerous factors regarding the history, use, and upkeep of a residence go to the determination of whether a residence is a private home. *See Welding v. Bios Corp.*, 353 F.3d 1214, 1219-20 (10th Cir. 2004) (listing relevant factors to determine whether a residence is a private home). As with any other exemption from the Act’s protections, the employer bears the burden of showing that this exemption is properly claimed. *See Meza v. Intelligent Mexican Mktg., Inc.*, --- F.3d ---, 2013 WL 3013871, at *3 (5th Cir. June 18, 2013) (“The employer must prove facts by a preponderance of the evidence that show the exemption is ‘plainly and unmistakably’ applicable.” (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1156-57 (10th Cir. 2012))). While the Secretary refrains from addressing the procedural question of whether the district court properly concluded that A.S.U.I. failed to meet its burden of providing evidence to support its contention that the companionship services exemption applied, he has a significant interest in the proper implementation of that exemption. In the Secretary’s view, it is apparent from the record that the residences in which plaintiffs worked were not private homes. Specifically, A.S.U.I.’s clients move into group residences, in which they live with other clients rather than with existing friends or family, in order to begin receiving A.S.U.I.’s services, and A.S.U.I., through the direct care specialists, manages and maintains the residences by cooking and cleaning. *See Chapman I*, 2012 WL 3614187, at *1. Other courts have found residences not to be private homes under similar circumstances. *See, e.g., Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 565 (10th Cir. 2000) (holding that where individuals with developmental disabilities lived “outside the family home and without the full-time, live-in care of a relative” but instead with other individuals receiving

B. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DIANN SIMIEN WAS PLAINTIFFS’ EMPLOYER UNDER THE FLSA BECAUSE SHE EXERCISED OPERATIONAL CONTROL OVER THEIR WORK SITUATIONS

Under the FLSA, “any employer” may be liable for violations of the Act. 29 U.S.C. 206, 207, 216(b). An “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. 203(d). This definition is “sufficiently broad to encompass an individual who, though lacking a possessory interest in the ‘employer’ corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees.” *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194-95 (5th Cir.1983), *abrogated on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *see Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971-72 (5th Cir. 1984) (explaining that “‘managerial responsibilities’ and ‘substantial control of the terms and conditions of the [employees’] work’ create statutory employer status” (quoting *Falk v. Brennan*, 414 U.S. 190, 195 (1973))). Furthermore, “a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation.” *Grim*

services, the residences were not private homes); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 183-84 (3rd Cir. 2000) (holding that where individuals with mental illness live in residences only as long as they are receiving services, and clients do not have full control over the residences or their day-to-day conduct in the residences, those residences are not private homes).

Hotel, 747 F.2d at 972 (quoting *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983)). Recently, this Court articulated a four-factor test for evaluating facts relevant to a determination of whether an individual exercises the “operational control” that results in individual employer liability, calling for consideration of “whether the alleged employer: ‘(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.’” *Gray v. Powers*, 673 F.3d 352, 355, 357 (5th Cir. 2012) (quoting *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010)).

Although the district court did not cite the four-factor test, it considered the facts relevant to that test in ruling for plaintiffs on the issue of whether Simien was plaintiffs’ employer. As to the first factor, Simien had the power to hire direct care specialists because she in fact hired Chapman and Howard. *See Chapman II*, 2013 WL 487032, at *5.⁵ In regard to the second factor, Simien set plaintiffs’ schedules. *Id.* at *2, 3.⁶ Concerning the third factor, Simien “set the rate of pay for plaintiffs.”

⁵ Howard testified that Simien hired her, and Chapman testified that Simien hired her. Tr. 10:6-7, 25:1-2, 75:18-19, 87:18-25. Simien herself testified that she “ensure[s] that a background check has been done” and that “letters of reference[] have come in and what is being said about the character of the individual” before allowing an applicant for a direct care specialist position to work in a residence. Tr. 141:19-24.

⁶ Howard testified that she reported to Simien, Simien assigned her to the residence in which she worked, and Simien set her schedule and work hours. Tr. 11:3-4, 15-

Id. at *3.⁷ The district court did not explicitly make a finding regarding employment records, but it did find that Simien “personally reviewed [plaintiffs’] hours and compensation.” *Id.* at *5.⁸ Therefore, at least three of the four factors weigh strongly in favor of determining that Simien was plaintiffs’ employer.

Based on these facts, the district court properly concluded that Simien is individually liable as an employer under the FLSA. Simien plainly exercised “operational control.” *Gray*, 673 F.3d at 357; *see Chapman II*, 2013 WL 487032, at *6 (noting that Simien “has, at all material times, been involved in the day-to-day operations of ASUI”). Moreover, Simien acted “on behalf of the corporation vis-a-vis its employees.” *Sabine Irrigation*, 695 F.2d at 195; *see Chapman II*, 2013

21, 26:6. Chapman testified to the same facts as to herself. Tr. 76:25-77:7, 89:22, 90:2-3. Chapman also testified, further reflecting Simien’s control over the conditions of employment, that “Ms. Simien[] will let me drive my clients home when I drive my car [to the Dayhabilitation Center].” Tr. 89:9-10.

⁷ Howard testified that Simien was responsible for payroll and issued paychecks, and that she talked to Simien when there were problems with her paychecks. Tr. 11:22-24, 15:22-16:6, 26:10-13. Chapman’s trial testimony included the same assertions. Tr. 77:8-15, 82:4-8.

⁸ At trial, Howard answered a question regarding service logs, or records of services provided to A.S.U.I.’s clients, testifying that “before we turn them in and get paid, they are read over by Diann Simien[].” Tr. 29:5-6. Howard also testified, regarding tax forms, that Simien “sends the 1099s out.” Tr. 24:16. Chapman testified that Simien gave her instructions regarding signing in for her shifts as well as regarding what description to give of services performed when completing service logs. Tr. 79:3-5; Tr. 96:11-12, 102:1-2.

WL 487032, at *3 (noting that Simien “exercised substantial control over the operational management of plaintiffs’ employment”).

C. THIS COURT SHOULD AFFIRM THE DISTRICT COURT’S AWARD OF LIQUIDATED DAMAGES

An employer that violates the FLSA is liable to its employees not only for the unpaid wages but also for “an additional equal amount as liquidated damages.” 29 U.S.C. 216(b). Only if the employer demonstrates both that the violation “was in good faith” *and* that the employer “had reasonable grounds for believing” that its actions did not constitute a violation of the Act, “may” the district court, “in its sound discretion,” award a lesser amount of, or no, liquidated damages.

29 U.S.C. 260. Accordingly, even if an employer can show that it both acted in good faith and committed violations of the FLSA based on a reasonable belief that it was complying with the statute, a district court may nevertheless exercise its discretion to award liquidated damages. *See Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1999) (citing 29 U.S.C. 260).

The statute therefore makes the award of liquidated damages the norm. *See Nero v. Indus. Molding Corp.*, 167 F.3d 921, 929 (5th Cir. 1999) (noting, in the context of a Family and Medical Leave Act case but relying on an FLSA case, that “[t]he district court’s discretion to reduce the liquidated damages ‘must be exercised consistently with the strong presumption under the statute in favor of doubling’” (quoting *Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729,

733 (7th Cir. 1998))). The requirements for deviating from that norm deliberately impose a ““substantial burden”” on employers. *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 267 (5th Cir. 1998) (quoting *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1415 (5th Cir.1990)). Specifically, “good faith requires some duty to investigate potential liability under the FLSA,” and an employer may not “rely on ignorance alone as [r]easonable grounds for believing that its actions were not in violation of the Act.” *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468-69 (5th Cir. 1979) (citations omitted).

This Court should affirm the district court’s award of liquidated damages. Given that the facts of this case weigh so strongly in favor of a determination that plaintiffs were employees, the district court was correct to conclude that A.S.U.I. did not act in good faith and in an objectively reasonable manner in classifying them as independent contractors. *See Chapman II*, 2013 WL 487032, at *4, 6-7. A.S.U.I. asserts that it had “no notice or basis to believe [it was] not in compliance with the FLSA” because no government or other entity had alerted it to a problem. Appellants’ Br. 34-35. But A.S.U.I.’s failure to ascertain on its own whether its direct care specialists were properly classified as independent contractors does not evince good faith. *See Barcellona*, 597 F.2d at 469 (“Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws.”); *see*

also Mireles, 899 F.2d at 1415-16 (affirming a district court’s conclusion that an employer’s FLSA violation was not based on reasonable grounds where the employer had “discussed minimum wage requirements” with a state agency that did not enforce the FLSA and reviewed information about the statute). This failure is compounded by the fact that A.S.U.I. ignored its obligation to ensure that it was acting in compliance with federal law even though it received and paid plaintiffs with public funds.

CONCLUSION

For the foregoing reasons, this Court should affirm the conclusions of the district court.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

/s/ Sarah Marcus
SARAH KAY MARCUS
Attorney

U.S. Department of Labor
Office of the Solicitor, Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5696

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

This brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,789 words (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This brief also complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief was prepared with Microsoft Office Word, using Times New Roman, 14-point font.

 /s/ Sarah Marcus
Sarah Kay Marcus
Attorney for the Secretary of Labor

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2013, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case except Lori Jean Chambers Gray are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system and, to Lori Jean Chambers Gray, by U.S. mail.

 /s/ Sarah Marcus
Sarah Kay Marcus
Attorney for the Secretary of Labor