IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

THOMAS DEGE, LOREN SCHMELING, JAFAR BIHI, FARHIA HASSAN, AHMED AHMED, ABDI GAARI, AND BRUCE FLINT,	)	
Plaintiffs,	)	No. 06-3754 (DWF/RLE)
v.	)	
HUTCHINSON TECHNOLOGY, INC.,	)	
Defendant.	)	

SECRETARY OF LABOR'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to this Court's Order dated August 15, 2007 (Doc. No. 174), the Secretary hereby submits this Brief as *Amicus Curiae* in Support of Plaintiffs' Motion for Partial Summary Judgment.

ISSUES

(1) Whether donning and doffing required gear is "work" under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. 201 *et seq*.;

(2) Whether such donning and doffing is integral and indispensable to Plaintiffs' principal work activities, and therefore is not excluded from compensable time by the Portal-to-Portal Act of 1947 ("Portal Act"), 29 U.S.C. 251 *et seq.*; and

(3) Whether the de minimis doctrine applies to the time Plaintiffs regularly spend donning, doffing, walking, and waiting each working day.[1]

FACTS[2]

Hutchinson Technology, Inc. ("HTI") manufactures disk drive suspension assemblies and medical devices. Def.'s Mem. at 2; February 22, 2007 Mem. Op. and Order at 1-2 ("2/22/07 MO&O") (Doc. No. 53). Plaintiffs are HTI employees who are, or were, required to don and doff clean room gear to perform their job duties. Pls.' Mem. of Law in Supp. of Pls.' Mot. for Partial Summ. J. at 3-4 ("Pls.' Mem.") (Doc. No. 134); 2/22/07 MO&O at 5 n.2; August 30, 2007 Order at 1 (Doc. No. 178).

HTI requires employees who work in clean areas to wear a hairnet or "bouffant," a facemask, a smock or "frock," latex-like gloves, and a beard guard, if necessary. Def.'s Mem. at 3; Pls.' Mem. at 3; 2/22/07 MO&O at 2. This clothing protects the company's products from contamination from dust, lint, body contaminants, or other airborne substances. Def.'s Mem. at 3; Pls.' Mem. at 3; 2/22/07 MO&O at 2. Individuals put on and take off this clothing in designated "gowning areas" near entrances to the clean rooms. Def.'s Mem. at 4. Gowning areas are located throughout HTI's facilities. Id. Employees are required to remove their clean room clothing when they leave the clean

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[1] This brief does not address the procedural and timeliness arguments raised by Defendant in its Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Def.'s Mem.") (Doc. No. 151). See id. at 1-2, 14-15.

[2] Consistent with the principle that when considering motions for summary judgment, "[t]he evidence and all fair inferences from it must be viewed in the light most favorable to the non moving party," Johnson v. Blaukat, 453 F.3d 1108, 1112 (8th Cir. 2006), the Secretary relies on the facts as presented by HTI and Plaintiffs' facts that HTI has not disputed.

areas and put the clothing back on when they return. Id. HTI has a preferred sequence for gowning and ungowning. Id. at 5. Employees can be disciplined for not gowning or for gowning improperly. Pls.' Mem. at 4. HTI recently implemented a new auditing procedure to ensure that production operators are gowning properly. Id. at 6.

HTI "takes a somewhat relaxed approach to timekeeping." Def.'s Mem. at 7. The company does not have a centralized timekeeping system. Id. Instead, employees work with their supervisors to record their time in one of several ways. Id. at 8. Some of the methods used include having employees (or their supervisors) fill out handwritten timesheets, or simply initial pre-printed time on a form, marking any exceptions from the employee's normal schedule. Id. In some cases, employees may record their time in advance based on their scheduled shifts. Id. While the exact start and end times vary slightly (generally by a few minutes) across different departments and plants, most employees work shifts that are approximately 12 hours long and run from around 5:55 a.m. or p.m. to about 6:00 p.m. or a.m. Id. at 6.

HTI pays its employees based on their scheduled shifts, subject to any exceptions that the employee or her supervisor may have recorded, and rounded to the nearest 15 minutes. Def.'s Mem. at 12. HTI does not pay its employees based on when they begin gowning, Pls.' Mem. at 4, and prohibits employees from entering the time they begin gowning as their shift start time. Id. at 6. Because HTI only pays its employees from their official shift start time until their official shift end time, employees generally are not paid for donning and doffing. Id. at 4, 5; Def.'s Mem. at 5. HTI has not disputed

Plaintiffs' contention that "time-keeping technology is available to record gowning, walking, and waiting times," Pls.' Mem. at 4. See Def.'s Mem. at 27, 28.

ARGUMENT

A. Employees' Donning and Doffing of Clean Room Gear Constitutes "Work" Under the FLSA

The FLSA generally requires employers to compensate covered employees at one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a workweek. See 29 U.S.C. 207(a)(1). The statute reflects "a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment." Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

The FLSA does not specifically define the terms "work" or "workweek."[3] However, the Supreme Court has construed these terms broadly. In Tennessee Coal, the Court defined "work" "as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. at 598. The Court subsequently clarified that this definition was "not intended as a limitation on the Act," and that even non-exertional acts, such as waiting, can be "work" under the FLSA. Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944); see IBP, Inc. v. Alvarez, 546 U.S. 21, 25 (2005) (Armour "clarified that 'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA.").

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[3] The most relevant definition, in section 3(g) of the Act, provides that "'[e]mploy' includes to suffer or permit to work." 29 U.S.C. 203(g).

In Anderson v. Mt. Clemens Pottery Co., the Supreme Court defined the "statutory workweek" for which employees must be compensated as including "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." 328 U.S. 680, 690-91 (1946). The Court specifically concluded that turning on lights, putting on aprons and coveralls, removing shirts, taping or greasing arms, and putting on finger cots constitute "work" under the FLSA for which employees must be paid. Id. at 692-93.

Plaintiffs' donning and doffing of clean room gear and associated walking before, during, and after their shifts, clearly constitute "work" under the FLSA because HTI requires or controls these activities, and they are performed solely for HTI's benefit. See Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50 (8th Cir. 1984) (pre-trip safety inspection of trucks required and controlled by employer and for employer's benefit constitutes "work"); see also De Asencio v. Tyson Foods, Inc., No. 06-3502, 2007 WL 2505583, at *10 (3d Cir. Sept. 6, 2007) (donning and doffing sanitary and protective clothing by poultry workers constitutes "work"); Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 911-12 (9th Cir. 2004) (donning and doffing clean room "bunny suits" constitutes "work" under the FLSA because it is "activity, burdensome or not, performed pursuant to [the employer's] mandate for [its] benefit as an employer.") (internal quotation marks and citation omitted).

HTI admits that it requires all employees working in clean room areas to wear a hairnet, a facemask, a smock, latex-like gloves, and a beard guard, if necessary. Employees must don this clothing before entering the clean areas and must doff it when

they leave the clean areas. HTI specifies the order in which employees must don and doff this clothing, and employees can be disciplined for not gowning or for gowning improperly. The company performs audits to ensure that production operators are gowning properly. Gowning areas are separate from the employees' workstations; therefore, employees must walk between the gowning areas and their workstations when they don and doff. These facts unequivocally establish that HTI requires and controls the donning and doffing of clean room clothing and any associated walking.

Plaintiffs' donning and doffing of clean room clothing and associated walking also are "pursued necessarily and primarily for the benefit of the employer." Alvarez v. IBP, Inc., 339 F.3d 894, 902 (9th Cir. 2003) (internal quotation marks and citation omitted), aff'd, 546 U.S. 21 (2005). HTI requires its employees to wear this clothing to protect the company's products from contamination from dust, lint, body contaminants, or other airborne substances. This allows HTI to produce a "quality product," which inures to the company's benefit. See, e.g., "Photo Etch Guidelines & Procedures," Ex. 2, at 9 to Aff. of Joshua T. Hoffman in Opp'n to Pls.' Mot. for Partial Summ. J. ("Hoffman Aff.") (Doc. No. 154) ("Providing our customers with quality product is an important part of our business and failure to follow these guidelines & procedures [including those addressing contamination and gowning] may compromise the quality of our product."); "Trace Guidelines and Procedures," Ex. 1, at 7 to Hoffman Aff. (same). Thus, these activities are clearly "work" under the FLSA.

HTI argues that "activities of the sort for which plaintiffs seek compensation are so trivial . . . that it is not 'work' within the meaning of the FLSA." Def.'s Mem. at 36

(citing Reich v. IBP, Inc., 38 F.3d 1123, 1126 (10th Cir. 1994) and Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556, 561 (E.D. Tex. 2001), aff'd, 44 F. App'x 652 (5th Cir. 2002)). The cases HTI relies on to make this cursory point are neither convincing, nor binding on this Court.

The courts in Reich v. IBP and Pilgrim's Pride concluded that donning and doffing certain protective gear is not work because it does not involve "physical or mental exertion." Reich v. IBP, 38 F.3d at 1125-26; Pilgrim's Pride, 147 F. Supp. 2d at 561. A number of other courts have expressly rejected these courts' holdings. See, e.g., De Asencio, 2007 WL 2505583 at *9-10 (rejecting Reich v. IBP's holding that "work" requires exertion, and concluding that the "better view" is that stated by the Ninth Circuit in Ballaris); Ballaris, 370 F.3d at 910-11 (noting that the Ninth Circuit in Alvarez, 339 F.3d at 902, expressly rejected Reich v. IBP's holding); Davis v. Charoen Pokphand (USA), Inc., 302 F. Supp. 2d 1314, 1322 n.8 (M.D. Ala. 2004) ("[E]ven an activity which 'takes seconds' and 'requires very little concentration,' can be work if it is 'pursued necessarily and primarily for the benefit of the employer.'") (citations omitted); Fox v. Tyson Foods, Inc., No. 99-BE-1612, 2002 WL 32987224, at *9 (N.D. Ala. Feb. 4, 2002) (order adopting magistrate judge's report and recommendation) (rejecting Reich v. IBP's reasoning). Moreover, the Supreme Court's recent decision in Alvarez makes abundantly clear that exertion is not necessary for an activity to constitute "work." See 546 U.S. at 25, 30; see also De Asencio, 2007 WL 2505583 at *8 ("[W]e conclude that Alvarez not only reiterated the broad definition of work, but its treatment of walking and waiting time under the Portal-to-Portal Act necessarily precludes the consideration of cumbersomeness

or difficulty on the question of whether activities are 'work.'"). That decision severely undermines the continued validity of Reich v. IBP. See De Asencio, 2007 WL 2505583 at *8-9; Garcia v. Tyson Foods, Inc., 474 F. Supp. 2d 1240, 1246 (D. Kan. Feb. 16, 2007); Lopez v. Tyson Foods, No. 06-459, 2007 WL 1291101, at *3 (D. Neb. Mar. 20, 2007).

B. Donning and Doffing Clean Room Clothing Is Integral and Indispensable to Plaintiffs' Principal Activities and Therefore Is Not Excluded from Compensable Time by the Portal Act

The Portal Act creates a limited exception to the FLSA's general rule that an employer must compensate its employees for all hours worked. Section 4(a) of the Portal Act relieves an employer of responsibility for compensating employees for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).[4]

[4] Both Plaintiffs and HTI incorrectly quote this statutory language in their Memoranda by including the phrase, "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities," as part of paragraph 2 of Section 4(a). See Pls.' Mem. at 12; Def.'s Mem. at 31. As shown in the above-quoted passage, that phrase, which describes the "continuous workday" concept, see Alvarez, 546 U.S. at 28-29, is part of subsection (a) of Section 4, and therefore applies equally to both paragraphs (1) and (2) of Section 4(a) of the Portal Act.

The Portal Act was designed to "preserve to the worker the rights he has gained under the Fair Labor Standards Act." 29 C.F.R. 790.2(a) (quoting 93 Cong. Rec. 2297, 2300 (1947) (statement of Sen. Cooper)). Consistent with this congressional intent, "the terms 'principal activity or activities' . . . are to be read liberally." Barrentine, 750 F.2d at 50; see Dunlop v. City Elec., Inc., 527 F.2d 394, 398 (5th Cir. 1976) (terms must be construed liberally "to encompass 'any work of consequence'"); 29 C.F.R. 790.8(a) (same).

By its terms, the Portal Act only excludes traveling and other preliminary and postliminary activities when they occur outside the workday, which is defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. 790.6(b); see 29 U.S.C. 254(a); Alvarez, 546 U.S. at 28-29. This principle, known as the "continuous workday" rule, requires an employer to pay an employee for any activity that occurs between the first and last principal activities of the employee's workday. See Alvarez, 546 U.S. at 28 (quoting 29 C.F.R. 790.6(a)). Thus, "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [Section 4(a)], and as a result is covered by the FLSA." Alvarez, 546 U.S. at 37. The principle applies to waiting time as well. See id. at 40.

The Supreme Court has established that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and

indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956). Further, "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." Alvarez, 546 U.S. at 37. Such an activity commences the continuous workday, and marks the beginning of compensable time. See id.[5]

An activity is integral and indispensable to a principal activity if it is "performed as part of the regular work of the employees in the ordinary course of business." Dunlop, 527 F.2d at 401. This essentially is a functional test, focusing on the relatedness of the activity to the primary duties of the job. See 29 C.F.R. 790.8(c) ("Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance."). Thus, "[t]o be 'integral and indispensable,' an activity must be necessary to the principal work performed and done for the benefit of the employer." Alvarez, 339 F.3d at 902-03 (citing Barrentine, 750 F.2d at 50 and Dunlop, 527 F.2d at 398); see Lee v. Am-Pro Protective Agency, Inc., 860 F. Supp. 325, 327 (E.D. Va. 1994) (same); cf. Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340, 1344 (11th Cir. 2007) (an activity is integral and indispensable to a principal activity if the activity is required by the employer, necessary for the employee to perform her duties, and primarily for the benefit of the employer).

[5] Any "principal activity" can begin and end the workday, regardless of how long that activity takes to perform. 29 U.S.C. 254(a); see 93 Cong. Rec. at 2298 (statement of Sen. Cooper that an employee's pre-shift activity of handing out clothes in the morning would be a "principal activity" whether it took "15 or 10 minutes or five minutes or any other number of minutes."); 29 C.F.R. 790.8(b) n.63 (construing legislative history to indicate that "any amount of time" will suffice).

In Steiner, the Supreme Court specifically held that pre- and post-shift clothes changing on an employer's premises can be integral and indispensable to an employee's principal activities. See Steiner, 350 U.S. at 249, 254-58. The Court found persuasive Senator Cooper's statement during debate on the Portal Act that "if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable." Id. at 258. The Court also based its interpretation on the regulation at 29 C.F.R. 790.8, see 350 U.S. at 255 n.9, which provides, in part, that changing clothes on the employer's premises is compensable where it is required by the employer, the law, or the nature of the work. See 29 C.F.R. 790.8(c) n.65.

Donning and doffing[6] clean room clothing is integral and indispensable to clean room employees' principal production activities. See Ballaris, 370 F.3d at 910-11; Brock v. Mercy Hosp. & Med. Ctr., No. 84-1309, 1986 WL 12877, at *6 (S.D. Cal. May 6, 1986) (donning and doffing hospital uniforms integral and indispensable to employees' principal activities). As discussed in Section A, supra, these activities are required by HTI and performed primarily, if not exclusively, for HTI's benefit. In addition, Plaintiffs' donning and doffing is necessary because, pursuant to HTI's policies, employees cannot

[6] This Court recently observed, in a decision by Judge Kyle, that "'Donning' an item of clothing means to obtain it and put it on, while 'doffing' means taking the item off and storing it." Dominquez v. Minnesota Beef Indus., Inc., No. 06-1002, slip op. at 1 n.1 (Aug. 21, 2007) (citing Tum v. Barber Foods, Inc., 360 F.3d 274, 283 (1st Cir. 2004), aff'd in part, rev'd in part and remanded, 546 U.S. 21 (2005)). This is consistent with the Department of Labor's ("DOL" or "Department") position. See Wage and Hour Advisory Mem. No. 2006-2, at 1 n.1 (May 31, 2006), available at http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemo2006_2.pdf.

perform their production work in the clean room unless they are wearing their required clean room clothing. See, e.g., Ex. 1, at 3 to Hoffman Aff. ("Proper Gowning procedures are to be followed in all production areas."). Even if, as HTI contends, see Def.'s Mem. at 28, some employees arrived early without specifically being instructed to, the time they spend donning clean room gear is integral and indispensable. See Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 718 (2d Cir. 2001) ("If the proper performance of [the employees'] job required the preparatory work to be completed when the first walk-in patient could potentially arrive, this time should have been counted, regardless of whether anybody specifically instructed them to arrive early.").

Because donning and doffing clean room clothing is integral and indispensable to Plaintiffs' principal work activities, Plaintiffs must be paid for all time, including any walking and waiting time (but excluding bona fide meal periods), between their first donning activity and their last doffing activity. Alvarez, 546 U.S. at 37. Currently, HTI only pays its employees based on their shift times, not their actual donning and doffing times. This practice violates the FLSA.

HTI relies primarily on the Second Circuit's recent decision in Gorman v. Consolidated Edison Corp., 488 F.3d 586, 594-95 (2007) (petition for reh'g filed July 20, 2007), to support its argument that donning and doffing clean room clothing is not "integral" to Plaintiffs' principal activities.[7] See Def.'s Mem. at 31-36. Gorman held that

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[7] HTI finds significance in the Second Circuit's parsing of the terms "integral" and "indispensable." See Def.'s Mem. at 32, 34-35 & n.12. However, the Second Circuit, in distinguishing these terms and relying on dictionary definitions, ignored Dunlop's widely

nuclear power plant employees donning and doffing of "generic" protective gear, including a helmet, safety glasses, and steel-toed boots, is not integral to the employees' principal activities. 488 F.3d at 594-95. The court stated that such donning and doffing is "not different in kind from 'changing clothes and showering under normal conditions,' which, under Steiner, are not covered by the FLSA." Id. at 594. The Gorman decision, however, does not provide persuasive authority for HTI's argument.

The Second Circuit relied on a DOL regulation, 29 C.F.R. 790.7(g), which states that clothes changing, "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities." Gorman, 488 F.3d at 594. However, the court inexplicably ignored a footnote appended to that regulation, which states, "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'" 29 C.F.R. 790.7(g) n.49. This footnote is consistent with another DOL regulation (relied on by Steiner) explaining that clothes changing is compensable if an employee "cannot perform his principal activities without putting on certain clothes," 29 C.F.R. 790.8(c), and stating that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. This regulation was ratified by Congress in 1949 when former Section 16(c) of the FLSA was enacted, see Steiner, 350 U.S. at 254-55 & n.8 (quoting

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accepted test for determining whether an activity is integral and indispensable, and DOL's regulation addressing required clothes changing, 29 C.F.R. 790.8(c). See supra.

Section 16(c) to the effect that existing Wage-Hour regulations and interpretations were to remain in effect unless inconsistent with the amendments, 63 Stat. 920 (1949), 29 U.S.C. 208 (note)), and is entitled to deference. See Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); cf. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

The Second Circuit ignored this longstanding regulation and determined that "[t]he donning and doffing of generic protective gear is not rendered integral by being required by the employer or by government regulation." Gorman, 488 F.3d at 594. This conclusion is flatly contradicted by the authority the court cites in support of it. See Reich v. IBP, 38 F.3d at 1125 ("[T]he same reasons supporting the finding of indispensability and integrality for the unique equipment (i.e., company, OSHA, and Department of Agriculture regulations requiring such items and the health, safety, and cost benefits to the company of the employees wearing the items) apply with equal force to the 'standard' equipment.") (emphasis added). This holding is also inconsistent with Alvarez, 546 U.S. at 41 n.8 (noting that the Court's analysis of pre-donning waiting time

would be different if the employer "required" employees to arrive at a certain time to begin waiting).

The Second Circuit also relied, in part, on its determination that the donning and doffing of "generic" protective gear was "relatively effortless." Gorman, 488 F.3d at 594. The court's emphasis on the "generic" nature of the protective gear is squarely at odds with the Supreme Court's decisions in Alvarez and Steiner. In Alvarez, the Supreme Court referred approvingly to the Ninth Circuit's view that whether gear is "unique" or "non-unique" is irrelevant in determining whether donning and doffing the gear qualifies as a principal activity. See Alvarez, 546 U.S. at 30, 32; see also Wage and Hour Advisory Mem. No. 2006-2, at 3. This position is consistent with Steiner's holding that donning and doffing old, clean work clothes, which would qualify as "non-unique" gear, was integral and indispensable to the employees' principal activities. 350 U.S. at 256. Likewise, and contrary to Gorman's holding, 488 F.3d at 594, the amount of effort involved in donning and doffing clean room clothing is not relevant in determining whether this activity is integral and indispensable to Plaintiffs' principal activities. See Alvarez, 339 F.3d at 903 ("[E]ase of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable' as that term is defined in Steiner.").

C. HTI Cannot Rely on a "De Minimis" Defense to Avoid Paying its Employees for Time Regularly Spent Donning and Doffing

The Supreme Court in Mt. Clemens recognized that employers do not need to pay employees for otherwise compensable time if that time is "de minimis." 328 U.S. at 692 ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."). Pursuant to DOL's implementing regulation, the narrow "de minimis" exception "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 C.F.R. 785.47 (emphasis added).[8] The Department's longstanding regulation is entitled to controlling deference. See Barnhart, 535 U.S. at 221-22.[9]

The Department's regulation makes clear that if it is feasible for the employer to record the time, then the employer cannot escape liability for paying its employees for this time by relying on the de minimis rule. See 29 C.F.R. 785.47 ("An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him."); see also Wage and Hour Opinion Letter,

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[8] DOL promulgated this regulation in 1955. See 20 Fed. Reg. 9963, 9967 (Dec. 24, 1955) (29 C.F.R. 785.4(b)). DOL revised the regulation in 1961, renumbering it and adding citations to some court decisions. See 26 Fed. Reg. 190, 195 (Jan. 11, 1961).

[9] If this Court determines that the regulation is not entitled to controlling Chevron deference, it is entitled, at a minimum, to substantial deference under Skidmore, 323 U.S. at 140.

1993 WL 901156 (Mar. 19, 1993) ("Even if the time so spent is not great, but can be ascertained, it must be considered hours worked for purposes of the FLSA."); Lindow v. United States, 738 F.2d 1057, 1062-63 (9th Cir. 1984) ("Employers . . . must compensate employees for even small amounts of daily time unless that time is so miniscule [sic] that it cannot, as an administrative matter, be recorded for payroll purposes.") (relying on 29 C.F.R. 785.47). Thus, the de minimis defense only applies where activity involves "uncertain and indefinite periods of time." 29 C.F.R. 785.47.

The Department's de minimis regulation is designed to prohibit an employer from relying on the de minimis defense where it has intentionally decided not to pay its employees for, as an example, five minutes of regularly scheduled work every day. Such a situation is no different from an employer not paying employees when they regularly don and doff required equipment each working day. Thus, the Department has consistently stated in opinion letters that an employer cannot rely on a de minimis defense if an activity is "performed pursuant to the work rules of the employer, is done during practically ascertainable periods of time, and constitutes a duty which the employee is regularly required to perform." See, e.g., Wage and Hour Opinion Letter dated June 21, 1993, Ex. M to Aff. of Troy A. Poetz in Support of Pls.' Mot. for Partial Summ. J. ("Poetz Aff.") (Doc. No. 139) (time spent changing shoes not de minimis); Wage and Hour Opinion Letter dated July 12, 1973, Ex. L to Poetz Aff. (daily clothes changing not de minimis). The Department's interpretation of its own regulation, as expressed in opinion letters and in this amicus brief, is entitled to controlling deference. See Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2349 (2007).

HTI challenges the validity of the Department's regulation, arguing that its consideration of factors other than insubstantiality of time is inconsistent with Mt. Clemens and subsequent court decisions. See Def.'s Mem. at 22-26.[10] HTI's argument is without basis. Mt. Clemens itself acknowledges that the "the realities of the industrial world" affect the computation of time under the FLSA. See 328 U.S. at 692. Consistent with this precedent, and with the Department's regulation, courts generally consider three factors to determine whether uncompensated time is de minimis: "1) the practical administrative difficulty of recording the additional time; 2) the size of the claim in the aggregate; and 3) whether 'the claimants performed the work on a regular basis.'" Brock v. City of Cincinnati, 236 F.3d 793, 804 (6th Cir. 2001) (quoting Lindow, 738 F.2d at 1062-63).

In this case, it is undisputed that HTI has technology, in the form of electronic card readers, that it could use to record the time HTI employees begin donning and finish doffing each day. See Pls.' Mem. at 23; Def.'s Mem. at 28. That these card readers are not currently in the gowning areas, see Def.'s Mem. at 28, does not establish that it would be administratively difficult for HTI to record the time employees begin donning and the time they finish doffing. For example, HTI could capture this time by simply eliminating

[10] HTI argues that the caselaw establishes that anything less than 10 minutes is de minimis. See Def.'s Mem. at 24-25. However, as the Ninth Circuit stated in the often-cited case, Lindow, "[t]here is no precise amount of time that may be denied compensation as de minimis." 738 F.2d at 1062. HTI's reliance on Riggs v. United States, 21 Cl. Ct. 664 (Cl. Ct. 1990), is similarly misplaced. See Def.'s Mem. at 26 & n.9. That case addressed an Office of Personnel Management regulation that applies only to federal government employees. See 5 C.F.R. 551.412(a)(1). That regulation does not discuss the de minimis doctrine, and does not apply to the employees in this case, who worked for a private company, not the federal government.

its current policy prohibiting employees from recording the time they spend gowning. See Dole v. Enduro Plumbing, Inc., No. 88-7041, 1990 WL 252270, at *6 (C.D. Cal. Oct. 16, 1990) ("Since in this case the construction workers do in fact check in in the morning upon arrival at the shop and do in fact check out upon leaving the shop in the afternoon, it is not administratively impossible to keep track of the unpaid time occur[r]ing each morning and each afternoon for each construction worker."). There is no evidence that such a policy change would be administratively difficult, given HTI's already "relaxed" system of timekeeping. Thus, HTI cannot rely on a de minimis defense because "even if the amount of time is small, it could easily be measured." Fast v. Applebee's Int'l Inc., No. 06-4146, 2007 WL 1309680, at * 9 (W.D. Mo. May 3, 2007).[11]

HTI also argues that it is administratively difficult to record the time employees spend donning and doffing because "[s]ome employees change clothes several minutes before their shift starts, apparently because it is convenient for them to do so and they want to proceed at a more leisurely pace." Def.'s Mem. at 28. However, this is not sufficient to establish that, "in this day of modern technology, [the employer] cannot record the compensable work performed by its employees." Reich v. IBP, Inc., No. 88-2171, 1996 WL 137817, at *7 (D. Kan. Mar. 21, 1996) (citing Saunders v. John Morrell & Co., No. C88-4143, 1992 WL 531674 (N.D. Iowa Oct. 14, 1992)). Indeed, HTI's argument that some employees may socialize or dawdle while performing these activities,

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[11] HTI has a duty to accurately record the hours its employees work each day. See 29 U.S.C. 211(c); 29 C.F.R. 516.2(a)(7) (employers must keep records of hours worked each workday); 29 C.F.R. 516.6(a)(1) (employers must maintain time cards or sheets showing daily starting and stopping time of individual employees).

see Def.'s Mem. at 28-29, does not excuse it for failing to record or pay for working time. As an employer, HTI has a responsibility to control when work is performed. See Reich v. Dep't of Conservation & Natural Res., 28 F.3d 1076, 1081-82 (11th Cir. 1994) (an employer who does not want work to be performed has an obligation to exercise its control over the workforce to prevent the work from occurring); United States Dep't of Labor v. Cole Enters., Inc., 62 F.3d 775, 779-80 (6th Cir. 1995) ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed. The management 'cannot sit back and accept the benefits without compensating for them.'") (quoting 29 C.F.R. 785.13). Because HTI knows its employees are gowning and ungowning outside their scheduled shift, HTI must pay them for this time. See Fast, 2007 WL 1309680, at *7 ("An employer is obligated to compensate employees for work it knows the employees are performing.") (citing 29 C.F.R. 785.11).

As Lindow's second factor regarding the size of the aggregate claim makes clear, the de minimis rule does not apply separately to each particular activity viewed in isolation. 738 F.2d at 1063; see also De Asencio, 2007 WL 2505583 at *11 (court must consider time spent donning, doffing, and walking in the aggregate); Wage and Hour Advisory Mem. No. 2006-2, at 3. This is because "independent de minimis determinations of each task would rarely result in findings of compensable time – work can always be subdivided into small enough tasks to be considered de minimis." Reich v. IBP, 1996 WL 137817, at *6. Thus, HTI's argument that "donning the required clothing takes about one minute and removing it takes somewhat less," Def.'s Mem. at 19, is

irrelevant. What matters is the size of the claim in the aggregate.[12] Here, Plaintiffs allege that HTI failed to pay for not just donning and doffing their clean room gear, but also for associated walking and waiting time. See Pls.' Mem. at 15. Because any post-donning and pre-doffing walking and waiting are compensable under the FLSA, see Alvarez, 546 U.S. at 37, 40, Plaintiffs' claim involves more than the isolated donning and doffing events HTI cites, and amounts to a sizable aggregate claim.

[12] Lindow did not state definitively what it meant by aggregating time. It did state that "[a]n important factor in determining whether a claim is *de minimis* is the amount of daily time spent on the additional work," though it also noted that no amount of time is dispositive. 738 F.2d at 1062. The Ninth Circuit also cited to other cases where time has been aggregated beyond a daily basis (ranging up to three years), id. at 1063, and pointed to cases where time was aggregated "in relation to the total sum or claim involved in the litigation." Id.; see also Reich v. Monfort, Inc., 144 F.3d 1329, 1334 (10th Cir. 1998) (post-Lindow case where court stated that "[i]t is also appropriate to consider an aggregate based on the total number of workers").

CONCLUSION

For the foregoing reasons, this Court should grant the Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

THOMAS DEGE, LOREN SCHMELING, JAFAR BIHI, FARHIA HASSAN, AHMED AHMED, ABDI GAARI, AND BRUCE FLINT,	)	
Plaintiffs,	)	No. 06-3754 (DWF/RLE)
v.	)	L.R. 7.1 WORD COUNT COMPLIANCE CERTIFICATE
HUTCHINSON TECHNOLOGY, INC.,	)	
Defendant.	)	

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I further certify that, in preparation of this memorandum, I used Microsoft Office Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

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Dated: September 12, 2007

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Plaintiffs,	No. 06-3754 (DWF/RLE)
v.	CERTIFICATE OF SERVICE
HUTCHINSON TECHNOLOGY, INC.,	
Defendant.	

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