Nos. 02-1679, 02-1739

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ABDELA TUM, ET AL.,

Plaintiffs-Appellants, Cross-Appellees,

v.

BARBER FOODS, INC., D/B/A BARBER FOODS,

Defendant-Appellee, Cross-Appellant.

On Appeal from the United States District Court
for the District of Maine

SUPPLEMENTARY BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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TABLE OF AUTHORITIES

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By order dated August 18, 2003, this Court requested the Secretary of Labor ("Secretary") to supplement her amicus brief filed in support of panel rehearing and rehearing en banc by stating her position on the following issues:

1. Assuming arguendo that (as the Secretary contends) the donning and doffing of required clothes is ordinarily integral to a principal activity, does such donning and doffing start and end the workday where the donning and doffing is itself de minimus;

2. On the same arguendo assumption -- that donning and doffing is part of a principal activity -- is waiting in line to obtain the initial required clothes part of the principal activity;

3. Assuming that in some situations doffing and

donning is covered by the statute (e.g., required clothes) and in other situations not (e.g., non-required clothes), how does the Secretary propose that the employer calculate hours covered by the statute where, as appears to be so in this case, employees may vary individually, and from day to day, in the order in which they stand in line for required or non-required clothes and walk between different points before actually "punching in" and in which the time spent on such activities itself varies from one day to the next.

The Secretary states the following in response.

1. This Court asks in its first question whether, assuming arguendo that donning and doffing of required clothes is integral to the employees' principal activity, does the donning and doffing start and end the workday when it is itself de minimis. We respectfully submit that the concept of de minimis is not relevant in determining the beginning and end of the "workday."

The only proper measure of when the "workday" begins and ends, thereby making all time spent in-between compensable "hours worked" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 et seq., is the performance of the employees' first and last principal activities. As explained in our initial brief, the Portal-to Portal Act ("Portal Act"), 29 U.S.C. 254(a), excludes from compensable "hours worked" under the FLSA only those 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). See also 29 C.F.R. 790.6(a), 790.6(b). Thus, it is an employee's principal activities (or those activities integral thereto) that determine what constitutes the "workday" and compensable hours worked. Nothing in the Portal Act limits or qualifies this definition.

Quite apart from any determination of the "workday," courts have applied a de minimis principle. The Supreme Court, in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), described the principle as follows:

> We do not, of course, preclude the application of a de minimis rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a) [FLSA overtime provision] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Id. at 692. The Sixth Circuit characterized the Mt. Clemens decision as "enabl[ing] courts to treat theoretically compensable work as noncompensable under the FLSA when the amount of such work is negligible." Brock v. City of Cincinnati, 236 F.3d 793, 804 (6th Cir. 2001).

As the Ninth Circuit stated in the frequently cited case of Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984), involving application of the de minimis principle to overtime claims under the FLSA, "as a general rule, employees cannot recover for otherwise compensable time if it is *de minimis*." Id. at 1062 (emphasis added). See also City of Cincinnati, 236 F.3d at 804 (same); Reich v. Monfort, 144 F.3d 1329, 1333 (10th Cir. 1998) (same); Reich v. New York City Transit Auth., 45 F.3d 646, 652 (2d Cir. 1995) (same). In other words, the first step is to determine compensable time, which, as dictated by the Portal Act, is measured by the "workday." Subsequent to such a determination, if employees have not been paid for any portion of the work performed during the "workday," one looks to whether that "otherwise compensable time" is de minimis and consequently not ultimately compensable. Thus, the de minimis principle is an "exception" to otherwise compensable time; it is not determinative of what is compensable time. See Monfort, 144 F.3d at 1333; Atkins v. General Motors Corp., 701 F.2d 1124, 1129 (5th Cir. 1983).

That the concept of de minimis is irrelevant to determining the beginning and end of the "workday" is made apparent by how most courts have applied the de minimis

principle. Specifically, they have followed the test laid out by the Ninth Circuit in Lindow, which includes among its criteria "the size of the aggregate claim" (gauged, at minimum, on a daily basis).[1] 738 F.2d at 1063. See, e.g., Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 719 (2d Cir. 2001); City of Cincinnati, 236 F.3d at 804-05; Monfort, 144 F.3d at 1333; Bobo v. United States, 136 F.3d 1465, 1468 (Fed. Cir. 1998); Saunders v. Morrell, No. C88-4143, 1991 WL 529542, at *5 (N.D. Iowa Dec. 24, 1991).[2] This is important because the aggregation of uncompensated time,

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[1] The Ninth Circuit in 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 additional work." 738 F.2d at 1062. The Ninth Circuit, however, also cited to other cases where time has been aggregated beyond a daily basis (ranging up to three years). Id. at 1063 ("Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim."). The court also pointed to cases where time was aggregated "in relation to the total sum or claim involved in the litigation." Id. See also Monfort, 144 F.3d at 1334 (post-Lindow case where court stated that "[i]t is also appropriate to consider an aggregate based on the total number of workers"). The Secretary does not comment here as to precisely how one should aggregate time other than to say that it should at minimum be done on a daily basis.

[2] The Ninth Circuit stated that "the practical administrative difficulty of recording small amounts of time for payroll purposes" should also be used to determine if time is de minimis. Lindow, 738 F.2d at 1062. See also 29 C.F.R. 785.47. And the court said that consideration should further be given to "whether the claimants performed the work on a regular basis." Lindow, 738 F.2d at 1063.

for purposes of a de minimis determination, can only take place after the "workday" is established. Discrete activities such as, for example, the donning of goggles, cannot be looked at in isolation and declared to be in and of themselves de minimis or not, and on that basis be determinative of whether the "workday" begins. Rather, there must be a determination of the "workday" based on the employee's first and last principal activities (or those activities that are integral to the performance of the employee's principal activities). Only then, after the "workday" is fixed, can a determination be made whether all the otherwise compensable time within the workday, for which employees were not compensated, should be compensated based on the Lindow de minimis criteria.

The Ninth Circuit, however, in its recent decision in Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), petition for rehearing filed (Aug. 26, 2003), concluded that the "specific tasks" of donning and doffing "non-unique" protective gear, such as hardhats and safety goggles, while integral and indispensable to the employees' principal activities, were not compensable because they were de minimis "as a matter of law." Id. at 903-04. In so concluding, the court inexplicably relied on its own Lindow precedent. Id. As explained above, Lindow does not support the court's

conclusion in Alvarez on this point. Rather, Lindow specifically sets out criteria for determining whether aggregate time during the "workday" is de minimis, which necessarily calls for a factual inquiry.[3] The court in Alvarez thus misapprehended its own precedent, and thereby misapplied the concept of de minimis to discrete activities as a matter of law. This, in turn, allowed the Ninth Circuit to treat as noncompensable "the *de minimis* time associated with the donning and doffing of non-unique protective gear." Alvarez, 339 F.3d at 904. The court was in error on this point.

In sum, in stating what is excludable from compensable "hours worked" under the FLSA, the Portal Act points to those activities occurring prior to the employee's first principal activity of the "workday" and subsequent to the last principal activity of the "workday." See 29 U.S.C. 254(a). Thus, compensable "hours worked" under the FLSA are delimited by the "workday," which in turn is determined by the employee's first and last principal activities. Nowhere in the Portal Act, the Secretary's interpretive regulations, or the applicable caselaw is the "workday," as defined by those starting and

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[3] The Secretary takes no position on whether the total time in the instant case is de minimis in accordance with the Lindow criteria.

ending principal activities, in any way limited by the de minimis concept. In fact, it cannot be so limited in light of the correct application of the de minimis principle, which applies only after the "workday" is properly established.

2. This Court also requests the Secretary's position on whether, assuming arguendo that donning and doffing is part of an employee's principal activity, waiting in line to obtain the initial required clothing also is part of the principal activity. As discussed below, Supreme Court and appellate court cases, the Secretary's interpretive regulations, and the legislative history of the Portal Act all support the conclusion that waiting in line to obtain the first item of required clothing is an integral and indispensable part of an employee's principal activity and, accordingly, is compensable as "hours worked" within the meaning of the FLSA and Portal Act.

Whether waiting time is compensable "hours worked" within the meaning of the FLSA depends on whether an employee is "waiting to be engaged" or "engaged to wait." See generally, Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944). In Skidmore, 323 U.S. at 136, the Court stated that "hours worked" under the FLSA is not limited to active labor: "No principle of law found either in the statute or in Court

decisions precludes waiting time from also being working time," and "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged." Accord Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers, 971 F.2d 347, 350-51 (9th Cir. 1992). See also 29 C.F.R. 785.7, 785.14; The Fair Labor Standards Act § 8.II.B (Ellen C. Kearns and Monica Gallagher eds. 1999).

Thus, "idle" or waiting time is compensable "work" under the FLSA where it is controlled by the employer and is spent predominantly for the employer's benefit. See, e.g., Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944) (a companion case to Skidmore).[4] The Secretary's interpretive regulations explain that an employee is "engaged to wait," and therefore performing work, when the periods of inactivity are unpredictable and of short duration:

> In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In [such] cases waiting is an integral part of the job. The employee is engaged to wait.

29 C.F.R. 785.15 (citations omitted). Under these governing

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[4] Armour and Skidmore thus clarify the Supreme Court's interpretation of "work" in Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944) -- physical or mental exertion (whether burdensome or not) that is controlled or required by the employer and is pursued necessarily and primarily for the benefit of the employer and his business.

legal principles, the Ninth Circuit in Alvarez recognized that the time spent by employees waiting in line to obtain protective clothing constitutes "work" under the FLSA. See 339 F.3d at 902 ("Plaintiffs' donning and doffing, as well as the attendant retrieval and waiting, constitute 'work' under Muscoda and Armour's catholic definition: pursued necessarily and primarily for the benefit of the employer, . . . these tasks are activity, burdensome or not, performed pursuant to IBP's mandate for IBP's benefit as an employer.") (internal quotations and citations omitted).

Even where wait time constitutes "work" under the FLSA, however, it nevertheless may not be compensable if it is preliminary or postliminary activity within the meaning of the Portal Act. See Vega v. Gasper, 36 F.3d 417, 425 (5th Cir. 1994) ("Wait time is compensable when it is part of a principal activity, but not if it is a preliminary or postliminary activity."). See also 29 C.F.R. 790.8(c). But, the Portal Act was not intended to limit FLSA coverage of work that is integral to the performance of an employee's principal activities, regardless of whether that work occurs before or after an employee's regular shift. See Steiner v. Mitchell, 350 U.S. 247, 256 (1956) ("[A]ctivities 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 [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).").

Thus, in Steiner, the Supreme Court essentially prescribed a functional test that requires an analysis of the relatedness of the activity at issue to the primary duties of the job.[5] Using a similar analysis, the Supreme Court held in Mitchell v. King Packing Co., 350 U.S. 260 (1956), a companion case to Steiner, that the knife-sharpening activities of the defendant meatpacking company were an integral and indispensable part of the principal activities for which they were employed and thus not "preliminary" or "postliminary" activities excluded from compensability under the Portal Act. Significantly, in reaching its conclusion, the Court rejected

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[5] See also Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50 (8th Cir. 1984) ("The only activities excluded from FLSA coverage are those undertaken 'for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.'") (quoting Dunlop v. City Elec., Inc., 527 F.2d 394, 398 (5th Cir. 1976)), cert. denied, 471 U.S. 1054 (1985); 29 C.F.R. 790.8(b) ("The term 'principal activities' includes all activities which are an integral part of a principal activity."); and 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.").

the lower court's concern that if all activity indispensable to the performance of productive work is excluded from the terms preliminary and postliminary, the intended effect of the Portal Act would be negated. See id. at 261. See also Alvarez, 339 F.3d at 902-03 ("To be 'integral and indispensable,' an activity must be necessary to the principal work performed and be done for the benefit of the employer.").

The Fifth Circuit also applied a functional analysis in Vega v. Gasper. Vega involved farmworkers who were transported to fields by their employer; they sought compensation for the time that they spent waiting for the sun to rise before starting their chile-picking duties. See 36 F.3d at 423. The court stated that "if the workers were on duty in the morning so as to get an early start for their employer's benefit (e.g., to assure that work would start promptly at sunrise) or because of Gasper's scheduling, the morning wait time is a compensable principal activity." Id. at 426 (citing Fields v. Luther, No. JH-84-1875, 1988 WL 59963, *14-*15 (D. Md. May 4, 1988) (time spent by farmworkers waiting in fields for dew to dry is compensable because workers were on duty)).

Under the Steiner analysis, the time spent by Barber Foods' employees waiting in line to obtain their initial

protective clothing is integral to their principal activities. To perform their processing jobs, the employees must don certain required clothing. Prior to donning the clothing, moreover, the employees must arrive at the processing plant before their shifts to wait in lines to obtain the required clothing. The clothing must be obtained and donned before the employees are allowed to punch in to the computerized time-keeping system at the entrances to the production floor.[6] Because the waiting is controlled by, and done for the benefit of, Barber Foods, and because obtaining protective clothing is necessary for the performance of the employees' processing jobs, the waiting is integrally related to their principal activities under Steiner's functional test. See Alvarez, 339 F.3d at 904 (waiting and walking connected with the employees' donning and doffing activities is integrally related to their principal activities and, therefore, constitutes compensable

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[6] The panel recognized implicitly that the amount of time that employees spend waiting for their required sanitary and protective gear is within the control of Barber Foods. In rejecting the compensability of walking time, the panel stated that "if Barber Foods were to dispense all of the gear from one point, then it could eliminate Employees[']' claim for walk time between dispensing areas." Tum v. Barber Foods, Inc., 331 F.3d 1, 6 (1st Cir. 2003). Similarly, if Barber Foods were to provide easier access to the clothing tubs or more attendants handing out gear at the equipment cage window, the time spent by employees waiting to obtain their gear would be lessened.

work under the FLSA and Portal Act).

The conclusion that the necessary waiting time associated with donning and doffing activities is compensable under the Portal Act as integral to the employees' principal activities also is compelled by the Secretary's interpretive regulations. Although the regulations do not specifically address the compensability of time spent waiting to pick up required protective clothing, they do distinguish between waiting time before the commencement of work that occurs when an employee voluntarily arrives earlier than required or expected, which is not compensable, and waiting time that occurs when an employee arrives at work when required, "but for some reason beyond his control there is no work for him to perform until some time has elapsed," which is compensable. See 29 C.F.R. 790.7(h). This interpretive regulation cites to the legislative history of the Portal Act, which makes clear that the Portal Act was not intended to apply to situations where employees are required to be at their place of employment, but for reasons beyond their control are unable to begin their productive work. Id. (citing 93 Cong. Rec. 2298 (1947) (colloquy between Senators Cooper and McGrath)).

For example, in Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990), assembly line workers at a frozen food

packaging facility were required to arrive at work at a specified time, place their names on a sign-in sheet, and wait before they began actual productive work. Relying on 29 C.F.R. 790.7(h), the Fifth Circuit concluded that the waiting time was compensable, stating that "[w]here an employee is required by his employer to report to work at a specified time, and the 'employee is there at that hour ready and willing to work but' is unable to begin work for a period of time for some reason beyond his control, the employee is engaged to wait and is entitled to be paid for the time spent waiting." Id. at 1414. Similarly, in Fox v. Tyson Foods, Inc., No. CV-99-TMP-1612-M (N.D. Ala. Feb. 14, 2001) (Putnam, Mag. J.) (pending on review before district court) (Attachment A), poultry workers sought compensation for time spent donning, doffing, and cleaning protective gear and for pre-shift time spent waiting to obtain smocks. Slip op. at 8-9. The magistrate judge concluded that all these activities were compensable as integral and indispensable to the employees' principal activities. Id. at 26-30. See also Reich v. IBP, Inc., 820 F. Supp. 1315, 1324 (D. Kan. 1993) ("We see no distinction between actually sharpening knives and waiting to obtain sharpened knives -- the benefit to IBP was the same."), aff'd on other grounds, 38 F.3d 1123 (10th Cir. 1994).

Because the donning and doffing of clothing necessary to the performance of an employee's principal activity is integrally related to that principal activity, the necessary waiting time connected with obtaining such clothing also is integrally related to the employee's principal activity, regardless of whether the waiting time occurs before or after the employees' regular work shift. See Steiner, 350 U.S. at 256.[7]

3. This Court's third question addresses an important practical issue: how can an employer track and record the first principal activity that triggers the start of the workday, when the timing of that activity can vary by individual and from day to day?

A basic principle under the FLSA is that employers are responsible for the recording of time. As the Supreme Court observed in Mt. Clemens Pottery Co., 328 U.S. at 687, "it is

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[7] Of course, once the employees don their first piece of required protective clothing, any subsequent waiting time (where not long enough for the employees to use effectively for their own purposes) would be compensable as part of the employees' workday. As the Secretary noted in her initial amicus brief and in response to this Court's first question above, the Portal Act does not apply to any time spent between the performance of an employee's first and last principal activities. Even absent application of the "first principal activity" principle, however, waiting to obtain required clothes is not excluded from compensability under the Portal Act because it is integral to the employees' principal activities.

the employer who has the duty under § 11(c) of the Act [29 U.S.C. 211(c)] to keep proper records of wages, hours and other conditions and practices of employment." Accordingly, the employer must structure its operations in a manner that permits the accurate recording of this time. Cf. Vega, 36 F.3d at 427 (where employees are forced to wait because of the inefficiencies of the employers' payroll system, that waiting time is compensable).

Here, Barber Foods has structured its operations in a manner that precludes the possibility of accurate timekeeping. While employees are paid from the moment they clock in at the entrances to the production floor, see Tum, 331 F.3d at 4, Barber Foods mandates that they don required equipment before they clock in and doff this equipment after they clock out. The company also allows its employees to don non-required equipment after clocking in. See id. at 3. Barber Foods thus exercises its control over the workforce to assure, if inadvertently, that the time employees take to perform their first principal activity is not captured in its records.

If, on the other hand, Barber Foods modified its current procedures, it could accurately capture time from the first principal activity to the last principal activity. The company could require its employees to don their optional

equipment prior to clocking in, and to don their required equipment (that is, clothing required by law, by rules of the employer, or by the nature of the work) after the clock-in. This procedure would capture the time taken to perform the first principal activity, and those activities performed thereafter, while excluding noncompensable activity from recorded time. In fact, Barber Foods already has a computerized time keeping system that uses time clocks that are located at the entrances and exits to the production floor. See Tum, 331 F.3d at 4. It is certainly within Barber Foods' control to move its racks and receptacles for required clothes to ensure that employees don and doff such clothing after clocking in and before clocking out. Alternatively, the company could move the time clocks to achieve the same purpose. Barber Foods could also use time clocks that do not allow employees to clock in prior to the appropriate time, enabling the company to better control its time recording processes.

The Secretary believes that these changes are feasible because at least one large poultry processing firm already has implemented these types of procedures. In May 2002, Perdue

Farms, Inc.[6] entered into a consent judgment with the Secretary in which Perdue agreed to record and pay for any time integral and indispensable to the work of its production line employees, including the donning, doffing, and sanitizing of any clothing or equipment required by law, by Perdue, or by the nature of the job. See Perdue Consent Judgement (Attachment C). Perdue also agreed to record and pay for the time employees spend walking or waiting after their first principal activity has been performed. See Perdue side agreement (Attachment D).

The side agreement to Perdue's consent decree makes clear that compliance merely requires that an employer structure its operations so that employees will clock in prior to putting on equipment that is required to be donned at the plant, and clock out after taking off that equipment.[5] Accordingly,

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[6] As of August 2001, Perdue Farms was the fourth largest poultry processor in the nation and the largest in the Northeast. See MeatPoultry.com, Article ID 48104 (Attachment B).

[5] Significantly, the Wage and Hour Division also has entered into agreements with Honda Manufacturing of Alabama and Mercedes-Benz U.S. International that require recording and payment for all time worked from the first principal activity to the last principal activity as described above. Prior to these agreements, those firms, like Perdue, did not pay for their employees' donning and doffing time. Since the agreements entered into with the Secretary, these companies have made changes in their corporate practices to achieve compliance. See Attachment E.

after entering into the consent decree Perdue modified its operations by, among other things, putting its time clocks on or near the production floor (waterproofing them where necessary); establishing or moving racks and receptacles holding required gear so that employees can don equipment only after clocking in and remove it prior to clocking out; moving or eliminating supply rooms at which employees had waited for supplies; experimenting with different kinds of gear which may be quicker to put on and take off; and obtaining computerized time recording equipment which prevents clocking-in prior to a time set by Perdue.

In short, with relatively straightforward modifications that already have proven effective by its competitor, Barber Foods can record and pay its employees for all of the time spent between their first principal activity and last principal activity, as defined in the Portal Act. Indeed, as the panel itself recognized, the procedures necessary to properly pay its employees are completely within the control of Barber Foods. See Tum, 331 F.3d at 6.

Additionally, consistent with the practical concerns of this Court, it is important to note that the donning and doffing of required clothing is not always compensable. The Secretary has created a bright-line test that distinguishes

between the donning and doffing of clothing that must be done at work and the donning and doffing of clothing that may be done elsewhere. The putting on and taking off of clothing that is required to be done on the employer's premises is compensable; on the other hand, where the employee has the option of donning and doffing required clothing at home, the activity is not compensable.

Thus, the Secretary's regulations specifically provide that "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," the clothes changing is compensable. 29 C.F.R. 790.8(c) and n.65 (emphasis added). Moreover, the Field Operations Handbook ("FOH"), which contains official guidance for the conduct of FLSA investigations by the Department of Labor's Wage and Hour Division, provides that changing required clothing at home is not compensable.[10]

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[10] FOH section 31b13 provides:

> Changing clothes at home.
>
> Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

The Secretary's position in this regard has been followed by the courts. For example, in Apperson v. Exxon Corp., No. S-78-192, 1979 WL 1979, *8 (E.D. Cal. Feb. 7, 1979), the court held that required clothes changing need not be compensated unless the employer requires that it be done at the worksite "or unless the employee cannot safely wear such clothing home at the end of the day." See also Baylor v. United States, 198 Ct. Cl. 331 (1972) (changing into uniforms that could not be worn to or from guards' homes was integral to performance of their principal activities); Riggs v. United States, 21 Cl. Ct. 664 (1990) (getting protective clothing, appearing at roll call, and putting clothing away after inspection was integral to firefighters' principal activities where the equipment could not be taken from the premises). Compare Bagrowski v. Maryland Port Auth., 845 F. Supp. 1116, 1121 n.6 (D. Md. 1994) (putting on uniforms at work was not compensable where "many officers came to work in their uniforms and nothing prevented the plaintiffs from doing so").

4. We therefore urge this Court to accept the principle, as set out in the Portal Act, that the "workday" begins and ends based on an employee's first and last principal activities, not on whether such first and last principal activities are themselves de minimis. We further urge this

Court to conclude that waiting in line to obtain the initial required protective gear is integrally related to the employees' principal activities, and is thus compensable. Finally, there are no practical obstacles to Barber Foods compensating its employees for all compensable time, because the manner in which the company sets up its operations are completely within its control.

Thus, for these reasons, and those set forth in the Secretary's initial amicus brief, the Secretary requests that this Court grant panel rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this supplementary brief for the Secretary of Labor as amicus curiae have been served on September 15, 2003, by deposit in first-class mail, on the following:

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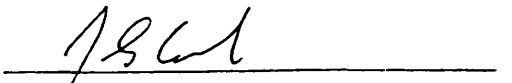

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ATTACHMENT A

M.H. FOX, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

Case No. CV-99-TMP-1612-M

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This cause is before the court on two motions filed by the defendant, Tyson Foods, Inc. ("Tyson"), and a motion for certification as a collective action filed by the plaintiffs. On September 24, 1999, Tyson filed a motion for partial summary judgment seeking judgment in its favor on the claims of 10 of the 11 named plaintiffs, contending that their claims for compensation for time spent donning, doffing, and cleaning certain sanitary and protective equipment were due to be dismissed pursuant to 29 U.S.C. § 203(o). On December 27, 1999, Tyson filed another motion for partial summary judgment seeking dismissal of: (1) the mastercard claims of plaintiffs Teresa Brothers, Princess Brown, and Ava Joyner; the overtime compensation claims of all plaintiffs for (2) activities performed before and after the plaintiffs' shifts, and (3) activities performed at the beginning and end of the unpaid

meal period; and (4) the off-the-clock meal period claims of plaintiffs Angela Hatchett, Sharon Mitchell, Ava Joyner, and Pamela Woodworth. Defendant filed supplemental submissions in support of its motions on May 11, 2000, and September 20, 2000. This matter has been fully briefed, and the court has considered the evidence and the arguments set forth by both parties. The parties have not consented to the exercise of jurisdiction by the undersigned pursuant to 28 U.S.C. § 636(c); accordingly, the court submits this report and recommendation.

I. SUMMARY JUDGMENT STANDARDS

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477

U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. Celotex, 477 U.S. at 322-23. There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." Id. at 323.

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party need not present evidence in a form necessary for admission at trial; however, she may not merely rest on her pleadings. Celotex, 477 U.S. at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

After the plaintiff has properly responded to a proper motion for summary judgment, the court must grant the motion if there is

no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52; see also Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249 (citations omitted); accord Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient

evidence on which the jury could reasonably find for the plaintiff. Anderson, 477 U.S. at 254; Cottle v. Storer Communication, Inc., 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The non-movant need not be given the benefit of every inference but only of every reasonable inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

II. FACTS

Applying these standards for addressing a motion for summary judgment, the following facts appear to be undisputed or, if disputed, taken in a light most favorable to the plaintiffs. It is emphasized that these facts are viewed most favorably for the plaintiffs; whether they can be established at trial must await another day.

Eleven individual plaintiffs brought this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., asserting that they have not been adequately compensated for work they performed in various Tyson chicken-processing plants. The plaintiffs seek certification of this case as a collective action.

In separate motions, Tyson seeks summary judgment against 10 of the 11 named plaintiffs on their overtime compensation claims relating to the donning, doffing, and cleaning of certain sanitary and protective equipment pursuant to 29 U.S.C. § 203(o)[1] and against all plaintiffs on the donning, doffing, and cleaning claims on the basis that the activities are not "work" within the ambit of the FLSA and are not compensable pursuant to the Portal-to-Portal Act. Tyson also seeks summary judgment against plaintiffs Brothers, Brown, and Joyner on their claims that they are denied compensation for time worked by the employer's use of a "mastercard" timing system. Finally, Tyson moves for summary adjudication on the meal period claims of Hatchett, Mitchell, Woodworth, and Joyner.

Plaintiffs' claims arise from their employment as workers in several of defendant's chicken-processing plants. Although the plaintiffs hold different positions in different departments at various Tyson plants, all must spend at least a few minutes before their shifts to retrieve and don certain items of sanitary and protective equipment, and after their shifts to clean, doff, and return the same equipment. At two break periods that Tyson allows during each shift, plaintiffs must remove some or all of the sanitary and protective equipment in order to enter the bathrooms,

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[1] Tyson seeks summary judgment on the claims of all plaintiffs except Sharon Mitchell, who was employed in a non-union facility.

the cafeteria, or other areas of the plant outside the work area. Before the break ends, employees must put the equipment back on and return to their work stations.

Although the type and amount of gear required depends upon the workers' job duties, all employees must wear some of the gear required by Tyson. All plaintiffs are required to wear a white cotton smock[2] provided by Tyson. Most plaintiffs also must wear a hair net and beard net, earplugs, and safety glasses.[3] Some plaintiffs also are required to wear plastic aprons over their smocks, thin knit gloves, cotton liner gloves, rubber outer gloves, mesh or chain gloves, plastic sleeve guards, and safety shoes or boots. In addition, plaintiffs who work in "live kill" or other jobs where they are in danger of being pecked or cut must also don

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[2] The smocks are described as a cotton outer garment worn over the street clothes, which opens in the back like a surgeon's gown, and is laundered daily on the premises. Plaintiffs retrieve a clean smock before their shifts begin, which may require waiting in long lines if plaintiffs do not arrive well before the shift begins, and deposit the soiled gowns in a bin as they leave their work areas.

[3] Hair nets are required for all workers, and beard nets for any worker with facial hair. Most plaintiffs also wear earplugs and safety glasses, as required by Tyson and federal workplace safety standards. The nets, earplugs, and glasses are apparently kept by the workers and can be reused until worn out. New nets and earplugs are sold on the plant premises by Tyson, where employees also may be required to wait in line to make such purchases.

protective mesh gloves, boots, dust masks, plastic sleeve covers, and hard plastic arm guards.[4]

The plaintiffs are required to wear the designated equipment both for their own safety and to assure the sanitary condition of Tyson's final product. It is undisputed that Tyson mandates the wearing of such equipment and does not compensate its employees for the time spent donning, doffing, and cleaning the sanitary and protective equipment. While certain pieces of equipment, like shoes, hair nets, beard nets, and earplugs can be worn or brought from home, smocks, aprons, gloves, face shields, and guards must be donned after the employee arrives at the plant. A clean smock must be obtained each day by every employee, and this usually requires the employee to wait in line at a supply shop for as much as 10 to 15 minutes. Also, many employees must wait in line daily to obtain other supplies, like rubber gloves, aprons, and glove liners that are torn or damaged during work. Although such supplies are issued for a week at a time, many require replacement daily due to wear and tear.

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[4] Items such as the arm guards and sleeve covers must be washed at cleaning stations located around the plant. At some cleaning stations, plaintiffs must wait in line to clean their equipment before leaving the plant but after their paid shift has ended.

After the employee has obtained his or her gear, it is then donned, which takes from two to five minutes more. Those employees working in production areas must then wash their aprons and gloves in a sanitary solution set up in wash basins at the entrance to production areas. Because of the number of employees attempting to wash their gear and the limited number of wash basins, employees stand in line for an additional two to ten minutes for this purpose. Thus, upon arriving for work, employees must spend from 14 to 25 minutes obtaining a smock and supplies, donning the equipment, and washing their aprons and gloves in a sanitary solution before their compensable shift begins.

Twice a day, employees are entitled to a thirty-minute break.[5] If an employee wishes to leave the production area to go to the cafeteria or restroom, he must remove all sanitary equipment and leave it in a locker. Thus, at the beginning of each break, most employees remove their aprons, gloves, sleeve guards, and smocks and store them in a locker, while keeping on their hair nets, beard nets, and safety shoes. At the end of the break, the employee must put back on all of this sanitary equipment, re-wash it, and return

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[5] It appears that whether this break is compensated varies from plant to plant. The plaintiffs' evidence showed that at most plants, the thirty-minute breaks were unpaid. But it also showed that at a few plants one of the breaks is paid or, perhaps, a few minutes (usually 12 minutes) of each break is paid.

to the production line. This doffing, donning, and washing at the beginning and end of a break consumes perhaps as much as 10 to 12 minutes of the break and, in most instances, is not compensable time.

At the end of the shift, employees again go through the process of washing and removing the sanitary equipment they wear. First, before leaving the production area (but after the "line time" or "mastercard" time has ended), they must wash their aprons, sleeve guards, and gloves (both rubber and mesh "cutting" gloves) in a sanitary solution, remove them, and store them in a locker. They then remove their smocks and deposit them in a laundry hamper on the way out of the plant. If an employee utilizes a knife or other portable piece of equipment in his or her job, it also is washed in the sanitary solution before being returned. This washing and doffing process may take as much as 10 to 12 additional minutes each day.

Most of the plaintiffs are paid according to a timekeeping system known as "line time" or a "mastercard." Upon arriving at work, plaintiffs swipe a card that records their attendance. That card, however, is not used to record time worked. At some time after arriving at the plant, obtaining smocks and other gear, putting on the gear, and reporting to a work station, a "mastercard" is swiped to record the time that the production line

begins work, which corresponds with the time that the first chicken begins to move down the line. When the last chicken is placed onto the line, the mastercard is again swiped to stop production-line time, and the thirty-minute break begins. The mastercard records time at the end of breaks and is finally swiped again at the end of the shift when the last chicken is placed on the line. The plaintiffs assert that they are required to be at their positions on the line before the mastercard is swiped, and that they must remain in their positions after the mastercard is swiped to end time until the last chicken passes the station at which they work.[6] Obviously, this time varies from just a minute or two for those at the beginning of the line to several minutes for those near the end of the line.[7] Plaintiffs complain that the mastercard system results in plaintiffs working without compensation during breaks and after the shift ends.

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[6] To be clear, the plaintiffs dispute Tyson's evidence that they are not required to be at their work station until the chicken product actually arrives at it. They contend that all employees must be on the production line when the product first begins to move down the line even though it may be several minutes before it reaches the employees further down the line.

[7] Tyson disputes this scenario and claims that the plaintiffs arrive in a staggered fashion and leave in a staggered fashion, consequently working the same amount of time as the mastercard records, even though they work slightly different times; i.e., the plaintiff who must work 12 minutes after the mastercard is swiped at the end of the shift is not required to begin work until 12 minutes after the card is swiped at the beginning of the shift.

III. § 203(o)

Tyson has moved for summary judgment on the claims of all but one plaintiff, asserting that the claims for the donning, doffing, and cleaning are not compensable pursuant to 29 U.S.C. § 203(o), which states:

> Hours Worked. - In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Accordingly, Tyson asserts that the donning, doffing, and cleaning time claimed by plaintiffs who work in unionized plants,[1] and are thus covered by a collective bargaining agreement, are excluded from the FLSA. The court is not persuaded, however, that the activities for which these plaintiffs seek compensation are included within the narrow exception carved out by Section 203(o). More specifically, the court does not deem the donning and doffing of safety and sanitary equipment to be "changing clothes," nor does the court find that the cleaning of such equipment is encompassed by the term "washing."

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[1] It is undisputed that the only named plaintiff who works in a non-unionized Tyson plant is Sharon Mitchell.

The plaintiffs correctly point out that, since § 203(o) establishes an exemption to the FLSA, it must be narrowly construed. Put another way, the court must recognize Congress's intent to provide "broad coverage" under the FLSA. See Dunlop v. City Electric, Inc., 527 F.2d 394, 399 (5th Cir. 1976). The burden of showing the applicability of the exemption is on the party urging its application, here, the defendant.

A. "Changing Clothes"

In support of its position that the exclusion set forth in 29 U.S.C. § 203(o) applies to employees' donning, doffing, and cleaning of safety and sanitary gear, Tyson relies upon an opinion from the Northern District of Iowa in which the court applied Section 203(o) to exclude compensation to employees in a unionized meat-packing plant for the time spent donning and doffing mesh gloves, goggles, helmets, arm guards, boots, steel-mesh aprons, and other protective gear. Saunders v. Morrell, 1991 WL 529542 *3 (N.D. Iowa 1991). While seeming to assume that such "safety equipment" constituted "clothes" within the meaning of § 203(o), the court focused its discussion on the fact that previous collective bargaining agreements included a period of time for "clothes changing," but the most recent agreements had not because the "clothes changing" time had been expressly negotiated away by the union. In Saunders, the plaintiffs essentially acquiesced to

the donning and doffing as "clothes changing" and, through the union, had foregone payment for "clothes changing" time in the 1983 collective bargaining process. The court in Saunders held that the plaintiffs were "barred from any recovery for clothes-changing time by virtue of contractual exclusion." Id. Clearly, that holding arose not from any examination of the "clothes" at issue, but from the fact that the union had contracted away the employees' rights to be compensated for that activity and could not now demand what it had voluntarily given away. Accordingly, this court finds that Saunders does not answer the question whether the gear used by Tyson employees is "clothing"[9] under § 203(o).

Tyson next relies on Nardone v. General Motors, Inc., 207 F. Supp. 336 (D.N.J. 1962), in support of its proposition that the activities complained of by plaintiffs are "clothes changing." In Nardone, a group of metal finishers in an auto body shop filed an action seeking compensation for obtaining tools and putting on coveralls, gloves, aprons, goggles, and hoods before their shift

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[9] The court recognizes that plaintiffs in the instant case argue that, if such safety equipment is not "clothes" within the meaning of § 203(o), it does not matter that the union may have given away "clothes changing" time in contract negotiations. The holding in Saunders at least implies that such safety equipment as steel-mesh gloves and aprons can be regarded as "clothes." Despite Saunders, this court remains persuaded that there is a difference between mere clothing and specialized pieces of gear required for safety and sanitation. Compare Reich v. Monfort, Inc., 144 F.3d 1329 (10th Cir. 1998); Reich v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994).

began, and for putting away tools, removing the gear, washing up, and taking a shower at home. As in Saunders, the court did not examine whether donning and doffing such gear qualified as clothes changing, but rather relied upon the fact that the defendant had shown "the history of its dealings with the Union as being that as would exempt washing and clothes changing time from payment." Id. at 340. Defendant also showed that the bargaining negotiations "encompassed such a problem." Id. In this case, the defendant has not shown that the issue of non-payment for the donning, doffing, and cleaning has ever been addressed in union negotiations. The parties simply agree that Tyson has never paid for such activities. Such is insufficient to place this case on equal footing with Saunders or Nardone.

Finally, the defendant relies upon Williams v. W.R. Grace & Co., 247 F. Supp. 433 (E.D. Tenn. 1965), to support its position that Section 203(o) excludes payment for Tyson employees' donning, doffing, and cleaning of safety and sanitary equipment. In Williams, the court noted that "[t]he defendants have shown conclusively, and without dispute, that the history of their dealings" with the union showed a practice of exempting clothes-changing and washing, and that "this problem was consistently an active issue in the negotiations." Id. at 435. Thus, the court

finds that Williams, like Saunders and Nardone, is distinguishable from the instant case.

The defendant further argues that the plain meaning of "changing clothes" encompasses the activity described by the plaintiffs. In more than 20 declarations submitted by plaintiffs' counsel, Tyson employees describe waiting in lines to obtain smocks and aprons, putting on hair nets, beard nets, earplugs, and goggles, and in some instances donning layer upon layer of protective gear that helps ward off the cold temperatures of the processing plant and the sharp blades used in killing and deboning the chickens. At least one worker describes donning thin knit gloves, followed by cotton liner gloves, followed by rubber gloves, and finally mesh protective gloves. This process does not resemble what most people would define as "changing clothes."

"Changing clothes" is an everyday, plain-language term that describes what most people do every day - taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening. In this case, the Tyson workers "changed clothes" at home. All of the sanitary and protective gear at issue here is worn over, and in addition to, the employees' street clothes. Given the liberal, remedial purpose of the FLSA, its "broad coverage," Dunlop v. City Electric, Inc., 527 F.2d 394, 399 (5th Cir. 1976), construction of the terms used in § 203(o)

should not be so restrictive as to exclude from coverage activities that clearly go beyond mere "clothes changing" and involve such unusual, extraordinary things as steel-mesh gloves, plastic aprons, and soft and hard plastic sleeve guards.

The donning of such equipment is much different than the time spent by a police officer putting on a uniform and strapping on a holster. The uniform is "clothes" because it takes the place of the clothing the officer was wearing before work. Furthermore, while a police officer may drive to work in his uniform, it is not realistic to expect Tyson workers to drive to Tyson's chicken plants in the rural South in the summer wearing boots, arm guards, plastic aprons, and several layers of gloves over their ordinary clothing. The equipment at issue here cannot be regarded as mere analogs to everyday clothing, like a uniform might be; the equipment is necessary not for the convenience or modesty of the employee, but required for the very specific needs of the employer for sanitation and safety.

Addressing the same issue in the context of a meat processing plant, the Department of Labor has determined that Section 203(o) "does not apply to the putting on, taking off, and washing of protective safety equipment" and therefore "cannot be excluded from hours worked." Letter from John R. Fraser, Acting Administrator, Department of Labor, Dec. 8, 1997 (attached to plaintiff's

submissions as Exhibit 27).[10] The DOL went on to opine that "clothes" as used in Section 203(o) "does not encompass protective safety equipment; common usage dictates that 'clothes' refers to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature." That interpretation of § 203(o) by the principal agency charged with enforcing the nation's labor laws is due some deference.

The court agrees that the term "clothes changing," when added to the FLSA in 1949, did not encompass the putting on, taking off, and cleaning of sanitary and safety equipment such as is at issue in this case. The defendant has not provided any finding that such donning, doffing, and cleaning falls within the exemption, except in those cases where it was clear that the union and the employer grappled with the issue in negotiations and agreed upon a policy of nonpayment for activities that include the donning, doffing, and/or cleaning of safety and protective equipment. Consequently, the motion for partial summary judgment as to the plaintiffs' claims based on the donning, doffing, and cleaning of sanitary and safety

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[10] Tyson argues that the opinion letter is not entitled to any deference; even if not due deference, however, the court agrees with the conclusion and finds that a reasonable interpretation of the statute is that clothes changing is a relatively narrow term that does not include all items that may be "worn" or "put on."

equipment before and after their workday, based on § 203(o), is due to be denied.

Even if donning and doffing of the sanitary and protective gear involved here can be regarded as "clothes changing" under § 203(o), the plaintiffs also argue that Tyson's failure to compensate workers for the donning, doffing, and cleaning is not within the exclusion of § 203(o) because the union never negotiated this term in connection with any collective bargaining agreement applicable to them. The defendant has failed to demonstrate what, if any, attention this issue has been given during contract negotiations. Clearly, Tyson has not presented the court with any collective bargaining agreement that by its "express terms" excludes time donning and doffing this equipment from plaintiffs' compensation. Moreover, there is no evidence that such donning and doffing has ever been a point of negotiation leading to a collective bargaining agreement. The evidence here does not establish that the question was raised during contract negotiations and then withdrawn or compromised by the union. The evidence is simply silent, and the court cannot say that Tyson has carried its burden of showing its entitlement to judgment as a matter of law on this point absent some indication that, in fact, the question has been raised and resolved in some fashion during contract negotiations.

Likewise, the court does not believe that non-payment for donning and doffing of safety equipment is within a "custom and practice under a bona fide collective-bargaining agreement." The "custom and practice" provision of § 203(o) is simply an alternative way of showing some form of agreement about an issue between a union and an employer. In the absence of an "express" term in the collective bargaining agreement, an employer can nonetheless show that it and the union have implicitly agreed on an issue by showing that the issue has been debated in contract negotiations. Certainly, the statutory language "custom and practice under a bona fide collective-bargaining agreement" means more than "this is the way we've always done it," for that amounts to nothing more than saying that once an illegal practice gets started, it becomes "immunized" from challenge over time. Mere silence alone cannot confer on a particular practice the status of a "custom and practice under a bona fide collective-bargaining agreement." Properly construed, the language requires some showing that the employer and the union have reached an agreement by implication that a certain practice is acceptable and, thus, the employer can take comfort in relying on it. In this case, Tyson has offered no evidence that non-compensation of donning and doffing by its employees either has been expressly negotiated or deliberately acquiesced to by the union to the detriment of its

members. Thus, the non-compensation is neither an express term of any collective bargaining agreement nor a "custom and practice under a bona fide collective-bargaining agreement."

B. Washing

Tyson also has failed to offer any precedent for its contention that the cleaning of the gloves or other safety equipment used by plaintiffs constitutes "washing" within the ambit of § 203(o). To the contrary, in Saunders, a case relied upon by Tyson, the court recognized that the cleaning of safety equipment is not "washing" within the meaning of Section 203(o) and could not be excluded from compensation on the basis of that statute. This is in keeping with the view, espoused in the legislative history, that "washing" refers to the worker's act of "cleaning his [or her] person" at the beginning or end of each workday. S. Rep. No. 81-640 (1949) reprinted in 1949 U.S.C.A.N. 2251, 2255. The "washing" that was excluded from payment in Nardone was not a cleaning of gear in the workplace, as in this case, but the employee's showering of his person, done at home after his shift. In Williams, the time spent washing to "decontaminate" the worker's person or clothing was paid as overtime.

In the instant case, the washing has less to do with personal hygiene than with the removal of chicken offal from equipment owned

by Tyson, for sanitation reasons. Such cleaning is more akin to decontamination than to mere "washing up." Tyson has failed to demonstrate that the time spent cleaning safety equipment is "washing" within the ambit of § 203(o) and has offered no compelling authority to support that position. Consequently, Tyson's motion for partial summary judgment on the issue of "washing" based on the narrow exclusion set forth is § 203(o) is due to be denied.

II. DONNING, DOFFING, AND CLEANING AS "WORK"

In a second motion for partial summary judgment filed by Tyson on December 27, 1999, the defendant argues that the activities of donning, doffing, and cleaning, along with waiting in line to obtain the required aprons and other equipment, are not compensable under the FLSA because the activities do not constitute "work." Both parties agree that the controlling definition of work under the FLSA, expressed by the Supreme Court, is: "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." Tennessee Coal, Iron & R.R. Co v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S. Ct. 698, 703, 88 L. Ed. 949 (1944); see also, Anderson v. Mount Clemens Pottery, 328 U.S. 680, 691-92, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946); Dade

County v. Alvarez, 124 F.3d 1380, 1384 (11th Cir. 1997), cert. denied, 523 U.S. 1122, 118 S. Ct. 1804, 140 L. Ed. 2d 943 (1998).

Tyson makes much of the fact that the safety and sanitary equipment used by the plaintiffs is "lightweight" and "not cumbersome," and requires little physical exertion to put on or take off. Plaintiffs have offered declarations that demonstrate that the process takes from about 8 to 30 minutes per day. The court recognizes that other courts have found that donning and doffing a portion of the equipment at issue here is not "work." See Reich v. IBP, Inc., 38 F.3d 1123, 1125 (10th Cir. 1994) aff'd sub. nom Metzler v. IBP, Inc., 127 F.3d 959 (10th Cir. 1997) (holding that the donning of earplugs, hard hats, safety shoes not compensable, but donning of bulky steel mesh protective gear compensable). This court, however, is not willing to adopt that reasoning.

The instant case is different than IBP in that the safety gear in that case required only a "few seconds" to don.[11] Id. at 1126.

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[11] Of course, it is possible that Tyson will be able to show that the plaintiffs have exaggerated or misstated the time it takes to don and doff the equipment and that the activity is not compensable because it falls within the *de minimis* exception; at this stage, however, the time is a disputed fact, and because all the plaintiffs assert that the donning, doffing, and cleaning takes at least about 8 minutes per day to about an hour per day, it would not appear to fall under the *de minimis* exception. See, e.g., Reich v. Monfort Inc., 144 F. 3d 1329 (10th Cir. 1998). Tyson has not raised this argument in its motion, although plaintiffs assert that the time spent should not be deemed *de*

More important, however, the Supreme Court has clearly expressed its intention that the burdensomeness of the activity be disregarded in an assessment of whether the activity is "work." The Supreme Court instead looks to whether the activity is "controlled or required" by the employer, and whether it is "primarily for the benefit" of the employer. Mount Clemens Pottery, 328 U.S. at 693.[12] A formulation that breaks down along whether the equipment is heavy or light, or easy or cumbersome to put on is too simplistic. Rather, the essence of the Supreme Court's analysis of this issue turns not on whether the work is "burdensome," but whether it is for the purposes and benefit of the employer, as distinct from the personal convenience or wishes of the employee.

In this case, the activity clearly is required by the employer. Tyson does not deny that the wearing of hair nets, smocks, boots, earplugs, arm guards, and other gear is mandatory, or that Tyson requires wearing of the gear in order to comply with state and/or federal law. Tyson makes no argument that the hair nets benefit the employee or that the maintenance of a sanitary

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minimis.

[12] Even in IBP, the court recognized that the special protective gear used by the knife workers at a meat-processing plant was compensable, noting that donning and doffing that "differ[s] in kind, not simply degree, from the mere act of dressing" are compensable. 38 F.3d at 1126.

workplace does not necessarily or primarily benefit Tyson. To the contrary, common sense requires a finding that Tyson could not continue to operate its chicken-processing business if it failed to maintain a certain level of cleanliness in compliance with USDA regulations, or if it failed to follow OSHA regulations relating to employee safety. The activities described by the Tyson employees differ in kind, not simply degree, from the noncompensable changing of clothes.

The cleaning of the equipment similarly is required by and benefits Tyson. It is clear that in order to maintain the requisite level of cleanliness in its plants, Tyson must have its workers equipped with clean and sanitary knives, aprons, arm guards, and other equipment that comes into contact with the chicken. There is simply no evidence, and logic does not compel the conclusion, that the cleaning of the gear primarily benefits the employee.

In this case, the court can comfortably conclude that the donning of smocks, plastic aprons, rubber gloves, steel-mesh gloves, and sleeve guards is done for the purposes and the benefit of the employer. Tyson is required to meet certain safety and sanitation standards for its product, and clearly the equipment discussed here is used for that reason, to meet the sanitation standards necessary to market processed chicken. While it might be

argued that the equipment shields employees from the blood and gore of the process, it can be argued equally that it assures that chicken is not contaminated by direct contact with employees and their clothing. Simply put, drawing inferences most favorably for the plaintiffs, the court cannot say that the donning of safety and sanitary equipment is not for the benefit of the employer and subject to its control. That being said, it is "work" under the FLSA.

Accordingly, the court finds that the donning and doffing of sanitary and safety equipment is "work" within the meaning of the FLSA because it is controlled by and required by Tyson, and because it primarily benefits Tyson and the chicken-processing business. The motion for partial summary judgment on this ground is due to be denied.

IV. THE PORTAL-TO-PORTAL ACT

Tyson asserts that the activities of donning, doffing, and cleaning of safety and sanitation equipment are not compensable for the additional reason that they are "preliminary" or "postliminary" activities under Section 4(a) of the Portal-To-Portal Act of 1947. In passing the Act, codified as 29 U.S.C. § 254(a), Congress narrowed the definition of compensable work to exclude:

> (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)(1) and (2). The Portal-to-Portal Act does not exclude all pre- or post-shift activity, however. Generally, such activities are compensable when they are "integral and indispensable" to the principal activity for which the employee is employed, and when the activity is predominantly in the employer's interest, rather than the employee's. See Lindow v. United States, 738 F.2d 1057, 1061 (9th Cir. 1984); Lee v. Am-Pro Protective Agency Inc., 860 F. Supp. 325, 327 (E.D. Va. 1994). Moreover, the concept of the "principal activity" of the employee is to be liberally construed. "Any activity which is 'an integral and indispensable part of' the principal activity is compensable" under the Portal-to-Portal Act. Barrentine v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 50 (8th Cir. 1984)(*quoting* Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330, 335, 100 L.Ed. 267 (1956)). Liberal construction is consistent with the goal of preserving the remedial purposes of the FLSA.

The issue raised by Tyson's motion for partial summary judgment based on the Portal-to-Portal Act is whether the activities of donning, doffing, and cleaning are preliminary and postliminary activities, or whether they constitute an integral and indispensable part of the chicken-processing duties for which they are employed. Whether such activities constitute preliminary or postliminary duties that are noncompensable is a question of fact. See, e.g., Blum v. Great Lakes Carbon Corp., 418 F.2d 283, 286 (5th Cir. 1969), cert denied, 397 U.S. 1040, 90 S. Ct. 1361 (1970); Mitchell v. Southeastern Carbon Paper Co., 228 F.2d 934, 938-39 (5th Cir. 1955).

In Steiner v. Mitchell, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956), the Supreme Court considered a similar issue, and examined both whether the activity at issue is required by law and whether the activity is compelled by the circumstances. In Steiner, the Court ultimately required the employer to compensate workers in a battery plant for changing clothes and showering. The Court noted that where the employees used caustic and toxic materials and were "compelled by circumstances, including vital considerations of health [and] hygiene, to change clothes and to shower" at the workplace, the activity should be compensated. Id. at 248. The Court further noted that the changing of clothes and the showering were "a recognized part of industrial hygiene

programs in the industry," required by state law, "indispensible to the performance" of their jobs, and "integrally related thereto." Id. at 251-252.

The Fifth Circuit Court of Appeals has explained that the Portal-to-Portal Act excludes from FLSA coverage only activities that predominantly benefit the employee. Dunlop v. City Elec., Inc., 527 F.2d 394 (5th Cir. 1976).[13] In Dunlop, the court stated that the activity was noncompensable only where the activity is undertaken for the convenience of the employee, "not being required by the employer and not being necessary for the performance of their duties for the employer." Furthermore, the Court of Appeals recognized that the definition of a principal activity must be construed liberally so as to effectuate the FLSA's broad remedial purpose of ensuring compensation for "any work of consequence performed for an employer, no matter when the work is performed." Id. at 398, citing Secretary's Interpretative Bulletin, 29 C.F.R. § 790.8(a).

The defendant cites several examples in which washing and clothes changing have been deemed not compensable, and argues that "in ordinary circumstances" clothes changing and washing are not

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[13] In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(*en banc*), the Eleventh Circuit Court of Appeals adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

compensable activities. The court, however, declines to agree that the Tyson workers' donning, doffing, and cleaning of sanitary and protective gear is an "ordinary circumstance" that can be likened to a police officer donning his uniform, as defendant asserts. As already discussed extensively, the need for Tyson to maintain a sanitary environment for chicken processing dictates the use of the equipment involved in this case. Donning of the smocks, aprons, boots, and other gear in this case is directly related to that goal and, thus, integral and indispensable to the work the plaintiffs perform. It is not merely preliminary or postliminary as those terms have been applied by the Supreme Court in Steiner or the Eleventh Circuit Court of Appeals in Dunlop. Consequently, the court finds that Tyson has failed to demonstrate that the plaintiffs' claims for compensation for the donning, doffing, and cleaning of sanitary and protective equipment is noncompensable under the Portal-to-Portal Act, and the motion for partial summary judgment on this issue is due to be denied.

V. MASTERCARD CLAIMS OF BROTHERS, BROWN, AND JOYNER

Tyson seeks summary judgment on the "mastercard" claims of individual plaintiffs Brothers, Brown, and Joyner. In essence, Tyson asserts that the use of a mastercard time system is not *per se* illegal, and that Brothers, Brown, and Joyner are fully paid for

all the time they spend working on the production line.[14] In support of these assertions, Tyson has presented evidence from Tyson supervisors who claim that the plaintiffs, whose shifts may not have corresponded exactly with the mastercard time, nevertheless worked the same number of hours as the mastercard indicated, and thus have been fully compensated.

In opposition to the motion, these plaintiffs assert that they worked more hours than the mastercard indicated and have not been compensated. For example, plaintiff Brown states that she is required to arrive at the production line at 7:00 a.m., but must continue to work 5-10 minutes after the mastercard time ends at about 4:15 p.m. Brown's declaration contradicts the evidence set forth by the defendant, which offers the declaration of Rosie James, who asserts that Brown was not required to report to her workstation until two minutes after the mastercard time begins, and is required to remain at her station only two minutes after the mastercard time ends, resulting in the number of hours worked

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[14] The issue of whether mastercard time is *per se* illegal is not dispositive of the issue, since even if mastercard use does not in itself constitute a violation of the FLSA, the use of mastercard to pay employees for less than the true "hours worked" would be violative of the FLSA and is, therefore, actionable. The court does not read the complaint to allege that any use of the mastercard system would be illegal, but rather to allege that Tyson uses the mastercard system in a manner which causes at least some employees to be paid for less time than they actually work.

equaling the number of hours recorded by mastercard. Granted, if James's declaration is found to be true, plaintiff's claim will fail, but that is a question of fact and is not an issue to be decided on defendant's motion for summary judgment.

Similarly, plaintiff Brothers alleges that she is required to be at her work station at 6:15 a.m., or she is considered late. She further alleges that she must continue to work until she finishes all the work at her station, which requires her to work approximately six minutes after the mastercard time ends, or six minutes for which she is not compensated. The defendant claims that Brothers is not required to report to the line until several minutes after the mastercard time begins. Accordingly, there exists a disputed issue of fact as to the hours that Brothers worked and the hours for which she was paid.

The same scenario describes plaintiff Joyner, who testifies that she is not paid for all of the time that she works because she works before or after the mastercard time is recorded. Tyson disputes the plaintiffs' declarations, but that does no more at this juncture than to create an issue of fact. Consequently, the defendant's motion for partial summary judgment on the issue of the mastercard claims of plaintiffs Brown, Brothers, and Joyner is due to be denied.

VI. UNPAID MEAL PERIOD CLAIMS OF HATCHETT, MITCHELL, JOYNER, AND WOODWORTH

Tyson seeks summary judgment on plaintiffs' claims that they were improperly denied compensation for donning, doffing, and cleaning their sanitary and protective equipment during their unpaid meal breaks. Tyson further seeks summary judgment in its favor against plaintiffs Hatchett, Mitchell, Joyner, and Woodworth, who claim they were improperly denied compensation for working in the production line during unpaid meal periods. The motion as to the donning, doffing, and cleaning claims is due to be denied for all the reasons set forth *supra*. The court finds that the working claims also raise a genuine issue of material fact, and the motion also is due to be denied as to those claims of Hatchett, Mitchell, Joyner, and Woodworth.

Plaintiff Hatchett has stated that she works without compensation for 10-15 minutes of each unpaid 30-minute break. Although Tyson disputes that testimony, Hatchett has demonstrated that a genuine issue of material fact exists as to whether she is required to work without pay during breaks. Similarly, Mitchell contends that, depending on her place in the production line, she works 2-12 minutes after the break begins, but is required to return to the line when the 30-minute paid break ends. Again, the fact that Tyson claims Mitchell was allowed to leave for break when it began, and not 2-12 minutes later, does not sufficiently support

its motion for summary judgment on her claim that she works during meal periods and is not paid.

Plaintiff Woodworth clearly states that she works for the first 10-12 minutes of her breaks, but still is required to return before the 30-minute period ends. Her testimony, even if disputed, is sufficient to create an issue of fact that precludes summary judgment in favor of the defendant. Finally, plaintiff Joyner alleges that she must work from 2-7 minutes after the beginning of the break. She further alleges that she is required to work "much of those breaks without compensation." Tyson points out that Joyner does not describe the method by which the end of her break is calculated. However, such lack of clarity does not eviscerate her claim. At the least, Joyner, too, has presented an issue of fact and the defendant's motion for partial summary judgment on the unpaid meal break claims of these four plaintiffs is due to be denied.

VII. CONCLUSION

Based on the foregoing undisputed facts and legal conclusions, the magistrate judge RECOMMENDS that the motions for partial summary judgment filed by Tyson Foods, Inc. be DENIED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is

filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this order upon counsel for all parties.

DATED this 13th day of February, 2001.

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

ATTACHMENT B

Perdue Farms

(MEAT&POULTRY, August 1, 2001)

by Keith Nunes

Arthur Perdue began his backyard egg business full-time in 1920 and watched it grow into a major poultry processor during the 1960s and 1970s with sales of $153 million in 1975. Mr. Arthur, as he was known, would be astonished at the goal his grandson, Jim, has established to mark Perdue Farms' 100th anniversary in 2020.

Jim Perdue, chairman and C.E.O. of Perdue Farms, Salisbury, Md., wants the company to achieve $20 billion in sales by 2020.

The privately held company has a long way to go to reach $20 billion, and Perdue knows it. In fiscal year 2001, the company topped more than $2.5 billion in sales. Perdue Farms is the fourth-largest poultry processor in the nation and the largest in the Northeast. The company has 21 processing plants in 14 states that produce approximately 50 million pounds of poultry products per week.

Perdue says 2001 was one of the most challenging in the company's 81-year history. The company implemented changes in its supply chain during the spring and summer of 2000 with the goal of improving customer service.

In early 2001, as employees became comfortable with the new technology of the supply chain system, customer service levels improved. Perdue says the company exceeded its goals in each of the six areas it uses to measure customer service, including order fill rate, value-added order fill rate, filled commitments, on-time deliveries, shipping accuracy and billing accuracy.

Perdue Farms' customer service initiative also included the opening of its first replenishment center in Petersburg, Va. The 125,000-square-foot facility opened in April of this past year and serves customers in the Mid-Atlantic. The center will process 300 million pounds of product per year when fully operational. Company spokespeople say the replenishment center "creates a new standard for customer service" because it consolidates products, from broilers to turkeys, at a hub.

During the year, Perdue says the company also enhanced its approach to quality assurance. At each of its 21 plants, the company utilizes quality assurance teams. "These teams are the champions of our Quality Index, the measurement Perdue uses to ensure we conform to predetermined requirements," Perdue said in the company's 2001 fiscal year-in-review address.

During 2001, the company implemented the two final components of its farm-to-fork food-safety program, including the establishment of food-safety teams at processing facilities and a new food-safety education program for employees.

Perdue Farms' employees pride themselves on the company's food-safety program, which dates back to when Frank Perdue, son of Arthur and the company's chairman and C.E.O. before Jim took over in 1991, built an in-house research department. The company touts that it employs 15 people with doctorate degrees in science, medicine, food safety and animal health.

Perdue Farms also expanded its Wellness Center program during the fiscal year. The company now provides access for all covered associates and their eligible dependents under its benefits package. The company opened its tenth Wellness Center at the Milford, Del., facility in December.

Meanwhile, Perdue executives continue to innovate on the product side. Several new products were introduced in 2001, including Simply Saute (ready-to-cook, seasoned chicken breast strips), Three Pepper Blend Short Cuts (an addition to the line) and chicken burgers.

Jim Perdue says the company began the 2002 fiscal year as a "more focused and determined company with new skills and technologies that will enable us to achieve even higher levels of customer service and quality."

The company will need to maintain that tenacious attitude as it approaches 2020, and Jim Perdue's goal of $20 billion in sales.

The author is a freelance writer based in Cleveland, Ohio

ATTACHMENT C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NORTHEASTERN DIVISION

ELAINE L. CHAO, Secretary of Labor, United States Department of Labor,

Plaintiff

v.

PERDUE FARMS INCORPORATED,

Defendant

CIVIL ACTION

FILE NO. 2-02-0033

JUDGE HAYNES

CONSENT JUDGEMENT

This cause came on for consideration upon Plaintiff's motion and Defendant, without admitting any violation of law, consents to the entry of this Judgment, without further contest. It is, therefore,

ORDERED, ADJUDGED and DECREED that Defendant, its officers, agents, servants, employees and all persons in active concert or participation with them who receive actual notice hereof are permanently enjoined from violating the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq., hereinafter referred to as the Act, in any of the following manners:

A. 1. Defendant shall not, contrary to §§ 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215(a)(2), employ any of its employees in any workweek who are engaged in commerce or in the

production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for more than 40 hours in a workweek unless such employee is compensated for such hours in excess of 40 at an overtime rate of at least one and one-half times the regular rate at which such employee is employed.

2. Each hourly paid processing employee who works on the production line during a production shift will be paid for all hours worked from the start of his or her first principal activity of the work day until the end of the last principal activity of his or her work day, with the exception of any time taken for bona fide meal breaks or bona fide off-duty time.

3. A principal activity is any activity that is integral and indispensable to the employee's work and includes such activities as the donning, doffing, and sanitizing of any clothing or equipment (excluding such items that the employee is free to put on at home, such as hair nets, bump caps, ear plugs, glasses and footwear) which is required by law, the employer, or the nature of the work, and not merely a convenience to the employee and not directly related to the specific work.

This Section A shall become fully effective within one year of the entry of this Judgment. During this one-year interim period, Defendant shall bring an additional 25% of its plants into compliance with Section A at the end of each 90-day period elapsing from the date of this Judgment. During the interim period, Defendant shall pay each employee employed on the

production line during a production shift at any plant that does not meet the requirements of this Section A, an additional 8 minutes of compensation for each day worked. An overtime premium will be added to this amount where appropriate.

B. Defendant shall not, contrary to §§ 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), fail to make, keep and preserve adequate and accurate employment records of the wages and hours of each employee. Such records will accurately capture all hours worked by each employee as prescribed by Regulation found at 29 C.F.R. Part 516.

C. Defendant agrees to use its best efforts to maintain future compliance with the Fair Labor Standards Act, as amended. Should a federal court of appeals after the date of this decree render a final, published and precedential opinion in a poultry processing case brought by the Secretary of Labor under the FLSA involving donning and doffing practices which are not materially distinguishable from Defendant's practices at facilities within that circuit, then Defendant, in any such facilities within that circuit, shall be entitled to act consistent with that circuit court's decision until it is reversed, overruled or otherwise nullified. The Plaintiff reserves the right to monitor Defendant's future compliance with the Act and this Consent Judgment through its compliance program and authority. Should the Plaintiff detect any non-compliance, the Plaintiff agrees to provide notice of such non-compliance to the Defendant and an

opportunity to correct any deficiency prior to taking any enforcement action.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant hereby is restrained from withholding payment of back wages to each hourly paid processing employee working on a production line during a production shift in the two-year period prior to the date of the filing of the Complaint in this action, for whom the Secretary has sought relief in Paragraph VIII.2 of the Complaint. The amount paid to each current or former employee will be equal to the amount owed to each employee for working 8 minutes per day, based upon the regular rate paid on the date of the work, in addition to the amount already paid by Defendant for each day worked. Such payments will include an overtime premium as described in section A above, where applicable.

To comply with this provision of this Judgment, Defendant shall, within 120 days from the date of this Judgment, deliver to Plaintiff's representatives the schedule of current or former employees described below. Within 180 days from the date of this Judgment, Defendant shall deliver checks to all employees who have been located. Within 12 months from the date of the Judgment, Defendant shall complete its efforts to locate employees and distribute back wages, provide Plaintiff a list of all unlocated employees and deliver to Plaintiff a check in the net amount due all unlocated employees. Defendants will distribute such amounts to the named employees or to their

personal representatives, less all legally mandated deductions, including income tax and the employee's share of F.I.C.A. Defendant shall endeavor to locate current and former employees and distribute back wages as expeditiously as possible.

Plaintiff will have the right to review and verify Defendant's calculations to determine compliance with this Agreement. This review may include reasonable on site review of payroll records and interviews as appropriate.

Within 30 days of making such payments, Defendant will provide Plaintiff proof of such payment in the form of Forms WH-58 signed by each individual to whom said amounts have been paid.

For any individuals to whom Defendant is unable, after a diligent search, to deliver the payments set out above within the time required herein, Defendant shall deliver to the United States Department of Labor, Wage and Hour Division, 60 Forsyth Street, S.W., Room 7M40, Atlanta, Georgia 30303, a certified or cashier's check or money order made payable to the "Wage and Hour Division--Labor," for the net amount due after appropriate deductions for income tax and the employee's share of F.I.C.A. In the event of default by Defendant in making such payment, post-judgment interest shall be assessed on any unpaid amount at the rate established pursuant to 28 U.S.C. §1961.

Defendant shall remain responsible for the employer's share of F.I.C.A. arising from or related to the back wages paid hereunder. Defendant also shall provide Plaintiff's attorneys

with a schedule showing its employer I.D. number and a schedule showing the employment dates, plant at which employed, last-known address, social security number, gross back wage amount, deductions, and net amount as to each employee.

Plaintiff shall distribute back wages to the named employees who could not be located by Defendant, or to their personal representatives, and any amounts not so distributed by the Plaintiff within the period of three (3) years after date of this Judgment, because of inability to locate the proper persons or because of such persons' refusals to accept such sums, shall be deposited with this Court, pursuant to 28 U.S.C. § 2041.

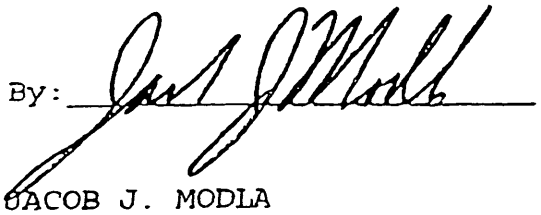
Neither Defendant nor anyone on its behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as back wages under this Judgment. Nor shall they retaliate against any employee for any action taken by any employee in connection with the investigation or settlement of this cause, or for asserting any rights under this Judgment. Defendant will not raise an employee's immigration status as a defense to the payment of back wages in any suit alleging such retaliation.

FURTHER ORDERED each party shall bear its own attorney's fees and expenses incurred by such party in connection with any stage of this case, including but not limited to, attorney's fees that may be available under the Equal Access to Justice Act, as amended.

This 10th day of May, 2002.

UNITED STATES DISTRICT JUDGE

Defendant consents to entry of the foregoing Judgment:

By: 

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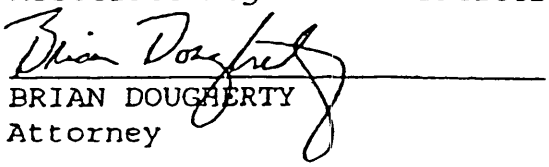

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ATTACHMENT D

This correspondence clarifies the Consent Judgment (Agreement) in Chao v. Perdue Farms Inc., Case No. 2:02-CV-0033 (M.D. Tenn.), executed on May 9, 2002. As we have discussed, the parties to the Agreement intend to assure that Perdue Farms Inc. (Perdue) achieves future compliance with the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.

Specifically, under the Agreement, and to the extent not excepted under 29 U.S.C. 203(o), Perdue will record and pay for the time taken from the first principal activity, which could be donning of clothing and equipment at the plant (excluding such items that the employee is free to put on at home, such as hair nets, bump caps, ear plugs, glasses and footwear). This includes any subsequent time taken for employees to sanitize themselves and their equipment and the time spent walking or waiting after the first principal activity has been performed. Similarly, at the end of the production shift, employees will be compensated until the completion of the last principal activity. The only uncompensated time during the workday will be during any bona fide meal periods or bona fide off-duty time. Before and after the bona fide meal periods, Perdue will record and pay for the time taken by employees to don or doff clothing and equipment, and to sanitize themselves and their equipment.

There are any number of ways in which this compliance can be accomplished. One method for doing so would be to organize employees into working groups. When the first member of the group is given his or her equipment by a supervisor as part of the group, the entire group would be "clocked in" by the supervisor and the time recorded. From the time of the "clock in" all employees in the group would be paid for all hours with the exception of bona fide meal breaks or bona fide off-duty time. At the end of the day, the work group would be "clocked out" when the last person in the group completes taking off or cleaning (whichever comes last) his or her last piece of equipment as part of the group included in the paragraph above. Persons who arrive or are relieved off schedule or are assigned additional duties will be compensated in accordance with actual time worked.

As part of the Agreement, Perdue will make diligent efforts to locate all of its present and former workers who are owed back wages under the Agreement. These efforts will include utilizing the services of the Internal Revenue Service in cooperation with the Department of Labor, Lexis-Nexus, and a mutually agreeable credit bureau, or an equivalent search service, to locate former

employees. This obligation to locate workers shall not apply to any worker due less than $100 in gross back wages.

Perdue will inform the Wage and Hour Division (Wage-Hour) that it has met the requirements of the FLSA and this agreement with respect to each Perdue facility. Wage-Hour, after receiving that notification, will review the payment and record-keeping practices at the facility for which notification is given and will attempt to complete this review within 90 days. When Wage-Hour has completed its review and has determined that the pay practices at the facility are consistent with this agreement, Wage-Hour will so certify.

The principle underlying the Agreement, that all work time from the first principal activity to the last principal activity must be compensated, except for bona fide meal breaks or bona fide off-duty time, is a principle that the Wage and Hour Division intends to apply consistently throughout the poultry processing industry.

By: _____

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ATTACHMENT E

Search Contents
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News

Wage & Hour
Honda Pays $1.2 Million to Alabama Workers Required to Don Uniforms Before Clocking In

Honda Manufacturing of Alabama will pay $1.2 million to workers at its Lincoln, Ala., plant, after a Department of Labor investigation found that workers there were not paid for the time they spent putting on their uniforms at work.

The auto company also will change its rules at that plant to allow workers the option of donning uniforms before arriving at work, a company spokesman said.

About 2,400 workers are employed at the nonunion facility, which opened in July 2001 and started mass production in November 2001. It is Honda's only U.S. plant that builds the popular Odyssey minivan. Honda also builds the Odyssey at a plant in Canada.

Honda required its employees to put on the uniforms in on-site locker rooms before starting their shifts, and to remove them after the end of their shifts, according to Mark Morrison, manager of corporate affairs for Honda Manufacturing of Alabama. Employees would clock in after putting on the uniforms and clock out before they removed them, he said.

The lab-style white uniforms, issued free of charge, are standard wear at Honda plants worldwide, Morrison said. They are specially designed to prevent damage to Honda products, with no metal showing, and buttons and belts closing on the inside.

Employees did not take uniforms home, and Honda provided on-site laundry services, Morrison said.

DOL began the still-open investigation in April 2002, according to Connie Klipsch, acting administrator of the DOL's Wage and Hour division's Atlanta office.

DOL policy precludes revealing why it investigates a particular site, Klipsch said. She also cannot confirm violations or give final results until the case is closed. But Wage and Hour Division officials did investigate the uniform policy at Honda's Lincoln plant, and whether employees were paid for all the hours they worked, Klipsch said.

A provision of the Fair Labor Standards Act generally provides that when an employer requires workers to change into uniforms on site, dressing time should be paid, she said.

To comply with those laws, Honda has changed its policy to allow workers the option of wearing uniforms home from work and to put them on before arriving at the plant if they choose, Morrison said.

If an employer offers that choice, in most cases the company then is in compliance, Klipsch said.

"Given the option, then that changes the facts of the situation completely," she said.

Honda also will pay the plant's hourly workers about $500 apiece in back pay, Morrison said. The plant employs about 2,000 hourly workers. The exact amount each worker receives will be based on length of service. Salaried employees are not affected, Morrison said.

Klipsch said the investigation is almost complete.

BNA, Inc.

Daily Labor®

REPORT

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Friday, April 4, 2003
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News

Wage & Hour

Mercedes to Pay $688,000 to Workers Required to Don Uniforms Before Clocking In

Mercedes-Benz U.S. International agreed to pay $687,588 in back wages to workers in its Vance, Ala., plant, after a Department of Labor-initiated investigation found that workers there were not paid for time spent putting on their uniforms at work, DOL said April 3.

The back pay will go to 240 paint shop workers at the facility, which produces Mercedes-Benz's "M-Class" vehicles, for time worked between Feb. 18, 2001, and Feb. 9, 2003, DOL said.

The department said the company agreed to pay the back wages following a self-audit prompted by notice from DOL's Wage and Hour Division of allegations that Mercedes had not paid the employees properly.

The company has agreed to full future compliance with recordkeeping and overtime provisions of the Fair Labor Standards Act, according to John L. McKeon, acting regional administrator for the Wage and Hour Division's Southeastern division.

That compliance could take the form of either allowing the employees to change into the uniforms prior to coming to work, or compensating workers for the time in which they change clothes at work, McKeon said.

Representatives for Mercedes-Benz were not available for comment, except to say in a written statement released through DOL's Wage and Hour Division that the company was pleased to cooperate with DOL and quickly find a solution.

The investigation is similar to another at a Honda Manufacturing of Alabama plant in Lincoln, Ala., begun in April 2002. In that investigation, DOL found that 2,400 workers were required to put on their work clothing before punching in, and change back into their street clothes after they clocked out each day (6 DLR A-8, 1/9/03).

In January 2003, Honda agreed to pay $1.2 million in back pay to those workers and change its company rules to comply with FLSA rules. It gave employees the option of wearing uniforms home from work and putting them on before arriving at the plant, if they choose.

There is no connection between the two cases, McKeon said.

Both facilities require at least some workers to wear white, lab-style uniforms that are designed to prevent damage to the cars and to protect workers.

At the Honda plant, most workers wore the special uniforms and were required to change at work. But at the Mercedes-Benz plant, only workers in the paint department were involved in the investigation, McKeon said.

The Mercedes-Benz plant investigation did not go further back than February of 2001 because the FLSA has a two-year statute of limitations, McKeon said.

The company cooperated fully, [illegible]