Nos. 02-35042; 02-35110

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, individually and as class representives, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ,

Plaintiffs-Cross-Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant-Cross-Appellant/Cross-Appellee.

On Appeal From The United States District Court
For The Eastern District of Washington

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae*, pursuant to Rule 29 of the Federal Rules of Appellate Procedure. This case presents fundamental questions of statutory interpretation concerning the compensability of work under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 et seq., and § 4(a) of the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. 254(a). The Secretary's decision to participate as *amicus* stems in part from the recent comprehensive departmental review of "hours worked" issues in the food processing industry, which in the last month led to two significant steps. First, the

Secretary filed legal actions seeking compensation for "donning and doffing" against two leading poultry producers. See Chao v. Perdue Farms, Inc., No. 02-CV-33 (M.D. Tenn. May 10, 2002) (consent judgment); Chao v. Tyson Foods, Inc., No. 02-CV-1174 (N.D. Ala.) (complaint filed May 9, 2002). The Secretary believes the recovery obtained in Perdue is among the largest in the history of the Department of Labor's Wage and Hour Division. Second, the Administrator of the Department's Wage and Hour Division issued an opinion letter that interprets § 3(o) of the FLSA, 29 U.S.C. 203(o), to include certain protective clothing worn by meatpacking employees like the plaintiffs in this case. The letter withdraws three letters that had been issued recently on the subject and returns to the position taken previously by regional and district officials in enforcement actions. See, e.g., Reich v. IBP, Inc., No. 88-2171-EEO (D. Kan. July 31, 1996).

STATEMENT OF ISSUES

1. Whether time spent by meatpacking employees in pre- and post-shift donning, doffing, cleaning, and storing of non-unique protective clothing, such as hard hats, hairnets, earplugs, safety glasses, frocks, and boots, including any related walking and waiting time, is compensable "hours worked" under the FLSA and Portal Act.

2. Whether the FLSA's § 3(o) exemption from compensable

"hours worked" for "changing clothes or washing" applies to all protective clothing typically worn in the meatpacking industry, and to washing of the person, not to washing clothing or tools.

STATEMENT OF THE CASE[1]

1. Statement of Facts

Plaintiffs are 815 slaughter or processing division employees who worked at IBP's Pasco, Washington meatpacking plant between June 30, 1995, and August 24, 1999 (Op. 10-11). Most of Pasco's slaughter and processing employees are represented by Local Union No. 556 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (id. at 3). Plaintiffs, who include the named plaintiffs and those who chose to "opt-in" to this § 16(b) action, alleged that IBP violated § 7 of the FLSA, 29 U.S.C. 207, by, *inter alia*, failing to compensate them for time spent before and after their regular shifts donning, doffing, cleaning, and storing certain necessary clothing and tools, and for waiting and walking time connected with these activities (id. at 1, 10-11). The employees also alleged that IBP failed to compensate them for pre-shift time spent obtaining various required gear, such as sandpaper for their "steels" (used to straighten the edge of their knives), air knives, and meat hooks, and for time spent sanding their steels

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[1] Only those facts and district court holdings relevant to the issues briefed herein are set forth below.

(id. at 6, 8, 17).

Employees in Pasco's slaughter and processing divisions are required to wear (as characterized by the district court) certain "non-unique" protective clothing consisting of hard hats, hairnets, earplugs, safety glasses (or face shields), safety boots, and frocks or other white outergarments (Op. 5, 19-20). Knife-users in both divisions are required to wear a variety of additional protective gear, including mesh and rubber aprons; mesh legging aprons; scabbards; gloves made of cloth, mesh, rubber, and "can't cut" material; plexiglass arm guards; mesh, plastic, and polar sleeves; and plastic leggings (id. at 5-6, 21). Many employees also wear weight belts to prevent back injuries (id. at 6). Employees also are assigned various tools such as steels, scissors, and meat hooks (id. at 6, 7, 33).

Before beginning their shifts, all employees are required to retrieve from company-provided lockers hard hats, hairnets, earplugs, and boots, as well as various tools necessary for their jobs, such as steels and meat hooks (Op. 5, 6). Slaughter division employees begin their day picking up their supplies, including a white shirt laundered daily by IBP, from the supply room and then going to their lockers (id. at 6). They don most of their safety clothing in the locker room and then proceed to the slaughter floor, where many go to the knife room to obtain sandpaper for their steels; knives are distributed on the

slaughter floor (id.). Before their shifts begin, knife-users sand their steels, while air knife users wipe and wash grease from their air knives (id.).

Processing division employees generally begin their day going to their lockers to put on their hard hats, hairnets, earplugs, safety glasses, and boots (see, e.g., Tr. 370; Tr. 427-28). After donning these items, the processing employees go to the cafeteria to obtain their frocks, laundered each night by IBP (Op. 6). Employees testified that they will not be given a frock unless they are wearing their hard hats (see, e.g., Tr. 359-60; Tr. 427). The employees also must wait for the general distribution of, and then spend "considerable time" locating their own gloves and protective sleeves, which also are laundered by IBP each evening (Op. 6-7, 8, 23). Prior to the beginning of their shifts, many knife-users in the processing division also spend time sanding their steels (Tr. 3472-73).

At the end of their shifts, all employees must clean their protective clothing and return it either to the supply room or their lockers (Op. 7). Most slaughter division employees hose down and scrub their aprons, sleeves, rubber gloves, and boots at wash stations located throughout the slaughter floor (id.). Knives are returned to collection boxes; soiled shirts, gloves, and sleeves are returned to the supply room (id.). Processing division employees clip soiled gloves and protective sleeves onto

a glove pin and then return them for laundering (id.). Processing division knife-users place their knives in buckets that are passed along the production lines (id.). Washable protective clothing and tools such as scabbards, chains, mesh gloves, steels, plastic sleeves, aprons, meat hooks, scissors, and boots, are washed at sinks before they are stored in the employees' lockers (id.). Employees often must wait in lines before they can wash their gear (id. at 18, 22).

Both slaughter and processing division employees clock in and out at the beginning and end of the day with "swipe" cards (Op. 3). Employees actually are paid on a "gang time" basis, under which compensable time begins when the first piece of meat reaches the beginning of the line and ends when the last piece of meat leaves the beginning of the line (Op. 2-3).

2. The District Court's Decision

The district court concluded that IBP violated the FLSA by failing to pay employees in Pasco's slaughter and processing divisions for certain pre- and post-shift time spent donning, doffing, cleaning, and storing the protective clothing and tools required for their jobs (Op. 33). Specifically, the court concluded that the donning and doffing of required protective gear, such as mesh and rubber aprons; mesh legging aprons; mesh, cloth, "can't cut," and rubber gloves; plexiglass arm guards; mesh, plastic, and polar sleeves; plastic leggings; and weight

belts, constituted work and was integral and indispensable to the employees' principal activities within the meaning of the Portal Act (id. at 20-21, 27-29, 31-33). The court rejected the rationale of Reich v. IBP, Inc., 38 F.3d 1123, 1126 (10th Cir. 1994), that the donning and doffing of safety gear not unique to the meatpacking industry was not work (Op. 19), but nevertheless held that time spent donning such non-unique protective clothing as hard hats, hairnets, earplugs, goggles, and boots was not compensable because these items were not integral and indispensable to the employees' principal activities within the meaning of the Portal Act (id. at 19, 20-21, 29, 31-33).[2] The district court also held that the time spent by employees waiting to retrieve or wash protective clothing or tools and time spent walking to and from the locker room to the work station was compensable, where such activities occurred after the start of the first principal activity of their workday (id. at 18-19). The court concluded that the employees' first principal activity begins when they start donning their first piece of compensable protective gear (id.).

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[2] Alternatively, the court concluded that the donning or doffing of these items was not compensable because they were clothing within the meaning of § 3(o) of the FLSA or the amount of time involved was *de minimis* (Op. 19-20, 21-22). Although the court held that frocks were integral and indispensable to the employees' principal activities for purposes of the Portal Act, it concluded that the donning or doffing of frocks was not compensable under § 3(o)'s "changing clothes" exemption (id. at 21, 33).

With regard to § 3(o), the district court concluded that the "changing clothes or washing" exemption does not apply to donning or doffing protective clothing unique to the meatpacking industry, and applies only to "washing of the person" (Op. 29). The court also concluded that the time spent by employees retrieving tools such as meat hooks and air knives, or engaging in such activities as sanding steels, cannot be excluded from compensable hours worked under § 3(o) (id.).

SUMMARY OF ARGUMENT

The time spent by the employees of IBP's meatpacking plant in pre- and post-shift donning, doffing, cleaning, and storing of required protective clothing was compensable "hours worked" under the FLSA and Portal Act because such activities were integral and necessary to the performance of their jobs. This conclusion is compelled by the Portal Act amendments to the FLSA, by the text of § 3(o) of the FLSA, 29 U.S.C. 203(o), by the legislative history of the Portal Act, by the Supreme Court's decision in Steiner v. Mitchell, 350 U.S. 247 (1956), and by the Secretary's longstanding, published interpretations of section 4(a) of the Portal Act, which were ratified by Congress in 1949, when § 3(o) was enacted. See Note following 29 U.S.C. 208, 63 Stat. 920 (1949); Steiner, 350 U.S. at 255 nn.8 and 9.

Section 3(o) of the FLSA permits employers and their employees' representative to collectively bargain over

compensation for "changing clothes." That statutory provision would be unnecessary and a nullity if the statutory scheme did not contemplate that clothes changing otherwise would be compensable in some circumstances. The legislative history of the Portal Act amendments to the FLSA confirm that clothes changing may be compensable. For example, the principal sponsors of the Portal Act clearly state that clothes changing would be compensable in the case of workers at a chemical company, if changing clothes at work was integral to their job and not merely a convenience to the employees. The Supreme Court held that clothes changing was compensable for workers at a battery plant in its Steiner decision; in making clear that clothes changing that is required and necessary to an employee's job is compensable "hours worked," the Court relied on the legislative history discussed above and actually appended it to its decision. Finally, when enacting § 3(o), Congress effectively ratified the Secretary's interpretation of § 4 of the Portal Act, which provides that changing clothes is compensable as an integral part of the employee's principal activity if the principal activity cannot be performed without putting on and taking off the clothes on the employer's premises, i.e., if it is not merely a "convenience" to the employee. See 29 C.F.R. 790.8(c) (first promulgated at 12 Fed. Reg. 7655, 7660 (Nov. 18, 1947)).

The clothes changing at issue in this case is required by

the employer and is integral to the plaintiffs' work and, accordingly, is compensable time under the text of the FLSA and Portal Act as interpreted by the Supreme Court, Congress, and the Department's longstanding regulations. The district court correctly rejected the Tenth Circuit's conclusion in Reich v. IBP, Inc., 38 F.3d at 1126, that the donning and doffing of safety gear not unique to the meatpacking industry is not work because it requires little or no concentration. The Tenth Circuit's IBP decision conflicts with the Supreme Court's holding in Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944), that "work" under the FLSA does not require a threshold level of exertion.

The district court also correctly concluded that time spent in donning and doffing activities, including any related time spent in walking and waiting, is compensable as "hours worked" under the Portal Act when it occurs subsequent to an employee's first principal activity and before his last principal activity of the workday. This conclusion is supported by the plain meaning of the Portal Act, its legislative history, and the Secretary's longstanding interpretations. See 29 U.S.C. 254(a); 29 C.F.R. 790.6.

Finally, the term "changing clothes or washing" under § 3(o) of the FLSA applies to all of the protective clothing worn by employees in this case, but only to washing of the person. See

Opinion Letter of the Administrator, Wage and Hour Division, to Samuel D. Walker, dated June 6, 2002 (Addendum "A," attached).

ARGUMENT

I. TIME SPENT IN PRE- AND POST-SHIFT DONNING, DOFFING, CLEANING, AND STORING OF THE "NON-UNIQUE" PROTECTIVE CLOTHING WORN BY IBP'S MEATPACKING EMPLOYEES, AND RELATED TIME SPENT WALKING AND WAITING, IS COMPENSABLE "HOURS WORK" UNDER THE FLSA AND PORTAL ACT

A. Pre- and Post-Shift Donning or Doffing of "Non-Unique" Protective Clothing is Integral and Indispensable to the Employees' Principal Activities

The Supreme Court has stated that both the legislative history of § 4 of the Portal Act, 29 U.S.C. 254,[3] and the

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[3] Section 4 of the Portal Act excludes from compensable "hours worked" under the FLSA:

> (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).

The Portal Act's exclusions should be read narrowly. See Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50 (8th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); Dunlop v. City Elec., Inc., 527 F.2d 394, 398 (5th Cir. 1976); 29 C.F.R. 790.2(a), 790.8(c).

enactment of § 3(o) of the FLSA, 29 U.S.C. 203(o), make clear that the Portal Act does not exclude from compensable "hours worked" time spent by an employee on his employer's premises changing into and out of clothes that are integral and necessary to his job. Steiner, 350 U.S. at 254-58. In Steiner, the Court specifically considered whether employees who worked in a battery plant should be compensated under the FLSA for changing into old work clothes as required by both state law and the employer. See 350 U.S. at 248. The Court concluded that the employees' changing of clothes was "an integral and indispensable part of the principal activity of the[ir] employment ...." Id. at 256. In so concluding, the Court took the extraordinary step of attaching as an appendix to its opinion the legislative history of the Portal Act that it deemed particularly pertinent, including the following statement from a sponsor of § 4 (governing post-1947 claims):

> In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable.

350 U.S. at 258 (quoting 93 Cong. Rec. 2297-98 (statement of

Senator Cooper)).[4]

Furthermore, the Supreme Court noted in Steiner that § 3(o), which provides for the exclusion from hours worked of time spent by employees changing clothes or washing at the start and end of each workday if such time is excluded under a CBA, reflects Congress's intent, in situations not governed by a CBA, to count as hours worked clothes-changing integral to the performance of the work. 350 U.S. at 254-55. See also 29 C.F.R. 785.26.

The Secretary has consistently interpreted the Portal Act to provide that changing clothes is compensable as an integral part of the employee's principal activity if the principal activity cannot be performed without putting on and taking off the clothes

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[4] The Portal Act's 1947 enactment was largely in response to the decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). See Steiner, 328 U.S. at 253. In Mt. Clemens, the Supreme Court held that the time employees were required to spend walking to and from their work stations on the employer's premises was "hours worked" under the FLSA. 328 U.S. at 691. The Court also found compensable, as a necessary prerequisite to the employees' production work, such preliminary activities engaged in by employees as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger sheaths, preparing equipment, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. Id. at 692-93. To protect employers against unexpected liabilities that arose as a result of Mt. Clemens § 2 of the Portal Act limited FLSA coverage to those activities engaged in prior to May 14, 1947, that were specified by "contract" or "custom or practice." 29 U.S.C. 252(a). As stated in Steiner, the Portal Act "was designed primarily to meet an 'existing emergency'" resulting from the unexpected liability for back wage claims. 350 U.S. at 253. By contrast, § 4, which governs post-1947 claims, was designed to preserve the employee's FLSA rights and benefits. See 93 Cong. Rec. 2297 (1947).

on the employer's premises, i.e., if it is not merely a "convenience" to the employee. See 29 C.F.R. 790.8(c) (first promulgated at 12 Fed. Reg. 7655 (Nov. 18, 1947)).[5] The interpretative regulations further explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." Id. at 790.8(c) n.65. See also 29 C.F.R. 790.7(g) n.49 ("Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's principal activity."). The Supreme Court in Steiner specifically upheld these regulations, noting that they were ratified by Congress in 1949 when former § 16(c) of the FLSA was enacted. See 250 U.S. at 255 nn.8 and 9. Section 16(c) provided that existing Wage-Hour regulations or interpretations, not inconsistent with the amendments, remained in effect. See Note following 29 U.S.C. 208, 63 Stat. 920 (1949).[6]

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[5] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), holds that the Secretary's interpretative regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." See also United States v. Mead, 533 U.S. 218, 227-28 (2001).

[6] Significantly, in enacting § 3(o), Congress, among other things, responded to concerns raised by the bakery industry that because of the Secretary's interpretative regulations the Portal Act would not insulate that largely unionized industry from post-1947 actions brought by bakery workers for compensation for time

Following Steiner, many courts specifically have deemed the donning and doffing of protective clothing to be compensable when it is required by the employer and is integral to the performance of the work. Essentially, these cases prescribe a functional test, requiring an analysis of the relatedness of the donning and doffing of clothing to the primary duties of the job. See, e.g., Lee v. Am-Pro Protective Agency, Inc., 860 F. Supp. 325, 326-27 (E.D. Va. 1994) (changing into uniforms that private security guards cannot wear to or from home is integral to performance of their principal activities); Apperson v. Exxon Corp., WH Cases (BNA) 364, 369 (E.D. Cal. Feb. 7, 1979) (clothes-changing is compensable where employer requires that it be done on premises or employee cannot safely wear clothing home); Tum v. Barber Foods, Inc., No. 00-371-P-C, 2002 WL 89399, *9 (D. Me. Jan. 23, 2002) (Cohen, Mag. J.), *recommended decision* (affirmed Feb. 20,

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spent changing clothes and washing up at the beginning and end of their workday. See Hearings before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 81st Cong., 1st Sess., on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, and S. 653, p. 815, at 815-17, and p. 1173, at 1175-79 (1949) (Memorandum on behalf of Pennsylvania Bakers Association; Letter of William A. Quinlan, General Counsel, Associated Retail Bakers of America). See also 95 Cong. Rec. H11210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter). The fact that Congress intended time spent changing clothes worn by bakery workers to be compensable under § 4 of the Portal Act (which may be inferred from Congress's ratifying the Secretary's Portal Act interpretations) belies any argument that the compensability for clothes changing under the Portal Act was meant to be limited to circumstances where employees at chemical, battery, or similar factories come into contact with toxic materials.

2002) (donning and doffing of clothing required by the defendant or by government regulation is integral to plaintiffs' work), *jury verdict* (May 1, 2002), *appeal docketed* (1st Cir. May 31, 2002); Fox v. Tyson Foods, Inc., No. CV-99-TMP-1612M, slip op. at 30 (N.D. Ala. Feb. 14, 2001) (Putnam, Mag. J.) (*recommended report* adopted by district court Feb. 4, 2002) (see Addendum "B," attached) (donning of smocks, aprons, boots, and other gear is integral and indispensable to work plaintiffs perform).[7]

Conversely, and in keeping with the Secretary's Portal Act interpretation at 29 C.F.R. 790.8(c), where pre- and post-shift clothes-changing and washing up is not required by the employer and is allowed merely as a convenience for the employees, courts have held that the time generally is not compensable. See, e.g., Blum v. Great Lakes Carbon Corp., 418 F.2d 283, 285 (5th Cir.

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[7] More generally, consistent with Steiner and Mitchell v. King Packing Co., 350 U.S. 260 (1956), a companion case to Steiner holding that pre-shift knife sharpening by meatpacking employees is compensable under the Portal Act, other courts have held that preparatory and concluding activities are compensable where they are required by the employer as necessary for the performance of the job. For instance, in City Elec., 527 F.2d at 398-99, in an opinion authored by Judge Wisdom, the Fifth Circuit held certain pre-shift activities to be compensable where "such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of business." Furthermore, the benefit to the employer need not be exclusive to make the required activity compensable. See Barrentine, 750 F.2d at 50; City Elec., 527 F.2d at 398; Secretary of Labor v. E.R. Field, Inc., 495 F.2d 749, 751 (1st Cir. 1974); Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956). As the First Circuit stated in E.R. Field, Inc., 495 F.2d at 751 (quoting 29 C.F.R. 790.8(a)), the Portal Act does not cover any work of consequence performed for an employer.

1969) ("early relief" system allowing employees to bathe and change clothes was created by employees, was wholly voluntary, and was not of benefit to employer); Jackson v. Air Reduction Co., 402 F.2d 521 (6th Cir. 1968) (same); Wirtz v. Harrell Packing Co., 16 WH Cases (BNA) 420, 422 (W.D. Tex. Mar. 3, 1964) (meat boners were not required to wear coats, aprons, gloves, or hand and wrist guards).

In the instant case, the donning and doffing of hard hats, hairnets, earplugs, safety goggles, frocks, and boots are integral and indispensable to the employees' principal activities; this "non-unique" protective clothing,[8] which must be donned and stored on the company's premises, is required by IBP as necessary for its employees' jobs.[9] Accordingly, time spent

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[8] The Secretary's position is that the donning and doffing of all protective gear is compensable as "hours worked." IBP did not argue before the district court, however, that time spent donning and doffing protective gear that is particular to the meatpacking industry is not "hours worked."

[9] For the period covered by this action, the United States Department of Agriculture ("USDA") prescribed specific sanitary standards for meat processing plants (9 C.F.R. Part 308 (1999)), including requiring that scabbards and similar devices for the temporary retention of knives, steels, etc., be kept clean, 9 C.F.R. 308.6; that rooms, equipment, and utensils used in the meat processing facilities be kept clean, 9 C.F.R. 308.7; and that clean aprons, frocks, and other outer clothing be worn at the start of each day, 9 C.F.R. 308.8(d). New regulations became effective on January 25, 2000. See 9 C.F.R. 416.2 - 416.6. They provide generally that each establishment "must be operated and maintained in a manner sufficient to prevent the creation of insanitary conditions and to ensure that product is not adulterated." 9 C.F.R. 416.1 (2000). See also id. at 416.5(b) ("Clean garments must be worn at the start of each working day

donning or doffing such "non-unique" safety clothing is compensable hours worked.

Finally, in considering whether the employees' donning and doffing activities are compensable under the FLSA and Portal Act, the district court correctly rejected IBP's reliance upon Reich v. IBP, 38 F.3d at 1125-26, which held that the donning and doffing of lighter protective gear is not compensable "work" under the FLSA because it requires little effort (Op. 19).[10] Work under the FLSA does not require a threshold level of exertion; even waiting time is compensable if it predominantly

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and garments must be changed during the day as often as necessary ....").

The Occupational Safety and Health Administration's general industry standard for personal protective equipment provides that "[p]rotective equipment ... shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards or processes or environment ...." 29 C.F.R. 1910.132(a).

[10] The Secretary believes that the decisions in Pressley v. Sanderson Farms, Inc., No. H-00-420, 2001 WL 850017, *2-*3 (S.D. Tex. Apr. 23, 2001), aff'd, No. 01-20527 (5th Cir. March 7, 2002) (per curiam; unpublished opinion), and Anderson v. Pilgrim's Pride Corp., 147 F. Supp.2d 556, 561 (E.D. Tex. 2001), appeal docketed, No. 01-40477 (5th Cir. May 8, 2001), which relied upon Reich v. IBP to conclude that the donning and doffing activities of poultry workers do not constitute work, are erroneous. On the other hand, the Secretary believes that the concept of "work" under the FLSA was correctly analyzed in Fox v. Tyson Foods, Inc., slip op. at 22-26. In that action brought by poultry workers, the magistrate judge rejected Tyson's argument that the plaintiffs' donning and doffing activities were not work, finding that the poultry workers' donning of smocks, plastic aprons, rubber gloves, steel-mesh gloves, and sleeve guards was required and controlled by Tyson and was necessary to the poultry workers' jobs. (See Addendum "B").

benefits the employer. See Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944) ("[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity."). In Skidmore v. Swift & Co., 323 U.S. 134, 138-39 (1944), a companion case to Armour, the Court reiterated that "hours worked" under the FLSA is not limited to active labor. See also 29 C.F.R. 785.7; The Fair Labor Standards Act §8.II.B (Ellen C. Kearns and Monica Gallagher eds. 1999).[11]

B. Activities Occurring after Commencement of an Employee's First Principal Activity and Before Completion of His Last Principal Activity Are Compensable Under the Portal Act

Only those activities occurring before an employee commences his first principal activity or after he ceases his last principal activity are excluded under the plain terms of the Portal Act. See 29 U.S.C. 254(a) (excluding from compensable "hours worked" only those activities occurring "either prior to the time on any particular workday at which such employee

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[11] Armour and Skidmore thus clarified 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. Recently, the Tenth Circuit itself effectively disavowed Reich v. IBP's holding that work for FLSA purposes requires exertion. See United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1116 n.8 (10th Cir. 1999).

commences, or subsequent to the time on any particular workday at which he ceases" his principal activities). Thus, any activity occurring between the employees' first and last principal activities, including walking and waiting time, is compensable. As the Secretary's interpretative regulations provide, "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a) (footnote omitted).[12]

The Secretary's interpretative regulations provide that "workday" for Portal Act purposes means "the period between the commencement and completion on the same workday of an employee's

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[12] The Senate Report accompanying the Portal Act provided that "[a]ny activity occurring during a workday will continue to be compensable in accordance with the existing provisions of the [FLSA]." S. Rep. No. 48, at 48 (80th Cong., 1st Sess.). The Report stated that "workday" means:

> that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. [Section 4] relieves an employer from liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after [1947], if such activities take place outside of the hours of the employee's workday.

Id. at 46-47 (emphases added). See also 93 Cong. Rec. 4269 (statement of Senator Wiley).

principal activity or activities ... includ[ing] all time within that period whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b) (footnote omitted).[13] These regulations, as noted above, were ratified by Congress in 1949. See Steiner, 350 U.S. at 255 n.8. See also United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1119 (10th Cir. 1999) (travel time during "workday" is not ordinary commuting time under Portal Act); Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1414 (5th Cir. 1990) (relying upon Secretary's definition of workday in 29 C.F.R. 790.6(b), court held that employees required to arrive at work at specific time to sign in and then wait until beginning productive work should be compensated for waiting time); Dole v. Enduro Plumbing, Inc., 30 WH Cases (BNA) 196, 200 (C.D. Cal. Oct. 16, 1990) (where an employee is required to arrive at a designated place to receive instructions or pick up tools, arrival at the designated spot triggers the start of his workday; once the workday is triggered, any subsequent time spent until the last principal activity of the workday constitutes hours worked under the FLSA).

In sum, the district court correctly ruled that pre-shift time spent by employees waiting to retrieve necessary protective

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[13] Of course, bona fide meal periods, as well as "[p]eriods during [the workday in] which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes," are not hours worked. 29 C.F.R. 785.16(a), 785.19.

clothing and tools and post-shift time spent waiting to wash protective clothing and tools, as well as time spent walking from the locker to the work station and back where the employer requires that protective clothing and tools be stored in company-provided lockers, is compensable as being all in a day's work. See 29 U.S.C. 254(a); 29 C.F.R. 790.6(b); Frio Foods, 899 F.2d at 1414; Enduro Plumbing, 1990 WL 252270 at *5.

II. SECTION 3(o) APPLIES TO ALL OF THE PROTECTIVE CLOTHING TYPICALLY WORN BY EMPLOYEES IN THE MEATPACKING INDUSTRY AND TO WASHING OF THE PERSON

Section 3(o) of the FLSA provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. 203(o). On June 6, 2002, the Administrator of the Department of Labor's Wage and Hour Division issued an opinion letter on the application of this provision to the clothes-changing and washing activities of employees in the meatpacking industry (see Addendum "A"). The letter provides that "clothes" under § 3(o) includes items worn on the body for covering, protection, or sanitation, but does not include tools such as knives, scabbards, or meat hooks; the letter also states that the term "washing" in § 3(o) refers to washing of the person, not to washing of protective

clothing or tools.[14] As discussed below, the Administrator's interpretation of these statutory terms is reasonable and comports with congressional intent.[15]

The FLSA does not define the term "changing clothes or washing" for purposes of § 3(o), and the legislative history specifically addresses only the scope of the term "washing." The House version of the provision would have allowed the elimination from hours worked of any activity of an employee as provided by the express terms of, or custom or practice under, a collective bargaining agreement. See S. Rep. No. 640 (1949), reprinted in 1949 U.S.C.C.A.N. 2241, 2255. The conference committee explained that it narrowed the scope of the provision by "limit[ing] this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of the

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[14] The Administrator returns to the position taken in meatpacking cases before December 3, 1997 (date of the earliest opinion letter withdrawn by the Administrator (see Addendum "A")) by regional and district officials of the Wage and Hour Division and Office of the Solicitor. That enforcement position applied § 3(o) if a bona fide CBA excluded from hours worked time spent by employees in donning and doffing activities. See Reich v. IBP, Inc., No. 88-2171-EEO (D. Kan. July 31, 1996) (pursuant to Secretary's proposed injunction, meatpacking "[p]lants subject to a collective-bargaining agreement are excluded by the reference to section 3(o)"). See also Op. 30. The 1997 opinion letter marked a sufficiently significant change that the Department decided to apply the 1997 interpretation prospectively in its enforcement actions.

[15] The Secretary takes no position in this brief on what constitutes a custom or practice for purposes of excluding time under § 3(o), or on whether there is such a custom or practice here.

workday." Id. (emphasis added). This explicitly narrow reading of "washing" is supported by a summary submitted during the debates that describes the conference agreement as "limit[ing]" the provision's application "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday." 95 Cong. Rec. S14875 (Oct. 18, 1949). See also Saunders v. John Morrell & Co., 1 WH Cases2d (BNA) 879, 882-83 (N.D. Iowa Dec. 24, 1991) (§ 3(o) does not cover the cleaning of safety equipment); 29 C.F.R. 790.7(g) & n. 49 (using the phrase "washing up or showering" in addressing test for preliminary or postliminary activities).

As noted above, the scope of the term "clothes changing" is not specifically addressed in the statute or legislative history. When words are not defined by statute, courts generally give them their ordinary or natural meaning. See United States v. Akintobi, 159 F.3d 401, 403 (9th Cir. 1998) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)). The ordinary meaning of the word "clothes" reasonably encompasses articles worn on the body for purposes of protection. See Webster's New World Dictionary (2d college ed. 1982) (defining "clothes" as "articles, usually of cloth, designed to cover, protect or adorn the body") (emphases added).[16] In fact, both the Supreme Court

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[16] This Court frequently resorts to dictionary definitions to determine the common meaning of words. See, e.g., Akintobi, 159 F.3d at 403; United States v. Smith, 155 F.3d 1051, 1057 (9th

and this Court have used the term "protective clothing." See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 660-61 (1980) (the "Benzene" case) (stating that compliance with an OSHA requirement "could be achieved simply by the use of protective clothing, such as impermeable gloves"); United States v. Stanley, 483 U.S. 669, 671, 690 (1987) (referring to clothing to protect from chemical exposure); Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 196 (9th Cir. 1989) (referring to use of protective clothing for PCB cleanup). Significantly, the Department of Labor itself has described articles worn for protective purposes as clothing. See 29 C.F.R. 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing").

Furthermore, although the legislative history of § 3(o) does not specifically address the scope of "changing clothes," Congress, in enacting the Portal Act, and the Supreme Court, in interpreting the Act in Steiner, recognized that the purpose of clothing specially worn for the workplace might well be protection. Indeed, it was in part precisely because the clothing at issue in Steiner served protective purposes that the Court, in reliance upon the legislative debates of the Portal Act, indicated that donning and doffing the clothing in question was "integral" to the job and, accordingly, compensable.

Cir. 1998).

That effective protective clothing may in some instances be heavier than ordinary street clothes is no basis to withdraw it from § 3(o)'s coverage. Indeed, it would be a disservice to the workers that the FLSA was designed to protect if employers who wished to introduce bulkier and more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their unions over the compensability of donning and doffing protective gear. Such an intent should not be attributed to Congress in interpreting § 3(o).

Additionally, the Administrator's interpretation provides a clearer definition of clothing than did the recent opinion letters that she withdrew. Congress intended to give a measure of deference to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating the terms and conditions of employment in the clothes-changing context. See 95 Cong. Rec. at H11210 (1949). Removal of uncertainty as to what constitutes clothing will facilitate negotiations between employers and unions, and thus serve the underlying purposes of § 3(o).

In sum, this Court should reverse the district court's conclusion that § 3(o) does not apply to all of the protective clothing worn by employees in the meatpacking industry, including mesh and rubber aprons; mesh, cloth, rubber, and "can't cut" gloves; plexiglass arm guards; mesh, plastic, and polar sleeves;

plastic leggings; and weight belts. This Court, however, should affirm the district court's conclusion that the definition of "clothes" under § 3(o) does not encompass tools such as scabbards, meat hooks, knives, or edge-straightening steels. This Court also should affirm the district court's conclusion that § 3(o) applies to washing the person, not to washing or sanitizing safety clothing or gear. As noted above, the Secretary takes no position in this brief on what constitutes a custom or practice for purposes of excluding time under § 3(o), or on whether there is such a custom or practice here.

CONCLUSION

The Secretary respectfully requests that this Court affirm and vacate, as set forth above, the district court's conclusions concerning the compensability, under the FLSA and § 4(a) of the Portal Act, of time spent by IBP's employees donning, doffing, cleaning, and storing their necessary protective clothing.

Respectfully submitted,

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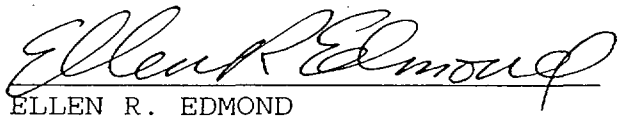

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CERTIFICATE OF SERVICE

I certify that copies of this Brief for the Secretary of Labor as *Amicus Curiae* have been served upon the following counsel by deposit in first-class mail this 10th day of June, 2002:

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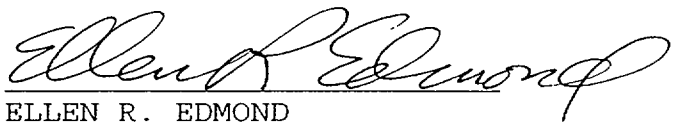

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, I certify that the attached *amicus* brief of the Secretary of Labor contains monospace type (Courier New, 12 point), which has 10.5 or fewer characters per inch, and contains not more than 7000 words of text.

6-10-2002
Date

Ellen R. Edmond
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U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
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June 6, 2002

Samuel D. Walker
Wiley, Rein & Fielding
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Dear Mr. Walker:

This responds to your letter of December 12, 2001, on behalf of the American Meat Institute, requesting reconsideration of two opinion letters issued by the Acting Administrator of the Wage and Hour Division and the Administrator of the Wage and Hour Division, respectively, on December 3, 1997, and January 15, 2001. The opinion letters concern application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), to employees in the meat packing industry. Specifically, the letters set forth the position that section 3(o) does not apply to the putting on, taking off, or washing of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts.

As noted in the January 15, 2001 opinion letter, the construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator. Further, a number of regional and district officials of the Wage and Hour Division and the Office of the Solicitor had, in their enforcement of some cases, historically applied section 3(o) if a bona fide collective bargaining agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

We have completed a careful review of the interpretation of section 3(o) set forth in these opinion letters, as well as in the opinion letter issued by the Acting Administrator on February 18, 1998. It is our view, based upon a reexamination of the statute and legislative history, that the "changing clothes" referred to in section 3(o) applies to the putting on and taking off of the protective safety equipment typically worn in the meat packing industry, as described in your letter. It remains our view, however, that the term "washing" in section 3(o) applies only to washing of the person and does not apply to the cleaning or sanitizing of protective equipment. Accordingly, for the reasons set forth below, we are withdrawing as of this date the opinion letters dated December 3, 1997, February 18, 1998, and January 15, 2001 (as it relates to section 3(o)).

Section 3(o) of the FLSA, enacted in 1949, provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o). (We take no position in this letter on what constitutes a custom or practice for purposes of excluding time under section 3(o), or on whether there is such a custom or practice by any employers in your industry.) The FLSA does not define the term "changing clothes or washing" for purposes of section 3(o), and we do not believe that a plain meaning of the term is evident from the statute. One dictionary defines "clothes" as

"garments for the body; articles of dress; wearing apparel" (The Random House College Dictionary (revised ed. 1982)), and another defines "clothes" as "articles, usually of cloth, designed to cover, protect or adorn the body ...." (Webster's New World Dictionary (2d college ed. 1982)) (emphases added). See also 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing") (emphasis added). The Department's interpretative regulations on "hours worked," published in 1965, merely repeat the terms "changing clothes" and "washing." See 29 C.F.R. § 785.26.

The legislative history is specific only with respect to the interpretation of "washing." The House version of section 3(o) would have allowed the elimination from hours worked of any activity of an employee as provided by the express terms of, or custom or practice under, a collective bargaining agreement. See S. Rep. No. 640 (1949), reprinted in 1949 U.S.C.C.A.N. 2241, 2255. The conference committee explained that it narrowed the scope of the provision by "limit[ing] this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of the workday." Id. (emphasis added). This explicitly narrow reading of "washing" is supported by a statement in the debates that describes the conference agreement as "limit[ing]" the provision's application "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday." 95 Cong. Rec. 14875 (1949). See also 29 C.F.R. § 790.7(g) & n. 49 (interpretative rule addressing the Portal-to-Portal Act's test for preliminary or postliminary activities using the phrases "changing clothes" and "washing up or showering"); Wage and Hour Division's Field Operations Handbook 31b01 (using the phrase "wash up time" in discussing section 3(o) and "hours worked").

The legislative history does not specifically address the scope of "changing clothes" under section 3(o). The provision was enacted subsequent to the Portal-to-Portal Act of 1947, which in turn was enacted in response to the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). In Mt. Clemens, the Supreme Court held that the time that employees spent walking to and from their work stations on the employer's premises was "hours worked." 328 U.S. at 691-92. The Court also found compensable, as a necessary prerequisite to the employees' production work, such preliminary activities as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger sheaths, preparing equipment, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. Id. at 692-93.

The legislative history indicates that some clothes changing was expected to remain compensable after enactment of the Portal Act, and the Supreme Court has so held. See Steiner v. Mitchell, 350 U.S. 247 (1956). During debate on the Act, one of the bill's sponsors stated that the clothes changing and showering that might be required of "chemical plant workers" would remain a compensable principal activity. 93 Cong. Rec. 2297-98 (1947). The Supreme Court appended this legislative history to its decision in Steiner, where it held that the time spent by workers in a battery plant changing into and out of old work clothes and showering was compensable. Although "changing clothes and showering under normal conditions ... ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time" under the Portal Act, the Court ruled, clothes changing and showering under the circumstances of this case are "an integral and indispensable part of the production of batteries." 350 U.S. at 249, 255-56. Thus, while the Portal Act excluded "ordinary" clothes changing from compensable time, other clothes changing that was

not "merely a convenience to the employee" and that was "directly related to the specific work" remained compensable (93 Cong. Rec. 2297-98 (1947)).

The function of section 3(o) is to allow companies and unions to agree to treat as non-compensable clothes-changing activities that otherwise would be compensable under the Portal Act. In stating that the Act invalidates such agreements in the case of protective gear in the meat packing industry, the 1997 opinion letter confined its reasoning to a single sentence where it explained that "clothes" has a "plain meaning" which excludes (i) "protective" articles that (ii) may be "cumbersome in nature" and (iii) are "worn over . . . apparel." Upon review, we have concluded that none of these qualities should prohibit a company and union from regarding the gear worn in the meat packing industry as clothes for purposes of section 3(o).

The Department of Labor has described articles worn for protective purposes as clothing, and so has a leading dictionary. See 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing"); Webster's New World Dictionary (2d college ed. 1982) ("clothes" are "articles, usually of cloth, designed to cover, protect or adorn the body ..."). The Supreme Court has used the phrase "protective clothing" on more than one occasion. See, e.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 660-61 (1980) (the "Benzene" case) (plurality) (stating that compliance with an OSHA requirement "could be achieved simply by the use of protective clothing, such as impermeable gloves"); United States v. Stanley, 483 U.S. 669, 671, 690 (1987) (referring to clothing to protect from chemical exposure and radiation). Congress, in enacting the Portal Act, and the Supreme Court, in interpreting it in Steiner, recognized that the purpose of clothing specially worn for the workplace might well be protection. Indeed, it was in part precisely because the clothing at issue served protective purposes that, in the legislative debates and Steiner, Congress and the Court indicated that donning and doffing the clothing at issue was "integral" to the job and, accordingly, compensable.

That an article may be "cumbersome" also is no indication that it is not clothing. Many items of clothing are cumbersome. In the case of clothing worn for protective purposes in particular, it often will be more protective if it is larger, heavier, and therefore more cumbersome than street clothes. It would disserve the workers the Fair Labor Standards Act is meant to protect if employers who wished to introduce bulkier and more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear. Such an intent should not be attributed to Congress in interpreting 3(o). In addition to lacking basis in the statutory text and legislative intent, a distinction between apparel that is "cumbersome" and that which is not is vague, difficult to administer, and fails to provide useful guidance to employers and unions regarding the legitimate parameters of their agreements and practices.

Finally, that an item is worn on top of another item plainly is no reason to believe they are not both items of clothing.

There are other bases in the history and purpose of section 3(o) for concluding that a broader interpretation of the provision is appropriate. It is reasonable to assume that when Congress enacted section 3(o), it had in mind the kind of "clothing" at issue in the Mt. Clemens case just

three years earlier; that case involved aprons and overalls, shirts, and finger sheaths. Finally, a less rigid definition of "clothes" comports with Congress's intent in enacting section 3(o), which was to give a measure of deference on this aspect of wage-hour practice to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating the terms and conditions of employment. See 95 Cong. Rec. 11210 (1949).

In sum, for the foregoing reasons we believe that the term "clothes" in section 3(o) includes the protective safety equipment typically worn by meat packing employees. Accordingly, we interpret "clothes" under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks. Furthermore, the term "washing" refers only to washing of the person, and not to the washing, cleaning, or sanitizing of protective or safety equipment. See Saunders v. John Morrell & Co., 1 WH Cases 2d 879 (N.D. Iowa 1991).

Sincerely,

Tammy D. McCutchen
Administrator

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

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