

Nos. 10-1821, 10-1866

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CLIFTON SANDIFER, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES STEEL CORPORATION,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of Indiana

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

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Pursuant to Federal Rule of Appellate Procedure 29(a), and in accord with this Court's March 25, 2010 order inviting the Secretary of Labor ("Secretary") to file an *amicus curiae* brief, the Secretary submits this brief in support of United States Steel employees ("steelworkers") who allege violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, et seq.

INTEREST OF THE SECRETARY

The Secretary administers and enforces the FLSA. See 29 U.S.C. 204, 211(a), 216(c), 217. She has compelling reasons to participate as *amicus curiae* because this case presents a fundamental question of statutory interpretation—whether the

donning of clothes under section 3(o) of the FLSA can be the employees' first principal activity starting the compensable continuous workday under 29 U.S.C. 254(a). The Department of Labor ("Department" or "DOL") recently issued guidance on this issue. See Administrator's Interpretation 2010-2, 2010 WL 2468195 (Jun. 16, 2010) ("2010 AI"). Furthermore, in its March 25, 2010 order granting U.S. Steel's request for an interlocutory appeal on the section 254(a) issue, this Court invited the Secretary to file a brief as *amicus curiae*. R.203, Apx.2863.

STATEMENT OF THE ISSUE

Whether, where it has been determined that the activities of donning, doffing, and washing are not to be included in compensable hours of work by operation of 29 U.S.C. 203(o), such activities can nonetheless start the continuous workday under 29 U.S.C. 254(a).

STATEMENT OF THE CASE

1. U.S. Steel's Gary Works Plant ("Gary Works" or "the plant") requires its approximately 4,500 production and maintenance steelworkers (including the Coke Plant steelworkers) to arrive at the plant before the start of their shift so that they can don their personal protective equipment ("protective equipment" or "PPE") and arrive at their work stations by the time the shift officially begins. See Sandifer, et al. v. U.S.

Steel Corp., 2009 WL 3430222 (N.D. Ind. Oct. 15, 2009)

("Sandifer I") (Apx.2483-84).¹ These items of PPE—all of which are purchased, maintained, laundered, and provided to the steelworkers by U.S. Steel—include flame-retardant jackets, flame-retardant pants, flame-retardant snoods, Nomex hoods, flame-retardant leggings, Kevlar wristlets, various types of protective gloves, flame-retardant spats, hard hats (some of which include an attached face shield), steel-toed boots with metatarsal guards, hearing protection, and safety glasses. Id.; Apx.1235-38, 1245. Certain steelworkers additionally don and doff respirators, aluminized suits, chemical suits, welders hoods, and related items which are put on as needed at certain job locations. See Sandifer I (Apx.2484); Apx.1237.

The PPE is only made available to the steelworkers for them to don and doff at the plant. See Sandifer I (Apx.2484). None of the protective equipment may be removed from the plant. Id. Plaintiffs estimate that they spend an average of nine to ten hours per week engaged in pre- and post-shift donning and doffing of PPE, walking to the work station, showering (with the exception of Coke Plant workers for whom the collective bargaining agreement provides fifteen to twenty minutes of time

¹ "Apx.____" refers to the Original Record on Appeal, filed with this Court on August 29, 2011. See Case No. 10-1866, Docket No. 26-3. "R.____" refers to docket entries in the trial court record, which was filed with Defendant-Appellant U.S. Steel's Opening Brief. See Case 10-1866, Docket No. 26-3 (Apx.1-33).

for showering), and laundering personal clothing. Id. at Apx.2484-85.

2. On December 21, 2007, Plaintiffs filed suit alleging unpaid overtime compensation for pre- and post-shift donning and doffing of required PPE, walking, showering, and laundering personal clothing. See Sandifer I (Apx.2481-82). On March 28, 2008, Plaintiffs sought to certify an FLSA collective action under 29 U.S.C. 216(b). R.32. U.S. Steel moved for summary judgment, arguing that section 3(o) precluded the donning and doffing claims and that section 254(a) precluded the post-donning and pre-doffing walking-time claims. R.82. On October 15, 2009, the district court granted summary judgment for U.S. Steel on the section 3(o) question, concluding that the PPE at issue constituted "clothes." See Sandifer I (Apx.2488-97, 2521-22). As to the section 254(a) question, however, the district court denied summary judgment, stating that it could not conclude as a matter of law that the noncompensability of donning, doffing, and showering under section 3(o) necessarily means that these activities cannot be an integral and indispensable part of employees' principal activities that begin the workday; rather, if found to be integral and indispensable, such activities would in fact render post-donning and pre-doffing walking time compensable. See Sandifer I (Apx.2504-11, 2521-22).

On October 30, 2009, U.S. Steel moved for interlocutory appeal on the section 254(a) question as to whether activities excluded from compensable working time under section 3(o) can still start the continuous workday. R.160-61. The district court certified the following issue as a controlling question of law:

Under the FLSA, where it has been determined that the activities of donning, doffing, and washing are not to be included in hours of employment by operation of 29 U.S.C. sec. 3(o), can such activities, under any circumstances, start or end the continuous workday under 29 U.S.C. sec. 254(a) of the Portal-to-Portal Act?

Sandifer, et al. v. U.S. Steel Corp., 2010 WL 61971 (N.D. Ind. Jan. 5, 2010) (Apx.2798-2809). On March 25, 2010, this Court granted U.S. Steel's request for an interlocutory appeal on the issue whether clothes changing rendered noncompensable under section 3(o) can nevertheless start the continuous workday under 29 U.S.C. 254(a). R.208. In that same order, the Court invited DOL to participate as *amicus curiae*. Id. Plaintiffs subsequently cross-appealed the district court's judgment for U.S. Steel on the section 3(o) clothes-changing issue. R.210. On August 2, 2010, the interlocutory appeal (section 254(a)) and cross-appeal (section 3(o)) were consolidated. See Docket No. 14.²

² In its order to consolidate, this Court ordered the parties to address the issue of appellate jurisdiction over Plaintiffs'

ARGUMENT

CLOTHES CHANGING EXCLUDED FROM COMPENSABLE HOURS WORKED UNDER SECTION 3(O) CAN STILL BE A PRINCIPAL ACTIVITY THAT STARTS THE CONTINUOUS WORKDAY

Employees must be paid for all "hours worked" under the FLSA. Alvarez v. IBP, Inc., 339 F.3d 894, 902 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005). Section 3(o) of the FLSA provides, however, that in determining 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." 29 U.S.C. 203(o). The discussion that follows addresses the question posed by this Court—whether, if the items in question are "clothes" under section 3(o) and thus excludable from hours worked, the donning of those items still start the compensable continuous workday.³

1. The Portal-to-Portal Act amended the FLSA by exempting employers from compensating employees for (1) time spent walking, riding, or traveling to and from the actual place of

cross-appeal on the section 3(o) issue. The Secretary does not address this jurisdictional question because she is participating in the only issue on which she has been asked to participate—the section 254(a) issue.

³ This formulation necessarily includes the related proposition that doffing these items ends the continuous workday.

performance of the principal activity; and (2) time spent performing activities that are "preliminary" or "postliminary" to the principal activity, if those activities occur either prior to the commencement of or subsequent to the ceasing of the principal activity on any particular workday. 29 U.S.C. 254(a)(1), (2).

As the Supreme Court stated, "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities" for which employees are employed. Steiner v. Mitchell, 350 U.S. 247, 256 (1956) (changing into old clean work clothes and showering on the employer's premises by battery plant workers were integral and indispensable to the employees' principal activities, and thus employees should be compensated for time spent donning and doffing and showering); 29 C.F.R. 790.8(c) & n.65. An activity is "integral and indispensable" if it is "necessary to the principal work performed" and if it is "done for the benefit of the employer." Alvarez, 339 F.3d at 902-03; see generally Perez v. Mountaire Farms, Inc., 650 F.3d 350, 367 (4th Cir. 2011) ("Because these acts of donning and doffing protective gear at the beginning and end of the employees' work shifts are necessary to Mountaire's chicken processing and primarily

benefit Mountaire, we conclude that these activities are 'integral and indispensable' to chicken processing."), petition for cert. filed (U.S. Oct. 3, 2011) (No. 11-497); see also IBP, Inc. v. Alvarez, 546 U.S. 21, 37, 39 (2005) (necessarily adopting conclusion that donning and doffing required sanitary items and protective equipment was integral and indispensable to poultry and meat processing employees' principal work activities when it concluded that any walking and waiting time that occurs after such donning and doffing is compensable).

"[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act," and is therefore compensable under the FLSA. Alvarez, 546 U.S. at 37. Thus, the donning and doffing of PPE commences and ends the continuous workday, and marks the beginning and end of compensable time; therefore, any walking or waiting time that occurs during the continuous workday, i.e., between the employees' first and last principal activities, is compensable. See id.; Perez, 650 F.3d at 367-68.

2. While section 3(o) permits an employer and employee to exclude "any time spent in changing clothes or washing at the beginning or end of the workday" from the FLSA's "hours worked" requirement, it does not by its terms render those activities any less "integral and indispensable" to the employees' work. Nothing in the statute suggests that section 3(o) affects

whether changing clothes or washing are "integral or indispensable" to the employee's principal activities. Rather, section 3(o) implicates only the *compensability* of "changing clothes and washing." Indeed, the express language of section 3(o) instructs that, pursuant to a bona fide collective bargaining agreement or custom or practice, "[i]n determining for the purposes of [29 U.S.C.] sections 206 and 207 . . . 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" 29 U.S.C. 203(o) (emphasis added). Section 206 sets the federal minimum wage per hour worked, see 29 U.S.C. 206, and section 207 specifies when overtime pay commences, see 29 U.S.C. 207. Thus, section 3(o) addresses only the compensability of changing clothes, not whether changing clothes can be a principal activity starting the continuous workday. Likewise, section 3(o)'s inclusion of the unequivocal phrase "at the beginning . . . of each *workday*" confirms that time spent "changing clothes or washing"—although it may be excluded from compensable hours worked pursuant to section 3(o)—does not affect the compensability of the time that comes thereafter, i.e., during the "continuous workday." 29 U.S.C. 203(o) (emphasis added).

As the 2010 AI explains, under the express language of section 3(o), any excluded time is nevertheless "'considered to

be part of the *workday*.'" 2010 AI (quoting Figas v. Horsehead Corp., 2008 WL 4170043, at *19 (W.D. Pa. Sept. 3, 2008))

(emphasis in original). "Because activities that are within the workday are compensable under the Portal Act [section 254(a)], the language of [section 3(o)] supports the compensability of the activities that follow clothes changing." 2010 AI.

Furthermore, section 3(o) "'does not make donning and doffing activities any less "integral and indispensable"

[because] the *character* of donning and doffing activities is not dependent upon whether such activities are excluded pursuant to a collective-bargaining agreement.'" Id. (quoting Figas, 2008 WL 4170043, at *20) (emphasis in original). Any other reading would expand the scope of section 3(o) well beyond the language of the statute. Id.⁴

⁴ This position reflected in the 2010 AI is different from the one set forth in the Department's 2007 Opinion Letter, FLSA 2007-10, 2007 WL 2066454 (May 14, 2007). The Secretary requests deference to the 2010 AI based on its persuasiveness. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that Wage and Hour opinion letters "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance"); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (agency interpretations are "'entitled to respect' . . . to the extent that [they] have the 'power to persuade.'" (quoting Skidmore, 323 U.S. at 140)); see also Centra, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund, 578 F.3d 592, 601 (7th Cir. 2009) (citing Christensen, 529 U.S. at 587); Miller v. Herman, 600 F.3d 726, 734 (7th Cir. 2010) (consistency is only one of numerous factors that this Court considers when determining an interpretation's "power to persuade"; these include thoroughness, validity, formality, an agency's care and relative expertise, and the overall persuasiveness of the

3. The only appellate court to have considered this question held that changing clothes and washing that are noncompensable under section 3(o) nevertheless constitute principal activities that start the continuous workday. See Franklin v. Kellogg Co., 619 F.3d 604, 618-20 (6th Cir. 2010). Noting the 2010 AI's position on the matter, the court agreed with the Department that "compensability under [section 3(o)] is unrelated to whether an activity is a 'principal activity.'" Id. at 619. Applying a three-part test, the Sixth Circuit concluded that where the donning and doffing of "standard equipment and [a] uniform" was required by the employer, necessary to performing the job, and done for the primary benefit of the employer, such activities were "integral and

interpretation); Aero Mayflower Transit Co. v. I.C.C., 711 F.2d 224, 228 n.30 (D.C. Cir. 1983) (even where an agency interpretation is "inconsistent with prior agency promulgations, the thoroughness and validity of the agency's reasoning may entitle the interpretation to some weight"); cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 296 n.7 (2009) (according controlling deference to the government's "fluctuat[ing]" position in the context of an agency interpreting its own regulation). Even if this Court does not defer to the 2010 AI based on its power to persuade, it should nevertheless adopt the interpretation contained therein based on the soundness of its reasoning. See Nat'l Shopmen Pension Fund v. DISA Indus., Inc., 653 F.3d 573, 580 (7th Cir. 2011) (declining to defer to agency's interpretation but nevertheless finding position to be persuasive); cf. Bailey v. Pregis Innovative Packaging, Inc., 600 F.3d 748, 750-51 (7th Cir. 2010) (declining to defer where opinion letter amounted to "just stat[ing] a conclusion" without "reasoning," but nevertheless adopting position set forth in the letter because it was the "better interpretation") (emphasis in original).

indispensable" to, and therefore constituted, employees' principal activities. Id. Thus, "under the continuous workday rule," even where section 3(o) excludes compensation for the donning and doffing of PPE, the post-donning and pre-doffing walking time is nevertheless compensable. Id. at 620.

The majority of district courts to have considered the interplay between section 3(o) and section 254(a) have followed Figas (as did the 2010 AI and the district court here) in concluding that, regardless whether donning and doffing activities are rendered noncompensable under section 3(o), they are nonetheless principal activities that start and end the continuous workday. Thus, the district court in In re Tyson Foods, Inc., 694 F. Supp. 2d 1358, 1371 (M.D. Ga. 2010), concluded that "[section 3(o)] only relates to the compensability of time spent donning, doffing, and washing of the person and that it does not mean that § 203(o) tasks cannot be considered principal activities that start the continuous workday." In Arnold v. Schreiber Foods, Inc., 690 F. Supp. 2d 672, 685 n.15 (M.D. Tenn. 2010), the court stated that "[section 3(o)], by its terms, applies only to clothes changing that occurs 'at the beginning or end of each workday.' This implies that such activities are work and that the continuous-work-day clock has already started to run." Further, in Johnson v. Koch Foods, Inc., 670 F. Supp. 2d 657, 670 (E.D. Tenn. 2009), the

district court concluded that "if the donning, doffing, and washing excluded by § 203(o) are determined by the trier of fact to be integral and indispensable, those activities could commence the workday." In Andrako v. U.S. Steel Corp., 632 F. Supp. 2d 398, 413 (W.D. Pa. 2009), the court held that section 3(o) relates to the compensability of donning and doffing; "[i]t does not render such time any more or less integral or indispensable to an employee's job." And, in Gatewood, et al. v. Koch Foods, LLC, 569 F. Supp. 2d 687, 702 n.31 (S.D. Miss. 2008), the district court concluded that "[a]lthough the statute precludes recovery for time spent washing and 'changing clothes,' it does not affect the fact that these activities could be the first 'integral and indispensable' act that triggers the start of the continuous workday rule for subsequent activities."

Thus, in response to this Court's direct question, see R.203, Apx.2863, the Secretary submits that clothes changing rendered noncompensable under 29 U.S.C. 203(o) nevertheless is a principal activity that starts the continuous workday under 29 U.S.C. 254(a).

CONCLUSION

For the reasons stated above, this Court should rule that clothes-changing activities excluded from compensable hours worked under section 3(o) of the FLSA can still be a principal

activity that triggers the continuous workday, making any subsequent walking time compensable.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees/Cross-Appellants was served this 18th day of November, 2011 via CM-ECF on each of the following:

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