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Supreme Court Hears Oral Argument and Appears to Seek Middle Ground on Definition of "Clothes" Under the FLSA

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On Monday, November 4, the Supreme Court heard oral arguments in *Sandifer v. United States Steel Corp.* on the issue of the meaning of the term "clothes" in section 3(o) of the Fair Labor Standards Act (FLSA). Under the FLSA, generally, employees must be paid for donning and doffing protective clothing if they are required by law or the employer to change into such clothing at the work site. However, section 3(o) of the FLSA, passed by Congress in 1949, provides that in a unionized setting time spent "changing clothes" may be excluded from compensable time by a collective bargaining agreement or by a custom or practice of non-compensation for such activities. The outcome of the case will have a significant impact on unionized employers in a wide variety of industries where workers change in and out of protective and/or sanitary clothing at the start and end of their workdays, including food processing, light and heavy industrial manufacturing, chemical processing, energy production, and health care.

Sandifer is notable for the oscillating positions taken by the Department of Labor (DOL) in the last 16 years on the meaning of "clothes" under section 3(o). Another interesting aspect of the case is that the employees are seeking compensation for activities their union specifically agreed were non-compensable in contract negotiations while the action was pending.

At oral argument, the Supreme Court wrestled with the different definitions of "changing clothes" offered by the petitioner-employees and respondent-employer, as well as a new middle ground alternative offered by the government that would incorporate certain protective equipment items if they were "ancillary" to donning and doffing clothing items.

The Case Below

In *Sandifer*, current and former U.S. Steel unionized employees claimed they were not properly compensated under the FLSA for pre- and post-shift time spent donning and doffing items such as flame-retardant jackets and pants, hoods, hard hats, gloves, wristlets, leggings, steel-toed boots, safety glasses, and ear plugs, and for time spent walking from the locker room to their work stations after changing clothes. Since 1947, two years before enactment of section 3(o), the collective bargaining agreement (CBA) between U.S. Steel and the Steelworkers provided that the company would not compensate employees for "time spent in preparatory and closing activities." In 2008, after *Sandifer* was filed, the union and U.S. Steel negotiated a new CBA in which the

union agreed to stronger and more specific language confirming that employees would not be compensated for time spent "donning and doffing protective clothes."

The district court granted summary judgment in U.S. Steel's favor on the issue of whether the various items were "clothes" within the meaning of FLSA section 3(o), and therefore determined the employees need not be paid for time spent donning. The district court also ruled that, although non-compensable under section 3(o), the donning and doffing could be a "principal activity" that starts or ends the continuous workday under the Portal-to-Portal Act of 1947, making the time spent walking from the locker room to the work stations compensable work time.

On appeal, the Seventh Circuit affirmed the district court's ruling that the protective items at issue were "clothes," but reversed the district court's continuous workday ruling. In its opinion, the Seventh Circuit noted the DOL's "oscillation" in its interpretation of time spent changing clothes under section 3(o) and the Portal-to-Portal Act. Under the Clinton Administration, the DOL took a narrow view of what constituted clothes, but changed course under the Bush Administration, taking a broad view of the term clothes and adding that clothes-changing time excluded by section 3(o) could not be a "principal activity" that starts the continuous workday. Then, under the Obama Administration, the DOL reverted to the Clinton Administration's position on the definition of clothes and rejected the Bush Administration's position on "principal activities." In its 2010 Administrator's Interpretation, the DOL stated the section 3(o) exemption "does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job," and declared that the 2002 and 2007 DOL opinion letters to the contrary could no longer be relied upon by employers. Given these position changes, the Seventh Circuit concurred with the Fourth Circuit that it could not give deference to "the gyrating agency letters on the subject."

The Seventh Circuit's decision conflicts with Ninth Circuit authority holding that "special protective gear is different in kind from typical clothing" and is not "clothes" under section 3(o). *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003). Still, the Fourth, Sixth, Tenth, and Eleventh Circuits have adopted a different definition of clothes that includes anything one "wears," including "accessories" such as ear plugs and safety glasses. The Seventh Circuit's decision creates a separate circuit split with the Sixth Circuit on whether activities excluded from compensation by section 3(o) can still trigger the beginning of the continuous workday, thus making subsequent time spent walking to work stations compensable even though the clothes changing itself is not. Although the petitioner-employees sought certiorari on both the meaning of "clothes" and the continuous workday issue, the Supreme Court granted certiorari only on the first question.

DOL Disavows 2010 Administrator's Interpretation

In its amicus brief to the Supreme Court, the DOL reversed course again, arguing that the "ordinary meaning" of the term "clothes" is "covering for the human body, or garments in general," and the protective items at issue fall within that ordinary meaning. In a footnote, the DOL quietly acknowledged the inconsistent positions it has taken since 1997 and stated it "does not urge deference to the 2010 Administrator's Interpretation in the context of this case." This carefully worded repudiation of the DOL's Administrator's Interpretation of clothes under the FLSA leaves open the question whether the DOL's prior interpretation under the Bush Administration has been restored. In fact, the 2010 Administrator's Interpretation remains posted on the DOL website as their current enforcement position, while the 2002 and 2007 opinion letters are shown as "withdrawn."

Oral Argument

At oral argument, the Supreme Court was presented with three different standards for determining the meaning of "clothes" in section 3(o).

Petitioner's counsel, Eric Schnapper, argued that "an item is not clothes if it is worn to protect against a workplace hazard and was designed to protect against hazards." Starting when Justice Ginsburg holding up a photo from the Seventh Circuit opinion and commenting that the items at issue looked like clothes to her, Mr. Schnapper was pressed by Justices Alito, Sotomayor, Kagan, and Scalia to explain why the line should be drawn at the protective function. However, Justice Sotomayor agreed that a "definition that says anything that covers the body might go too far." While Justice Scalia agreed that glasses and wristwatches were not "clothes", he also stated that petitioners were not proposing the "ordinary meaning" of clothes and that it was "peculiar" for "clothes" to include protective garments "except those that protect against workplace hazards."

When Justice Breyer examined the statute and asked why an "ordinary worker" represented by a union would be on petitioner's side, Mr. Schnapper explained that the lower courts have held that, in the absence of express language in a CBA, a past custom or practice not to

pay for donning and doffing can bind the union and make it difficult for the union to negotiate for the time to be paid. Chief Justice Roberts asked if the United Steelworkers of America was on the petitioner-employee's side and Mr. Schnapper responded that, in their most recent collective bargaining agreement, which provided that employees would not be paid for time spent changing clothes, the union had agreed not to file anything in the case on behalf of the employees. Chief Justice Roberts commented "it does seem to support [the] notion that this is something that should be left to the collective bargaining process." Respondent U.S. Steel's counsel, Lawrence DiNardo, argued that a practice or custom of not paying for donning and doffing time was an agreement, not a unilateral decision by the employer.

Mr. DiNardo asserted that "clothes" was "intended to encompass the work outfit industrial workers were required to change into and out of to be ready for work." He argued collective bargaining "takes place around activities and determines how certain activities are to be treated," and does not focus on whether a particular item is "clothes." Justice Ginsburg asked if it mattered whether the Court took the DOL's position or U.S. Steel's position since the Seventh Circuit had found that time related to the hard hat, ear plugs, protective eye gear, and respirator were *de minimis*, and Justice Kagan asked for examples where the difference mattered. Mr. DiNardo responded that a dichotomy between "clothes" and "equipment" would be a problem in future cases. Justice Scalia suggested that the government was being "principled" in its definition because "nobody would consider eyeglasses or a wristwatch or some of this other specialized equipment to be clothes" and that U.S. Steel's definition "does not adhere to the words of the statute, which says 'clothes.'" Justice Breyer offered his own definition of clothes as "those items that have, as a significant purpose, the covering of one's body," but Mr. DiNardo responded that protective eye wear is designed to cover part of the face.

Anthony Yang, representing the Solicitor General, argued "changing clothes" was an activity that includes "ancillary matters," such as opening a locker, putting on goggles and ear plugs, and snapping on a utility belt. Thus, such activities would be non-compensable if not provided for in collective bargaining.

This represented a new position for the government on the meaning of section 3(o). In response, Justice Kagan pressed on the difference between the government's position and the position of U.S. Steel. Mr. Yang responded that there were "some marginal cases where there is a collection of equipment . . . which is put on by an employee that is so significant that it no longer can be fairly treated in conjunction with changing clothes," such as for certain workers in the meat packing industry who don belly guards and chain mail gloves. Mr. Yang resisted the use of "*de minimis*" to describe his test, noting that *de minimis* is a "term of art in the FLSA . . . [that] requires an aggregation of all the time deemed to be *de minimis*," as well as other requirements imposed in the DOL regulations. Although not stated at the argument, the most notable of these DOL requirements is that an activity cannot be *de minimis* if it occurs regularly, which was the case in *Sandifer*.

Future Implications of *Sandifer*

Where employers have either expressly negotiated or established a custom and practice of not compensating for "donning" and "doffing" time, a reversal by the Supreme Court of the Seventh Circuit's decision would cast doubt on the validity of such agreements or long-standing practices and potentially subject such employers to retroactive liability in class action litigation. While the time to don and doff work-related clothing may seem inconsequential, perhaps just a few minutes a day, when such time is aggregated in class and collective actions over thousands of workers and years of non-compensation, the exposure can be significant. Employers who have made bargaining table concessions in exchange for non-compensation of donning and doffing time will lose the benefit of their bargains.

In addition, to the extent the Supreme Court does not categorically include or exclude protective clothing from the definition of "clothes" in section 3(o), the lower courts will be left with the task of including and excluding protective articles on a case-by-case, piece-by-piece basis and new uncertainty will exist at the bargaining table as to what is properly subject to bargaining. Even adoption of the "ancillary" test proposed by the government may still result in a case-by-case analysis of what is included in "changing clothes" and what pre- and post-shift activities are "ancillary" to changing clothes.

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