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Supreme Court Finds Middle Ground on Definition of "Clothes" Under the FLSA

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On Monday, January 27, 2014, in unanimously affirming the Seventh Circuit's judgment in favor of U.S. Steel Corporation in *Sandifer v. United States Steel Corp.*, the Supreme Court forged a middle ground on the meaning of the term "changing clothes" in section 3(o) of the Fair Labor Standards Act (FLSA). The outcome of this 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. However, the Supreme Court's opinion also leaves some unanswered questions on the compensability of clothes changing under section 3(o).

Section 3(o)

Under the FLSA, employees must generally be paid for time spent 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 *Sandifer* Case

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 if hardhats, safety glasses and ear plugs were not clothes, the time spent donning and doffing such items was *de minimis* and thus not compensable under the FLSA.

On appeal, the Seventh Circuit affirmed the district court's ruling, including its *de minimis* finding. The Seventh Circuit's decision, however, conflicted with Ninth Circuit authority[1] in a meatpacking case holding that "special protective gear is different in kind from typical clothing" and is not "clothes" under section 3(o). The Fourth, Sixth, Tenth, and Eleventh Circuits had adopted a different definition of clothes that includes anything one "wears," including "accessories" such as ear plugs and safety glasses.

The Supreme Court's Decision

At oral argument on November 4, 2013, the Supreme Court wrestled with the different definitions of "clothes" proposed by U.S. Steel and its employees. The employees argued an item should be excluded "if it is worn to protect against a workplace hazard and was designed to protect against hazards." The employer argued for inclusion of "work outfit[s] industrial workers were required to change into and out of to be ready for work." Filing an *amicus* brief supporting U.S. Steel, the government offered a new middle ground alternative by arguing that, although some protective gear—such as safety glasses and ear protection—are not clothes, donning and doffing such items are "ancillary" to changing clothes and thus non-compensable.

The Supreme Court rejected the definition of clothes proposed both by the employees and the employer. The Court held that the employees' effort to exclude all protective clothing from section 3(o) was too narrow, finding their definition "runs the risk of reducing §203(o) to near nothingness." But, the Court also characterized the "entire outfit" definition proposed by the employer to be a "capacious construction."

Instead, writing for the unanimous court, Justice Scalia resorted to the "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted taking their ordinary, contemporary, common meaning." Referencing contemporaneous dictionaries, the Court held that "clothes" means "*items that are both designed and used to cover the body and are commonly regarded as articles of dress.*" This definition, the Supreme Court stated, "leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices" (such as a wristwatch), but "does not exclude all objects that could conceivably be characterized as equipment." The Supreme Court rejected the view embraced by some courts of appeals that clothes meant anything worn on the body, including tools and accessories, and specifically singled out necklaces, knapsacks, knife holders, and tools as not qualifying as clothes.

Next, addressing the meaning of "changing" clothes, the Supreme Court rejected the employees' argument that protective gear put on over a worker's street clothes is not covered by section 3(o). Rather, the Court held, changing clothes includes not only putting on substitute clothing but also "altering dress."

Applying these principles to the 12 specific items at issue in the case, the Supreme Court found the following nine items to be "clothes": (1) flame-retardant jackets; (2) flame-retardant pants; (3) flame-retardant hoods; (4) a hard hat ("simply a type of hat"); (5) snoods (the industrial equivalent to a skier's "balaclava"); (6) wristlets ("essentially detached shirt-sleeves"); (7) work gloves; (8) leggings ("much like traditional legwarmers, but with straps"); and (9) metatarsal boots ("just a special kind of shoe"). The Court found that these items qualified as "clothes" because they were "both designed and used to cover the body and commonly regarded as articles of dress." On the other hand, the Court concluded safety glasses, ear plugs and a respirator are not "clothes" under section 3(o).

The *De Minimis* Standard

Addressing the compensability of donning and doffing the non-clothes items (safety glasses, ear plugs and a respirator), unlike the Seventh Circuit, the Supreme Court found that a "*de minimis* doctrine does not fit comfortably within the statute at issue here, which, it can be fairly said is all about trifles—the relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs." The Court found no basis in section 3(o) for distinguishing between the minute or so necessary to put on glasses from the minute or so to put on a snood: "If the statute in question requires courts to select among trifles, *de minimis non curat lex* is not Latin for close enough for government work."

1 *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003).

Instead, recognizing that "it is most unlikely Congress meant § 203(o) to convert federal judges into time-study professionals," the Supreme Court crafted a rule that focused on whether the pre-shift or post-shift period "on the whole" can be characterized as "time spent in changing clothes or washing." Thus, if the "vast majority of the time is spent donning and doffing 'clothes'," as defined by the Supreme Court, then "the entire period qualifies, and the time spent putting on and off other items need not be subtracted." Conversely, if the "vast majority of the time in question" is spent putting on and off equipment or other non-clothes items, then the entire period is not covered by section 3(o).

Future Implications of *Sandifer*

Sandifer seems a substantial victory for unionized employers, particularly where they have either expressly negotiated or established a custom and practice of not compensating for "donning" and "doffing" time. The closer an item can be characterized as something akin to ordinary clothing—such as jackets, hats, shoes, and gloves—the more likely it will be regarded as "clothes." Also, in situations where the "vast majority" of pre-shift and post-shift time at issue is spent donning and doffing these clothing items, employers may preserve their agreements and practices, and will not be subject to substantial back-pay liability.

Yet, despite the Court's clarification of the definition of clothes, substantial uncertainty remains in the application of the *Sandifer* holdings. While *Sandifer* makes clear that time spent donning and doffing safety glasses, earplugs, respirators and tools (but perhaps not the tool belt) will weigh against application of section 3(o), the decision only classifies the ends of the spectrum, *i.e.*, when the "vast majority" of time is spent on items that are "clothes" or items that are not. In the middle lies an indeterminate span. Is it the 30-70% range? 40-60%? In those cases, district courts may be forced to rely upon the "time-study professionals" to assess the percentage of time spent on clothes changing, or turn to juries to resolve factual disputes.

Complicating that inquiry, *Sandifer*'s item-by-item analysis also still leaves lower courts to determine whether a whole host of items are "clothes." Although the definition of "clothes" in *Sandifer* is surely helpful, lower courts may still be called upon to determine whether items not specifically at issue in *Sandifer* are clothing for purposes of section 3(o). For example, are hairnets more like a hard hat (clothes) or safety goggles (not clothes)? Where such items take little time to put on or take off, their classification may not matter due to the "vast majority" rule, but in other circumstances it may push the inquiry into the middle span between the spectrum poles.

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