IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LOUISA PEREZ, et al.,	:	
Plaintiffs	:	
	:	
v.	:	Civil No. AMD 06-121
	:	
MOUNTAIRE FARMS, INC., et al.,	:	
Defendants	:	

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MEMORANDUM and ORDER

This action arises under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., as amended by the Portal-to-Portal Act, 61 Stat. 86-87. Now before the court are the parties' cross-motions for summary judgment on the issue of whether 29 U.S.C. § 203(o)[*] relieves the defendants from any obligation to pay wages to the employee/plaintiffs for the time the latter expend in "donning and doffing" certain safety and protective apparel incident to their work in a chicken processing operation. The motions have been fully briefed and a hearing has been held. For the reasons stated within, the court concludes as a matter of law that the time is compensable.

I.

Summary judgment is proper where the moving party demonstrates that there is no

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[*]That provision excludes from compensable "work," time needed to "change clothes," as follows:

> In determining for the purposes of 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 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).

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A dispute is genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. A mere scintilla of evidence is not enough to frustrate a motion for summary judgment. Instead, the pleadings must demonstrate evidence in which the finder of fact could reasonably find for the party opposing judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Although cross-motions for summary judgment do not automatically empower the court to dispense with the determination whether questions of material fact exist, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987), the parties here emphatically agree that the issue is ripe for determination as a matter of law.

II.

Each day before starting work, defendants Mountaire Farms, Inc., and Mountaire Farms of Delaware, Inc. (together "Mountaire" or defendant), require all production employees to put on protective gear for cleanliness and safety purposes. Plaintiffs, employees in Mountaire's Selbyville, Delaware, plant, must don a lab coat, ear plugs, a bump cap (or helmet), an apron, a hair net, safety glasses, boots with steel toes and one or more pairs of four types of gloves used at the company (cloth, plastic, rubber and steel to protect from cutting), before entering the production area. It is undisputed that Mountaire has not paid, and does not pay, for the time spent donning and doffing the aforementioned items at the beginning and at the end of each workday.

The Mountaire orientation manual for new employees describes donning and doffing of personal protective equipment. A section entitled "PERSONAL PROTECTIVE EQUIPMENT" states that "all prescribed safety and personal protective equipment must be used when required and maintained in good working condition." (Pl.'s Ex. B.) Consistent with the manual, Mountaire plays a video entitled "Personal Protective Equipment" for new employees. In addition, Mountaire has devised a "STANDARD OPERATING PROCEDURE FOR MAINTAINING EMPLOYEE PERSONAL EQUIPMENT." "Personal equipment" included "aprons, rain suits, cooler suits, gloves (rubber, chain, & wizard), arm guards or sleeves, goggles or safety glasses, boots, hair nets, beard nets and bump caps in a sanitary condition." Nowhere are these items described as "clothing." (Pl.'s Ex. K.).

III.

As with other FLSA actions,"donning and doffing" cases have seemingly proliferated in recent years. In one such case, *Maciel v. City of Los Angeles*, 542 F.Supp.2d 1082, 1091 (C.D. Cal. 2008), Judge Lew explained:

> For Plaintiff to prevail on [his "donning and doffing] claim, he must prove the following: (1) that the activity of donning and doffing is "work", (2) that donning and doffing is not a preliminary or postliminary activity under the Portal to Portal Act of 1947, and, (3) that the donning and doffing of his personal safety equipment does not fall under the "clothing" exception.

In the case at bar, only the "changing clothes" exception has been put in issue.

Courts have differed on whether the "changing clothes" exception set out in 29 U.S.C. § 203(o), *see supra* n. *, excludes from hours worked the time employees spend donning and doffing certain required items at the beginning and end of each workday. Plaintiffs rely

heavily on the analysis in *Alvarez v. IBP, Inc*., 339 F.3d 894, 904-05 (9th Cir.2003), *aff'd on other grounds*, 546 U.S. 21 (2005), in which the court held that workers employed at a kill and processing meat packing plant should be compensated for time donning and doffing certain types of protective gear.

The meat-packing plant divided its slaughter and processing staffs into separate work crews, allocating its employees to work shifts. *Id*. at 898. The plant production line employees' responsibilities included being at their work stations and prepared to work when the first piece of meat came across the production line. *Id*. Before arriving at their work stations for a shift, these employees were required to complete a series of preliminary tasks. *Id*. At the end of each shift, these employees had to complete these preliminary tasks in inverse order. *Id*.

Even though each employee's preliminary and postliminary duties were distinct, a general pattern emerged. *Id*. As the court explained:

> At the start of a shift, Pasco's plant employees must gather their assigned equipment, don that equipment in one of the Pasco plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors. At the end of every shift, employees must clean, restore, and replace their tools and equipment, storing all of it at the Pasco plant itself.

Id. Specifically:

> all employees must wear a sanitary outer garment that is provided and washed each night by IBP; all employees must wear some form of a plastic hardhat, a hair net, and ear plugs, and all employees-save gutter employees in the slaughter division-must wear a face shield or safety goggles; all employees wear some sort of glove, with most processing employees using a number of sets per day of grip-facilitative and warmth-providing "yellow cotton gloves," and with some slaughter employees donning these yellow gloves and/or plastic

> or rubber gloves for enhanced grip and protection against blood and water saturation; all employees wear liquid-repelling sleeves, aprons, and leggings; all employees wear safety boots/shoes, all of which must be wiped/hosed after the end of a shift; and many employees opt to wear weight-lifting-type belts to prevent back injury. In addition, so-called "knife users" don an assortment of protective gear on their hands, arms, legs, and torsos; this gear often constitutes chain-link (i.e., "mesh") metal aprons, leggings, vests, sleeves, and gloves, and plexiglass arm guards, Kevlar gloves (that is, "can't cut" or "Polar" gloves), and puncture-resistant protective sleeves.

Id. at 898 n.2.

The court held that donning and doffing should be considered "work" (an issue not presented in this case) and then proceeded to consider whether that work should be excluded from compensation under the "changing clothes" exception. According to the court, the fundamental question to be decided was whether "putting on and taking off protective gear constitutes 'changing clothes' as that phrase is used in the statute." The court held that it did not. *Id*. at 903.

The court concluded that legislative history and case law shed scant light on the phrase "changing clothes." Thus, the court gave the statutory language its "ordinary, contemporary, common meaning." *Id*. Guided by the Supreme Court's directive that FLSA exemptions "are to be narrowly construed against the employers seeking to assert them," as well the fact that these exemptions should be "*plainly and unmistakably*" included in the exemption's "terms and spirit," the court rejected the defendant's expansive definition of "changing clothes." *Id*. at 905 (internal quotations and citations omitted). Specifically, the court reasoned that "since the protective gear does not plainly and unmistakably fit within [§203(o)'s] clothing term," *id*. (internal quotations omitted), the court should construe the

exemption against the defendant. Moreover, the court stressed that as distinct from typical clothing, "personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards." *Id*. The court concluded that "from both a regulatory and common sense perspective, changing clothes means something different from donning required specialized personal protective equipment." *Id*. (internal quotations omitted).

Spoerle v. Kraft Foods Global, Inc., 527 F.Supp. 2d 860 (W.D. Wis. 2007), applied *Alvarez* to conclude that time spent by meat processing plant employees putting on and taking off safety and sanitation equipment was compensable under the FLSA. In doing so, the court found § 203(o) to be inapplicable, stating that its "construction of the statute is consistent with both the purpose of § 203(o) and sound policy." *Id*. at 867. The court emphasized that "donning and doffing safety and sanitation equipment on the work site . . . are activities performed for the employer, for a uniquely job-related purpose and are under the employer's control." *Id*. at 868.

Furthermore, the court agreed with the common sense definition of "changing clothes" employed by at least one other court:

> "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." This view makes the relevant questions straight forward: Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason? Under this understanding of "changing clothes," putting on a uniform would not be covered under the FLSA under ordinary circumstances, but donning and doffing equipment used

to protect against hazards particular to the workplace would be covered.

Id. at 867 (citing *Fox v. Tyson Foods, Inc*., 2002 WL 32987224, *6-7 (N.D.Ala. Feb.4, 2002) (internal citation omitted).

Adding that it was unlikely that "Congress intended to allow safety and sanitation to become a bargaining chip in contract negotiations," *id*. at 868, the court concluded that personal protective equipment should not be considered "clothes" within the meaning of §203(o)." *Id*. *See also Lemmon v. City of San Leandro,* 538 F.Supp.2d 1200 (N.D. Cal. 2007) (holding that time police officers spend donning and doffing their uniforms and protective gear is compensable); *Maciel*, *supra* (holding that police officers' donning and doffing of personal safety equipment was compensable as a matter of law).

Mountaire counters the reasoning of the above authorities by citing to a contrary interpretation of the "changing clothes" exception found in *Anderson v. Cagle, Inc*., 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 2008 WL 112189 (June 9, 2008). *Anderson* arose, like this case, in the chicken processing industry. The protective gear at issue in *Anderson* "includ[ed] smocks, hair/beard nets, gloves, and hearing protection." *Id*. at 949. *Anderson* rejected the Ninth Circuit's approach to § 203(o) and adopted a broadly-worded dictionary definition of "clothing:"

> The dictionary defines "clothes" as "clothing," which itself is defined as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." Webster's Third New International Dictionary 428 (unabridged) (1986) ["Webster's"]. This broad definition, we believe, is consistent with the common understanding of the word, and we see no need to distinguish uniforms from protective clothes, for example, worn in the workplace.

Id. at 955. Similarly, the court adopted a broadly-worded dictionary definition of "change:" "to make different," that is, "to modify in some particular way but short of conversion to something else." *Id*. at 956.

Significantly, in rejecting the Ninth Circuit's approach to § 203(o), the Eleventh Circuit reasoned, and Mountaire argues here, while urging that § 203(o) and the related 1949 Amendments to the FLSA were passed to counter courts' liberal interpretations of the FLSA and represented a "pro-management" viewpoint, that § 203(o) is not an "exemption" from coverage (but merely a "definition" *limiting coverage*) under the FLSA and is therefore not subject to the Supreme Court's mandate that FLSA exemptions "be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc*., 361 U.S. 388, 392 (1960). But the legislative history record is inconclusive at best. And even if § 203(o) does not qualify as an "exemption," the Supreme Court has not restricted its "pro-employee" interpretations under the FLSA merely to "exemptions." For example, in its interpretation of "employee" and "production," the Court has stated that it needs to take a "realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion . . . these provisions like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose [and] such a statute must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592-597 (1944) (internal quotations omitted). *Alvarez*, 339 F.3d at 905, and its progeny, have the better of this dispute.

Finally, Mountaire refers the court to a 2002 Department of Labor (DOL) opinion

letter that withdrew three prior DOL opinion letters. In the 2002 letter, the DOL's Wage and Hour Division defined clothing under § 203(o)'s as "includ[ing] the protective safety equipment typically worn by meat packing employees." *See Alvarez*, 339 F.3d at 905 n.9 (citing DOL letters). The DOL's 2002 stance contradicts two earlier letters: a 1997 opinion letter which found that the "plain meaning of 'clothes' in section 3(o) does not encompass protective safety equipment," as well as a DOL letter penned in January 15, 2001, restating the 1997 letter's finding. *Id*. In light of this inconsistency, I am constrained to embrace the *Alvarez* court's conclusion that "[i]n view of conflicting interpretations over such a short period of time, there is no reason for this court to give deference to the 2002 letter." *Id*. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, n. 30 (1987)("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."). (At oral argument, counsel for Mountaire stated that the 2002 letter conformed to DOL interpretations that predated the 1997 and 2001 letters, respectively. There is no evidence in the record to support this contention.)

IV.

At bottom, defendant posits an overly expansive definition of "clothes" that does not distinguish between everyday clothing and personal protective gear. As noted above, the *Alvarez* court clearly differentiated between the two: "The admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to

materials worn by an individual to provide a barrier against exposure to workplace hazards." *Alvarez*, 339 F.3d at 905. Here, the items at issue should be regarded as "protective and safety gear" because they protect plaintiffs from workplace hazards such as chicken dust, excrement, chicken scratching, and contamination and because that is how defendant has treated and regarded these items. *See supra* p. 3.

It is clear from § 203(o)'s plain text that the items being donned and doffed by the plaintiffs at the beginning and end of their shifts should not be considered "changing clothes" for the purposes of the statute. I must look to the statute's plain text for its meaning because neither the FLSA, nor its legislative history, provide a definition of "changing clothes." The *Spoerle* court's two-step analytical approach is helpful here: "Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason?" *Spoerle*, 527 F.Supp. 2d at 867. Here, it is clear that the articles plaintiffs are donning and doffing are not items employees would "normally wear."

V.

For the reasons set forth, plaintiffs' motion for summary judgment is GRANTED and defendant's motion for summary judgment is DENIED.

Filed: June 10, 2008

/s/
Andre M. Davis
United States District Judge