No. 13-0101

In the

Supreme Court of the United States

Spring Term, 2013

ERNIE HENSON, ET. AL.,

Petitioners,

- against -

GROVER WASTE SOLUTIONS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

Brief For The Respondent

Team #32R
Counsel for Respondent

ISSUES PRESENTED

I. Whether Section 203(o) of the Fair Labor Standards Act, as modified by the Portal-to-Portal Act, allows employers to establish a policy of non-compensation for "clothes-changing" time, "travel" time, and "washing-up" time, when a long-standing custom and practice of non-compensation for this time existed, and the employees' latest collective bargaining agreement does not explicitly alter that practice.

II. Whether the National Labor Relations Act recognizes an employer's right to use a social media policy to control employees' posting of crude and offensive comments in publicly visible internet sites, particularly when those comments do not explicitly reference working conditions or terms of employment.

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The decision of the United States District Court for the Eastern District of Wagner in *Henson v. Grover Waste Solutions, Inc.* is published at 101 F. Supp. 3d 1 (E.D. Wgr. 2011). The decision of the Court of Appeals for the Thirteenth Circuit is published at 185 F.3d 26 (13th Cir. 2012). A copy of both opinions is attached as Appendix A.[1]

STATUTES INVOLVED

This case involves interpretation of the Fair Labor Standards Act, 29 U.S.C. § 203(o) (2012) ("FLSA"),[2] the Portal-to-Portal Act, 29 U.S.C. § 254 (2012),[3] and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, (2012) ("NLRA").[4]

STATEMENT OF THE CASE

A. Statement of the Facts

This appeal originated as a collective action claim that Petitioner, Ernie Henson ("Mr. Henson"), filed on behalf of himself and other similarly-situated individuals against the Respondent and former employer, Grover Waste Solutions, Inc. ("Grover").[5] R. at 2. Petitioners as a class are current and former employees of Grover who asserted claims against Grover based on two alleged violations of federal labor law. *Id.* at 1-2. First, Petitioners claimed that Grover illegally refused to pay them for time spent donning and doffing personal protective equipment ("clothes-changing" time), time spent traveling to and from the locker room changing area

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[1] The opinions of the lower courts, together with this Court's Order Granting Certiorari, are attached as Appendix "A."
[2] A copy of the relevant provisions of the FLSA is attached as Appendix B.
[3] A copy of the relevant provisions of the Portal-to-Portal Act is attached as Appendix C.
[4] A copy of the relevant provisions of the NLRA is attached as Appendix D.
[5] Because Mr. Henson was suing on his own behalf and on behalf of other, similarly-situated former employees, Grover will use the term "Petitioners" when referring to Mr. Henson and all similarly-situated current and former employees. When referring to Mr. Henson only, Grover will use Mr. Henson's name only.

("travel" time), and time spent showering after the end of their respective work shifts ("washing-up" time). *Id.* at 1-2. Second, Petitioners claimed that Grover's social media policy, as applied, violated the right to collective action under the NLRA. *Id.* at 2.

1. Grover's Policy on Compensation for "Clothes-Changing" Time, "Travel" Time, and "Washing-up" Time

Grover operates a number of private waste treatment facilities in the State of Wagner, providing waste removal for many businesses, including factories, food service operations, schools, hospitals, and shopping centers. *Id.* at 2. Grover's treatment facilities remove solids and reduce pollutants and organic matter from wastewater. *Id.* at 3. To accomplish these activities, Grover employs over 350 employees, of whom 200 work at the Worth treatment facility, where Mr. Henson worked as a Waste Treatment Specialist ("WTS"). *Id.* at 3-4.

To comply with Wagner state law, and also to protect WTS employees from chemicals encountered in the ordinary course of business, Grover required the WTS employees to wear personal protective equipment ("PPE"), which the employees changed into and out of at the beginning and end of each workday. *Id.* at 4-5. The PPE included gloves, goggles, special clothing, and steel-toed boots. *Id.* at 5. After changing into PPE in the locker room, employees walk approximately five minutes to the time clock area, where they would punch in for the day and travel to their stations to begin work. *Id.* Because this time spent traveling to the time clocks is before the beginning of the shift, it is not uncommon for employees to take time to chat in the hallways before clocking in. *Id.* Grover compensates its employees for work time beginning when they "punch in" at the time clocks, which were in a room next to the supervisor's office. *Id.*

At the end of the workday, employees punched out, went to the locker room, removed their PPE, showered, and put on their street clothes to leave work. *Id.* Employees spent a total

of thirty minutes daily walking to and from the time clocks and their lockers, removing their street clothes, putting on PPE at the start of the shift, and walking back to the lockers, removing PPE, showering, and putting on street clothes at the end of their respective shifts. *Id.* at 5-6.

Since 2003, Grover and the employees' union ("the Union") have negotiated Collective Bargaining Agreements ("CBAs") every three years. *Id.* at 3. At the Worth facility and at Grover's other plants, there has been a longstanding custom and practice excluding "clothes-changing" time, "travel" time, and "washing-up" time. *Id.* Grover's employees and the Union were aware of this custom and practice, which was in existence long before the Union negotiated the first CBA in 2003, and the current CBA does not expressly alter this custom and practice. *Id.*

In contrast to the existing customs and practices, with regard to forward-looking changes to working conditions and practices, the CBA between the Union and Grover contains the following "Local Working Conditions" provision:

> The term "local working conditions" as used herein means specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work or other conditions of employment which the Parties reduced to writing by mutual agreement. No local working condition shall be established except as it is expressed in writing in an agreement approved by the Facility Manager and the local Union President. Only those officials shall be empowered to *change, modify or eliminate* local working conditions.

Id. at 3-4 (emphasis added).[6]

2. Grover's Social Media Policy

To keep up with developing social trends and technology, Grover included a social media policy ("SMP" or "the Policy") in its Employee Handbook, which is distributed to all new employees at orientation. *Id.* at 6. The original policy read: "Always be fair and courteous to

[6] A copy of the relevant portions of the CBA is attached as Appendix E.

fellow associates, customers, members, suppliers or people who work on behalf of Grover Waste Solutions, Inc. We encourage employees to speak with managers, supervisors and co-workers about work-related complaints instead of posting online." *Id.* [7]

In May 2009, Grover amended the Policy, including the following language, which addresses inappropriate content posted online: "If you must post complaints or criticism [on social media], avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying." *Id.*

Grover's human resources department distributed the amendment by placing paper copies of the SMP in the lockers of all employees and emailing it to all employees instructing them to read it and direct any questions to their supervisors. *Id.* New employees received and signed for handbooks at orientation conducted by human resources personnel. *Id.* Managers were responsible for conducting weekly refresher talks on company time, in which they discussed policies in the handbook, including the SMP, and answered employee questions. *Id.* All employees were required to attend the talks and sign in at the meetings. *Id.*

3. The Basis for the Instant Litigation

The instant case arose from incidents that began during a night of drinking on October 26, 2012. *See generally, id.* at 6-9. On the evening of October 26, three Grover employees, Mr. Henson, Mr. Jacobson, and Mr. Clash, were all spending the evening drinking at a local bar. *Id.* at 6-7. The conversation topic turned to feelings among the three that they should be paid for "clothes-changing" time and "washing-up" time. *Id.* at 7. After some more drinks, Mr. Henson

[7] A copy of the relevant portions of the SMP is included in Appendix F.

used his cell phone to create a discussion group called "Who's got a loser boss?" on a popular social networking site. *Id.* After creating the discussion group, Mr. Henson promptly invited twenty people, including Mr. Jacobson and Mr. Clash, to join the group. *Id.* The vast majority of the people whom Mr. Henson invited to view the discussions were not Grover employees. *Id.* Mr. Henson then posted several incendiary messages to the group board, including "I work for some incompetent morons. They're about to get a piece of my mind on Monday! They don't value me, why should I even care?" *Id.* Still at the bar, Mr. Jacobson joined the discussion group and "liked" the post, while Mr. Clash also joined the group and "liked" the post once he had returned home. *Id.*

The following work shift, the employees brought their concerns about "clothes-changing" time and "washing-up" time to the attention of their supervisor, who told them that this was not compensable time under the Union's CBA with Grover. *Id.* at 8. The next day, the employees were released from their employment for violating the SMP, because of the crude postings from the weekend before. *Id.* at 8.

B. Course of Proceedings and Disposition in the Courts Below

After he was released from employment for violating the SMP, Mr. Henson sued Grover on behalf of himself and others similarly situated in the Wagner District Court, claiming that Grover had violated the FLSA by its non-compensation of activities before and after the workday commenced, and also that Grover had violated the NLRA by using the SMP to quell collective action. *Id.* at 1.

Addressing the issue of compensable time under the FLSA, the district court correctly concluded that the time spent donning and doffing PPE was "clothes-changing" time for purposes of § 203(o) of the FLSA and therefore non-compensable under the terms of the Union's

CBA with Grover. *Id.* at 11, 13. However, the district court ultimately decided that because the wearing of PPE was integral and indispensable to the principal activity (i.e. processing waste), the act was "work" within the meaning of the FLSA, and not excluded as a preliminary or postliminary activity under the Portal-to-Portal Act. *Id.* at 14-16. Finally, the court concluded that because the time spent changing clothes, traveling to the work stations, and showering were not *de minimis*, they were compensable as a matter of law. *Id.* at 19-20.

Addressing the NLRA claims, the court concluded that: (1) the SMP was overly broad and unenforceable, *id.* at 22; (2) the Petitioners were engaged in concerted activity, *id.* at 23; and (3) the Petitioners' behavior was not so egregious as to lose the NLRA's protections. *Id.* at 25.

On appeal, the Thirteenth Circuit reversed the district court's judgment. *Id.* at 27. With respect to the FLSA issue, the Thirteenth Circuit agreed with the district court's analysis that the time spent donning and doffing PPE was not compensable under § 203(o). *Id.* at 28. However, the Thirteenth Circuit found the district court's interpretation of donning and doffing PPE as an integral and indispensable activity flawed. *Id.* at 30. As the court explained, if the Union and Grover agreed that "clothes-changing" time would be non-compensable under § 203(0), such time could not be an integral and indispensable activity under the FLSA as a matter of law. *See id.*

The Thirteenth Circuit reversed the district court's judgment on the NLRA issue as well. *See id.* at 34-29. With respect to the SMP, the Thirteenth Circuit rejected the contention that the SMP was overbroad, reasoning that the SMP could not reasonably be construed as restricting Section 7 activity, and moreover that the SMP properly addressed legitimate business interests. *Id.* at 35-36. Additionally, the Thirteenth Circuit found that Mr. Henson was not engaged in concerted activity when he posted his comments to the social media website, because his

comments were actually personal gripes, rather than a call to action to his fellow employees. *Id.* at 37-38. Finally, the Thirteenth Circuit found that Petitioners' comments to the social media website lost the protection of the NLRA, because of the comments' "unprofessional and unjustified" quality. *Id.* at 38.

Petitioners sought review in this Court, which granted Certiorari on January 11, 2013, with respect to the following two questions:

1. Whether an employer's failure to pay waste treatment facility employees for the time spent donning and doffing, travel time to and from the locker room, and wash-up time, violate Section 203(o) of the Fair Labor Standards Act.

2. Whether an employer commits an unfair labor practice under the National Labor Relations Act by promulgating a social media policy that bars employees from posting statements online "that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive or intimidating" and enforcing the policy by discharging employees who posted online statements protesting their working conditions.

See R. at Appendix A. As will be demonstrated herein, the Fair Labor Standards Act allows an employer to exclude "clothes-changing" time, "travel" time, and "washing-up" time from compensable work time. Additionally, the National Labor Relations Act allows an employer to prohibit employees from posting offensive and obscene comments concerning the employer on the internet, and discharging employees for violating the policy does not violate the National Labor Relations Act. Accordingly, Respondent respectfully requests that this Court affirm the Thirteenth Circuit's judgment.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's judgment for two reasons. First, the plain language of the FLSA and the better-reasoned decisions of the courts of appeals support a finding that the FLSA excludes from "time worked" time spent changing clothes, traveling from an employee locker room to duty stations, and time spent showering at the end of a shift, where a union and an employer have agreed to exclude such time from compensation. Second, the NLRA allows employers to use social media policies to ensure that employees do not harm employer reputations through inappropriate postings, where, as here, the policy is not overbroad, the postings themselves did not constitute Section 7 activity, and the employees' comments are so egregious as to lose the NLRA's protection in any event.

Section 203(0) of the FLSA excludes time spent donning and doffing "clothes" from compensable "work," so long as a CBA expressly excludes such time from compensable work, or a custom or practice of non-compensability exists. The instant case falls squarely within Section 203(o)'s parameters. First, as both the district court and the Thirteenth Circuit correctly concluded, the PPE items Grover's waste treatment employees wear are "clothes" under Section 203(o). Almost every court of appeals to address the issue whether PPE is "clothes" has concluded that it is, and the lone exception on this issue is based on a mistaken understanding of 203(o)'s status as an "exemption," rather than as a "definition," section of the FLSA.

Proceeding to the second requirement of Section 203(o), there is a pre-existing custom and practice of non-compensability at Grover's facilities, such that this custom or practice became an implied term of Grover's CBA with the Union, excluding "clothes-changing" time and "washing-up" time from compensable work. This custom and practice of non-

compensability long pre-existed the current CBA, and courts have consistently held that a CBA incorporates a pre-existing custom and practice when it does not explicitly address that issue.

The Portal-to-Portal Act does not, as the district court erroneously concluded, require a different result. Although this Court has interpreted the Portal-to-Portal Act to require compensability of preliminary and postliminary activities which are "integral and indispensable" to the principal work activities, a Section 203(o) activity cannot become a "principal" work activity. As the Seventh Circuit has explained, interpreting this Court's decision in *Alvarez*, a preliminary or postliminary activity cannot be compensable when it is excluded by Section 203(o). To hold otherwise would lead to the evisceration of Section 203(o)'s definition of "work." Regardless, even if this Court were to hold that Section 203(o) activities could still be compensable as preliminary or posliminary activities, the donning and doffing of PPE in the instant case is not integral or indispensable to the principal activities of work. Accordingly, this Court should affirm the Thirteenth Circuit's judgment on the FLSA issue.

This Court should affirm the Thirteenth Circuit's judgment on the NLRA issue for two reasons. First, the Thirteenth Circuit correctly held that Grover's SMP was lawful under Section 7. This is because the SMP is not overbroad, and further because it only addresses legitimate business concerns like employee morale and the employer's reputation in the community.

Second, the Thirteenth Circuit correctly held that Grover's enforcement of its SMP was lawful under the NLRA. Grover enforced the SMP when it released Petitioners after their offensive posts on the social networking site. This enforcement was lawful under the NLRA because the employees were not engaged in protected concerted activity. Even if this Court finds that the employees were engaged in protected concerted activity, Grover's enforcement was still

lawful. Grover's enforcement was still lawful because the Petitioners' conduct on the social media site was egregious enough to lose protection.

This Court should affirm the Thirteen Circuit's judgment. It is clear from case law and the facts of this case that Grover and the Union agreed that time spent changing into PPE before work, traveling to duty stations, and showering at the conclusion of the workday was non-compensable, and neither the FLSA nor the Portal-to-Portal Act requires a contrary result. Moreover, this Court should affirm the Thirteenth Circuit's judgment approving Grover's SMP. As the Thirteenth Circuit correctly concluded, the SMP is not overbroad, does not infringe on Section 7 activity, and Petitioners' behavior was so outrageous that it was beyond the NLRA's protection in any event. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

ARGUMENT

I. SECTION 203(o) OF THE FAIR LABOR STANDARDS ACT DOES NOT REQUIRE GROVER TO COMPENSATE PETITIONERS FOR "CLOTHES-CHANGING" TIME BEFORE AND AFTER WORK SHIFTS, "TRAVEL" TIME TO AND FROM THE EMPLOYEE LOCKER ROOM, AND "WASHING-UP" TIME AFTER WORK SHIFTS.

Section 203(o) of the FLSA excludes from the definition of the word "work" time spent "changing clothes" and "washing," so long as a CBA expressly excludes such time from compensable work, or a custom or practice of non-compensability exists. 29 U.S.C. § 203(o). The instant case falls squarely within Section 203(o)'s exception. First, as both the district court and the Thirteenth Circuit correctly concluded, the PPE items which Grover's waste treatment employees wear are "clothes" within the meaning of the FLSA. R. at 11, 13, 28. Almost every court of appeals to address the question of whether PPE is Section 203(o) "clothes" has concluded that it is, and the lone exception on this issue is based on a mistaken understanding of Section 203(o)'s status as an "exemption" section rather than a "definition" section of the FLSA.

Compare Sandifer v. U.S. Steel Corp., 678 F.3d 590, 593-94 (7th Cir. 2012) (concluding that PPE was "clothes" under Section 203(o)), *with Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *affd. on other grounds*, 546 U.S. 21 (2005) (concluding that PPE was not "clothes" because Section 203(o) was an FLSA "exemption," even though Section 203 is entitled "Definitions").

Addressing the second requirement of Section 203(o), there is a pre-existing custom and practice of non-compensation for "clothes-changing" time and "washing-up" time at Grover's facilities, and this custom and practice became an implied term of Grover's CBA with the Union. *See* R. at 3. *See also Turner v. City of Philadelphia*, 262 F.3d 222, 226 (3d Cir. 2001) (interpreting the words "custom or practice" in Section 203(o) as simply restating the well-established principle that a particular custom or practice can become an implied term of a CBA). Thus, when Grover negotiated its latest CBA, the custom and practice of non-compensation for "clothes-changing" time and "washing-up" time became an implied term of the CBA. *See id.*

Excluding "clothes-changing" time and "washing-up" time from compensation leaves only Petitioners' claim that "travel" time to and from the locker room should be compensable. However, Congress excluded travel time to and from the principal place of employment from the FLSA's definition of "work" with the Portal-to-Portal Act. *See* 29 U.S.C. § 254(a)(1). This Court has interpreted the Portal-to-Portal Act to require compensability of travel time only when it occurs between "principal activities" during the work day. *See Alvarez*, 546 U.S. at 37. On the other hand, Petitioners claim, and the district court curiously agreed, that "clothes-changing" time, "travel" time, and "washing-up" time could be compensable because they are preliminary and postliminary activities which are integral and indispensable to the principal work activities. *See* R. at 14-16.

In contrast to the district court's opinion, the plain language of the FLSA, the better-reasoned opinions of the courts of appeals have interpreted this Court's decision in *Alvarez* to provide that a preliminary or postliminary activity cannot be compensable when it is excluded by Section 203(o). *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596-97 (7th Cir. 2012). To hold otherwise would lead to the evisceration of Section 203(o)'s definition of "work." *Id.* These well-reasoned opinions are also consistent with dicta from this Court's decision in *Steiner v. Mitchell*, which reasoned, in part, that the ability to exclude activities like "travel time" under Section 203(o) actually supported this Court's interpretation of the Portal-to-Portal Act's "travel" time exclusion. 350 U.S. 247, 255 (1956). Regardless, even if Section 203(o) activities somehow could be compensable preliminary or postliminary activities, the wearing of PPE in the instant case is not integral or indispensable to the principal activities of work.

Finally, the Department of Labor ("DOL") position on the compensability of "clothes-changing" time and "travel" time is entitled to no deference at all. *Sandifer*, 678 F.3d at 599. As the Seventh Circuit has explained, the constantly shifting policy position on this point (it has changed positions twice in the last fifteen years) suggests that the DOL's positions are not closely tied to well-reasoned legal arguments. *Id.* Thus, this Court should affirm the Thirteenth Circuit's judgment on the compensability of time spent changing clothes, traveling to the work stations, and washing up at the completion of Petitioners' shifts.

A. Petitioners' "Clothes-Changing" Time and "Washing-Up" Time is Non-Compensable Under the FLSA as an Implied Term of Grover's Collective Bargaining Agreement with the Union.

Section 203(o) of the FLSA provides that "changing clothes" and "washing" at the beginning or end of the workday is excluded from the definition of "hours worked" if such activities have been excluded from measured work time under an explicit agreement in a CBA,

or as a custom or practice of non-compensability. 29 U.S.C. § 203(o). Stated differently, Section 203(o) applies if two conditions exist: first, the activities at issue must constitute "changing clothes" or "washing" at the beginning or end of the workday. *Id.* Second, there must be a collective bargaining agreement which excludes from measured working time the time spent engaging in these activities. *Id.* Both conditions exist in the instant case.

1. The Courts of Appeals overwhelmingly agree that the PPE equipment which Petitioners wear at work constitutes "clothes" under FLSA Section 203(o), with the result that "clothes-changing" time can become non-compensable under a collective bargaining agreement.

The PPE which Petitioners change into and out of at the beginning and end of their shifts constitutes "clothes" under Section 203(o). While the FLSA does not expressly define the term, and this Court has not addressed the issue, established rules of statutory interpretation support this conclusion, because the plain and ordinary meaning of the word "clothes" includes the protective clothing Petitioners wear during work hours. *See Alabama Tissue Ctr. Of Univ. of Ala. Health Serv. Found., P.C. v. Sullivan*, 975 F.2d 373, 378 (7th Cir. 1992) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). As a consequence, when the plain language of Section 203(o) is applied to the PPE items at issue here, the items constitute "clothes."

To determine the ordinary meaning of a word or phrase, courts begin with the dictionary definition of the word. *United States v. England*, 507 F.3d 581, 588-89 (7th Cir. 2007). Webster's 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). With one

exception, every circuit court of appeals addressing the term "clothes" under Section 203(o) has construed the word "clothes" in Section 203(o) consistently with this definition as a "covering for the human body or garments in general." *See, e.g.*, *Sandifer*, 678 F.3d at 593-94.[8]

Only the Ninth Circuit has reached a contrary result, adopting a minority view in *Alvarez*, 339 F.3d at 905. In *Alvarez*, the Ninth Circuit erroneously characterized Section 203(o) as an "exemption provision" of the FLSA and, thus, concluded it must be construed narrowly. *Id.* Under a restrictive interpretation driven by the mistaken premise that Section 203(o) is an "exemption," the court confined the term "clothes" to uniforms, pants, shirts, and other general work clothes, which would exclude the type of PPE equipment Petitioners use here. *See id.*

However, in reality, Section 203(o) is a definitional section, which excludes from the term "hours worked" the donning and doffing of clothes if excluded by a CBA, or pursuant to a custom or practice. *See Sandifer,* 678 F.3d at 595. The status as a definition rather than an exemption was also most recently the basis for the Seventh Circuit's critique of *Alvarez. Sandifer*, 678 F.3d at 595 (declining to follow *Alvarez* and explaining that the Ninth Circuit "seemed to have forgotten that [Section 203(o)] is not found in the section of the FLSA that creates exemptions.").

In the instant case, it is clear that the type of PPE worn by Petitioners is "clothes" as interpreted by the courts correctly applying Section 203(o). For instance, the Record reflects that Petitioners' PPE includes gloves, goggles, special clothing, and steel-toed boots. R. at 5. Courts

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[8] *See also Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 (4th Cir. 2009) (poultry workers' PPE, including USDA-required smocks were clothing); *Bejil v. Ethicon. Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (same); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614-15 (6th Cir. 2010) (same); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1140-41 (10th Cir. 2011) (concluding that PPE including frocks, aprons, gloves, boots, and hardhats was clothes under Section 203(o)); *Anderson v. Cagle's*, 488 F.3d 945, 955 (11th Cir. 2007) (same).

have held that each and every item in this list is "clothes" within the meaning of Section 203(o). *See, e.g., Anderson*, 477 F.3d at 955 (holding that special smocks were Section 203(o) clothing); *Kassa*, 487 F. Supp. 2d at 1066-67 (holding that glasses, boots and smocks were Section 203(o) clothing).[9] Consequently: (1) PPE is "clothing" under Section 203(o); and (2) the particular types of PPE which Petitioners wear is included in that category of clothing.

2. "Washing-up" time at the end of the workday also is not compensable under Section 203(o)'s express language.

While the courts have had to engage in some interpretation to determine whether PPE is "clothing" under Section 203(o), the question of whether "washing-up" time is included in Section 203(o) is much more straightforward - Section 203(o) expressly excludes "washing" at the end of the workday from the definition of "hours worked." *See* 29 U.S.C. § 203(o).

In the instant case, Petitioners shower at the conclusion of their shifts, after removing their PPE. R. at 5. Common sense, case law, and advisory opinions from the Department of Labor make clear that this showering is "washing" for Section 203(o) purposes. *See, e.g., Saunders*, 1991 WL 529542, at *4 (noting that Section 203(o) construes "washing" to include bathing, and that the legislative history of Section 203(o) includes language describing "washing" as "cleaning his person."). *See also Hoover v. Wvandotte Chem. Corp.*, 455 F.2d 37 (5th Cir. 1972) (holding that time spent showering was excluded from "hours worked" under Section 203(o)); U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA 2002-2 (June 6, 2002) (quoting the same legislative history as *Saunders*, *supra*). Accordingly, both "clothes-changing" time and "washing-up" time is non-compensable under Section 203(o).

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[9] *See also Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1321-22 (M.D. Ala. 2004) (holding that smocks, aprons, rubber gloves, and arm guards were Section 203(o) clothing); *Saunders v. John Morrell & Co.*, No. C-88-4143, 1991 WL 529542, at *4 (N.D. Iowa Dec. 24, 1991) (assuming that steel-toed shoes, rubber gloves, rubber aprons, goggles, and other PPE was Section 203(o) clothing as an implied term of a CBA).

3. Grover's long-standing custom and practice of non-compensability for "clothes-changing" time and "washing-up" time has become an implied term of its collective bargaining agreement with the Union.

As mentioned above, the inclusion of "clothes-changing" time and "washing-up" time within Section 203(o)'s list of non-compensable activities is only the first half of the analysis – the second half requires that this practice of non-compensability must be either an express or implied term of a CBA. *See* 29 U.S.C. § 203(o). Section 203(o) contemplates that non-payment of "clothes-changing" time may be an express or implied term of a CBA. *See id.* A mutually-accepted custom or practice may become an implied CBA term. *See Turner,* 262 F.3d at 226.

Here, there is no express provision of Grover's CBA which addresses "clothes-changing" time and "washing-up" time. *See* R. at 3. Therefore, Section 203(o) only operates to exclude this time if an implied term of Grover's CBA excludes it. *See* 29 U.S.C. § 203(o). The Record reflects that there has been a long-standing custom and practice of excluding "clothes-changing" time and "washing-up" time at Grover's facilities, and this custom and practice pre-dates the latest CBA, which is silent on the issue. *See* R. at 3.

Courts addressing the issue have confirmed that the long-standing treatment by Grover of "clothes-changing" time and "washing-up" time as non-compensable constitutes an agreement, custom or practice between the Petitioners and Grover. *See Kassa*, 487 F. Supp. 2d at 1068. The court in *Kassa* explained that the factors relevant to determining whether an agreement has become an implied term of a CBA include: (1) length of time the practice has existed; (2) knowledge of the practice by the parties; and (3) acquiescence to the practice. *See id.* at 1070. These factors are sufficient to prove a custom and practice even if no formal negotiations occurred concerning compensable time for a particular Section 203(o) activity. *See id.* at 1070-71. *See also Anderson*, 488 F.3d at 958 ("Absence of negotiations cannot in this instance equate

to the ignorance of the policy. Rather, it demonstrates acquiescence to it."); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1141 (10th Cir. 2011) (same).

Here, all three of the factors described in *Kassa* are present, demonstrating that non-compensability for time spent changing clothes and showering has become an implied term of the CBA. 487 F. Supp. 2d at 1068. For instance, the district court noted that Grover has had a custom of non-compensation for changing and showering for the last ten years. *See* R. at 3. The district court also took note of the second factor – knowledge. *See id.* ("The employees and Union were aware of this custom and practice that was in existence long before the Union negotiated the first CBA in 2003."). Finally, the factor of "acquiescence" is inferable from the fact that the issue of non-compensation has never been changed. *See Anderson*, 488 F.3d at 958 (concluding that an absence of negotiations demonstrated acquiescence). Accordingly, the custom and practice of non-compensation for "clothes-changing" time and "washing-up" time has become an implied term of the CBA, defeating Petitioners' claims to the contrary.

B. "Travel" Time and the Section 203(o) Activities of "Clothes-Changing" time and "Washing-Up" Time are Not Compensable Under the Portal-to-Portal Act.

The Portal-to-Portal Act provides that "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" is non-compensable. 29 U.S.C. § 254(a)(1) (2012). Interpreting the Portal-to-Portal Act, this Court has explained that walking time is compensable only if it occurs in between the employees' principal activities. *See Alvarez*, 546 U.S. at 37.

Here, the only principal activity occurs after Petitioners arrive at their duty stations for the day. This is because activities that occur in the locker room before and after Petitioners' paid shifts ("clothes-changing" time and "washing-up" time) are Section 203(o) activities, which are

not included in measured working time. 29 U.S.C. § 203(o). As a consequence, Section 203(o) activities cannot be considered principal activities as a matter of law, and do not start or end the workday. U.S. Dept. of Lab. FLSA 2007-10, 2007 WL 2066454 (May 14, 2007); *see also Ciemnoczolowski v. P.O. Ordnance Corp.*, 228 F.2d 929, 933 (2d Cir. 1955) ("If the term 'principal activity' was intended to include *ipso facto*, activity necessarily incident to the principal activity there would be no possibility of applying [Section 203(o)].").

The consequence of Section 203(o) activities not being principal activities is that "travel" time after a Section 203(o) activity and immediately before a Section 203(o) activity is not compensable. *Id.* Because Petitioners' work clothes here are also preliminary and postliminary, the donning and doffing necessarily cannot be "principal activities" under the express language of the Portal-to-Portal Act. *See* 29 U.S.C. § 254(a)(1) (excluding payment for "activities which are preliminary and postliminary to said principal activity or activities"); *Alvarez*, 546 U.S. at 37. Likewise, walking after a preliminary activity and immediately before a postliminary activity is expressly excluded from hours worked by the Portal-to-Portal Act. 29 U.S.C. § 254(a)(1). *See also* 29 C.F.R. § 790.4(b) (noting that under the Portal-to-Portal Act, an employer need not pay for walking time that "take[s] place before or after the performance of all of the employee's 'principal activities' in the workday").

This Court has held that an activity which occurs before or after the principal activity of work (a "preliminary" or "postliminary" activity), may be considered part of the principal activity and be compensable under the Portal-to-Portal Act if the preliminary or postliminary activity is "integral and indispensable" to the principal activity. *Steiner*, 350 U.S. at 248-49. The district court erroneously concluded that this allowed for the possibility that a Section 203(o) activity, which is normally non-compensable, could independently be made compensable by the

Portal-to-Portal Act under the "integral and indispensable" rationale. *See* R. at 14-16. However, the plain language of the Portal-to-Portal Act, this Court's informative reasoning in *Steiner*, and the better-reasoned decisions of the courts of appeals confirm that the district court's interpretation cannot be correct. While it is true that the Department of Labor does not agree with the Thirteenth Circuit's interpretation on this issue, the Department of Labor's opinion is entitled to no deference, because it frequently changes.

1. The plain language of the FLSA shows that Section 203(o) time cannot be compensable under the Portal-to-Portal Act.

If a "statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal quotations marks omitted). Where multiple statutory provisions are involved in the analysis, they must be read in harmony with one another. *Adler v. N. Hotel Co.*, 175 F.2d 619, 621 (7th Cir. 1949). Statutory interpretation requires courts to look at words and their meaning not in isolation, but in the context of the statutory scheme in which the words appear. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

In this case, multiple statutory provisions that are part of the same Act—the FLSA—are at issue. The analysis begins with the plain language of Section 203(o). Section 203(o) excludes "clothes-changing" and "washing" from the hours for which an employee is "employed." 29 U.S.C. § 203(o). The key word in Section 203(o) is "employed." Similarly, under the FLSA's overtime provision, employers are only liable for overtime for activities that constitute "employment." *See* 29 U.S.C. § 207(a)(1) (providing for overtime compensation for "*employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which [employees] are *employed*.") (emphasis added). Additionally, the Portal-to-Portal Act's "travel time" exemption, Section 254(A)(1), also uses the word

"employed" when describing a "principal activity." *See* 29 U.S.C. § 254(A)(1) (excluding from compensation time spent "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.") (emphasis added).

Read together, the plain language of these three sections shows that § 203(o) activities cannot be "principal activities" as a matter of law. Under Section 254(a)(1) of the Portal-to-Portal Act, being "employed" is a condition precedent to being engaged in a "principal activity." *See id.* But Section 203(o) activities are, by definition, not "employment" or "hours worked." *See* 29 U.S.C. § 203(o). Quite the contrary, under the plain language of the statute, they are "excluded" from the "hours for which an employee is employed." *See id.* As a consequence, an activity that does not constitute employment under the FLSA cannot, for purposes of determining coverage under the FLSA, constitute a "principal activity" under the Portal-to-Portal Act. The reason why is that one cannot be simultaneously "employed" for purposes of defining a principal activity under the Portal-to-Portal Act, and not "employed" for purposes of overtime compensation under Section 203(o). So, regardless of whether activities like "clothes-changing" time, "travel" time, and "washing-up" time could, in theory, be "principal activities," the operation of Section 203(o) dictates that they cannot also be a "principal activity" an employee is employed to perform for purposes of the Portal-to-Portal Act. *See* 29 C.F.R. § 790.2(a) at n.7.

Adopting a contrary reading of these sections of the FLSA "would render every statute a chameleon" by "establish[ing] . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 382, 386 (2005). Specifically, permitting a Section 203(o) activity to also be a "principal activity" under the Portal-to-Portal Act would require assigning one meaning to the word "employ" in Sections

203(o), 206, and 207(a), and another meaning to the word "employ" for purposes of Section 254(a)(1). This is impermissible. *See U.S. v. La Faive*, 618 F.3d 613, 617 (7th Cir. 2010) ("[a]bsent evidence of Congress's intent to the contrary, we assume that Congress intended the same words used close together in a statute to have the same meaning."). It would also be inconsistent with DOL's own regulations, which make clear that "the terms 'employer' and 'employee' . . . when used in the Portal-to-Portal Act, in relation to the [FLSA], have the same meaning as used in the latter Act." 29 C.F.R. § 790.2 at n.7; *see also* 29 C.F.R. § 790.2(a) (noting that the Portal-to-Portal Act's effect on the FLSA must be determined by viewing the two acts as interrelated parts of the entire statutory scheme). Accordingly, the plain language of the FLSA and the Portal-to-Portal act show that Section 203(o) activities cannot be "principal activities" as a matter of law.

2. The better-reasoned decisions of the courts have adopted this construction of the Portal-to-Portal Act and Section 203(o), which is consistent with informative dicta from this Court's decision in *Steiner*.

Although courts have split on this issue, the better-reasoned decisions have concluded that Section 203(o) activities cannot also be "principal activities" that start or end the continuous workday. Three Courts of Appeals—the Fourth, Seventh, and Tenth Circuits—have affirmed the dismissal of claims for compensation for travel time similar to those at issue here, after holding that travel time before or after a § 203(o) activity (i.e., donning, doffing, and washing) was not subject to the FLSA. *See, e.g.*, *Sepulveda*, 591 F.3d at 212. In each case, the predicate for the denial of the travel time claims was finding that "clothes-changing" time and "washing-up" time that preceded and followed the travel time was not time for which the employee was "employed" under Section 203(o). *See id.*

In the Fourth Circuit's decision in *Sepulveda*, 591 F.3d at 209, the plaintiffs claimed they were entitled to compensation for time they spent donning and doffing personal protective equipment and traveling to and from their workstations. *Id.* at 212. The court held that "[b]oth Section 203(o) and the Portal-to-Portal Act, enacted two years earlier, were intended to give employers and employees greater latitude to determine when the workday begins and ends." *Id.* The Seventh and Tenth Circuits have agreed with *Sepulveda*. *See, e.g.*, *Sandifer*, 678 F.3d at 593-94 (7th Cir.); *Salazar*, 644 F.3d at (10th Cir.).[10]

In addition to these decisions, dicta from this Court's decision in *Steiner v. Mitchell*, 350 U.S. 247, 248-49 (1956), also suggests that Section 203(o) activity cannot be a principal activity. *Steiner* noted that its conclusion that preliminary and postliminary activities could be compensable under the Portal-to-Portal Act was actually strengthened by the existence of Section 203(o), which implied that this default position could be varied by agreement in a CBA. *See id.* at 255. Accordingly, the better-reasoned opinions of the courts favor a holding that Section 203(o) time cannot be a "principal activity" as a matter of law. *See id.*

3. Changing into and out of the PPE items at issue is not integral and indispensable to Petitioners' principal work activities; therefore, it cannot itself be a principal work activity.

Even assuming that Section 203(o) "clothes-changing" time could be a principal activity under this Court's "integral and indispensable" criteria, the non-unique PPE at issue in this case

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[10] *See also Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 724 (E.D. La. 2008); *Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1011 (W.D. Tenn. 2008); *Hudson v. Butterball*, No. 08-5071, 2009 WL 3486780, at *4 (W.D. Mo. Oct. 14, 2009). The Sixth Circuit has arrived at a different conclusion, but with no analysis at all. *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010). In *Franklin*, the court noted disagreement on this issue among district courts, but simply held that it "agree[d] with the courts that have taken the position that . . . we must consider whether the time spent donning and doffing the standard equipment and uniform is integral and indispensable to [the employee's] job." *Id.* at 619. The Seventh Circuit has criticized the Sixth Circuit's lack of analysis of the interaction between the Portal-to-Portal Act and Section 203(o). *Sandifer*, 678 F.3d at 598 ("[T]he *Franklin* opinion offers only a conclusion, not reasons[.]").

is not integral and indispensable to the principal work activities. Although this Court has not considered the issue, many courts of appeals have analyzed whether donning and doffing of items similar to those at issue here is preliminary and postliminary under the Portal-to-Portal Act. *See, e.g., Gorman v. The Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007). In *Gorman*, the court held that donning and doffing helmets, safety glasses, and steel-toed boots was not "integral and indispensable" to the jobs of nuclear power station employees. 488 F.3d at 594. Other courts have reached similar results. *See e.g., Reich v. IBP*, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (holding that the donning of non-unique protective gear such as safety glasses, ear plugs, hard hats, and safety shoes was not integral and indispensable, reasoning that "[r]equiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a business person with a suit and tie, or a judge with a robe."); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001) (holding that donning and doffing of non-unique sanitary and safety PPE was not integral and indispensable to the employees' jobs).

Turning to the instant case, it is clear that the type of PPE worn by Petitioners is exactly the same type of non-unique PPE worn in a similar industrial setting as the cases cited above. For instance, the Record reflects that Petitioners' PPE includes gloves, goggles, special clothing, and steel-toed boots. R. at 5. As the *Gorman* court explained, goggles and steel-toed boots are not integral and indispensable in the nuclear power context. 488 F.3d at 594. Similarly, gloves and special clothing such as United States Department of Agriculture-mandated smocks and aprons are not integral and indispensable to poultry line workers, who often have to deal with biological materials, just as the Petitioners here do. *Compare Pressley v. Sanderson Farms, Inc.*, No. H–00–420, 2001 WL 850017, at *2 (S.D. Tex. Apr. 23, 2001), *with* R. at 4 (noting that

Grover's employees used the PPE, which was required by law, to protect themselves from chemical and biological hazards). Accordingly, even if this Court were inclined to find that "clothes-changing" time could be a principal activity even though it is excluded by Section 203(o), there are no facts in the Record to suggest that the PPE at issue in this case actually is integral and indispensable to Petitioners' duty positions. *See id.*

4. Current Department of Labor Guidance on this issue is inconsistent and entitled to no deference.

Finally, current DOL guidance on this issue deserves no deference. Whether a court defers to an agency opinion will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944). Here, DOL guidance on whether a Section 203(o) activity can be a "principal activity" should be afforded no deference because of multiple reversals of its position on the issue. *See id.* Moreover, the agency's latest position is poorly reasoned and unpersuasive, as it ignores the plain text of the Portal-to-Portal Act and Congressional intent. In 2007, the DOL issued an Opinion Letter interpreting its own regulations defining "principal activities" under the Portal-to-Portal Act. *See* U.S. Dep't of Labor Op. Letter, FLSA 2007-10, 2007 WL 2066454 (May 14, 2007) (the "2007 Opinion Letter"); 29 C.F.R. § 790.8(a) (defining "principal activities"). There, the DOL concluded that in enacting Section 203(o), "Congress plainly excluded activities covered by" that provision "from time that would otherwise be '[h]ours worked.'" 2007 WL 2066454, at *1. Accordingly, "activities covered by [Section 203(o)] cannot be considered principal activities and do not start the workday." *Id.*

In 2010, the DOL issued Administrative Interpretation 2010-2, changing its interpretation of its regulations. *See* U.S. Dep't of Labor Admin. Interp., FLSA 2010- 2, 2010 WL 2468195

(June 16, 2010) (the "2010 AI"). This Interpretation declared, for the first time, that "clothes changing covered by [Section 203(o)] may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable." *See id.* The 2010 AI did not cite any material changes since its 2007 Opinion Letter that required the 2010 change. *See id.* The DOL's website, next to the link for the 2007 Opinion Letter, simply states: "This letter has been withdrawn." *See* http://www.dol.gov/whd/opinion/flsa.htm#2007 (last visited Feb. 15, 2013).

Where, as here, an agency alters its interpretation of a statute, its persuasiveness is diminished. *See Salazar*, 644 F.3d at 1130 (declining to afford *Skidmore* deference to the 2010 AI in part based on the DOL's erratic guidance). In addition, the 2010 AI is not well-reasoned and is inconsistent with the language of Section 203(o) and the Portal-to-Portal Act, as well as the legislative intent in enacting these two provisions. For instance, it adopts the reasoning of what it calls the "leading case" on this issue, *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043 (W.D. Pa. Sept. 3, 2008), and cites other district courts that have followed *Figas*. *See id.* But *Figas* and its progeny did not engage in any analysis of the statutory language, or the intent of the Congress, but focused solely on whether the activity should be "integral and indispensable." *See generally, id.* Consequently, no deference is appropriate here, and this Court should not consider the current interpretation of the DOL and affirm the Thirteenth Circuit's judgment.

II. BOTH GROVER'S SOCIAL MEDIA POLICY AND ITS ENFORCEMENT OF THIS POLICY WERE LAWFUL UNDER THE NATIONAL LABOR RELATIONS ACT.

This Court should affirm the Thirteenth Circuit's judgment for two reasons. First, the Thirteenth Circuit correctly held that Grover's SMP was lawful under Sections 7 and 8(A)(1) of the NLRA, because the SMP is not overly broad, and Grover did not violate the NLRA in

enforcing the SMP. Section 7 of the NLRA protects an employee's right to engage in "self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012). Section (8)(A)(1) of the NLRA provides, "It shall be an unlawful labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] of this title." 29 U.S.C. § 158(A)(1) (2012). As the Thirteenth Circuit correctly held, Grover's SMP is lawful under the NLRA because the SMP is not overly broad. R. at 35-36. As the Thirteenth Circuit explained, the SMP does not restrict, restrain, or interfere with the employees' Section 7 rights, because no reasonable employee could construe the egregious conduct prohibited in the SMP to be examples of protected activity. *See id.*

Second, the Thirteenth Circuit correctly held that Grover's enforcement of its SMP was lawful under the NLRA. R. at 37-39. Petitioners were released from their employment when they violated Grover's SMP through their posts, which included crude and offensive language, on the social networking site. R. at App. D. This enforcement was lawful under the NLRA because the employees were not engaged in protected concerted activity. *See* R. at 37. However, even if this Court finds that the employees were engaged in protected concerted activity, Grover's enforcement was still lawful because Petitioners' conduct was egregious enough to lose protection of the NLRA, as the Thirteenth Circuit correctly concluded. *Id.* at 38-39. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

A. Grover's Social Medial Policy Is Not Overly Broad Under the National Labor Relations Act

The Thirteenth Circuit correctly held that Grover's SMP was not overly broad under Section 8(a)(1) of the NLRA. *Id.* at 35-36. An employer's work rule violates Section 8(a)(1) when the rule "would reasonably tend to chill employees in the exercise of their Section 7

rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998). The NLRB has established a two-part test to determine if a work rule would reasonably tend to chill employees' Section 7 rights in *Lutheran Heritage Village-Livonia*. 343 N.L.R.B. 646, 647 (2004). First, a work rule is unlawful if it explicitly restricts a Section 7 protected activity. *Id.* Second, if a rule does not explicitly restrict a Section 7 activity, the rule is unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.*

Here, the SMP does not meet any of the criteria for overbreadth. First, the policy does not expressly restrict any Section 7 activity. *See* R. at App. C; R. at 22. Second, the policy does not meet any of the factors for non-explicit overbreadth. For instance, Grover's employees cannot reasonably construe the policy's language as prohibiting Section 7 activities, because the policy merely prohibits conduct that is not protected by Section 7, and the policy addresses legitimate business concerns and provides sufficient examples of prohibited conduct. *See id.* Additionally, there is no contention that Grover's policy was promulgated in response to union activity. *See generally*, R. at 1-9. And finally, the rule has not been applied to restrict the exercise of Section 7 rights, because the Petitioners were not engaging in protected concerted activity. As such, Grover's policy is lawful under Section 8(a)(1) of the NLRA, and this Court should affirm the Thirteenth Circuit's judgment.

1. Grover's social media policy is lawful because it merely prohibits conduct that is not protected by Section 7.

An employer's policy is not overbroad if it prohibits conduct that could not reasonably be read as encompassing Section 7 activity. *Tradesmen Int'l*, 338 N.L.R.B. at 462. Grover's SMP restricts employee conduct that "reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage[s] employees, supervisors, managers,

customers, suppliers, or the Company, or that might constitute harassment or bullying." R. at Appx. C. Grover's SMP is not overbroad because the employees could not reasonably construe the ability to post malicious or obscene messages concerning co-workers or management as a protected Section 7 activity. *See id.*

The National Labor Relations Board ("the Board") has consistently upheld employer policies that use language nearly identical to Grover's SMP. For instance, in *Palms Hotel & Casino*, 344 N.L.R.B. 1363, 1363 (2005), the Board upheld an employer's rule prohibiting "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees." Likewise, in *Tradesmen International*, a policy banning "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees," could not be reasonably be understood as prohibiting protected activity. 338 N.L.R.B. at 662. Also, in *General Motors v. Henson*, No. 07-CA-53570, 2012 WL 1951391, at *1 (N.L.R.B. Div. of Judges May 30, 2012), an administrative law judge held a policy barring "offensive, demeaning, abusive, or inappropriate remarks" could not reasonably be construed as prohibiting Section 7 activity. *See also Lutheran Heritage*, 343 N.L.R.B. at 646 (holding that a rule prohibiting abusive and profane language, harassment, and verbal, mental and physical abuse cannot reasonably be interpreted as prohibiting protected activities).

In contrast, the Board has held that an employer policy prohibiting employees from engaging in merely disrespectful conduct *could* reasonably be interpreted to encompass Section 7 protected activities. *University Medical Center*, 335 N.L.R.B. 1318, 1320-21 (2001). In reaching its conclusion, the Board reasoned that the word "disrespectful" was overly broad. *Id.* at 1321. It reasoned that employees could reasonably believe that concerted activities such as employee protest of management or supervisory activity and solicitation of union support would

be included in the policy. *Id.* at 1320; *see also Costco Wholesale Corp. & United Food & Comm'l Workers Union, Local 371*, 358 N.L.R.B. 1, 2 (2012) (holding an employee could reasonably construe a rule against damaging and defamatory posts as incorporating protected activity). However, unlike the policies in *University Medical Center* and *Costco,* Grover's policy does not simply preclude disrespectful, damaging, or defamatory conduct. *See id.* Instead, Grover's policy goes beyond disrespectful or damaging posts and prohibits posts that are threatening, offensive, malicious, obscene, intimidating, and harassing. R. at App. C.

Although an administrative law judge has found a social media policy's rule prohibiting disparaging posts unlawful under Section 8(a)(1), *Echostar Technologies, L.L.C. v. Leigh*, No. 27-CA-066726, 2012 WL 4321039 (N.L.R.B. Div. of Judges Sept. 20, 2012), Grover's SMP still cannot be reasonably interpreted to chill Section 7 activities. The rule at issue in *Echostar* only included an additional restriction on defamatory comments and an instruction "to use good judgment." *Id.* The Board concluded that this context was not enough to render the rule lawful. *Id.* at *48. In contrast to the rule in *Echostar*, Grover's rule provides employees with sufficient context by including malicious, obscene, threatening, offensive, intimidating, and harassing conduct – conduct that Section 7 does not protect. R. at App. C. Accordingly, the Board's holding in *Echostar* does not preclude this Court from upholding Grover's SMP.

Grover's SMP is lawful because reasonable employees cannot interpret the policy to prohibit Section 7 activities, because the policy prohibits only employee conduct that falls outside Section 7's protections. Even more, the policy is consistent with policies the NLRB has repeatedly upheld on the grounds that an employee cannot reasonably interpret the rule to prohibit protected activity. As such, this Court should hold that Grover's policy is lawful because it cannot reasonably be interpreted to prohibit Section 7 protected activity.

2. Grover's social media policy is also lawful because it addresses legitimate business concerns and provides examples of prohibited conduct.

Employer policies are not overbroad if the policies address legitimate business concerns. *Tradesmen Int'l*, 338 N.L.R.B. at 462-63. Grover's SMP is lawful because it addresses legitimate business concerns; these concerns include protecting the company's reputation, *Triple Play Sports Bar*, No. 34-CA-12915, 2012 WL 76862 (Jan. 3, 2012), and maintaining a civil workplace. *Martin Luther*, 343 N.L.R.B. 646, 647 (2004). In *Triple Play Sports Bar*, the Board upheld a social media policy that prohibited inappropriate discussions about management because inappropriate discussions have a detrimental impact on the company's reputation. 2012 WL 76862, at *1. Similarly, in *Martin Luther*, a policy that prohibited abusive and profane language served the legitimate interest of maintaining order in the workplace. 343 N.L.R.B. at 647. Grover's SMP serves both legitimate business interests by prohibiting obscene and abusive language, as well as harassment and bullying. *See* R. at App. C.

Employer policies are also lawful and not ambiguous if the policies "clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity." Office of The General Counsel Memorandum OM 12-59 (May 30, 2012) (citing *Tradesmen Int'l*, 338 N.L.R.B. 460, 460-62 (2002)); Advice Memorandum from the NLRB Office of the Gen. Counsel to Walmart No. 11-CA-067171, 2012 WL 1951766 (May 30, 2012) (hereinafter "*Walmart*"). The NLRB concluded that an employer's social media policy could not reasonably be construed to prohibit Section 7 activities. *Walmart*, 2012 WL 1951766, at *2. The policy in *Walmart* prohibited "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar

inappropriate or unlawful conduct," and instructed employees to be respectful, fair, and courteous while posting on social media websites. *Id.* at *1.

The policy in *Walmart* directed employees to avoid making posts that "could be viewed as malicious, obscene, threatening or intimidating," and harassing or bullying posts that were offensive and meant to harm a person's reputation or "could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." *Id.* Not only did the Board conclude that the policy could not reasonably be construed to apply to Section 7 activities because the rule prohibited "plainly egregious conduct," it also held that the policy could not be reasonably construed to prohibit Section 7 activities because the policy provided sufficient examples of unprotected conduct. *Id.* at *2.

Like the policy in *Walmart*, Grover's SMP provides sufficient examples of prohibited conduct, because it states "[e]xamples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." R. at App. C. Not only does the SMP include the exact hostile work environment example in *Walmart*, it provides employees with more examples by including offensive posts. 2012 WL 1951766, at *2. As such, Grover's policy is not overbroad.

B. The Thirteenth Circuit Correctly Held That Grover's Enforcement of the Social Media Policy was Lawful.

This Court should affirm the Thirteenth Circuit's judgment because Grover's enforcement of its SMP was lawful under the NLRA. Grover's enforcement of the policy was lawful because the employees were not engaged in protected concerted activity when Petitioners posted to the social media website. *See Daly Park Nursing Home*, 287 N.L.R.B. 710, 711 (1987) (holding that the employer did not violate Section 8 of the NLRA when the employees were not

engaged in protected activity). Therefore, Grover did not violate Section 8(a)(3) of the NLRA. *See id.* Further, even if this Court did find that Petitioners' activity on the social media website was protected concerted activity, their activity lost protection under the NLRA. *Atlantic Steel Co.*, 245 N.L.R.B. at 816 (holding that egregious behavior can lose the NLRA's protection). Thus, even if Petitioners engaged in protected concerted activity, Grover still did not violate the NLRA. *See id.* Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

1. Petitioners were not engaged in protected concerted activity when they posted offensive messages to an internet discussion board.

This Court and the NLRB have recognized that there are limits on what employee conduct is considered concerted activity. *See N.L.R.B. v. City Disposal Sys.*, 465 U.S. 822 (1984); *Meyers Indus.*, 281 N.L.R.B. 882, 885 (1986) (*Meyers II*). Although it is well-established that protest of supervisory actions is protected concerted activity, *Datwyler Rubber and Plastics, Inc.*, 350 N.L.R.B. 669, 676-77 (2007), an employee's activity is not concerted if he engages in the activity solely by and on behalf of himself and not with, or on the authority of, other employees. *Meyers*, 281 N.L.R.B. at 885. Applying this principle, Petitioners' activity in this case was not protected concerted activity because the employees were not acting with, or on the authority of, the other employees for their mutual aid and protection.

Petitioners' social media posts were not intended to induce, and had no relation to, group action in the interests of Grover's employees. The Third Circuit has held that a conversation can constitute protected concerted activity only if "it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action . . . ." *Mushroom Transportation Co. v. N.L.R.B*, 330 F.2d 683, 685 (3d Cir. 1964). Likewise, mere employee gripes are not protected concerted activity. *JCR Hotel v. N.L.R.B.*, 342 F.3d 837, 840 (8th Cir. 2003). Mr. Henson's posts were merely gripes about his boss. For instance, He

complained that he had a "loser boss" and worked for an "incompetent moron." R. at 7. The posts were not designed to induce group action, but rather were just his personal complaints about his dissatisfaction about his boss. *See* Advice Memorandum for the NLRB Office of the Gen. Counsel to Public Serv. Credit Union, No. 27-CA-21923, 2011 WL 5822506, at *2 (Nov. 1, 2011) (holding that Facebook posts expressing an employee's own frustrations with his boss were not protected concerted activity).

The Board's recent decision, *Hispanics United of Buffalo*, does not support a finding of protected concerted activity in this case. 359 N.L.R.B. 1 (2012). In *Hispanics United*, one employee posted on her Facebook wall, "[A] coworker feels that we don't help our clients enough [ ]. I about had it! My fellow coworkers how do u feel?" *Id.* at 1. Four coworkers responded with comments about how they felt about the coworker's criticisms. *Id.* All five employees were terminated as a result of the Facebook posts. *Id.* The comment and subsequent posts were protected concerted activity because they "had the clear 'mutual aid' objective of preparing [ ] coworkers for a group defense to [the other employee's] complaints." *Id.* at 3. In reaching its conclusion, the Board noted that an express announcement of a concerted objective is not required and can be inferred from the circumstances. *Id.*

In contrast to *Hispanics United*, a concerted objective cannot be inferred in the instant case. For instance, the internet group was not directed to fellow Grover employees. R. at 7 (indicating that most of the discussion group members were not fellow employees). Further, Mr. Henson's post only addressed his personal complaint and stated that he was going to talk to his boss on Monday to "give him a piece of his mind." *Id.* Unlike the employees in *Hispanics United*, Mr. Henson's post in the discussion group was not directed at coworkers. *Compare* R. at 7, *with Hispanics United*, 359 N.L.R.B. at 3. Additionally, the nature of the posts does not

indicate the three employees were going to act for the mutual aid of other employees. For instance, Mr. Clash posted that the boss is "just grouchy," but is just "doing his job." R. at 7. Employees do not engage in protected concerted activity where there is no evidence that employees contemplated group action in response to an employment issue. *Daly Park Nursing Home*, 287 N.L.R.B. at 711.

Likewise, an employee's social media post is not concerted activity when the post does not "relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment." Advice Memorandum from the NLRB Office of Gen. Counsel to Arizona Daily Star, No. 28-Ca-23267, 2011 WL 1825089, at *5 (Aril 31, 2011). The internet posts in the instant case did not relate to terms and conditions of employment because the posts never identified a specific dissatisfaction with management. *See* R. at 7. There is no evidence Mr. Henson believed he worked for "incompetent morons" because of any employment-related issues. *See id.* Therefore, Petitioners were not engaged in concerted protected activity.[11]

2. Even if Petitioners' comments were protected concerted activity, Petitioners' comments were so offensive that they lost protection under the National Labor Relations Act.

Even if Petitioners' statements could constitute concerted activity, the statements lost protection under the Act because, as this Court has noted, there are limits to Section 7's

[11] Even if this Court finds that the Petitioners' activity was concerted activity, Grover still did not violate Section 8(a)(1) because Grover did not know: (1) of the concerted nature of the activity; (2) that the activity was protected; (3) and did not terminate the employees because of the activity. *See Meyers*, 268 N.L.R.B. at 497 ("Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the [discharge] was motivated by the employee's protected concerted activity."). Grover could not have known the employee posts were protected concerted activity because the posts did not indicate that Mr. Henson and Mr. Jacobson were acting for the mutual aid and protection of all employees. *See* R. at 7. Further, the employees were terminated for "publically disparaging and embarrassing" Grover in violation of Grover's SMP, not for discussing any wage or hour issues. R. at 8.

protection when employees' behavior is abusive. *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 837 (1984) ("The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses protection of § 7."). To determine whether an employee's conduct loses protection under the NLRA, this Court should balance the following four factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Atlantic Steel Co.*, 245 N.L.R.B. at 816. In balancing these factors, the NLRB has indicated that the disruption to workplace discipline and disparagement of the employer's products and services should be taken into consideration. *See* General Counsel Memo OM 12-31 Jan 24, 2012. Balancing these four factors, this Court should find that Petitioners' comments lost the protection of the NLRA.

First, the employees were not engaged in protected activity at the time they posted comments. Admittedly, comments that occur during work time, *Gaylord Hospital*, No. 34-CA-13008, 2012 WL 3878931 (N.L.R.B. Div. of Judges Sept. 6, 2012), and in a private location away from the work area and other employees, such that the comments cause no disruption to order or discipline in the workplace, weigh in favor of protection. *Plaza Auto Center v. NLRB*, 664 F.3d 286, 292 (9th Cir. 2011). In *Stanford Hotel & Joong Hyun Park*, the Board concluded that the first *Atlantic Steel* factor weighed in favor of protection when an employee's outburst occurred in a basement lunchroom with no other employees present and the door shut. 344 N.L.R.B. 558, 558 (2005). Here, however, the discussion occurred while at a bar, not at work. R. at 7. Additionally, the discussion occurred on a public networking site in the presence of two

coworkers. *Id.* Thus, the comments' non-work origins and public context weigh heavily against protection.

Second, the subject matter of the comments was not protected activity, because the social media discussion group and the comments within the group never mentioned protected activity. *Id.* For example, the comments do not reference an unfair labor practice or call for Grover employees to organize. *See id.* Additionally, one comment discusses employees' plans to watch football. *Id.* Even more, the group's creator invited twenty people to join the group, eighteen of whom had no connection to Grover. *Id.* Clearly, the subject matter of the discussion does not indicate that the employees were attempting to organize for the mutual aid of all employees. *See, e.g.*, *Fresenius USA Mfg.*, 358 N.L.R.B. 1, 9 (2012) (holding that the subject matter weighed in favor of protection when employee was conveying concerns to warehouse employees). Therefore, the second factor also weighs against protection.

Third, the nature of the comments was offensive, inappropriate, demeaning, and disrespectful. The comments called Grover supervisors "losers" and "incompetent morons." R. at 7. The comments' nature weighs against protection under the third factor. This test "recognizes that 'in the heat of discussion' employees may use strong language that would be wholly inappropriate in other contexts. . . " *Media General Operations v. NLRB*, 560 F.3d 181, 188 (4th Cir. 2009). Here, however, the comments were not produced in the heat of discussion between the employer and the employee. *See* R. at 7. As a result, the district court failed to distinguish between the use of "scumbag" in *Atlantic Steel* and the language used in this case. In *Atlantic Steel*, the employee was reacting to a supervisor's answer regarding overtime. 245 N.L.R.B. at 814; *see also Stanford New York, LLC*, 344 N.L.R.B. 558, 565 (2005) (protecting an employee responding to a threat of termination from supervisor). Here, the comments were not

in response to any discussions with management. *See* R. at 7. Because the comments were not made in the heat of discussion, they were not protected. Thus, the nature of the comments weighs against protection.

Finally, the Petitioners' comments were not provoked by an unfair labor practice. The fourth *Atlantic Steel* factor only protects outbursts that are spontaneous and reflexive reactions to unfair labor practices. *Trus Joist MacMillan & United Mineworkers of America*, 341 N.L.R.B. 369, 371 (2004). Petitioners' comments were not spontaneous reactions —the Record indicates that Petitioners never spoke with their supervisor about unfair labor practices before making the comments. R. at 6. Thus, the fourth factor weighs against protection.

All four factors under the *Atlantic Steel* balancing test weigh against protecting the Petitioners' comments. The nature and subject matter of the comments, in addition to the place the comments were made and lack of provocation, all support the Thirteenth Circuit's judgment that the comments lost protection under the NLRA. Thus, this Court should affirm the Thirteenth Circuit's judgment.

CONCLUSION

Grover's policy of non-compensation for "clothes-changing" time, "travel" time, and "washing-up" time is lawful and enforceable under the FLSA. Additionally, Grover's SMP is not overbroad, Petitioners were not engaged in protected concerted activity when they violated it, and Grover's enforcement of the SMP did not violate the NLRA. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

Respectfully submitted,

/s/_____
Team 32R
Counsel for Respondent
Grover Waste Solutions, Inc.

APPENDIX A

New York Law School Moot Court Association
The 37th Annual Robert F. Wagner
National Labor & Employment Law Moot Court Competition

In the

Supreme Court of the United States

SPRING TERM, 2013
Docket No. 13-0101

ERNIE HENSON, ET AL.,

Petitioners,

- against -

GROVER WASTE SOLUTIONS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

THE FACT PATTERN

Cite as: 101 F.Supp 3d 1 (E.D. Wgr. 2011)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WAGNER
----------X
ERNIE HENSON, et al.,

Docket No. 11-0581

Plaintiffs,

- against –

GROVER WASTE SOLUTIONS, INC,

Defendant,

----------X

W. Kleindienst, U.S. District Judge:

This matter involves an action brought by Ernie Henson on behalf of himself and other former employees similarly situated pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), and the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 et seq., against his former employer, Grover Waste Solutions, Inc. (hereafter "Grover," "the Company," or "the Employer").[1] Plaintiffs bring their FLSA claims individually and as part of a collective action under 29 U.S.C. § 216(b) on behalf of other similarly situated individuals currently or formerly employed by Grover. Plaintiffs seek reinstatement, back pay, liquidated damages (or, alternatively, interest), overtime compensation, attorney's fees, and costs.

Under the FLSA section 203(o), Plaintiffs seek to recover wages for time spent donning and doffing personal protective equipment ("clothes-changing time"), for time spent traveling to and from the locker room changing area ("travel time"), and for time spent showering after their

[1] For the purposes of this action, in light of the larger FLSA claim at issue, and on a non-precedential basis, the Employer and the United States District Court for the Eastern District of Wagner have agreed that the District Court has jurisdiction over the Nlra action, notwithstanding the fact that it did not begin with an unfair labor practice charge at the National Labor Relations Board ("NLRB").

work shifts ("washing up time"). After considering this claim, this Court concludes that: (1) donning and doffing personal protective equipment constitutes "clothes-changing time" under the § 203(o) of the FLSA; (2) donning and doffing uniform and personal protective equipment constitutes a principal activity that was integral and indispensable to the employees' work; and (3) the clothes-changing time, travel time and washing-up time was not *de minimis*.

Additionally, Plaintiffs argue that the Company's social media policy and the application of that policy to the Plaintiffs causing their termination were unlawful under Sections 7 and 8(a)(1) and (3) of the NLRA. Under the NLRA, Plaintiffs seek an order to the Employer to cease and desist from promulgating and enforcing the portions of the Employer's social media policy that Plaintiffs argue chill their Section 7 rights. Plaintiffs also seek reinstatement with full back pay and benefits. After considering this claim, this Court concludes that: (1) Plaintiffs were engaged in protected concerted activity as defined by the NLRA; (2) Plaintiffs' actions were not egregious so as to lose the protection of the NLRA; and (3) Defendant's social media policy was overly broad under the NLRA. For these reasons, we find in favor of Plaintiffs.

As a remedy, Plaintiffs shall be reinstated as waste treatment specialists at Grover with full back pay and benefits, including overtime, for the time spent donning and doffing, attorney's fees, and costs. The Employer is ordered to cease and desist from discharging employees who engage in protected concerted activity. It is so ORDERED.

I. Factual Background

The following facts are undisputed: Grover Waste Solutions, Inc., a private employer, operates a number of private waste treatment facilities in the State of Wagner that provide waste removal for approximately 100 businesses, including factories, food service operations, schools,

hospitals and shopping centers throughout the State. The Employer's treatment facilities remove solids and reduce pollutants and organic matter from wastewater, making it safe to release into the environment. The Employer employs over 350 employees, of whom 200 work at the Worth treatment facility. The Worth treatment facility is located in the northeastern region of the State of Wagner.

At all times material herein, certain non-supervisory hourly employees of the Company were represented for the purposes of collective bargaining by Local 300-G, American Federation of Waste Treatment Workers (the "Union"). All hourly employees are entitled to two paid fifteen-minute breaks and one thirty-minute paid lunch period per shift. The workweek is forty hours.

Since 2003, the Company and the Union have negotiated Collective Bargaining Agreements ("CBAs") every three years. The CBA is silent as to whether employees will be paid for time spent changing clothes. However, the custom and practice at the Worth treatment facility and the Employer's other treatment facilities throughout the State was that employees were not paid for the time spent donning and doffing personal protective equipment ("PPE") or time spent showering after the shift. The employees and Union were aware of this custom and practice that was in existence long before the Union negotiated the first CBA in 2003.

The CBA between the Union and the Employer contains the following "Local Working Conditions" provision:

> The term "local working conditions" as used herein means specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work or other conditions of employment which the Parties reduced to writing by mutual agreement. No local working condition shall be established except as it is expressed in writing in an agreement approved by the

Facility Manager and the local Union President. Only those officials shall be empowered to change, modify or eliminate local working conditions.

Before the Company began operations in the State of Wagner in 2003, the State was plagued with pollution due to the lack of proper waste management practices. Untreated waste from the State of Wagner contributed significantly to the pollution of drinking water and air. When the Employer opened the Worth treatment facility, many of the problems of the past were remedied by its state-of-the-art treatment facilities and machinery.

Ernie Henson and Bert Jacobson were employed under the job title "waste treatment specialist" ("WTS") at the Worth facility. Mr. Henson was hired by the Company as a waste treatment assistant in 2007 and subsequently promoted to WTS in 2008. Mr. Jacobson was hired in the summer of 2009 as a WTS. The WTS job title, included in the bargaining unit of the CBA, pays $20 per hour plus benefits.

The work of a WTS involved close contact with dirty, noxious and dangerous fumes and materials such as chlorine, ammonia and lime. A WTS maintains and cleans treatment equipment, uses chemicals to treat waste and conducts tests on water and sewage. The work also involves dangerous working conditions due to exposure to chemicals and frequent workplace injury.[2] Wagner state law mandates that employers whose employees work in dangerous conditions take measures to minimize the risk to safety and health.[3] To comply with the law, the

[2] In December 2010, Grover employee Abby Cadabby, a WTS, was injured when she accidentally stuck herself with a medical syringe, partially filled with insulin discarded by a medical facility, that was one of the Company's customers. Following the incident, Ms. Cadabby was rushed to the hospital and treated for a puncture wound to her finger and given medication to counter the effect of insulin which had infiltrated her bloodstream. During this incident Ms. Cadabby was not wearing the protective gloves provided to her by Grover.

[3] 19 WSL 45.1: Employers shall provide protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Company required employees in certain job classifications, including WTS, to wear protective clothing and to shower at the end of their shifts.[4]

Each work day, Mr. Henson and Mr. Jacobson arrived at the Worth treatment facility, went to their lockers, and changed into personal protective equipment ("PPE") stored there. They put on gloves, goggles, special clothing, and steel-toed boots before punching in at their time clocks and heading to work to clean the machinery and treat the water and sewage. The Company used computerized time clocks to register and record the start and end times of employees' shifts. Employees are compensated for work time beginning when they "punch in" at the time clock. The time clocks were in a room, next to the supervisor's office. Employees typically took their time to chat about personal matters in the hallways before punching in at the start of their shifts. Company required employees in certain job classifications, including WTS, to wear protective clothing and to shower at the end of their shifts.

Lockers were located in sector L and time clocks in sector X of the facility. Employees changed into their protective clothing in sector L and walked five minutes to sector X to the time clocks. A diagram of the facility is attached as Appendix A. At the end of the work day, they punched out, went to the locker room, removed their PPE, showered, and put on their street clothes to leave work. Employees spent a total of thirty minutes daily walking to and from the time clocks and their lockers, removing their street clothes, putting on PPE at the start of the shift, and walking back to the lockers, removing PPE, showering, and putting on street clothes at the end of the shift. The Employer argued that even though WTS employees were on work premises when changing into and out of PPE, that time was noncompensable.

The Court notes that 19 WSL 45.1 is consistent with federal and local laws regulating worker safety in this industry.

[4] Assume that the manufacturer of the protective clothing provided the best quality clothing available and has no liability in this matter.

Much like other 21st century companies, Grover included a social media policy ("SMP" or "the Policy") in its Employee Handbook distributed to all new employees at orientation. The original policy read: "Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Grover Waste Solutions, Inc. We encourage employees to speak with managers, supervisors and co-workers about work-related complaints instead of posting online." Appendix B. In May 2009, the Company amended the policy in pertinent part: "If you must post complaints or criticism [on social media] avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying." Appendix C. The Company's human resources department distributed the amendment by placing paper copies in the lockers of all employees and emailing it to all employees instructing them to read it and direct any questions to their supervisors. New employees received and signed for handbooks at orientation conducted by human resources personnel. Managers were responsible for conducting weekly refresher talks on company time in which they discussed policies in the handbook, including the SMP, and answered employee questions. All employees were required to attend the talks and sign in at the meetings.

On October 26, 2012, after working double shifts, and having no work scheduled on Saturday or Sunday, Mr. Henson and Mr. Jacobson stopped at a local bar. At the bar, they ran into Elmo Clash, another WTS employed at the Company. Mr. Henson said, "I'm beat. That was a long work day. And why don't they pay me for the time I spend changing into and out of my work clothes, and showering at the end of the day?" Mr. Jacobson agreed, responding that "this takes a lot of our time and it is like working for free." The three became riled up about not

being paid for the time they put on and take off their work clothes and decided to vent about it online. After a few drinks, Mr. Henson used his personal smartphone to access a social networking website called Schmoozer[5] and created a group called "Who's got a loser boss?" He invited twenty people from his personal schmooze-list. With the exception of Mr. Jacobson and Mr. Clash, the other eighteen invitees had no connection to the Employer. Mr. Henson did not want other co-workers to see his post because he was afraid it might be seen by his boss who might retaliate. He posted the following message to the group: "I work for some incompetent morons. They're about to get a piece of my mind on Monday! They don't value me, why should I even care. Oh wait, I have bills to pay, that's why!!?!"

While still at the bar, Mr. Jacobson joined the group and "liked"[6] the post using his personal smartphone. Mr. Clash joined the Schmoozer group but said nothing online until later that night. When he got home, he "liked" the post and responded, "Our boss is grouchy but he is just doing his job. We still on for football tomorrow??"

The three met the next day, Saturday, to watch college football. They discussed a way to get their boss to listen to their concerns. They considered bringing it to their Union steward, but rejected the idea because they thought they could resolve the problem themselves. They decided to talk with their supervisor. On Monday, they spoke with their supervisor, Mr. Oscar Byrd, about being paid for the time it took for them to put on their work gear, take it off and shower at the end of the shift. Mr. Byrd told them "that it wasn't part of their CBA," and that they "should

[5] Schmoozer is a social networking site targeting a professional crowd. Users can create a personal profile, search for friends and add them to their "schmooze-list" Users can create and join common-interest groups, workplace groups and other groups based on certain characteristics.

[6] "Liking" a post is a feature on Schmoozer where a user can express that he/she likes, enjoys or supports certain content by clicking on the word "like."

just forget it because that was not part of their workday and the Company would never pay for it."

On Tuesday morning, October 30, 2012, when Mr. Henson went to his locker to get dressed for work, Mr. Byrd asked him to come to his office. As Mr. Henson walked into Mr. Byrd's office, he saw that Mr. Jacobson and Mr. Clash were in the office. Mr. Byrd asked Mr. Henson to explain his post on Schmoozer. After Mr. Henson replied, "I was just venting," Mr. Byrd handed each of the three employees a termination letter for violating the Company's SMP. Mr. Byrd specifically referenced Mr. Henson's post on Friday evening and explained that their online conversation breached the SMP by publicly disparaging and embarrassing the Company and Mr. Byrd. Appendix D.

Mr. Henson and Mr. Jacobson did not understand what they did wrong. Mr. Henson asserted that because he was not familiar with the employee handbook, he should not be punished for violating a rule about which he had no notice. Mr. Byrd stated that they had signed for their copies of the handbook at orientation, and HR sent emails to all employees about the changes to the policy and that Mr. Byrd recently followed up with a weekly talk on the changes. Mr. Henson and Mr. Jacobson reminded Mr. Byrd that they had unblemished disciplinary records. Mr. Clash's history with the Company was a bit different, as he had received progressive discipline, namely, a written reprimand for reporting to work late on three occasions and a one-day suspension for "horseplay" with another employee.[7]

The three discharged employees filed a complaint in the United States District Court for the Eastern District of Wagner under section 203(o) of the FLSA, as amended, alleging that

[7] A review of Mr. Clash's disciplinary record at the Company revealed an instance of vigorously "tickling" another employee, Kermit T. Frog, in the vicinity of hazardous chemicals.

Grover unlawfully refused to pay them and all similarly situated employees for donning and doffing, including travel time and washing-up time, that their discharges constituted unlawful retaliation under section 215(a)(3) of the FLSA and that Grover violated their right to engage in protected concerted activity under Section 7 of the NLRA.

II. Discussion

1. Fair Labor Standards Act

The FLSA was enacted to ensure that employees receive a "fair day's pay for a fair day's work." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942). The Portal-to-Portal Act of 1947 was enacted as an amendment to the FLSA to offer guidance to employers on the law regarding travel and other activities before and after the workday. In the Portal-to-Portal Act, Congress excluded some activities that might otherwise be compensable under the FLSA. The Portal-to-Portal Act exempted two categories of activity as not compensable 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 or postliminary to said principal activities." 29 U.S.C. § 254(a). Activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities. Steiner v. Mitchell, 350 U.S. 247, 256 (1956); see also Mitchell v. King Packing Co., 350 U.S. 260, 261 (1956) ("an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions").

Two years after the Portal-to-Portal Act was passed, Congress added section 3(o) to the FLSA, codified as 29 U.S.C. § 203(o). That section excludes, from the time for which an

employee is entitled to compensation at the minimum hourly wage (or, if it is overtime work, at 150% of the hourly wage), "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time ... by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." Sandifer v. United States Steel Corp., 678 F.3d 590, 592 (7th Cir. 2012).

The issue of compensation for the time an employee takes to put on and take off required protective clothing and other gear, also known as donning and doffing, is a live one among the circuits. Currently, decisions of the Sixth and Seventh Circuits differ on the interpretation of section 203(o). See Franklin v. Kellogg, 619 F.3d 604 (6th Cir. 2010); Sandifer, 678 F.3d 590. We hope to shed some light on the circuit split here today.

A. Clothes-Changing Time

The first issue is whether Plaintiffs' donning and doffing constituted "clothes-changing time" so as to be compensable under the FLSA. We find that it is compensable.

The analysis begins with determining whether the clothes-changing in the instant matter falls under the exclusion in section 203(o) of the FLSA. When a word such as "clothes" is undefined in a statute, we must engage in statutory construction, relying first on Congressional purpose and then giving the words their ordinary meaning. Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1983); see also Perrin v. United States, 444 U.S. 37, 42 (1979).

The plain meaning of the word "clothes" is quite expansive. However, because section 203(o) applies to changing into clothes worn during the workday, it appears that Congress was referring to clothes worn for the purpose of doing work and not simply "ordinary" clothes. See Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 215 (4th Cir. 2009).

The clothing, or PPE, at issue includes masks, gloves, protective clothing and steel-toed boots, all of which fall within the ordinary meaning of clothes. Furthermore, these clothes are required by Wagner state law, 19 WSL 45.1, and by Company policy and thus are excluded by section 203(o).

Because the items at issue are clothes within the meaning of section 203(o) which excludes clothes-changing from compensation under the specified circumstances, we must consider whether there was a custom or practice under a bona fide CBA of nonpayment for the time spent changing into those items.

It is undisputed that the CBA is silent on whether donning and doffing time is compensable. Plaintiffs assert that the Local Working Conditions provision of the CBA prohibits the recognition of any unwritten custom or practice, including an unwritten custom or practice regarding compensation for the period of time spent donning and doffing. The Employer argues, however, that the Local Working Conditions provision does not prohibit such unwritten customs or practices, but only prohibits prospective unwritten local working conditions. Moreover, it asserts that because the practice of nonpayment for donning and doffing existed when the first CBA was negotiated, the Local Working Conditions provision does not apply to it. Franklin, 619 F.3d at 616. In other words, because the Union and employees were aware of the custom and practice of nonpayment for the time spent donning and doffing, that practice would not be included within the purview of the Local Working Conditions.

When interpreting a CBA, we should begin with the explicit language of the agreement. Raceway Park, Inc. v. Local 47, Servs. Emps. Int'l Union, 167 F.3d 953, 963 (6th Cir. 1999). Here, the CBA has no language about custom and practice. We find that the Local Working

Conditions provision does not prohibit unwritten customs or practices. However, the Local Working Conditions provision does prohibit unwritten local working conditions. The plain meaning of the provision leaves open the possibility that there may be unwritten customs or practices that are not local working conditions. Franklin, 619 F.3d at 616. Accordingly, the Local Working Conditions provision does not prohibit any unwritten customs or practices, just unwritten local working conditions.

In Turner v. City of Phila., 262 F.3d 333 (3rd Cir. 2001), the court concluded that even though donning and doffing was discussed during formal negotiations for a CBA, that does not necessarily demonstrate there is a custom or practice. Turner, 262 F.3d at 226-27 (citing Franklin, 619 F.3d at 616). Instead, it "view[ed] the phrase 'under a bona fide collective bargaining agreement' as simply restating the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence." Id. at 226. In Anderson v. Cagle's Inc., 488 F.3d 945 (11th Cir. 2007), the court found "that a policy concerning compensation (or noncompensation, as the case may be) for clothes-changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a 'custom or practice under a bona fide' CBA." Id. at 958-59. The Eleventh Circuit concluded that the relevant inquiry was whether the Union was ignorant of the policy of noncompensation, not whether it was ignorant of its members' possible entitlement to payment. Id. at 959 (inquiring as to whether the Union lacked notice of the relevant compensation policy when it entered into each of the CBAs).

Much like the Third and Eleventh Circuits, the Fifth Circuit in Allen v. McWane, Inc., concluded that "even when negotiations never included the issue of noncompensation for changing time, a policy of noncompensation for changing time that has been in effect for a

prolonged period of time, and that was in effect at the time a CBA was executed, satisfies § 203(o)'s requirement of 'a custom or practice under a bona fide' CBA." Allen v. McWane, Inc., 593 F.3d 449, 457 (5th Cir. 2010) (quoting Anderson, 488 F.3d at 958-59). The Fifth Circuit continued, "[i]n such instances, regardless of whether the parties negotiated regarding compensation for changing time, acquiescence of the employees may be inferred." Id. However, "where there have been no relevant negotiations and the facts do not demonstrate that a policy of noncompensation for changing time has been in effect for a prolonged period of time, other evidence of knowledge and acquiescence by the employees will be required." Franklin, 619 F.3d at 617.

In the instant case, the policy of noncompensation for clothes-changing time existed for at least ten years before the Union and the Employer entered into the first CBA. Moreover, there is no question as to whether the employees and the Union were aware of the Employer's custom and practice of noncompensation for time spent donning and doffing PPE. Thus, the evidence demonstrates that there was a custom or practice of nonpayment for time spent changing clothes under a bona fide CBA. See Allen, 593 F.3d at 457; Anderson, 488 F.3d at 958-59. Accordingly, the time spent donning and doffing the equipment would be excluded from compensable time under section 203(o). Franklin, 619 F.3d at 618.

B. Principal Activity

However, Plaintiffs maintain that an activity excluded under section 203(o) may still be compensable if the donning and doffing of PPE is a principal activity within the meaning of the FLSA. Id. To determine whether an employee's act is a principal activity, we must first consider whether the acts are necessary to the principal work and whether the employee's acts of donning

and doffing at the beginning and end of his work shifts were integral and indispensable to his principal activity. Perez v. Mountaire Farms, Inc., 650 F.3d 350, 366 (4th Cir. 2011). In Perez, the court considered whether the donning and doffing of protective gear was necessary to a principal activity in a chicken-processing factory and concluded that it was. To protect employees' health and safety and maintain a sanitized workplace, employees wore PPE, which was required not only by company rules, but also by regulations promulgated by the U.S. Department of Agriculture, 9 C.F.R. § 416.5, and the Occupational Safety and Health Administration, 29 C.F.R. § 1910. Perez, 650 F.3d at 361. Production line employees were required to wear earplugs, "bump caps," smocks, hair and beard nets, and steel-toed rubber boots. Id. Some employees were required to wear "nitrile/latex/rubber" gloves, aprons, safety glasses, cut-resistant gloves, chain gloves, and sleeves. Id. When entering the workplace, employees sanitized their feet in a foot bath, splashed sanitizing solution on their aprons, dipped their gloves in sanitizing solution or washed their hands if they did not wear gloves. Id. The Fourth Circuit in Perez concluded that the use of this protective equipment and clothing was "integral and indispensable" to the principal work of the employees and therefore a principal activity. Id. at 367.

We find that the facts in this case are similar to those in Perez; likewise, Plaintiffs' use of PPE is a principal activity. Plaintiffs were required to wear PPE at work, and to remove it and shower after work. An act is necessary to a principal activity if that act is required by law, by company policy, or by the nature of the work performed. See Alvarez v. IBP, Inc., 339 F.3d 894, 902–03 (9th Cir. 2003) (citing 29 C.F.R. § 790.8(c) n.65); Perez, 650 F.3d at 366 (stating federal law mandates employees wear personal protective gear). Plaintiffs had no choice whether to wear PPE because the protective gear was required by both Company rules and Wagner state

law. See 19 WSL 45.1. Therefore, Plaintiffs' activity of donning and doffing PPE was a principal activity. However, we agree with the Sixth Circuit's position that "compensability under § 203(o) is unrelated to whether an activity is a "principal activity." Franklin, 619 F.3d at 619. We must determine whether the donning and doffing of PPE is an integral and indispensable part of the principal activity of Plaintiffs' jobs.

To determine whether donning and doffing of protective gear at the beginning and end of a work shift is integral and indispensable to a principal activity, the court must look at whether it is: 1) necessary to the principal work performed; and 2) primarily benefits the employer. See Alvarez, 339 F.3d at 902–03. In other words, "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." Steiner, 350 U.S. at 258.

We find Steiner controlling on this issue for several reasons. In Steiner, employees at a battery plant had to handle "dangerously caustic and toxic materials and were compelled by circumstances including vital considerations of health to change clothes and shower" at the facility. Id. at 248. Chief Justice Warren held in Steiner that employees clothes-changing time and showering were an integral and indispensable part of a principal activity and were therefore compensable under the FLSA. Id. at 249. Similarly, Plaintiffs are compelled to don and doff PPE to prevent exposure to noxious fumes, hazardous chemicals and dangerous working conditions. Plaintiffs are also required by the Employer and Wagner state law to wear PPE when they are working to minimize their exposure to hazardous chemicals. We find that one would be hard pressed to find another situation where changing clothes and showering was not more of an integral and indispensable part of the principal activity of employees. Moreover, as the Supreme

Court has concluded, any activity that is integral and indispensable to a principal activity is itself a principal activity. IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005).

Therefore, the donning and doffing of PPE by the WTS employees is both integral and indispensable. First, the Employer requires WTSs to wear gloves, masks, goggles and steel-toed boots. The donning and doffing of the PPE is necessary to the principal work performed. Second, the donning and doffing of the PPE was primarily for the benefit of the employer. We recognize that the PPE protects employees from workplace hazards. However, the Employer also benefits from the PPE by making it possible to maintain sanitary treatment facilities, keeping workers' compensation claims down, keeping missed time to a minimum and shielding the Company from pain and suffering payments. Perez, 650 F.3d at 367.

C. De minimis

We must now address whether the clothes-changing time, travel time and washing-up time is *de minimis*. An activity is noncompensable as *de minimis* when it involves only a few seconds or minutes beyond the scheduled working hours. Alvarez v. IBP, Inc., 339 F.3d 894, 903 (9th Cir. 2003).

In IBP, Inc. v. Alvarez, the Supreme Court held that post-donning and pre-doffing time spent walking between the locker room and the production line in a food processing plant was compensable because under the continuous workday rule, the compensable workday includes all activities that occur "after the beginning of the employee's first principal activity and before the end of the employee's last principal activity." IBP, 546 U.S. at 37.

In applying the *de minimis* rule here, the proper test is the aggregate amount of time the employees are otherwise legally entitled to compensation. See DOL Wage & Adv. Mem. No.

2006–2 n.1 (May 31, 2006); Perez, 650 F.3d at 373. When analyzing the *de minimis* standard, courts have adapted the analysis to the particulars of the situation. Lindow v. United States, 738 F.2d 1057, 1061-62 (9th Cir. 1984) (finding that the five to fifteen minutes per day that employees of the Northern Division of the Army Corps of Engineers spent reading log books and exchanging information before work hours was *de minimis*); E.I. Du Pont De Nemours & Co. v. Harrup, 227 F.2d 133 (4th Cir. 1955) (finding that cashier reporting to work early to count the sum of $200 and receive any information which the outgoing cashier had to communicate was *de minimis*).

The employees' compensable work day begins with their first principal activity: changing clothes. Their compensable work day ends when they finish washing up at the end of the day, not when they punch out at the time clock. The time employees spend changing clothes, traveling to and from their time clocks, and showering at the end of the day takes a total of thirty minutes daily. It is this Court's view that this is not *de minimis*.

In Lindow, the Ninth Circuit articulated three factors to consider when conducting a *de minimis* analysis: "(1) the practical difficulty the employer would encounter in recording the additional time; (2) the total amount of compensable time; and (3) the regularity of the additional work." Lindow, 738 F.2d at 1063; see also De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007); Brock v. City of Cincinnati, 236 F.3d 793, 804–05 (6th Cir. 2001); Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 719 (2d Cir. 2001).

By applying these factors, the *de minimis* analysis requires a factual inquiry that will vary according to the circumstances of each case. Perez, 650 F.3d at 373-74 (citing Lindow, 738 F.2d at 1062). First, the Employer would not encounter difficulty in recording the additional time

because employees would punch in the at the time clock pre-donning and post-doffing start and ending times. Second, the total amount of compensable time is thirty minutes per day or two and a half hours per week, which is not an insignificant amount of time. At the WTS pay rate of $20 per hour, two and a half hours of additional compensable time amounts to $50 per week. Applying this figure to an annual work schedule of fifty-two weeks, the extra annual compensation is $2,600, or 6.25% of an employee's $41,600 annual salary. Finally, the third factor in Lindow is satisfied because employees perform the disputed work on every scheduled workday.

Not only does the Company require the wearing of PPE, it is also regulated by Wagner state law. WTSs provide a valuable service to their community by maintaining clean and sanitary air and water. The legislative intent of the statute is clear: employees in waste management must wear PPE to ensure their health and safety. There are sound public policy reasons supporting this legislative intent, such as reducing the costs of health care and workers compensation claims to employers. Wearing PPE is an integral and indispensable part of their work because no employee could perform their work for any length of time without PPE, given the high risk of illness and injury that would result from working without protection. We find that the Company must compensate WTSs for time spent donning and doffing PPE. As a remedy, the Company is directed to adjust its payroll records to compensate all similarly situated employees for back pay and future pay.

Our conclusion is consistent with the most recent position of the U.S. Department of Labor ("DOL"). Since 1997, the DOL has issued five opinion letters defining "clothes-changing time." See Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 1997 WL 998048 (concluding that "by its very terms section 3(o) does not apply to the putting on, taking off, and

washing of protective safety equipment, and, therefore, time spent on these otherwise compensable activities cannot be excluded from hours worked"); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2001 WL 58864 (Jan. 15, 2001) (reiterating the 1997 Opinion Letter); but see Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2002 WL 33941766 (June 6, 2002) ("[i]t 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"); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2007 WL 2066554 (May 14, 2007) (reiterating the June 6, 2002 Opinion Letter); Adm'r Interp. No. 2010-2 (Dep't of Labor Wage & Hour Div. June 16, 2010) (reverting back to the position it took in the 1997 and 2001 Opinion Letters).

In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Supreme Court concluded that although only persuasive, administrative rulings, interpretations, and opinions may be entitled to some deference by reviewing courts. Id. at 140. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id.; see also Chao v. Occupational Safety & Health Review Comm'n, 540 F.3d 519, 526-27 (6th Cir. 2008). While the inconsistency of the DOL's interpretation of the terms "clothes-changing time" suggests we should afford the DOL scant deference, it is the duty of the courts to determine whether a particular case falls within or without the gambit of an Act. Skidmore, 323 U.S. at 137. We agree with the DOL's current interpretation of section 203(o) and hope that our decision will provide the agency with guidance in the future.

Finally, Plaintiffs also bring a claim under FLSA section 215(a)(3), the anti-retaliation provision, against the Company for termination after verbal and online complaints. We find that the discharge was retaliatory under Kasten v. Saint-Gobain Performance Plastics, Corp., 131 S.Ct. 1325 (2011) because it was in direct response to the verbal protest about the terms and conditions of employment to Mr. Byrd and after the post on Schmoozer, both protected activity.

2. National Labor Relations Act

Plaintiffs argue that the promulgation and implementation of the Company's SMP was unlawful under sections 7 and 8(a)(1) and (3) of the NLRA, as amended. We agree because: (1) the Employer's SMP is overbroad and could reasonably lead employees to believe that their section 7 rights are restricted; (2) employees were engaged in protected concerted activity; and (3) employees' statements online were not egregious enough so as to lose protection of the Act.

Section 8(a)(1) states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the NLRA." 29 U.S.C. § 158(a)(1). Section 8(a)(3) prohibits "discrimination based on union activity or not engaging in union activity." 29 U.S.C. § 158(a)(3). Section 7 provides to all employees, unionized and non-unionized, the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

A. Overbroad

The pertinent portion of the SMP, as amended, states: "If you must post complaints or criticism [on social media] avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that

disparage customers, members, associates or suppliers, or that might constitute harassment or bullying." Appendix C.

The first issue is whether the language is overbroad. A SMP is overbroad if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998). The National Labor Relations Board's ("NLRB") two-step inquiry requires the court to determine, first, whether the policy explicitly restricts Section 7 rights. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004). There is no explicit restriction here. The second step of the NLRB analysis requires a determination as to whether: (1) employees would reasonably construe the SMP to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule was applied to restrict the exercise of Section 7 rights. Id.

We believe the policy is overbroad because it can be reasonably construed by employees as restricting the exercise of their Section 7 rights. The policy prohibits employees from making "humiliating or offensive" posts on social media websites. Humiliating or offensive conduct may involve employee activity that could include protected activity, such as criticism of the Employer's treatment of employees, or the Employer's policies regarding terms and conditions of employment, such as compensation. Both may be offensive to an employer but are protected under the NLRA.

Most recently, the NLRB found that a rule that prohibited employees from making statements that "damage the Company, defame any individual or damage any person's reputation" clearly interfered with concerted communications. Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371, 358 N.L.R.B. No. 106 (Sept. 7, 2012)

(finding that Costco maintained a company policy that tended to chill the Section 7 rights of employees). This is precisely what happened here. The employees complained on the social networking website Schmoozer about their working conditions. Mr. Henson's post on Schmoozer was titled "Who's got a loser boss?" This language can be understood as communication seeking mutual aid from fellow employees. When the objective of a post is for mutual aid, it falls under the purview of the NLRA's protected activity. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 (Dec. 14, 2012) (finding that when examining individual activity to determine whether Section 7 rights are implicated, courts must look to whether a mutual aid objective is implicitly manifest from the surrounding circumstances).

B. Protected Concerted Activity

The second issue is whether employees were engaged in concerted activity protected by Section 7. An employee's action is deemed concerted when acting "with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Industries (Meyers I), 268 N.L.R.B. 493 (1984). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. Meyers Industries (Meyers II), 281 N.L.R.B. 882, 887 (1986).

Mr. Henson engaged in protected activity when he used his personal smartphone in the bar to post his frustration on Schmoozer regarding the Company's failure to compensate WTSs properly. Mr. Henson's actions occurred off duty and off Company premises using his personal cell phone. Because of the time and location of the communication, we need not address the issue of whether the employer may restrict the use of an employee's smartphone during working

hours. The content of the post related to terms and conditions of employment, namely, not being paid for time spent donning and PPE. It is well established that the protest of supervisory actions is protected conduct under Section 7. See Datwyler Rubber and Plastics, Inc., 350 N.L.R.B. 669 (2007). Accordingly, the Plaintiffs' discussion of terms and conditions of employment was protected concerted activity. Mr. Henson, Mr. Jacobson, and Mr. Clash engaged in concerted activity when they expressed their anger about their Employer not paying them for time they believed should be compensated. To constitute protected activity, the objective of a post on a social networking site must be for mutual aid. Hispanics United of Buffalo, 359 N.L.R.B. at 10 (an employee's posting on Facebook stating, "Lydia Cruz, a coworker, feels that we don't help our clients enough at HUB [Hispanics United of Buffalo, Inc.] I about had it! My fellow coworkers how do u feel?" was protected activity because the objective of the post was for mutual aid to prepare fellow employees for a group defense of supervisory criticism of their performance).

C. Losing Protection of the Act

The final issue is whether the employees' statements online were so egregious or opprobrious as to justify their losing protection of the Act. To determine whether an employee loses the protection of the Act due to the allegedly opprobrious conduct, the court must consider four factors established in Atlantic Steel, 245 N.L.R.B. 814, 816 (1979): "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."

We find that Plaintiffs did not lose protection of the Act. First, the discussion occurred at a bar on a Friday night during non-working hours and was posted on a non-company-related

professional networking website where users might be expected to discuss complaints about their supervisors, company or working environment; thus, the location of the discussion should not offend the employer. Second, Mr. Henson's post discussed his disdain for one of the terms and conditions of his employment, namely the failure of the Company to pay for donning and doffing. Although the title of the group – "Who has a loser boss?" – does not reference specifically a term and condition of employment, the subject of the post was that his work was "not valued." Third, the nature of the outburst was not so egregious as to lose protection of the Act. In Atlantic Steel, the NLRB found that calling your boss a "scumbag" was not so egregious as to lose the protection of the Act when taken in conjunction with the other Atlantic Steel factors. Report of the Gen. Counsel, 20570 (Aug. 18, 2011). Here, Mr. Henson referred to Mr. Byrd as a "loser boss" and an "incompetent moron," which, while disparaging, fall within protected activity under NLRB precedent because of the context in which they were made. At the time Mr. Henson made the remark, he was on non-company property; he used his personal smartphone to post on Schmoozer; he attempted to keep the post out of the workplace by not inviting several employees of the Employer; and it was in the context of protesting a term and condition of employment with co-workers which is protected activity under Section 7 of the NLRA. Further, the NLRB has found more egregious conduct about a supervisor as still being protected activity. See e.g., Stanford Hotel, 344 N.L.R.B. 558, 558-59 (2005) (holding calling a supervisor a "liar and a bitch" and a "****ing son of a bitch" was not so opprobrious as to cost the employee the protection of the Act); see also Alcoa Inc., 352 N.L.R.B. 1222, 1226 (2008) (holding reference to supervisor as an "egotistical ****" protected).

Finally, the Schmoozer group and post were in response to an alleged violation of FLSA Section 203(o), if not a claimed violation of the NLRA. Although not provoked by an

employer's unfair labor practice, Plaintiffs nevertheless engaged in a discussion about their employer's failure and refusal to abide by the FLSA in their terms and conditions of employment, specifically, not being paid for the time spent donning and doffing.

We note that our decision is supported by three recent Advice Memoranda issued by the NLRB's Acting General Counsel, Lafe E. Solomon, between August 2011 and May 2012 concerning SMPs and Section 7 rights.

III. Conclusion

Accordingly, and for the reasons set forth above, this Court concludes that the Company's SMP, as amended, is unlawfully overbroad under Section 7 and 8(a)(1) and (3) and orders the Employer to cease and desist from discharging employees who engage in protected concerted activity. Furthermore, this Court reinstates Plaintiffs as WTSs at the Company with full back pay and benefits, including overtime compensation, for the time spent donning and doffing PPE, attorney's fees, and costs. It is so ORDERED.

Cite as: 185 F.3d 26 (13th Cir. 2012)

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT
----------X
GROVER WASTE SOLUTIONS, INC.,

Docket No. 12-0102

Appellant,

- against -

ERNIE HENSON, et al.,

Respondents,

----------X

Majority opinion delivered by Chief Judge Tooker, joined by Judges Patel and Blackmer:

This matter is on appeal from a decision of the United States District Court for the Eastern District of Wagner reinstating Respondents as waste treatment specialists (WTSs) at Grover Waste Solutions, Inc. ("Grover," "the Company," or "the Employer") with full back pay, including overtime pay, for the time spent donning and doffing, attorney's fees, and costs. The District Court held that: (1) donning and doffing personal protective equipment (PPE) constituted "clothes-changing time" under section 203(o) of the Fair Labor Standards Act (FLSA); (2) donning and doffing PPE constituted a principal activity that was integral and indispensable to the employees' work; and (3) the length of time it took employees to change into and out of PPE, travel time and wash-up time was not *de minimis*.

Also on appeal is the District Court's conclusion that the Employer's social media policy (SMP) was unlawful under Sections 7 and 8(a)(1) and (3) of the National Labor Relations Act (NLRA). The District Court held that: (1) Appellant's SMP was overly broad under the NLRA; (2) Respondents' were engaged in protected concerted activity as defined by the NLRA; and (3) Respondent' actions were not so egregious as to lose protection of the NLRA.

Grover appeals both issues. For the reasons that follow, we hold that: (1) Grover is not required to compensate WTSs for time spent changing into and out of their PPE, and (2) Grover is not required to compensate workers for travel time to and from the locker area and wash-up time. With regard to the NLRA claim, we hold that: (1) Grover's SMP was not overly broad; (2) employees were not engaging in protected concerted activity; and (3) employees' statements were so egregious as to lose protection of the NLRA.

I. Donning and Doffing

The FLSA provides that employers shall pay employees a minimum hourly wage for all "hours worked." 29 U.S.C. § 206. In 1947, Congress passed the Portal-to-Portal Act which specified what type of time was compensable work time. 29 U.S.C. 251 et seq. Specifically, the Portal-to-Portal Act excludes from mandatory compensation: (1) time spent traveling to and from the actual place where the employee performs his principal activities, and (2) time spent on incidental activities before or after the employee's principal activities. 29 U.S.C. § 254(a). In 1949, Congress added section 3(o) to the FLSA which excludes from the time during which an employee is entitled to be compensated at the minimum hourly wage, "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time . . . 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).

It is an open question in this Circuit whether donning and doffing PPE is a preliminary or postliminary activity or integral or indispensable to the principal activity of waste treatment. In determining what "changing clothes" means under section 203(o), the Eleventh Circuit deemed that the term "clothes" should be given its ordinary meaning, that is, "covering for the human

body or garments in general...." Anderson v. Cagle's, Inc., 488 F.3d 945, 955-59 (11th Cir. 2007) (citing Webster's Third New Int'l Dictionary 428 (1986)). The Fourth Circuit in Sepulveda v. Allen Family Foods, Inc., applied the "fundamental canon of statutory construction" that "words will be interpreted as taking their ordinary, contemporary, common meaning" and agreed with the Eleventh Circuit on the meaning of the term "clothes." Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 214 (4th Cir. 2009) (holding that donning and doffing PPE at a poultry processing plant constitutes "changing clothes" within the meaning of FLSA section 203(o), and that employees were not entitled to compensation for donning and doffing PPE because of the CBA). Moreover, courts have found that putting on protective glasses or inserting ear plugs takes a matter of seconds and are *de minimis* and not compensable. Sandifer v. United States Steel Corp., 678 F.3d 590, 593 (7th Cir. 2012). "Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." Id. (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946)).

We find this case factually similar to, and legally indistinguishable from, Sandifer v. United States Steel Corporation. There, unionized production and maintenance workers sued their employer under the FLSA, alleging a failure to compensate them for time spent putting on and taking off their work clothes in a locker room at the plant, and in walking from the locker room to their work stations, and back to the locker room at the end of the day. Id. at 591. Judge Posner held: "(1) [the] employer did not have to compensate its workers for time spent changing into and out of their work clothes, and (2) [the] employer did not have to compensate workers for

travel time to and from locker area." Id. at 590. We agree with the Seventh Circuit's legal analysis in that case and rely on it as a basis for our decision.

We find that the clothing in this case is both clothing and PPE. Protection is a common function of clothing, such as protection against sun, wind, cold, and insect bites. It would be inconsistent with Congressional intent to exclude all work clothes that have a protective function under FLSA section 203(o) because that section concerns changing into and out of clothes at the beginning and end of the workday. However, under section 203(o), "time spent by employees in pre- and post-shift donning and doffing of PPE and showering is excluded from the computation of hours worked if two conditions are met." Sandifer v. United States Steel Corp., 2009 WL 3430222, at *4 (N.D. Ind. Oct. 15, 2009). First, "the activities at issue constitute 'changing clothes' as that term is used in the statute," and second, "a bona fide collective bargaining agreement excludes, by its express terms or by a custom or practice under the agreement, time spent changing clothes and washing from compensable working time." Id.

Here, the CBA is silent as to whether employees are to be compensated for time spent donning and doffing PPE and walking to and from the locker area. Thus, it has been custom and practice under the agreement for the Employer to exclude the time it takes employees to change clothes and walk to and from the locker area from compensation. A CBA has been in place for at least ten years and has been reviewed and renegotiated every three years. The record is silent as to whether during negotiations for successor agreements there was discussion about compensating employees for donning and doffing PPE, travel time to and from the locker area or washing-up time. Furthermore, with the Local 300-G, American Federation of Waste Treatment Workers Union's (the Union) knowledge, it has been custom and practice for the Employer to

exclude employees from such compensation. Accordingly, the custom and practice under a bona fide CBA excludes such time from employee compensation.

Additionally, we find "puzzling and paradoxical," in Judge Posner's words, the District Court's conclusion that donning the Company's PPE is an integral and indispensable part of employees' principal activities. See Sandifer, 678 F.3d at 595-96. The Portal-to-Portal Act exempts from minimum wage "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." 29 U.S.C. § 254(a). Unless donning and doffing work clothes are principal activities even when made noncompensable pursuant to section 203(o), section 254(a)'s exemption applies; thus, the Employer need not compensate for travel time. See Sandifer, 678 F.3d at 596.

It is perplexing that the district judge thought that clothes-changing time could be a "principal activity" even though the Employer and the Union decided that such time is not work time and therefore need not be compensated. Id. Notably, Judge Posner asked: "If it is not work time -- the workers aren't being paid and their union has agreed to their not being paid -- how can it be one of the 'principal . . . activities which [the] employee is employed to perform'?" Id. Additionally, Judge Posner pointed out that "not all requirements imposed on employees constitute employment." Id. He explained,

> [an employee] is required to wear work clothes, and for that matter he is required to show up for work. But he is not employed to show up or employed to change clothes. . . . [Also,] [a]n employee may be required to call in when he is sick, but unless he is paid on sick leave he is not paid for the time it takes to place the call.

Id.

Moreover, the District Court relies heavily on Steiner v. Mitchell for the Court's statement that "the term 'principal activity or activities' included all activities that are an 'integral and indispensable part of the principal activities' for which the employee is employed...." Id.; see also Steiner v. Mitchell, 350 U.S. 247, 252-53 (1956). However, section 203(o) says "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 . . . involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement...." 29. U.S.C. § 203(o); Anderson v. Cagle's, Inc., 488 F.3d 945, 958 (11th Cir. 2007) (holding that employer's policy of not compensating employees of its chicken processing facilities for donning and doffing activities satisfied the custom or practice requirement of FLSA section 203(o). Donning and doffing at the beginning and end of each workday was excluded by custom or practice under a bona fide CBA, even though the CBA never addressed the compensation policy with respect to clothes-changing and even though the parties to the CBA never discussed the policy). That is precisely what happened in this case. For the past ten years, the Union, as the exclusive bargaining representative of WTSs, has had an understanding with the Employer that the workday started when employees arrived at their work site; it would not start when the workers changed their clothes. As Judge Posner remarked in Sandifer, "if clothes-changing time is lawfully not compensated, we can't see how it could be thought a principal employment activity, and so section 254(a) exempts the travel time...." Sandifer, 678 F.3d at 596-97.

The District Court also relies on Franklin v. Kellogg Co., 619 F.3d 604, 618-19 (6th Cir. 2010), where, as in this case, the employer, invoking FLSA section 203(o), did not compensate its employees for time spent donning and doffing work clothes. The court in that case incorrectly

concluded that changing time was a "principal activity" because it was required by the employer. We agree with the Seventh Circuit that this a convoluted definition of principal activity and we cannot agree with the Sixth Circuit's conclusions. Id. at 598.

Moreover, while the District Court places immense weight on the Department of Labor's (DOL) most recent opinion letter, we believe the letters should be read with considerable skepticism due to the DOL's inconsistent interpretations of section 203(o) over time. During the Clinton Administration, the DOL viewed the meaning of the term "clothes" narrowly for purposes of deciding whether time spent donning and doffing work clothes could be excluded under FLSA section 203(o). Id. (citing U.S. Dep't of Labor, Opinion Letter, 2001 WL 58864 (Jan. 15, 2001); Opinion Letter, 1997 WL 998048 (Dec. 3, 1997)). During the Bush Administration, the DOL took a broad view of the meaning of "clothes," even expanding that "clothes-changing time excluded under section 203(o) could not be a 'principal activity' under the Portal-to-Portal Act." Id. (citing U.S. Dep't of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007); Opinion Letter, 2002 WL 33941766 (June 6, 2002)). After the Obama Administration took over in 2009, the DOL reverted back to the Clinton Administration's position on "changing clothes" and rejected the Bush Administration's position on "principal activity." Id. at 599 (citing U.S. Dep't of Labor, Administrator's Interpretation No. 2010-2, 2010 WL 2468195 (June 16, 2010)). Judge Posner put it best, remarking,

> [i]t would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them....

Id.

As a matter of public policy, we agree with the Seventh Circuit that in the long run, workers would not benefit from a rule that travel time must be compensated. Id. at 597. Judge Posner reasoned,

> it would mean that in an 8-hour shift ... the employer would not obtain eight hours of productive work; he would be paying the same wage and getting less work in return ... and so the wage would have to fall the next time the collective bargaining agreement was renegotiated unless the laws of economics were repealed.

Id. at 597.

While this Court agrees with the Employer that donning and doffing is noncompensable, we find the Employer retaliated against Appellants by discharging them for complaining to Mr. Byrd about the Employer's failure to pay for clothes-changing, travel and wash-up time. 29 U.S.C. § 215(a)(3). We agree with the District Court that this was a clear case of retaliation under Kasten v. Saint-Gobain Performance Plastics, Corp., 131 S.Ct. 1325 (2011). Kasten is consistent with the Supreme Court's long held view that statutory anti-retaliation provisions should be read and applied broadly.

II. Social Media

Respondents contend that the promulgation and application of the Employer's SMP were unlawful under Sections 7 and 8(a)(1) and (3) of the NLRA, as amended. We disagree and reverse the District Court's holding with regard to this issue.

Section 7 provides employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1)

states that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment for any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

A. The Employer's Social Media Policy is Not Overly Broad.

An employer violates Section 8(a)(1) by promulgating work rules that "reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998). The NLRB applies a two-step test to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004). First, a work rule is unlawful if it explicitly restricts Section 7 activities. Second, even if the rule does not explicitly restrict Section 7 activities, it may be unlawful upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." SWH Corporation d/b/a Mimi's Cafe, No. 28-CA-084365, N.L.R.B. (Oct. 31, 2012); Rocha Transportation, No. 32-CA-086799, N.L.R.B. (Oct. 31, 2012).

In Costco Wholesale Corp. & United Food & Commercial Workers Union, Local 371, the NLRB found lawful a rule requiring employees to use "appropriate business decorum" in communications. The NLRB did not find the rule to be overly broad because it was "clearly intended to promote 'a civil and decent workplace'" and reasonable employees would not infer that the rule restricted Section 7 activity. Costco Wholesale Corp. & United Food & Commercial Workers Union, Local 371, 358 N.L.R.B. No. 106 (Sept. 7, 2012).

Here, Respondents contend the following language is overly broad:

> If you must post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Appendix C. Employees would not reasonably construe the Employer's SMP to apply to Section 7 activity and thus, the rule is not overly broad. Employees will understand that the rule appears in a list of plainly egregious conduct, such as violations of the Employer's workplace policies against discrimination, harassment, or hostility on account of race, religion, sex, disability, or other protected class or characteristic, which illustrates that the Employer was merely trying to promote "a civil and decent workplace." Costco Wholesale Corp. & United Food & Commercial Workers Union, Local 371, 358 N.L.R.B. No. 106. Prior NLRB decisions that considered rules similar to the one here concluded that where the rules are, on their face, "clearly intended to promote a 'civil and decent workplace,' even though in some circumstances protected conduct might be restricted, reasonable employees *would not* infer that the rules restrict Section 7 activity." Id. (emphasis added) (quoting Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647-49 (2004) (upholding a rule prohibiting "abusive or profane language," "harassment," and "verbal, mental and physical abuse"); Tradesmen International (upholding a rule prohibiting "disloyal, disruptive, competitive or damaging" conduct and prohibiting "verbal or other statements, which are slanderous or detrimental to the company or any of the company's employees")).

Moreover, it is within management's rights to maintain discipline in the workplace. We find that the Employer's SMP is business related in that it prohibits conduct and statements detrimental to the Company and its employees. The SMP provisions that prohibit damaging or defamatory speech are contained in a list of categories of speech that unequivocally are not protected under the NLRA.

B. Employees Were Not Engaging in Protected Concerted Activity.

The NLRB has defined protected concerted activity as action "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Industries, (Meyers I), 268 N.L.R.B. 493, 497 (1984). In Meyers II, the Board concluded that concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. Meyers Industries, (Meyers II), 281 N.L.R.B. 882, 887 (1986).

Here, Messrs. Henson and Jacobson did not contemplate group action; nor were they speaking on behalf of employees but themselves. Rather, they were venting about something at work. That is hardly Section 7 protected activity. This case is similar to Daly Park Nursing Home, 287 N.L.R.B. 710 (1987), where the NLRB found that a discussion among employees about a coworker's discharge did not constitute protected concerted activity because there was no evidence that any of the coworkers planned to take any action about the discharge. Daly Park Nursing Home, 287 N.L.R.B. at 711. The NLRB reasoned that "there [was] nothing more than a conversation between employees relating their opinion on matters of interest to the employees." Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 (December 14, 2012) (quoting Daly Park

Nursing Home, 287 N.L.R.B. at 711). Additionally, the NLRB concluded that the conversation "[did] not indicate that 'group action of any kind [was] intended contemplated, or even referred to.'" Id. (quoting Mushroom Transportation, 330 F.2d 683, 685 (3d Cir. 1964).

Board Member Hayes echoed the NLRB's reasoning in Daly Park Nursing Home in his dissenting opinion in Hispanics United of Buffalo. We apply Member Hayes's legal analysis in determining that the employees here were not engaged in protected concerted activity. He pointed out that "'in order for employee conduct to fall within Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Hispanics United of Buffalo, 359 N.L.R.B. No. 37 (citing Hollings Press, Inc., 343 N.L.R.B. 301, 302 (2004)). Though these elements are related, they are separate; thus, both elements must be established to show a violation of Section 8(a)(1). In the case before us, the conversations in the "Who's got a loser boss?" group may have been concerted, in the sense that it was a group activity, but Respondents have failed to prove that it was for the purpose of "mutual aid or protection."

Additionally, Member Hayes noted: "Not all shop talk among employees—whether in-person, telephonic, or on the internet—is concerted within the meaning of Section 7, even if it focuses on a condition of employment." Id. Importantly, he emphasized the need for a nexus to group action; without such nexus, "such conversations are mere griping, which the Act does not protect." Id. As the dissent made clear, the activity must be in preparation for, in an effort to induce, or hoping to initiate some kind of group activity for the benefit of the employees. Id.

Here, Mr. Henson was not engaged in protected concerted activity within the meaning of Meyers I or II. His Schmoozer post expressed his personal anger at his employer and was made solely on his own behalf expressing his personal frustration with his employer: "*I* work for some

incompetent morons. They're about to get a piece of *my* mind on Monday! They don't value *me*, why should *I* even care. Oh wait, *I* have bills to pay, that's why!!?!" (emphasis added). Significantly, he only used the pronoun I, and never you or we, that is, never including co-workers in his griping. Clearly, the post expressed only his individual complaints, not those of a group of fellow employees.

C. Employees' Statements Were Egregious Enough to Lose Protection of the Act.

Although under Section 8(a)(1) an employer may not "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights, an employee's rights under Section 7 are not without limit. The NLRB and courts have recognized that employers may discipline and even discharge employees for conduct that is so disloyal or opprobrious as to lose protection of the Act. See Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979). To determine whether an employee has crossed that line depends on several factors: "(1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Id.

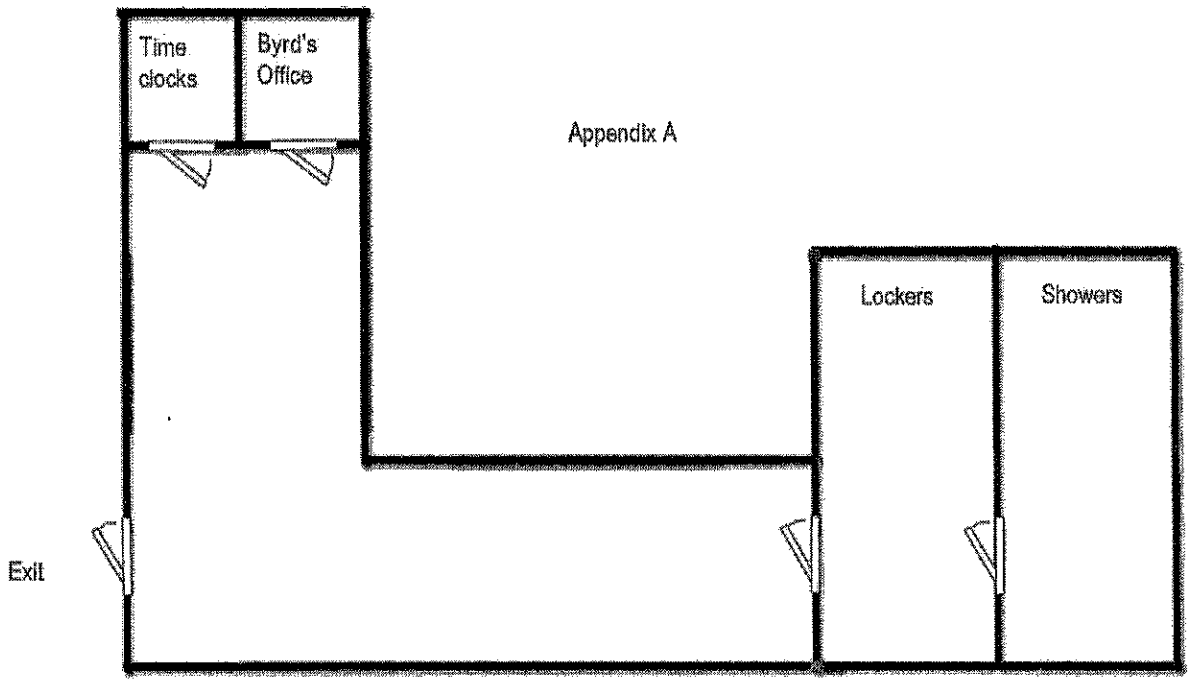
Here, Respondents lost protection of the Act when they complained about their employer and supervisor at a local bar and wrote that they had a "loser boss" who was an "incompetent moron" on Schmoozer. Although "employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect" in the workplace. Kiewit Power Constructors Co. v. N.L.R.B., 652 F.3d 22, 26 (D.C. Cir. 2011) (quoting Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994)). Mr. Henson's outburst was unprofessional and unjustified as the record shows that the Company's failure to pay donning and doffing time was custom and practice for well over ten years, with

employees and the Union well aware of the practice. Nor was Mr. Henson's outburst provoked by an employer unfair labor practice.

Mr. Henson posted on a professional networking social media website, in the full view of twenty individuals, two of whom were employees of the Employer. He engaged in insubordination by creating the group "Who's got a Loser boss," posting that he "work[s] for some "incompetent morons." The D.C. Circuit Court has held that "denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms... properly counts against according [the employee] the protection of the Act." Felix Industries, Inc. v. N.L.R.B., 251 F.3d 1051 (D.C. Cir. 2001). We find that Mr. Henson's choice of language caused him to lose the protection of the NLRA. The nature of the post was not in response to an employer's unfair labor practice; rather, its intended effect was to disrupt the workplace. Thus, the employees displayed conduct so egregious so as to lose the protections of Sections 7 and 8(a)(1) and (3) of the Act.

III. Conclusion

Accordingly, and for the reasons set forth above, this Court concludes that the Employer's SMP was unlawful under Section 7 and 8(a)(1) and (3). The Employer's SMP is narrowly tailored to business needs and is not overbroad so as to interfere with employees' rights under federal labor law. Furthermore, Grover is not required to compensate WTSs for time spent changing into and out of their clothes, for travel time to and from the locker area or for wash-up time after work. It is so ORDERED.



**Note: The "Exit" leads to the WTSs' work area.

Appendix B

Grover Waste Solutions, Inc.

Social Media Policy

[Original Policy prior to May 10, 2009 Amendment]

At Grover Waste Solutions, Inc., we understand that social media is the hip new way to share your life and opinions with family, friends and co-workers around the world. We just want to give you a reality check when it comes to using social media, i.e. the risks and responsibilities that social media presents. These rules will help you navigate the social media world safely and confidently. All you have to do is follow them!

RULES

We've all seen the rapid rise in social media in the last few decades. What does social media even mean? The term changes every day! What we at Grover Waste Solutions, Inc. include as social media is: all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal website, social networking or affinity website, web bulletin board or a chat room, whether or not associated or affiliated with Grover Waste Solutions, Inc., as well as any other form of electronic communication.

Let's be clear, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow employees or otherwise adversely affects employees, supervisors, managers, customers, suppliers, or the Company, people who work on behalf of Grover Waste Solutions, Inc. or Grover Waste Solutions, Inc.'s legitimate business interests may result in disciplinary action up to and including termination.

READ AND UNDERSTAND THE RULES

Carefully read these rules and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, offensive, and threats of violence or similar inappropriate conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

R-E-S-P-E-C-T

Always be fair and courteous to fellow employees, supervisors, managers, customers, suppliers, or the Company, or people who work on behalf of Grover Waste Solutions, Inc. We encourage employees to speak with managers, supervisors and co-workers about work-related complaints instead of posting online.

HONESTY AND ACCURACY

Be sure that you are always honest and accurate when posting information or news. Be open about any previous posts you have altered. In this day-and-age, once something is on the Internet, it is archived until the end of time! You should be extra cautious of your posts content. Never post any information or rumors that you know to be false about Grover Waste Solutions, Inc., employees, supervisors, managers, customers, suppliers, or the Company, or people working on behalf of Grover Waste Solutions, Inc. or competitors.

Post only appropriate and respectful content

If Grover Waste Solutions, Inc. is a subject of the content you are creating, be clear and open about your job title or position at Grover Waste Solutions, Inc. Disclaimers are a good way to let people know that these are your own opinions.

Using *social media* at work

This is common-sense! As an employee at Grover Waste Solutions, Inc., you are not permitted from using *social media* while on work time or on equipment we provide, unless it is work-related as authorized by your manager.

DISCLAIMER

Nothing in the policy is in intended to interfere with employees' rights to engage in activity that is protected by the National Labor Relations Act.

For more information

If you have questions or need further guidance, please contact your supervisor or an HR representative.

This policy applies to all employees, supervisors, and managers who work for Grover Waste Solutions, Inc.

Managers and supervisors should use the supplemental social media management guidelines

for additional guidance in administering the policy.

Appendix C

May 10, 2009

Amendment to social media policy:

R-E-S-P-E-C-T

If you must post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage employees, supervisors, managers, customers, suppliers, or the Company, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy. These are big no-no's and may subject you to disciplinary action up to and including termination.

Appendix D

GROVER WASTE SOLUTIONS, INC.

123 SESAME STREET WORTH, WAGNER 10013 OSCAR@GWS.COM

TEL 987-555-0000 **FAX** 123-555-1234

CONFIDENTIAL

October 30, 2012
Ernie Henson
10 Muppet Place
Worth, Wagner 10013

Dear Mr. Henson,

We regret to inform you that your employment with Grover Waste Solutions, Inc. shall be terminated on November 1, 2012, for the following reason: violating Grover Waste Solutions, Inc.'s social media policy by publicly disparaging and embarrassing the Company and Mr. Byrd.

Please arrange for the return of any company property in your possession. Again, we regret this action is necessary.

Sincerely yours,

/s/ Oscar Byrd
Supervisor

cc: Local 300-G, American Federation of Waste Treatment Workers

In the

Supreme Court of the United States

ERNIE HENSON, ET. AL.,

Petitioners,

- against -

GROVER WASTE SOLUTIONS, INC.,

Respondent.

Order Granting Certiorari

[January 11, 2013]

The petition for writ of certiorari to the United States States Court of Appeals for the Thirteenth Circuit is hereby GRANTED so that this Court may hear the following issues:

1. Does an employer's failure to pay waste treatment facility employees for the time spent donning and doffing, travel time to and from the locker room, and wash-up time, violate Section 203(o) of the Fair Labor Standards Act?

2. Does an employer commit an unfair labor practice under the National Labor Relations Act by promulgating a social media policy that bars employees from posting statements online "that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive or intimidating" and enforcing the policy by discharging employees who posted online statements protesting their working conditions?

It is so ORDERED:

/s/ *Vilhelm Booker*
Vilhelm Booker, JJ

Dated: January 11, 2013

APPENDIX B

Fair Labor Standards Act

29 U.S.C. § 203(o) (2006).

(o) 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.

APPENDIX C

Fair Labor Standards Act

29 U.S.C. § 254

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947-

> **(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. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either--

> **(1)** an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> **(2)** a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

APPENDIX D

National Labor Relations Act

29 U.S.C. § 151 (2006).

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act

29 U.S.C. § 157 (2006).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

National Labor Relations Act

29 U.S.C. § 158(a) (2006).

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

APPENDIX E

The CBA between the Union and the Employer contains the following provision:

The term "local working conditions" as used herein means specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work or other conditions of employment which the Parties reduced to writing by mutual agreement. No local working condition shall be established except as it is expressed in writing in an agreement approved by the Facility Manager and the local Union President. Only those officials shall be empowered to change, modify or eliminate local working conditions.

APPENDIX F

Grover Waste Solutions, Inc. — Social Media Policy

May 10, 2009

Amendment to social media policy:

R-E-S-P-E-C-T

If you must post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening, humiliating, offensive, or intimidating, that disparage employees, supervisors, managers, customers, suppliers, or the Company, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy. These are big no-no's and may subject you to disciplinary action up to and including termination.