



QUARTERLY EMPLOYMENT LAW NEWSLETTER

**Donning and Doffing**

By: *Lori L. Athmann, Attorney*

Under the Fair Labor Standards Act (FLSA) nonsalaried employees may be entitled to compensation for time spent donning (putting on) and doffing (taking off) uniforms and safety equipment if they are required to do so at work.

The issue of when and whether an employee is entitled to compensation for time spent donning and doffing was addressed by the Ninth U.S. Circuit Court of Appeals in *Bamonte v. City of Mesa*, 9th Cir. No. 05-16206 (March 25, 2010). Mesa police officers commenced a class action lawsuit arguing that because they must wear uniforms and related gear, including weapons, holsters, and other safety equipment, the City violated the FLSA for not compensating the officers for the time spent donning and doffing their uniforms. The U.S. District Court acknowledged the three stage inquiry used to determine whether donning and doffing is compensable. First, the court must consider whether the activity 1) constitutes “work”; 2) is “integral and indispensable” to the officers’ principal activities; and 3) is minimal. The court agreed that the option to don and doff uniforms and protective gear at home, the activities could be considered “work” because they were requirements of the job. However, the court concluded that the question was not whether wearing the uniform and gear was by itself integral to the job, but whether the donning and doffing on the employer’s premises is integral and indispensable. If it could be done at home or at work at the option of the police officer, then such activity was not integral to the actual performance of the officers’ duties and, as such, the time spent on that activity was not compensable under the FLSA.

How does this ruling compare to the Minnesota Fair Labor Standards Act? The Minnesota Court of Appeals has also weighed in on this particular issue in its decision *Rios v. Jennie-O Turkey*, 793 N.W.2d 309 (Minn.App.2011). A group of employees of Jennie-O Turkey Store, Inc., based

in Marshall, Minnesota, filed suit claiming that the Minnesota Fair Labor Standards Act required that they be compensated for time spent “donning and doffing”, or removing and putting on, their required uniforms and safety equipment before and after their work shifts, as well as for meal breaks. Specifically, they argued that they were not paid overtime compensation for the time spent donning and doffing, nor were they given a full 30 minute meal break during each eight hours of work when taking into account the time spent partially donning and doffing.

In order to meet sanitation and safety standards, the employees were required to wear certain gear and equipment, such as boots, pants, smocks, gloves, and hats. At the start and end of their shifts, the employees were required to put on and take off the necessary gear and equipment. They also had to particularly take off the gear and equipment for meal breaks. This donning and doffing of safety equipment and gear were conditions of employment. The employees claimed that the method of timekeeping implemented by Jennie-O Turkey did not fully capture the time required for mandated donning and doffing and, as such, they were underpaid wages in violation of the Minnesota Fair Labor Standards Act (MFLSA). The Court of Appeals rejected the employees’ claims. The Court reasoned that under the MFLSA, an employee is entitled to overtime pay for time worked in excess of 48 hours. The MFLSA is less restrictive than its federal counterpart, the Fair Labor Standards Act (FLSA) which requires overtime pay for time worked in excess of 40 hours per work week. The Court found that the employees could not demonstrate that their compensation fell below the 48 hour requirement under the MFLSA. The Court was very clear that the employees could not import the requirements of the FLSA into the determination of whether there has been a violation of the MFLSA. The FLSA is a more restrictive statute, requiring overtime compensation after 40 hours in

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### ELECTRONIC NEWS

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## Retaliation

By: Jessie Sogge, Attorney

### Introduction

Retaliation claims by employees against employers are at record levels. According to the U.S. Equal Employment Opportunity Commission, there were 36,258 retaliation claims in the United States in 2010; this number represents a 68% increase since 2000, and an 8% increase over 2009. Unfortunately for employers, this trend looks to continue. The Supreme Court recently handed down two employee friendly retaliation decisions.

In both cases, the Petitioner brought an anti-retaliation suit against their former employer under the Fair Labor Standards Act of 1938 (Act), which forbids employers "to discharge . . . any employee because such employee has filed any complaint" alleging a violation of the Act, 29 U. S. C. §215(a)(3). Title VII also provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII. 42 U. S. C. §2000e-3(a). The statute permits "a person claiming to be aggrieved" to file a charge with the EEOC alleging that the employer committed an unlawful employment practice, and, if the EEOC declines to sue the employer, it permits a civil action to "be brought . . . by the person claiming to be aggrieved . . . by the alleged unlawful employment practice." §2000e-5(b), (f)(1).

### Thompson v. North American Stainless

In *Thompson v. North American Stainless*, the Supreme Court expands the class of employees that may bring a retaliation claim against employers. The *Thompson* case begins with a tale of inter-office romance. While working at North American Stainless (NAS), Mr. Thompson met his fiancé Miriam Regalado (also working at NAS). Sometime after their relationship began, Ms. Regalado filed a Title VII discrimination claim against NAS. Five months later, Mr. Thompson was terminated. It was widely known in the company that Ms. Regalado and Mr. Thompson were engaged. Mr. Thompson filed a complaint alleging that his termination was in retaliation against his fiancé for engaging in protected activity under Title VII. The District Court dismissed Mr. Thompson's complaint on summary judgment holding that Title VII does not allow third-party retaliation claims and the Court of Appeals agreed.

The Supreme Court reversed holding that Mr. Thompson could bring a third-party retaliation claim under Title VII. In addressing whether NAS committed unlawful retaliation, the court adopted the following test: Unlawful retaliation under Title VII will constitute "any employer action 'that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Applying this standard to Mr. Thompson, the Court found that retaliating against an employee by firing her fiancée would dissuade the employee from engaging in protected activity. While the Court notes that the firing of a close family member will almost always meet the standard, the Court reserves judgment on whether the firing of an employee's girlfriend, close friend, or trusted co-worker will meet the standard. Thus, ultimately refusing to identify a fixed class of relationships for which third-party reprisals are unlawful.

NAS argued that applying the *Burlington* standard to third-party reprisals would place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC. The Court acknowledged their concern, but did not think that concern justifies a categorical rule that third-party reprisals do not violate Title VII,

explaining they adopted a broad standard in *Burlington* because Title VII's anti-retaliation provision is worded broadly.

The Court held that, "[g]iven the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's anti-retaliation provision is simply not reducible to a comprehensive set of clear rules". Instead, "the significance of any given act of retaliation will often depend upon the particular circumstances."

### Kasten v. Saint Gobain Performance Plastics Corporation

In *Kasten v. Saint Gobain Performance Plastic Corporation*, the Court held that the scope of the term "filed any complaint" encompassed oral as well as written complaints. In a separate District Court action, the court had found that Saint Gobain violated the Act by placing time clocks in a location that prevented workers from receiving credit for time spent dressing in their work clothes. In this suit, Kasten claimed that he was discharged because he had orally complained to company officials about the location of these time clocks. The District Court granted Saint Gobain summary judgment concluding that the Act's anti-retaliation provision did not cover oral complaints. The Seventh Circuit affirmed but the Supreme Court reversed holding that the scope of the statutory term "filed any complaint" includes oral as well as written complaints.

Kasten alleged that he had repeatedly called the unlawful time clock location to Saint Gobain's attention in accordance with company policy. Kasten claims that he had "raised a concern" with his shift supervisor that "it was illegal for the time clocks to be where they were" because of Saint Gobain's exclusion of "the time you come in and start doing stuff"; he told his lead operator that the location was illegal and that he "was thinking about starting a lawsuit about the placement of the time clocks"; and he told the human resources manager and the operations manager that he thought the location was illegal and that the company would "lose" in court. Kasten alleged that his reports led the company to discipline him and ultimately dismiss him. Naturally, Saint Gobain presented a different version of events. It denied that Kasten made any significant complaint about the time clock location and said that it dismissed Kasten simply because he failed to record his comings and goings on the time clock after several warnings to do so. The Supreme Court accepted Kasten's version of the contested events.

The ultimate question presented to the Court was whether "an oral complaint of a violation of the Fair Labor Standards Act" is "protected conduct under the [Act's] anti-retaliation provision." The Court ultimately concluded that the phrase "filed any complaint" included oral as well as written complaints when taken in context. Following a lengthy discussion about the word "filed" the Court made its holding based on many factors including the following:

The Court reasoned that several functional considerations indicated that Congress intended the anti-retaliation provision to cover oral, as well as written, "complaint[s]." The Court stated that, "[f]irst, an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives" as the "Act seeks to prohibit 'labor conditions detrimental

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## New Employee Rights Poster Required by the NLRB as of April 30, 2012

By: Victoria Lupu, Attorney

### Background

In December 2010, the National Labor Relations Board (Board) issued a proposed rule requiring all employers under its jurisdiction to post a notice detailing employees' rights under the National Labor Relations Act (NLRA). On August 26, 2011, in spite of substantial controversy and numerous objections, the Board published its Final Rule. The Rule was originally set to go into effect as of November 14, 2011. However, citing compliance concerns, the Board first pushed the effective date back to January 31, 2012. In its October 5, 2011 press release, the Board explained that its decision was based on widespread public uncertainty over which businesses fall under the Board's jurisdiction and that the new date will allow for "enhanced education and outreach to employers" so as to ensure "broad voluntary compliance."

At the request of a federal court in Washington, D.C., on December 23, 2011, the Board again postponed the effective date for the new posting requirement. The new deadline is April 30, 2012. The Board's ruling explains that this second postponement is intended to "facilitate the resolution of the legal challenges that have been filed with respect to the rule."

At present, employers falling under the jurisdiction of the Board (that is, most private-sector employers) will need to have the Employee Rights Poster posted as of April 30, 2012. The Poster is available through the Board's website at the following address: <https://www.nlr.gov/poster>. Employers can simply print a copy from the website or order a print by mail. Both options are free of charge.

### Compliance

The Poster must be posted wherever notices regarding personnel rules and policies are customarily posted. However, in addition to the employer's premises, the Board's Final Rule states that the Poster must also be posted at worksites where "the employer has the ability to post a notice or cause a notice to be posted directed to its own employees." These locations must be readily seen by employees.

If you customarily post personnel rules or policies on an internet or intranet site, the Poster must be placed on those same sites. It is not required that the Poster be distributed via email, voice mail, text messaging or other electronic communications, even if you customarily communicate with your employees in this manner.

Also, keep in mind that if at least 20% of your employees are not proficient in English and speak another language, you will need to post a translation of the Poster in that other language wherever the other English version was placed. The Board will provide translations.

### Board Jurisdiction

The posting requirement applies to all private-sector employers that are subject to The posting requirement applies to all private-sector employers that are

subject to the Act, whether or not employees are presently part of a union. Subject employers are those that, in the Board's opinion, have a "substantial effect on commerce." This will include any retail employer with a gross annual volume of business of \$500,000 or more. Most non-retail employers are also subject to the Board's jurisdiction. In these cases, jurisdiction is based on the amount of goods sold or services provided by the employer out of state (outflow), or goods or services purchased by the employer from out of state (inflow). This includes even indirect sales, provisions or purchases. The jurisdictional standard for non-retail employers is an annual inflow or outflow of at least \$50,000. As you might imagine, this will necessarily encompass most employers, excepting only some very small employers whose annual volume of income has only a slight effect on interstate commerce. Please note, however, that agricultural, railroad and airline employers are excluded from Board jurisdiction and this posting requirement will not apply to them.

### What happens in the event of a violation?

First, it must be noted that the Board does not have authority to fine employers for violating the rule by failing to post the required notice and the Rule does not include any record-keeping or reporting requirements. Furthermore, the Board does not conduct workplace audits or initiate enforcement actions on its own. A failure to post would need to be brought to the Board's attention in the form of an unfair labor practice charge by employees or unions.

However, if the Board determines that an employer "knowingly and willfully" failed to post the required notice, that failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA. Failure to post could also be grounds for tolling the normal six-month statute of limitations for unfair labor practice cases.

### Legal Challenges to the Rule

Numerous organizations throughout the United States have taken issue with the Board's Final Rule and it is presently facing at least four legal challenges in various states. Such challenges have been asserted by the National Association of Manufacturers, the National Right to Work Foundation, the U.S. Chamber of Commerce, the South Carolina Chamber of Commerce and the National Federation of Independent Business. The primary issue at play is whether the Board has sufficient authority to require posting of its notice. Other issues concern the significant impact the new Rule could have on small businesses, the implication of the First Amendment and violation of federal labor and regulatory laws. Accordingly, although at this time you should assume you will be required to comply with the posting requirement as of April 30, 2012, this deadline could face yet another postponement in the face of mounting legal challenges.

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## Retaliation

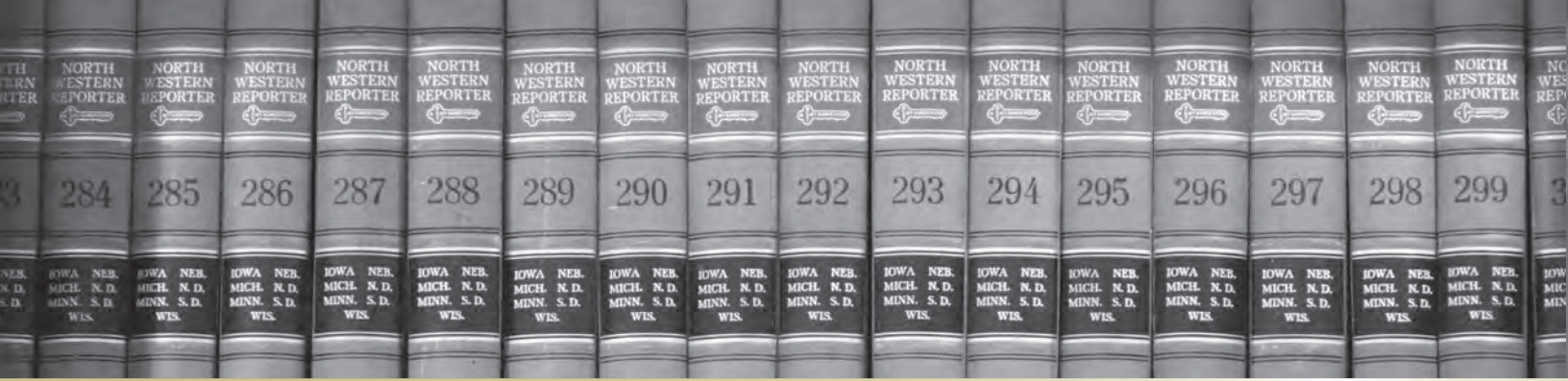
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to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." That, it does so in part by setting forth substantive standards relying upon enforcement of these standards in part by information and complaints received from employees. The anti-retaliation provision makes such enforcement effective by preventing "fear of economic retaliation" from inducing workers "quietly to accept substandard conditions." The Court asked, "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or over-worked workers?"

Saint Gobain had argued that worker protection is not the only relevant statutory objective as the Act also seeks to establish an enforcement system that is fair to employers, and to do so, the employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation. Saint Gobain argued that if oral complaints sufficed, employers would too often be

left in a state of uncertainty about whether an employee (particularly an employee who seems unusually angry at the moment) is in fact making a complaint about an Act violation or just letting off steam. The Court agreed that the statute requires "fair notice" and suggested that a "filing" is a serious occasion, rather than a triviality. The Court stated that, "the phrase 'filed any complaint' contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns" and held that, "[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones."

The attorneys at Rajkowski Hansmeier are always available to advise employers in retaliation cases.



QUARTERLY EMPLOYMENT LAW NEWSLETTER

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**Donning and Doffing**

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a work week. Thus, employees who work more than 40 hours in a work week, but fewer than 48 hours, may have a claim under the FLSA, but not under the MFLSA. Nothing under the MFLSA compels or allows courts to take into account compensation paid or due under the FLSA in determining whether there has been a violation of the MFLSA.

As for the employees’ claims relative to meal breaks, the Court noted that the MFLSA provides that “An employer must permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal”. Citing Minn. Stat. 177.254, Subd. 1(2010). The statutes does not, however, “require the employer to pay the employee during the meal break”. As such, this claim was dismissed upon the

basis that there is no bright-line requirement for a 30 minute meal break under Minnesota law. It was also dismissed upon the same grounds as the overtime pay arguments, above.

The bottom line is this: Whether reviewing the activity in light of the FLSA or the MFLSA, it is possible that different facts and situations will yield a different result. As a result, an employer may benefit from reviewing their policies and practices by giving employees the option to don and doff off-premises if possible.

Rajkowski Hansmeier Ltd.’s QUARTERLY EMPLOYMENT LAW NEWSLETTER is intended to be informational and not to solve individual legal problems. Some of this information involves significant changes which could impact your organization. If you have further questions about this information, please contact us for an attorney’s opinion. If you would prefer to receive this newsletter via e-mail, just let us know at [ajolson@rajhan.com](mailto:ajolson@rajhan.com).

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