UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLARA E. SALAZAR and JUANITA YBARRA, on behalf of themselves and others similarly situated,	)	
Plaintiffs and Proposed Collective and Class Action Representatives-Appellants,	)	Case No. 10-1154
v.	)	
BUTTERBALL, LLC,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE MARCIA S. KRIEGER
DISTRICT COURT FILE NO. 1:08-CV-02071-MSK-CBS

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

DAVID LICHTENSTEIN,
CO Bar No. 11408
Attorney at Law
1556 Williams St., Suite 100
Denver, CO 80218
303-831-4750
303-863-0835 (Fax)

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
DAVID BORGEN, CA Bar No. 099354
LIN CHAN, CA Bar No. 255027
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
510-763-9800
510-835-1417 (Fax)

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

ATTORNEYS FOR *AMICUS CURIAE*

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT.....1

A. PPE Protects Workers from Injury. 1

B. The FLSA Offers Necessary Protection to a Vulnerable Workforce.....3

C. This Court Should Defer to the DOL Administrator's Interpretation Finding that PPE Is Not "Clothes." 4

1. The DOL's Specialized Experience Warrants Deference.....4

2. The Meaning of "Clothes" Is Ambiguous. 5

3. The DOL's Interpretation Is Reasonable. 5

4. The DOL's Current Interpretation Is Entitled to Significant Weight Despite Prior Conflicting Opinions. 7

III. CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003).....6

Anderson v. Perdue Farms, Inc.,
604 F. Supp. 2d 1339 (M.D. Ala. 2009).....2

Barrentine v. Ark.-Best Freight Sys., Inc.,
450 U.S. 728 (1981).....4

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....5, 7

Gonzalez v. Farmington Foods, Inc.,
296 F. Supp. 2d 912 (N.D. Ill. 2003).....6

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007).....4

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986).....5

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005).....7

Perez v. Mountaire Farms, Inc.,
610 F. Supp. 2d 499 (D. Md. 2009).....3

Perez v. Mountaire Farms, Inc.,
2008 WL 2389798 (D. Md. June 10, 2008).....6

Rivera v. NIBCO, Inc.,
364 F.3d 1057 (9th Cir. 2004).....3

2001 WL 58864 (Jan. 15, 2001).....8
2010 WL 2468195 (June 16, 2010) .....*passim*
1997 WL 998048 (Dec. 3, 1997).....8

TABLE OF AUTHORITIES: (con't)

FEDERAL STATUTES

21 C.F.R.
§ 110.10 2

29 C.F.R.
§ 1910.95 3
§ 1910.133 3
§ 1910.136 3
§ 1910.1030(b) 6

MISCELLANEOUS

David Barboza, "Meatpackers' Profits Hinge On Pool of Immigrant Labor," The New York Times, Dec. 21, 2001 3

Human Rights Watch, "Blood, Sweat, and Fear: Workers' Rights In U.S. Meat and Poultry Plants," Jan. 24, 2005 ..... 1, 2, 3

William G. Whittaker, "Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview," July 20, 2005 ..... 1, 2, 3

U.S. DOL, Wage and Hour Div., Final Rulings & Opinion Letters, http://www.dol. gov/whd/opinion/opinion.htm 7

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus curiae* the National Employment Lawyers Association hereby provides the following statement:

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

NELA writes to shed light on the public policies supporting the enforcement of the Fair Labor Standards Act (FLSA) to protect low-wage workers and deference to the interpretations of the Department of Labor (DOL).

NELA is a non-profit corporation that offers no stock; there is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

I. SUMMARY OF ARGUMENT

Poultry processing workers should be paid for time spent donning and doffing personal protective equipment ("PPE") that protects workers from injury while performing hazardous work. On June 16, 2010, the DOL issued a well reasoned Administrator's Interpretation finding that the PPE worn by poultry and meat processing employees does not constitute "clothes" for the purposes of section 203(o). DOL Administrator's Interpretation FLSA 2010-2, 2010 WL 2468195. The court should defer to the DOL, the agency charged with enforcing the FLSA to protect this vulnerable workforce.

II. ARGUMENT

A. PPE Protects Workers from Injury.

PPE is necessary because poultry processing is hazardous work with an extraordinarily high rate of injury. PPE protects workers from the "blood, grease, animal feces, ingesta . . . , and other detritus from the animals they slaughter" with which they "inevitably come into contact." Human Rights Watch, "Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants," *available at* http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear.pdf (Jan. 24, 2005) (hereinafter, "HRW Report"); *see also* William G. Whittaker, "Labor Practices in the Meat Packing and Poultry Processing Industry: An Overview," CRS Report for

Congress at CRS-44, *available at* http://www.nationalaglawcenter.org /assets/crs/RL33002.pdf (July 20, 2005) (hereinafter, "CRS Report") ("Whether working with large animals (cattle, hogs, sheep) or with poultry, the slaughtering and packing process involves contact with potentially hazardous substances: blood, feces, intestinal juices, etc.").

For instance, "[w]ith the live birds defecation occurs on a random basis. Workers are encouraged to wear masks to protect fecal matters from getting into the facial areas." HRW Report (noting that "[n]early every worker interviewed for this report bore physical signs of a serious injury suffered from working in a meat or poultry plant.").

The legal requirements for PPE underscore its necessity.[1] Plugs, bump caps, smocks, safety glasses, earplugs, face masks, hair and beard nets, mesh gloves, plastic shields, and steel toed rubber boots worn by poultry processing workers "are required by [] company policy, United States Department of Agriculture [ ] sanitary regulations, and Occupational

[1] Protective gear also protects poultry food products from contamination by workers. *See, e.g.*, 21 C.F.R. § 110.10(b)(9) (2010) (PPE are "necessary precautions to protect against contamination of food, food-contact surfaces, or food-packaging materials with microorganisms or foreign substances including, but not limited to, perspiration, hair, cosmetics, tobacco, chemicals, and medicines applied to the skin."). Thus, the absence of such protective gear in poultry processing plants might lead to "the sale of stale or contaminated poultry." *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1354 (M.D. Ala. 2009).

Safety and Health Administration safety requirements ('OSHA')"). *Perez v. Mountaire Farms, Inc.*, 610 F. Supp. 2d 499, 517 (D. Md. 2009); *see also* 21 C.F.R. § 110.10(b)(6) (2010) (hair and beard nets and bump caps); 29 C.F.R. § 1910.136 (2009) (boots); 29 C.F.R. § 1910.95 (2009) (earplugs); 29 C.F.R. § 1910.133 (2009) (safety glasses).

B. The FLSA Offers Necessary Protection to a Vulnerable Workforce.

Poultry processing workers need FLSA protection because they are among America's most vulnerable workers. Many are immigrants, both documented and undocumented. HRW Report; CRS Report at CRS-42; David Barboza, "Meatpackers' Profits Hinge On Pool of Immigrant Labor," The New York Times, Dec. 21, 2001, A26. Due to fear and ignorance of workplace rights, these immigrants are less likely to enforce their rights. HRW Report ("The massive influx of immigrant workers into meat and poultry industry plants around the country means that a growing number of workers are unaware of their workplace rights."); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) ("[M]ost undocumented workers are reluctant to report abusive . . . employment practices."). "Fully aware of workers' fear and sure that they will not complain to labor law authorities or testify to back up a claim, employers have little incentive against violating their rights." HRW Report.

Congress enacted the FLSA "to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."' *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Thus, the FLSA's remedial purpose dictates interpreting section 203(o) to maximize protection for low-wage workers who are least able to vindicate their rights.

C. This Court Should Defer to the DOL Administrator's Interpretation Finding that PPE Is Not "Clothes."

The Administrator's Interpretation found that the term "clothes" in section 203(o) "does not extend to protective equipment [PPE] worn by employees that is required by law, by the employer, or due to the nature of the job." 2010 WL 2468195.

1. The DOL's Specialized Experience Warrants Deference.

Here, deference is particularly appropriate because the DOL's role in administering the FLSA "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007). The "administrative interpretation of the Act by the enforcing agency . . . constitute[s] a body of experience and informed judgment to which courts

and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

2. The Meaning of "Clothes" Is Ambiguous.

The meaning of "clothes" in section 203(o) is ambiguous, making deference to the DOL's interpretation particularly apt. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is . . . ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute.").

The DOL highlighted this ambiguity noting "the vastly divergent definitions of 'clothes'" in dictionaries and the conflicting judicial interpretations of the term. 2010 WL 2468195. The fact that multiple opinion letters have been issued regarding the meaning of "clothes" further demonstrates the inherently ambiguous nature of the statute.

3. The DOL's Interpretation Is Reasonable.

The DOL Administrator's Interpretation presents a well-reasoned enforcement policy. The DOL distinguished "protective equipment" from "clothes," finding that "the § 203(o) exemption does not extend to protective equipment [PPE] worn by employees that is required by law, by the employer, or due to the nature of the job." 2010 WL 2468195.

The *Alvarez* court made a similar distinction, following OSHA regulations defining PPE as "specialized clothing or equipment worn by an employee for protection against a hazard." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (quoting 29 C.F.R. § 1910.1030(b) (1999)); *see also Perez v. Mountaire Farms, Inc.*, No. AMD 06-121, 2008 WL 2389798, at *5 (D. Md. June 10, 2008) (same). The court distinguished PPE from "[g]eneral work clothes (e.g. uniforms, pants, shirts or blouses) not intended to function as protection against a hazard." *Alvarez*, 339 F.3d at 905 (quoting 29 C.F.R. § 1910.1030(b) (1999)); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 930-31 (N.D. Ill. 2003) (same).

The DOL's analysis of the legislative history augments the persuasiveness of this distinction. In its analysis, the DOL highlighted Congress' intent to limit the scope of section 203(o). It reasoned that "Congress inserted the phrase 'changing clothes' to limit the bill's original breadth" because the "original House bill" applied the exception "to all activity performed under a [collective bargaining agreement]" with no limitation to activities such as "changing clothes." 2010 WL 2468195. Congress "in 1949 when it **narrowed the scope** of § 203(o)" "had in mind . . . those 'clothes' that workers in the bakery industry changed into and 'took off' in the 1940s." *Id.* (emphasis added). Such "clothes" "hardly resemble

the modern-day protective equipment commonly donned and doffed by workers in today's meat packing industry, and other industries where protective equipment is required by law, the employer, or the nature of the job." *Id.*

Thus, the distinction between PPE and regular work clothes presents a narrow, workable standard that effectuates section 203(o) without overextending the meaning of "clothes" such that the term "would embrace any conceivable matter that might adorn the human body, including metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes." *Alvarez*, 339 F.3d at 905.

4. The DOL's Current Interpretation Is Entitled to Significant Weight Despite Prior Conflicting Opinions.

The recent Administrator's Interpretation is entitled to more weight than its predecessors. The DOL announced on March 24, 2010 that going forward, it will no longer issue opinion letters based on specific factual predicates, but "will set forth a general interpretation of the law and regulations, applicable *across-the-board* to all those affected by the provision in issue." U.S. DOL, Wage and Hour Div., Final Rulings & Opinion Letters, http://www.dol.gov/whd/opinion/opinion.htm (emphasis added). Thus, unlike previous letters, the Administrator's Interpretation was designed to provide formal, "comprehensive guidance." *Id.*

The DOL Administrator's Interpretation warrants deference despite its change in position. "[T]he fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute." *Chevron*, 467 U.S. at 864 (deferring to change in agency's opinion); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (crediting revised agency opinion because "change [in agency interpretation] is not invalidating . . .").

Here, the Administrator's Interpretation is a correction back to the DOL's long standing interpretation of section 203(o). *Compare* 2010 WL 2468195 ("clothes" does not include PPE) *with* 1997 WL 998048 (Dec. 3, 1997) ("[S]ection 3(o) does not apply to . . . protective safety equipment) *and* 2001 WL 58864 (Jan. 15, 2001) (reaffirming that section 3(o) does not apply to protective equipment). In light of the substantial safety and sanitary concerns that necessitate PPE and the DOL's careful reasoning and experience, the DOL's finding that PPE are not "clothes" under section 203(o) merits deference.

III. CONCLUSION

For the foregoing reasons, the Court should remand this case for consideration of the recent Administrator's Interpretation.

Dated: November 1, 2010

Respectfully submitted,

GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN

s/ Lin Chan
LIN CHAN, CA Bar No. 255027
lchan@gdblegal.com
DAVID BORGEN, CA Bar No. 099354
dborgen@gdblegal.com
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
Tel: (510) 763-9800
Fax: (510) 835-1417

DAVID LICHTENSTEIN, CO Bar No. 11408
Attorney at Law
1556 Williams St., Suite 100
Denver, CO 80218
Tel: (303) 831-4750
Fax: (303) 863-0835
Email: dave@lichtensteinlaw.com

ATTORNEYS FOR *AMICUS CURIAE*
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and this Court's Order of October 7, 2010 because: I certify that this brief is proportionally spaced and contains 1,655 words.

I relied on my word processor to obtain the count and it is MS Word 2003 in Times New Roman 14 point.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Lin Chan
Lin Chan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 1st day of November, 2010, a true and correct copy of the above and foregoing BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS was sent via CM/ECF electronic filing, addressed to the following parties:

T. Joseph Snodgrass
LARSON KING LLP
2800 Wells Fargo Place
30 E. Seventh Street
St. Paul, MN 55101

J. Gordon Rudd, Jr.
Anne T. Regan
ZIMMERMAN REED, PLLP
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402

Attorneys for Plaintiffs/Appellants

Stephen X. Munger
Eric Magnus
JACKSON LEWIS LLP
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309-3600

Ryan P. Lessman
JACKSON LEWIS LLP
950 17th Street, Suite 2600
Denver, CO 80202

Attorneys for Defendant/Appellee

s/ Lin Chan
Lin Chan

CERTIFICATE RE: REDACTIONS AND DIGITAL SUBMISSIONS

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Endpoint Protection Version 11.0.5002.333, updated November 1, 2010, which is the latest version of this software). According to the program, the digital submission is free from viruses.

s/ Lin Chan
Lin Chan