No. 09-5880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICE FRANKLIN, on behalf of herself
and all other similarly situated employees,

Plaintiff-Appellant,

vs.

KELLOGG COMPANY,

Defendant-Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the Western District of Tennessee
Western Division

Case No. 08-2268-JPM-tmp
The Honorable Jon Phipps McCalla

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Alice Franklin respectfully requests oral argument in this case, which gives this Court its first opportunity to interpret and apply §§ 203(o) and 259(a) of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., to Plaintiff-Appellant's "donning and doffing" and walking activities. Plaintiff-Appellant believes oral argument can be of significant benefit to the Court. Oral argument will allow the parties to amplify the factual underpinnings of this case and relate their application to the relevant case law.

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Tennessee exercised jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b). The district court entered judgment on July 20, 2009 (R. 264: Order Granting Summ. J), and Plaintiff-Appellant Alice Franklin filed a timely notice of appeal on August 17, 2009. (R. 266: Notice of Appeal.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in failing to grant summary judgment in favor of Alice Franklin on Kellogg Company's affirmative defense under 29 U.S.C. § 203(o), since the plain language of all of the parties' collective-bargaining agreements have precluded the formation of an unwritten custom and practice concerning the payment of wages?

2. Did the district court err in determining that the protective gear and equipment donned and doffed by Alice Franklin and other hourly employees at Kellogg Company's Rossville, Tennessee, manufacturing plant qualified as "clothes" for purposes of 29 U.S.C. § 203(o)?

3. Did the district court err in concluding that a fact question did not exist concerning Kellogg Company's claim that the Rossville plant employees knowingly acquiesced to the practice of nonpayment of donning and doffing time and walking time?

4. Did the district court err in holding that Kellogg Company sufficiently established each element of its good faith defense under 29 U.S.C. § 259(a)?

STATEMENT OF THE CASE

This case involves Defendant-Appellee Kellogg Company's ("Kellogg") failure to pay Plaintiff-Appellant Alice Franklin ("Franklin") and many other hourly employees for time spent donning and doffing Kellogg's mandatory food safety uniforms and protective equipment, as well as for time spent walking to and from the changing area and the time clock. Kellogg relies on the affirmative defenses in §§ 203(o) and 259(a) of the Fair Labor Standards Act ("FLSA") to justify its nonpayment of these otherwise compensable wages.

Section 203(o) of the FLSA excludes from compensable hours worked any time spent by an employee changing "clothes" at the beginning or end of each work day, if this time is expressly excluded in a bona fide collective-bargaining agreement or implicitly excluded because an unwritten custom or practice concerning the non-payment of this time arose under such an agreement. See 29 U.S.C. § 203(o). Section 259(a) relieves an employer of liability for failing to pay wages in compliance with the FLSA if the employer can establish that its failure and violation was an act taken "in good faith in conformity with and in reliance on" a "written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Wage and Hour Division. See 29 U.S.C. § 259(a).

Since Kellogg's Rossville, Tennessee plant opened in 1989, Kellogg has paid its plant production and maintenance employees hourly wages based on their

scheduled shift, but has failed to compensate them for time spent donning and doffing Kellogg's mandatory protective gear and equipment and walking to and from the changing area and the time clock. Pursuant to § 216(b) of the FLSA, Franklin initiated this action on behalf of herself and the hourly employees at the Rossville plant. Franklin seeks compensation for the time she spent changing into and out of the protective gear and equipment and the time she spent walking to and from the changing area and the time clock.

On October 17, 2008, Kellogg moved for summary judgment, arguing that the affirmative defenses in §§ 203(o) and 259(a) of the FLSA applied and absolved Kellogg of any liability for nonpayment of wages for donning and doffing time and walking time. (R. 119: Def.'s Mot. for Summ. J.) In response, Franklin refuted that Kellogg had establish the necessary elements of each of its affirmative defenses. (R. 207: Pl.'s Summ. J. Resp.) Relying on language present in all of the parties' collective bargaining agreements, which expressly prohibits the formation of unwritten customs or policies concerning wages at the Rossville plant, Franklin instead asked the district court to grant summary judgment in her favor. Alternatively, Franklin argued that genuine fact disputes exist, precluding summary judgment for Kellogg.

On July 20, 2009, the district court issued its opinion and order granting Kellogg's Motion for Summary Judgment. (R. 264: Order Granting Summ. J., p. 34.) Franklin timely filed a notice of appeal on August 17, 2009. (R. 266: Notice of Appeal.)

STATEMENT OF THE FACTS

A. The Parties.

Franklin is an hourly production employee of Kellogg. At the time the district court decided Kellogg's summary judgment motion, Franklin was joined in this § 216(b) FLSA collective action lawsuit by approximately 243 other current and former Kellogg employees who work or worked in various Kellogg manufacturing plants around the country. (R. 264: Order Granting Summ. J., p. 12-13.) Over seventy-five of the opt-in Plaintiffs are current and former hourly workers employed at Kellogg's Rossville, Tennessee, plant (the "Plant"). (Id.)

Kellogg produces breakfast foods in twenty-eight manufacturing plants located across the United States. (R. 111: Def.'s Opp'n Mem. to Pl.'s Mot. For Conditional Cert., p. 3.) Franklin is employed at the Plant, where Kellogg produces frozen waffles and other frozen breakfast foods. (R. 119-6: Def.'s SOF at ¶ 2; R. 207-2: Pl.'s SOF at ¶ 2.) Kellogg hired Franklin as an hourly production employee at the Plant on March 21, 2005. (R. 119-6: Def.'s SOF at ¶ 4.)

Kellogg employs approximately 265 full-time hourly production operators like Franklin, and approximately thirty-six hourly maintenance employees at the Plant. (Id. at ¶ 5.) Since the Plant opened in 1989, a union has handled all bargaining and negotiating on behalf of the Plant's hourly production and maintenance employees. (Id. at ¶ 9.) Currently, these employees are represented

by a local union affiliated with the Bakery, Confectionary, Tobacco Workers, and Grainmillers (AFL-CIO CLC) (the "Union"). (Id. at ¶ 10.)

Kellogg requires all hourly employees at the Plant to wear company-provided food safety uniforms and protective equipment including shirts, pants, slip resistant shoes, hair and beard nets, ear plugs, safety glasses, bump caps and goggles. (Id. at ¶ 20, 33; R. 207-2: Pl.'s SOF at ¶ 44.) Additionally, Kellogg requires the hourly employees to change into their protective gear and equipment upon arriving at the Plant, and to change back into their street clothes before departing the Plant, leaving soiled uniforms in a bin in the locker rooms. (R. 119-6: Def.'s SOF at ¶¶ 26-27.) Kellogg does not allow employees to bring their uniforms or equipment home. (R. 207-2: Pl.'s SOF at ¶ 28.) As a result, Franklin and hundreds of hourly employees spend approximately twenty minutes both before and after a shift "donning and doffing" Kellogg's mandatory food safety uniforms and protective equipment at the Plant. (Id. at ¶¶ 36, 40.) Kellogg has never paid its hourly employees for the time spent donning and doffing the mandatory gear or equipment or time spent walking to and from the changing area and the time clock. (Id. at ¶ 36, 40; R. 119-6: Def.'s SOF at ¶¶ 30, 32.)

B. The Collective-bargaining Agreements Between the Union and Kellogg.

The first collective-bargaining agreement ("CBA") protecting Plant employees was executed on March 4, 1989 between Kellogg (formerly Mrs. Smith's Frozen Foods Co.) and the American Federation of Grain Millers International AFL-CIO. (R. 119-6: Def.'s SOF at ¶ 8.) In 2000, the American Federation of Grain Millers International AFL-CIO merged with the Bakery, Confectionary, Tobacco Workers, and Grain Millers (AFL-CIO CLC), but the local union remained unchanged. (Id. at ¶ 10.)

Today, the Plant's hourly employees are still represented by the Union and abide by the provisions of all effective CBAs. (Id. at ¶ 11.) All of the CBAs between the Union and Kellogg, including the current version, have explicitly contained a provision known as "Local Working Conditions," which states:

> 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 Plant Manager and the local Union President**. Only those officials shall be empowered to change, modify or eliminate local working conditions by written agreement.

(R. 207-2: Pl.'s SOF at ¶¶ 57-58) (emphasis added). Thus, pursuant to this provision, there are no working conditions, i.e., customs and practices related to

wages that have not been reduced to writing by the parties. (Id. at ¶ 59.) Indeed, the Rossville Plant Director concedes that there are no working conditions related to wages that have not been reduced to writing (Id.)

Unlike the "Local Working Conditions" provision, which prohibits the formation of unwritten customs or practices concerning the payment of wages, there is no express provision in the CBA that addresses payment for donning and doffing time, and walking time. (R. 119-6: Def.'s SOF at ¶ 14.) Kellogg has never paid its Plant employees for the time they spend donning and doffing mandatory food safety uniforms and protective equipment and walking to and from the changing areas and the time clock. (Id. at ¶ 41.) The issue of payment for this time has never been broached by the Union or Kellogg. (R. 207-2: Pl.'s SOF at ¶ 53a-e.)

The Union never mentioned payment for these activities because the Union was unaware that its members may have been entitled to compensation for this time. (Id. at ¶ 54.) Had the Union believed that its members could be compensated for time spent on mandatory donning and doffing activities, the Union would have raised the issue during contract negotiations. (Id. at ¶ 55.) Because the Union was unaware that this time could be compensated, the issue of payment for these activities was not even raised amongst the union members

themselves. (Id.) The Union's silence regarding payment for donning and doffing time was not made for tactical or strategic bargaining reasons. (Id. at ¶ 56.) Instead, the Union did not raise the issue because it did not know that its members could be compensated for this time. (Id.)

C. Kellogg's Decision to Continue Nonpayment for Donning and Doffing, and Walking Activities.

In March 2005, Kellogg's in-house counsel, William Muth and other company officials decided to continue nonpayment for donning and doffing time at its various manufacturing plants. (R. 207-2: Pl.'s SOF ¶¶ 65, 69.) Kellogg's decision was not specific to the Rossville plant. (Id.) Indeed, Kellogg conducted no research related to the Rossville plant, no investigation into the Plant's specific donning and doffing practices, no review of its collective bargaining agreement, and no research or investigation concerning whether a custom or practice of nonpayment in fact existed at the Plant. (Id. at ¶ 70.) Kellogg did not specifically conclude that the Rossville plant's pay practice complied with § 203(o) of the FLSA. (Id. at ¶ 69.)

Mr. Muth's advice regarding general compliance with the law at all of Kellogg's plants was based on research that he had conducted back in February 2004 concerning the Lancaster, Pennsylvania and Omaha, Nebraska plants only. (Id. at ¶¶ 60, 66.)

Based on his research, Mr. Muth concluded that Kellogg's pay practices at its Lancaster and Omaha plants were in compliance with the § 203(o) of the FLSA. (Id. at ¶ 61.) Based on factual assumptions he made regarding the gear donned and doffed at Kellogg's other plants, Mr. Muth also determined that his research supported a conclusion regarding the other plants' compliance with the FLSA. (Id. at ¶ 62.)

Mr. Muth admits that he had no knowledge about union grievances or bargaining negotiations at Kellogg's other plants, no knowledge regarding the donning and doffing practices at other plants, and no knowledge regarding what employees knew or believed with respect to entitlement for donning and doffing time. (Id. at 63.) With respect to the Rossville plant, Mr. Muth admits that his research and investigation had nothing to do with the Rossville plant, and that he had no knowledge regarding the donning and doffing practices at the Rossville plant, and that he talked no one from the Rossville plant. (Id. at ¶ 63.) Mr. Muth also admits to having no knowledge regarding what the Rossville Union knew or believed with respect to compensation for donning and doffing time. (Id. at ¶ 72.) Indeed, what the Union knew or believed about entitlement to payment this time was not part of his analysis. (Id.)

Instead, Mr. Muth assumed that the Rossville employees had a history of not being paid for donning and doffing time. (Id. at ¶¶ 62, 67.) Mr. Muth admits that he could have reached a different conclusion had he based his advice on different factual assumptions. (Id. at ¶ 72.)

While Kellogg claims to have relied on the Department of Labor's June 6, 2002 opinion letter, Mr. Muth acknowledges that the June 6, 2002 letter only addressed the meaning of "changing clothes" for purposes of § 203(o), and did not address what constitutes a "custom or practice" under a CBA. (Id. at ¶ 67.) Further, Mr. Muth admits that he relied on the June 2002 DOL letter for the "changing clothes" element of § 203(o) only. (Id.) According to Mr. Muth, he and the other company officials assumed that employees who worked in non-cereal producing plants donned and doffed "less cumbersome" gear than those donned and doffed by the Lancaster and Omaha cereal plant employees, and that based this assumption, § 203(o)'s changing clothes requirement was met at the other facilities. (Id.)

Kellogg has not obtained a DOL opinion letter addressing both elements of the § 203(o) defense. (Id. at ¶ 73.)

D. The Commencement of Litigation.

On May 2, 2008, pursuant to 29 U.S.C. § 216(b), Franklin filed the instant nationwide collective action against Kellogg in the United States District Court for

the Western District of Tennessee on behalf of herself and all similarly situated persons. Plaintiff alleges that Kellogg violated the FLSA by failing to pay her and other similarly situated employees overtime compensation. (See generally R. 1: Compl.)

Specifically, Franklin alleges that Kellogg violated the FLSA by failing to compensate her for time spent donning and doffing mandatory food safety uniforms and protective equipment before and after scheduled shifts, and for time spent walking to and from the changing areas and the time clock. (Id. at ¶¶ 9-11.) In light of her hourly rate of $17.55 per hour, Franklin alleges that she is owed approximately $11.70 per day for uncompensated work time. (R. 207-2: Pl.'s SOF at ¶ 36.)

SUMMARY OF ARGUMENT

Summary judgment should have been granted in Franklin's favor because the parties' CBAs expressly forbid the creation of an unwritten custom or practice related to wages. Such a provision is in harmony (rather than in conflict) with Congress's intent in enacting 29 U.S.C. § 203(o).

If the Court, however, concludes that a "conflict" exists between the parties' bargained agreement and § 203(o), summary judgment in favor of Kellogg was still improper because none of the CBAs negotiated between Kellogg and the Union contained an express term that excludes payment for donning and doffing and walking activities. Kellogg also failed to establish that there are no genuine issues of material fact as to whether the Union knowingly acquiesced to the non-payment of wages for donning and doffing time. Lastly, the mandatory protective gear and equipment "donned and doffed" by Franklin and other similarly situated co-workers at the workplace do not constitute "clothes" for purposes of § 203(o).

The district court also erred in concluding that Kellogg had established its affirmative defense under § 259(a). The Department of Labor ("DOL") opinion letters relied on by Kellogg only address one part of the two-part affirmative defense under § 203(o). Thus, Kellogg cannot be said to have acted in conformity with or have relied in good faith on an opinion letter that does not exist, and

summary judgment in Franklin's favor was warranted on Kellogg's § 259(a) affirmative defense.

STANDARD OF REVIEW

A district court's grant of summary judgment is to be reviewed *de novo*, and the appellate court must view the record in the light most favorable to the non-moving party, giving the non-moving party the benefit of all reasonable inferences. Nickels v. Grand Trunk W.R.R., Inc., 560 F.3d 426, 429 (6th Cir. 2009).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, the judge's role is not to weigh the evidence or to assess credibility, but solely to determine whether there is a genuine issue for trial. Id. at 251.

As a threshold matter, the district court erred in failing to recognize that Kellogg's burden to prove its FLSA affirmative defenses is stringent. Section 203(o) is an exclusionary clause that should have been strictly construed in Franklin's favor. See Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981) (referring to § 203(o) as an "exception" to the FLSA's overtime requirement); In re Cargill Meat Solutions Wage & Hour Litig., 632 F. Supp. 2d

368, 383 (M.D. Pa. 2008) ("For purposes of statutory interpretation, an exception contained in § 203 should not be treated differently from an exemption contained in § 213."); see also Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (holding that FLSA exemptions "are to be narrowly construed against the employers seeking to assert them").

Under the proper narrow construction, the district court erred in granting summary judgment in Kellogg's favor on its affirmative defenses under §§ 203(o) and 259(a) of the FLSA.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN KELLOGG'S FAVOR ON THE APPLICATION OF SECTION 203(o).

The Court should find that the district court erred in applying § 203(o) in a manner inconsistent with Congressional intent. Section 203(o) of the FLSA was designed to provide a zone of bargaining autonomy between employers and employees who fully appreciate their respective obligations and entitlements in the workplace, and to negotiate an agreement based on that understanding. Figas v. Horsehead Corp., 2008 WL 4170043, at *15 (W.D. Pa. Sept. 3, 2008). Accordingly, § 203(o) allows the union and the employer to agree *expressly* or

implicitly that the time an employee spends changing in to and out of "clothes" will not be considered compensable "hours worked." Indeed, Section 203(o) provides:

> Hours Worked. --In determining for the purposes of sections 206 and 207 of this title the hours worked for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

The district court erred by ignoring Congress' intent in amending the FLSA to include § 203(o), and failing to recognize that the bargaining parties in this case expressly agreed that any customs or practices related to the Rossville employees' wages must be in writing. Further, the district court incorrectly determined that an implicit custom or practice for nonpayment of certain work activities can be established merely by a history of nonpayment despite the Union's lack of knowledge of entitlement to such payment. Lastly, § 203(o) is inapplicable because Franklin did not don and doff "clothes."

A. No "Conflict" Exists Between Section 203(o) and the CBA's Prohibition Against Unwritten Customs and Practices.

The district court erred in concluding that Kellogg is immune from liability under § 203(o) because a "conflict" exists between the parties' CBA and § 203(o). (See R. 264: Order Granting Summ J., p. 29, n.18.) As noted below, no such

conflict exists. Thus, summary judgment should have been granted in Franklin's favor as to whether § 203(o) applies because the parties specifically bargained against the existence and formation of unwritten customs and practices relating to the payment of wages.

In 1947, in response to expansive judicial decisions, Congress enacted the Portal-to-Portal Act to exclude from compensable work "activities which are preliminary or postliminary to [the] principal activity or activities [that the employee is employed to perform]." Sisk v. Sara Lee Corp., 590 F. Supp. 2d 1001, 1005 (W.D. Tenn. 2008) (quoting 29 U.S.C. §§ 251, 254(a)(2)). Two years later, Congress enacted § 203(o) as a carve-out provision to close a "loophole" in the Portal-to-Portal Act. Figas, 2008 WL 4170043, at *5. According to Figas, § 203(o):

> [E]vinces a legislative determination that, under certain circumstances, deference to the terms of a bona fide collective-bargaining agreement may be more in keeping with the FLSA's spirit of protecting the interests of covered workers than would be strict, unqualified adherence to a loose-fitting, imprecise statutory mandate.

Id. at *9.

Here, the parties' CBA expressly provides:

> Section 5. Local Working Conditions.
> 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 Plant Manager and the local Union President.** Only those officials shall be empowered to change, modify or eliminate local working conditions by written agreement.

(R. 207-2: Pl.'s SOF at ¶¶ 57-58.) (emphasis added). Thus, the parties have undeniably agreed that any unwritten custom or practice concerning wages, e.g., not getting paid for donning and doffing time, as well as walking time, at the Plant is null and void.

Yet, despite Congress's clear intent and the plain language of the parties' CBAs, the district court improperly determined that the CBA's "Local Working Conditions" provision conflicted with § 203(o) of the FLSA. The district court stated:

> Plaintiff cites the portion of the CBA stating that "no local working condition shall be established except as it is expressed in writing in an agreement approved by the Plant Manager and the Local Union President" . . . The CBA also states, however, that "[i]n the event that any of the provisions of this Agreement are found to be in conflict with any federal, state or local law or governmental regulation now existing or hereafter enacted, it is agreed that such law shall supersede the conflicting provisions without in any way affecting the remainder of the provisions." The CBA provision Plaintiff cites is in conflict with § 203(o); according to the CBA's own terms, it cannot prevail over the statute.

(R. 264: Order Granting Summ. J., p. 29, n.18.)

Implicit in the district court's conclusion is the fact that the district court agreed with Franklin that the Local Working Condition provision prohibits the formation of unwritten customs and practices such as the non-payment of wages for donning and doffing time and walking time. But the district court reasoned that anytime a collective bargaining agreement expressly requires all customs and practices related to wages to be in writing, it is in conflict with § 203(o) because this provision recognizes the formation of implicit customs and practices. The district court's conclusion is erroneous for several reasons.

First, in light of § 203(o)'s legislative history and intent, the Local Working Condition provision is actually in harmony, rather than in conflict, with § 203(o). Indeed, the purpose of § 203(o) is to prevent interference with agreed-upon collective-bargaining agreements and "to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating [what is to constitute a working day]." Figas, 2008 WL 4170043, at *9 (quoting 95 Cong. Rec. H11210 (statement of Rep. Herter)).

In this case, every CBA negotiated by Kellogg and the Union at the Rossville plant has included this same limiting language prohibiting the formation of unwritten customs and practices related to wages. In other words, Kellogg and the Union specifically agreed that the express terms of the collective bargaining

agreements would be the determining factor on what constituted a "custom or practice" at the Plant, as opposed to permitting the formation of unwritten custom or practices. They also agreed that unlike some of Defendant's other plants, no unwritten customs and practices related to wages can exist at the Rossville plant.[1]

Even Kellogg's Plant Director conceded that there are no local working conditions at the Rossville plant related to wages that are not in writing. Surely, if Franklin were to argue that an unwritten custom or practice regarding the payment of wages had been formed by the parties, Kellogg would rely on the plain language of the CBA to contend that the parties' CBA prohibited the formation of an unwritten custom or practice. Thus, the sanctity of the CBA should be honored regardless of whether the employees or the employer is attempting to uphold it.

Second, nothing in the plain language or legislative history of § 203(o) suggests that parties who are expressly permitted by the statute to bargain to exclude from hours worked time spent "changing clothes" cannot also expressly agree to forbid the creation of unwritten customs and practices concerning the payment of wages for, e.g., time spent donning and doffing. Further, the district court cites no authority in support of its ruling, and provides no analysis to support

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[1] According to Kellogg, "[t]he workers at the Rossville Plant, where Ms. Franklin works, are unionized under a CBA that applies only to that facility." (R. 111: Def.'s Mem. Opp'n to Pl.'s Mot. for Conditional Cert. at 5.)

its conclusion. (R. 264: Order Granting Summ. J., p. 29.)

Here, Kellogg is attempting to evade the very provision it bargained for. The well-defined purpose of § 203(o) will be frustrated if the Sixth Circuit affirms the district court's reasoning that every time parties negotiate against unwritten customs and practices related to wages, that agreement is in "conflict" with § 203(o). Allowing bargaining parties to be autonomous and free of involvement by courts and the DOL is entirely consistent with the legislative intent of § 203(o).

Because the parties' CBA clearly establishes that no implicit custom or practice can exist regarding the nonpayment of wages for time spent donning and doffing and walking to and from the changing areas and the time clock, summary judgment in favor of Kellogg should be reversed, and instead should be granted in Franklin's favor.

B. Summary Judgment Was Improper Because Genuine Fact Disputes Exist as to Whether Franklin's Union Knowingly Acquiesced.

Even if this Court rejects Franklin's argument that the plain language of the CBA compels summary judgment in her favor, Kellogg failed to establish each element of its § 203(o) affirmative defense by a preponderance of the evidence.

It is undisputed that the parties' CBA contains no express provision for the nonpayment of donning and doffing and walking time. Moreover, Kellogg failed

to establish the Union's knowing acquiescence to nonpayment necessary for a custom or practice to become an implied term in the parties' CBA.

Section 203(o) requires Kellogg to establish that the nonpayment for these activities became an implied term of the parties' CBA. Kellogg relies on the doctrine of acquiescence. But because Kellogg failed to establish that Franklin's Union ***knowingly acquiesced*** to nonpayment for donning and doffing time and walking time, summary judgment for Kellogg on this element was not justified. See Figas v. Horeshead Corp., 2008 WL 4170043, at *14 (W.D. Pa. Sept. 3, 2008) (applying "knowing acquiescence" standard and denying summary judgment for the employer because there was no evidence that the union had informally considered and abandoned their efforts to seek compensation); Kassa v. Kerry, Inc., 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007) (refusing to grant summary judgment on § 203(o) because there was no evidence that the employees ***knowingly acquiesced*** to the nonpayment for donning and doffing time).

Unlike the cases relied upon by the district court and Kellogg, the Union's lack of knowledge of entitlement to payment and history of nonpayment is a far distance from Congress's intent in enacting § 203(o) to allow unions to *knowingly* bargain away rights to payment its members would otherwise be entitled to under the FLSA. For example, in Sisk v. Sara Lee Corp., 590 F. Supp. 2d 1001, 1004

(W.D. Tenn. 2008), the district court concluded that the defendant had established a custom and practice existed under § 203(o) because the union and the company revised current pay practices through joint time studies, thereby specifically addressing whether the defendant's current system adequately compensated the employees. As such, the employees, through their union engaged in **formal negotiations** addressing the company's payment practices for donning and doffing time. Id.

The Third Circuit has taken it one step further and determined that formal contract negotiations are not necessary to establish a custom or practice of nonpayment. See Turner v. City of Philadelphia, 262 F.3d 222, 225 (3d Cir. 2001). In Turner, the Third Circuit found that the plaintiffs knowingly acquiesced to defendant's practice of nonpayment for changing time, even though it was not addressed during formal collective-bargaining negotiations, because a former union president had proposed that the time be compensable at several labor management meetings. Id. In other words, **informal negotiations** were sufficient to establish knowing acquiescence.

The types of knowing acquiescence found to sufficiently create a custom or practice in Sisk (formal negotiations) and Turner (informal negotiations) are simply not present in this case. Kellogg admits that the issue of payment for

donning and doffing and walking time was never raised in either formal or informal negotiations. (R. 119-6: Def.'s SOF at ¶ 15; R. 207-2: Pl.'s SOF at ¶ 15, 53(a)-(e).) In other words, payment for these activities was never part of the negotiation process, or even mentioned informally as part of the negotiation process.

Despite no formal or informal negotiations, no informal discussions between union members, and no contemplation by the Union that this time was even compensable, the district court concluded that the Union knew they could have been paid for these activities and agreed not to be paid for them. (R. 264: Order Granting Summ. J., p. 27-28.) The district court erred for a variety of reasons.

First, the district court made an improper credibility determination in the face of contradictory evidence. Franklin submitted declarations from five Union officials (Ocie Johnson, Calvin Bogan, Joseph Hines, Letitia Malone and Simon Ebarb) who took part in the bargaining negotiations of nearly every CBA since the inception of Rossville plant. (R. 207-5: Decls. of O. Johnson, C. Bogan, J. Hines, L. Malone, and S. Ebarb.) Each of Franklin's witnesses was ignored by the district court. Based on these declarations, a reasonable juror could have found that the Union lacked the sufficient knowledge to have "knowingly acquiesced" to nonpayment for donning and doffing and walking time. A reasonable juror could

have also concluded that the reason why the Union remained silent regarding payment for this time is due to the fact that Union did not even know that they could be compensated for this time, and that had Union known its members may be entitled to payment, it would have raised the issue during contract negotiations, or at least discussed the issue amongst the Union membership.

Conversely, Kellogg submitted a **single**, **eleventh-hour** declaration from a former Union official (Teresa West) who, unlike Franklin's witnesses, never actually took part in the negotiation process because she was not a member of the Union bargaining team. (R. 216-2: Decl. of Teresa West.) Yet, Ms. West, now a salaried employee, recalled a single occasion at some point in the past that the Union considered including in its list of contract proposals, payment for time spent donning and doffing. (Id. at ¶ 11.)

Clearly, in granting summary judgment for Kellogg, the district court impermissibly seized on Ms. West's declaration and determined that Ms. West was more credible than the five Union officials who provided declarations in support of Franklin. Accordingly, basic summary judgment principles warrant reversal of the district court's decision because it is within the jury's province—not the court's—to determine the credibility of the parties' competing witnesses. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (internal citation omitted)

("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.")

Second, in addition to making an improper credibility determination, the district court also erred in concluding that Franklin's Union knowingly acquiesced to nonpayment because it had "institutional knowledge" of Kellogg's practice of nonpayment at its Lancaster plant. (R. 264: Order Granting Summ. J., p. 28.) According to the district court, "[b]y representing the Lancaster employees who sued Defendant in 2004 for compensation for clothes-changing time, the Union acquired institutional knowledge of Defendant's practices of noncompensation." (R. 264: Order Granting Summ. J., p. 28.)

While it might be argued that dismissing the lawsuit establishes knowing acquiescence on the part of the employees at the Lancaster plant, such action does not establish "institutional knowledge" on the part of the Union at the Rossville plant. As Kellogg argued in its opposition to Franklin's Motion for Conditional Class Certification, the Union that represents the Rossville plant employees is separate and apart from the union that represents Kellogg's four cereal plants, including the plant in Lancaster, Pennsylvania. (R. 111: Def.'s Opp'n Mem. to Pl.'s Mot. For Conditional Cert., p. 5.) According to Kellogg, the Rossville plant

stands on its own as a "location where a single CBA is in place," whereas the Lancaster plant is subject to a master agreement that applies to workers at Kellogg's Lancaster, Pennsylvania, Battle Creek, Michigan, Memphis, Tennessee, and Omaha, Nebraska plants, and has a locally negotiated supplemental CBA that applies to Lancaster specifically. (Id.) Most notably, the Rossville CBA includes the express provision prohibiting the formation of unwritten customs and practices regarding wages, whereas the Lancaster CBA does not. (R. 207-2: Pl.'s SOF at ¶¶ 57-58.) Moreover, even Kellogg's Director of Labor Relations admits to having no knowledge regarding the Rossville employees' donning and doffing practices. (Id. at ¶ 63.)

In short, institutional knowledge cannot be imputed to the Rossville Union simply because the Lancaster union is part of the same international union. This is particularly true in light of the different local bargaining units at each plant, Kellogg's contention that the practices regarding payment for time spent donning and doffing varies widely from plant-to-plant, and Kellogg's own admission regarding its lack of knowledge regarding the Rossville plant.

Third, the district court erred in failing to drawing all reasonable inferences in favor of Franklin, the non-moving party. The district court improperly inferred Alicia Williams's statement concerning nonpayment "for a long time" as evidence

of the Union's knowing acquiescence to nonpayment. (R. 264: Order Granting Summ. J., p. 28.) Viewing the evidence in the light most favorable to Franklin, and drawing reasonable inferences in her favor, the proper inference for Ms. Williams' statement is that it is nothing more than an acknowledgement regarding Kellogg's history of nonpayment, a fact that is undisputed in this case.

As discussed above, such an acknowledgement is wholly insufficient to establish the knowing acquiescence necessary for a "custom or practice" to exist for purposes of § 203(o). See Figas, 2008 WL 4170043, at *15 ("An employer may negotiate away its obligation for paying for donning, doffing, and washing time by participating in the collective bargaining process, but cannot evade the requirements of the FLSA simply by establishing history of ignoring them. If otherwise, the § 203(o) inquiry would be wholly circular."); Kassa, 487 F. Supp. 2d at 1071 ("If an employer's history of nonpayment for clothes-changing time were sufficient, by itself, to establish a "custom or practice" under § 203(o), then § 203(o) would essentially be an unlimited FLSA exemption applicable to every unionized employer that did not pay for clothes-changing time. The Court does not believe that § 203(o) is so sweeping.")

Based on the foregoing, the district court's finding that Franklin's Union "knowingly acquiesced" to nonpayment for donning and doffing and walking time

established a "custom or practice" under the CBA constitutes clear error and must be reversed.

C. The Mandatory Food Safety Uniform and Protective Equipment Donned and Doffed by Franklin Are Not "Clothes" for Purposes of Section 203(o).

The district court also erred in concluding that Kellogg has established its burden to prove that the items donned and doffed by Franklin and her co-workers constituted "clothes" within the meaning of § 203(o). The district court did not specifically address the items donned and doffed by Franklin. It also failed to consider the authorities submitted by Franklin involving plant workers who donned and doffed very similar protective gear and equipment. Instead, the district court merely deferred to its decision in Sisk v. Sara Lee Corp., 590 F. Supp. 2d 860 (W.D. Tenn. 2008), stating, "Plaintiff . . . has not provided the court with any additional justification to reconsider its holding in Sisk." (R. 264: Order Granting Summ. J., p. 24.)

Although the district court chose to follow its own previous ruling in Sisk, Congress's intent in enacting the FLSA and the weight of case law nonetheless supports defining the term "clothing" more narrowly than the district court did in Sisk. In Sisk, the district court's broad definition of "clothing" is premised on the deferential weight it attributed to the Department of Labor's ("DOL") 2002 and

2007 opinion letters addressing the meaning of "clothing."[2] The district court improperly deferred to these letters despite the inconsistency between these opinion letters and the DOL's 1997 and 2001 opinion letters. See Perez v. Mountaire Farms, Inc., 2008 WL 2389798, at *5 (D. Md. June 10, 2008) (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) ("In light of this inconsistency, I am constrained to embrace the Alvarez [v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003)] court's conclusion that in view of conflicting interpretations over such a short period of time, there is no reason for this court to give deference the 2002 letter.") (internal quotation marks omitted).

Unlike the broad definition adopted by the district court, other district courts have ruled consistently with the pro-employee intent of the FLSA, applied the plain meaning of "clothes," and have found that very similar items donned and doffed by factory workers were not "clothes" for purposes of § 203(o). See Perez, 2008 WL 2389798, at *4; Hoyt v. Ellsworth Coop. Creamery, 579 F. Supp. 2d 1132 (W.D. Wis. 2008); Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860,

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[2] The 2002 Department of Labor Opinion Letter defined clothing as "items worn on the body for covering, protection or sanitation." Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2002 WL 33941766 (June 6, 2002). The 2007 Opinion Letter concluded that "clothing" includes "heavy protective safety equipment worn in the meat packing industry such as mesh aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards." Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007).

866-67 (W.D. Wis. 2007).

The Perez court analyzed § 203(o), and the 2002 DOL opinion letter, and concluded:

> And even if § 203(o) does not qualify as an "exemption," the Supreme Court has not restricted its "pro-employee" interpretations under the FLSA merely to "exemptions." For example, in its interpretation of "employee" and "production," the Court has stated that it needs to take a 'realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion . . . these provisions, like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purposes [and] such a statute must not be interpreted or applied in a narrow, grudgingly manner.'"

2008 WL 2389798, at *4 (internal citation and quotations omitted). Accordingly, the court held that the protective equipment the employees were required to don and doff for safety and cleanliness reasons were not "clothes" because they protect from workplace hazards, not items employees would normally wear. Id. at *5.

In Spoerle, the district court also applied a plain-meaning approach in defining "clothes." The court articulated four factors to distinguish donning and doffing sanitation equipment on the work site from "changing clothes," including (1) if work is performed for employer, (2) for uniquely job-related purposes, (3) under the employer's control, and (4) for safety related purposes. Pursuant to these four factors, the court concluded that under § 203(o):

> "[c]hanging clothes" is "an everyday, plain-language term that describes what most people do every day-taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening." This view makes the relevant questions straight forward: Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason? Under this understanding of "changing clothes," putting on a uniform would not be covered under the FLSA under ordinary circumstances, but donning and doffing equipment used to protect against hazards particular to the workplace would be covered.

Id. at 867 (citing Fox v. Tyson Foods, Inc., 2002 WL 32987224, *6-7 (N.D. Ala. Feb. 4, 2002)) (internal citation omitted); see Hoyt, 579 F. Supp. 2d at 1132 (concluding that sanitary/safety uniforms consisting of clean pants, shirt, hair net, and hard hat were not "clothes" because they are required to satisfy the defendant's very specific needs for sanitation and safety and not similar to clothing worn for everyday convenience).

Here, Kellogg's mandatory food safety uniforms and protective equipment donned and doffed by Franklin and other Plant employees are nearly identical to the sanitation and safety equipment worn in Spoerle. Specifically, both the Plant employees and the plaintiffs in Spoerle must wear bump caps, certain shoes, ear plugs, hair and beard nets, safety glasses or goggles, and specific pants and shirts. Compare Spoerle, 527 F. Supp. 2d at 86 with R. 207-2: Pl.'s SOF at ¶ 44. Accordingly, viewed narrowly, the protective gear and equipment worn by

Franklin does not fit within the plain and ordinary meaning of "clothes" for purposes of § 203(o).

Further, the time spent donning and doffing Kellogg's mandatory protective gear and equipment should be considered compensable because Kellogg requires employees to don and doff at the workplace and employees cannot launder the food safety uniforms themselves. See Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 911-12 (9th Cir. 2004) (holding that time spent donning and doffing full-body gowns or "bunny suits" before entering "cleanrooms" to handle sensitive silicon products was compensable because, among other things, the employer required its employees to change at the plant); Lee v. Am-pro Protective Agency, Inc., 860 F. Supp. 325, 326 (E.D. Va. 1994) (holding that the time spent donning and doffing security guard uniforms was compensable because the guards were not allowed to change at home).

Here, Kellogg requires Franklin and the hourly Plant employees to change into their uniforms and protective gear at the Plant. (R. 207-2: Pl.'s SOF at ¶ 44.) Kellogg does not allow the employees to take any part of their uniform home for any reason, even to launder the garments. (Id.) Moreover, federal and state regulators enforce Kellogg's stringent requirements, and employees are subject to discipline if they fail to properly don and doff the uniforms and protective

equipment at the workplace. (Id.) Thus, based on company policy, the time spent donning and doffing the uniforms and protective gear is compensable.

D. Alternatively, Franklin and the Plant's Hourly Employees Should Be Compensated For Walking Time After Donning and Before Doffing Even If the § 203(o) Defense Applies.

To the extent that the Court finds § 203(o) to be an affirmative defense to Kellogg's failure to pay wages for donning and doffing activities, Franklin should nonetheless be compensated for time spent walking between the locker room and the time clock because these activities are "principal activities." The United States Supreme Court recognized that "[d]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity . . . is covered by the FLSA." IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005). Accordingly, Franklin's walking time is not compensable only if this Court determines that her donning and doffing activities are not principal activities under the FLSA.

A principal activity is one that is an integral and indispensable part of the activities for which the employee is employed. Figas v. Horsehead Corp., 2008 WL 4170043, at *20; see also Steiner v. Mitchell, 350 U.S. 247, 256 (1956) (holding that changing clothes and showering are an "integral and indispensable part of the principal activity of the employment"). Several courts have determined

that § 203(o) does not apply to the time spent walking to and from changing areas. See Andrako v. U.S. Steel Corp., 632 F. Supp. 2d 398, 413 (W.D. Pa. 2009) (concluding that the Portal-to-Portal Act does not preclude compensation for post-donning/pre-doffing walking time); see also Figas, 2008 WL 4170043, at *20 (holding that "activities rendered noncompensable under § 203(o) by a collective-bargaining agreement can nevertheless mark the beginning and end of a continuous workday for purposes of the Portal Act" and "203(o) should be read to exclude only 'time spent in changing clothes or washing'"); Gatewood v. Koch Foods of Miss., 569 F. Supp. 2d 687, 702 (S.D. Miss. 2008) (holding that "[a]lthough the act of 'changing clothes' itself is barred based on § 203(o) . . . the activities that occur after changing into sanitary gear and before changing out of sanitary gear are not impacted by the defense").

Because Franklin's donning and doffing activities are undeniably principle activities, her post-donning and pre-doffing walking time is compensable. It is undisputed that Kellogg requires every hourly worker at the Rossville plant to don and doff protective gear in order to work on the production floor. (R. 117-2: Decl. Herbert Taylor at ¶¶ 11, 19, 21.) Moreover, Kellogg specifically provides Franklin and her co-workers with locker rooms to change into and out of the protective gear

and equipment because they are not allowed to take their uniforms and equipment home with them after their shift has ended. (R. 119-6: Def.'s SOF at ¶¶ 27-28.)

In short, even if this Court determines that § 203(o) applies to Franklin's donning and doffing activities, the Court should still reverse the district court's decision to grant Kellogg's motion for summary judgment with respect to walking time and remand this case for further proceedings.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR KELLOGG ON ITS § 259(a) DEFENSE.

Pursuant to 29 U.S.C. § 259(a), Kellogg claims to be completely immune from liability because it relied in good faith on a June 6, 2002 Department of Labor opinion letter in deciding to continue nonpayment for donning and doffing time. Section 259 of the FLSA provides a "good faith" defense to liability for violations of the FLSA if an employer **pleads and proves** that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States such as the Administrator of the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 259(a).

Because Kellogg has not met its heavy burden of proof on any of § 259(a)'s requirements, the district court grant of summary judgment in Kellogg's favor constitutes reversible error.

A. Kellogg Cannot Prove that It Acted In Conformity With A DOL Opinion Letter Because the No DOL Opinion Letter Discusses What Constitutes a "Custom or Practice."

In March 2005, Kellogg decided to continue nonpayment for donning and doffing time at all of its plants. (R. 207-2: Pl.'s SOF ¶ 65.) The district court granted summary judgment for Kellogg on its § 259(a) defense based its argument that it relied in good faith on the DOL's June 6, 2002 opinion letter in making this decision. Contrary to the district court's ruling, Kellogg did not, and cannot, prove the actual conformance requirement for § 259(a) because no DOL opinion letter has addressed both elements of § 203(o). See Figas v. Horsehead Corp., 2008 WL 4170043, at *23 (W.D. Pa. Sept. 3, 2008) (finding that the DOL's silence in the DOL's 2002 letter on the "dispositive issue" of whether challenged practice was excluded "by custom or practice under a bona fide collective-bargaining agreement" to be fatal to the defendant's motion for summary judgment). As such, summary judgment should be reversed.

"The 'good faith' defense is not available to an employer unless the acts or omissions complained of were 'in conformity with' the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied . . . actual conformity is necessary." See 29 C.F.R. § 790.14(a). If there is no conformity, general good faith in other respects cannot save the day. EEOC

v. Home Ins. Co., 672 F.2d 252, 265 (2d Cir. 1982). This is because § 259 was not intended to allow an employer to insulate itself from its own improvident interpretation of the statute—which is precisely what the district court allowed Kellogg to do by granting summary judgment in its favor. Id. at 266.

Like Figas, several courts have consistently determined that § 259(a) will absolve an employer only if the administrative opinion relied upon addresses the employer's specific circumstances. See Hultgren v. County of Lancaster, 913 F.2d 498, 508 (8th Cir. 1990) (concluding that § 259 was not available to the defendant because it did not in fact act in conformity with the letters because of inconsistencies between the circumstances described in the letters and the defendants' actual circumstances). Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 928 (11th Cir. 1987) ("While the attempts of employers to make correct decisions on the basis of general guidelines is prudent and commendable the attempt alone does not raise the statutory bar of § 259. The administrative interpretation relied upon must provide a clear answer to the particular situation in order for the employer to rely on it."); see also Schneider v. City of Springfield, 102 F. Supp. 2d 827, 834 (S.D. Ohio 1999) (denying defendants' motion for summary judgment on § 259(a) because the plaintiff did not "fit precisely" within the terms of the Administrator's ruling).

Despite this clear-cut requirement to prove actual conformance, the district court incorrectly concluded that § 259(a) applied because of its decision to grant summary judgment under § 203(o). Specifically, the district court reasoned that Figas offered no support to Franklin's position because of the court decision to grant summary judgment under § 203(o). (R. 264: Order Granting Summ. J., p. 33.) Respectfully, the district court's decision misses the point.

As held by Figas, Kellogg cannot claim to have acted in conformity with either the June 6, 2002, or subsequent May 14, 2007 opinion letters because the letters are indisputably silent as to the second element of § 203(o). 2008 WL 4170043, at *23. Specifically, while the DOL's 2002 and 207 opinion letters discuss the "changing clothes" element, the DOL expressly declares that it takes no position regarding what constitutes a § 203(o) "custom or practice." See Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2002 WL 33941766 (June 6, 2002); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007).

Therefore, even if Kellogg claims to have relied on these opinion letters for its discussion of the "changing clothes" element, § 259(a) cannot apply because the 2002 and 2007 opinion letters are completely silent on the critical "custom or practice" prong. Kellogg cannot possibly establish that it acted in conformity with

an Administrator's "written administrative regulation, order, ruling, approval, or interpretation," that does not exist.

B. Kellogg Also Failed to Establish the Two Remaining Elements of Section 259(a).

1. Kellogg failed to establish actual reliance on the June 6, 2002 opinion letter.

While the district court cited the proper standard for the actual reliance requirement of § 259(a), it incorrectly concluded that the facts of this case demonstrate Kellogg's actual reliance. (R. 264: Order Granting Summ. J., p. 33.)

To satisfy the actual reliance requirement, Kellogg must show that it actually relied on the June 6, 2002 DOL opinion letter, and that the opinion letter in fact had an impact on its decision to continue nonpayment for donning and doffing time at the Rossville plant. 29 C.F.R. § 790.16(a); Figas, 2008 WL 41 70043, at *22. Kellogg cannot meet the actual reliance element by merely showing that it "relied upon its own incorrect interpretation of a 'vague and general administrative guideline.'" Id.

The district court based its erroneous conclusion on the fact that Kellogg's "analysis" and "decision" regarding the applicability of § 203(o) was done after the DOL issued its June 6, 2002 opinion letter. (R. 264: Order Granting Summ. J., p. 34.) When Kellogg's in-house counsel, William Muth, analyzed the applicability

of § 203(o) to the Rossville plant, he did not actually rely on the 2002 DOL opinion letter. And in March 2005, when he and the other company officials determined to continue nonpayment for donning and doffing time at the Rossville plant, they did not make the decision in actual reliance on the 2002 DOL opinion letter. Instead, both the post-2002 "analysis" and "decision" were based on Mr. Muth's opinion that the letter supported research and conclusions he had completed back in February 2004 regarding the donning and doffing pay practices at two other Kellogg's plants, not the Rossville plant. (Id. at ¶ 60.) The March 2005 decision was not plant-specific and was not based on actual facts gathered or any investigation conducted into Kellogg's Rossville plant. (R. 207-2: Pl.'s SOF at ¶¶ 69, 70, 72.) More importantly, Mr. Muth acknowledged that the 2002 DOL opinion letter only addressed the meaning of "changing clothes" for purposes of § 203(o) and did not address what a "custom or practice" under a collective bargaining agreement meant under § 203(o). (Id. at ¶ 67.)

Mr. Muth had no knowledge regarding the donning and doffing practices or whether a custom or practice existed at the Rossville plant. (Id. at ¶¶ 63, 70.) His conclusion regarding whether § 203(o) applied to the Rossville plant was made based on factual assumptions regarding items donned and doffed at Kellogg's unionized plants generally, and factual assumptions he made regarding the history

of nonpayment for this time at these plants, not made in actual reliance on any DOL opinion letter. (Id. at ¶ 67.) Moreover, Mr. Muth's concession regarding the fact that he could have reached a different conclusion had he made different factual assumptions belies any argument regarding actual reliance on any DOL opinion letters. (Id. at ¶ 72.)

2. Kellogg failed to satisfy the objective good faith standard.

Even if the Court concludes that Kellogg actually relied on the 2002 DOL Letter, Kellogg failed to satisfy the good-faith element for § 259(a). Good faith requires an objective, not subjective, evaluation of the employer's behavior. Sisk, 2008 WL 4922397, at *10; Figas, 2008 WL 417003, at *24 (concluding the objective good faith requirement was not met where the collective bargaining agreement was silent regarding compensation for the contested time because a reasonable employer in the position of [the defendant] may well have acted differently.") "An employer who acts in reliance on an administrative ruling will have acted 'in good faith so long as the ruling remained unrevoked and the employer had no notice of any facts or circumstances which would lead a reasonably prudent man to make further inquiry as to whether the employees came within the act's provisions.'" Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 237 n. 2 (6th Cir. 1981) (quoting 29 C.F.R. § 790.15) ("[T]he employer's 'good faith' is

not to be determined merely from the actual state of mind . . . '[G]ood faith' also depends upon an objective test—whether the employer . . . acted as a reasonably prudent man would have acted under the same or similar circumstances."). "Good faith requires that the employer have honesty of intention and no knowledge of circumstances which ought to have put him upon inquiry." 29 C.F.R. § 790.15.

The district court erred in concluding that Kellogg met the objective good faith requirement because Mr. Muth purportedly conducted "further inquiry" when he "researched and provided advice in 2004 and when he met with company officials in 2005." (R. 264: Order Granting Summ. J., p.31.) The district court also erred when it concluded that despite Mr. Muth's lack of knowledge about the Rossville plant, other company labor officials had "more general knowledge about Defendant's donning and doffing policies." (Id.)

First, it is undisputed that whatever research or "further inquiry" Mr. Muth conducted, it had nothing to do with the Rossville plant. (R. 207-2: Pl.'s SOF at ¶¶ 63.) Indeed, Mr. Muth admitted that he conducted no research or investigation into the Rossville plant's specific donning and doffing practices, no review of Rossville's collective bargaining agreement, no investigation about whether a custom or practice in fact existed at the Rossville plant, and made no determination about whether the plant's pay practice complied with the FLSA. (Id. at ¶¶ 63, 69-

70.) Mr. Muth failed to have any discussions with any employees at the Rossville plant, including the Plant Director. (Id. at ¶¶ 63, 74.) As such, Mr. Muth had no knowledge about the donning and doffing practices at the Rossville plant, and no knowledge what employees knew or believed with respect to entitlement for payment for such activities. (Id. at ¶ 63.)

Second, the record does not support the district court's conclusion that the other company officials' "general knowledge" about Kellogg's donning and doffing practices sufficiently establishes objective good faith. According to Kellogg, the donning and doffing and pay practices vary from plant to plant and when it made the decision to continue nonpayment, its decision was not plant-specific and no plant's pay practice was individually discussed, including Rossville's. (Id. at ¶ 69; R. 111: Def.'s Opp'n Mem. to Pl.'s Mot. for Conditional Cert. at 9, 10.) ("Kellogg's policies regarding compensation for time spent changing clothes is based on particular facts, circumstances, customs and practices unique to each plant.").

In short, the objective good faith standard cannot be met where Kellogg admits that its decision to continue nonpayment at the Rossville plant had nothing to do with the Rossville plant. Accordingly, the district court's grant of summary judgment regarding the application of § 259(a) defense should be reversed.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellant Alice Franklin respectfully requests that this Court reverse the district court's decision to grant summary judgment in favor of Defendant-Appellee Kellogg Company.

Respectfully submitted,

Dated: October 13, 2009

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This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 9,930 words.

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I hereby certify that a true and correct copy of Plaintiff-Appellant's Brief with Addendum was served via regular the Court's electronic filing system, this 13th day of October, 2009, upon the following:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. 1	Collective Action Complaint
R. 111	Defendant's Memorandum in Opposition to Plaintiff's Motion for Conditional Certification
R. 117-2	Declaration of Herbert Taylor
R. 119	Defendant Kellogg Company's Motion for Summary Judgment
R. 119-2	Defendant Kellogg Company's Memorandum of Law in Support of Its Summary Judgment Motion
R. 119-6	Kellogg Company's Statement of Undisputed Material Facts
R. 207	Plaintiff's Response to Defendant's Motion for Summary Judgment
R. 207-2	Plaintiff's Response to Kellogg's Statement of Facts
R. 207-5	Declarations of O. Johnson, C. Bogan, J. Hines, L. Malone, and S. Ebarb
R. 216-2	Declaration of Teresa West
R. 264	Order Granting Summary Judgment