

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ABDELA TUM, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. ) **Docket No. 00-371-P-C**  
 )  
 **BARBER FOODS, INC.,** )  
 )  
 **Defendant** )

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

The defendant, Barber Foods, Inc., moves for summary judgment on all claims asserted by the forty-one named plaintiffs<sup>1</sup> against it in this action brought under the Fair Labor Standards Act. I recommend that the court grant the motion in part and deny it in part.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*,

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<sup>1</sup> The defendant has requested dismissal of sixteen of these plaintiffs as a sanction for failure to respond to the defendant’s interrogatories as ordered in my Report of Final Pretrial Conference and Order (Docket No. 32) at 2. Barber Foods’ Motion for Sanctions, etc. (Docket No. 37). I have recommended that this motion be granted. Recommended Decision on Defendant’s Motion (continued on next page)

56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The summary judgment record includes the following undisputed material facts appropriately supported in accordance with this court's Local Rule 56. The defendant is a secondary processor of poultry products at a single facility located in Portland, Maine. Barber Foods' Statement of Material Facts in Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 22) ¶ 1.1;<sup>2</sup> Affidavit of Peter Bickford ("Bickford Aff."), Exh. 3 to Defendant's SMF, ¶ 2. The defendant has two production shifts, each with six lines, three of which are "specialty" lines and three of which are "pack-out" lines. Defendant's SMF ¶ 1.2; Bickford Aff. ¶ 3. The product is assembled on the

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for Sanctions (Docket No. 40).

<sup>2</sup> Plaintiffs' Statement of Response to Barber Foods' Material Facts ("Plaintiffs' SMF") (Docket No. 29) provides no response to this and many other paragraphs of the defendant's statement of material facts. These paragraphs are accordingly deemed admitted, to the extent that they are supported by the citations to the summary judgment record given by the defendant. Local Rule 56(c). A citation to the defendant's statement of material facts followed by a citation to the summary judgment record will be made in this section of my (continued on next page)

specialty lines. *Id.* After moving through the specialty lines and large spiral freezers, the product is pouched, packed and palletized on the pack-out lines. *Id.*

The production lines are staffed primarily by rotating associates, who generally rotate to different positions on the lines every two hours. Defendant's SMF ¶ 1.3; Bickford Aff. ¶ 4. There are 149 rotating associates on each shift. *Id.* In addition to rotating associates, each line has set-up operators whose primary duties are to make sure that the various machines on the lines are operating smoothly. Defendant's SMF ¶ 1.4; Bickford Aff. ¶ 5. There are 34 set-up operators on each shift. *Id.*

The plaintiffs include seven associates currently employed by the defendant and 37 former employees. Defendant's SMF ¶ 2.1; Bickford Aff. ¶ 7. Twenty-six of the plaintiffs are or were rotating associates. Defendant's SMF ¶ 2.2 & Exh. 1 thereto. Two of the plaintiffs are employed as set-up operators; one plaintiff worked in the meat room; two plaintiffs worked in maintenance; two plaintiffs worked in shipping and receiving; eight plaintiffs worked in sanitation; and three plaintiffs work or worked in two job classifications. *Id.* The sanitation crew works on the third shift; the first two shifts are production shifts. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9.

Associates are expected to be on the production floor ready to work when their shift begins. Defendant's SMF ¶ 3.3; Plaintiffs' SMF ¶ 3.3. Associates are paid from the time they actually punch in. Defendant's SMF ¶ 3.3; Bickford Aff. ¶ 11. Associates are given paid breaks of 15 minutes in the first half of the shift and 10 minutes in the second half. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. In each break associates are given an extra paid five minutes to get to and from the production floor. *Id.*<sup>3</sup>

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recommended decision whenever I refer to such factual allegations.

<sup>3</sup> The plaintiffs' statement of material facts includes a paragraph 4.1 which reads, in its entirety: "Barber Foods had not submitted credible evidence that its employees are paid for an extra 5 minutes of travel time per break." Plaintiffs' SMF ¶ 4.1. A statement to that effect in the defendant's statement of material facts is supported by citations to paragraph 12 of the Bickford affidavit and certain pages of the deposition of William Whittier, which are attached to the statement of material facts as Exhibit 11. Both of these citations (*continued on next page*)

Associates are also given an unpaid 30-minute meal break in the middle of each shift, along with an extra five paid minutes to get to and from the production floor. Defendant's SMF ¶ 4.2; Bickford Aff. ¶ 12.

All associates are required to wear the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Defendant's SMF ¶ 5.1; Affidavit of William Whittier ("Whittier Aff.") (Exh. 4 to Defendant's SMF) ¶ 2. Since October 15, 2001 all associates on the production floor have also been required to wear safety glasses. *Id.* Associates may also wear one or more of the following: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, steel-toed boots, rain pants, steel mesh gloves, and lockout-tagout equipment. Defendant's SMF ¶ 5.2; Plaintiffs' SMF ¶ 5.2. The parties dispute the question whether the defendant requires associates to wear any of these additional items. Nets, earplugs, gloves, sleeve covers and aprons are dispensed by employees at the supply cage. *Id.* ¶ 5.4. Vinyl gloves, sleeve covers and aprons are also available from tubs on the production floor. Defendant's SMF ¶ 5.5; Whittier Aff. ¶ 6. Most associates who wear these items obtain them from the tubs. *Id.* All associates are offered the use of a locker in which they may store reusable clothing or equipment. Defendant's SMF ¶ 5.8; Whittier Aff. ¶ 9.

Rotating associates are required to wear lab coats, hair and beard nets, earplugs and safety

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support the allegation in the statement of material facts. If the plaintiffs' response is intended as an objection, it fails for lack of any identified basis. Questions of credibility are reserved for the trier of fact, but the party contesting credibility must provide the court with something beyond a conclusory assertion that the cited evidence is not credible before the court can determine whether such a situation exists. At a minimum, some evidence disputing the sworn evidence at issue must be cited.

glasses. Defendant's SMF ¶ 6.1; Plaintiffs' SMF ¶ 6.1.<sup>4</sup> Set-up operators are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats and back belts and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.2; Plaintiffs' SMF ¶ 6.2. Set-up operators are also required at times to wear sleeves, rubber gloves or palletizing gloves. Plaintiffs' SMF ¶ 6.2; Deposition of Tadeusz Olszynski ("Olszynski Dep.") (Exh. 9 to Plaintiffs' SMF) at 5, 9-10.

Employees working in the meatroom are required to wear lab coats, hairnets, beardnets, earplugs, safety glasses, vinyl gloves, aprons, sleeve covers, steel-toed boots and back belts and to carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.3; Plaintiffs' SMF ¶ 6.3.<sup>5</sup> Shipping and receiving employees are required to wear safety glasses, steel-toed boots and a bump hat or hard hat. *Id.* ¶ 6.4. They are also required to wear back belts. Plaintiffs' SMF ¶ 6.4; Deposition of Kevin Snow ("Snow Dep.") (Exh. 1 to Plaintiffs' SMF) at 24. These employees must pass through the production floor in order to punch in and punch out and must put on the gear required for production employees in order to do so. Plaintiffs' SMF ¶ 6.4; Snow Dep. at 9-10. Maintenance employees must wear safety glasses and steel-toed boots and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.5; Deposition of Jeffrey Shaw ("Shaw Dep.") (Exh. 12 to Defendant's SMF) at 12-13. Sanitation employees are required to wear lab coats, hairnets and beard nets, earplugs, safety glasses, gloves, rain pants, steel-toed boots and bump caps and to carry lock-out/tag-out equipment, hose nozzles and tool clips. Defendant's SMF ¶ 6.6; Affidavit of Cletis R. Bragg, Jr. (Exh. 10 to Defendant's SMF) ¶ 2.

Lab coats and cotton glove liners are laundered and reused. Defendant's SMF ¶ 7.1; Affidavit of Thomas Page ("Page Aff.") (Exh. 5 to Defendant's SMF) ¶ 2. Laundry bins are located at several

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<sup>4</sup> The plaintiffs contend that "some rotating associates are required to wear gloves" as well, Plaintiffs' SMF ¶ 6.1, but the record citation given for this assertion does not support it, and the defendant has appropriately objected to the statement on this basis. Barber Foods' Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 33) ¶ 6.1.

<sup>5</sup> The plaintiffs contend that these employees are also required to wear bump hats. Plaintiffs' SMF ¶ 6.3; Deposition of Ernest Levesque ("Levesque Dep.") (Exh. 4 to Plaintiffs' SMF) at 8.

points along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant. *Id.* Vinyl gloves, sleeve covers and aprons are disposable. Defendant's SMF ¶ 7.2; Page Aff. ¶ 3. Trash bins are located on the production floor and along the hallway from the production floor exits to the plant exits. *Id.* These items may be removed and deposited in the trash bins before punching out if the associate chooses. *Id.* Bump hats, back belts, safety glasses, steel-toed boots and reusable earplugs are retained by the associates and may be stored in a locker or taken home at their option. Defendant's SMF ¶ 7.3; Plaintiffs' SMF ¶ 7.3.

The defendant uses a computerized time-keeping system. *Id.* ¶ 8.1. Each associate has a swipe card with a bar code. *Id.* The system downloads clock punches into the payroll software. *Id.* Time clocks are located at the entrances and exits to the production floor and at various other locations in the facility. *Id.* ¶ 8.2. Employees swipe their individual cards through the machine and the machine registers the punch. Plaintiffs' SMF ¶ 8.2; Deposition of Barber Foods, Inc. ("Page Dep.") (Exh. 11 to Plaintiffs' SMF) at 11. Rotating associates, set-up operators and meatroom associates generally punch in at a clock in the area where they will be working and punch out on the "out" clocks which are located next to the two primary exits. Defendant's SMF ¶ 8.3; Affidavit of Catherine Smith ("Smith Aff.") (Exh. 6 to Defendant's SMF) ¶ 3; Affidavit of Tyrone Ive ("Ive Aff.") (Exh. 7 to Defendant's SMF) ¶ 3; Affidavit of Douglas Goodwin ("Goodwin Aff.") (Exh. 8 to Defendant's SMF) ¶ 3; Deposition of Thomas Page (Exh. 13 to Defendant's SMF) at 99. Maintenance associates punch in on a time clock in the maintenance room. Defendant's SMF ¶ 8.3; Shaw Dep. at 25. Shipping and receiving associates punch in and out on the plant office clock located by the shipping and receiving office. Defendant's SMF ¶ 8.3; Affidavit of Timothy Scanlin ("Scanlin Aff.") (Exh. 9 to Defendant's SMF) ¶ 3. Sanitation associates punch in on the cafeteria clock and punch out at the plant office clock. Defendant's SMF ¶ 8.3; Bragg Aff. ¶¶ 3, 5.

During busier times, there may be lines at the coat racks and glove liner bins, the cage window or the time clocks. Defendant's SMF ¶ 10.3; Smith Aff. ¶ 7. During these times an associate may have to wait to obtain a coat and glove liners, to obtain items from the cage or to punch in. *Id.* An employee can spend between two and eight minutes in line at the supply cage. Plaintiffs' SMF ¶ 10.3; Deposition of Abdela Tum ("Tum Dep.") (Exh. 5 to Plaintiffs' SMF) at 30-32.

Associates on the production floor must be wearing lab coats, hairnets and earplugs before they can enter the production floor and punch in. Defendant's SMF ¶ 10.5; Smith Aff. ¶ 3. Gloves, aprons and sleeve covers are optional. *Id.* Most associates wear gloves; aprons and sleeve covers are worn by most associates on the specialty lines and infrequently by associates on the pack-out lines. *Id.* Gloves, aprons and sleeve covers are usually donned after punching in. Defendant's SMF ¶ 10.6; Smith Aff. ¶ 4.

Set-up operators don the required equipment and then punch in on the production floor. Defendant's SMF ¶ 10.8; Ive Aff. ¶ 3. Prior to punching out, they return to the cage any items they had checked out earlier. Defendant's SMF ¶ 10.9; Plaintiffs' SMF ¶ 10.9. After punching out, they deposit their coats, gloves and hairnets in the appropriate bins and may store other equipment in their lockers or take it home. *Id.* at ¶ 10.10.

Meatroom associates don the required equipment and punch in at the meatroom clock. Defendant's SMF ¶ 10.11; Goodwin Aff. ¶ 3. Gloves, aprons and sleeve covers may be deposited in the trash before punching out. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4. At the end of the shift, meatroom associates wash their boots if necessary. Defendant's SMF ¶ 10.12; Plaintiffs' SMF ¶ 10.12. Lab coats, gloves, hairnets, sleeve covers and aprons are deposited in laundry or trash bins; remaining items are stored in lockers or taken home. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4.

Shipping and receiving associates go to the shipping office and don coats, hairnets and earplugs before entering the production floor to punch in at the plant office clock. Defendant's SMF ¶ 10.13; Scanlin Aff. ¶ 3. After punching in they return to the shipping office to doff this equipment and go to their assigned area, unless they are going directly from the time clock to work on the production floor or in the freezer. *Id.* At the end of their shift, these associates must again don coats, hairnets and earplugs before entering the production floor to punch out at the plant office clock. Defendant's SMF ¶ 10.14; Scanlin Aff. ¶ 4. After punching out, they leave their coats in the shipping office and drop the hairnet and earplugs in the trash. *Id.*

Maintenance associates have their own time clock in the maintenance department. Defendant's SMF ¶ 10.15; Shaw Dep. at 25. Any required clothing or equipment is put on after punching in. Defendant's SMF ¶ 10.15; Shaw Dep. at 28. At the end of the shift, these associates doff all equipment before punching out. Defendant's SMF ¶ 10.16; Plaintiffs' SMF ¶ 10.16.

Sanitation workers punch in on the cafeteria clock. Defendant's SMF ¶ 10.17; Bragg Aff. ¶ 3. There is a nightly meeting in the cafeteria, after which the associates go upstairs to work. *Id.* At the end of the shift, these associates wash their rain pants and tools while on the clock and then punch out at the plant office clock. Defendant's SMF ¶ 10.19; Bragg Aff. ¶ 5. They then deposit their coats, glove liners, hairnets and gloves in the appropriate bins and reusable items of equipment in their lockers. *Id.*

Associates are free to leave the premises during their unpaid break. Defendant's SMF ¶ 11.1; Bickford Aff. ¶ 19. Lab coats must be removed if an associate leaves the premises or uses the bathroom. Defendant's SMF ¶ 11.2; Whittier Aff. ¶ 10. Gloves, aprons and sleeve covers also must be removed when an associate uses the bathroom. *Id.*

The defendant has a medical office that is staffed by a nurse from 6:00 a.m. to 6:30 p.m. Monday through Friday and by a physician from 2:00 p.m. to 5:00 p.m. Tuesdays and Thursdays. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. Appointments with this office are initially made by an associate's crew lead. Defendant's SMF ¶ 12.2; Bickford Aff. ¶ 21. If an associate needs to visit the office on other than an emergency basis, the crew lead checks the available appointment times on the computer and generally tries to schedule the associate for the next available slot. *Id.* Appointments cannot be scheduled during an associate's meal break on the second and third shifts because the medical office is not staffed when those meal breaks occur. Defendant's SMF ¶ 12.4; Bickford Aff. ¶ 23.

Plaintiff Toan Dang left the employ of the defendant on April 2, 1998; plaintiff Mohammad Habibzai left the employ of the defendant on May 7, 1998; and plaintiff Lee LaCroix left the employ of the defendant on July 22, 1998. Defendant's SMF ¶ 13.3; Bickford Aff. ¶ 26.

### **III. Discussion**

The complaint alleges that the defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to keep accurate time records resulting in the denial of regular and overtime compensation and by permitting or requiring employees to perform integral and indispensable activities for its benefit before and after the regular paid work shift and during unpaid breaks. Complaint (Docket No. 1) at 19-20. The defendant seeks summary judgment on these claims. Due to the nature of the evidence presented in the summary judgment record, different groups of employees must be considered separately with regard to each of these claims.

#### **A. Statute of Limitations**

The defendant contends that the claims of ten plaintiffs who left its employ more than two years before the complaint was filed or their written consents as opt-in plaintiffs were filed are barred by the applicable statute of limitations. Barber Foods' Memorandum in Support of Motion for Summary Judgment ("Motion"), attached to Barber Foods' Motion for Summary Judgment (Docket No. 21) at 21-23. The applicable statute provides that actions based on claims like those raised by these plaintiffs "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). An action is considered to have been commenced on the day the complaint was filed for named plaintiffs and on the date when a written consent to become a party plaintiff is filed for all plaintiffs not named in the original complaint. 29 U.S.C. § 256(a). The plaintiffs respond that there is sufficient evidence to support a finding that the defendant's alleged violations of the FLSA were willful, making the three-year period applicable. Plaintiffs' Memorandum in Opposition of [sic] Barber Food's Motion for Summary Judgment ("Opposition")(Docket No. 30) at 15-16.

Even if the three-year period were applicable, it is undisputed that the written consents of plaintiffs Mohammad Habibzai and Toan Dang were filed in this court on June 18, 2001, Docket No. 16, more than three years after they each left the employ of the defendant, Defendant's SMF ¶ 13.3. Accordingly, summary judgment should be entered against them. *See Bolduc v. National Semiconductor Corp.*, 35 F.Supp.2d 106, 116 (D. Me. 1998).

"[A]n employer acts willfully for the purposes of the FLSA's statute of limitations if it knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (citation and

internal quotation marks omitted). Here, the plaintiffs rely, Opposition at 15-16, on the defendant's assertion that Peter Bickford, its "human resources business partner," who is primarily responsible for monitoring the defendant's compliance with the FLSA, attended annual seminars on labor and employment issues and subscribed to numerous periodicals which deal with current issues under the FLSA, Defendant's SMF ¶ 13.2. Asserting in conclusory fashion that the defendant's violation of the FLSA as alleged is "clear," the plaintiffs then draw the conclusion that the defendant must have known through Bickford that its conduct violated the FLSA or at least recklessly disregarded the possibility that its conduct violated the FLSA. Opposition at 15-16. However, as will become apparent later in this recommended decision, even if the the defendant's conduct occurred as alleged by the plaintiffs, to the extent that those allegations are supported in the summary judgment record, it is far from clear that the conduct at issue violated the FLSA. The First Circuit noted in *Baystate* that the applicable standard for a willful violation of the FLSA was established by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which rejected a negligence standard for liability. 163 F.3d at 679, 681. Where, as here, "legitimate disagreement" may exist with respect to application of the FLSA to a specific set of facts, a court should be reluctant to find a knowing violation of the FLSA. *Id.* at 680. An employer does not act willfully even if it acts unreasonably in determining whether it is in compliance with the FLSA. *Id.* at 681.

The plaintiffs argue that willfulness must always be determined by the factfinder. Opposition at 15. However, the First Circuit has held that, where no genuine issue of material fact is raised on the summary judgment record, summary judgment on this issue is appropriate. *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510, 1515-16 (1st Cir. 1991). I conclude, given the closeness of the substantive questions raised by the plaintiffs under the FLSA and the lack of dispositive authority, as discussed more thoroughly below, that there is no genuine issue of material fact as to the

defendant's knowledge that its alleged actions violated the FLSA or as to any reckless disregard by the defendant of the possibility that its alleged actions violated the FLSA. Accordingly, the claims of the following plaintiffs are barred by the two-year statute of limitations and the defendant is entitled to summary judgment against them: Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue. Docket No. 16 & Exh. 1 to Defendant's SMF.

### **B. Pre-Shift and Post-Shift Activities**

The plaintiffs seek compensation for time spent (i) walking from the plant entrance to the places where they obtain the clothing and equipment they wear while working and then to the time clocks where they punch in, Complaint ¶ 20; Opposition at 8; (ii) waiting in line to obtain clothing and equipment or to punch in, Opposition at 8, 10; (iii) putting on clothing and equipment, Complaint ¶ 20; and (iv) removing clothing and equipment and placing it in bins or lockers, Complaint ¶ 23, Opposition at 8.<sup>6</sup> The defendant relies in significant part on the Portal-to-Portal Act, 29 U.S.C. § 254, in support of its motion for summary judgment on these claims. That statute provides, in pertinent part:

[N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . . —

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

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<sup>6</sup>The defendant contends that the plaintiffs also seek compensation for “the time it takes . . . to walk from the clocks where they punch out to their lockers, if they use them, and then to the plant exits.” Motion at 4. I find no such allegation in the complaint or in the plaintiffs' opposition to the motion for summary judgment.

29 U.S.C. § 254(a). The term “principal activity or activities” “embraces all activities which are an integral and indispensable part of the principal activities.” *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956) (citation and internal quotation marks omitted). “[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed . . . .” *Id.* at 256.

Walking from the plant entrance to a workstation or actual place of performance of the employee’s principal work activity is not compensable. 29 C. F. R. § 790.7(e) & (f); *Pressley v. Sanderson Farms, Inc.*, 143 Lab.Cas. ¶ 34,262, 2001 WL 850017 (S.D. Tex. Apr. 23, 2001), at \*2-\*3.

The plaintiffs here attempt to combine this time with time spent waiting to punch in or to obtain necessary clothing or equipment, but time spent waiting in line to punch in or out is also not compensable under the FLSA. 29 C.F.R. §§ 790.7(g); 790.8(c). With respect to the time spent waiting to pick up clothing or equipment, the plaintiffs rely on *Amos v. United States*, 13 Cl. Ct. 442 (1987), Opposition at 6-7, but in that case the employer conceded that the time spent procuring and returning keys, a radio and a body alarm was compensable under the FLSA, 13 Cl. Ct. at 448. The Court of Claims held that “once [the plaintiffs] had the keys and other equipment items in their possession, [they] in effect had reported for duty,” *id.* at 449, and found the time spent walking to duty stations thereafter to be compensable, *id.* at 450. Here, the plaintiffs claim compensation for the time spent before obtaining their clothing and equipment. Based on the statutory and regulatory language quoted above, as well as the case law, that time is not spent in activity that could reasonably be construed to be an integral part of employees’ work activities any more than walking to the cage from which hairnets and earplugs are dispensed is to be so considered.

The defendant is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

With respect to claims based on the donning and doffing of equipment, the available case law varies in its application of section 254. Before considering that case law, however, it is necessary to address the defendant's argument that maintenance employees are paid for any time spent donning and doffing equipment and that sanitation employees are paid for time spent donning equipment. Motion at 10. The plaintiffs do not respond to this argument, but the court must nonetheless consider it on the merits in the context of summary judgment. *Lopez*, 938 F.2d at 1517.

The defendant's contention that maintenance employees are paid for time spent doffing clothing and equipment, Defendant's SMF ¶ 10.16, is supported by the citation and not denied by the plaintiffs' response, Plaintiffs' SMF ¶ 10.16 (maintenance employees take off equipment and clothing "before punching out").<sup>7</sup> Accordingly, the defendant is entitled to summary judgment on any claim by maintenance employees for compensation for time spent doffing clothing and equipment or engaged in other activities post-shift. With respect to the donning of clothing and equipment by maintenance employees, the plaintiffs challenge the defendant's assertion that "[a]ny required clothing or equipment is put on after punching in," Defendant's SMF ¶ 10.15, with the statement that "[m]aintenance employees are required to obtain much of their required gear before clocking in," Plaintiffs' SMF ¶ 10.15. While the plaintiffs offer only the interrogatory responses of a single employee to support their assertion that all maintenance employees are required to obtain "much of" their required gear before

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<sup>7</sup> The corresponding paragraph of the plaintiffs' statement of material facts is not supported by the citation given. As stated, it cannot reasonably be interpreted as anything other than an agreement with the defendant's statement. The fact that it is not supported by the citation given also means that the corresponding paragraph in the defendant's statement of material facts must be deemed admitted so (continued on next page)

punching in and that it “typically” takes 10-15 minutes to walk from the entrance of the building to a locker,<sup>8</sup> get equipment and don clothing and equipment, *id.*, and while, strictly speaking, “obtaining” equipment is not the same thing as putting it on, so that the plaintiffs’ statement is not directly responsive to the defendant’s factual assertion, this evidence is sufficient, although barely, to create a disputed issue of material fact on the question whether pre-shift donning activity is paid for by the defendant. Summary judgment for the defendant is not appropriate on this issue.

With respect to sanitation employees, the defendant asserts that “[a]ssociates are paid to get ready,” and that they “may obtain and don their clothing and equipment before going to the cafeteria to punch in if they wish, but this would be at their option, it is not required.” Defendant’s SMF ¶ 10.18. The plaintiffs’ response, again supported by the interrogatory responses of a single plaintiff, represents that “[s]anitation workers must obtain” their clothing and equipment and don it prior to punching in. Plaintiffs’ SMF ¶ 10.18. Again, giving the plaintiffs the benefit of the inferences available to the party opposing summary judgment, the fact that two supervisors told a single sanitation employee that he “would be reprimanded” if he “did not have all [his] protective clothing, gear, and equipment on when it was time to punch in,” Plaintiff Albert R. Howard, Jr.’s Answers to Defendant Barber Foods’ Interrogatories (“Howard Int.”) (Exh. 22 to Plaintiffs’ SMF), Answer to Interrogatory No. 5, is sufficient to raise a dispute concerning an issue of material fact on this claim. The defendant accordingly is not entitled to summary judgment on the pre-shift “donning” claim for compensation by sanitation employees.

*1. Activities as “Work.”* The remaining donning and doffing claims may be discussed together. The defendant contends that these activities are not “work” within the meaning of the FLSA and that the time spent in these activities is in any event *de minimis*, taking it outside the requirements of the FLSA

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long as it is supported by the record citation given, which is the case here. *See Shaw Dep.* at 30-31.

as a matter of law. Motion at 10-15. The plaintiffs challenge both of these arguments. Opposition at 2-14. Changing clothes “when performed under the conditions normally present, would be considered ‘preliminary’ or ‘postliminary’ activities, 29 C.F.R. § 790.7(g), and thus not compensable under the Portal-to-Portal Act, but “an activity which is a ‘preliminary’ or ‘postliminary’ activity under one set of circumstances may be a principal activity under other conditions,” *id.* § 790.7(h), and thus compensable. “The term ‘principal activities’ includes all activities which are an integral part of a principal activity.” 29 C.F.R § 790.8(b).

Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer’s premises at the beginning and end of the workday would be an integral part of the employee’s principal activity.

*Id.* § 790.8(c). *See also id.* n.65 (“Such a situation may exist where the changing of clothes on the employer’s premises is required by law, by rules of the employer, or by the nature of the work.”) The First Circuit has noted that courts may determine whether disputed activities are preliminary or postliminary for purposes of the FLSA. *Ballou v. General Elec. Co.*, 433 F.2d 109, 111 (1st Cir. 1970).

I conclude that the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs’ work for the defendant. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (“physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business”).

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<sup>8</sup> I have already determined that such time is not compensable under the FLSA.

This is admittedly a close question. Several courts have held otherwise in cases that appear close on their facts to the claims presented here.

In *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), the Tenth Circuit upheld a trial court's FLSA decision, finding that "the placement of a pair of safety glasses, a pair of earplugs and a hardhat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration," so that these activities did not meet the "physical or mental exertion" prong of the *Muscoda* test, and accordingly could not be considered "work" under the FLSA. *Id.* at 1125-26. However, the court also upheld the trial court's finding that workers who required special safety equipment including "some combination of" aprons, belly guards, mesh sleeves or arm guards, wrist wraps, gloves, rubber boots, belts and shin guards should be compensated under the FLSA for the time involved in donning, doffing and cleaning these items. *Id.* at 1124-25. Among the reasons given for the distinction were that the safety gear used by the latter group of employees was uniquely required by the dangers of the production jobs being performed and that the donning, doffing and cleaning activities required physical exertion, time and "a modicum of concentration." *Id.* at 1125, 1126. Here, the facts suggest a scenario that is somewhere between the two groups described in *IBP*. The time required for donning and doffing is hotly disputed. The parties offer little in the way of evidence about the necessity of any of the clothing or equipment at issue for safety of the employees, although the plaintiffs offer some general statements, not specifically tied to their jobs or the clothing and equipment at issue, about the potential hazards of work in the plant. Plaintiffs' SMF ¶¶ 5.2(a)-5.2(c).<sup>9</sup>

I do not find *IBP* persuasive for purposes of the present motion.

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<sup>9</sup> The defendant failed to provide a response to these and certain other paragraphs of the plaintiffs' statement of material facts that presented new facts in addition to those submitted initially by the defendant after I ordered it to do so if it did not wish those paragraphs to be deemed admitted. Order (Docket No. 36) at 2. Accordingly, they have been deemed admitted to the extent that they are appropriately supported by citations to the summary judgment record.

In *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), the court held, after trial, that employees were not entitled to compensation for the donning and doffing of sanitary and safety equipment under the FLSA because the employees wore clean outer garments to protect their street clothes from becoming soiled and changing into and out of such garments was not integral and indispensable to their principal jobs. *Id.* at 563. The clothing at issue was earplugs, hairnets, cotton “frocks,” rubber aprons, rubber gloves and cotton gloves. *Id.* at 562. The court found that “the donning and doffing of these items does not involve ‘physical or mental exertion’” due to the fact that the donning and doffing “takes seconds to accomplish and requires very little concentration,” and therefore did not qualify as work under the FLSA. *Id.* at 561. Here, the defendant has submitted evidence that the activities at issue may take from 1 to 5 minutes pre-shift, Defendant’s SMF ¶¶ 10.4, 10.8, 10.11, 10.20, and from 1 to 4 minutes post-shift, *id.* ¶¶ 10.7, 10.10, 10.12, 10.14, 10.20. The plaintiffs suggest that the pre-shift activities take between 8 and 36 minutes, Plaintiffs’ SMF ¶¶ 10.3, 10.3(b), 10.4, 10.6, 10.8, 10.11, 10.19-10.20,<sup>10</sup> and the post-shift activities take from 7 to 25 minutes, *id.* ¶¶ 10.7(a), 10.9, 10.10, 10.12, 10.14, 10.16, 10.19-10.20. While it appears that most of the clothing and equipment involved would require very little concentration to don or doff, it is far from clear on this record that this could be accomplished in seconds. Again, I do not find *Anderson* to be persuasive.

Finally, in *Pressley*, the trial court found in the context of summary judgment, citing *IBP*, that a claim under the FLSA for compensation for time spent donning, doffing and cleaning a smock, apron, cotton or rubber gloves, rubber sleeves, a hairnet and earplugs “fails as a matter of law.” 2001 WL 850017 at \*2-\*3. The opinion provides no analysis in support of this conclusion.

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<sup>10</sup> These figures apparently include time spent walking from plant entrances to time clocks or to sites where clothing and equipment could be obtained and time waiting in line to punch in or to obtain equipment, both of which are not compensable. It is not possible in most cases to determine from the plaintiffs’ submissions how much of the total stated times is accounted for by those activities.

The First Circuit has stated that

[t]he activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee. The crucial question is not whether the work was voluntary but rather whether the employee was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.

*Secretary of Labor v. E.R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir. 1974) (citation and internal punctuation omitted). The First Circuit attached particular significance to the fact that the Portal-to-Portal Act does not cover any work of consequence performed for an employer, citing 29 C.F.R. § 790.8(a). *Id.* On this record, I cannot conclude that the plaintiffs were not performing services for the benefit of the defendant when they donned and doffed the required equipment.

I do find persuasive the reasoning of the court in *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325, 326-27 (E.D.Va. 1994), supporting its holding on a motion for summary judgment that the employer defendant was not entitled to summary judgment on a claim under the FLSA for compensation for time spent changing into clothing required by the employer for its security guard employees. *See also Dunlop v. City Elec., Inc.*, 527 F.2d 394, 397-401 (5th Cir. 1976) (test is whether activities in question performed as part of regular work of employees in ordinary course of business and are necessary to business and performed primarily for benefit of employer). The donning and doffing at issue here are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities.

2. *Whether the activities are “de minimis.”* Activity which may be considered work under the FLSA, not excluded from compensability by the Portal-to-Portal Act, may nonetheless not require compensation under the FLSA if it involves only a few minutes of work beyond the scheduled working hours. *Anderson*, 328 U.S. at 692. “It is only when an employee is required to give up a substantial

measure of his time and effort that compensable working time is involved.” *Id.* Courts weight four facts to determine whether an activity is *de minimis* as a matter of law for purposes of an FLSA claim:

- (1) the amount of daily time spent on the additional work;
- (2) the administrative difficulty in recording the time;
- (3) the size of the aggregate claim;
- and (4) the regularity of the work.

*Anderson*, 147 F.Supp.2d at 564; *Pressley*, 2001 WL 850017 at \*3. “Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable.” *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984) (citing cases).

Here, the amount of daily time spent on the activities at issue is very much in dispute. The defendant expresses concern about the administrative difficulty that would be involved in recording this time, Motion at 15, but employees are required to engage in these activities every day, and the scope of the activities does not change from day to day. Thus, there should be little or no variation in the time spent on these activities by each employee from day to day. *See also* 29 C.F.R. § 785.47 (“An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee’s fixed or regular working time or practically ascertainable working period of time he is regularly required to spend on duties assigned to him.”). The defendant does not suggest that it could not practically establish rules allowing each employee to punch in before donning and to punch out only after doffing the clothing and equipment at issue, while excluding time spent socializing, walking or waiting, Motion at 15. The lack of such information does not mean that the plaintiffs are entitled to recover but merely precludes the entry of summary judgment in the defendant’s favor on the basis of this record. I have already mentioned the regularity of the work. Given the number of employees on each of the defendant’s two shifts, the size of the aggregate claim could be quite large. These factors also counsel against the entry of summary judgment on the basis of the *de minimis* rule.

### **C. Meal Break**

The plaintiffs contend that the defendant provides less than the 30-minute meal break required by law and requires them to use the bathroom during the unpaid meal break, so that the available time is further reduced by the need to remove and re-don the required clothing and equipment. Complaint ¶ 21. The defendant makes the same arguments with respect to this claim: that these activities are not work within the meaning of the FLSA and that the time involved is in any event *de minimis*. Motion at 16.

The defendant first contends that this claim cannot be raised by sanitation associates, “who are paid from punch in to punch out with no deduction for an unpaid meal break,” or to maintenance or shipping and receiving employees. *Id.* The plaintiffs do not respond to this argument but their response to the paragraph in the defendant’s statement of material facts cited by the defendant in support of this argument does dispute the necessary underlying factual assertion with respect to maintenance employees. The plaintiffs again generalize from the interrogatory response of a single sanitation employee, Plaintiffs’ SMF ¶ 4.4, who details his activities during a 30-minute break in response to an interrogatory seeking a description of “all work performed by you . . . for which you claim you were entitled to be paid but were not paid for [sic],” Howard Int. at [4], Interrogatory No. 12 & Answer thereto. With the benefit of a reasonable inference, this evidence raises a disputed issue of material fact that precludes summary judgment on this aspect of the plaintiffs’ claims. The fact that a review of this employee’s payroll records demonstrates that he was paid from punch in to punch out with no deduction for any unpaid lunch break, Barber Foods’ Reply Statement of Material Facts (“Defendant’s Reply SMF”) (Docket No. 33) ¶ 4.4,8.4 [sic]; Affidavit of Peter Bickford (Exh. 1 thereto) ¶ 3; Payroll record (Exh. 3 thereto), provides impeachment evidence but does not permit the court to disregard the employee’s sworn statement in the context of a motion for summary judgment.

The outcome is different for maintenance and shipping and receiving associates. The defendant's statement of material facts, unchallenged by the plaintiffs in this regard, establishes that employees must remove lab coats, gloves, aprons and sleeve covers in order to use the bathroom. Defendant's SMF ¶ 11.2, Whittier Aff. ¶ 10; Plaintiffs' SMF ¶ 11.1-11.2. The defendant's statement that maintenance employees are required to wear only safety glasses, steel-toed boots and lock-out/tag-out equipment is not challenged by the plaintiffs. Defendant's SMF ¶ 6.5, Shaw Dep. at 12-13. Maintenance employees are required to wear a lab coat when they enter the production floor, *id.*, but even assuming that such an employee's lunch break would occur while he or she was on the production floor, doffing the coat on the way off the floor can hardly consume more than a few seconds, a *de minimis* period of time. The defendant's statement of material facts also establishes that shipping and receiving associates are required to wear only safety glasses, steel-toed boots and a bump hat or hard hat. Defendant's SMF ¶ 6.4, Scanlin Aff. ¶ 2. The plaintiffs' SMF adds a back belt to this list, Plaintiffs' SMF ¶ 6.4, but that is not an item that needs to be doffed in order to use the bathroom. These employees are also required to wear a lab coat when on the production floor, Defendant's SMF ¶ 6.4, Plaintiffs' SMF ¶ 6.4, but the same considerations discussed with respect to maintenance employees apply here. The defendant is entitled to summary judgment on any lunch break/bathroom use claims raised by maintenance and shipping and receiving employees.

An employer need not be compensated for bona fide meal periods, during which the employee "must be completely relieved from duty for the purposes of eating regular meals" and which must ordinarily consist of 30 minutes or more. 29 C.F.R. § 785.19(a). The evidence concerning the question whether the defendant provides those of its employees whom it does not pay for a 30-minute period in each work day, on a regular basis, with at least 30 minutes of time during which they are "completely relieved from duty" cannot be determined on the basis of the summary judgment record.

The defendant contends that employees are given an extra five minutes of paid time to get to and from the production line in connection with the lunch break, Defendant's SMF ¶ 4.2, which the plaintiffs do not dispute, and that the 30-minute meal break "starts when the last associate leaves the line," Defendant's Reply SMF ¶ 11.1-11.2. These facts, it contends, suffice to establish as a matter of law that no employee receives less than 30 minutes of lunch break time. Motion at 17.

However, the plaintiffs have provided the testimony of two employees to the effect that they did not in fact receive 30-minute lunch breaks. Plaintiffs' SMF ¶¶ 11.1-11.2, 11.3; Deposition of Ernest Levesque (Exh. 4 to Plaintiffs' SMF) at 39-41; Deposition of Celso Florendo (Exh. 2 to Plaintiffs' SMF) at 48. Coupled with their assertions that the time required to doff and don required clothing and equipment in order to eat is more than *de minimis*, Plaintiffs' SMF ¶ 11.3; Howard Int. at [4] (Answer to Interrogatory No. 12); Plaintiff Allison Carey's Answers to Defendant Barber Foods' Interrogatories (Exh. 21 to Plaintiffs' SMF) at [4] (Answer to Interrogatory No. 12); Plaintiff Kenneth LaMarche's Answers to Defendant Barber Foods' Interrogatories (Exh. 24 to Plaintiffs' SMF) at [4]-[5] (Answer to Interrogatory No. 15), a fact-based assertion which for the reasons discussed previously cannot be determined on the basis of the summary judgment record, the plaintiffs have raised a disputed issue of material fact on this claim.

With respect to the plaintiffs entitled to raise a claim concerning bathroom breaks, the record supports the defendant's position. The defendant notes that "there is no evidence that associates cannot use the bathroom if necessary during the shift," and points out that all employees are given a 15-minute paid break in the first half of the shift and a 10-minute paid break in the second half, in addition to the lunch break. Motion at 16-17. They are also given an additional five paid minutes in connection with each break to get to and from the production floor. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. The defendant also argues that removing a lab coat, gloves, apron and sleeve covers in

order to use the bathroom is not work within the scope of the FLSA and that the time involved is in any event *de minimis*. Motion at 17-19. The plaintiffs respond that bathroom break activities “take substantially more time and effort than alleged by” the defendant, Opposition at 10, and that the defendant “has admitted that it suggests to employees that they use their lunch break or other break to use the restroom,” *id.* at 11. They assert in conclusory fashion that this “effectively . . . force[s] employees to perform compensable work during unpaid break time.” *Id.* This minimalist argument is insufficient. Even if the evidence could reasonably be interpreted to allow an inference that a “suggestion” by management about when employees should use the bathroom has the practical force of a requirement, an inference that cannot be reasonably drawn on the basis of the existing summary judgment record,<sup>11</sup> the plaintiffs have made no attempt to show that using the bathroom as recommended during one of the paid breaks is not practically possible for employees. Under these circumstances, the defendant is entitled to summary judgment on the plaintiffs’ claims based on use of the bathrooms, because the plaintiffs have not offered sufficient evidence to allow a reasonable jury to find in their favor on this claim.

#### **D. Medical Visits**

The defendant contends that the evidence is insufficient to allow the plaintiffs to proceed with their claim that they are sometimes ordered to use their unpaid break time to visit the plant nurse’s office. Motion at 19-21. The applicable regulation provides:

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<sup>11</sup> In connection with their argument on their final claim, discussed below, the plaintiffs assert that a recommendation from management that employees visit the plant nurse’s office during lunch break “surely carries great weight for an at will employee and is tantamount to a command. *See Barber Foods Associate Handbook.*” Opposition at 14. This assertion is not supported by a reference to, or indeed an entry in, the plaintiffs’ statement of material facts and therefore will not be considered by the court. In addition, the lack of a pinpoint citation to a page or pages in the document, as well as any indication where in the record the document may be found, makes the citation too general to be of any use to the court. It is not the court’s role to search through the summary judgment record for material that might support a party’s factual assertions. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

29 C.F.R. § 785.43.

The defendant first argues out that this claim cannot be raised by sanitation workers, because they only work on the third shift, when the plant medical office is not staffed, nor by any second-shift workers, because the medical office is not staffed when the second-shift meal period is taken. Motion at 20. The plaintiffs do not respond to the argument concerning sanitation workers. The medical office at the defendant's plant is staffed from 6:00 a.m. to 6:30 p.m. Monday through Friday. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. The defendant's first shift runs from 6:30 a.m. to 3:00 p.m., its second shift runs from 3:45 p.m. to 12:15 a.m., and its third shift runs from 11:30 p.m. to 6:30 a.m. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9. All sanitation workers work on the third shift. Defendant's SMF ¶ 3.2; Bickford Aff. ¶ 10. Obviously, no sanitation worker could receive medical attention on the premises during his or her normal working hours. The plaintiffs make no claim that any sanitation workers received medical attention at any other location at the direction of the defendant during the third shift. Accordingly, the defendant is entitled to summary judgment on any claim concerning medical attention raised by sanitation workers.

With respect to second-shift workers, the plaintiffs do not dispute the defendant's assertion that the medical office is closed during the meal break. Instead, they argue that the applicable regulation is violated because second-shift employees "typically must visit the nurse before their shift begins and before they clock in." Plaintiffs' SMF ¶ 12.2-12.5. The plaintiffs offer the testimony of two individuals, each of whom was scheduled once to visit the nurse before the start of the second shift, in support of this assertion. Tum Dep. at 52-53; Olszynski Dep. at 47-48. Even if the plaintiffs were given the benefit of an inference that these individuals' experience was "typical," however, the

scheduling of medical visits before an employee's shift begins at 3:45 p.m. does not, for all that appears in the summary judgment record, require that employee to wait for or receive that attention during his or her normal working hours. Therefore, the evidence would not allow a factfinder to conclude that the regulation was violated. The defendant is entitled to summary judgment on this claim insofar as it is raised by second-shift workers.

With respect to first-shift workers, the plaintiffs provide evidence only that two supervisors "recommended" that an employee visit the medical office during lunch break. Plaintiffs' SMF ¶ 12.2-12.5; Levesque Dep. at 42. For the reasons discussed earlier, *see* footnote 10, the plaintiffs cannot convert such a recommendation into evidence that any employee actually was required to do so. Even plaintiff Levesque testified that he was not required to do so. Levesque Dep. at 42. The defendant points out, correctly, that there is no evidence in the summary judgment record that any of the plaintiffs was required to visit the medical office during lunch break and was not paid for that time. Barber Foods' Reply Memorandum (Docket No. 34) at 5-6; Defendant's Reply SMF ¶ 12.2-12.5. The only other evidence from a first-shift employee cited by the plaintiffs, Plaintiffs' SMF ¶ 12.2-12.5, and therefore the only evidence that the court may consider in connection with this motion for summary judgment, is the deposition testimony of plaintiff Tum, who testified that since he had been working on the first shift, he had not been required to see the nurse during his lunch breaks. Tum Dep. at 53.

Tum also testified that management did require "some people" to see the nurse during the lunch break or made appointments for them to see the nurse at that time. *Id.* If the plaintiffs meant to invoke this testimony in their statement of material facts, it still does not support the necessary additional element of such a claim that the employees involved were not paid for the time so spent. The defendant's evidence that employees who have medical appointments scheduled during their meal breaks "because this was the only available slot" are paid for the time involved and allowed to take

the entire meal break before or after the appointment, Defendant's SMF ¶ 12.4, Bickford Aff. ¶ 23, is not challenged by any evidence identified by the plaintiffs in their statement of material facts. The summary judgment record would not allow a reasonable factfinder to conclude that the defendant violated the applicable regulation with respect to its first-shift employees.<sup>12</sup> Accordingly, the defendant is entitled to summary judgment on all first-shift medical-visit claims.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to the following claims: (i) all claims asserted by plaintiffs Mohammad Habibzai, Toan Dang, Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue; and (ii) all claims asserted by the remaining defendants based on (a) time spent walking from the plant entrances to an employee's work station, locker, time clock or site where clothing or equipment is to be obtained; (b) time spent waiting to punch in or out or for clothing or equipment to be dispensed; (c) use of bathrooms; and (d) medical visits. I recommend that the motion be **DENIED** as to the remaining claims set forth in the parties' submissions in connection with the motion.

#### **NOTICE**

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

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<sup>12</sup> In addition, a basic requirement for a "collective action" under 29 U.S.C. § 216(b), such as this action, *see* Order for Notice Under 29 U.S.C. § 216(b) (Docket No. 14), which allows one or more employees to bring an action "for and in behalf of himself or themselves and other employees similarly situated," would seem to be that at least one of the employees involved, whether as a self-designated representative or as an opt-in plaintiff, have suffered the injury that is the subject of the claim.

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Dated this 23rd day of January, 2002.

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David M. Cohen  
United States Magistrate Judge

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