IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFF SPOERLE, NICK LEE,
KATHI SMITH, JASON KNUDTSON,
on behalf of themselves and all others
who consent to become Plaintiffs and
similarly situated employees,

OPINION AND ORDER

Plaintiffs,

3:07-cv-00300-bbc

v.

KRAFT FOODS GLOBAL, INC.,
Oscar Mayer Foods Division,

Defendant.

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This is a proposed class action brought by employees who work at a meat processing plant owned by defendant Kraft Foods Global, Inc. Plaintiffs contend that defendant is violating the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and state law by failing to pay them for time spent donning and doffing certain articles of safety and sanitation equipment.

The equipment includes the following: a hard hat or bump cap, steel-toed shoes or sanitation boots, ear plugs, hairnet and beard net, safety glasses, a freezer coat (if necessary)

and a cotton frock. Defendant moved for summary judgment on all of plaintiff's claims before plaintiffs moved for class certification. It argued that donning and doffing the equipment was not compensable under the FLSA because those activities fall into several exceptions to the statute involving "preliminary" and "postliminary" activities, "changing clothes" and "de minimis" acts. In addition, it contended that plaintiff's state law claims were preempted by state law. In an opinion and an order dated December 31, 2007, I denied defendant's motion for summary judgment in most respects, concluding that its preemption arguments were unpersuasive and that it had not shown that it was entitled to judgment as a matter of law on plaintiff's FLSA claim.

Now before the court is defendant's motion for "clarification, reconsideration, and for certification and stay to file an interlocutory appeal." The motion will be granted with respect to the request for clarification. It will be denied in all other respects.

Defendant asks for clarification regarding which "donning/doffing activities remain at issue" in the case. The answer to that question is simple: all of them. This should have been clear from the fact that I denied defendant's motion for summary judgment in full with respect to plaintiffs' FLSA claim.

Anticipating that conclusion, defendant next asks for reconsideration of the ruling that it was not entitled to summary judgment under 29 U.S.C. § 203(o), which excludes from FLSA protection the activity of "changing clothes" under some circumstances.

Defendant advances two primary arguments. First, defendant says that even under the court's definition of "clothes" (the type of article a person would normally wear anyway), some of the items of equipment should be excluded. But all of its arguments rely on facts not before the court. If it believes that plaintiff's equipment falls within § 203(o), it will have to develop the record to show this.

Second, defendant says that I should reconsider the December 31 order because the court in Fox v. Tyson Foods, Inc., No. CV-99-BE-1612-M, 2002 WL 32987224, *11 (N.D. Ala. Feb. 4, 2002), a case on which I relied in the order, recently reversed its own holding that items of equipment similar to that at issue in this case were not "clothes" under § 203(o). Of course, this court is not bound by the decisions of any district court or court of appeals outside this circuit. I followed the decision in Fox because its reasoning was thoughtful and persuasive. The court in Fox reversed course only because it was required to do so by Anderson v. Cagle's, Inc., 488 F.3d 945, 955-56 (11th Cir. 2007), a decision I declined to follow in the December 31 order because it was conclusory and internally inconsistent. I do not find it to be any more persuasive now.

The rest of defendant's argument for reconsideration consists of retreading the same ground as its motion for summary judgment. Defendant's request for reconsideration will be denied.

This leaves defendant's request for the court to certify an interlocutory appeal under

28 U.S.C. § 1292. I will deny this request because I do not believe that allowing an appeal now would "materially advance the ultimate termination of the litigation." Id. I say this for two reasons.

First, as I noted above, defendant's argument about the proper application of § 203(o) is not solely a question of law. It is intertwined with factual questions regarding the nature of the articles and how they are used. Because the record is still relatively undeveloped, allowing an interlocutory appeal would not be productive.

Second, as class actions go, this one is relatively simple, involving one issue and covering employees at one plant. Defendant has not suggested that it will be unduly burdensome to litigate the case in district court. Further, the motion for class certification is due in one week and trial is set for July of this year. Thus, the case is likely to be fully resolved in this court before defendant could receive a ruling from the court of appeals.

ORDER

IT IS ORDERED that defendant Kraft Foods Global, Inc.'s motion "clarification, reconsideration, and for certification and stay to file an interlocutory appeal," dkt. #26, is GRANTED with respect to defendant's request for clarification and DENIED with respect

to defendant's request for consideration and certification to file an interlocutory appeal.

Entered this 31st day of January, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge