

A10-419

143

State of Minnesota
In Court of Appeals

OFFICE OF
APPELLATE COURTS

Eduardo Ríos, Rodolfo Gutierrez, Evelia Mendoza, Jennifer Brickweg, May 26 2010
 Marsha Winter, Juan Guerra, Jr., Valeria Cabral, Margarita
 Ruiz, Todd E. Nord, Jeff Rudie and John Patrick Kelley, Jr., FILED

Appellants,

v.

Jennie-O Turkey Store, Inc., a Minnesota corporation, West Central
 Turkeys, Inc. (a/k/a Pelican Turkeys, Inc.) and Heartland Foods Co.,

Respondents.

APPELLANTS' BRIEF AND ADDENDUM VOLUME I

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. The trial court below found that the Defendant-employer contracted with Plaintiffs, line workers at Defendant's Minnesota turkey processing plants, to perform hourly work; but because the parties did not define "work," or discuss and agree on payment for each task, the employer could refuse to pay for tasks that were not covered by a specific "meeting of the minds." This was so even where the court found that the tasks – which Plaintiffs refer to collectively as "Donning and Doffing" – were required by the employer and performed in Defendant's plants as a necessary part of their daily duties. The court failed to recognize that Minnesota law has a definition of "work" that applies to the employer-employee relationship and mandates payment for the Donning and Doffing in this case. Did the trial court err by not applying the state law definition of "work" to the employment agreement, giving the employer the discretion to disclaim wages owing for hours worked, just because there was no "meeting of the minds" with regard to specific tasks?

On summary judgment the trial court held that Defendant did not have to pay for Donning and Doffing because it was not specifically discussed as part of the employment agreement.

Most apposite authorities: Minn. R. 5200.0120, subpt. 1; Lugo v. Farmers Pride, Inc., 967 A.2d 963 (Pa. Super. Ct. 2009), cert denied 980 A.2d 609 (Pa. 2009); Martinez-Hernandez v. Butterball, LLC, 578 F. Supp. 2d 816 (E.D.N.C. 2008).

2. It is undisputed that Plaintiffs are required to "Don and Doff" in Defendant's processing plants, and that some of this work activity was unpaid. Where

the Minnesota Fair Labor Standards Act (“MFLSA”) requires all work-related tasks performed on an employer’s premises to be paid as hours worked, did the trial court err in denying Plaintiffs’ motion for summary judgment as to MFLSA overtime liability?

The trial court denied Plaintiffs’ motion for summary judgment as to MFLSA overtime liability with no explanatory memorandum and entered judgment for Defendant.

Most apposite authorities: Minn. R. 5200.0120, subpt. 1.

3. Defendant uses a computerized timekeeping and payroll system to automatically deduct 30 minutes for meal breaks from each employee’s daily “hours worked.” However, evidence shows that they do not get 30 minutes completely relieved from work, when Donning and Doffing is considered “work.” The MFLSA requires employers to give employees sufficient time to eat a meal during a break, but for an employer to deduct a 30-minute meal break, MFLSA rules require the employer to actually give a “bona fide” 30-minute break free from work.

The trial court granted summary judgment on Plaintiffs’ MFLSA meal break claim because it failed to consider the pivotal issue of deductibility and misinterpreted the statute as repealing the rules. Did the court err by granting summary judgment against Plaintiffs on the MFLSA meal break claim where significant evidence shows that Plaintiffs did not get the full 30-minute meal breaks that Defendant deducted from their pay?

The trial court granted summary judgment, failing to address the deductibility of meal breaks and holding that Minn. Stat. § 177.254 repealed MFLSA meal break rules.

Most apposite authorities: Minn. Stat. § 177.254, subd. 2; Minn. R. 5200.0060 and 5200.0120, subpts. 1 and 4; Bolin v. Japs-Olson Company, No. 06-CV-3574, 2008 WL 1699531, (D. Minn. Apr. 9, 2008); Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018, 2007 WL 2780504 (D. Minn. Sept. 24, 2007).

4. The MFLSA's overtime provision requires employers to pay time-and-a-half for each hour worked in excess of 48 in a workweek. Each Named Plaintiff worked in excess of 48 hours in a workweek when the wrongfully unrecorded and unpaid Donning and Doffing time is added. The court, however, applied an unprecedented "workweek averaging" rule to wipe out Plaintiffs' entitlement to unpaid hours worked. Did the trial court err by entering judgment for Defendant on Plaintiffs' MFLSA overtime claim, where the undisputed facts show that Plaintiffs performed uncompensated work in excess of 48 hours in a workweek?

The trial court sua sponte reversed its November 16, 2009 order and granted Defendants' motion for summary judgment on Plaintiffs' overtime claim on December 24, 2009.

Most apposite authorities: Bot v. Residential Services, Inc., No. C8-96-2545, 1997 WL 328029 (Minn. Ct. App. June 17, 1997); United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2d Cir. 1960); Minn. Stat. § 177.25; Minn. R. 5200.0120, subpt. 1.

5. From the first filing in this case, Plaintiffs have put in issue the accuracy of records of hours worked Defendant is required to keep under Minn. Stat. § 177.30. In Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008), the Minnesota Supreme

Court held that MFLSA plaintiffs could seek civil penalties in just such a situation. Did the court err by entering final judgment dismissing this case without ruling on Plaintiffs' claim that Defendant failed to keep accurate records?

The Trial Court did not rule on the recordkeeping issue, but implicitly dismissed it by entering final judgment.

Most apposite authorities: Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008); Minn. Stat. § 177.30; Minn. R. 5200.0120, subpt. 1.

6. Defendant produced numerous discovery documents marked "attorney client privileged," many addressing the central issue in this case, Defendant's non-payment for "Donning and Doffing." After receiving such documents, Plaintiffs' counsel immediately verified with defense counsel that they had been intentionally produced. Over a period of months, the specific documents at issue were used repeatedly without objection, but at a deposition, an executive of Defendant claimed that two such documents were privileged. The court upheld this claim, requiring Plaintiffs to return the documents. Did the trial court err by holding that the privilege was not waived and requiring return of the documents?

The trial court granted Defendant's motion for return of the document, holding the privilege was not waived.

Most apposite authorities: Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999).

STATEMENT OF THE CASE

This case presents questions about what constitutes “work” under Minnesota law, and whether an employer can require its employees to perform unpaid, “off-the-clock” work – not incidentally or sporadically, but as a structured part of every work day. Plaintiffs claim, on behalf of a certified class, that at the beginning and end of each shift, and during breaks, they must perform a series of tasks in Defendant’s plants in order to process turkeys on the production lines. What these tasks are, and the fact that Plaintiffs perform them, is not in dispute; nor is it disputed that Defendant does not record and pay for all of the tasks. The core issue on appeal is whether those tasks must be paid – in MFLSA language, whether the time to perform the tasks must be included in the calculation of Plaintiffs’ “hours worked.” This case is on appeal because, in a series of summary judgment rulings, the trial court mistakenly read the MFLSA and the common law to allow employers to make employees work extra hours every week without compensation.¹ This is not the law in Minnesota.

The summary judgment motions culminated in entry of a final judgment against Plaintiffs on January 22, 2010. Plaintiffs appealed on March 2, 2010. Plaintiffs now ask this Court to reverse the lower court’s orders, order partial summary judgment for Plaintiffs on liability, and remand for trial on the issues of damages and civil penalties.

¹ The Hon. Tony N. Leung presided for 5 ½ years until rotating onto the Juvenile Court bench in June 2009. The Hon. Tanya Bransford then took over the case.

FACTS

The facts set out below are drawn from the trial court's October 6, 2006 Summary Judgment Memorandum and Order (A.6-33) and repeated consistently in later orders; and from evidence submitted during extensive motion practice. Plaintiffs² agree with virtually all of the factual findings below³ but believe the lower court erred on the law. The most comprehensive statement of the facts – viewed in a light favorable to Plaintiffs, as the procedural posture demands – appears in Judge Leung's June 2009 Memorandum granting Plaintiffs' Motion to Add a Punitive Damages Claim. (A.71-80)

I. The Parties.

41 Named Plaintiffs are 11 current or former Jennie-O Turkey Store, Inc. ("JOTS") production line employees. (A.8) Their average hourly pay when the lawsuit began ranged from \$9.00 to \$11.30. (Id.) Three work or worked in the Willmar plants, two in Melrose, one in Montevideo, two in Faribault and one in JOTS' former Marshall plant. (Id.) JOTS is the country's largest turkey processor and a wholly-owned subsidiary of Hormel Foods, Inc. (A.8) JOTS is the result of a 2001 merger between Jennie-O, Inc., which then operated plants in Marshall, Melrose, Montevideo, Pelican Rapids, and Willmar; and the Turkey Store, Inc., which operated a plant in Faribault. (Id.) Jennie-O had previously acquired its Pelican Rapids and Marshall plants from West Central Turkeys, Inc. and Heartland Foods, Inc., respectively. (Id.) JOTS has employed

² Except where Plaintiffs are identified as "Named Plaintiffs," anything said about "Plaintiffs" applies to all Members of the Class.

³ Judge Bransford's December 24, 2009 Order (A.84-96) contains a number of errors of fact, some of which are discussed herein.

as many as 6,000 line production workers at any given time (App.50-51) and has employed over 13,000 potential class members during the relevant period. (App.11)

JOTS is subject to both the MFLSA and the federal Fair Labor Standards Act. See Minn. Stat. § 177.23, subd. 6; 29 U.S.C. § 203. As a food processor, JOTS is subject to state and federal sanitation and safety standards. See, e.g., 21 C.F.R. § 110.10; 29 C.F.R. §§ 1910.95, 1910.132; Minn. R. 1540.0710, 1545.0920. To comply with these standards, and because the market demands wholesome food products, JOTS imposes extensive sanitation and safety requirements on Plaintiffs. (App.254-275) Among other things, line workers must wear specific sanitation and safety gear appropriate to their positions, and workers who do not comply with these standards are subject to dismissal. (A.9-10)

II. Donning and Doffing.

As part of their daily routine, and in order to comply with sanitation and safety rules, Plaintiffs perform a series of tasks before they are allowed to process turkeys. (A.9-10) At the start of shifts employees must acquire and put on (“don”) work-related gear, walk to production areas and equipment pick-up stations, wait in line, wash their hands before shifts and after breaks for specified lengths of time, and sanitize their boots. (Id.) At shifts’ end they reverse this process and “doff,” clean, and dispose of their gear. The extensive set of tasks Plaintiffs must perform before they can process turkeys on the line, and after their line duties are finished, are referred to herein for convenience as “Donning and Doffing.” Donning and Doffing is a condition of Plaintiffs’ employment. JOTS provides the equipment at the plants, and both the equipment and employees’ behavior are subject to work rules set out in employee handbooks, which all employees

receive, including the detailed Food Safety and Good Manufacturing Practices Handbook for Employees and Supervisors. (A.9, App.255) Under the Food Safety Handbook, some items such as boots are stored in employee lockers, but must be cleaned daily. (App.257, 259) Others, such as the coveralls referred to as “frocks,” are picked up from supply rooms and changed daily or more frequently. (App.257) “Required plant clothing and equipment (frocks, bump caps, rubber boots, overshoes, mesh gloves, etc.) cannot be worn outside the plant.” (App.258) Therefore, once employees start donning they are locked into the sequence to preserve sanitary conditions. (Id.) The employee handbook commands:

ALWAYS WEAR THE PERSONAL PROTECTIVE EQUIPMENT
REQUIRED FOR EACH TASK THAT YOU DO. FAILURE TO DO SO
WILL NOT BE TOLERATED.

(A.9) (upper-case in original). In addition, “All personal equipment must be cleaned after each use and throughout the day as necessary.” (App.277) Plaintiffs must also partially Doff and Don during breaks to preserve sanitary conditions. (App.258)

III. JOTS’ Timekeeping and Pay Practices.

JOTS has “a centrally-administered computerized employee timekeeping system, called KRONOS, as well as company-wide wage and hour policies.” (A.73) KRONOS “automates the management, collection, and distribution of employee time and attendance data by recording when employees’ and supervisors’ cards are swiped” (or “punched”). (Id.) JOTS changed its pay practices in June 2007, so analysis of the pay practices varies before and after that date. (Id.) Pay practices from both periods include unpaid time for Donning and Doffing; the revised pay practice reduced, but did not

eliminate, unpaid time. (Id.) As it weighed timekeeping changes, JOTS concealed its findings about unpaid time from its hourly employees, carefully scripting how it would communicate the changes. (See App. 290 (“[W]e do not want anyone to perceive we are adding time that we should have been doing in the past.”))

A. Pre-June 2007.

Before June 2007, “paid time began and ended at either predetermined scheduled times . . . or upon the supervisors’ time clock swipes . . . depending on the plant.” (A.73) This pre-June 2007 system of keeping track of paid time is generally called “line time,” “gang time” or “master card time” (hereinafter “line time”). (Id.) JOTS recorded individual time card swipes for attendance purposes, but paid people from line time. (Id.) A person “who [was] not at his/her workstation at his or her scheduled start time” was tardy, and subject to discipline. (App.285) Consistent with this policy, Plaintiffs testified that they had to be fully “Donned” and at the lines at the beginning of their scheduled start times. (App.83 (Brickweg Aff. ¶11); App.88-89 (Cabral Aff. ¶10); App.94 (Guerra Aff. ¶11); App.98 (Gutierrez Aff. ¶9); App.136 (Winter Aff. ¶11); App.104 (Kelley Aff. ¶9); App.109 (Mendoza Aff. ¶9); App.119 (Rios Aff. ¶10); App.131 (Ruiz Aff. ¶10)) A tardy employee could eventually be subject to dismissal. If Named Plaintiffs’ testimony – and JOTs’ policy – are believed, under line time all Donning time was unpaid. (See App.289)

B. Post-June 2007.

In 2007 JOTS abandoned line time and began paying workers from their individual time clock swipes. (A.73) But even after this change, employees still partially Don before swiping in, and partially Doff after swiping out. (A.73) This design was intentional – JOTS claims these Donning and Doffing activities are not “work” under the MFLSA. (See App.150, 162-165) The still-unpaid activities include acquiring, donning and doffing frocks, helmets, boots, and hair nets, and some walking and waiting time, and take an average of 7.424 to 11.093 minutes per day.⁴ (App. 11) The video clip from Defendant’s Faribault plant shows a worker’s start-of-shift activities. (A.144) One of hundreds analyzed by Plaintiffs’ expert Dr. Robert Radwin,⁵ it shows a woman going to her locker at the beginning of her shift, and then performing a series of activities, including acquiring and donning gear such as boots, smocks, helmets, hairnets, ear protectors, knife belts, scabbards and sharpening steels, walking, waiting in line, washing, and cleaning. All these activities were necessary to enable her to process turkeys and, because all occurred before she swiped in, all were unpaid. (App.276-280)

IV. Unpaid hours in Excess of 48 in a Workweek.

JOTS’ KRONOS and payroll records show that Plaintiffs work hard. Time and payroll records (summarized in Dr. Frank Martin’s March 2, 2009 Report) show that all but one Named Plaintiff worked in excess of 48 hours in one or more pay weeks even

⁴ Average Donning and Doffing times for each plant were calculated based on a study performed by Plaintiffs’ industrial engineering expert, Dr. Robert Radwin. (App.3-12A) Dr. Radwin observed off-the-clock work at the beginning and end of shifts in each of Defendant’s plants. (App.9)

without counting unpaid Donning and Doffing hours. (App.24-34) All would have unpaid MFLSA overtime (hours worked over 48 hours in a workweek) if Donning and Doffing time were added. (Id.) When Donning and Doffing hours are added to JOTS' acknowledged hours worked, based on KRONOS data received through September 30, 2008, 9,924 Class Members of 13,076 potentially eligible line workers are entitled to relief on the overtime claim alone. (App.16, 36)

V. Recordkeeping.

JOTS does not keep records that include all the time employees spend Donning and Doffing, either at the start and end of their shifts or during rest and meal breaks. (App.59-63)

VI. Plaintiffs' Employment Agreements.

The court found "it is undisputed that Defendants . . . made clear and definite offers of employment to each Plaintiff and had agreements to pay each Plaintiff for working in their various plants." (A.14) However, the court continued, "[w]hile the parties did certainly form viable and enforceable oral employment contracts," they did not specifically discuss payment for Donning and Doffing as work. (A.25) Therefore, it concluded as a matter of law, the contract to pay for work did not include payment for Donning and Doffing.

Plaintiffs received JOTS' employee handbook and other written policies, including the above-referenced Food Safety Handbook, at the time they were hired. (App.255) The handbooks are important for what they say and what they do not. They do say employees would be paid "for the work done the previous week." (App.288, 299, 282

(emphasis added)). They don't define "work." Until 2004 they did say, in substance, that hourly workers would receive time-and-a-half for overtime "for all hours over 40" in a workweek (App.283, 287, 300); and that employees should swipe in and out "to assure full credit for your work." (App.288) The handbooks do not explain Donning and Doffing pay practices, the "line time" payment system, or the fact that (pre-June 2007) individual time clock swipes did not determine paid time. The court found that there was a contract to pay for "work," but permitted JOTS to decide, after the fact, what it wanted to include in the definition of "work." (A.14, 25)

VII. Meal and Rest Breaks.

Using KRONOS, JOTS "automatically deducts 30 minutes from each employee's shift for meal breaks" (A.11), but the computer does not control what actually happens in the plants. Despite what the court called "a clear intent" that employees would get rest periods and an unpaid 30-minute meal break (A.26), each Named Plaintiff testified to getting less than the promised breaks after Doffing and Donning – some meal breaks were as short as 20 minutes. (App.83, 89, 94, 99, 104-105, 109, 115, 120, 126, 131-132, 137-138) JOTS understood that break periods should not include time spent Doffing and Donning. During a 1999-2000 internal compliance audit at the Turkey Store, the person who later became JOTS' Director of Employee Relations (A.77) advised: "Must not require any work or work activities during unpaid lunch (putting on or taking off safety equipment . . . etc.)" (A.134). She further stated, "if employees are putting on or taking off equipment, donning smocks, etc., during that 30-minute unpaid lunch break, the lunch break may be compensable. We need to insure that people are being given a full 30

minutes for lunch (unless, of course we institute paid lunch breaks!).” (A.140) In other words, a break of 30 minutes from beginning to end would by definition short workers because they would have to Doff and Doff during the breaks. (See A.134)

Extensive additional evidence confirms that break times were shortened by Doffing and Donning. JOTS’ Senior Vice President David Juhlke admitted that some employees had to Doff and Don during their 30-minute, unpaid breaks. (App.44) JOTS simply treated this time as “de minimis” and decided not to pay for it. (App.42-44) In a compliance survey, Juhlke found less-than-30-minute meal breaks at several locations. (App.291-294, 296-297) The company’s chief industrial engineer found no extra time added for Doffing and Donning during meal breaks except at the Faribault plant, which added an inadequate three minutes. (A.129) Dr. Radwin observed that meal break doffing and donning at JOTS’ plants took, on average, between 5.783 and 9.114 minutes. (App.12)

Evidence of inadequate meal breaks presented JOTS with a conundrum because it kept no records of the actual length of meal breaks and therefore could not prove employees received adequate breaks exclusive of Donning and Doffing. (App.301) To solve the problem, JOTS’ managers proposed, but never implemented, a timekeeping policy change captioned “Donning and Doffing for Lunch,” which provided in pertinent part:

Supervisors must start the 30-minute lunch period after team members have doffed their equipment and left the department. The team members should be back in the department at the end of the 30-minute lunch period at which time they will don their equipment. Team members will be given the equivalent of 30 minutes plus the time required to don and doff equipment.

(A.131(emphasis added)). As to rest breaks, the Doffing and Donning requirements and issues are the same. Plaintiffs report getting rest breaks of 7-11 minutes (App.83, 89, 94, 99, 104-105, 109, 115, 120, 126, 131-132, 137-138), even though it was understood they would have two 15-minute rest breaks per eight-hour shift. (A.26)⁶

VIII. JOTS' Awareness of Unpaid Donning and Doffing Time and 2007 Timekeeping Changes.

An undated JOTS spreadsheet listing the company's then operational plants showed that some or all Donning and Doffing was unpaid in each plant. (A.143) JOTS began addressing liability concerns in 2001 when it started a lengthy internal labor standards compliance audit. (See A.76-80) In his Punitive Damages Order, Judge Leung found that Plaintiffs had shown clear and convincing evidence that some or all of Plaintiffs' claimed Donning and Doffing time should have been, but was not, paid under the MFLSA; that JOTS knew it should be paying for Donning and Doffing; and that it did not reform its faulty pay practices because it would have been too expensive. (A.76-80) He particularly noted that companies acquired by JOTS had previously compensated their employees for some Donning and Doffing (A.76); that the compliance audits "showed widespread non-payment for donning and doffing" (A.77); and that Plaintiffs' experts concluded that neither JOTS pre-or post-June 2007 timekeeping system paid workers for all Donning and Doffing time. (A.73)⁷ The amount of unpaid Donning and Doffing time

⁶ The rest breaks, unlike the meal breaks, are paid breaks. The measure of damages for inadequate rest breaks is outside the scope of this appeal.

⁷ In her December 24, 2009 Order granting JOTS' summary judgment motion, Judge Bransford mistakenly wrote that Judge Leung did not have the expert reports before him when he issued his punitive damages order. Compare (A.95) to (A.73).

is hotly disputed, but to give this Court an idea of the magnitude of JOTS' violation, Plaintiffs' time studies show average start and end of shift Donning and Doffing times ranging from 14.713 to 22.33 minutes daily, or approximately 62 to 95 hours per year – not counting break times.⁸ (App.10,12) It is undisputed that after June, 2007 all Donning before the in-punch and all Doffing after the out-punch has been unpaid. (See App.152-153)

IX. Privilege Issues Related to JOTS' Donning and Doffing Time Study Documents.

Significant evidence of unpaid Donning and Doffing comes from JOTS' belated response to Plaintiffs' June 16, 2004 demand for production of "All documents . . . relating to the donning and doffing of required clothing or equipment." (App.140-148) After seven months of delays, JOTS produced Bates-labeled documents JOTS 5466 – 5919 on January 12, 2005. (App.77) Upon receiving the documents, Plaintiffs' counsel noted many were marked "attorney client privileged" and immediately called defense counsel, who confirmed that JOTS intended to produce these documents. (App.77-78) Documents marked as "attorney client privileged" included surveys of then-current donning and doffing practices at various plants (e.g., A.135-138); Donning and Doffing time studies performed by JOTS industrial engineers (e.g., A.129); and quantifications of the cost of paying for Donning and Doffing. That last category included two versions of a spreadsheet – JOTS 5857-58 – prepared by JOTS executive Mr. Juhlke, who, using

⁸ Radwin Report Table 7 (App.10), based on Melrose and Faribault averages per day and a 254-day work year, the number of days JOTS' accountants used to estimate Donning and Doffing costs. (See A.142)

unknown assumptions, quantified the cost of paying for Donning and Doffing in different departments and plants. These documents thus show not only awareness of liability and evidence of damages but (relevant to class certification) the ability to fairly allocate unpaid time to all JOTS line workers.

Over the next 2 ½ months Plaintiffs' counsel shared 5858 with experts and presented it to two JOTS witnesses in depositions – all without objection. (App.77-78) On March 30, 2005, however, during Mr. Juhlke's deposition, he claimed that 5757 and 5758 were privileged. (App.40-41) It also emerged that Mr. Juhlke coordinated JOTS' document production and that he was the person responsible for many documents being mismarked as privileged. (App.46, 48) On JOTS' motion to the Special Master, affirmed over Plaintiffs' objection, the court found that 5857-58 had been inadvertently produced and ordered Plaintiffs to return the pages, implicitly rejecting Plaintiffs' argument that any privilege attached to the documents had been waived. (A.1-5)

X. Procedural History.

Named Plaintiffs filed this case on December 31, 2003, on behalf of themselves and their fellow production workers at JOTS' Minnesota processing plants.⁹ The Complaint recited eight causes of action: three breaches of the employment agreement between JOTS and its workers; three MFLSA violations; and two claims for equitable

⁹ Two wholly-owned JOTS subsidiaries, Heartland Foods Co. (now closed) and West Central Turkeys, Inc., are also defendants. (A.8) No issues arise out of the separate corporate existence of the two subsidiaries. (Id.)

relief.¹⁰ After extensive discovery and motion practice, the court granted Defendants' motions for summary judgment as to Counts I and III-VI on December 16, 2005, and as to Counts VII-IX on September 7, 2007. Judge Leung reconsidered his order regarding the statutory meal break claim in light of Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018, 2007 WL 2780504 (D. Minn. Sept. 24, 2007) which reached the opposite conclusion of law, but denied Plaintiffs' Motion for Reconsideration. (A.60) In July 2007, the court certified a class on Plaintiffs' MFLSA overtime claim. The Class includes:

All current and former hourly-compensated production line employees of [Defendants] in the State of Minnesota who, within two years preceding the date of filing . . . or within three years . . . if the violation was willful, engaged in uncompensated-for donning and doffing activities and whose employment included in any workweek in which the aggregate of compensated-for time and time spent donning and doffing exceed 48 hours.

(A.98) This class definition recognizes that under the MFLSA hourly workers are entitled to overtime for hours worked in excess of 48 in a workweek, Minn. Stat. § 177.25; and that the statute of limitations on actions for back wages may be two or three years, depending on whether the violation was willful. See Minn. Stat. § 541.07(5).

(A.112-113)

In May 2009, the court granted Plaintiffs' motion for leave to plead a punitive damages claim, finding, among other things, that the "plain language" of the MFLSA "mandates payment for most, if not all, of Plaintiffs' donning and doffing activities"

¹⁰ Plaintiffs have amended the Complaint six times; however, four of those amendments recognized only changes in parties. The substantive amendments added a fourth MFLSA count, not at issue in this appeal, and a punitive damages claim allowed by the trial court. (See App. 487-524)

(A.79) and that Plaintiffs had shown clear and convincing prima facie evidence that JOTS failed to pay workers according to law, despite knowing “of their duty to pay and Plaintiffs’ right to receive such pay for donning and doffing.” (A.80) On August 16, 2009, after the case was reassigned, Judge Bransford heard numerous motions, including Plaintiffs’ motions to reconsider dismissal of the contract claims, cross motions to exclude expert testimony, cross motions for summary judgment and JOTS’ motion to decertify the class. On November 16, 2009, the court denied all the motions and set the matter for trial on February 1, 2010. On December 15, 2009, JOTS petitioned for discretionary review of the denial of its motion for summary judgment, a petition this Court rejected on December 22, 2009. (App.231-232) However, on December 24, without further hearings, Judge Bransford sua sponte “reversed” herself and granted JOTS’ motion for summary judgment on Plaintiffs’ overtime claim. (A.84) Judgment was entered on January 22, 2010.

XI. The Rulings Below.

The court granted JOTS’ summary judgment on the contract-based claims for unpaid wages, and inadequate meal and rest breaks (Counts I, III and IV), finding that there was a contract to pay for work, but it did not include Donning and Doffing because the parties did not specifically talk about that kind of work. (A.7, 14, 25) It dismissed the MFLSA meal break claim, focusing solely on the fact that Named Plaintiffs had “sufficient time to eat a meal,” but missing the critical distinction between paid and unpaid meal breaks – i.e., between meal breaks that were not properly deducted from “hours worked” and those that were. (A.31-32) The court granted summary judgment on

the overtime claim because it concluded that the MFLSA did not require JOTS to pay for each hour worked in excess of 48. (A.93-94) This conclusion was contrary to law and also assumed disputed material facts. As explained below, these decisions were wrong on the law, as was the denial of Plaintiffs' motion for summary judgment as to MFLSA overtime liability (A.81) and the failure to recognize a triable claim for recordkeeping violations.

ARGUMENT

I. Standards of Review.

A. Summary Judgment is Subject to De Novo Review.

Viewing the evidence in the light most favorable to the party against whom summary judgment was entered, an appellate court reviews a grant of summary judgment de novo, asking whether any genuine issues of material fact exist, and whether the district court erred in its application of the law. Offerdahl v. Univ. of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988). No deference is given to a district court's decision on a question of law. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). The moving party has the burden to show the absence of any question of material fact. Bixler by Bixler v. J.C. Penney Co., Inc., 376 N.W.2d 209, 215 (Minn. 1985). There is no genuine issue of material fact when the record "could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Construction of a contract and interpretation of a statute are questions of law subject to de novo review. Business Bank v. Hanson, 769 N.W.2d 285, 288 (Minn.

2009). Likewise, a district court's application of a contract or statute to undisputed facts is a legal conclusion not entitled to deference by a reviewing court. Paradigm Enters., Inc. v. Westfield Nat'l Ins. Co., 738 N.W.2d 416, 419 (Minn. Ct. App. 2007).

Whether JOTS must pay for Donning and Doffing under its employment agreement and the MFLSA is ripe for summary judgment because "what is work" is a question of law. See Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 802 (M.D. Tenn. 2008). The MFLSA is remedial and should be construed liberally to effectuate the legislature's intent to protect employees. See Urban v. Cont'l Convention & Show Mgmt., 68 N.W.2d 633, 636 (Minn. 1955).

B. The Implicit Dismissal of Plaintiffs' Recordkeeping Claims Is Subject to De Novo Review.

By entering judgment when it granted JOTS' motion to dismiss Plaintiff's overtime claim, the trial court erred by implicitly dismissing Plaintiffs' recordkeeping claim on the pleadings. The only question before the Court in reviewing an implicit dismissal is "whether the complaint sets forth a legally sufficient claim for relief." See Bahr v. Capella Univ., 765 N.W.2d 428, 436 (Minn. Ct. App. 2009). Pleadings are to be liberally construed in the furtherance of justice. Milner v. Farmers Ins. Exch., 748 N.W.2d 608, 618 (Minn. 2008). The reviewing court is to "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 229 (Minn. 2008) (quotations omitted). A plaintiff is not required to plead a particular theory of relief, but must plead enough facts to give a defendant notice that a

particular theory might apply to the facts alleged. Barton v. Moore, 558 N.W.2d 746, 749-50 (Minn. 1997). The Minnesota Supreme Court allowed an MFLSA recordkeeping claim in the same circumstances as this one. Milner, 748 N.W.2d at 618-19.

C. Evidentiary Issues are Subject to Discretionary Review.

The trial court's affirmance of the Special Master's evidentiary ruling concerning a waiver of privilege is subject to discretionary review. See Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997). A trial court's evidentiary ruling may be reversed if it was based on an erroneous view of the law or if the court abused its discretion by acting "arbitrarily, capriciously, or contrary to legal usage." Id.

II. In Granting Summary Judgment on Plaintiffs' Contract Claims, the Court Correctly Found an Employment Contract, But Erred by Not Applying the State Law Definition of "Work," and by Deciding Material Issues of Fact Concerning the Terms of the Contract.

Plaintiffs' position in this lawsuit is that employees should be paid for their work. When JOTS hired Plaintiffs it did not tell them what it considered to be "work," and the trial court found that there was no explicit agreement about this critical term.

(App.288A, App.290A)¹¹ But this omission did not leave the concept of work without meaning – state law has a definition of work intended to apply to just this relationship.

The trial court erred because, while it found an employment contract between JOTS and each Plaintiff, it failed to apply (or even acknowledge) this definition. Instead, although

¹¹ Indeed, JOTS actively concealed the fact that it had decided to pay for some Donning and Doffing as work. JOTS' Senior Human Resources Manager, writing about proposed time keeping changes, warned "do not let any hourly [employ]ees see this." (App.288A) He was concerned that "we do not want anyone to perceive we are adding time that we should have been doing in the past." (App.290A)

JOTS admitted hiring Plaintiffs for hourly work (App.212),¹² the court found as a matter of law that JOTS had no obligation to pay for Donning and Doffing because the parties did not identify that specific activity as “work.” (A.24-25) Therefore, the court granted summary judgment on Count I, the claim for general hours worked at the appropriate rate (which would include time-and-a-half for weekly hours in excess of 40), and also on Counts III and IV, the contractual meal and rest break claims.

The court’s ruling is based on the erroneous premise that employers and prospective employees must discuss and agree on each specific task that constitutes “work” or the employer is not bound to pay. A binding MFLSA rule, general principles of contract construction, and recent decisions, directly on point, from other jurisdictions show that summary judgment was wrong as a matter of law; that Plaintiffs have a contractual right to payment for all hours worked, including Donning and Doffing during breaks; and that the case should be remanded for trial on the many fact issues surrounding the contract claims.

A. Donning and Doffing is Work under Minn. R. 5200.0120.

First, the court failed to interpret the employment agreement in light of the MFLSA definition of “work” which applies to precisely the kind of employer-employee relationship at issue. Minn. R. 5200.0120, subpt. 1 defines “hours worked” in relevant part:

¹² In granting Plaintiffs the right to add a punitive damages claim, the court noted that companies later acquired by JOTS had treated some Donning and Doffing as compensable work. (A.76)

Hours worked include training time, call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment or must remain on the premises until work is prepared or available.

The following table shows how the literal language of the rule applies to the undisputed sequence of activities Plaintiffs refer to as Donning and Doffing:

Activity	Minn. R. 5200.0120, subpt. 1
Putting on and taking off safety and sanitary gear (donning)	“must be on the premises” “involved in the performance of duties in connection with his or her employment”
Walking (e.g., to and from production areas, equipment pickup stations, time clocks, etc.)	“must be on the premises” “involved in the performance of duties in connection with her or her employment”
Waiting (e.g. waiting in lines to acquire gear, swipe time clock, at the production area before product arrives)	“waiting time;” “must remain on the premises until work is prepared or available”
Cleaning	“cleaning time”
Sanitizing	“cleaning time” “must be on the premises” “involved in the performance of duties in connection with his or her employment”

Nowhere in its contract analysis did the Court cite the governing rule or recognize that Minnesota has an applicable definition of work. (A.6-33) Ironically, the court acknowledged that Donning and Doffing must be compensated under the FLSA cases interpreting “work”;¹³ but it did not even cite the state law.¹⁴ (A.22)

Under general principles of contract construction “the incorporation of applicable

¹³ See generally IBP, Inc. v. Alvarez, 546 U.S. 21 (2005); De Asencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007); Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860 (W.D. Wis. 2007); Jordan, 542 F. Supp. 2d at 790.

¹⁴ Plaintiffs cited the rule in the Complaint and in their trial court brief. (See App. 335)

existing law into a contract does not require a deliberate expression by the parties.

Except where a contrary intention is evident, the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law.” 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 30:19 (4th ed. 1999) (emphasis added). The Minnesota Supreme Court follows this principle. See e.g., Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc., 128 N.W.2d 334, 341 (Minn. 1964) (“[P]arties to a contract are presumed to enter into their engagements with reference to the applicable law.”); Johnston v. L.B. Hartz Stores, Inc., 277 N.W. 414, 416 (Minn. 1938) (considering the relationship between contract and statutory transportation rates and holding that “the minimum rates fixed by statute should be read into the contract as binding upon defendant”); Larkin v. Glens Falls Ins. Co., 83 N.W. 409, 410 (Minn. 1900) (“[W]here parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute and the same enters into and becomes a part of the contract.”). Employment contracts do not need to define what is paid work in order to be enforceable; to the contrary, “[i]t is a well-settled rule that, in the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him thereby bargains to pay for the services rendered.” Jacobson v. Edman, 47 N.W.2d 103, 105 (Minn. 1951).

Recent Donning and Doffing cases from other jurisdictions have applied state labor law definitions of work to cases like Plaintiffs.’ Lugo v. Farmers Pride, Inc., 967 A.2d 963 (Pa. Super. Ct. 2009), cert denied 980 A.2d 609 (Pa. 2009), was an action by

poultry processing workers complaining that their employer paid them only for line production work, but not for Donning, Doffing and sanitizing their protective gear. Id. at 965. The trial court dismissed plaintiffs' breach of contract claim because it, like Judge Leung, believed the employer's agreement to pay "for all hours worked" did not supply the "meeting of the minds necessary to a valid contract because" there was no "express promise to pay for time spent donning, offing and sanitizing personal equipment." Id. at 969. The appellate court reversed, holding that Donning and Doffing had to be included in "hours worked" because of a Pennsylvania Minimum Wage Act ("PWMA") regulation substantially identical to the Minnesota rule. Id. at 966-67.¹⁵ The Lugo court wrote:

We find that the term "hours worked" has been defined as a term of art by the regulations supporting the PMWA. It includes all time that the worker is required by the employer to be on the employer's premises. . . . Under the circumstances of this case, [plaintiffs] could argue that the regulations supporting the PMWA supply the meeting of the minds because they set the firm meaning of "hours worked."

Id. at 969. The instant case raises the precise same issue. Like the PMWA rule, the MFLSA rule supplies meaning to the term "work."

Martinez-Hernandez v. Butterball, LLC, 578 F. Supp. 2d 816 (E.D.N.C. 2008) rejected a similar poultry processor defense. Deferring to the state law definition of "work," and noting the employer's deliberate policy of not defining "hours worked," the court said:

¹⁵ Like Minn. R. 5200.0120, subpt. 1, the Pennsylvania rule provides, in pertinent part, that "Hours worked . . . includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place." 34 Pa. Code § 231.1.

Were the court to interpret [state labor law] as requiring plaintiffs to prove that their employer expressly agreed to pay them for particular services performed (such as changing into and out of protective gear required by the employer), an employer would be able to avoid payment of any wages . . . by simply claiming that the services rendered, although for the benefit of the employer, were something other than “work.”

Butterball, 578 F. Supp. 2d at 822 (emphasis original). The Minnesota trial court should similarly have applied the state law definition to JOTS’ agreement to pay for hourly work. Any other outcome would allow the employer to manipulate the concept of hours worked, and would require the employer to count hours one way under the common law and another under the MFLSA.

B. Meal and Rest Break Contract Claims.

It follows from the fact that Donning and Doffing is work as a matter of law, as discussed above, that the trial court erred in granting summary judgment against Plaintiffs’ meal and rest break contract claims. As the court recognized, a break is not a break if the employee must work (A.29), and there was a clear agreement that Plaintiffs would receive a 30-minute unpaid meal break and two 15-minute paid rest breaks per eight-hour shift. (A.26-7) The lack of specific agreement that breaks would be free from Donning and Doffing is irrelevant – the state law and above-discussed principles of contract construction give meaning to that term of the agreement.

There is more than enough evidence to create a fact issue for trial about whether Plaintiffs received the agreed-upon breaks. Plaintiffs say their meal breaks, after Doffing and Donning, were as short as 20 minutes, and their rest breaks were only 7-11 minutes long. JOTS’ compliance study found no extra time added for breaks to allow for

Donning and Doffing (A.135-138), and recognized a need to allow workers to doff and don outside of nominal break times. (A.140) A JOTS executive admitted that some people had to doff and don during their designated breaks, but the company decided to treat that time as de minimis. One of the predecessor companies actually added a small amount of time for Doffing and Donning at breaks. (App.196) Plaintiffs' expert measured average Doffing and Donning times during breaks between 5.783 and 9.114 minutes. (App.12)

C. Additional Fact Issues for Trial.

Even if this Court does not apply the MFLSA definition of work to the agreement between the parties, the contract claims are fraught with fact issues. If work is not defined by law, then the solution is not to do what the court did, and find that as a matter of law Donning and Doffing was not compensable – instead, it would be for the jury to decide the parties' intent in light of all the facts and circumstances. Donnay v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966) (“It is generally recognized that summary judgment is not appropriate where the terms of a contract are at issue and any of its provisions are ambiguous or uncertain.”). For example, if the term “work” is missing or ambiguous, the jury would consider that JOTS knew or had reason to know that Donning and Doffing was work (see A.71-80); that JOTS is immeasurably more sophisticated and knowledgeable about pay practices than its prospective employees; that JOTS did not explain its timekeeping practices about Donning and Doffing; and that it later sought to conceal relevant knowledge from Plaintiffs. (A.288A); see Robbins v. Lynch, 836 F.2d 330, 332 (7th Cir. 1988)(where one party to a contract has a private and subjective intent

regarding a contract term, it is obliged to tell the other party). The jury would be instructed to consider the plain and ordinary meaning of the word “work” – “bodily or mental effort existed to do or make something; purposeful activity; labor; toil,” according to Webster’s New Universal Unabridged Dictionary 2107 (2d ed. 1983). And although the court placed the burden on Plaintiffs, (see e.g., A.16), the jury would be instructed that “Where no . . . written agreement is entered into the burden of proof shall be upon the employer to establish the terms of the verbal agreement in case of a dispute with the employee as to its terms.” Minn. Stat. § 181.56. The jury would also consider the overarching questions of how much time Plaintiffs spent Donning and Doffing, and how much of that time was unpaid.

In deciding the intent of the parties and the terms of the contract, the jury would also be entitled to look to the Employee Handbook. Named Plaintiffs received a standard handbook when they were hired; it stated, among other things, the terms of breaks, corporate cleanliness standards, and the requirement of Donning and Doffing. (A.9) The handbook contained a disclaimer which, the trial court ruled, not only prevented the handbook terms from being enforceable as a contract (A.25), but even from being - considered as evidence of parties’ intent regarding the terms of the contract.

The trial court misapplied the law governing handbook disclaimers of employment. Plaintiffs are not arguing that they had a right to continuing employment on the handbook terms. Rather, they seek to show the terms on which they accepted employment and actually worked. As to those terms, Plaintiffs had vested rights. Brown v. Tonka Corp., 519 N.W.2d 474, 477 (Minn. Ct. App. 1994). What this court said in

Berglund v. Grangers, Inc., No. C8-97-2362, 1998 WL 328382, * 3 (Minn. Ct. App. June 23, 1998) (App.253J-253K), regarding a handbook's representations about accrued vacation pay applies equally here:

[I]f an employee is not entitled to rely on the language of an employer's written description of the consideration for his employment, the employer effectively is free to modify the contract retroactively by inserting compensation terms under which the employee might not have agreed to work.

Id.

JOTS' instructions making Donning and Doffing mandatory and setting the lengths of breaks were specific offers and Plaintiffs' work was both consideration for and acceptance of these specific offers. See Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 883 (Minn. 1986). JOTS may have had the right to change the policies, but as to work already performed they could not.

The court incorrectly relied on two distinguishable cases. In Audette v. Ne. State Bank of Minneapolis, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989), this Court held that where a disclaimer negated the existence of a contract, a manual could not be read to give employees more than an at-will employment relationship. In Jordan v. Jostens, Inc., No. C6-98-894, 1998 WL 901769, *2 (Minn. Ct. App. Dec. 29, 1998) (App.253N), the handbook disclaimer negated any contractual obligations with respect to the termination procedures in the handbook. Neither Audette nor Jordan discuss the application of a disclaimer to the employer's obligation to pay earned wages, the kind of term which, according to Berglund, the case law treats as "wholly contractual because they are a

‘form of compensation.’” Berglund, 1998 WL 328382 at *3 (citing Brown, 519 N.W.2d at 477). (App.253J-253K)

The court cited no authority for the proposition that a handbook disclaimer may be used to retroactively reduce pay and benefits after the employee has performed work explicitly required and directed by the employer. Once an employee provides services to an employer, he or she is entitled to wages in return. Plaintiffs received written information detailing JOTS’ benefits for plant production employees, including time-and-a-half pay for overtime. (App.82, 87, 93, 97, 103, 108, 113, 118, 124, 129-30, 135) Such representations established their understanding about fundamental terms of employment which the employer cannot retroactively change and the jury should be entitled to consider at trial.

Finally, the trial court’s ruling leads to a result that, if adopted by this court, would give employers a blank check for abuse. The disparity of knowledge and bargaining power between JOTS and Plaintiffs could hardly be starker. It is simply unconscionable for an employer to hire people to “work,” and then refuse to pay them because it later defines “work” in artificially narrow terms, divorced from legal context. See Butterball, 578 F. Supp. 2d at 822. JOTS might just as well have refused to pay people for cutting the left wing of the turkey, as opposed to the right wing, because there was no specific meeting of the minds on which wings would be cut. Nothing highlights this injustice more clearly than the actual result in this case: under the District Court’s ruling, JOTS has been able to make its employees work in the plants for some two weeks a year without pay.

III. Plaintiffs Are Entitled to Summary Judgment on MFLSA Overtime Liability Because the Undisputed Facts Show That Donning and Doffing Should Have Been, But Was Not, Included in Their Hours Worked Throughout the Class Period.

JOTS' failure to pay for Donning and Doffing violates the MFLSA because these activities should have been, but were not, included in "hours worked" for statutory overtime and break purposes. Plaintiffs' liability claim is ripe for summary judgment because "what is work" is a question of law (Jordan, 542 F. Supp. 2d at 802); and what Plaintiffs do, where they do it, and the fact that some of it is unpaid, is not in dispute. In addressing this question, this Court should apply the MFLSA broadly to effectuate its remedial, worker protection purpose. See Urban, 68 N.W.2d at 636.

Donning and Doffing is mandatory, and each task for which Plaintiffs claim damages necessarily occurs in JOTS' plants as part of the sequence of preparing to process turkeys. (A.72-73, 144; App.276-280) A sample video clip taken by Plaintiffs' expert in 2008 shows the start-of-shift donning process for a worker in JOTS' Faribault plant. (See A144; App.12A, line 1) From the time she began to put on work boots at her locker (less than a minute into the clip), and except for a brief time dropping off her lunch box in the cafeteria, this worker was necessarily on JOTS' premises, acquiring and donning work-related gear, walking, washing, and waiting. (A.144) Some 14 minutes into this process the worker can be seen swiping her card at a time clock. (App. 12A) This swipe began her paid time – it is undisputed that under JOTS' current pay practices, all activity up to that card swipe was unpaid. (A.73)

At this stage of the case it does not matter how much Donning and Doffing was wrongly unpaid (a jury question) – the important thing is that there undisputedly was some. In his last order on the case, Judge Leung wrote “[t]he plain language of the [MFLSA] rule . . . mandates payment for most, if not all, of Plaintiffs’ donning and doffing activities.” (A.79) The court therefore erred as a matter of law when it denied Plaintiffs’ motion for summary judgment on liability (A.81), with no explanatory memorandum. (A.81) This Court should reverse and remand for trial to determine the extent of unpaid time and the resulting damages.

IV. The District Court Erred in Granting Summary Judgment On Plaintiffs’ MFLSA Meal Break Claim and in Failing to Apply the MFLSA Provision Prohibiting Deductions of Meal Breaks Where the Employee is not Completely Relieved from Duty.

JOTS violated Minnesota law by automatically docking Plaintiffs for 30-minute breaks even though Plaintiffs had to Doff and Don during break times and were therefore actually relieved from duty for as little as 20 minutes. (See App.83, 89, 94, 99, 104-105, 109, 115, 120, 126, 131-132, 137-138) Despite acknowledging that when Donning and Doffing was considered work Plaintiffs may have received shorter meal breaks than were deducted from their pay, the court granted summary judgment for JOTS. The court concluded that the MFLSA rule did not mandate bright-line 30-minute breaks, and that even if it did, the rule was implicitly repealed by Minn. Stat. § 177.254, which mandates meal breaks and requires employees to get “sufficient time to eat a meal.” (A. 32, 63) The court regarded Plaintiffs’ testimony that they had enough time to eat during their

meal breaks as dispositive. (A.68) As explained below, the court misconstrued MFLSA meal break law and took two wrong turns in its analysis of Plaintiffs' claim.

MFLSA meal break law is set forth in a statute and two administrative rules. Section 177.254, subd. 1 mandates that "an employer must permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal." It does not state whether a meal break may be deducted from paid time. Instead, the rules govern deductibility. Minn. R. 5200.0120, subpt. 4 provides in relevant part:

Bona fide meal periods are not hours worked. Bona fide meal periods do not include rest periods such as coffee breaks or time for snacks. The employee must be completely relieved from duty for the purpose of eating regular meals. Thirty minutes or more is ordinarily long enough for a bona fide meal period. A shorter period may be adequate under special conditions. The employee is not completely relieved from duty if required to perform any duties, whether active or inactive, while eating.

In addition, Minn. R. 5200.0060 provides in pertinent part:

Meal periods of less than 20 minutes may not be deducted from hours worked, nor may meal periods be deducted where the employee is not entirely free from work responsibility.

JOTS understood these rules, but ignored them. During pre- and post-merger compliance audits, JOTS' Director of Employee Relations wrote that "[i]f employees are putting on or taking off equipment, donning smocks, etc., during that 30-minute unpaid lunch break, the lunch break may be compensable," and that "a full 30 minutes" must be given without the employee being "in a work status." (App.303) Turkey Store and JOTS compliance audits identified the need to "lengthen lunch periods to allow for cleanup of equipment, changing clothes, etc., outside of the 30 minute break for lunch" (A.134), and

to give employees “a full 30 minutes . . . without the employee performing an activity.”

(A.132 (emphasis added)). She further wrote:

Federal regulations do not mandate lunch hours (but there are some state regs on this). However, if lunch hours are provided, a full 30 minutes must be given without the candidate being in any kind of work status. . . . If a 30-minute unpaid lunch can not be offered in one block of time, the smaller breaks can be taken as paid time but no unpaid time can be deducted for lunch.

(A.139-141) (emphasis added). JOTS’ failure to follow this advice is the basis of Plaintiffs’ MFLSA meal break claim.

The court’s first wrong turn was its sole focus on supposed “bright line” rules about the required length of breaks. Plaintiffs’ meal break claim is about JOTS’ automatic deducting a half hour’s pay for meal breaks even though employees are not relieved from duty for a full 30 minutes – a daily occurrence – because of JOTS’ computer programming and because it dismisses Doffing and Donning during breaks as de minimis. Nowhere in its meal break orders did the court acknowledge deductibility as the issue, or recognize that JOTS violated the rules by giving employees less of a break than its automatic deduction. (A.30-32, 61-68) The court does not even mention Minn. R. 5200.0060, which prohibits JOTS’ 30-minute deduction unless employees are completely relieved from duty for that entire period of time. This practice affects all JOTS line employees, not just people entitled to overtime pay.¹⁶

¹⁶ This meal break class, like the contract class, would be broader than the certified overtime class, whose members would only be entitled to meal break damages to the extent they worked over 48 hours in a workweek. (See A.97-114)

The second wrong turn the district court took was failing to read the MFLSA statute and rules together in a way that gives effect to both. (See A.62-68) This error resulted from the court's focus on whether the MFSLA has a "bright-line" 30-minute break rule and its failure to recognize that the length of a meal break depends on whether it is paid (not deducted from hours worked) or unpaid (deducted from hours worked). The court reconsidered its summary judgment ruling after a contrary decision from the District of Minnesota in Gold'n Plump, 2007 WL 2780504 (D. Minn. Sept. 24, 2007), but refused to vacate its prior order.

As the following table shows, the MFLSA statute and rules form a consistent body of law on meal breaks around the central issue of deductibility. Because Judge Leung and Judge Schiltz in Gold'n Plump discussed federal/FLSA meal break law in their opinions, the table also depicts the key differences between state and federal laws.

ISSUE	MFLSA	FLSA
Is a meal break mandatory?	Yes - § 177.254, subd. 1 (post-1989)	No. See Gold'n Plump, at *8
What is the minimum length of a meal break?	Depends on whether it is paid or unpaid.	None specified.

What is the minimum length of a paid meal break (i.e., not deducted)?	Sufficient time to eat a meal. § 177.254, subd. 1 does not require employer to pay. Subd. 2 leaves the issue of payment to existing law.	No minimum if paid.
What is the minimum length of an unpaid meal break (i.e., when may the employer deduct the break time from “hours worked”)?	Must be “bona fide” - 30 minutes or more, absent special conditions. Minn. R. 5200.0120. May not be deducted if less than 20 mins or if employee is not completely relieved from work during break. Minn. Rule 5200.0060.	Must be “bona fide” - 30 minutes or more, absent special conditions. § 785.19. Split in federal cases re: interpretation of “bona fide.” See Gold’n Plump *8.
Does administrative rule have the force of law?	Yes - § 14.38 and 177.27	No – guideline only. See Gold’n Plump, *8.

This meal break overview law can be summarized as follows: The FLSA does not require meal breaks, but if the employer does give meal breaks, it cannot deduct them from pay unless they meet the minimum standards for “bona fide” meal breaks. Likewise, when originally enacted, the MFLSA did not require meal breaks. See 1973 Minn. Laws, Ch. 721. However, certain aspects of meal breaks were regulated. In 1973, the Commissioner of Labor and Industry promulgated Minn. R. 5200.0060, which prohibited employers from deducting from hours worked any meal period where the employee is not entirely free from work responsibility. This rule goes directly to JOTS’ practice of deducting 30 minutes from employees’ pay while actually relieving them from duty for less time because they must Doff and Don during the 30 minutes. In 1986 the Commissioner added the bona fide meal break rule, importing the federal rule almost

verbatim. Gold'n Plump, 2007 WL 2780504 at *7. However, unlike the FLSA rule, state rules have the force and effect of law. Minn. Stat. § 14.38; Gold'n Plump, 2007 WL 2780504 at 8. Judge Schiltz saw this distinction as critical and held that the MFLSA rule requires a full 30 minutes for a bona fide meal break unless the employer can show special circumstances justifying a shorter break. Id. at *9. JOTS has not even tried to show “special circumstances.”

The meal break statute, Minn. Stat. § 177.254, came into the picture in 1989. Minn. Laws 1989, ch. 167 § 1. Subdivision 1 made meal breaks mandatory, requiring employees to have “sufficient time to eat a meal.” However, subdivision 2 explicitly qualified that “this section” did not require the employer to pay for the meal break. § 177.254, subd. 2. Subdivision 2 acknowledges the existing standards governing payment for/deductibility of meal breaks. This reference would be implied even if it were not express. It is a cardinal principle of statutory construction that the Legislature enacts legislation with knowledge of existing law.

It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together.

2B Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 51:2 (7th ed. 2008); see also Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237, 244 (Minn. 2005); Pecinovsky v. AMCO Ins. Co., 613 N.W.2d 804, 809 (Minn. Ct. App. 2000). Indeed, the Senate legislative history file for 1989

Minn. Laws, ch. 167 § 1 actually contains copies of the bona fide meal break rule, the other law referred to in the new statute. (App.69, 71)

The court erred in finding a conflict between a statute requiring “sufficient time to eat a meal” and a rule requiring 30 minutes for a bona fide meal break. The court reasoned that there could be no right to a 30-minute meal break, the court reasoned, if the statute required only enough time to eat. (A.63-68) But this ignores deductibility, and as Judge Schiltz observed, the statute “does not . . . stand alone. It is supplemented by Minnesota Rule 5200.0120.” Gold’n Plump, 2007 WL 2780504 at *6. The history of the statute and the rules shows that Minn. Stat. § 177.254 was intended as a step away from the federal model, where meal breaks were not mandatory. Had the legislature intended to impose the “sufficient time to eat a meal” standard on all aspects of meal break law, it would have said so instead of adding the qualifying subdivision 2, stating that nothing “in this section” requires payment for a mandatory break. Minn. Stat. § 177.254 (emphasis added). Subdivision 2 removes any potential conflict between the new and existing standards.

The Legislature always intends laws to be read together in harmony, so as to give effect to all provisions. Minn. Stat. § 645.17(2); State ex rel. Carlton v. Weed, 294 N.W. 370, 372 (Minn. 1940) (“[A]ll statutes which relate to the same subject matter were presumably enacted in accord with the same general legislative policy, and that together they constitute an harmonious and uniform system of law.”). Moreover, “[r]epeals by implication . . . will not be inferred unless such was the manifest intention of the legislature or unless the later statute fully covers the subject of the prior one and is

manifestly inconsistent therewith.” State v. Northwest Linseed Co., 297 N.W. 635, 636 (Minn. 1941). Another recent federal court case had no problem reading the statute and rule together, holding that a meal break may not be deducted unless it is “bona fide.” Bolin v. Japs-Olson Co., No. 06-3574, 2008 WL 1699531 *3 (D. Minn. Apr. 9, 2008) (App.253A-253G).

JOTS’ practice of deducting 30 minutes for meal breaks is undisputed. But, there is clearly a genuine factual dispute about whether Plaintiffs actually received the 30 minutes completely relieved from duty that was deducted from their pay. See Argument II(B) above. Given its failure to keep records, JOTS may not be able to meet its burden of proving that it actually gave Plaintiffs’ bona fide meal breaks, see Anderson v. Mt. Clemens Pottery Co, 328 U.S. 680,688, 66 S.Ct. 1187, 1192-93 (1946); but given the disputed facts Plaintiffs respectfully request that this Court reverse the trial court and remand their meal break claim for trial.

V. The District Court Erred in Adopting JOTS’ Unprecedented “Workweek Averaging” Methodology and Deciding Issues of Material Fact in Granting Summary Judgment on Plaintiffs’ Overtime Claim.

The trial court’s sua sponte “reversal” of its decision to deny JOTS’ motion for summary judgment on Plaintiffs’ overtime claim is based on a clear mistake in law and on assumptions of fact that are improper at summary judgment. With no supporting precedent, in the face of contrary case law, and ignoring disputed facts, the court used

JOTS' so-called "workweek averaging" calculations to wipe out Named Plaintiffs' claim for unpaid hours in excess of 48 in a given workweek.¹⁷ Under Minn. Stat. § 177.25:

No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate. . . .

On its face, the statute draws a line at 48 hours and requires JOTS to pay time-and-a-half for all overtime hours worked in excess of that amount. See Boelter v. City of Coon Rapids, 67 F. Supp. 2d 1040, 1048 (D. Minn. 1999) (MFLSA "requires employers to pay . . . overtime compensation for any hours worked in excess of 48 hours each week." (emphasis added)). The MFLSA differs from the FLSA, which requires employers like JOTS to pay overtime beginning at 40 hours in a week. See 29 U.S.C. § 207(a)(1).

Plaintiffs' overtime claim is simple: for each week, take the number of hours each Plaintiff worked according to JOTS' own time records and add the number of unpaid Donning and Doffing hours that JOTS should have recorded and paid. If the sum is greater than 48, the individual is entitled to time-and-a-half for the unpaid time over 48. For example, during the pay week ending September 29, 2007, JOTS recorded and paid 47.33 hours for Named Plaintiff Valeria Cabral who worked a six-day week. (App.24, line 16) According to Plaintiffs' time studies, Mrs. Cabral should have been paid for an

¹⁷ JOTS moved for summary judgment as to Named Plaintiffs. The court erred in dismissing the claims of all Class Members without even considering the merits of the unnamed plaintiffs' claims or permitting Plaintiffs to substitute the Named Plaintiffs. The trial court's order should be reversed on this basis alone. (Compare App.190-211 to A.84)

additional 1.109 beginning and end of shift Donning and Doffing hours that week.¹⁸

Disregarding meal breaks for the purposes of this example (because the lower court did), Mrs. Cabral should have been paid for 48.44 hours, with the .44 hours at the MFLSA overtime rate. Mrs. Cabral was then making \$10.60 an hour, so if JOTS had properly recorded and paid for all “hours worked,” she would have been paid an extra \$7.00 ($\$10.60 \times .44 = 4.664 \times 1.5 = \$6.996 = \$7$) for that week. That is Mrs. Cabral’s damage claim for one example week. But according to the lower court, she is entitled to nothing for her unpaid time.

The court reached this extraordinary result by using JOTS’ “overtime averaging” calculation. (See A.92-94; App.190-211) This calculation compares what JOTS actually paid people in a given week, with what it would have paid had it properly recorded and paid for Donning and Doffing time and if Plaintiffs’ wages were determined only by the MFLSA. Because JOTS paid overtime for hours in excess of 40 hours weekly (per the FLSA and per its handbook), Mrs. Cabral received \$540.55 for her 47.33 hours of work, \$424 for the first 40 hours (40×10.60), plus \$116.55 for the next 7.33 hours ($7.33 \times \$10.60 \times 1.5 = \116.55). If Mrs. Cabral did not have a federal law (and contractual) right to overtime beginning at 40 hours, and if she had gotten credit for 1.109 MFLSA overtime Donning and Doffing hours, she would have received her regular rate of pay for the first 48 hours, and overtime only for .44, or \$508.80 ($48 \times \10.60) plus \$7.00 ($.44 \times \10.60×1.5) for a total of \$515.80. Because JOTS actually paid Mrs. Cabral \$540.55 –

¹⁸ Based on the average unpaid beginning and end of shift donning and doffing times in the Faribault Plant, $11.093 \text{ mins/day} \times 6 \text{ days} = 66.56 \text{ mins} = 1.109 \text{ hours}$. (See App.11)

more than she would have received if she had only MFLSA overtime rights – the district court found there is no damage, even though she had to work 1.109 hours off the clock.

(A.94) This was wrong on the law and on the facts.

First, contrary to the court’s reading, Minn. Stat. § 177.25 imposes an unqualified obligation to pay for “employment” in excess of 48 hours in a given week. No hours worked over 48 may be ignored. In this context, the “workweek” (as defined in the Minnesota rule) is the unit within which the employer determines when the overtime threshold is reached; each discrete hour worked in excess of 48 must be paid at the overtime rate. See Minnesota Department of Labor and Industry (“MNDOLI”) “Most Frequently Asked Questions” about the MFLSA:

When does my employer have to pay me overtime?

Overtime is to be paid at one and one-half times the regular rate of pay for all hours worked in excess of 48 hours in a seven-day workweek, under state law.

(App.37-38) (emphasis added)). Federal overtime law is the same. As a leading treatise explains:

[I]n order to comply with the overtime provisions of the FLSA, an employer must first determine what constitutes an employee’s “workweek, . . . and then pay 1 ½ times that rate for all hours worked over 40 in that workweek.

The Fair Labor Standards Act 566 (Ellen C. Kearns ed., BNA Books 1999) (emphasis added). The reason for the overtime rule affirms this interpretation. Congress enacted overtime laws not just to give employees more money but also to discourage employers from requiring too much work. See Khan v. IBI Armored Servs., Inc., 474 F. Supp. 2d 448, 450 (E.D.N.Y. 2007); see also Overnight Motor Transp. Co., Inc. v. Missel, 316

U.S. 572, 577-78 (1942). Each extra hour paid at overtime rates contributes to the disincentive.

Second, “workweek averaging” is based on the erroneous assumption that in calculating MFLSA “over 48 in a workweek” overtime damages, JOTS could ignore its obligation to pay FLSA and contractual “over 40” overtime. The simple fact is that if JOTS had complied with the MFLSA, it would have paid Ms. Cabral an extra 1.109 hours at her overtime rate during the work week ending September 29, 2007, and she would have made an additional \$17.63, including \$7 for time over 48 hours.¹⁹ Yet, under the district court’s MFLSA analysis, JOTS could make Mrs. Cabral and other Plaintiffs work for nothing.

Third, there is no precedent for overtime “workweek averaging.” In the very different minimum wage context, Judge Leung imported “workweek averaging” from United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2d Cir. 1960).²⁰ (A.49-

¹⁹ Ms. Cabral would be able to recover this entire amount if Plaintiffs’ contract claim is reinstated. Because MFLSA overtime begins at 48 hours, she can only recover .44 hours (\$7) under the state overtime statute.

²⁰ Judge Bransford apparently believed that Judge Leung’s reasoning with respect to the minimum wage claim applied to overtime pay. (A.92) In fact, Judge Leung explicitly qualified his minimum wage ruling:

These calculations are made and intended to be used only in the context of Plaintiffs’ minimum wage claims. The Court does not intend for these calculations to be imported into discussions or arguments in the future regarding Plaintiffs’ remaining overtime claims.

(A.56) Judge Leung was clearly aware that his September 7, 2007 Order would leave the overtime claim as the only damage claim and understood that workweek averaging would not apply.

50) In Klinghoffer, the Second Circuit reviewed the convictions of a corporation and its officers for three criminal violations of the FLSA: Failure to pay minimum wage, failure to pay overtime and failure to keep records of unpaid work. No employee made less than \$67.20 for up to 46 hours per week (including up to six unpaid hours). Klinghoffer, 285 F.2d at 490-91. The court held that even though some hours were unpaid, because the average wage was never less than \$1.00 ($\$67.20 \div 46 \text{ hours} = \1.46 per hour), there was no minimum wage violation. But, the court upheld convictions for failure to pay overtime for the unpaid hours and for failing to record them on the corporate books. Id. at 491-92.

Klinghoffer squarely supports Plaintiffs' conceptually identical overtime claim. It requires employers to record all work hours and pay time-and-a-half for each hour in excess of the overtime threshold. Plaintiffs are aware of no case applying a minimum wage averaging methodology to an overtime claim. Moreover, this Court previously declined to apply workweek averaging even in the minimum wage context. Bot v. Residential Servs., Inc., No. C8-96-2545, 1997 WL 328029 *6 (Minn. Ct. App. June 17, 1997).

Fourth, the trial court decided issues about a hotly disputed fact: the amount of unpaid Donning and Doffing time. Applying its "workweek averaging analysis," the court cited Dr. Frank Martin's Report (App.13-36) for the proposition that "the most alleged unpaid donning and doffing time that was recorded was 2.158 hours in a single

workweek.”²¹ (A.93) This figure excludes unpaid Donning and Doffing during meal breaks. (App.23-34; compare column F to H) Based on all the evidence of improperly deducted meal breaks, a reasonable jury could find that Plaintiffs were entitled to 30 minutes per work day of additional unpaid time because “meal periods [may not] be deducted where the employee is not entirely free from work responsibility.” Minn. R. 5200.0060.

The omission of meal break time is important because, even if this court were to accept the “workweek averaging” method, the “averaging effect” disappears if meal breaks are added. In the six-day example work week, if Mrs. Cabral’s lunch was shorted every day, she is entitled to an additional three hours of damages, or another \$47.70. In this scenario, she should have been paid \$563.50 (\$47.70 + the original \$515.80) – and the unpaid time would have exceeded what JOTS actually paid her.²²

Finally, all Named Plaintiffs (and 9,925 of the potential 13,076 class members) have at least one “over 48” week during the Class Period, when Donning and Doffing hours are included, and therefore qualify for MFLSA overtime. (App.23-34) All but one Named Plaintiff worked in excess of 48 hours in at least one workweek, even without additional Donning and Doffing hours. (Id.) Yet, under the trial court’s ruling, they are entitled to no compensation at all for the unpaid hours over 48. The trial court’s ruling is the equivalent of saying that after working eight hours a day, Monday through Saturday,

²¹ Elsewhere in the Order this figure is erroneously given as 2.185. Order at 3 and 10.

²² If Plaintiffs are not entitled to a full 30-minutes credit for being shorted on their meal breaks, they are at least entitled to the actual time worked during unpaid meal breaks, which could be up to 45 minutes (.75 hours) per week. (See A.29)

at a dangerous and exhausting job, JOTS can make its employees work half of Sunday for nothing.

By granting summary judgment on Plaintiffs' overtime claim, the court went against the plain meaning and policy of § 177.25, ignored the case law, misinterpreted Judge Leung's earlier Order, allowed JOTS to benefit from violating the MFLSA, and made impermissible findings of fact. This Court should reverse and remand the overtime claim for trial.

VI. The District Court Erred by Ordering Final Judgment When Plaintiffs Have a Triable Recordkeeping Claim.

Recordkeeping has been part of this case since the first filing. Paragraph 23f of the original Complaint challenges JOTS' compliance with Minn. Stat. § 177.30, and the prayer for relief requests civil penalties for violation of a series of statutes including the recordkeeping section. (App.470-486)

The facts supporting this claim are largely undisputed. Even after revising its timekeeping practices in 2007, JOTS admits it still does not record all Donning and Doffing as hours worked. (App.59-67) JOTS uses its computerized timekeeping system to subtract a 30-minute meal break from line workers' daily wages, but does not keep track of the actual length of breaks. (*Id.*) Judge Leung concluded that Plaintiffs had made a prima facie showing that JOTS knew it should have been paying for Donning and Doffing. It follows that JOTS also knew it should have been keeping track of Donning and Doffing hours worked. (*See* A.130-131) Even if JOTS believed in good faith belief that Donning and Doffing was not "work," it is still liable for not keeping accurate

records. See Minn. Stat. § 177.30; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946) (employer liable for not keeping accurate records of hours worked, even if it misunderstood the nature of “work”). JOTS’ failure to keep accurate records conceals MFLSA violations and makes it harder for Plaintiffs to prove actual damages.

The Minnesota Supreme Court has held that an employer failing to keep accurate records is subject to civil penalties under § 177.30, whether or not Plaintiffs can prove damages from a separate MFLSA overtime violation. Milner, 748 N.W.2d at 608. Milner was a class action by insurance claims representatives who sought overtime damages. The class did not plead a separate recordkeeping count, but referenced § 177.30 in the complaint and raised the issue at trial. Id. at 618-19. The jury found that plaintiffs were in fact misclassified but had no damages; however, the trial court imposed civil penalties for failure to keep records. Id. at 612. On appeal, Farmers argued, among other things, that the entire recordkeeping issue was not fairly raised because plaintiffs had not pleaded it as a separate count. Id. at 610-11. The Supreme Court disagreed, holding that “[c]ivil penalties are fitting . . . for the recordkeeping violations . . . ,” which were properly in the case because Farmers was on notice of the issue from the pleadings and it was the subject of evidence at-the trial. Id.

Milner controls the instant case. While, as in Milner, there is no separate “count” alleging a recordkeeping violation, Plaintiffs’ complaint identified JOTS’ non-compliance with Minn. Stat. § 177.30 as a common class issue and the prayer for relief requested civil penalties. Plaintiffs did significant discovery on recordkeeping, establishing, among other things, that JOTS keeps no records to support its 30-minute

meal break deduction; and that the company admits its records do not include all beginning and end of shift hours worked, as “work” is defined in Minn. R. 5200.0120, subpt. 1. Plaintiffs have raised recordkeeping repeatedly during the litigation, and JOTS has engaged on this issue. (See e.g., App.59-67) The parties discussed the recordkeeping claim during the March 2009 hearing on punitive damages. (App.184-189)

Inexplicably, Judge Bransford ordered judgment without allowing Plaintiffs to present their recordkeeping claim and seek civil penalties. While JOTS’ failure to keep accurate records of Donning and Doffing is clear, the court had yet to hear testimony establishing the full scope of the violations or the facts that would inform a decision about the amount of civil penalties. Pursuant to Milner and Minn. Stat. § 177.30, this Court should remand the recordkeeping issue for trial.

VII. JOTS Waived Any Claim of Privilege for Documents 5857 and 5858 by Representing That it Intended to Produce Documents Marked “Privileged” and by Allowing Them to be Used Without Objection in Multiple Ways Over an Extended Period of Time.

Minnesota courts have not definitively articulated a standard for the waiver of supposedly “inadvertently produced” documents. See Sarah Morris, Inadvertent Disclosure of Privileged Information, Bench & Bar of Minnesota, Aug. 2007, at 25. Courts have generally formulated tests labeled “strict,” “lenient” and “middle-of-the-road.” See Starway v. Indep. School Dist. No. 625, 187 F.R.D. 595, 596 (D. Minn. 1999). JOTS waived the privilege for 5857-5858 under any standard, and the district court abused its discretion in affirming the Special Master finding that privilege had not been waived. (A.1-5)

If JOTS waived the privilege under the “lenient” standard, the most favorable to its argument, it waived it *a fortiori* under any test. The “lenient” standard requires a knowing and intentional waiver of privilege. Starway, 187 F.R.D. at 596. That is literally what happened in this case: Plaintiffs inquired and defense counsel confirmed the deliberate intent to produce attorney-client privileged documents, including 5857 and 5858, and then allowed Plaintiffs to use these specific document for months without objection. (App.309-12)

Because Minnesota Courts would likely adopt the five-factor “middle-of-the-road test,” see Starway, 187 F.R.D. at 596-97, those factors are also discussed:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in light of the extent of document production.

JOTS took seven months to produce the set of documents containing 5857-58. During that time, JOTS’ lawyers and staff were obviously vetting individual documents and made a knowing decision to produce them – a decision defense counsel explicitly confirmed. The JOTS executive who authored the document, and ultimately claimed privilege, was also the person who coordinated the document production in-house. He had every opportunity to catch a mistake; and he was also the person responsible for a sweeping and unfounded attempt to hide highly probative evidence under the cloak of attorney-client privilege.

(2) and (3) The number and extent of inadvertent disclosures.

The disclosures were not extensive in numbers, but were significant in proportion to the care taken by JOTS and its counsel. These documents were not lost in a shuffle of

paper – they were withheld for seven months, a delay caused certainly by intensive scrutiny of damaging evidence wrongly marked “attorney-client privileged.” Documents so marked expressly show the nature and extent of unpaid Donning and Doffing, the ultimate issue in this case. (See A.129-132, 142) JOTS 5857-58 show a distribution of Donning and Doffing damages by plant and department – a natural extension of a problem JOTS had been studying internally since 2001. The mere existence of this analysis by JOTS shows that there is a reasonable way to define a class of line workers and to calculate and distribute damages easily and fairly – facts JOTS has vigorously denied in the past and will no doubt do so before this Court in opposing class certification.

(4) The promptness of measures taken to remedy the problem.

This factor weights heavily against JOTS, which knew Plaintiffs had and were using 5757-58 for over 2 ½ months before raising an objection.

(5) Whether justice is served by relieving the party of the error.

Justice would not be served by denying Plaintiffs the use of a highly probative document that was clearly reviewed, intentionally produced and dramatically shows liability and the appropriateness of class damages. Doing so would allow JOTS to escape the consequences of its decision and benefit from the confusion created by its attempt to misuse the attorney-client privilege.

Based on the above, Plaintiffs ask this Court to find that the trial court abused its discretion in finding JOTS did not waive privilege with respect to JOTS 5857-58 and require their return to Plaintiffs.

CONCLUSION

Plaintiffs respectfully ask this Court to reverse the District Court's denial of Plaintiffs' motion for summary judgment as to MFLSA overtime liability, reverse summary judgment for Defendants as to Counts I and III-V (Plaintiffs' contract and MFLSA claims); order the return of JOTS 5857-58, and remand this matter for trial on the damage-related issues and recordkeeping claim.

Dated: May 28, 2010

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