

NO. A10-419

*State of Minnesota
In Court of Appeals*

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Marsha Winter, Juan Guerra, Jr., Valeria Cabral, Margarita Ruiz, Todd E.
Nord, Jeff Rudie, And John Patrick Kelly, Jr.,

Appellants/Cross-Respondents,

vs.

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

Respondents/Cross-Appellants,

**BRIEF AND ADDENDUM OF AMICUS CURIAE MINNESOTA
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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 INTEREST

The Minnesota Chamber of Commerce (“the Chamber”)¹ was granted leave to participate in this appeal as amicus curiae by this Court’s Order of March 29, 2010. The Chamber is Minnesota’s largest business-advocacy organization. It represents more than 2,300 businesses of all types and sizes from across the state. Its members employ approximately 500,000 persons, which represents approximately 20 percent of the state’s private-employer workforce.

The Chamber’s primary mission is to advance public-policy and job-growth strategies that create an environment for businesses statewide to prosper. In furtherance of that mission, it is the Chamber’s policy to request leave to participate as amicus curiae only in those cases that raise issues of consequence to the general business community. The present matter presents precisely such issues because they could significantly affect employers in Minnesota. The Chamber has, on numerous occasions, appeared as an amicus before this Court in cases presenting important issues of employment law.²

Appellants brought an action against Respondents, their employers, alleging that Respondents violated the Minnesota Fair Labor Standards Act (“MFLSA”), Minn. Stat. §

¹ The Chamber hereby certifies that (1) this amicus brief was not authored in whole or in part by counsel for any party and (2) no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation and submission of this brief. *See* Minn. R. Civ. App. P. 129.03.

² *See Frieler v. Carlson Marketing Group*, 751 N.W.2d 558 (Minn. 2008); *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2007); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732 (Minn. 2000); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271 (Minn. 1995).

177 *et seq.*, by failing to compensate Appellants for donning, doffing, and related cleaning activities pre-shift, post-shift, and during breaks and meal times. Appellants also allege that, by these alleged acts and omissions, Respondents committed common law breaches of Appellants' alleged employment contracts with Respondents; contracts that Appellants claim were, by and large, created by operation of Respondents' employee handbooks. *See, e.g., Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 625-27 (Minn. 1983).

The proper interpretation of the MFLSA is an important issue of statewide concern, one for which the Chamber has a strong and compelling interest. Similarly, the Chamber has a strong interest in the appropriate application of the *Pine River State Bank* employment contract doctrine. Accordingly, in this amicus brief the Chamber addresses the following important issues of statewide concern that are raised by Appellants' appeal and Respondents' cross-appeal:

1) Does an employer's statement that it will pay at-will employees for work performed, in an employee handbook that disclaims the formation of an employment contract, constitute an enforceable agreement to pay the employee for time performing donning and doffing and related cleaning activities?

2) Is time spent donning and doffing light sanitary clothing and personal protective apparel and related cleaning activities compensable time under Minnesota law if the time spent donning and doffing is *de minimis*?

3) Does the MFLSA meal break statute require only, as its language states, that "[a]n employer must permit each employee who is working for eight or more

consecutive hours sufficient time to eat a meal” or do the statute and the Minnesota Rules require that employers provide a minimum of 30 minutes for a meal break?

4) Does the MFLSA employ the workweek rule for calculating overtime compensation?

ARGUMENT

I. **A UNILATERAL CONTRACT OF EMPLOYMENT CANNOT BE BASED UPON AN EMPLOYEE HANDBOOK THAT EXPRESSLY DISCLAIMS CONTRACT FORMATION AND WHICH CONTAINS LANGUAGE THAT IS TOO INDEFINITE TO GIVE RISE TO CONTRACTUAL OBLIGATIONS**

In their Sixth Amended Complaint, Appellants asserts three claims for common law breach of employment contract. The gravamen of these contract claims is Appellants' contention that Respondents contractually agreed to pay Appellants for time spent donning and doffing and related cleaning activities. As Respondents have demonstrated in their Brief, these contract claims cannot possibly be premised upon alleged oral contracts; the named Appellants all admitted at their depositions that they never reached any sort of oral contract or understanding with Respondents regarding compensation for donning and doffing. Instead, the primary thrust of Appellants' contract claims appears to be that Respondents' employee handbooks gave rise to enforceable contracts mandating that Appellants be compensated for their donning and doffing activities. But this contention fails entirely upon examination of the purported source of this contractual obligation, Respondents' employee handbooks.

For almost 30 years, it has been established Minnesota law that a unilateral contract of employment may be based on provisions in an employee handbook. *Pine*

River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983). The Chamber has no quarrel with this settled law; indeed, the Chamber has expressly endorsed application of the *Pine River State Bank* doctrine in previous amicus filings. See *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117 (Minn. 2007). But certain well-established predicates must be satisfied before an employee handbook can give rise to an enforceable unilateral contract, and these predicates are absent from Respondents' employee handbooks.

First, a disclaimer in an employee handbook that clearly expresses an employer's intent that the handbook *does not* give rise to a contractual relationship will prevent the formation of contractual obligations. See *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 231-32 (Minn. Ct. App. 2010); *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App. 1991), *aff'd mem.*, 479 N.W.2d 58 (Minn. 1992); *Audette v. Ne. State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989). Respondents' employee handbooks contain such express disclaimers. For example, the Jennie-O employee handbook contained the following disclaimer located prominently in the handbook's first page of text:

This handbook is presented as a matter of information only. While Jennie-O Foods believes wholeheartedly in the plans, policies, and procedures described in this handbook, they are not conditions of employment. Jennie-O Foods reserves the right to modify, revoke, suspend, terminate, or change any or all such plans, policies, or procedures, in whole or in part, at any time, with or without notice. **The language used in this handbook is not intended to create, nor is it to be construed to create a contract (expressed or implied) between Jennie-O and any one or all of its employees. These programs and policies do not affect, alter or modify the "employment at will" status of the employee or employees of the Company.** No agent of Jennie-O, other than the President & C.E.O., has

any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

(R.App. 1339) (bold emphasis in original). The Turkey Store Company handbook contains a similarly-phrased and prominently located disclaimer. (R.App. 1373).

As a matter of law, these disclaimers defeat the formation of a unilateral contract of employment for *any* purpose, be it related to employee discipline, employee compensation or any other topic discussed within the handbooks. While Appellants argue that a disclaimer only prevents formation of a contract with respect to employee termination and related disciplinary issues, and does not prevent formation of a contract related to terms of compensation, this Court recently rejected this same argument in *Roberts*, 783 N.W.2d at 231-32. Appellants' purported distinction between disciplinary terms and compensatory provisions is simply untenable.

Employee handbook disclaimers are commonly used by Minnesota employers (including many of the Chambers' members). The Chamber opposes any effort to interject the sort of hair-splitting uncertainty that Appellants' position would attach to the *Pine River State Bank* doctrine. The disclaimers in Respondents' employee handbooks completely refute Appellants' breach of contract claims.

Second, the handbook language upon which Appellants purport to rely is, as a matter of law, too vague and indefinite to form the basis for an enforceable unilateral contract of employment. To be enforceable as contractual obligations, the handbook language "must be 'sufficiently definite'". *Alexandria Housing and Redevel. Auth. v. Rost*, 756 N.W.2d 896, 904 (Minn. Ct. App. 2008) (quoting *Hunt v. IBM Mid Am.*

Employees Fed. Credit Union, 384 N.W.2d 853, 856 (Minn. 1986)). To satisfy this standard, the handbook language must be definite enough “for a court to discern with specificity what the provision requires of the employer so that if the employer’s conduct in terminating the employee or making other decisions affecting the employment is challenged, it can be determined if there has been a breach.” *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 742 (Minn. 2000). “[T]he resolution of whether the language used rises to the level of a contract is for the court.” *Hunt*, 384 N.W.2d at 856.

In this case, the handbook language Appellants purport to rely upon states that employees will be paid “for the work done the previous week.” (App. 288; *see also* App. 282 and 299). As Appellants admit, the term “work” is undefined in the handbooks. Accordingly, this language fails the test of contract formation since a court cannot specifically discern that the term “work” as used in these handbooks encompasses donning and doffing activities. *See Hunt*, 384 N.W.2d at 857 (rejecting on indefiniteness grounds handbook language stating “[i]n the event of a serious offense, an employee will be terminated immediately.”); *Rost*, 756 N.W.2d at 904-05 (rejecting for indefiniteness handbook language stating “[a]n employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice.”); *Ward v. Employee Devel. Corp.*, 516 N.W.2d 198, 200, 203 (Minn. Ct. App. 1994) (rejecting for indefiniteness handbook language that an employee would be “dismissed immediately” if he or she “performs any act which is determined detrimental to the ethical and/or quality standards established by EDC.”).

Appellants argue that the undefined phrase “work” as used in the handbooks can be defined by reference to the definition of “hours worked” contained in Minn. R. 5200.0120, subpt. 1. But this argument places the cart many steps before the horse. The issue presented here is not whether an extrinsic source can supply a definition for an ambiguous term in an *existing contract*. Rather, the issue presented here is whether the language at issue *establishes the contract’s existence in the first instance, i.e.*, whether the language of a document is sufficiently concrete and definite to allow formation of contractual obligations. Language that is ambiguous is, as a matter of law, too indefinite to allow for contract formation.

One cannot, as Appellants would have it, simply assume the contract’s existence and then use an extrinsic source to define the very ambiguous language that purportedly gives rise to the contract. If such bootstrapping were allowed, then a creative litigant could always find some favorable extrinsic source to provide the definition that is otherwise lacking in handbook language, and every employee handbook would give rise to contract formation. Such a result plainly contradicts well-established Minnesota law.

II. THE MFLSA DOES NOT REQUIRE COMPENSATION FOR *DE MINIMIS* DONNING AND DOFFING ACTIVITIES

Under the federal Fair Labor Standards Act it has established for more than 60 years that an employee is not entitled to be compensated for *de minimis* activity, *i.e.*, work time that is difficult to capture and amounts to ten minutes per day or less. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (recognizing *de minimis* rule). Applying the *de minimis* rule, a number of federal courts have concluded that

donning and doffing activities of the sort Appellants allege are not compensable under the federal Fair Labor Standards Act. See *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n.4 (4th Cir. 2009) (time spent by employees during their lunch breaks donning and doffing a few items, washing, and walking to and from the cafeteria was *de minimis*, and thus non-compensable); *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 Fed.Appx. 448, 454, 2009 WL 2391400, at *3 (5th Cir., Aug. 4, 2009) (time employees spent obtaining standard tool bags, clocking in and out, and donning and doffing safety gear was *de minimis* and noncompensable); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) (“The time it takes to perform these tasks vis-à-vis non-unique protective gear is *de minimis* as a matter of law.”), *aff’d on unrelated grounds*, 546 U.S. 21 (2005).

The Court should apply a similar analysis and hold that Appellants’ claimed donning and doffing activities are *de minimis* and hence, noncompensable under the MFLSA. While it appears that no court considering the MFLSA has discussed the *de minimis* rule, the MFLSA is modeled upon its federal counterpart. (R.A. 22). There is no reason grounded in logic or policy to treat *de minimis* activity differently under the MFLSA than under the federal Act. As noted, the *de minimis* rule is intended to relieve employers of the burden of calculating compensable time that is difficult to capture and is measured in only minutes or seconds. Countless non-exempt Minnesota employees are required to wear work uniforms, safety equipment or other specified apparel while on the job. Treating the time spent on donning and doffing such clothing and equipment as “compensable” under the MFLSA when the same activity is deemed as *de minimis* and

“noncompensable” under the federal Fair Labor Standards Act would be manifestly unfair to Minnesota employers and would subject them to significant administrative costs and burdens.

III. THE MFLSA DOES NOT REQUIRE EMPLOYERS TO PROVIDE EMPLOYEES WITH A 30-MINUTE MEAL BREAK

By its express terms, the MFLSA requires only that “[a]n employer must permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal”. Minn. § 177.254, subd. 1. This meal break does not even need to be a paid meal break. Minn. § 177.254, subd. 2. Nevertheless, citing to Minnesota Rules 52000.0120 and 5200.0060, Appellants argue that Minnesota law mandates that they receive a 30-minute meal break.

In their Brief at pages 23-24, the legislative history makes clear that the Legislature rejected adoption of any bright-line minimum or maximum requirement for meal breaks under Section 177.254. Moreover, at pages 28-29 of their Brief, respondents demonstrate that, when promulgating Minn. R. 5200.0120 and 5200.0060, the Minnesota Department of Labor and Industry did not intend to subject employers to a bright-line 30-minute meal break obligation. Mindful of the Court’s admonition not to reiterate Respondents’ arguments, the Chamber will not restate these analyses here.

The Chamber does, however, believe it appropriate to explain for the Court why it should reject the analysis contained in *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 WL 2780504 (D. Minn., Sept. 24, 2007), a case upon which Appellants heavily rely. In *Frank*, the Minnesota federal district court concluded that

Minn. R. 5200.0120 “require[s] employers to provide an uninterrupted, thirty-minute meal break unless the employer can demonstrate that ‘special conditions’ justify a shorter period.” *Id.* at *9. However, as Respondents demonstrated below, it is apparent that the federal district court was never presented with the relevant legislative and rulemaking histories discussed in Respondents’ Brief while the state district court below had the full benefit of these histories when considering and rejecting Appellants’ motion for reconsideration of the dismissal of the meal break claim. (R.App. 369; A. 63-68). As noted, the legislative and rulemaking histories make clear that neither the Legislature nor the Department of Labor and Industry intended the conclusion embraced by the federal district court in *Frank*.

Moreover, Minn. R. 5200.0120 does not speak in mandatory bright-line terms. Rather, it uses permissive and flexible language, stating: “Thirty minutes or more is ordinarily long enough for a bona fide meal period. A shorter period may be adequate under special conditions.” *Id.* This language is entirely compatible with the flexible “sufficient time to eat a meal” standard established in Section 177.254 -- which, as Respondents observe, the Legislature enacted several years *after* Rule 5200.0120 was promulgated. To the extent there is any incompatibility between the statute and the rule, then the statute must control.³ In sum, in *Frank*, the federal district court misconstrued

³ The Department of Labor and Industry’s MFLSA rulemaking authority derives solely from a legislative grant. *See* Minn. § 177.28. Quite obviously, the Department cannot use this rulemaking authority to overrule any part of the MFLSA, including Section 177.254. express statutory provisions.

Rule 5200.0120, and the district court below properly refused to follow *Frank's* erroneous lead.

Finally, the Chamber directs the Court's attention to House File No. 2810, a bill introduced on February 8, 2010 – more than two years after the *Frank* opinion was issued -- to the Minnesota House of Representatives. (Amicus Add. 1-2). Among other things, House File No. 2810 would have amended Section 177.254, subd. 1 as follows:

Subdivision 1. Meal break. Except as provided in subdivision 1a, An employer must permit each employee who is working for eight or more consecutive hours ~~sufficient time~~ at least 30 minutes to eat a meal.

Subd. 1a. Exemptions. Subdivision 1 does not apply to an employer with fewer than five employees and operating a retail location. Employers exempted from the requirements of subdivision 1 must allow each employee who is working for eight or more consecutive hours sufficient time to eat a meal.

(Amicus Add. 1-2) (proposed additions underlined; proposed deletion struck through).

House File No. 2810 was not enacted into law. (Amicus Add. 3). Its introduction and failed enactment are significant for two reasons. **First**, the bill would not have been introduced had its sponsors believed that Minnesota law already required Minnesota employers to provide their employees with a 30-minute meal break. *See Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 566 (Minn. 2008) (“An amendment to a statute is normally presumed to change the law unless it appears that the legislature only intended to clarify the law.”) (Internal quotation omitted). **Second**, that the bill failed to pass reflects the Legislature's conclusion that no change in the existing Minnesota law was warranted; and “courts cannot supply that which the legislature purposely omits.” *Meyer v. Nwokedi*, 777 N.W.2d 218, 225 (Minn. 2010).

IV. THE MFLSA EMPLOYS THE WORKWEEK RULE FOR CALCULATING OVERTIME COMPENSATION

In appealing the dismissal of their MFLSA overtime compensation claim, Appellants appear to suggest that the MFLSA does not endorse use of the so-called “workweek rule” for calculating overtime compensation. This contention ignores the plain language of the pertinent Department of Labor and Industry MFLSA regulation.

In this respect, Minn. R. 5200.0170, which is unambiguously captioned “WORKWEEK”, provides as follows:

The period of time used for determining compliance with the minimum wage rate, overtime compensation, and designation as a part-time employee is the workweek, which is defined as a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods. This is true whether the employee is paid on an hourly, piecework, commission, or any other basis. Once the workweek is established, it remains fixed, although it may be changed if the change is intended as permanent rather than as an evasion of the overtime provisions. If no workweek is designated, it shall follow the calendar week.

(Emphases added). *See also LePage v. Blue Cross and Blue Shield of Minnesota*, Civ. No. 08-584 (RHK/JSM), 2008 WL 2570815, at *4 (D. Minn., Jun. 25, 2008) (noting that the MFLSA uses the workweek rule for calculating overtime compensation).⁴

This language, which is to be construed in accordance with its plain and ordinary terms, *see Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980), clearly mandates application of the workweek rule for determining compliance

⁴ The workweek rule requires a comparison of the total amount an employee should have been paid for a workweek under Minnesota’s 48-hour overtime statute to the total amount the employee was actually paid for that workweek. If the employee’s actual total compensation meets or exceeds the total compensation the employee should have been paid under the overtime statute, then there has been no violation of the overtime statute.

with the MFLSA's overtime compensation requirements. The workweek rule has longstanding application in wage and hour law and has provided an equitable and workable framework for properly calculating compensation in both the minimum wage *and* overtime compensation settings. This Court should adhere to the longstanding workweek rule when reviewing the dismissal of Appellants' MFLSA overtime compensation claim.

CONCLUSION

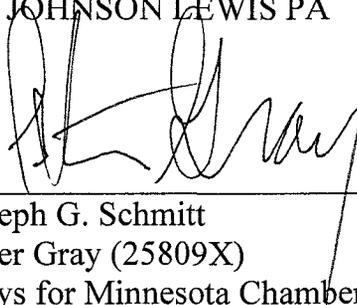
Accordingly, when considering Appellants' appeal and Respondents' cross-appeal, the Minnesota Chamber of Commerce respectfully submits that the Court should hold as follows: (1) a unilateral contract of employment cannot be based upon an employee handbook that expressly disclaims contract formation and which contains language that is too indefinite to give rise to contractual obligations; (2) the MFLSA does not require compensation for *de minimis* donning and doffing activities; (3) the MFLSA does not require employers to provide employees with a 30-minute meal break; and (4) the MFLSA employs the workweek rule for calculating overtime compensation.

Respectfully submitted,

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