No. _____

In The
Supreme Court of the United States

E. I. DU PONT DE NEMOURS
AND COMPANY AND ADECCO USA, INC.,

Petitioners,

v.

BOBBI-JO SMILEY, AMBER BLOW
AND KELSEY TURNER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns whether, under the Fair Labor Standards Act ("FLSA"), employers that have paid employees for non-compensable, *bona fide* meal breaks and included such compensation in their regular rate of pay may use such payments as credits against any overtime compensation owed to employees for time spent performing shift relief and donning and doffing their uniforms and protective gear. The Third Circuit and Department of Labor ("DOL") acknowledged that the FLSA is silent and does not expressly prohibit this pay practice. Nevertheless, squarely contrary to this Court's decisions in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942) and *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), the Third Circuit held that the FLSA's lack of express authorization of the practice at issue meant that it is implicitly prohibited. The Third Circuit's holding also conflicts with prior decisions by the Seventh Circuit and Eleventh Circuit permitting the same pay practice.

In reaching its decision, the Third Circuit accorded *Skidmore* deference to amicus curiae briefs submitted by the DOL. The Third Circuit deferred to the DOL's statutory interpretation even though the Court did not find the statute to be ambiguous and the DOL has never promulgated a regulation, issued an opinion letter or taken any enforcement actions concerning the practice at issue. The Third Circuit's decision deepens a circuit split concerning whether *Skidmore* deference should be accorded to statutory interpretations by

QUESTIONS PRESENTED – Continued

agencies expressed for the first time in litigation, such as in amicus briefs, and this Court has not yet addressed this important and recurring issue.

The questions presented by this Petition are:

1. Does the FLSA prohibit an employer from using compensation paid to employees for non-compensable, *bona fide* meal breaks that it included in their regular rate of pay as a credit against compensation owed for work time?

2. Is an agency's interpretation of a statute advanced for the first time in litigation entitled to *Skidmore* deference?

PARTIES TO THE PROCEEDING

Petitioners E. I. du Pont de Nemours and Company and Adecco USA, Inc. were the defendants in the district court and the appellees in the Third Circuit.

Respondents Bobbi-Jo Smiley, Amber Blow, and Kelsey Turner were the plaintiffs in the district court and appellants in the Third Circuit.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

E. I. du Pont de Nemours and Company has no parent, and no publicly held company owns 10% or more of its stock. Adecco USA, Inc. is a wholly-owned subsidiary of ADO Staffing, Inc., whose parent company is Adecco, Inc. Adecco, Inc. is a wholly-owned subsidiary of Adecco S.A., a foreign company not incorporated in the United States. No other publicly held company owns 10% or more of Adecco USA, Inc. or any company affiliated with Adecco USA, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners E. I. du Pont de Nemours and Company ("DuPont") and Adecco USA, Inc. ("Adecco") respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (Pet. App. 1-22) is published at 839 F.3d 325. The district court's opinion (Pet. App. 25-49) is unpublished but available at 2014 WL 5762954.

JURISDICTION

The Court of Appeals entered judgment on October 7, 2016. (Pet. App. 23-24). A petition for rehearing was denied on November 30, 2016. (Pet. App. 54-55). On February 7, 2017, Justice Sotomayor extended the time within which to file a petition to and including March 30, 2017. No. 16A755. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 207(h) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §207(h), provides in relevant part:

> (h) CREDIT TOWARD MINIMUM WAGE OR OVERTIME COMPENSATION OF AMOUNTS EXCLUDED FROM REGULAR RATE
>
> (1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.
>
> (2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

Section 207(e) of the FLSA, 29 U.S.C. §207(e), is reproduced at Pet. App. 58-61. 29 C.F.R. §778.201, 29 C.F.R. §785.18 and 29 C.F.R. §785.19 are reproduced at Pet. App. 61-63.

PRELIMINARY STATEMENT

Seventy-five years ago, this Court set forth the governing principle concerning the relationship between the FLSA and a challenged employer pay practice: "[I]n the absence of statutory interference, no reason is perceived for its invalidity." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942). This Court reiterated that cardinal principle in *Christensen v. Harris County*, 529 U.S. 576 (2000), where the FLSA was "silent" on whether the defendant county could require its employees to use accrued compensatory time. *Id*. at 585. An opinion letter by the Department of

Labor ("DOL") took the position that because the challenged practice was not expressly permitted by the FLSA, it was "implicitly prohibit[ed]." *Id*. at 582. This Court disagreed and refused to accord deference to the DOL opinion, holding as follows:

> [T]his view is exactly backwards. Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. And the FLSA contains no such prohibition.

Id. at 588 (italics in original).

In this case, although Section 207(h)(1) of the FLSA expressly prohibits the use of five categories of "extra compensation" *excluded* from the regular rate of pay as credits against overtime compensation owed, the Third Circuit repeatedly acknowledged that this provision "*fail*[*s*] *to expressly prohibit offsetting where the compensation used to offset is included in the regular rate*."[1] (Pet. App. 17) (emphasis added); *see also id*. ("*it is true that the statute does not explicitly set forth this prohibition*. . . .") (emphasis added) (Pet. App. 20) (acknowledging the "*lack of express prohibition*" and "*absence of a direct prohibition*" of the challenged pay practice) (emphasis added). Moreover, the Third Circuit declared that "[*w*]*e disagree with DuPont's notion that the FLSA's silence indicates permission*." (Pet. App. 17) (emphasis added).

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[1] While the statute uses the term "credit," the Third Circuit instead used the term "offset."

Likewise, the DOL's amicus briefs in this case acknowledged the lack of any express prohibition: "Section 7(h) [29 U.S.C. §207(h)] *does not address*, however, payments that are included in the regular rate and whether those payments can be used as a credit against required overtime compensation. *It is silent as to that issue.*" (Pet. App. 73-74) (emphasis added).

The Third Circuit's conclusion that the FLSA's silence and lack of express authorization of the challenged pay practice means that it is implicitly prohibited "is exactly backwards" and squarely foreclosed by *Christensen*, 529 U.S. at 588.

The Third Circuit's decision also directly conflicts with prior decisions by the Seventh and Eleventh Circuits holding that compensation for *bona fide* breaks included in employees' regular rate of pay can be used as credits against compensable work time. *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996); *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994). The Third Circuit was dismissive of these decisions. (Pet. App. 21-22). Instead, it relied upon an admittedly "distinguishable" Ninth Circuit decision (Pet. App. 19) where the employer sought to use meal break compensation that had been *excluded* from the employees' regular rate of pay as a credit, which fell directly within the ambit of the express prohibition in Section 207(h)(1). *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 913 (9th Cir. 2004).

This Court should grant certiorari to provide much-needed clarity and guidance on an issue correctly recognized as "important" by the Third Circuit (Pet. App. 6), and which affects countless employers and employees around the country. The lawfulness of an employer's compensation practice under the FLSA should not be dependent upon the vagaries of where suit has been brought. This is particularly true for employers such as DuPont, who operate nationwide with uniform compensation practices. The conflict in the circuits has created confusion and uncertainty, and encourages forum-shopping.

Unable to point to any provision in the FLSA expressly prohibiting Petitioners' pay practices, the Third Circuit accorded *Skidmore* deference to the DOL's interpretation of the FLSA contained in amicus curiae briefs it filed at the Court's invitation. (Pet. App. 6-7, 18). The Court deferred to the DOL's view that "the policy rationales underlying the FLSA do not permit crediting compensation used in calculating an employee's regular rate of pay. . . ." (Pet. App. 17). However, the DOL's statutory interpretation was not entitled to any deference.

The Third Circuit correctly recognized that the FLSA is silent on the permissibility of the challenged practice, but it did *not* find that there is any ambiguity in the pertinent statutory provisions. The FLSA's silence should have been dispositive under *Christensen*, and "does not license interpretive gerrymanders" by the DOL. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

The DOL's amicus curiae briefs were its first statement on the pay practice at issue. According deference to these after-the-fact briefs to impose substantial FLSA liability on Petitioners for a practice not previously prohibited in any DOL regulation, opinion letter or enforcement action constitutes the same type of "unfair surprise" condemned by this Court in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 132 S. Ct. 2156, 2167-68 (2012). Here, too, DOL's decades of "acquiescence" and "conspicuous inaction" should have precluded deference to its amicus briefs. *Id*. at 2168.

Moreover, the Third Circuit's deference to the DOL's newly-expressed statutory interpretation in its amicus briefs is contrary to *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), in which this Court stated that "[w]e have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Id*. at 212.

This Court has not yet squarely addressed whether deference should be accorded to an agency's interpretation of a statute set forth for the first time in litigation, such as in an amicus curiae brief. This case represents an ideal vehicle to address this significant and recurring issue, which has deeply divided the courts of appeals, in particular because "[t]he Secretary of Labor has been particularly aggressive in 'attempt[ing] to mold statutory interpretation and

establish policy by filing "friend of the court" briefs in private litigation.'" *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 927 n.5 (6th Cir. 2014). This Court should make clear that an agency's practice of "regulation by amicus" is impermissible. *Id*. at 927.

STATEMENT OF THE CASE

A. Factual Background

Respondents are hourly, non-union employees at DuPont's manufacturing plant in Towanda, Pennsylvania. (Pet. App. 4, 38). They filed a collective action under the FLSA and a class action under Pennsylvania state law seeking overtime compensation for time they spent donning and doffing their uniforms and protective gear and performing "shift relief" before and after their regularly-scheduled twelve-hour shifts.[2] (Pet. App. 4).

The time spent providing shift relief, donning and doffing ranged between thirty to sixty minutes a day. (Pet. App. 4). Petitioners paid Respondents for three, thirty-minute *bona fide* meal breaks during each of their twelve-hour shifts, despite no FLSA obligation or contractual agreement to do so. (Pet. App. 4-5). Those *bona fide* meal breaks are not considered "work time"

[2] "Shift relief" occurs in work areas that operate continuously, when the incoming employee confers with his or her outgoing counterpart regarding the status of matters over the course of the last shift.

under the FLSA. 29 C.F.R. §785.19. (Pet. App. 63). Petitioners treated the compensation paid for the meal breaks like other types of compensation paid to the employees. (Pet. App. 5). Consistent with 29 C.F.R. §778.218(b), Petitioners included the compensation paid for the meal breaks when calculating employees' regular rate of pay, and included the meal break time in the twelve hours for which they paid employees each shift. *Id*. Petitioners paid the employees overtime compensation of time-and-a-half for all meal breaks that occurred after the employees worked 40 hours in a week.[3] (Pet. App. 45, 98-104). Significantly, "[t]he paid break time always exceeded the amount of time Plaintiffs spent donning and doffing and providing shift relief." (Pet. App. 5).

Petitioners argued that, under the FLSA, the payments they made for the three, thirty-minute *bona fide* meal breaks and included in the regular rate of pay could be used as a credit against any overtime compensation owed for time spent performing shift relief, donning and doffing. They further contended that, because the paid meal break time always exceeded the time spent performing shift relief, donning and doffing, there was no liability under the FLSA.

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[3] When employees work a week of four twelve-hour shifts, they cross the 40 hour threshold during the fourth day. On that fourth day, after the 40 hour mark has been passed, Petitioners pay employees time-and-a-half for all time during the balance of the shift, both work time and the non-compensable, thirty-minute meal breaks. (Pet. App. 45, 98-104).

B. Statutory and Regulatory Background

The district court, Third Circuit and DOL all correctly recognized that the use of payments for *bona fide* meal breaks included in the regular rate of pay as credits against compensation owed for work time is neither expressly authorized nor prohibited by the FLSA.

The only provision of the FLSA that addresses credits in any respect is Section 207(h). 29 U.S.C. §207(h). However, it only addresses the practice of using payments *excluded* from the regular rate as credits. Indeed, that is made plain in the title of Section 207(h): "Credit toward minimum wage or overtime compensation of *amounts excluded from regular rate.*" (emphasis added). Section 207(h) does not address whether amounts *included* in the regular rate may be used as credits.

Section 207(h)(1) of the FLSA expressly prohibits using five categories of "extra compensation" that are "excluded from the regular rate" pursuant to Sections 207(e)(1)-(4) and (8) as credits against an overtime obligation. (Pet. App. 58-61). Section 207(h)(2) creates a limited carve-out from that prohibition. It expressly permits using three categories of "extra compensation" that are "excluded from the regular rate" in Sections 207(e)(5)-(7) as credits against an overtime obligation. *Id*. The lower courts each pointed out that both the express prohibition in Section 207(h)(1) and express authorization in Section 207(h)(2) are inapplicable, because the payments for the *bona fide* meal breaks

used as credits by Petitioners were *included* in the employees' regular rate of pay. (Pet. App. 15, 17, 20, 31, 42).

Just as the FLSA has been silent for over 60 years with respect to the lawfulness of using payments for non-work time that are included in the regular rate as credits against compensation owed for work time, so too have the DOL's regulations long been completely silent on this issue.

The Third Circuit made a passing reference to 29 C.F.R. §778.201(c) as ostensible support for its conclusion that the Petitioners' pay practices are implicitly prohibited by the FLSA. (Pet. App. 15). However, the Court's reliance was misplaced because that regulation, entitled "Overtime premiums," only addresses the "extra compensation" *excluded* from the regular rate identified in Sections 207(e)(5)-(7) of the FLSA discussed above. *See* 29 C.F.R. §778.201(a), (b). (Pet. App. 61-62). Consistent with Section 207(h)(2), this regulation provides that the only "extra compensation" excluded from the regular rate that may be credited toward overtime compensation is specified in Sections 207(e)(5)-(7). 29 C.F.R. §778.201(c). (Pet. App. 62). This regulation does not address the permissibility of using payments made for non-work time that are *included* in the regular rate as credits against compensation owed for work time. Inasmuch as both the Third Circuit and DOL conceded that Section 207(h)(1) does not expressly prohibit using payments for non-work time included in the regular rate as credits, it follows *a fortiori* that 29 C.F.R. §778.201(c) cannot be construed to

contain such a prohibition, because such a construction would conflict with the statute.

The DOL has promulgated a regulation concerning "rest periods" that specifically provides that "[c]ompensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time." 29 C.F.R. §785.18. (Pet. App. 62). In stark contrast, the DOL's regulation concerning "*bona fide* meal breaks," which is included in the same Subpart, contains no restriction on the use of compensation paid for a *bona fide* meal break as a credit against compensation owed for work time. 29 C.F.R. §785.19. (Pet. App. 63). Once again, any such regulatory prohibition would be inconsistent with the FLSA, which contains no such restriction.

C. Proceedings Below

1. The District Court

The district court granted Petitioners' motion for summary judgment. (Pet. App. 25-53). It emphasized that the parties agreed that the three, thirty-minute paid meal breaks that employees received during each twelve-hour shift were non-compensable *bona fide* meal breaks, which are not considered "work time" under 29 C.F.R. §785.19. (Pet. App. 44, 63). The court recognized that the FLSA "does not expressly grant employers permission to use paid non-work time to offset unpaid work time." (Pet. App. 31). On the other hand, it also noted that the express prohibition in Section 207(h)(1) applies only "when the paid non-work

time is excluded from the regular rate of pay." (Pet. App. 32).

The court found that Petitioners had included compensation for employees' meal breaks in their regular rate of pay. (Pet. App. 42). It also found that Respondents "failed to establish that the parties had an agreement to treat the paid non-work time meal periods as 'hours worked.'" *Id*. The court explained:

> Defendants did not convert plaintiffs' meal period time into 'hours worked' merely because this time was paid. Further, plaintiffs do not have a collective bargaining agreement providing that the meal period time is 'hours worked.' Moreover, defendants' meal period policy did not create a contract, express or implied, which converted plaintiffs' meal period time into 'hours worked.' Finally, plaintiffs agree, and their conduct establishes, that their meal periods were *bona fide* and not spent for the predominant benefit [of] their employer. (Pet. App. 42).

The court held that Petitioners' credits were permissible under the FLSA. It relied upon the Seventh and Eleventh Circuits' decisions in *Barefield* and *Avery*, respectively, which upheld the employers' use of payments for *bona fide* meal periods included in the regular rate as credits against compensable work time. (Pet. App. 43-44). After concluding that Petitioners' pay practices are permissible under the FLSA, the court found that Respondents are not owed any additional compensation:

> [*T*]*he undisputed record establishes that defendants paid plaintiffs for twelve hours each shift at their regular (or overtime) rate of pay, and plaintiffs worked fewer than twelve hours*. Specifically, plaintiffs' deposition testimony establishes that the time spent donning and doffing and performing shift relief is less than the amount of time plaintiffs spent on paid meal periods. (Pet. App. 45) (emphasis added).

Therefore, it held that Petitioners "can completely offset the plaintiffs' unpaid donning and doffing and shift relief activities with plaintiffs' paid meal periods," and granted summary judgment for Petitioners. (Pet. App. 47).

2. The Court of Appeals

On appeal, the Third Circuit left undisturbed the district court's findings that: (1) the meal breaks were *bona fide*; (2) there had been no contractual agreement to treat the meal breaks as "hours worked"; (3) neither the FLSA nor any contract obligated Petitioners to compensate the employees for those meal breaks; (4) Petitioners had included the compensation for the meal breaks when they calculated the employees' regular rate of pay; and (5) the paid meal break time always exceeded the amount of time employees spent providing shift relief, donning and doffing. (Pet. App. 4-5, 21).

After the parties completed their briefing, the Third Circuit, *sua sponte*, invited the DOL to submit an amicus curiae brief "to assist us in understanding

the intricacies of the important FLSA issue presented by this case." (Pet. App. 6, 56-57). Thereafter, the DOL submitted two letter briefs (Pet. App. 64-89), and also participated extensively in oral argument.[4] The DOL sided with Respondents' position that the Petitioners' pay practices are implicitly prohibited by the FLSA. Significantly, the DOL has never promulgated a regulation prohibiting the use of compensation for non-work time included in the regular rate as a credit; has not issued any opinion letters, published statements of policy, or guidance on this subject; and, to the best of Petitioners' knowledge, has not taken any enforcement actions with respect to this issue. It remained silent even after the Seventh and Eleventh Circuits' decisions in *Barefield* and *Avery* held more than 20 years ago that the pay practice at issue is permissible under the FLSA. Also, as far as Petitioners are aware, the amicus curiae briefs filed by the DOL in this case represent its first and only such briefs on the issue.

Nowhere in the Third Circuit's opinion did it suggest that the provisions in Section 207(h) were ambiguous. Nevertheless, it accorded *Skidmore* deference to the newly-adopted position by the DOL in its amicus briefs that the Petitioners' pay practices are implicitly prohibited by the FLSA. (Pet. App. 6-7, 18).

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[4] In fact, pursuant to an agreement between the DOL and Respondents, the DOL was allocated twelve of the fifteen minutes of argument time, with Respondents using only the first three minutes.

Like the DOL, the Third Circuit acknowledged that the FLSA is silent and does not "expressly prohibit offsetting where the compensation used to offset is included in the regular rate." (Pet. App. 17, 20). However, it rejected the district court's reasoning that "the FLSA's silence indicates permission" and that "the absence of a direct prohibition controls the analysis of the offset issue." (Pet. App. 17, 20). Instead, the Third Circuit emphasized that the FLSA does not expressly authorize "the type of offsetting DuPont advances here, where an employer seeks to credit compensation that it *included* in calculating an employee's regular rate of pay against its overtime liability." (Pet. App. 15) (italics in original).

The Third Circuit predicated its ruling on deference to the DOL's statutory interpretation and also upon "the policy rationales underlying the FLSA," "the goals and purposes of the FLSA," and the "broad remedial purpose" of the FLSA. (Pet. App. 8, 17, 19). But the Court did not explain why, if the practice at issue is contrary to the goals, purposes and policy rationales of the FLSA, Congress has not expressly prohibited it.

The Third Circuit stated that "the FLSA must be construed liberally in favor of employees" and "exemptions should be construed narrowly, that is, against the employer." (Pet. App. 7). However, no exemption is at issue in this case. Section 207 contains various provisions relating to the payment of overtime, and does not outline the contours of the exemptions from the minimum wage and overtime requirements, which are addressed in Section 213. 29 U.S.C. §213.

As stated above, the Seventh and Eleventh Circuits' decisions in *Barefield* and *Avery* held that the same pay practice at issue here is lawful under the FLSA. The Third Circuit refused to follow those decisions because, in its view, they "did not analyze the offset issue in detail." (Pet. App. 22). But the Seventh and Eleventh Circuits did not need to engage in an exhaustive statutory analysis because, as both the Third Circuit and the DOL readily acknowledged, the FLSA does not contain any provision "expressly prohibit[ing] offsetting where the compensation used to offset is included in the regular rate." (Pet. App. 17, 20, 73-74).

The Third Circuit relied instead on the Ninth Circuit's decision in *Ballaris*, despite conceding that *Ballaris* is "distinguishable" because "the employer in that case *excluded* meal break compensation when calculating the employee's regular rate. . . ." (Pet. App. 19) (emphasis added). The Third Circuit quoted with approval *Ballaris*' condemnation of the employer's use of credits in that case as "'creative bookkeeping' that, if tolerated, would frustrate the goals and purposes of the FLSA." *Id*. However, *Ballaris* held that, because "compensation for the paid lunch breaks is excluded from the regular rate," the use of such compensation as a credit against overtime compensation due "is in direct violation of the express provisions of Section 7(h) [Section 207(h)(1)]." 370 F.3d at 913. In contrast, the Third Circuit and DOL admitted that the express prohibition of Section 207(h)(1) does not apply here. Therefore, unlike *Ballaris*, Petitioners' use of compensation for *bona fide* meal breaks included in the

regular rate as a credit against compensation owed for pre- and post-shift activities is neither "creative bookkeeping" nor contrary to the goals and purposes of the FLSA.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Contravenes This Court's FLSA Precedents And Creates a Circuit Conflict

A. The Third Circuit's Decision Conflicts with This Court's Decisions in *Williams* and *Christensen*

The Third Circuit's decision squarely conflicts with this Court's long-established FLSA jurisprudence by disallowing a payment practice that both the Third Circuit and DOL conceded is not even addressed, much less prohibited, by the FLSA. This Court's decisions in *Williams* and *Christensen* make abundantly clear that, unless the FLSA expressly prohibits an employer's pay practice, it is lawful. The absence of express authorization in the FLSA for a challenged practice is not sufficient to support the conclusion that it is implicitly prohibited. The FLSA may not be construed to prohibit a statutorily-unaddressed employment practice with which employees, the DOL or a court may happen to disagree.[5]

[5] The pending petitions for certiorari in *Wynn Las Vegas, LLC v. Cesarz*, No. 16-163, and *National Restaurant Association v. Department of Labor*, No. 16-920, raise similar issues concerning

The DOL's own "Handy Reference Guide to the Fair Labor Standards Act" recognizes as much:

> While the FLSA does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the FLSA does not regulate. . . . The above matters are for agreement between the employer and the employees or their authorized representatives.

Id., available at https://www.dol.gov/whd/regs/compliance/hrg.htm. The fact that the FLSA is not a comprehensive wage-payment law is further evidenced by the fact that many states have enacted laws that supplement federal law to legislate on issues left unaddressed by the FLSA, such as frequency and timing of payment, or use of compensatory time, as in *Christensen*.

In *Williams*, this Court found that no provision in the FLSA barred the employer and its employees from agreeing to count customer tips as wages for minimum wage purposes, with the employer making up any shortfall if the tips were insufficient. Given "the absence of statutory interference" to the parties' agreement, this Court stated that "no reason is perceived for its invalidity" under the FLSA. *Williams*, 315 U.S. at 397.

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whether *Williams* and *Christensen* preclude a court from declaring unlawful under the FLSA an employment practice not expressly prohibited by the statute, and also raise issues relating to the deference owed to DOL interpretations of the FLSA that are similar to the deference issues presented here.

In *Christensen*, the plaintiffs and the United States as amicus curiae conceded that "nothing in the FLSA expressly prohibits" a State or subdivision from compelling employees to use accrued compensatory time. 529 U.S. at 582. Nevertheless, they argued that "the FLSA implicitly prohibits such a practice." *Id.* This Court disagreed, holding that a challenged employment practice does not "violat[e] the FLSA" "[u]nless the FLSA *prohibits* [it.]" *Id.* at 588 (italics in original). If the FLSA is "silent" on a challenged pay practice, the employee cannot prove that the employer has violated the statute. *Id*. at 585. This Court characterized as "exactly backwards" the DOL position that the challenged practice was unlawful simply because it was not expressly permitted under the FLSA. *Id*. at 588. Because the FLSA "says nothing" about the practice at issue, the plaintiffs could not establish a violation. *Id.* at 585.

This Court's decisions in *Williams* and *Christensen* should have been dispositive of Respondents' claims in this case. Just as in *Christensen*, the Third Circuit and DOL conceded that the FLSA is silent concerning whether compensation paid for breaks that is included in the regular rate may be used as a credit against compensation owed for work time. (Pet. App. 17, 20, 73-74). Because there is no express prohibition of that practice in the FLSA, it is permissible.

The express authorization of credits in Section 207(h)(2) with respect to the three categories of "extra compensation" *excluded* from the regular rate in Sections 207(e)(5)-(7) does not support the Third Circuit's conclusion that these are the "only" credits permitted

under the statute. (Pet. App. 13, 15). Indeed, in *Christensen*, this Court rejected a similar reliance by plaintiffs and the United States upon the *expressio unius* canon. 529 U.S. at 582-83. The Court held that a provision in the FLSA that expressly granted employees the right to use compensatory time off upon request, so long as it would not cause undue disruption to the employer, could not be construed "as setting forth the exclusive method" by which employers could exercise some measure of control over employee use of compensatory time. *Id*. at 583.

Likewise, Section 207(h)(2)'s express authorization of the use of certain "extra compensation" *excluded* from the regular rate as credits may not be construed "as setting forth the exclusive method" by which employers may utilize credits, because Section 207(h) simply does not address whether compensation *included* in the regular rate may be used as credits. Neither Section 207(h)(2) nor any other provision of the FLSA states that the "only" credits allowed under the statute are those which are expressly authorized in Section 207(h)(2). Indeed, if Congress had intended to prohibit employers from using compensation for nonwork time included in the regular rate as credits, it would have said so expressly, just as it did with respect to the five categories of "extra compensation" excluded from the regular rate that Section 207(h)(1) expressly prohibits from being used as credits.

B. The Third Circuit's Decision Creates a Circuit Split

The Third Circuit's decision also conflicts with the decisions by the Seventh and Eleventh Circuits in *Barefield* and *Avery*, which both upheld the use of compensation paid for non-work time that was included in the regular rate as credits against overtime compensation owed for pre- and post-shift work time. This Court's intervention is needed to bring much-needed guidance to courts confronted with this important FLSA issue.

In *Barefield*, the employer required its employees to attend a 15-minute roll call before the scheduled start of their shifts. The employer also paid employees for a 30-minute *bona fide* meal break. 81 F.3d at 707. The Seventh Circuit held that "the meal periods are not compensable [hours worked] under the FLSA and [defendant] may properly offset the meal break against the compensable roll call time worked by plaintiffs." *Id*. at 710.

Similarly, in *Avery*, the Eleventh Circuit held that a credit is appropriate when an employer pays for "*bona fide* meal breaks" under the FLSA. 24 F.3d at 1344. The Court concluded that "[i]f the meal break is not compensable time under the FLSA, then the [employer] should be allowed to offset the amount it pays for the meal break against any amount it owes the plaintiffs for pre- and post-shift time at work." *Id*.

Thus, the Third Circuit's unprecedented decision[6] creates a circuit split concerning whether the FLSA allows an employer to use compensation paid to employees for *bona fide* meal breaks and included in their regular rate of pay as a credit against compensation owed for work time. This issue arises often, and has also engendered numerous opinions in the district courts.[7]

Unable to rely upon any express statutory prohibition of the pay practice at issue, the Third Circuit instead invoked myriad policy grounds. (Pet. App. 8, 17-18, 19). For instance, it expressed agreement with the DOL's mistaken view that allowing the Petitioners' pay practices "would necessarily shortchange employees." (Pet. App. 18). Yet neither the Court nor the DOL

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[6] As discussed above, the Third Circuit conceded that the Ninth Circuit's decision in *Ballaris* is "distinguishable" because the meal break compensation used as a credit in that case had been excluded from the regular rate. (Pet. App. 19).

[7] Other cases allowing the use of paid, non-compensable breaks as credits against unpaid, compensable time include *Ruffin v. MotorCity*, No. 12-cv-11683, 2014 WL 11309796, at *4 (E.D. Mich. March 10, 2014), *aff'd*, 775 F.3d 807 (6th Cir. 2015); *Agner v. United States*, 8 Cl. Ct. 635, 637 (1985), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986); *Brubach v. City of Albuquerque*, 893 F. Supp. 2d 1216, 1232-34 (D.N.M. 2012); *Smith v. Safety-Kleen Sys., Inc.*, No. 10-6574, 2012 WL 162206, at *3 (N.D. Ill. Jan. 18, 2012); *Agee v. Wayne Farms LLC*, 675 F. Supp. 2d 684 (S.D. Miss. 2009); *Abbe v. City of San Diego*, No. 05-1629, 2007 WL 4146696, at *7-8 (S.D. Cal. Nov. 9, 2007), *aff'd*, 444 Fed. Appx. 189 (9th Cir. 2011); *Schwertfeger v. Village of Sauk Village*, No. 99-6456, 2001 WL 29315, at *7-8 (N.D. Ill. March 23, 2001); *Bridges v. Amoco Polymers, Inc.*, 19 F. Supp. 2d 1375 (S.D. Ga. 1997); *Bolick v. Brevard County Sheriff's Dep't*, 937 F. Supp. 1560, 1572 (M.D. Fla. 1996).

provided any factual substantiation for that conclusion, which turns the economic reality on its head. Indeed, the Third Circuit conceded that "[t]he paid break time *always exceeded* the amount of time Plaintiffs spent donning and doffing and providing shift relief." (Pet. App. 5). (emphasis added).

In *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946), this Court held that the plaintiff carries the initial burden of showing uncompensated work time in order to establish an FLSA violation. The Third Circuit's decision effectively eliminates the employees' burden and, if left undisturbed, would mean that even where, as here, it is undisputed that employees have been paid for *more* hours than they actually worked, there can nevertheless be an FLSA violation. Such a counter-intuitive result simply cannot be reconciled with *Mt. Clemens* and longstanding FLSA jurisprudence.

Petitioners included all of the paid meal breaks in the employees' regular rate of pay, and paid them time-and-a-half for meal breaks that occurred after the employees worked 40 hours in a week. (Pet. App. 45, 98-104). The DuPont employees' pay stubs show they were paid "OT" at "1.5" (time-and-a-half) for eight hours in a 48-hour work week comprised of four, twelve-hour shifts. (Pet. App. 98-102). The Adecco employees' pay stubs likewise show that they were paid at a time-and-a-half rate ($16.50 per hour) for eight hours in a 48-hour work week comprised of four, twelve-hour shifts. (Pet. App. 103-04). There was no evidence that Petitioners ever sought to use pay for *straight time* as a

credit against the overtime compensation owed for shift relief and donning and doffing. Both the district court and Third Circuit recognized that Respondents were compensated for *more* hours than they actually worked, including time spent performing shift relief and donning and doffing. (Pet. App. 5, 45, 47).

The Third Circuit agreed with the DOL's contention that Petitioners' pay practices entailed impermissible "double-count[ing]" of compensation paid for "hours worked." (Pet. App. 18, 74-75). But that argument was fundamentally flawed, because the Third Circuit acknowledged that the paid meal breaks at issue were "*bona fide*" and therefore did *not* constitute "hours worked" that Petitioners were required to compensate. (Pet. App. 4 and n.2). Petitioners did not use amounts paid for "hours worked" as credits, and thus there was no impermissible "double-count[ing]" of compensation for work time, as mistakenly asserted by the DOL and Third Circuit. (Pet. App. 18, 74-75).

In support of its conclusion that the practice at issue is implicitly prohibited by the FLSA, the Third Circuit also relied on the notion that "the FLSA must be construed liberally in favor of employees." (Pet. App. 7). But its decision, if allowed to stand, would have *adverse* economic consequences for employees.

Petitioners had no obligation under the FLSA to pay employees for their three, thirty-minute *bona fide* meal breaks each shift. Moreover, as the district court and Third Circuit recognized, the employees, who are not members of a union, did not have a collective

bargaining agreement with the Petitioners requiring that the meal breaks be treated as "hours worked" for which compensation must be paid. (Pet. App. 4, 38, 42). If an employer cannot use gratuitous payments for *bona fide* meal breaks that it has included in the regular rate as credits against compensation owed for work time, it will have an economic incentive to discontinue making those voluntary payments. And if Petitioners stop paying their employees for the *bona fide* meal breaks, and instead pay them only for hours worked, including shift relief, donning and doffing, the employees will earn less.[8]

The Third Circuit acknowledged "the important FLSA issue presented by this case" when it invited the DOL to participate as an amicus curiae. (Pet. App. 6). The Third Circuit's direct contravention of this Court's controlling FLSA precedents in *Williams* and *Christensen*, as well as its creation of a conflict with decisions by the Seventh and Eleventh Circuits on the same pay practice, militate strongly in favor of this Court's review. Only this Court can resolve the circuit conflict and restore uniformity to this important area of federal law, which affects countless employers and employees nationwide. If the conflict in the circuits is allowed to persist, confusion, uncertainty and forum-shopping will follow, which will particularly affect

[8] As one commentator has aptly observed, "*Smiley v. Du Pont* illustrates one of the rare cases where a good deed is punished, and heavily." Lauren Russell, "*Paid Breaks Do Not Offset Overtime Under the FLSA*," Delaware Employment Law Letter (Dec. 2016).

employers like DuPont that operate on a nationwide basis.[9]

II. The Courts of Appeals Are Deeply Divided Over Whether Deference is Owed to Statutory Interpretations by Agencies Advanced For The First Time in Litigation

This Court should grant the Petition for the additional reason that the Third Circuit's decision exacerbates a deep division among the courts of appeals as to whether, under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), deference should be accorded to statutory interpretations by agencies expressed for the first time in litigation, such as in amicus briefs. As recognized in *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014), "[t]he Supreme Court has yet to address the appropriate level of deference to give the construction of a statute articulated by an agency *only* in amicus briefs." *Id*. at 927 (emphasis in original). *See also* George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and The Skidmore Shuffle*, 80 U. Chi. L. Rev. 447, 459-60 (2013).

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[9] Indeed, DuPont was recently sued in an employment class action in Illinois with respect to the same pay practice at issue here, and the Complaint expressly relies upon the Third Circuit's decision in this case. *Kramer, et al. v. Danisco USA, Inc., DuPont USA, et al.*, No. 2017L2 (Circuit Court, Carroll Co., Ill.), Complaint at ¶¶ 54-55.

Just as Congress has not prohibited the pay practice at issue, the DOL has not promulgated any regulation or published any opinion letter prohibiting that practice either. In fact, it is reasonable to presume that the reason the Third Circuit took the highly unusual step of inviting the DOL to submit an amicus brief expressing its views after the parties had already completed their briefing is that the Court could not locate any prior agency guidance on point. The Third Circuit then accorded *Skidmore* deference to the DOL's statutory interpretation, and did not express any concern about the fact that this interpretation was first advanced in this litigation.

A. The Third Circuit's Decision Conflicts With This Court's Decisions Concerning Deference

In light of the Third Circuit's recognition that the FLSA is unambiguous, it erred in according *Skidmore* deference to the DOL's statutory interpretation. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court emphasized that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. Similarly, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court stated that "[w]e only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *Id*. at 320 n.45. When there is "no ambiguity in such a statute for an agency to resolve," no

deference is owed to the agency's statutory interpretation. *Id.*; *see also Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language"); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210 (2011) (explaining that, in *Gonzales*, "no deference was warranted to an agency interpretation of what were, in fact, Congress' words"); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) (deference to an agency's statutory interpretation is warranted "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.").

Under *Christensen*, if the FLSA is silent or unambiguous with respect to a particular compensation practice, neither a court nor the DOL can rely upon notions of public policy or deference to re-write the statute by adding "implicit" prohibitions that Congress itself did not see fit to incorporate into the statute. No *Skidmore* deference should have been accorded to the DOL's statutory interpretation in its amicus briefs, because "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989).

The Third Circuit contravened this Court's precedents not only by according deference to the DOL's interpretation of an unambiguous statute, but also by doing so where the DOL's statutory interpretation was

first expressed in an amicus curiae brief. In *Bowen*, this Court emphasized that "[*w*]*e have never applied* [*deference*] *to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice*. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." 488 U.S. at 212 (emphasis added). The Court stated that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Id.*; *see also United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (*Bowen* demonstrates that "near indifference" is accorded to an agency "interpretation advanced for the first time in a litigation brief"); *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting) (no deference to FDA's views was warranted because "the FDA has set forth its positions only in briefs filed in litigation, not in regulations, interpretations, or similar agency work product"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting) (by deferring to "an agency's litigating position" in an amicus brief, "courts force regulated entities like petitioner here to 'divine the agency's interpretations in advance,' lest they 'be held liable when the agency announces its interpretations for the first time' in litigation"); *Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring) ("The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline,

policy statement, or administrative adjudication. Instead, it is merely the EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little, if any, deference.") (italics in original).

In *Christensen*, this Court refused to accord deference to the DOL's opinion letter interpreting its own unambiguous regulation, observing that to defer in such a case would allow the agency "to create *de facto* a new regulation." 529 U.S. at 588. The Court stressed that "we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id*. at 587; *see also Mutual Pharm. Co.*, 133 S. Ct. at 2481 (Breyer, J., dissenting) ("I cannot give special weight to the FDA's views. For one thing, as far as the briefing reveals, the FDA, in developing its views, has held no hearings on the matter or solicited the opinions, arguments, and views of the public in other ways."). By according *Skidmore* deference to the DOL amicus briefs' interpretation of the FLSA as implicitly prohibiting the practice at issue, the Third Circuit impermissibly allowed the DOL to create *de facto* a new prohibition without notice-and-comment rulemaking and contrary to the FLSA, which does not contain that prohibition.

In *Christopher*, this Court denied *Skidmore* deference to the DOL interpretations of its ambiguous regulations concerning whether overtime was owed to "outside salesmen" that had been advanced for the first time in the DOL's amicus briefs. The Court emphasized that "where, as here, an agency's announcement

of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." 132 S. Ct. at 2168. The DOL's interpretation of its own regulations, which was "first announced" "in a series of amicus briefs," "plainly lacks the hallmarks of thorough consideration" and "there was no opportunity for public comment." *Id*. at 2169.

Section 207(h) of the FLSA was first enacted in 1949.[10] It does not expressly prohibit the use of compensation paid for non-work time and included in the regular rate as a credit against compensation owed for work time; therefore, numerous employers have long utilized that practice. Yet, just as in *Christopher*, "the DOL never initiated any enforcement actions . . . or otherwise suggested that it thought the industry was acting unlawfully." *Id*. at 2168. Also, just as in *Christopher*, "[o]ther than acquiescence, no explanation for the DOL's inaction is plausible." *Id*.

Imposing substantial FLSA liability on Petitioners based on *Skidmore* deference to the DOL's statutory interpretation in amicus briefs filed long after the fact would be manifestly unfair. As this Court explained in *Christopher*, in words equally applicable here:

> Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. To defer to the agency's interpretation in this circumstance would seriously

[10] Pub. L. No. 81-393, ch. 736, §7(g), 63 Stat. 910, 915 (1949).

> undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires'. . . . Indeed, it would result in precisely the kind of 'unfair surprise' against which our cases have long warned. *Id.* at 2167.

The "unfair surprise" resulting from deference to the newly-minted statutory interpretation in the DOL's amicus briefs is even greater here than in *Christopher*, because the DOL has never issued opinion letters or promulgated any regulations, ambiguous or otherwise, concerning the pay practice challenged in this litigation. What's more, decisions by the Seventh Circuit in *Barefield* and the Eleventh Circuit in *Avery* both upheld the pay practice at issue here over twenty years ago. The DOL's decades of silence in the face of these precedents further underscores its "acquiescence" and "conspicuous inaction." *Christopher*, 132 S. Ct. at 2168.

B. The Circuits Are Deeply Divided Concerning Whether Deference is Owed To Statutory Interpretations by Agencies First Expressed in Litigation

This Court has not yet squarely addressed whether *Skidmore* deference is owed to an agency's statutory interpretation expressed for the first time in litigation. Thus, "[g]iven the seemingly divergent positions of *Bowen, Skidmore*, and *Mead*, it is unsurprising that a split has developed among the circuit courts as to whether interpretations first advanced by agencies

during litigation in single-agency regimes can receive deference." Hubbard, *supra*, 80 U. Chi. L. Rev. at 460. *See also Boyd v. Office of Personnel Management*, 2017 WL 1046221, at *7 n.2 (Fed. Cir. March 20, 2017) ("the practice of according deference in some instances to positions taken in agency briefing has been the subject of considerable recent debate.").

The Third Circuit accorded *Skidmore* deference to the DOL's statutory interpretation in its amicus briefs notwithstanding the DOL's longstanding failure to set forth its position earlier in any fashion. Likewise, the Second Circuit has held that *Skidmore* deference is warranted even when "an agency advances a statutory interpretation in an amicus brief that has not been articulated before in a rule or regulation." *Conn. Office of Prot. & Advocacy for Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 239 (2d Cir. 2006) (Sotomayor, J.). *Accord In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 80 (2d Cir. 2004) (according *Skidmore* deference to new statutory interpretation by SEC in amicus brief that "has never been articulated in any rule or regulation."). The First Circuit, citing the foregoing Second Circuit cases with approval, accorded *Skidmore* deference to a DOL interpretation of ERISA first expressed in an amicus brief. *Merrimom v. Unum Life Ins. Co.*, 758 F.3d 46, 55-56 (1st Cir. 2014). And the Eleventh Circuit has stated that "most courts would not completely ignore an agency's interpretation of its organic statutes – even if that interpretation is

advanced in the course of litigation rather than a rule-making or agency adjudication." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1250 (11th Cir. 2003).

On the other hand, a number of courts of appeals have refused to accord *Skidmore* deference to agency interpretations of statutes expressed for the first time in litigation. In *Smith v. Aegon*, the Sixth Circuit declined to accord *Skidmore* deference to the DOL's amicus brief, which reflected the Secretary's interpretation of ERISA, because "the only indication here that the Agency has adopted this particular interpretation of ERISA is the amicus briefs themselves." 769 F.3d at 929. The Court commented that "the Secretary is no more expert than this Court" in interpreting ERISA. *Id*. at 928-29. It concluded that "[t]he Secretary's new interpretation is not consistent with prior acquiescence, *see Mead*, 533 U.S. at 228 . . . and lacks longevity, suggesting the interpretation does not 'reflect careful consideration,' *see Kasten*, 131 S. Ct. at 1335." *Smith*, 769 F.3d at 929.

The Sixth Circuit condemned what it characterized as "the Secretary's 'regulation by amicus' in this case." *Id*. at 927. It concluded as follows:

> [T]he amicus brief in this case can only be characterized as, to borrow a phrase from Justice Frankfurter, an expression of a mood. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). An agency's mood is not entitled to *Skidmore* deference. There has never been an enforcement action brought related to a venue selection clause, and only one other

> amicus brief exists that has articulated the Secretary's current position. The Secretary has promulgated no regulation or interpretive guidance related to venue selection clauses. As we have noted, '*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted.'

Smith, 769 F.3d at 929.

Likewise, the Ninth Circuit has refused to defer to "interpretations of statutes expressed for the first time in case-by-case amicus filings," because that would "sanction bypassing of the Administrative Procedure Act and notice-and-comment rulemaking." *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395 (9th Cir. 2011), *aff'd*, 567 U.S. 142 (2012). In *Christopher*, the Ninth Circuit stressed that "there exists no meaningful regulatory language to interpret," and "the Secretary has used her appearance as *amicus* to draft a new interpretation of the FLSA's language." 635 F.3d at 395.

Similarly, in *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089 (9th Cir. 2008), the Ninth Circuit stated that "[w]e do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation." *Id.* at 1095. The agency's proposed statutory interpretation had not been advanced previously "in any legally-binding regulation or in any official agency interpretation of the regulation. Rather, this interpretation appears to be purely a litigation position, developed during the course of the present

case." *Id.* Thus, the Court held that "we owe the interpretation no deference." *Id.*

In *Texas v. United States EPA*, 829 F.3d 405 (5th Cir. 2016), the Fifth Circuit stated that "[t]he minimal deference owed to an agency interpretation first raised during the course of litigation is insufficient to persuade us that EPA's interpretation of the Clean Air Act and Regional Haze Rule is reasonable." *Id*. at 429-30. The District of Columbia Circuit held in *Landmark Legal Foundation v. IRS*, 267 F.3d 1132 (D.C. Cir. 2001), that no deference was owed to an IRS interpretation of a statutory provision that "it developed in litigation here," rather than "in a notice-and-comment rulemaking, [or] a formal agency adjudication. . . ." *Id*. at 1135-36. Similarly, in *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), the Seventh Circuit refused to accord deference to the position taken by the PBGC in litigation, emphasizing that "the PBGC has not promulgated any rules pertinent to this subject. Nor has it issued the sort of interpretive guidelines that deserve the court's respectful consideration." *Id*. at 449-50.

In *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016), the Eighth Circuit cited *Smith v. Aegon* with approval and refused to accord deference to a statutory interpretation first set forth in an EEOC amicus brief. *Id*. at 1111 n.4. Likewise, in *Been v. O.K. Indus., Inc*., 495 F.3d 1217 (10th Cir. 2007), the Tenth Circuit stated that "we need not defer to the agency's interpretation of the statute" in its amicus brief, particularly since "the Secretary has not promulgated a regulation applicable to the practices" at issue. *Id*. at 1227; *accord*

Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304, 1315-16 (10th Cir. 2005) (refusing to defer to EEOC interpretation of the ADEA because "the EEOC simply asserts its position in an amicus brief").

Many more examples could be provided, but the foregoing cases amply demonstrate that "the state of the law across the various circuits seems to be in disarray." Hubbard, *supra*, 80 U. Chi. L. Rev. at 466. Clarification of whether *Skidmore* deference is owed to an agency's statutory interpretation first advanced in litigation is greatly needed, particularly in light of the importance and recurring nature of this issue. One author has observed:

> [A]gencies can also improperly exploit amicus filings and manipulate judicial deference doctrine to pursue political goals, sometimes to the detriment of the statutory purpose with which Congress has entrusted them. 'Regulation by amicus' can, in some cases, undermine the democratic values of accountability, transparency, public participation, and reflective, reasoned decision making embodied in the Administrative Procedure Act.

Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223, 1225 (2013).

The DOL "has been especially active and masterful at using an amicus approach to mold policy for the statutes with which Congress entrusted it to enforce." *Id*. at 1227-28. In fact, "[m]any of the leading agency

deference cases . . . involved the DOL offering an interpretation of the FLSA – often for the first time – in an amicus brief rather than through rulemaking or a direct enforcement action." *Id*. at 1228 (citations omitted). This is problematic because "amicus briefs and other informal guidance also can be more easily, and stealthily, manipulated by regulated interests to achieve political aims than traditional administrative processes such as rulemaking." *Id*. at 1230. Of particular significance here is the author's observation that "amicus positions can flip-flop quickly with a change in administration." *Id.* at 1230-31. Indeed, it is unclear whether the statutory interpretation adopted by the DOL in its amicus briefs in this case still represent its view.

This case provides an excellent vehicle for this Court to resolve the conflicts and "disarray" in the circuits[11] and finally eliminate the longstanding doctrinal confusion as to a profoundly important issue: the level of deference to be accorded to statutory interpretations by agencies advanced for the first time in litigation. According deference to a statutory interpretation first advanced by an agency in an amicus brief invades the province of Congress and the courts to enact and construe statutes. Moreover, according deference under such circumstances is fundamentally inconsistent with *Bowen* and also with the notice-and-comment

[11] Hubbard, *supra*, 80 U. Chi. L. Rev. at 466.

rulemaking requirements of the Administrative Procedure Act. It also leads to the type of "unfair surprise" condemned by this Court in *Christopher*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. In the alternative, if this Court grants certiorari in either *Wynn Las Vegas, LLC v. Cesarz*, No. 16-163, or *National Restaurant Association v. Department of Labor*, No. 16-920, it should hold this Petition pending its decision in either of those cases.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4583

BOBBI-JO SMILEY; AMBER BLOW;
KELSEY TURNER,

Appellants

v.

E.I. DUPONT DE NEMOURS AND COMPANY;
ADECCO USA, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No.: 3-12-cv-02380)
District Judge: Honorable James M. Munley

Argued July 14, 2016

Before: VANASKIE, KRAUSE, and RENDELL,
Circuit Judges

(Opinion Filed: October 7, 2016)

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OPINION

RENDELL, *Circuit Judge*.

Plaintiffs Bobbi-Jo Smiley, Amber Blow, and Kelsey Turner appeal the District Court's grant of summary judgment in favor of Appellees E.I. DuPont De Nemours & Company and Adecco USA, Inc. (collectively, "DuPont") on their claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. and Pennsylvania's Wage Payment and Collection Law ("WPCL"), 43 P.S. § 260.1, *et seq*. Plaintiffs filed a putative collective action and class action against DuPont, seeking overtime compensation for time they spent donning and doffing their uniforms and protective gear and performing "shift relief" before and after their regularly-scheduled shifts. DuPont contended that it could offset compensation it gave Plaintiffs for meal breaks during their shift – for which DuPont was not required to provide compensation under the FLSA – against such required overtime.

The District Court agreed with DuPont. We conclude that the FLSA and applicable regulations, as well as our precedent in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005), compel the opposite result and will therefore reverse the District Court's grant of summary judgment and remand for further proceedings.

I.

Appellants worked twelve-hour shifts at DuPont's manufacturing plant in Towanda, Pennsylvania.[1] In addition to working their twelve-hour shifts, Plaintiffs had to be on-site before and after their shifts to "don and doff" uniforms and protective gear. DuPont also required them to participate in "shift relief," which involved employees from the outgoing shift sharing information about the status of work with incoming shift employees. The time spent donning, doffing, and providing shift relief varied, but ranged from approximately thirty to sixty minutes a day.

DuPont chose to compensate Plaintiffs for meal breaks[2] – despite no FLSA requirement to do so – during their twelve-hour shifts. The employee handbook set forth DuPont's company policy for compensating meal breaks, stating that "[e]mployees working in

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[1] DuPont directly employed Bobbi-Jo Smiley and Amber Blow. Adecco employed hourly contract employees at the Towanda plant, including Kelsey Turner.

[2] The parties agree that Plaintiffs' meal breaks were *bona fide* breaks.

areas requiring 24 hour per day staffing and [who] are required to make shift relief will be paid for their lunch time as part of their scheduled work shift." Employees who worked twelve-hour, four-shift schedules, as did Plaintiffs in this case, were entitled to one thirty minute paid lunch break per shift, in addition to two non-consecutive thirty minute breaks. The paid break time always exceeded the amount of time Plaintiffs spent donning and doffing and providing shift relief.

DuPont treated the compensation for meal breaks similarly to other types of compensation given to employees. It included the compensation given for paid meal breaks when it calculated employees' regular rate of pay, and meal break time was included in employees' paystubs as part of their total hours worked each week.

Plaintiffs brought this putative collective action and class action against DuPont, claiming that DuPont violated the FLSA and WPCL by requiring Plaintiffs to work before and after their twelve-hour shifts without paying them overtime, i.e., time and one-half, compensation. Plaintiffs sought to recover overtime compensation for time spent donning and doffing their uniforms and protective gear and performing shift relief. DuPont argued that their claims fail because it could offset the paid breaks DuPont voluntarily provided Plaintiffs against the unpaid donning and doffing and shift-relief time. Plaintiffs filed a motion to conditionally certify a FLSA collective action, which the District Court granted. Plaintiffs' counsel sent a notice of the FLSA class to the prospective class

members, and more than 160 workers opted in. Following the close of discovery, DuPont filed its motion for summary judgment.

The District Court granted DuPont's motion for summary judgment, holding that the FLSA allowed DuPont to use paid non-work time to offset the required overtime and dismissing the lawsuit entirely.[3] The District Court held that Plaintiffs were not owed any additional compensation because the amount of paid non-work time exceeded unpaid work time. Although it recognized that "[t]he FLSA does not expressly grant employers permission to use paid non-work time to offset unpaid work time," App. 12, the District Court nonetheless concluded offset was not specifically prohibited and therefore granted summary judgment in favor of DuPont.

Prior to oral argument, we invited the Department of Labor ("DOL") to file an amicus brief to assist us in understanding the intricacies of the important FLSA issue presented by this case. At our request, the DOL and DuPont each filed letter briefs further addressing how we should analyze the issue of offsetting paid non-work time against unpaid time worked under the FLSA. We are to give deference to the DOL's position and guidelines under *Skidmore v. Swift*, 323 U.S. 134 (1944). *See Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 186 (3d Cir. 2000) ("[I]nformal agency interpretations in 'opinion letters and similar documents'

[3] The District Court assumed, without deciding, that Plaintiffs' pre- and post-shift work was compensable under the FLSA.

are. . . . 'entitled to respect' under *Skidmore v. Swift* . . . but only to the extent they have the 'power to persuade.' ") (internal footnote omitted). Under *Skidmore*, "[t]he weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a). We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's interpretation of the FLSA and its grant of summary judgment. *Rosano v. Twp. of Teaneck*, 754 F.3d 177, 184 (3d Cir. 2014). Additionally, we note that "the FLSA must be construed liberally in favor of employees" and "exemptions should be construed narrowly, that is, against the employer." *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008).

III.

To provide context for the ultimate issue before us, we begin by reviewing the contours of the FLSA and the circumstances in which an employer may offset

compensation already given to an employee against required overtime.[4]

A. Overtime and Calculating Regular Rate Under the FLSA

We have noted that the FLSA has a "broad remedial purpose." *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007). "The central aim of the Act was to achieve . . . certain minimum labor standards." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The Act established baseline standards through "federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013).

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[4] Plaintiffs' amended complaint also alleges claims under the WPCL. The District Court below did not evaluate the WPCL claim, and the parties have not significantly briefed the WPCL claim on appeal. We have recognized that "[t]he FLSA and WPCL are parallel federal and state laws." *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308 (3d Cir. 2003). However, their parallel nature does not mean that they are identical, and material differences between the two claims could exist. *See, e.g.*, *id.* at 309-10 ("Even then, whether an implied contract may give rise to a claim under the WPCL has never been addressed by the Pennsylvania state courts and will require additional testimony and proof to substantiate beyond that required for the FLSA action."); *id.* at 309 n.13 ("There are some differences in the comprehensiveness of the federal and state remedies as well since the FLSA remedy is only for overtime pay and the WPCL remedy is broader."). As the FLSA claim was the thrust of both the District Court opinion and briefing before this Court, we express no view on the merits of the WPCL claim.

Among the bedrock principles of the FLSA is the requirement that employers pay employees for all hours worked. 29 C.F.R. § 778.223 ("Under the Act an employee must be compensated for all hours worked."); *see also Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 913 (9th Cir. 2004) ("One of the principal purposes of the FLSA is to ensure that employees are provided appropriate compensation for *all* hours worked.") (emphasis in original). Pursuant to the FLSA, employers cannot employ any employee "for a workweek longer than forty hours unless such employee receives compensation for his employment . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). In other words, employers are required to compensate employees for time in excess of forty hours with overtime compensation, which is paid at a rate of one and one-half times the employee's regular rate of pay.

The regular rate at which an employee is paid for "straight time" – or the first forty hours of work in a week – is integral to the issue of overtime payment under the FLSA. The regular rate is determined by way of a calculation. It is a "rate per hour" that "is determined by dividing [the] total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. Thus, the regular rate is a readily definable mathematical calculation that is explicitly controlled by the FLSA. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424-25

(1945) ("Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."). As the Supreme Court has explained, the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact," that "by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments." *Id.* at 424; 29 C.F.R. § 778.108 (citing *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948), and *Walling*, 325 U.S. at 419). There are two components to the calculation: (1) the dividend, which includes total remuneration minus statutory exclusions; and (2) the divisor, which includes all hours worked. *See* 29 C.F.R. § 778.109.

The FLSA characterizes the compensation that must be included in the dividend of the regular rate calculation broadly. It "include[s] *all* remuneration for employment paid to, or on behalf of, the employee" except the exclusions that are listed in section 207(e)(1)-(8). 29 U.S.C. § 207(e) (emphasis added). Further, "*[o]nly the statutory exclusions are authorized*. . . . [A]ll remuneration for employment paid which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is [to be] determined." 29 C.F.R. § 778.200(c) (emphasis added). We have recognized that "there are several exceptions to the otherwise all-inclusive rule set forth in section

207(e)," but the statutory exclusions "are narrowly construed, and the employer bears the burden of establishing [that] an exemption [applies]." *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456, 1459 (3d Cir. 1988) (internal citations omitted). Thus, although a handful of types of compensation are statutorily excluded from the definition of "all remuneration," all other compensation is included in the regular rate.

The divisor in the regular rate calculation is comprised of all "hours worked." 29 C.F.R. § 778.223. "Hours worked" includes all hours worked "under [an employee's] contract (express or implied) or under any applicable statute." 29 C.F.R. § 778.315. In general, "hours worked" includes time when an employee is required to be on duty, but it is not limited to "active productive labor" and may include circumstances that are not productive work time. *See* 29 C.F.R. § 778.223. Employers have a measure of flexibility in determining whether otherwise non-productive work time will be considered "hours worked" under the FLSA. For instance, meal periods – while not necessarily productive work time – may nevertheless be considered "hours worked" under the Act. *Id.* ("Some of the hours spent by employees . . . in meal periods . . . are regarded as working time and some are not. . . . To the extent that those hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as 'payments not for hours worked.' "). The decision to treat otherwise non-productive work time as "hours worked" is fact dependent.

Relevant here, the regulations provide that "[p]reliminary and postliminary activities and time spent in eating meals between working hours fall into this category [of work that an employer may compensate his employees for even though he is not obligated to do so under the FLSA.] The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." 29 C.F.R. § 778.320.

Thus, if the time at issue is considered hours worked under the Act, the corresponding compensation is included in the regular rate of pay. 29 C.F.R. § 778.223. Whether or not the time is considered hours worked under the Act, however, if the time is regarded by the parties as working time, "the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of 'payments made for occasional periods when no work is performed due to failure of the employer to provide sufficient work, or other similar cause' as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2)."[5] *Id.*

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[5] The regulations appear somewhat inconsistent as to whether payments made for meal breaks may be excluded from the regular rate pursuant to the exception listed at section 207(e)(2). One part of the regulations states that the exclusion described in section 207(e)(2) "deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular 'absences' such as lunch periods." 29 C.F.R. § 778.218. Another section, 29 C.F.R. § 778.320(b), makes clear that when there

B. Permissible Offsetting Under the FLSA

The FLSA explicitly states when an employer may use certain compensation already given to an employee as a credit against its overtime liability owed to that employee under the Act. Offsetting with already-disbursed compensation against incurred overtime is discussed in section 207(h), which states:

> (1) Except as provided in paragraph (2), sums excluded from the regular rate *pursuant to subsection (e) shall not be creditable* toward wages required under section 6 or overtime compensation required under this section.
>
> (2) Extra compensation paid as described in paragraphs *(5), (6), and (7) of subsection (e) of this section shall be creditable* toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h)(1)-(2) (emphasis added). As noted above, subsection (e) sets forth the exclusions from the regular rate. Thus, the FLSA explicitly permits offsetting against overtime only with certain compensation that is statutorily excluded from the regular rate, that

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is an agreement to treat compensation given for meal breaks not as "hours worked," the compensation is excluded from the regular rate under section 207(e)(2). Whether compensation for meal breaks is excludable from the regular rate pursuant to section 207(e)(2) is ultimately irrelevant in situations such as this one, where the employer has included it in the regular rate.

is, only three categories of compensation,[6] which are "extra compensation provided by a premium rate." *Id.* § 207(e)(5)-(7). Unlike the compensation addressed by the other exclusions, the three categories of excludable

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[6] The three portions of subsection (e) relevant to offsetting are:

> (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;
>
> (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
>
> (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek;. . . .

29 U.S.C. § 207(e)(5)-(7).

compensation that qualify for the offsetting provision at section 207(h)(2) are paid at a premium rate. Accordingly, we have previously characterized these three categories listed in section 207(e)(5)-(7) as "dollar-for-dollar credit[s] for premium pay" and limited permissible employer offsets to only those premium payments. *See Wheeler v. Hampton Twp.*, 399 F.3d 238, 245 (3d Cir. 2005). The regulations also support limiting employers' ability to offset overtime liability. Only extra compensation that falls within sections 207(e)(5), (6), and (7) may be creditable – "[n]o other types of remuneration for employment may be so credited." *See* 29 C.F.R. § 778.201(c).

IV.

Nothing in the FLSA authorizes the type of offsetting DuPont advances here, where an employer seeks to credit compensation that it *included* in calculating an employee's regular rate of pay against its overtime liability. Rather, the statute only provides for an offset of an employer's overtime liability using other compensation excluded from the regular rate pursuant to sections 207(e)(5)-(7) and paid to an employee at a premium rate.

In *Wheeler*, as here, the employer, Hampton Township, had voluntarily included non-work pay – which did not need to be included in the regular rate under the Act – in the regular rate calculation. It sought to offset compensation it was required to include in the

regular rate, but did not, with compensation it voluntarily chose to include in the regular rate. *Wheeler*, 399 F.3d at 243. We held that this was not permitted. We could not find any "textual reason to 'credit' the Township for including such pay in its regular rate." *Id.* at 244. We explained that "while § 207(e) protects the Township from having to include non-work pay in the regular rate, it does not authorize the Township now to require such augments to be stripped out, or to take a credit for including such augments." *Id.* In essence, at the point at which compensation is included in the regular rate (regardless of whether the Act required it be included), an employer may not use that compensation to offset other compensation owed under the Act. We determined that "[w]here a credit is allowed, the statute says so." *Id.* at 245. The Township was not entitled to a credit under the explicit offset contemplated by section 207(h), so we concluded that the FLSA did not permit the offset. *Id.* ("The Township seeks a credit for allegedly including non-work pay – presumably at a non-premium rate – in the CBA's basic annual salary. The FLSA does not provide for such an offset.").

We based our conclusion that offsetting was limited to the type addressed by section 207(h) on our recognition that Section 207(h) offsetting pertained only to "extra compensation," which is distinct from regular straight time pay. *Wheeler*, 399 F.3d at 245. Indeed, "such 'extra compensation' is a kind of overtime compensation, and thus need not be added to the regular rate. Likewise, such compensation may be credited against the Act's required overtime pay." *Id.*

Courts have widely recognized that an employer may offset its overtime liability with accumulated premium pay given to employees under sections 207(e)(5)-(7). *See, e.g.*, *Singer v. City of Waco*, 324 F.3d 813, 828 (5th Cir. 2003); *Kohlheim v. Glynn Cty*, 915 F.2d 1473, 1481 (11th Cir. 1990). The offset created by section 207(h) is logical because it authorizes employers to apply one type of premium pay to offset another, both of which are excluded from the regular rate.[7] *See* 29 U.S.C. § 207(e). It is undisputed that the compensation paid for meal breaks was included in plaintiffs' regular rate of pay, and thus could not qualify as "extra compensation." Accordingly, DuPont may not avail itself of the offset provisions explicitly allowed by § 207(h)(2).

DuPont argues that the FLSA's failure to expressly prohibit offsetting where the compensation used to offset is included in the regular rate indicates that offsetting is allowed. We disagree with DuPont's notion that the FLSA's silence indicates permission. While it is true that the statute does not explicitly set forth this prohibition, the policy rationales underlying the FLSA do not permit crediting compensation used in calculating an employee's regular rate of pay

[7] The "premium" nature of compensation referenced in § 207(h)(2) is important. Indeed, at least one court has not allowed offsetting unless the premium payment made was one and one-half times the regular rate of pay, or equivalent to the overtime rate. *See O'Brien v. Town of Agawam*, 508 F. Supp. 2d 142, 146 (D. Mass. 2007) ("Because the payments at issue are less than one-and-one-half times Plaintiffs' regular rate of pay, they cannot be used to offset the Town's overall liability, regardless of when or how these payments were made.").

because it would allow employers to double-count the compensation. The DOL convincingly urges this viewpoint. It observes that "[t]here is no authority for the proposition that compensation already paid for hours of work can be used as an offset and thereby be counted *a second time* as statutorily required compensation for other hours of work." DOL Letter Br. 6. Further, "there is no reason to distinguish between compensation for productive work time and compensation for bona fide meal breaks." *Id.* Compensation included in, and used in calculating, the regular rate of pay is reflective of the first forty hours worked. We agree with the reasoning of the DOL that allowing employers to then credit that compensation against overtime would necessarily shortchange employees.

The statutory scheme that limits crediting to the three types of "extra compensation" excluded from the regular rate against overtime obligations makes sense. "To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium – a pyramiding that Congress could not have intended." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948). Excludable premium compensation may offset other excludable premium compensation. To allow compensation included in the regular rate to offset premium-rate pay, however, would facilitate a "pyramiding" in the opposite direction by allowing employers to pay straight time and overtime together. This approach fundamentally conflicts with the FLSA's concern that employees be compensated for all hours worked. As the Ninth

Circuit observed in *Ballaris*, "it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA." *Ballaris*, 370 F.3d at 914.

While *Ballaris* is distinguishable because the employer in that case excluded meal break compensation when calculating the employee's regular rate and the parties agreed that the meal break period was excluded from each employee's hours worked, its reasoning nonetheless applies here. The Ninth Circuit concluded that "[c]rediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute. It is, instead, false and deceptive 'creative' bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA." 370 F.3d at 914 (internal footnote omitted). Here, permitting DuPont to use pay given for straight time – and included in the regular rate of pay – as an offset against overtime pay is precisely the type of "creative bookkeeping" that the Ninth Circuit cautioned against and the FLSA sought to eradicate.

While the District Court cited *Wheeler* in passing, it did not apply our holding but, instead, looked at the two circumstances that the statute expressly states preclude offsetting by an employer:

> First, employers cannot use paid non-work time to offset unpaid work time when the paid non-work time is excluded from the regular

> rate of pay. Second, if the parties agree to treat paid non-work time as "hours worked," and this time is included in the regular rate of pay, the employer cannot offset.

App. 12. The District Court concluded that because neither of these circumstances was present in this case, the FLSA does not expressly prohibit an offset. It recited the prohibition set forth in 29 U.S.C. § 207(h)(1), which generally bars employers from offsetting incurred overtime liability with sums excluded from the regular rate of pay. The District Court observed that "defendants cannot offset if the FLSA expressly excludes plaintiffs meal periods – non-work time – from plaintiffs' regular rate of pay." App. 12-13. After reviewing section 207(e)'s list of mandatory exclusions from the regular rate of pay, it concluded that the one category of exclusions that was arguably implicated by the facts, 29 U.S.C. § 207(e)(2), was not applicable because the meal periods were not the type of absences covered by the exclusion. "Accordingly, section 207(e)(2) does not prohibit defendants from including plaintiffs' meal period time in their regular rate of pay, rendering section 207(h)'s prohibition against an offset inapplicable." App. 14. Thus, like DuPont, the District Court focused on the lack of express prohibition. In light of our holding in *Wheeler* that offsetting is limited to circumstances where an employer is paying "extra compensation" at a premium rate, we reject the District Court's reasoning that the absence of a direct prohibition controls the analysis of the offset issue.

Moreover, we do not accept the significance that the District Court and DuPont place on two lingering issues: first, whether the parties had an agreement to treat the breaks in question as hours worked, and second, whether the FLSA required DuPont to compensate the employees for the breaks in question. With respect to the former, both the Ninth Circuit in *Ballaris* and the FLSA's implementing regulations advance the notion that employers may not offset if there is an agreement to treat otherwise uncompensable time as "hours worked," and the compensation at issue is included in the regular rate. But inclusion in the regular rate is sufficient for our purposes, as noted above, so the existence of an agreement is beside the point.[8] As to the latter, 29 C.F.R § 785.19 simply states that employers are not required by the FLSA to treat meal breaks as hours worked, but it does not prohibit them from doing so. Indeed, section 778.320 expressly contemplates that an employer may agree to treat nonwork time, including meal breaks, as compensable hours worked.

The District Court relied on the Seventh Circuit's opinion in *Barefield v. Village of Winnetka*, 81 F.3d 704

[8] Ultimately, the District Court rejected Plaintiffs' argument that there was an agreement to treat the meal periods as hours worked, stating that DuPont's decision to compensate for meal breaks did not convert them into hours worked, the policy did not create a contract deeming the time hours worked, and the meal periods were *bona fide*. "Ergo, the FLSA does not expressly preclude defendants from offsetting plaintiffs[']unpaid donning and doffing and shift relief time with the paid meal period time." App. 25.

(7th Cir. 1996), and the Eleventh Circuit's opinion in *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994), in concluding that DuPont could offset using meal break compensation. The two opinions did not analyze the offset issue in detail, but instead focused on compensability. The courts in both *Barefield* and *Avery* presumed an offset was permissible and focused on the fact that the FLSA did not require employers to compensate employees for the *bona fide* meal break periods at issue. Notably, neither opinion addresses the most relevant provision in the FLSA on the issue of offsetting – 29 U.S.C. 207(h). Given our holding in *Wheeler*, limiting offsetting to "extra compensation" not included in the regular rate, it is irrelevant whether the breaks were compensable.

V.

For the reasons discussed above, we will reverse the District Court's decision of November 5, 2014, and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4583

BOBBI-JO SMILEY; AMBER BLOW;
KELSEY TURNER,

Appellants

v.

E.I. DUPONT DE NEMOURS AND COMPANY;
ADECCO USA, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No.: 3-12-cv-02380)
District Judge: Honorable James M. Munley

Argued July 14, 2016

Before: VANASKIE, KRAUSE, and RENDELL,
Circuit Judges

JUDGMENT

(Filed Oct. 7, 2016)

This case came on to be heard on the record before the United States District Court for the Middle District of Pennsylvania and was argued on July 14, 2016.

On consideration whereof, is it now here,

ORDERED and ADJUDGED by this court that the Judgment of the District Court entered November 5, 2014, be and the same is hereby REVERSED and REMANDED for further proceedings.

Costs taxed against appellees.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Dated: October 7, 2016

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

BOBBI-JO SMILEY, AMBER BLOW and KELSEY TURNER, Plaintiffs	:	**No. 3:12cv2380**
	:	**(Judge Munley)**
v.	:	
E.I. DU PONT DE NEMOURS AND COMPANY and ADECCO USA, INC., Defendants.	:	

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MEMORANDUM

Before the court is defendants' motion for summary judgment. (Doc. 112). This motion is fully briefed and ripe for disposition.

BACKGROUND

The instant federal and state wage and hour action arose from Plaintiffs Bobbi-Jo Smiley, Amber Blow and Kelsey Turner's (collectively "plaintiffs") employment with E.I. du Pont de Nemours and Company and Adecco U.S.A., Inc. (collectively "defendants").

Defendants employ hundreds of hourly workers at DuPont's manufacturing plant in Towanda, Pennsylvania (hereinafter "Towanda Plant"). (Doc. 112-6, Defs.' Statement of Undisputed Facts (hereinafter "SOF") ¶ 1).[1] Plaintiffs were assigned to work twelve-hour shifts from 6:30 a.m./p.m. to 6:30 p.m./a.m. (*Id.* ¶ 2). During their twelve-hour shift, defendants compensated plaintiffs for three, thirty-minute meal periods. (*Id.* ¶ 4; Doc. 112-3, Ex. E, Break/Lunch Period Policy revised 11/09/2001 (hereinafter "Break Policy") at 1; Doc. 112, Ex. A, Dep. of Kelsey Turner (hereinafter "Turner Dep.") at 56; Ex. B, Dep. of Bobbi-Jo Smiley (hereinafter "Smiley Dep.") at 74-76, 84-86, 91-92; Ex. C, Dep. of Amber Blow (hereinafter "Blow Dep.") at 72-73).

Plaintiffs claim that defendants required them to work, without pay, before and after their twelve-hour shift. First, defendants directed plaintiffs to be in their areas before their regularly-scheduled start time to provide "shift relief."[2] (SOF ¶ 3). Second, defendants required plaintiffs to be present at the facility before and after their scheduled shifts to put on and take off (don and doff) uniforms and protective gear. (*Id.* ¶ 4).

Accordingly, plaintiffs filed the instant lawsuit on November 28, 2012, and an Amended Complaint on

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[1] Adecco employs hourly contract employees at DuPont's Towanda Plant. (SOF at 1).

[2] "Shift relief" consists of the outgoing shift sharing information with the oncoming shift about the status of their work, before the regularly-scheduled start time of the oncoming shift. (SOF ¶ 3).

March 15, 2013. In their Amended Complaint, plaintiffs allege claims under the Fair Labor Standards Act (hereinafter "FLSA") and Pennsylvania's Wage Payment and Collection Law (hereinafter "WPCL"). Specifically, plaintiffs seek to recover overtime compensation for donning and doffing their uniforms and protective gear and performing shift relief before and after their regularly-scheduled shifts.

At the conclusion of discovery, defendants filed a joint motion for summary judgment. (Doc. 112). The parties then briefed the issues bringing the case to its present posture.

JURISDICTION

The instant suit is brought under the FLSA, which provides that suits "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. § 216(b). Accordingly, the court has federal question jurisdiction. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The court has supplemental jurisdiction over plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

LEGAL STANDARD

Granting summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Knabe v. Boury*, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(c)). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate

specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories demonstrating that there is a genuine issue for trial. *Id.* at 324.

DISCUSSION

Defendants' motion for summary judgment presents three issues: First, defendants argue that the FLSA allows them to use paid non-work time to offset unpaid work time. Second, plaintiffs are not owed any overtime compensation because the amount of paid non-work time exceeds unpaid work time. Third, defendants ability to offset does not expose them to additional liability under the FLSA. The court will addresses [sic] these issues *in seriatim.*

I. Offset

Defendants contend that the FLSA allows them to use paid nonwork time to offset unpaid work time. Specifically, defendants paid plaintiffs for three thirty-minute *bona fide* meal periods, which are not considered work time under the FLSA. 29 C.F.R. § 785.19. Defendants assert that this paid non-work meal period time can be used to offset plaintiffs' unpaid donning and doffing and shift relief time. Plaintiffs argue that offsetting their donning and doffing and shift relief time with the paid meal periods misallocates agreed upon wages in contravention of the FLSA. As this issue turns on interpreting the FLSA, the court begins by laying out the controlling provisions of the statute.

A. The FLSA

The Supreme Court has stated that "[t]he central aim of the [FLSA] was to achieve . . . certain minimum labor standards." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). To accomplish this goal, "[t]he FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract." *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523, 1527 (2013).[3]

Under the FLSA, covered employers may not employ any employee "for a workweek longer than forty hours unless such employee receives compensation for his employment . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).[4] The FLSA "provides that 'employee' generally means 'any individual employed by an employer,' and, in turn, provides that to 'employ' is 'to suffer or permit to work.'" *Sandifer v. U.S. Steel*

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[3] The provisions of the FLSA requiring an employer to pay its employees a specified minimum wage for work performed, 29 U.S.C. § 206, are not at issue in the instant case.

[4] In full, section 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

Corp., ___ U.S. ___, 134 S. Ct. 870, 875 (2014) (quoting 29 U.S.C. §§ 203(e)(1) and 203(g)).

Additionally, "the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee[.]" 29 U.S.C. § 207(e) (hereinafter "section 207(e)"). The regular rate, however, "shall not be deemed to include . . . payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause [.]" 29 U.S.C. § 207(e)(2). The Third Circuit Court of Appeals has held that the phrase "shall not be deemed" means "that employees seeking unpaid overtime may not under the FLSA require that non-work pay be added to the regular rate." *Wheeler v. Hampton Twp.*, 399 F.3d 238, 243-44 (3d Cir. 2005).

The FLSA does not expressly grant employers permission to use paid non-work time to offset unpaid work time. Rather, the statute and interpreting cases preclude offsetting in two ways. First, employers cannot use paid non-work time to offset unpaid work time when the paid non-work time is excluded from the regular rate of pay. Second, if the parties agree to treat paid non-work time as "hours worked," and this time is included in the regular rate of pay, the employer cannot offset. As such, defendants cannot offset if either of the above apply.

1. Statute precludes offset

The FLSA expressly precludes an employer from using paid nonwork time to offset unpaid work time when the paid non-work time is excluded from the regular rate of pay. The FLSA provides that:

> (1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward . . . overtime compensation required under this section.
>
> (2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h). Thus, defendants cannot offset if the FLSA expressly excludes plaintiffs paid meal periods-non-work time-from plaintiffs' regular rate of pay.

The FLSA excludes specific payments from an employee's regular rate of pay. "Where payment is ostensibly made as compensation for . . . hours . . . not regarded as working time under the [FLSA], the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion. . . ." 29 C.F.R. § 778.223. Section 207(e) lists several categories of compensation which are excluded from the regular rate of pay. Here, the only category arguably implicated is found in section 207(e)(2). Section 207(e)(2) excludes from the regular rate any "payments made for occasional periods when no work is performed due to

vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause. . . ." 29 U.S.C. § 207(e)(2).[5]

The federal regulations pertaining to this issue, however, clearly establish that the payments for plaintiffs' regular *bona fide* meal periods do not fall under the section 207(e)(2) exclusion. The exclusion "deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular 'absences' such as lunch periods." 29 C.F.R. § 778.218(b). "The term 'other similar cause' refers to payments made for periods . . . [such as] absences due to jury service, reporting to a draft board, attending a funeral," and the like. 29 C.F.R. § 778 .218(d). "Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the 'other

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[5] In full, section 207(e)(2) states:

> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –
>
> > (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.]
>
> 29 U.S.C. § 207(e)(2).

similar cause' category." *Id.* Accordingly, section 207(e)(2) does not prohibit defendants from including plaintiffs' meal period time in their regular rate of pay, rendering section 207(h)'s prohibition against offset inapplicable.

2. Agreement precludes offset

Second, if the parties agree to treat paid non-work time as "hours worked," and this time is included in the regular rate of pay, the employer cannot offset. The Ninth Circuit Court of Appeals has issued the lead opinion on this issue. In *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), the Ninth Circuit held that the FLSA requires an employer to pay an employee for all **agreed-upon compensation.**[6] "Even without section 7(h), we emphasize that it would undermine the purpose of the FLSA if an employer could use **agreed-upon compensation** for non-work time

[6] Initially, the Ninth Circuit noted that the parties agreed to exclude the meal period payments from the employee's regular rate of pay under section 207(e)(2). *Ballaris* 370 F.3d at 909. Thus, the *Ballaris* court held, as discussed above, that section 207(h) precluded using the meal period payments as a credit. *Id.* at 913. The instant case is distinguishable because, unlike the parties in *Ballaris*, the undisputed evidence establishes that the defendants **included** the meal break payments in plaintiffs' regular rate of pay. (Doc. 143, N.T. 8/28/14 at 9, 16; SOF ¶ 4; Doc. 121-1, Ex. 12, Dep. of Gregory Allen Saufley (hereinafter "Saufley Dep.") at 17-21; (Doc. 121-1, Ex. 13, Dep. of Annette Phifer (hereinafter "Phifer Dep.") at 81-84; Doc. 119-2, Ex. 9 Bobbi-Jo Smiley pay stub at 12-13; Doc. 119-2, Ex. 10, Amber Blow pay stub at 15-16; Doc. 119-2, Ex. 11, Kelsey Turner pay stub at 18-19).

(or work time) as a credit so as to avoid paying compensation required by the FLSA." *Ballaris*, 370 F.3d at 914. (emphasis added).

The implementing regulations support this conclusion. The regulations establish that "time spent in eating meals between working hours" may or may not constitute "hours worked," for purposes of determining an employee's work week, "depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." 29 C.F.R. § 778.320. Absent such agreement, *bona fide* meal periods are not "hours worked" under the FLSA. *See* 29 C.F.R. § 785.19 ("*Bona fide* meal periods are not work time.").

The FLSA does not define the term "work." *Sandifer*, 134 S. Ct. at 875; 29 U.S.C. § 203 ("Definitions"). In 1944, the Supreme Court defined "work" as meaning "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). The same year, the Supreme Court clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).[7] "An employer, if he chooses, may

[7] In response to the Supreme Court's expansive definition of work, Congress enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62. The Portal-to-Portal Act, however, did not change *Tennessee Coal* and *Armour*'s definitions of work. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005). Rather, the Portal-to-Portal Act provided

hire a man to do nothing, or to do nothing but wait for something to happen." *Id.*

In the instant case, plaintiffs first contend that the parties agreed to treat their meal periods as "hours worked" because the meal periods were paid. If defendants had intended to exclude the meal period time from "hours worked," defendants would have a policy indicating such or employee's time cards would indicate that the meal period hours are not "hours worked." The court disagrees.

Plaintiffs' conclusion may have been appropriate under the version of 29 C.F.R. § 778.320 (hereinafter "section 778.320")) that was in effect prior to January 23, 1981. As explained in a Federal Register notice serving as a preamble to the regulatory amendments that became effective on that date, "[o]ld section 778.320 very strongly implied that payment for time spent in the specified activities would almost invariably convert them into hours worked." 46 FED. REG. 7308 (Jan. 23, 1981).

The more recent version of section 778.320, however, was expressly designed "to **avoid** the implication that payment for time devoted to the specified activities converts them, virtually without exception, into hours worked." *Id.* (emphasis added). Instead, the new section 778.320 expressly states that whether or not

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an exception for preliminary and postliminary activities. *Id.* at 26-30. Because plaintiffs' meal periods are not preliminary or postliminary activities, the Portal-to-Portal Act does not apply to whether plaintiffs' meal periods are "hours worked."

payment converts the activities into hours worked depends on "whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." 29 C.F.R. 778.320. Therefore, plaintiffs' meal period time is not considered "hours worked" simply because it is paid. Rather, the court must determine whether the parties have **agreed** to treat this time as "hours worked." After careful review, the court is aware of no agreement in this case.

While no court within the Third Circuit has directly addressed this issue, district courts outside of the Third Circuit Court of Appeals have looked to the parties' collective bargaining agreement to ascertain whether the parties agreed to treat meal period time as "hours worked." *See Scott v. N.Y.C.*, 592 F. Supp. 2d 386, 408 (S.D.N.Y. 2008) (finding that the collective bargaining agreement's silence on the issue of whether meal periods were "hours worked" evinces an agreement to treat meal periods as "hours worked" because "it is counterintuitive to presume that the repeated and contentious contract negotiations between the NYPD and collective bargaining agents failed to take into account this policy decision [in the parties' collective bargaining agreement]."); *O'Brien v. Town of Agawam*, 440 F. Supp. 2d 3, 12-13 (D. Mass. 2006) (holding that the parties' collective bargaining agreement explicitly defined "hours of work" to include time allegedly spent on meal breaks); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 145-46 (D. Mass. 2003) (stating that the analysis of whether lunch periods are considered "hours worked" turns on "whether the parties

explicitly acknowledged in the [collective bargaining agreement] that the plaintiffs were being compensated for 'hours worked,' not whether the lunch payment is compensation."); *O'Hara v. Menino*, 253 F. Supp. 2d 147, 157-59 (D. Mass. 2003) (noting that the meal period time was not "hours worked" because the collective bargaining agreement did not expressly require that plaintiffs' meal periods be treated as "hours worked.").

The undisputed evidence establishes that plaintiffs are non-union employees. (Doc. 143, N.T. 8/28/14 at 18). Thus, plaintiffs do not have a collective bargaining agreement defining whether their meal periods are "hours worked." Instead, plaintiffs' assert that defendants' meal period policy found in the employee handbook is the agreement, which converted plaintiffs' meal period time into "hours worked."[8]

The Third Circuit Court of Appeals has recognized that in Pennsylvania, an employee handbook "only forms the basis of an implied contract if the employee shows that the employer affirmatively intended that it do so." *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 115 (3d Cir. 2003) (quoting *Jacques v. AKSO Int'l Salt, Inc.*, 619 A.2d 748, 753 (Pa. Super. Ct. 1993)). Similarly, "'[a] written personnel policy may serve as the basis for a cause of action for breach of a provision contained within it if under all of the circumstances, the parties

[8] Defendants' meal period policy states that twelve-hour shift employees required to make shift relief "will be paid for their lunch time as part of their scheduled work shift." (Doc. 112-3, Break Policy at 27-28).

manifest an intent that it become a legally binding contract.'" *Henderson v. Merck & Co.*, 998 F. Supp. 532, 538 (E.D. Pa. 1998) (quoting *Curran v. Children's Serv. Ctr.*, 578 A.2d 8, 10 (Pa. Super. Ct. 1990)).

In the instant matter, plaintiffs have failed to establish that defendants affirmatively indicated that their meal period policy would be construed as a contract or agreement to convert the meal period time into "hours worked." Plaintiffs argue that the meal period policy, in addition to the fact that defendants did not have a separate offset policy, created a contract, which included the paid meal periods as "hours worked." (Saufley Dep. at 20; Phifer Dep. at 81). Defendants' failure to have a separate offset policy, however, is not tantamount to an affirmative and unequivocal intent to be legally bound by the provisions in their handbook or meal period policy. As such, the defendants' meal period policy is not an agreement, which converted plaintiffs' paid meal period time into "hours worked" as a matter of law.

Finally, a review of all the pertinent facts further demonstrates that the parties have not agreed to treat plaintiffs' meal period time as "hours worked." Specifically, plaintiffs and defendants **agree** that the meal periods are *bona fide*, and therefore, not "hours worked" under the FLSA's meal period regulation, 29 C.F.R. § 785.19. (Doc. 143, N.T. 8/28/14 at 3). Moreover, plaintiffs have failed to establish that the time spent

during their meal periods predominantly benefitted defendants.[9]

Pursuant to the predominant benefit test, "a meal period . . . is compensable if an employee is perform[ing] activities predominantly for the benefit of the employer." *Lugo v. Farmer's Pride Inc.*, 802 F. Supp. 2d 598, 613 (E.D. Pa. 2011) (internal quotation marks omitted). In the instant case, plaintiffs have failed to establish that they performed activities during their meal periods that predominantly benefitted defendants. Plaintiffs were not assigned job-related duties to perform during their meal periods. Plaintiffs did not have to attend mandatory meetings or trainings over their meal periods. Plaintiffs' meal periods were rarely interrupted. In fact, plaintiffs were only called back early once or twice a year. (SOF ¶ 15, 40). Accordingly, a review of all pertinent facts establishes that plaintiffs' meal periods did not predominantly

[9] While the Third Circuit Court of Appeals has not yet identified the test to determine whether an employee's meal period is *bona fide*, and therefore not "hours worked" under the FLSA, district courts within this circuit have determined that the "predominantly for the benefit of the employer" test is consistent with the traditional principles underlying the FLSA. *See Lugo v. Farmer's Pride Inc.*, 802 F. Supp. 2d 598, 613 (E.D. Pa. 2011) (citing cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuit Courts of Appeals holding that the appropriate test for determining whether meal periods are compensable and therefore hours worked, is whether the meal period is used predominantly for the benefit of the employer or for the benefit of the employee); *Babcock v. Butler Cnty.*, No. 12-CV-394, 2014 WL 688122, at *5 (W.D. Pa. Feb. 21, 2014) (same); *Aboud v. City of Wildwood*, Civ. No. 12-7195, 2013 WL 2156248, at *6 (D.N.J. May 17, 2013) (same).

benefit defendants, and therefore, are not "hours worked" under the FLSA.

Plaintiffs rely on a recent case from the Southern District of Indiana to enhance their contention that the plaintiffs and defendants had an express or implied agreement to treat their meal period time as "hours worked." In *Jones v. C & D Tech., Inc.*, unionized employees claimed the FLSA required their employer to treat their twenty-minute lunch break as "hours worked." 8 F. Supp. 3d 1054, 1066-67 (S.D. Ind. 2014). The court agreed for two reasons.

First, the court determined that the twenty-minute lunch breaks were actually rest, not meal periods. *Id.* at 1067. Thus, the twenty minutes were "hours worked" under the FLSA's rest period regulation, not the meal period regulation. *See* 29 C.F.R. § 785.18 ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. . . . They must be counted as hours worked."). Second, and relevant to the instant case, the court noted that the parties **had an agreement** to treat the lunch breaks as "hours worked." *Jones*, 8 F. Supp. 3d at 1067-69. Specifically, the plaintiffs, members of a labor union, had an express agreement stating that the twenty-minute lunch break would be "hours worked." *Id.* at 1068.

Jones is distinguishable for two reasons. First, in the instant case, the parties agree that plaintiffs' three thirty-minute breaks are meal periods, not rest periods. (Doc. 143, N.T. 8/28/14 at 3). Therefore, the FLSA's

rest period regulation, which requires that periods of short duration are "hours worked," does not apply. Second, plaintiffs are non-unionized employees and do not have a collective bargaining agreement providing for the inclusion of their meal periods as "hours worked." Accordingly, *Jones* fails to support plaintiffs' assertion that the parties had an express or implied agreement to convert plaintiffs' paid non-work meal period time into "hours worked."

In sum, the FLSA's prohibitions against offsetting are inapplicable to the instant case. First, defendants included plaintiffs' non-work meal period pay in plaintiffs' regular rate of pay because section 207(e)(2) does not expressly exclude plaintiffs' meal period pay from the regular rate. As such, section 207(h)'s prohibition against using paid non-work time to offset unpaid work time does not apply because defendants included the non-work time pay in plaintiff's regular rate of pay.

Second, plaintiffs have failed to establish that the parties had an agreement to treat the paid non-work time meal periods as "hours worked." Defendants did not convert plaintiffs meal period time into "hours worked" merely because this time was paid. Further, plaintiffs do not have a collective bargaining agreement providing that the meal period time is "hours worked." Moreover, defendants' meal period policy did not create a contract, express or implied, which converted plaintiffs' meal period time into "hours worked." Finally, plaintiffs agree, and their conduct establishes, that their meal periods were *bona fide* and not spent for the predominant benefit [of] their employer. Ergo, the

FLSA does not expressly preclude defendants from offsetting plaintiffs unpaid donning and doffing and shift relief time with the paid meal period time.

B. Cases

Having determined that the FLSA does not expressly prevent defendants from offsetting, the court next looks to cases addressing defendants' offset argument. The court can find, and the parties have identified, no precedent binding on this court regarding whether defendants may offset plaintiffs' donning, doffing and shift relief activities with paid, *bona fide*, meal periods. A review of cases from the Courts of Appeals that have addressed this argument, however, allow for an offset.

The Seventh Circuit Court of Appeals addressed the issue of offsetting paid meal periods against other compensable time in *Barefield v. Village of Winnetka*, 81 F.3d 704, 707 (7th Cir. 1996). In *Barefield*, thirty-five (35) current and former police officers and civilian dispatchers filed an FLSA action seeking overtime pay for time spent in roll call prior to their shifts. *Id.* at 707-09.

The district court determined at summary judgment that the FLSA did not require defendant to pay plaintiffs overtime for 15-minute roll call periods prior to beginning their shifts and the Seventh Circuit affirmed. *Id.* at 711. To reach this determination, the Seventh Circuit held that plaintiffs' meal periods were *bona fide* because plaintiffs did not spend that time

predominantly for the benefit of the defendant. *Id.* at 710-11. The only restriction on plaintiffs' meal period "was [plaintiffs] had to remain in the police department building or in radio contact with the building in case of an emergency." *Id.* at 710. As such, "the meal periods are not compensable [hours worked] under the FLSA and [defendant] may properly offset the meal break against the compensable roll call time worked by plaintiffs." *Id.*

Similarly, the Eleventh Circuit held in *Avery v. City of Talladega*, that an employer could offset a paid *bona fide* meal period against other compensable time. 24 F.3d 1337, 1344-47 (11th Cir. 1994). The Eleventh Circuit first applied the predominant benefit test and determined that "[n]o reasonable jury could find that the plaintiffs' meal periods generally are spent predominantly for the benefit of the [defendant]." *Id.* at 1347. Thus, the Seventh Circuit affirmed the district court's determination at summary judgment that defendant's decision to offset compensable pre-shift and post-shift work time did not violate the FLSA. *Id.*

Here, the parties agree that the meal periods are *bona fide*, and therefore, not work time under the FLSA's meal period regulation, 29 C.F.R. § 785.19. (Doc. 143, N.T. 8/28/14 at 3). Further, the parties agree that defendants included the meal period payments in plaintiffs' regular rate of pay. (Doc. 143, N.T. 8/28/14 at 9, 16; SOF ¶ 4; Saufley Dep. at 17-21; Phifer Dep. at 81-84; Doc. 119-2, Ex. 9 Bobbi-Jo Smiley pay stub at 12-13; Doc. 119-2, Ex. 10, Amber Blow pay stub at 15-16; Doc. 119-2, Ex. 11, Kelsey Turner pay stub at

18-19). Moreover, as previously discussed, the FLSA does not expressly preclude defendants from offsetting plaintiffs unpaid donning and doffing and shift relief work time with the paid meal period non-work time. Therefore, the court will follow the decisions of the Seventh and Eleventh Circuits and find that defendants may offset plaintiffs' unpaid donning and doffing and shift relief time with their paid meal period time. Accordingly, the court will grant defendants' motion for summary judgment on the offset issue.

II. Plaintiffs Are Not Owed Any Additional Compensation[10]

The court next addresses whether defendants owe plaintiffs any additional money after offsetting the paid meal periods against unpaid donning, doffing and shift relief. In the instant case, the undisputed record establishes that defendants paid plaintiffs for twelve hours each shift at their regular (or overtime) rate of pay, and plaintiffs worked fewer than twelve hours. Specifically, plaintiffs' deposition testimony establishes that the time spent donning and doffing and performing shift relief is less than the amount of time plaintiffs spent on paid meal periods. (Turner Dep. at 56, 68, 69-71, 81, 85-86, 91; Smiley Dep. at 64-65,

[10] Both parties agree that shift relief is a compensable activity. The parties, however, dispute whether donning and doffing personal protective equipment is a compensable activity. The court assumes, without deciding, that plaintiffs' donning and doffing of personal protective equipment are compensable activities under the FLSA.

71-76, 82-86, 91-92; Blow Dep. at 29, 55-56, 64-67, 72-73; Bashore Decl. at ¶¶ 5-7).

For example, Plaintiff Turner testified that when she worked in building B10, the time she spent performing compensable activities outside her regularly-scheduled shift added up to about twenty-eight minutes.[11] (Turner Dep. at 68-71, 91, 85-86). This is sixty-two fewer minutes than the amount of paid meal periods each shift. (*Id.* at 56). Similarly, when Plaintiff Turner worked in Building 41, donning and doffing and shift relief took approximately twenty-five minutes – sixty-five fewer minutes than the amount of paid meal periods during her shift. (*Id.* at 69, 84).[12]

While working in the 9 Slitter building, Plaintiff Smiley spent twenty-five minutes donning and doffing her personal protective equipment and performing shift relief. (Smiley Dep. at 64-65, 70-76). Plaintiff Smiley always received at least one thirty-minute paid meal period. (SOF ¶ 25). Thus, the maximum unpaid compensable time, twenty-five minutes, is less than the paid non-compensable time – thirty minutes. Likewise, when Plaintiff Smiley worked in B10, she spent

[11] It took Plaintiff Turner about five minutes to put on her uniform and safety shoes, retrieve her safety glasses, and walk to the B10 area. (SOF ¶ 9). At the end of the shift, the same process in reverse took her eight minutes. (*Id.* ¶ 11). Generally, shift relief lasted five to fifteen minutes. (*Id.* ¶ 13).

[12] Plaintiff Turner testified that she spent thirty seconds in the air shower and spent around five minutes getting out of the air shower and changing out of her clean room uniform. (SOF ¶ 12). Generally, the maximum time for shift relief was fifteen minutes. (*Id.* ¶ 13).

thirty-five minutes donning and doffing her uniform and conducting shift relief. (Smiley Dep. at 78, 80-83, 122). She received at least sixty minutes of paid meal periods when working in this area. (*Id.* at 84-86, 91-92). Therefore, the paid meal periods are at least twenty-five minutes more than the time she spent performing unpaid offline activities.

Finally, Plaintiff Blow has been completely compensated for the time she spent working in building B10. Plaintiff Blow received three thirty-five-minute paid meal period breaks. (SOF ¶ 39). Plaintiff Blow spent fifty-five minutes donning and doffing her personal protective equipment and performing shift relief.[13] (*Id.* ¶¶ 33-38). This time for donning and doffing is fifty fewer minutes than the amount of time that Plaintiff Blow spent on paid meal periods. As such, Plaintiff Blow is not entitled to any additional compensation.

Viewing the evidence in the light most favorable to plaintiffs, the undisputed material facts establish that defendants paid plaintiffs for twelve hours each shift. The plaintiffs in all cases worked fewer than twelve hours. Thus, the defendants can completely offset the plaintiffs' unpaid donning and doffing and shift relief activities with plaintiffs' paid meal periods.

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[13] Plaintiff Blow got in uniform no later than 6:10 and could be at the floor for shift relief at 6:15. (SOF ¶ 35). Rarely, she could spend thirty minutes beyond her regularly-scheduled shift performing shift relief. (*Id.* ¶ 30).

Accordingly, the court will grant defendants' motion for summary judgment.

III. Post Lawsuit Reassignment of Wages

Finally, plaintiffs argue that defendants are liable under the FLSA for unlawful post-lawsuit reassignment of wages. Plaintiffs assert that a successful offsetting defense inevitably leads to defendants' alternative liability under the FLSA for unpaid wages, including overtime, owed to plaintiffs. The alternative claims are premised upon defendants' post-litigation decision to re-cast prior wage payments actually made to plaintiffs for meal periods as, instead, mere down payments which the defendants now hope to reallocate in order to satisfy their FLSA obligations to pay plaintiffs and the class members for time spent donning and doffing and performing shift relief.

In response, defendants argue that plaintiffs alternative claims are simply an argument in response to defendants' offset theory. They assert that plaintiffs have been paid for all "hours worked" under the FLSA.

The court will find that defendants are not liable under the FLSA for any post-lawsuit reassignment of wages. Because defendants are allowed to offset the unpaid donning and doffing and shift relief time with the paid meal period time, they have compensated plaintiffs for all "hours worked." The plaintiffs were paid for twelve-hours each shift even though in all cases plaintiffs worked fewer than twelve hours.

CONCLUSION

For the reasons stated above, the court will grant defendants' joint motion for summary judgment. First, the FLSA allows defendants to use paid non-work time to offset unpaid work time. Second, plaintiffs are not owed any additional or overtime compensation because the amount of paid non-work time exceeds paid work time. Finally, defendants ability to offset does not expose them to additional liability under the FLSA. An appropriate order follows.

Date: 11/05/14 **s/ James M. Munley**
JUDGE JAMES M. MUNLEY
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOBBI-JO SMILEY, AMBER BLOW and KELSEY TURNER, **Plaintiffs**	:	**No. 3:12cv2380**
v.	:	**(Judge Munley)**
E.I. DU PONT DE NEMOURS AND COMPANY and ADECCO USA, INC., **Defendants**	:	

: :

ORDER

AND NOW, to wit, this 5th day of November 2014, Defendant E.I. DuPont De Nemours & Company and Defendant Adecco USA, Inc.'s motion for summary judgment (Doc. 112) is **GRANTED**. The Clerk of Court is directed to enter judgment in favor of defendants.

It is further **ORDERED** that Defendant E.I. DuPont De Nemours & Company and Defendant Adecco USA, Inc.'s motions to decertify the FLSA collective action (Docs. 113 & 114), and Plaintiffs Bobbi-Jo Smiley, Amber Blow and Kelsey Turner's motion for class certification pursuant to Pennsylvania's wage

payment and collection law (Doc. 126) are **DENIED** as **MOOT**.

BY THE COURT:

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF PENNSYLVANIA

BOBBI-JO SMILEY,
AMBER BLOW,
and KELSEY TURNER,

Plaintiffs

v.

CIVIL ACTION NO.:
3:12cv2380

E.I. DU PONT DE
NEMOURS AND COMPANY,
and ADECCO USA, INC.,

Defendants

JUDGMENT IN A CIVIL ACTION

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict on _____

[X] Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

SUMMARY JUDGMENT be and is hereby entered in favor of the Defendants, *E.I. Du Pont De Nemours and Company*, and *Adecco*

USA, Inc., and against the Plaintiffs, *Bobbi-Jo Smiley, Amber Blow, and Kelsey Turner.*

MARIA E. ELKINS
Clerk of Court

November 5, 2014
Date

/s/ [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4583

BOBBI-JO SMILEY; AMBER BLOW;
KELSEY TURNER,
Appellants

v.

E.I. DUPONT DE NEMOURS AND COMPANY;
ADECCO USA, INC.

(District Court Civil No.: 3-12-cv-02380)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, AMBRO,
FISHER, CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, JR., VANASKIE, SHWARTZ,
KRAUSE and RESTREPO, *Circuit Judges*
and RENDELL*, *Senior Circuit Judges*

The petition for rehearing filed by **appellants** in the above-entitled case having been submitted to the

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* Pursuant to Third Circuit I.O.P. 9.5.3, the vote of Judge Rendell is limited to panel rehearing only.

judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

BY THE COURT,

s/ MARJORIE O. RENDELL
Circuit Judge

Dated: 30 November 2016
AWI/CC: TMM
PVP
ALB
DSF
APD-M
ERM
RG

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4583

BOBBI-JO SMILEY;
AMBER BLOW;
KELSEY TURNER,
Appellants

v.

E.I. DUPONT DE NEMOURS AND COMPANY;
ADECCO USA, INC.
(M.D. Pa. No. 3-12-cv-02380)

The following issues have been raised on appeal before this Court:

(1) May an employer offset payments due for compensable work time with previously paid compensation for break time "paid as part of the employees' regular work shift?"

(2) If so, may the employer do so even if the employer had already specially agreed in writing to pay the break time pay "as part of [the] regular work shift" and paid for this break time in accordance with this written agreement at all times and had never sought to apply an offset prior to litigation? Did this convert otherwise non-compensable break time into compensable work time under 29 C.F.R. §778.320(a) and (b)?

The United States Court of Appeals for the Third Circuit believes that input from the United States Department of Labor on this matter would benefit the Court. Accordingly, the Court hereby invites an *amicus curiae* letter brief from the United States Department of Labor setting forth its position on the issues in this case.

The Department of Labor is requested to advise the Court on or before August 20, 2015 whether it will accept this Court's invitation and file a letter brief in this matter. If the Department of Labor agrees to file a letter brief, the Court will set a briefing schedule giving ample time for the filing of the letter brief and responses thereto by the parties.

For the Court,

s/ Marcia M. Waldron
Clerk

29 USC § 207

§ 207. Maximum hours

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona

fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate

established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if –

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other

circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are –

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

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29 CFR 778.201

§ 778.201 Overtime premiums – general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case,

the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due under section 7(a) of the Act. Moreover, under section 7(h) this extra compensation may be credited toward the overtime payments required by the Act.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Act are outlined in section 7(e) (5), (6), and (7) of the Act as set forth in § 778.200(a). These are discussed in detail in the sections following.

(c) Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

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29 CFR 785.18

§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

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29 CFR 785.19

§ 785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

U.S. Department of Labor Office of the Solicitor [SEAL]
Washington, D.C. 20210

November 2, 2015

Marcia M. Waldron
Clerk of the Court
United States Court of Appeals
for the Third Circuit
James A. Byrne Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Smiley v. E.I. DuPont De Nemours and Company, et al.*, No. 14-4583 (3d Cir.)

Dear Ms. Waldron:

In an order dated August 5, 2015, this Court invited the Department of Labor ("Department") to file an *amicus curiae* letter brief addressing the issues presented in the above-referenced case. In response, the Secretary of Labor ("Secretary") files this *amicus curiae* letter brief addressing whether an employer that has agreed to treat bona fide meal break time as hours worked under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.*, may use the compensation paid to employees for the meal breaks to offset unpaid overtime compensation required by the FLSA. As discussed below, an employer may not use the compensation paid to employees for bona fide meal breaks to offset unpaid overtime compensation required by the FLSA where the employer has agreed to treat the meal break time as hours worked, as evidenced by

characterizing the meal breaks as part of the employees' regularly scheduled hours of work in the employee handbook and including the meal breaks in each employee's total number of hours worked each week, as well as including the compensation paid for the meal breaks in determining the employee's regular rate of pay. In such circumstances, the compensation for the meal breaks is compensation for those hours of work and cannot be used to offset compensation owed for other hours of work.

Statutory and Regulatory Background

The FLSA requires employers to pay their employees one and one-half times the employees' "regular rate" of pay for any hours worked over forty in a workweek. 29 U.S.C. 207(a)(1). Section 7(e) defines the "regular rate" at which an employee is employed to include "all remuneration for employment" paid to employees except specific categories of payments set out in subsections (e)(1) through (e)(8). 29 U.S.C. 207(e). Thus, any payment or compensation made to an employee must be included in the regular rate unless it falls within one of the categories set out in subsections (e)(1)-(8). *See* 29 C.F.R. 778.200(c) (all remuneration for employment paid to employees which does not fall within one of the statutory exclusions in (e)(1)-(8) must be added into the total compensation received by the employee before his regular rate can be determined).[1]

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[1] The regulations further explain the regular rate. Section 778.109 states:

As relevant here, section 7(e)(2) excludes the following types of compensation from the regular rate:

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.]

29 U.S.C. 207(e)(2). Payments such as vacation pay or payments for travelling expenses are excluded from the calculation of the regular rate because their inclusion would distort the regular rate. For example, an employee who is paid $10 per hour (i.e., her regular rate is $10 per hour) and works 50 hours in a week in

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> The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . . . The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

29 C.F.R. 778.109.

which she also receives a $100 payment for travelling expenses is entitled to $500 in regular wages (50 hours x $10) plus $50 in overtime (10 hours x $5). But if the travelling expense payment of $100 were included in the regular rate, that rate would be $12 per hour ($100/50 hours = $2 extra per hour) rather than $10, and the employee would be entitled to $60 in overtime (10 hours x $6) rather than $50.

If compensation paid by an employer is excluded from the regular rate pursuant to one of the categories in subsections (e)(1)-(8), section 7(h) prohibits, with certain exceptions, an employer from using that compensation to offset required minimum wages or overtime compensation:

> **(h) Extra compensation creditable toward overtime compensation**
>
> **(1)** Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.
>
> **(2)** Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. 207(h) (emphases in original).[2] Thus, for example, if the employer described above paid only the

[2] Paragraph (e)(5) excludes from the regular rate extra compensation provided by a premium rate for certain hours worked

regular rate of $10 per hour for the 10 overtime hours worked, but failed to pay the extra overtime premium of $5 per hour for those 10 hours of overtime (i.e., failed to pay $50 in overtime) that it owed under the FLSA, it could not rely on its $100 payment for travelling expenses to offset its liability for unpaid overtime. Although the total amount paid by the employer for the week ($600, which consists of $500 for 50 hours of work + $100 payment for travelling expenses) would still exceed the minimum amount required by the FLSA ($550, which would consist of $500 for 50 hours of work + $50 for 10 overtime hours), section 7(h) makes clear that the $100 travelling expense payment cannot be used to offset the $50 in overtime owed under the Act.

Part 778 of the regulations specifically addresses overtime compensation and the regular rate. *See* 29 C.F.R. Part 778. Section 778.201(c) elaborates on the instances when an employer may use compensation already paid to offset required overtime compensation:

> Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections

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in excess of eight in a day, forty hours in a workweek, or the employee's normal working hours; (e)(6) excludes from the regular rate extra compensation provided by a premium rate for work on certain days of the week, such as Saturday or Sunday; (e)(7) excludes from the regular rate extra compensation provided by a premium rate pursuant to an employment contract or collective-bargaining agreement for work outside specified hours. *See* 29 U.S.C. 207(e)(5)-(7). None of the parties contend that the compensation at issue in this case – compensation for bona fide meal breaks – falls within any of these three categories.

> 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. *No other types of remuneration for employment may be so credited.*

29 C.F.R. 778.201(c) (emphasis added). Similarly, section 778.216 makes clear that payments of the type described in section 7(e)(2), 29 U.S.C. 207(e)(2), *cannot* be credited toward overtime compensation required by the FLSA. *See* 29 C.F.R. 778.216.

Section 778.320 discusses time for which compensation is paid that in the usual course would not be considered hours worked under the FLSA, but which might be considered hours worked in certain circumstances:

> In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement of the parties will be respected, if reasonable.

(a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have

> agreed to exclude such activities from hours worked. payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

29 C.F.R. 778.320 (italicized emphases in original, underlined emphases added).

Discussion

1. As noted above, 29 U.S.C. 207(h) addresses payments that are excluded from the regular rate and identifies which of those payments can be used as a credit against required overtime compensation. With three exceptions not relevant here, section 7(h) provides that compensation that is excluded from the regular rate pursuant to section 7(e) cannot be credited toward overtime compensation owed under the FLSA. This is consistent with the regulation at 29 C.F.R. 778.320. Section 778.320(b) explains that the parties can agree not to treat bona fide meal breaks as hours worked; if they do so, the payment for the bona fide meal break can be excluded from the regular rate under section 7(e)(2), in which case the compensation paid for the meal break cannot, in accordance with 29

U.S.C. 207(h)(1), offset required overtime compensation. *See* 29 C.F.R. 778.320(b).[3]

Opinion letters issued by the Department's Wage and Hour Administrator make clear that when the parties agree to treat non-compensable time *not* as hours worked, compensation for such time is excluded from the regular rate pursuant to section 7(e)(2) and therefore is *not* creditable toward required overtime compensation in accordance with section 7(h). Specifically citing section 778.320, the Administrator stated in a

[3] Subsection (e)(2) includes three provisions listing different types of compensation for periods when no work is performed that can be excluded from the regular rate: (1) vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; (2) reasonable payments for traveling or other expenses; and (3) other similar payments which are not made as compensation for an employee's hours of employment. *See* 29 U.S.C. 207(e)(2). The regulations at 29 C.F.R. 778.217 through 778.224 explain these different types of compensation. Section 778.218 addresses the provision in section 7(e)(2) concerning "vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause" and says that payments for lunch breaks are not these types of payments. *See* 29 C.F.R. 778.218(b). Section 778.224, by contrast, discusses what qualifies under the separate category of " '[o]ther similar payments' " as excludable from the regular rate under subsection (e)(2). Compensation for bona fide meal breaks reasonably qualifies as " '[o]ther similar payments' " under this regulation and therefore is excludable from the regular rate. This is confirmed by the explicit statement in section 778.320 that compensation for bona fide meal breaks not treated as hours worked can be excluded from the regular rate under section 7(e)(2). *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004) (citing section 778.320 in concluding that the compensation for bona fide meal breaks that the parties agreed not to treat as hours worked was properly excluded from the regular rate).

December 3, 1996 opinion letter that if an employer and its employees agree that payment for half of a bona fide thirty-minute meal break does not make the meal break hours of work, then the meal break is not converted into hours of work and the meal break payment may be excluded from the calculation of the employees' regular rate. *See* Opinion Letter (FLSA), 1996 WL 1031805, at *1 (Dec. 3, 1996). The Administrator thus noted that the meal break payment cannot offset any required overtime compensation. *See id.*; *see also* Opinion Letter (FLSA), 1996 WL 1031776, at *1 (May 6, 1996) (citing section 778.320 and opining that an employer's payment for travel time that is not hours worked under the FLSA "does not convert the hours into hours worked under the FLSA[,]" and noting that the payments cannot offset any required overtime compensation).

Allowing employers to use compensation excludable from the regular rate to offset their overtime obligations under the FLSA would undermine the Act's "dual purpose[s] of inducing the employer to reduce the hours of work . . . and of compensating the employees for the burden of a long workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945). Those purposes depend on "increasing the employer's labor costs by 50% at the end of the 40-hour week" and "giving the employees a 50% premium for all excess hours[.]" *Id.*

2. Section 7(h) does not address, however, payments that are included in the regular rate and whether

those payments can be used as a credit against required overtime compensation. It is silent as to that issue. But section 778.320(a) of the regulations, together with fundamental principles of the FLSA, indicate that an employer that agrees to treat non-compensable time such as a bona fide meal break as hours worked despite not being required to do so by the FLSA must include the payment for that meal break in the regular rate and, as a result, necessarily cannot use that payment to offset unpaid overtime compensation.

Section 778.320(a) explains that the parties can agree to treat a bona fide meal break as hours worked; if they do so, the payments for the bona fide meal break must be included in the regular rate. *See* 29 C.F.R. 778.320(a). And in turn, such payments cannot be used as an offset for unpaid overtime compensation. *See* 29 C.F.R. 778.201(c) ("Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. *No other types of remuneration for employment may be so credited*.") (emphasis added).

There is no authority for the proposition that compensation already paid for hours of work can be used as an offset and thereby be counted *a second time* as statutorily-required compensation for other hours of work. Permitting a credit in such a situation would violate the requirement that compensation for hours worked be paid free and clear because it would permit

the employer to pay the employee for hours worked, but then essentially take that payment back to use it as a credit against required overtime compensation. *See* 29 C.F.R. 531.35 (wages are not considered to have been to paid unless they are paid "finally and unconditionally or 'free and clear"). Permitting an employer to offset in such circumstances would permit the employer to double-count the compensation. Compensation for specific hours of work, regardless of whether the compensation is for productive work time, for example, or for a bona fide meal break that the employer has agreed to treat as work time, cannot be allocated as compensation for other hours of work, and therefore cannot be used to offset overtime compensation due for those other hours of work. There is no reason to distinguish between compensation for productive work time and compensation for bona fide meal breaks that the parties treat as hours worked. Thus, for example, if an employer chooses to compensate its employees for bona fide meal breaks and to treat those meal breaks as hours worked, that compensation is already allocated to the hours worked during the meal breaks and cannot be allocated to other hours worked for which overtime compensation is required, *Cf. Wheeler v. Hampton Twp.*, 399 F.3d 238, 245 (3d Cir. 2005) (concluding that the FLSA does not permit an employer to use compensation for nonworking time such as holidays and sick days that was included in the employees' base salary (i.e., the regular rate) as an offset).

While this Court confronted a different scenario in *Wheeler*, the Court's analysis is instructive. In *Wheeler*,

a collective bargaining agreement ("CBA") provided for compensation for certain non-working time (e.g., holidays, sick days, etc.) and also provided for specified incentive and expense payments. *See* 399 F.3d at 241. The CBA included the compensation for non-work time in calculating the regular rate, but did not include the incentive and expense payments in calculating the regular rate. *See id.* at 243. This Court noted that under section 7(e) the regular rate need not include the non-work pay, but must include the incentive and expense payments (i.e., the opposite of how the CBA treated these two types of payments). *See id.* at 241-43. The employer argued that the FLSA allowed it to use the inclusion of the non-work compensation in the regular rate to offset the unlawful exclusion of the incentive and expense payments from the regular rate on the ground that inclusion of the non-work compensation resulted in a higher regular rate than would have been the case had the incentive and expense payments been included instead. *See id.* at 243. This Court held that the employer did not qualify for the credit allowed under section 7(h)(2) because the non-work compensation was not of the type described in subsections (e)(5), (6), or (7). *See id* at 245; 29 U.S.C. 207(e)(5)-(7). "Where a credit is allowed, the [FLSA] says so." *Id.* The Court's conclusion, albeit in a different context, that the FLSA does not permit an employer to use compensation for non-work that was included in the regular rate as an offset is relevant here. *See id.*

The two primary cases on which the district court relied in concluding that Defendants EI. DuPont de

Nemours and Company and Adecco U.S.A., Inc. (collectively "DuPont") could use the meal break compensation to offset any unpaid overtime compensation did not analyze the offset issue in any detail and therefore offer little guidance in the instant case. *See Smiley v. E.I. DuPont De Nemours & Co.*, No. 3:12-cv-2380, 2014 WL 5762954, at *7-8 (M.D. Pa. Nov. 5, 2014) (citing *Barefield v. Vill. of Winnetka*, 81 F.3d 704, 707-10 (7th Cir. 1996); *Avery v. City of Talladega*, 24 F.3d 1337, 1342-47 (11th Cir. 1994)). In *Barefield* and *Avery*, the main issue before the respective courts was the applicability of the partial overtime exemption in 29 U.S.C. 207(k) for certain employees engaged in fire protection or law enforcement activities and whether a thirty-minute paid meal break was a bona fide break, which turned on whether the meal break time was used predominantly for the employer's benefit. *See Barefield*, 81 F.3d at 707-10; *Avery*, 24 F.3d at 1342-47. After thoroughly analyzing those issues, the courts noted, with no analysis, that because the meal breaks were bona fide and therefore not compensable hours worked under the FLSA, the employer could use the meal break compensation to offset the unpaid overtime compensation. *See Barefield*, 81 F.3d at 710; *Avery*, 24 F.3d at 1344, 1347. In *Barefield*, the employees had also argued that the payment for the meal breaks automatically converted the meal breaks into work time. *See* 81 F.3d at 711. The Seventh Circuit rejected that argument, reasoning that nothing in the statute, regulations, or case law prevents an employer from compensating its employees for forty hours even if they work less. *See id*. Because these cases presume that an

offset is permitted in such situations but provide no analysis of the issue, they should not be determinative of the outcome here. Of particular note in this regard is the fact that neither of these decisions refers to 29 U.S.C. 207(h), which sets out the parameters for compensation that is creditable toward required overtime compensation; 29 C.F.R. 778.201, which indicates that the only credit an employer may take is for the type of compensation outlined in 29 U.S.C. 207(e)(5)-(7); or 29 C.F.R. 778.320, which prohibits an employer from taking a credit for payment of bona fide meal breaks.

The Ninth Circuit decision in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), offers limited guidance because, while presenting similar facts, it differs in one critical aspect. The employees in *Ballaris*, similar to the employees here, worked twelve-hour shifts, were paid for a bona fide meal break during those shifts, and claimed that they were not paid for donning, doffing, and "pass-down" time (similar to the shift relief time in this case). *See id.* at 904-05; *Smiley*, 2014 WL 5762954, at *1. Unlike the instant case, however, the employer in *Ballaris* excluded the meal break compensation when calculating the employees' regular rate and the parties agreed that the meal break period was excluded from each employee's total hours worked. *See* 370 F.3d at 909. Relying heavily on section 778.320, the Ninth Circuit concluded that the meal break payment was properly excluded from the regular rate pursuant to 29 U.S.C. 207(e)(2). *See* 370 F.3d at 909. The court further concluded that, because the meal break payment was excluded from the regular rate pursuant

to section 7(e)(2), section 7(h)(1) prohibited the employer from using those payments as a credit against its unpaid overtime compensation. *See id.* at 913. Nonetheless, part of the court's reasoning is particularly relevant to this case:

> Even without section 7(h), we emphasize that it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA. . . . Crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute. It is, instead, false and deceptive "creative" bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA.

370 F.3d at 914. Thus, while *Ballaris* addressed different facts, the court's observation of the fundamentally unfair result of allowing agreed-upon wages to offset unpaid overtime compensation owed under the FLSA is equally applicable in this circumstance and counsels for allowing crediting only in very narrow circumstances as set forth in 29 U.S.C. 207(h). This conclusion also finds support in 29 C.F.R. 778.201(c), which states:

> Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments [described in sections 7(e)(5), (6), and (7)] may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum

> hours standard. *No other types of remuneration for employment may be so credited.*

29 C.F.R. 778.201(c) (emphasis added).

3. In sum, as section 778.320(b) makes clear, when an employer does not agree to treat bona fide meal breaks as hours worked, compensation paid for the meal breaks is excludable from the regular rate under 29 U.S.C. 207(e)(2), in which case 29 U.S.C. 207(h)(1) prohibits using that compensation to offset required overtime compensation. As section 778.320(a) makes clear, when an employer agrees to treat bona fide meal breaks as hours worked despite not being required to do so by the FLSA, the compensation paid for the meal breaks must be included the [sic] in the regular rate. Because the compensation is for those hours worked, the employer cannot use that compensation to offset unpaid overtime compensation owed for other hours of work as that would be impermissibly double-counting the compensation, as discussed above. Thus, regardless of whether an employer agrees to treat the bona fide meal break as hours worked, the compensation paid for the meal break cannot be used to offset required overtime compensation under section 7(h). *See* 29 U.S.C. 207(h); *Wheeler*, 399 F.3d at 245 ("Where a credit is allowed, the [FLSA] says so.").

4. Despite the conclusion that compensation for bona fide meal breaks cannot be used to offset required overtime compensation regardless of whether the parties agreed to treat the bona fide meal breaks as hours worked, the Secretary addresses the issues presented

in the manner in which they were framed by this Court and litigated by the parties, i.e., accepting the premise that the existence of an agreement to treat the bona fide meal breaks as hours worked is critical to the analysis.[4] It is the evidence in the record that determines whether an employer has agreed to treat bona fide meal breaks as hours worked. This is confirmed by the preamble in the Federal Register that accompanied the 1981 revision to the regulation at section 778.320. *See* U.S. Dep't of Labor, Wage & Hour Div., Overtime Compensation, 46 Fed. Reg. 7308 (Jan. 23, 1981). It clarified that although an employer's payment for non-compensable time such as a bona fide meal break does not automatically convert the time into hours worked, the parties can nonetheless agree to treat such time as hours worked. *See id.* The preamble noted that the previous version of section 778.320 "very strongly implied that payment for time spent in the specified activities [such as eating meals between work hours] would almost invariably convert them into hours worked." *Id.* The revision changed the language to avoid this implication and to state expressly that whether or not payments convert the time spent in such activities into hours worked depends on whether the facts show that

[4] It bears noting that the issue of whether bona fide meal breaks are treated as hours worked is not an irrelevant determination; it has independent significance. Treating the meal breaks as hours worked increases an employee's total hours worked each workweek, thereby putting that employee's total hours at the forty-hour threshold for earning overtime compensation sooner than would otherwise occur if the meal breaks were not included as hours worked.

the parties agreed to treat such time as hours worked. *See id.*; *see also* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Ch. 32, § 32j09(2) (2000) (citing section 778.320(b) and explaining that "the conversion of certain activities into hours of work by virtue of the employer's payment for such time depends on 'whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked"), available at http://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

The language in section 778.320 suggests that the agreement may be implied by the conduct of the parties. "The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on *whether or not it appears from all the pertinent facts that the parties have agreed* to treat such time as hours worked." 29 C.F.R. 778.320 (emphasis added). "[A]n agreement cognizable for purposes of the FLSA overtime inquiry may arise by conduct." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 938 (9th Cir. 2004) (concluding that an agreement existed regarding policy for twenty-four-hour duty shift compensation and citing cases where implied agreements were found based on conduct of the parties); *see Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 354-55 (9th Cir. 1992) (concluding that an agreement existed regarding on-call time because, although the employer unilaterally imposed the call-in policy, the employees accepted the terms of that agreement by continuing to work); *cf. Reich v. Lucas Enters., Inc.*, 2 F.3d 1151, 1993 WL

307080, at *2-3 (6th Cir. 1993) (per curiam) (unpublished) (concluding that the conduct of the parties did not show an implied agreement to treat paid meal breaks as hours worked).

5. The record of the parties' conduct in the instant case demonstrates that DuPont treated the meal breaks as hours worked. DuPont's statement in its employee handbook describing the compensation for the meal breaks, together with the fact that DuPont included the meal break compensation in calculating the employees' regular rate and included the meal break time in the total hours worked for each employee, show that the parties effectively agreed to treat the meal breaks as hours worked. While it is true that the mere act of paying for the bona fide meal breaks does not alone convert the breaks into hours worked, *see* 29 C.F.R. 778.320, there is considerably more than mere payment in this case.

DuPont's Meal Break Policy in its employee handbook states, in relevant part:

> Employees working in areas requiring 24 hour per day staffing and are required to make shift relief will be paid for their lunch time *as part of their scheduled work shift.*

App. 229 (emphasis added). The first part of the sentence – "[e]mployees working in areas requiring 24 hour per day staffing and are required to make shift relief" – defines the category of employees to whom the Meal Break Policy applies. The phrase "will be paid for their lunch time as part of their scheduled work shift"

indicates that these employees' twelve-hour scheduled work shifts include their paid lunch time. Thus, this statement indicates that the meal breaks were included with the productive work time in the total twelve hours that employees worked each shift.

In addition, the fact that DuPont included the compensation for the meal breaks in calculating the employees' regular rate and included the three thirty-minute meal breaks in each employee's total hours worked per shift further show that the meal breaks were treated as hours worked. The district court stated that the parties agreed that the compensation for the meal breaks was included in determining the employees' regular rate of pay. *See Smiley*, 2014 WL 5762954, at *4 n.6, *8. Neither party appears to dispute this on appeal. Plaintiffs point out that their own paystubs reflect the inclusion of the three thirty-minute meal breaks per shift in the total hours worked each workweek; they were always paid for twelve hours per shift, which included the three thirty-minute meal breaks. *See* Pls.' Br. 18. Thus, DuPont counted the three thirty-minute meal breaks in determining each employee's total hours worked each week.

DuPont does not contest that it included the meal breaks in each employee's total hours worked for each week. Instead, DuPont attempts to discount this fact by providing an explanation for why it included the meal breaks in the hours worked, saying that it must include the meal breaks in employees' hours "so that the time is included in the regular rate[.]" Dfs.' Br. 14. Doing so, DuPont argues, enables it to use the meal

break compensation to offset the required overtime compensation. *See id.* Putting aside the circular nature of this reasoning, this argument is unavailing. The reason that DuPont has chosen to pay its employees who work twelve-hour shifts for three thirty-minute bona fide meal breaks, whatever that reason may be, is not determinative of whether that time forms a part of the hours worked. The fact is that DuPont admits that it included the time for these breaks in the total hours worked and included the compensation paid for these breaks in determining the employees' regular rate of pay. In doing so, DuPont agreed to treat the bona fide meal breaks as hours worked.

6. The fact that meal breaks are bona fide breaks for which the FLSA does not require an employer to compensate employees is irrelevant in determining whether the parties have agreed to treat the bona fide meal breaks as hours worked. The Sixth Circuit in *Lucas Enterprises* and the district court in this case erred in concluding otherwise. In *Lucas Enterprises*, the Sixth Circuit concluded that the conduct of the parties did not indicate an implied agreement to treat meal breaks as hours worked despite the employer's practice of including the meal breaks in the total hours worked each week for purposes of determining when an employee worked overtime hours. *See* 1993 WL 307080, at *2-3. The court based its conclusion primarily on the fact that the employees were free to use the meal break time for their own purposes, which showed, the court concluded, that the parties did not agree to treat the meal breaks as hours worked. *See id.* The

employer's inclusion of the meal breaks in the total hours worked each week was not enough, according to the court, to show that the parties agreed to treat the meal breaks as hours worked as required by section 778.320. *See id*. The court's analysis of this issue in *Lucas Enterprises*, however, was flawed because it ignored that section 778.320 specifically contemplates that a bona fide meal break (i.e., a break where the employees are free to use the time for their own purposes) can be hours worked if the parties so agree. The relevant inquiry is not whether the meal breaks were bona fide or not, but whether the parties treated the concededly bona fide meal breaks as hours worked.

In a somewhat similar fashion to what the Sixth Circuit did in *Lucas Enterprises*, the district court in this case based its conclusion that the parties did not agree to treat the meal breaks as hours worked primarily on the fact that the parties agreed that the meal breaks were bona fide breaks and on the fact that the regulation on meal breaks at 29 C.F.R. 785.19 states that bona fide meal breaks are not compensable hours worked under the FLSA. *See Smiley*, 2014 WL 5762954, at *6. The district court's conclusion rests on a fundamental misunderstanding of sections 785.19 and 778.320 of the regulations. Section 785.19 merely stands for the proposition that the FLSA does not require that bona fide meal breaks be treated as compensable hours worked; it does not prohibit an employer from voluntarily treating bona fide meal breaks as hours worked.

Moreover, as noted above, section 778.320 expressly contemplates that the parties may agree to treat bona fide meal breaks as hours worked. While the mere payment for otherwise non-compensable time is not alone sufficient to convert the time to hours worked, the parties may agree to treat the time as hours worked (and such agreement may be shown by conduct). Thus, the fact that the meal breaks are bona fide breaks for which the FLSA does not require DuPont to compensate Plaintiffs has no bearing on whether the parties agreed to treat the bona fide meal breaks as hours worked.[5]

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[5] Even if the district court were correct that DuPont did not agree to treat the bona fide meal breaks as hours worked, the court erred in concluding that DuPont could use the meal break compensation as credit against the unpaid overtime compensation. Section 778.320, upon which the district court relied, is clear that when bona fide meal breaks are *not* treated as hours worked, the compensation for such meal breaks is excludable from the regular rate under 29 U.S.C. 207(e)(2) and therefore is *not* creditable under 29 U.S.C. 207(h) towards required overtime compensation. *See* 29 C.F.R. 778.320. This was the result that the Sixth Circuit in *Lucas Enterprises* ultimately reached. The Sixth Circuit noted that "the regulations contain repeated prohibitions against the crediting of payments for hours not worked toward overtime compensation due under the Act." 1993 WL 307080, at *4 (citing, as examples, 29 C.F.R. 778.216's statement that payments made for hours not worked cannot be credited toward overtime compensation due under the FLSA and section 778.320's statement that payments for bona fide meal times qualify for the exclusion from the regular rate under section 7(e)(2) and such payments cannot be credited toward overtime compensation due). Thus, although the Sixth Circuit first concluded that there was no implied agreement to treat the bona fide meal breaks as hours worked, the court ultimately concluded that the compensation for the meal breaks was excludable from the regular rate (despite the fact that

DuPont's description of the meal break compensation in its employee handbook, together with the inclusion of the meal break compensation in the calculation of the regular rate and the inclusion of the meal break time in the total hours worked each workweek for each employee, show that DuPont treated the meal breaks as hours worked. Therefore, it cannot use the compensation paid for the meal breaks to offset the unpaid overtime compensation it owes for the donning, doffing, and shift relief work that the Plaintiffs performed. To permit offsetting in such circumstances would be to permit DuPont to double-count the meal break compensation, first as compensation for the meal breaks that it treated as hours worked, and second as compensation for the pre- and post-shift unpaid work that Plaintiffs performed.

For the reasons set forth above, an employer that has agreed to treat bona fide meal breaks as hours worked may not use the compensation paid for the meal breaks

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the employer had included the compensation in the regular rate), and therefore could not be used to offset unpaid overtime compensation. *See id.*; *see also Ballaris*, 370 F.3d at 913 (concluding that compensation for bona fide meal breaks that the parties agreed not to treat as hours worked was excluded from the regular rate under section 7(e)(2) and therefore was not creditable toward required overtime compensation).

to offset unpaid overtime compensation required under the FLSA.

Respectfully submitted,

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February 8, 2016

Marcia M. Waldron,
Clerk of the Court
United States Court of Appeals
for the Third Circuit

Re: *Smiley v. E.I. DuPont De Nemours and Company, et al.*, No. 14-4583 (3d Cir.)

Dear Ms. Waldron:

At the invitation of this Court, the Secretary of Labor ("Secretary") filed an *amicus curiae* letter brief on November 2, 2015 arguing that an employer may not use the compensation paid to employees for bona fide meal breaks to offset unpaid overtime compensation required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C, 201 *et seq.*, where the employer has agreed to treat the meal break time as hours worked. In an order dated January 27, 2016, the Court directed the Secretary to file a reply in letter form to Defendants-Appellants E.I. DuPont de Nemours and Company and Adecco U.S.A., Inc.'s (collectively "DuPont") response to the Secretary's brief. The Secretary files this reply to address several arguments raised by DuPont.

1. DuPont argues that section 7(e)(2) of the FLSA and the Department of Labor's ("Department") regulations at Part 778, 29 C.F.R. Part 778, prohibit DuPont from excluding the payments to its employees for bona fide meal breaks from the regular rate, and therefore section 7(h) is inapplicable in this case because,

DuPont contends, section 7(h) is relevant only when payments are excluded from the regular rate under section 7(e). (DuPont's December 18, 2015 letter ("Resp.") 2-3.) This argument has no merit. Neither the FLSA nor the regulations at Part 778 prohibit an employer from excluding payments for bona fide meal breaks from the regular rate. As the Secretary outlined in his letter brief (Br. 4-5), payments for bona fide meal breaks are within the scope of section 7(e)(2) as payments that can be excluded from the regular rate, and are specifically recognized as excludable from the regular rate in the regulation at 29 C.F.R. 778.320(b).

Section 7(e)(2) identifies three different types of compensation for periods when no work is performed that can be excluded from the regular rate: (1) payments for "occasional periods when no work is performed due to vacation, holiday, illness"; (2) payments for expenses; and (2) [sic] "other similar payments to an employee which are not made as compensation for his hours of employment[.]" 29 U.S.C. 207(e)(2). DuPont latches onto the word "occasional" in the first clause to assert that any payment must be an occasional payment to qualify for exclusion from the regular rate under section 7(e)(2), and that meal breaks are not occasional because they occur every day. DuPont's argument fails, however, because the word "occasional" modifies only the first of the three types of compensation listed in section 7(e)(2). There is no requirement that expenses be incurred or that "other similar payments" be made only occasionally.

Moreover, the regulation at section 778.320 explicitly states that payments for bona fide meal breaks can be excluded from the regular rate under section 7(e)(2). Where the parties have agreed that time spent in an activity that is normally non-compensable, such as a bona fide meal break, will not be counted as hours worked despite the employer paying for such time, "payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2)[.]" 29 C.F.R. 778.320(b); *see Ballaris v. Wacker Siltronic Corp.* 370 F.3d 901, 909 (9th Cir. 2004) (concluding that a bona fide meal break payment was properly excluded from the regular rate pursuant to 29 U.S.C. 207(e)(2)). This regulation, which DuPont failed to address in its analysis, belies DuPont's conclusion that it was required to include the bona fide meal break payments in the regular rate. Thus, DuPont's argument (Resp. 3) – that meal break payments must be included in the regular rate and thus the FLSA permits using such payments to offset unpaid overtime compensation – rests on a faulty premise; meal break payments need not be included in the regular rate. And section 7(h)(1) makes clear that payments excluded from the regular rate under section 7(e)(2) cannot be used as a credit against unpaid overtime compensation. *See* 29 U.S.C. 207(e)(2), (h).

2. DuPont further argues that nothing in the FLSA prohibits using payments that are included in the regular rate to offset unpaid overtime compensation, and that the plain language of the statute is clear on this point and permits DuPont's pay practice. (Resp. 3, 5.)

This proposition flies in the face of fundamental FLSA principles. Nothing in the statute permits using payments that are included in the regular rate, and that are for time that is treated as hours worked, to offset unpaid overtime compensation. Indeed, as explained in the Secretary's letter brief (Br. 6.), to permit an employer to use such payments as a credit would permit the employer to double-count the payment. DuPont fails to refute this point, nor could it. When payments for bona fide meal breaks are included in the regular rate and the meal break time is included in the hours worked, those payments have already been included as part of the employee's straight time pay, i.e., the pay that is the basis for calculating the regular rate (which, in turn, is the basis upon which overtime is calculated), and the payments have already been allocated to those hours worked. An employer cannot transfer amounts that were paid as part of an employee's straight time pay to count as payment for unpaid overtime compensation. The FLSA does not permit an employer to satisfy its overtime compensation obligation with payments that it has agreed to make to employees for hours worked. Rather, the FLSA requires that employers compensate employees for overtime hours at a rate of one and one-half the employee's regular rate, *see* 29 U.S.C. 207(a); the regular rate is not the minimum wage, but is an "actual fact" based on all remuneration paid to the employee minus any section 7(e) statutory exclusions. *See* 29 C.F.R. 778.108-.109; *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 578 (1942). Permitting a credit in such situation would amount to

"false and deceptive 'creative' bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA." *Ballaris*, 370 F.3d at 914.

3. Contrary to DuPont's assertion (Resp. 4), this Court's decision in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005), supports the Secretary's position. In *Wheeler*, the employer included payments for holidays, vacation, and sickness (referred to as "non-work pay") in the regular rate even though the employer could have excluded such payments under section 7(e)(2). *See id.* at 241, 243. The employer, however, unlawfully excluded incentive payments from the regular rate. *See id.* The inclusion of the non-work payments in the regular rate resulted in a higher regular rate and therefore higher pay to the employees than if the non-work pay had been excluded and the incentive payments had been included. *See id.* The court concluded that the inclusion of the non-work payments in the regular rate could not be used as an offset against what should have been paid if the incentive payments had been included in the regular rate as was required. *See id.* at 244.

DuPont asserts that the Court's reason for disallowing the offset was because the non-work pay could have been excluded under section 7(e)(2), and section 7(h)(1) prohibits offsets for pay that is excluded from the regular rate. (Resp. 4.) DuPont mischaracterizes this Court's reasoning. The Court did not base its conclusion on the fact that the non-work pay could have been excluded under section 7(e)(2). Rather, because the employer voluntarily chose to include the non-work pay in the regular rate, it could not use the inclusion of that

pay in the regular rate as an offset for the unlawful exclusion of the incentive pay. The Court explained that there was "no textual reason to 'credit' the [employer] for including [the non-work] pay in its regular rate." *Id.* at 244. "[W]hile § 207(e) protects the [employer] from having to include non-work pay in the regular rate, it does not authorize the [employer] now to require such augments to be stripped out, or to take a credit for including such augments." *Id.* The Court further reasoned that the types of payments described in section 7(e)(5), (6), or (7) were the only payments that could be used as an offset under the FLSA: "Where a credit is allowed, the FLSA says so." *Id.* at 245. Similarly, DuPont's voluntary inclusion of the bona fide meal break payments in the regular rate does not permit it to use those payments to offset the overtime compensation it should have paid for the pre- and post-shift work. This Court should conclude, consistent with *Wheeler*, that nothing in the FLSA permits an employer to take a credit for bona fide meal break payments.

4. DuPont asserts that there is no factual basis to conclude that it agreed to treat the bona fide meal breaks as compensable time, i.e., hours worked. (Resp. 5-7.) As explained in the Secretary's letter brief (Br. 9-10), however, the facts show that DuPont treated the meal break time as hours worked. Notably, DuPont fails to acknowledge in its response that it included the meal break time in the total hours worked for each employee as shown in Plaintiffs' pay stubs (in addition to including the meal break compensation in its regular

rate and describing the meal breaks as part of the total compensable hours worked in its employee handbook). Including the time for the bona fide meal breaks in the total hours worked on Plaintiffs' paystubs unequivocally shows that DuPont treated the meal break time as hours worked.[1]

5. DuPont argues that the Secretary's interpretation in his letter brief is not entitled to deference. (Resp. 8-10.) As an initial matter, we note that the Secretary did not explicitly ask for deference in his brief. Nonetheless, the regulations at issue, upon which the Secretary relies and which DuPont has not challenged, are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because they represent the Secretary's long-standing and reasonable interpretation of the FLSA. *See Ingram v. Cty. of Bucks*, 144 F.3d 265, 268 (3d Cir. 1998).

For the foregoing reasons, as well as those stated in the Secretary's letter brief, this Court should conclude that when an employer includes payments for bona fide meal breaks in the regular rate and treats those meal breaks as hours worked, the employer cannot use those

[1] There is no merit to DuPont's argument that Plaintiffs' admission that the meal breaks were bona fide breaks shows that DuPont did not agree to treat the breaks as hours worked. (Resp. 8). The fact that the meal breaks were bona fide breaks for which the FLSA does not require an employer to compensate employees has no bearing on whether DuPont voluntarily agreed to treat those concededly bona fide meal breaks as compensable hours worked. (Sec'y Br. 10-11.)

payments as a credit against unpaid overtime compensation.

Respectfully,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
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[LOGO]

E. I. DU PONT DE NEMOURS AND COMPANY
MYINFO SERVICE CENTER
PO BOX 29005
HOT SPRINGS NATIONAL PARK, AR 71903-9005

Bobbijo Smiley
4360 Millstone Rd
Monroeton PA 18832

PAY GROUP: SEMI-MONTHLY	PERSONNEL NO: 70087459	
PAY PERIOD: 07/16/2012 – 07/31/2012	CO. CODE/PERS. AREA: 2350/1421	
PAYMENT DATE: 07/31/2012	ORG UNIT: TOWANDA B10	
CHECK/ADVICE NO. 7008745900712	LOCATION: TOWANDA PLANT [DUPONT]	
TOTAL NET: 1,434.88	SALARY/HRLY RATE: 44,256.00	
	UNSCHEDULED OT RATE 21.28	
	SCHEDULED OT RATE: 21.28	

AUTHORITY	MS	EXMPT	ADD/W/H
FED	S	00	0.00

EARNINGS	PERIOD	HRS	EARNINGS	YTD HRS	YTD EARNINGS
REG PAY	07/31		1,844.00		25,520.00
SHFT PRM	07/31	56.00	24.00	839.00	354.80
OT .5	07/31	16.00	170.24	122.00	1,283.03
OT 1.0				8.00	166.80
OT 1.5	07/31	8.00	255.36	104.00	3,288.72
PAY BQ	07/31	4.00-	85.12-	60.00-	1,261.32-
TOWOP					476.56-
LPBC					915.00
BLI CASH	07/31		1.76		24.12
TOTAL CASH EARNINGS		76.00	2,210.24	1,013.00	29,814.59

TXBL	PERIOD	N/C TXBL	YTD N/C TXBL
IMP INC	07/31	0.20	2.04
TOTAL NONCASH TXBL EARNINGS		0.20	2.04

TAXES	TXBL/RPBTL	TAX	YTD TXBL/RPBL	YTD TAX
FED	2,095.81	336.14	28,155.83	4,432.58
FICA	2,140.18	89.89	28,752.05	1,207.59
FICM	2,140.18	31.03	28,752.05	416.90
PA	2,139.98	65.70	28,750.01	882.63
SUI EE	2,210.24	1.77	29,733.59	23.79
Monroe T	2,139.98	34.24	28,750.01	460.00
North To				
OCCUP. EE			1,953.85	10.00
TOTAL TAXES		558.77		7,433.49

BEFORE TAX DEDUCTIONS	CURRENT	YTD
HIMEDCR	7.50-	105.00-
MED PPO	41.25	577.50
EE LIFE	1.63	22.76
RSP BT	44.17	594.18
VAC BUY	34.88	488.32
TOTAL BT DED.	114.43	1,577.76

AFTER TAX DEDUCTIONS	CURRENT	YTD
UWBRDCTY	2.50	35.00
EE LIFE	0.13	1.42
401K LN	59.23	829.22
401K LN	40.30	564.20
TOTAL AT DED.	102.16	1,429.84

NET PAY DISTRIBUTION	AMOUNT PAID
******3910	1,434.88
TOTAL NET	1,434.88

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E. I. DU PONT DE NEMOURS AND COMPANY
MYINFO SERVICE CENTER
PO BOX 29005
HOT SPRINGS NATIONAL PARK, AR 71903-9005

AMBER BLOW
TERRY TOWNSHIP 27
RR 2 Box 189B
Wyalusing PA 18853

PAY GROUP: SEMI-MONTHLY	PERSONNEL NO: 70147715	
PAY PERIOD: 09/01/2012 – 09/15/2012	CO. CODE/PERS. AREA: 2350/1421	
PAYMENT DATE: 09/14/2012	ORG UNIT: TOWANDA B10	
CHECK/ADVICE NO. 7014771500333	LOCATION: TOWANDA PLANT [DUPONT]	
TOTAL NET: 1,341.30	SALARY/HRLY RATE: 46,392.00	
	UNSCHEDULED OT RATE 22.31	
	SCHEDULED OT RATE: 22.31	

AUTHORITY	MS	EXMPT	ADD/W/H
FED	S	00	0.00
PBG6	S	00	0.00

EARNINGS	PERIOD	HRS	EARNINGS	YTD HRS	YTD EARNINGS
REG PAY	09/15		1,933.00		32,549.00
SHFT PRM	09/15	60.00	25.60	1,040.50	466.10
REGEXCP				112.00	2,694.72
OT 1.5				22.25	734.31
OT .5				133.00	1,461.69
OT 1.5	09/15	8.00	267.72	142.00	4,750.83
HLPRM1.5				16.00	530.04
HOL DEFR				16.00-	353.36-
GUAR ALL				2.88	64.25
PAY BQ	09/15	8.00-	178.48-	76.00-	1,679.36-
LPBC					977.00
BLI CASH	09/15		0.59		10.17
SAL PROR					2,498.72-
TOTAL CASH EARNINGS		60.00	2,048.43	1,376.63	39,706.67

TXBL	PERIOD	N/C TXBL	YTD N/C TXBL
IMP INC	09/15	3.39	59.55
TOTAL NONCASH TXBL EARNINGS		3.39	59.55

TAXES	TXBL/RPBTL	TAX	YTD TXBL/RPBL	YTD TAX
FED	1,810.89	264.91	35,703.17	5,733.01
FICA	1,957.63	82.22	38,164.99	1,603.93
FICM	1,957.63	28.38	38,164.99	553.39
PA	1,954.24	60.00	38,105.44	1,169.84
SUI EE	2,048.43	1.64	39,706.67	31.77

BEFORE TAX DEDUCTIONS	CURRENT	YTD
HIMEDCR	7.50-	127.50-
MED PPO	41.25	701.25
DENTAL	10.00	170.00
VISION	4.28	72.76
ADI	0.85	14.45
EE LIFE	0.53	9.01
RSP BT	143.35	2,402.27
VAC BUY	44.78	761.26
TOTAL BT DED.	237.54	4,003.50

AFTER TAX DEDUCTIONS	CURRENT	YTD
UWBRDCTY	2.50	42.50
EE LIFE	1.80	31.52
TOTAL AT DED.	4.30	74.02

NET PAY DISTRIBUTION	AMOUNT PAID
******4388	1,341.30
TOTAL NET	1,341.30

North To					
OCCUP. EE			2,172.56	10.00	
Wyalusin	1,954.24	28.14	38,105.44	546.71	
TOTAL TAXES		465.29		9,549.65	

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AMBER BLOW
TERRY TOWNSHIP 27
RR 2 Box 189B
Wyalusing PA 18853

PAY GROUP:	SEMI-MONTHLY	PERSONNEL NO:	70147715
PAY PERIOD:	09/07/2012 – 09/07/2012	CO. CODE/PERS. AREA:	2350/1421
PAYMENT DATE:	09/07/2012	ORG UNIT:	TOWANDA B10
CHECK/ADVICE NO.	7014771500332	LOCATION:	TOWANDA PLANT [DUPONT]
TOTAL NET:	150.80	SALARY/HRLY RATE:	0.00
		UNSCHEDULED OT RATE	22.31
		SCHEDULED OT RATE:	22.31

AUTHORITY	MS	EXMPT	ADD/W/H
FED	S	00	0.00
PBG6	S	00	0.00

EARNINGS	PERIOD	HRS	EARNINGS	YTD HRS	YTD EARNINGS
REG PAY					30,616.00
SHFT PRM				980.60	420.50
REGEXCP	08/15	40.00	962.40		
REGEXCP	08/31	72.00	1,732.32	112.00	2,694.72
OT 1.5				22.25	734.31
OT .5	08/31	14.00-	156.17-		
OT .5	08/31	14.00	168.42	133.00	1,461.69
OT 1.5	08/15	8.00-	267.72-		
OT 1.5	08/15	8.00	288.72		
OT 1.5	08/31	8.00	288.72		
OT 1.5	08/31	8.00-	267.72-	134.00	4,483.11
HLPRM1.5				16.00	530.04
HOL DEFR				16.00-	353.36-
GUAR ALL				2.88	64.25
PAY BQ				68.00-	1,500.88-
LPBC					977.00
BLI CASH					9.50
SAL PROR	08/15	40.00-	892.40-		
SAL PROR	08/31	72.00-	1,606.32-		2,498.72-
TOTAL CASH EARNINGS			250.25	1,316.63	37,658.24

TXBL	PERIOD	N/C TXBL	YTD N/C TXBL
IMP INC			56.16
TOTAL NONCASH TXBL EARNINGS			56.16

BEFORE TAX DEDUCTIONS	CURRENT	YTD
HIMEDCR		120.00-
MED PPO		660.00
DENTAL		160.00
VISION		68.48
ADI		13.60
EE LIFE		8.48
RSP BT	15.02	2,258.92
VAC BUY	0.00	716.48
TOTAL BT DED.	15.02	3,765.96

AFTER TAX DEDUCTION	CURRENT	YTD
UWBRDCTY		40.00
EE LIFE		29.72
TOTAL AT DED.		69.72

NET PAY DISTRIBUTION	AMOUNT PAID
******4388	150.80
TOTAL NET	150.80

TAXES	TXBL/RPBTL	TAX	YTD TXBL/RPBL	YTD TAX
FED	235.23	58.81	33,892.28	5,468.10
FICA	250.25	10.51	36,207.36	1,520.71
FICM	250.25	3.63	36,207.36	525.01
PA	250.25	7.68	36,151.20	1,109.84
SUI EE	250.25	0.20	37,658.24	30.13
North To OCCUP. EE			2,172.58	10.00
Wyalusin	250.25	3.60	36,151.20	520.57
TOTAL TAXES		84.43		9,184.36

Pay History PayStub Details PayStub Comparison

Print Time Sheet

< Previous PayStub | Pay Date: 10/1/2012 – Regular ↓ | Next PayStub >

Adecco USA Inc
2106 College Ave
Elmira, NY 14903-1653
(866) 528-0707

KELSEY TURNER
1 THOMAS ST
TOWANDA, PA 18848-1525

Pay Advice # 33052970
Employee ID *******
Department Hand/325 Wrap/05315 Office/5325
Expand All Collapse All

Pay Cycle End Date 10/07/2012
Pay Frequency Weekly

Tax Withholding	State Codes	Marital Status	Allowances		Additional Amounts	Local Codes
Federal		Single	0			Loc 1: 08050
Primary State	PA		0			Loc. 2: 00806
Secondary State			0			Loc. 3:
Local			0			Loc. 4:
Earnings	Work Week	Rate	Hours	Hours YTD	This Period	YTD
7879396				24.00	0.00	254.00
7879396				32.00	0.00	346.00
7879396	10/01/2012/10/07/2012	16.5000	8.00	141.00	132.00	2,273.63
7879396	10/01/2012/10/07/2012	11.0000	40.00	1,382.00	440.00	14,992.89
Total Earnings:					$572.00	$17,866.52
Pre-Tax:					This Period	YTD
Total Pre-Tax					$0.00	$0.00
Taxes					This Period	YTD
Federal – OASDI/Disability-EE					$24.02	$750.39
Federal – FICA Med Hospital Ins/EE					$8.29	$259.06
Federal – Withholding					$71.23	$2,076.02
State of PA – Withholding					$17.56	$548.49
State of PA – Emergency & Municipal Servs Tx					$0.00	$24.00
State of PA – Unemployment EE					$0.45	$14.29
PAH080505					$5.72	$116.21

PAH080507	$0.00	$62.47
State of PA – Locality – NORTH TOWANDA TWP (M + SD) – Emergency & Municipal Servcs Tx	$0.00	$10.00
State of PA – Locality – TOWANDA BORO (M + SD) – Emergency & Municipal Servcs Tx	$0.00	$14.00
Total Taxes:	$127.27	$3,850.93
After-Tax:	This Period	YTD
Total After-Tax:	$0.00	$0.00
Net Pay	This Period	YTD
Total Net Pay:	$444.73	$14,015.59

Pay Summary	This Period	YTD
Earnings	$572.00	$17,888.52
Pre-Tax Deductions	$0.00	$0.00
Federal Taxable Wages	$572.00	$17,866.52
Social Security Taxable Wages	$572.00	$17,866.52
Medicare (HI) Taxable Wages	$572.00	$17,866.52
State Taxable Wages	$572.00	$17,866.52
Total Taxes	$127.27	$3,850.93
After-Tax Deductions	$0.00	$0.00
Net Pay	$444.73	$14,015.59