

Appeal No. 2014AP1880

Cir. Ct. No. 2010CV2595

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

**UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 1473, DENNIS A. WARNE, CHARLES R. SEELEY
AND PAMELA COLLINS,**

PLAINTIFFS-RESPONDENTS,

v.

HORMEL FOODS CORPORATION,

DEFENDANT-APPELLANT.

FILED

DEC 23, 2014

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

This appeal arises from a class action lawsuit by unionized workers at a Hormel plant seeking compensation for time spent donning and doffing clothing and equipment that the workers are required by their employer to wear while processing food and to remove before leaving the facility. Pursuant to WIS. STAT. RULE 809.61 (2011-12), this court certifies the appeal to the Wisconsin Supreme Court for its review and determination of two questions.

First: Is the donning and doffing of clothing that is required by the employer, occurs on the employer's premises, and benefits the employer "integral" and "indispensable" to the principle work activities of the employees—and therefore compensable under Chapters 103 and 109 of the Wisconsin Statutes and

WIS. ADMIN. CODE § DWD 272.12 (Feb. 2009)—even if the employees’ tasks could be performed without the required clothing and equipment?

Second: Even if donning and doffing required work clothing and equipment is deemed “integral” and “indispensable” to the employees’ work activities, is it nonetheless rendered non-compensable by the doctrine of *de minimis non curat lex*?

The first issue appears to be controlled by our decision in *Weissman v. Tyson Prepared Foods*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502. Hormel advances several reasons it believes that *Weissman* was erroneously decided. Since we are bound by our own decisions, we cannot meaningfully address a claim that *Weissman* should be modified or overruled. However, we note that the Wisconsin Supreme Court previously granted a petition for review in *Weissman*, but did not issue a decision on the merits because the parties settled the case. This appeal therefore presents another opportunity for the Wisconsin Supreme Court to consider the application of the “integral and indispensable” test for compensation in a “donning and doffing clothing” case under Wisconsin law.

The second issue—whether to treat the activity as *de minimis*—was noted but not addressed in our decision in *Weissman*. It appears to be one of first impression in this state. Because resolution of the issue could involve a decision whether, or how closely, to follow or deviate from federal case law interpreting analogous federal statutes and administrative code provisions, the Wisconsin Supreme Court would appear to be the most appropriate forum for hearing it.

Finally, we note that United Food & Commercial Workers Union Local 538 has requested permission to file a nonparty amicus brief. We will hold

that motion in abeyance pending the decision of the Wisconsin Supreme Court whether to certify the appeal.

