

Judge's In-Chamber Experiment Answers Dressing Question

How long does it take three appellate court staff members to change into and out of protective clothing for a poultry processing plant? Not long, so the appellants lost their appeal in the Seventh Circuit.

The novel experiment conducted in chambers and privately videotaped was apparently conducted by Judge Richard Posner and detailed in a written opinion he wrote. However, Judge Posner denied that the experiment swayed his opinion—a conclusion disputed by the dissenting judge.

The experiment took place in a case involving whether overtime payments were due to poultry processing plant employees who had to remove their protective clothing and then re-don the clothing after they were done eating, all within their half-hour lunch period.

The trial court granted a motion to dismiss because it found the cleaning up at lunch was not part of the employee's work. The appellate court majority found, because the time to take off the protective gear and then put it back on was "de minimis," the employees were not entitled to overtime pay.

The plaintiffs alleged it took 10-15 minutes to remove and put back on their protective clothing at lunchtime. The company said it took only 2-3 minutes. The trial court made no finding on the precise time involved. That's when the appellate court "decided to experiment with a novel approach." The court bought from a supplier the protective clothing the employees were required to wear. "Upon arrival of the clothing/equipment three members of the court's staff donned/doffed it as they would do if they were workers at the plant," the opinion explained. The exercise was videotaped and the majority found the "average time it takes to remove the clothing/equipment is 15 seconds, and the average time to put it on is 95 seconds."

Judge Posner argued that this was not considered as "evidence" in deciding the appeal but was only "common sense," which "has a place in adjudication." The opinion then found the "poultry workers in our case do not spend the 'vast majority of the time' during their lunch breaks donning and doffing" the protective clothing.

The dissent noted the question of how much time it takes to change out of and back into the protective clothing was a disputed fact. "I am startled, to say the least, to think that an appellate court would resolve such a dispute based upon a post-argument experiment conducted in chambers by a judge," Judge Wood wrote. "To the extent (even slight) that the court is relying on this experiment to resolve a disputed issue of fact, I believe that it has strayed beyond the boundaries established by Federal Rule of Civil Procedure 56. . . . I note as well that this experiment proceeded on the assumption that washing is not essential for workers handling raw poultry—an assumption I have already shown to be inconsistent with government regulations for hygiene within a meat processing plant."

Judge Wood wrote that “the amount of time at issue is a question that must be developed at trial; no amount of common sense, internet research, or personal experience can substitute for that.”

The opinion is available at <http://www.balough.com/judges-in-chamber-experiment-answers-dressing-question>.

Mitchell v. JCG Industries, Inc., 7th Cir. No. 13-2115, issued March 18, 2014.