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NO. 68528-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, MOISES SANTOS GONZALEZ, HERIBERTO VENTURA SATURNINO, ORLANDO VENTURA REYES, JOSE LUIS CORONADO, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO

Appellants/Plaintiffs,

v.

EXPERT JANITORIAL, LLC, dba Expert JMS, and FRED MEYER STORES, INC.,

Respondents/Defendants.

Appeal from the Superior Court of Washington
for King County
(Cause No. 10-2-11852-7 SEA)

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

The trial court erred in:

A. Entering judgment for defendant Fred Meyer Stores, Inc. ("Fred Meyer") (CP 1945-1946);

B. Entering judgment in favor of defendant Expert Janitorial LLC (CP 1942-1944);

C. Entering Order Granting, In Part, Defendant Expert Janitorial LLC's ("Expert") Motion For Summary Judgment (CP 1960-1963);

D. Entering the Order Granting Fred Meyer Stores, Inc.'s Motion for Summary judgment (CP 1964-1967); and

E. Entering an Order Approving Fred Meyer Stores, Inc.'s 2012 Cost Bill and Judgment (CP 1971-1973).

II. ISSUES PRESENTED

A. Given the Washington Minimum Wage Act's ("MWA") connection to the Fair Labor Standards Act ("FLSA"), should this Court look to FLSA appellate decisions from federal court and the United States Department of Labor's ("DOL") interpretations as to how an employer is defined and how joint employment is determined?

B. Given the evidence in those two summary judgments, what are the relevant factors for determining economic dependence?

C. Should only the factors identified in *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), be utilized in

determining joint employment particularly given contrary U.S. Supreme Court authority, Court of Appeal's authority, as well as contrary interpretations by DOL?

III. INTRODUCTION

The five appellants[1] in this appeal ("plaintiffs") worked as janitors in Fred Meyer stores for up to 18 months. *See* CP 194-199. They typically worked 7 days a week, 8 or more hours a day and were not only not paid overtime, but were not even paid minimum wage under the Washington MWA. *Id.* While their work was difficult and essential to Fred Meyer, it was unskilled so, for example, plaintiffs had little, if any, training,[2] and did not need to speak or understand English to do their job. Moreover, their work was primarily supervised by Fred Meyer. CP 1032, 1039, 1192, 1202-1203, 910. While plaintiffs were directly paid by All Janitorial or All American Janitorial (the "second tier contractors"), the money to pay plaintiffs came from Expert – JMS which was a first tier contractor with Fred Meyer and which did not pay the second tier contractors such as All Janitorial and All American Janitorial enough money for them to pay plaintiffs in accordance with the MWA. *See* CP 240-241.

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[1] Carolina Becerra Becerra, Julio Cesar Martinez Martinez, Alma Becerra, Orlando Ventura Reyes, and Adelene Mendoza Solorio (an appellant only against Fred Meyer).

[2] CP 1200 (Martinez), CP 1233 (Mendoza Solorio), CP 1222 (Alma Becerra), CP 1211 (Ventura-Reyes).

Plaintiffs' characteristics and experiences were typical of other janitors working at Fred Meyer stores. For example, all of the more than 30 janitors hired by All Janitorial and All American to work in the Fred Meyer stores from 2007 through April 2010 spoke Spanish and did not speak English. CP 703. Furthermore, CP 1252-1255 and CP 1278-1279 are records of days worked by more than 30 such janitors at Fred Meyer stores, including plaintiffs, and shows most of them working every day of the month. Fred Meyer's Vice President also admitted both that Fred Meyer provided most cleaning and restroom supplies to the janitors and that Fred Meyer employees during the day used the same supplies to do many of the same jobs that the janitors did at night.[3] Fred Meyer also admitted that from at least 1994-2004 "Fred Meyer used its own employees to do janitorial work in Fred Meyer stores in the Pacific Northwest." CP 719.

Plaintiffs also provided declarations from John Ezzo against both Expert (CP 549-642) and Fred Meyer (CP 1054-1182). Mr. Ezzo gave expert business and historical opinions placing Fred Meyer and Expert as participants in what he referred to as the "Building One model" which ultimately leads to large retailers, such as Fred Meyer, "first tier" janitorial contractors, such as Expert, and "second tier" contractors such as All

[3] "All cleaning supplies, restroom supplies, and mops used by both the janitorial contractors at night and by Fred Meyer's retail store employees during the day to clean up spills and clean and supply the bathrooms are purchased by Fred Meyer." CP 721 (Emphasis added).

Janitorial and All American Janitorial obtaining and controlling janitorial work without paying necessary taxes, or minimum and overtime wages to the janitors themselves. At CP 1063, Mr. Ezzo explains:

> 24. The Building One model has continued in retail because it meets the needs of the participants. The retailers get janitorial services at the lowest price possible. It is the cheapest way to supply services. The retailers assure quality by maintaining tight control over what is done, how it is done and whether the service is satisfactory. The 1st tier subcontractors win bids because they can underbid companies that have their own janitors, treat them as employees, pay industrial insurance premiums, etc. The 1st tier subcontractors can win bids by attracting 2nd tier companies who are willing to try to make a profit by misclassification, 7-night shifts, no overtime pay and, often, minimum wage violations. The model depends on a pool of laborers who are willing to work 7-nights a week and long hours without overtime pay or, even, minimum wage. That is why the model developed in Southern California and has expanded with the exploitable labor pool. The events in this case are not aberrant or due to unusual behavior by All Janitorial or All American Janitorial. It is how too much of janitorial work is performed in the retail industry. (Emphasis added.) *See also* CP 555-560.

Plaintiffs sued (a) Fred Meyer, (b) Expert, a "first tier" contractor with Fred Meyer to provide it janitorial services, which had no janitors and subcontracted out the actual janitorial work, (c) All Janitorial LLC, a subcontractor with Expert between 2007 and January 2010 for the actual provision of janitorial services for 19 Fred Meyer stores, (d) Sergey Chaban, an owner of All Janitorial, and (e) All American Janitorial, another subcontractor of Expert, which took over the cleaning of 19 Fred Meyer stores after All Janitorial stopped doing that work in January 2010.

Plaintiffs alleged that they were employees of each defendant and thus entitled to be paid minimum wage and overtime by each of them. CP 1-2. All of the defendants denied that any of the plaintiffs were employed by them. CP 20, 31, 1464, and 1472. If defendants were correct then plaintiffs would be employees of no one and thus would be independent contractors under both the FLSA and MWA.

Defendants, however, are incorrect. The MWA, including its definitions, is patterned on the FLSA.[4] The FLSA defines the term "employ" as "includes to suffer or permit to work."[5] Additionally, the Washington Legislature amended the overtime provisions of the MWA to conform to the FLSA in 1975.[6] This is not hotly disputed by defendants since Expert admitted in its motion for summary judgment,

> [B]ecause the MWA and its definitions are patterned on the FLSA, Washington courts look to interpretations of comparable provisions of the FLSA as persuasive authority. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 50; *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App. 401, 422 (2002). CP 1989.

The two primary Supreme Court FLSA cases in determining whether a company is an employer or joint employer are *Rutherford Food Corp. v. McComb,* 331 U.S 722 (1947), and *Goldberg v. Whitaker House*

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[4] *Stahl v. Delicor of Puget Sound, Inc.,* 148 Wn.2d 876, 885, 64 P.3d 10 (2003); *Inniss v. Tandy Corp.,* 141 Wn.2d 517, 523-24, 7 P.3d 807 (2000); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000); *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 50, 244 P.3d 32 (2010).

[5] 29 U.S.C. § 203(g).

[6] *Inniss* at 523-24; *Anfinson* at 50.

Co-op., Inc., 366 U.S. 28, 33 (1961). *Rutherford* is important for several reasons. First, it explained that the definitions of "employer" and "employee" (which use the very broad language of "suffer" or "permit", and are the same as the MWA definitions) are "comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Id.* at 729.

Secondly, the *Rutherford* Court explained that the determination of joint employment does not depend on "isolated factors but rather upon the circumstances of the whole activity." *Id.* at 730. Finally, the Court discussed at page 730 six factors particularly relevant to its determination that Kaiser was a joint employer of the meat boners:

> [1] The workers did a specialty job on the production line. [2] The responsibility under the boning contracts without material changes passed from one boner to another. [3] The premises and equipment of Kaiser were used for the work. [4] The group had no business organization that could or did shift as a unit from one slaughter-house to another. [5] The managing official of the plant kept close touch on the operation. [6] While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.

In *Goldberg*, 366 U.S. at 33, the court held:

> In short, if the 'economic reality' rather than 'technical concepts' is to be the test of employment (*United States v. Silk*, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468, 91 L.Ed. 1757; *Rutherford Food*

Corp. v. McComb, 331 U.S. 722, 729, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772), these homeworkers are employees.

Basing a decision on "economic reality" and "the circumstances of the whole activity," requires examination of the historical and business underpinnings of actions and documents that attempt to label workers as independent contractors rather than employees. In *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 74 (2d Cir. 2003), the Second Circuit explained:

> [H]istorical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws.[7]

The Ezzo declarations provide such evidence that both Fred Meyer and Expert are part of such "contracting device."

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[7] *See also Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132, 145-46 (2d Cir. 2008):

> But nothing in *Zheng* suggests, as defendants urge, that functional control factors are relevant *only* to identifying subterfuge. To the contrary, *Zheng* makes clear that the reason for "looking beyond a defendant's formal control over the physical performance of a plaintiff's work" is to give full "content to the broad 'suffer or permit' language in the statute." *Id.* at 75-76 (quoting 29 U.S.C. § 203(g)). In short, *Zheng* contemplates arrangements under which the totality of circumstances demonstrate that workers formally employed by one entity operatively function as the joint employees of another entity, even if the arrangements were not purposely structured to avoid FLSA obligations. (Emphasis added.)

Thus, while for summary judgment purposes, the evidence does show that the arrangements here were "purposely structured" by Fred Meyer and Expert to avoid wage and hour obligations, this Court need not so conclude in order to find the plaintiffs were joint employees of either Fred Meyer or Expert.

Basing a decision on economic reality also calls for an examination of the economic effects of decisions such as was done in *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007), where the Seventh Circuit explained:

> If Zarate had been solvent, Remington [the putative joint employer] would have had to offer him enough that he could pay all of the workers' wages (including the minimum wage and any overtime premium), cover the costs of fringe benefits such as housing, and still be able to make a profit. But when a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers (as Zarate did), and then treating the principal firm as a separate employer is essential to ensure that the workers' rights are honored. ....
>
> If everyone abides by the law, treating a firm such as Remington as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator, such as Zarate, or one who plans to spurn the FLSA (as Zarate may have thought he could do), is Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor. And there are ways to avoid this risk: either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full. (Emphasis added.)

An economic analysis in this case also supports a finding that both Fred Meyer and Expert are employees of plaintiffs.

Both DOL[8] and numerous courts of appeal have drawn on the factors set forth in *Rutherford* and *Goldberg* in formulating tests for

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[8] 29 C.F.R. § 500.20(b)(4) and (5); U.S. Dept. of Labor Opinion Letter Fair Labor Standard Act (FLSA) (May 11, 2001), WL 1558966 (DOL Opinion). That DOL Opinion supplemented an earlier August 24, 1999 opinion which is reported as 1999 WL 1788146.

determining joint employment which can fairly be described as variations on the *Rutherford* or *Goldberg* theme. The courts of appeals that have been most active in deciding FLSA joint employment cases are the Second[9], Fifth[10], Seventh[11], Ninth[12], and Eleventh Circuits[13]. Applying those tests here calls for reversing the summary judgment entered in both Fred Meyer's and Expert's favor.

IV. STATEMENT OF FACTS

A. Facts Relating To Fred Meyer's Summary Judgment Motion.[14]

1. Plaintiffs' Used Fred Meyer's Premises And Supplies For Their Janitorial Work.[15]

a. Plaintiffs Worked On Fred Meyer Premises.

Fred Meyer's Vice President for Maintenance describes the janitorial activities at issue as cleaning Fred Meyer stores which necessarily take place on Fred Meyer premises. CP 720. *See also* CP 2068 (admitting that "Fred Meyer owned the building cleaned"). Furthermore, each of the five plaintiffs testified that he or she worked only

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[9] *Zheng*, 355 F.3d at 69, *Zheng v. Liberty Apparel Co. Inc.*, 617 F.3d 182 (2d Cir. 2010); *Barfield*, 537 F.3d at 143; and *Carter v. Dutchess Comty Coll.*, 735 F.2d 8 (2d Cir. 1984).

[10] *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir. 1973); and *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 109 (5th Cir. 1961).

[11] *Reyes*, 495 F.3d at 409; and *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987). *See also Moldenhauer v. Tazewell-Pekin Consol. Communications Ctr.*, 536 F.3d 640 (7th Cir 2008) (FMLA).

[12] *Torres-Lopez v. May*, 111 F.3d 633, 646 (9th Cir. 1997); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); and *Moreau v. Air France*, 356 F.3d 942, 950 (9th Cir. 2004) (FMLA).

[13] *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996); *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999).

[14] For the Court's ease of reference, plaintiffs' discussion of facts will briefly note the cases and authorities supporting the relevance of the particular facts.

[15] *Rutherford* at 331; *Zheng* at 72; *Torres-Lopez* at 643-44; *DOL, Antenor* at 932.

at Fred Meyer Stores while working for All Janitorial and/or All American. CP 1228 (Alma Becerra), CP 1214 (Ventura-Reyes), CP 1193 (C. Becerra), CP 1201 (Martinez), CP 1234 (Mendozo).[16]

b. Plaintiffs Primarily Used Fred Meyer Supplies.

The contract between Fred Meyer and first tier contractors such as Expert called for Fred Meyer to supply the "chemicals and cleaning supplies" needed for the janitorial worker. CP 726; *see also* CP 752-784 (list of materials supplied by Fred Meyer). Mr. Ezzo's declaration at CP 1055-1056, explains that the monthly cost per store of such supplies averaged $2,500 and far exceeded the monthly cost of the other supplies or equipment used by the janitors.[17] CP 721, 1309.

2. Fred Meyer Supervised And Controlled Plaintiffs' Work.[18]

Every plaintiff testified that Fred Meyer managed or supervised his or her work. CP 1039 (Ventura) ("I was supervised by my Fred Meyer manager"). CP 1032 (Alma Becerra) ("Our shift was supposed to end at

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[16] Mr. Ezzo also explained that Fred Meyer had the power to insist that work on its premises comply with wage and hour laws:

> 14. Paragraph 9.2 provides that the work is subject to and comply with the Fair Labor Standards Act and other employment laws. I explained in my earlier declaration that this language has been customarily included in retail janitorial contracts since the early 2000s as retailers became aware of the widespread problems with janitor misclassification and unpaid overtime work. This gives a retailer the power to require classification of janitors as employees and overtime pay for overtime work.

CP 1058 (emphasis added).

[17] CP 1017, 1023-1024 estimates All Janitorial's "Estimated Average Equipment Replace or Repairs Monthly" cost at about $750 a month at a time when it had 15 stores. This averages to $50/store/month. As discussed at CP 1055-1056, Fred Meyer's Schedule C was $2,500 store/month for tools, chemicals and supplies. *See also* CP 1269.

[18] *Rutherford* at 331; *Zheng* at 72; *Torres-Lopez* at 642; *Bonnette* at 1470; *Hodgson*; *DOL.*

7:00 in the morning, but we could not go home until our Fred Meyer manager inspected our work, we made any corrections and they signed us out"); CP 1192 (C. Becerra) (supervised by the store manager at Fred Meyer); CP 1202-03 (Julio Martinez); CP 910 (Mendoza Solorio) ("the only supervisors we had were the managers from Fred Meyer")). Moreover, the Fred Meyer contract so provided at ¶ 4.1. CP 51, 728.[19] Much other testimony shows Fred Meyer's control and supervision.

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[19] Mr. Ezzo's states in his August 19th declaration at CP 1056-1057:

> 10. In a typical janitorial situation, the customer will be concerned with quality of the work and will review the work. But, here, the customer is deciding minute details of the work, all of the materials to use, and does daily, detailed inspections. These inspections may be the only detailed review of the janitors' work. This gives Fred Meyer control over conditions of the work and the evaluation of employees' performance.[19] (Emphasis added.)

See also 1058. In his declaration at CP 1035, former Fred Meyer Manager Randy Dedman stated:

> 10. Usually around 7:30 a.m., sometimes as late as 8 or as early as 7:10, the janitorial crew would go to the customer service booth and request that I come up and sign them out. By this time I knew what needed to be done, because I had already done my inspection.
>
> 11. When I saw things that were not done properly, I instructed them to complete what needed to be done. I gave specific directions. It could have been anyone of a number of things that they might have missed. I communicated in different ways. Mostly, I walked them over to where the problem was, pointed and said a few words.
>
> ....
>
> 14. I never saw anyone else in the store with a janitor, inspecting their work. As far as I could see Fred Meyer managers, such as myself, were the only individuals who inspected the janitors' work. (Emphasis added.)

In his declaration at CP 1051, former Fred Meyer Manager Robert Fazio agreed:

> 5. I knew the janitors were not supposed to leave the store until they had their form signed off. I would not sign them off until the work had been done to Fred Meyer's satisfaction. (Emphasis added.)

3. "Whether The Activities The Workers Perform Are An Integral Part Of The Overall Business Operations."[20]

Mr. Fazio also explained at CP 1051 how "essential" and thus integral, the janitors work was to Fred Meyer's overall business operations. Moreover, Fred Meyer admitted its employees did the same kind of work as did the janitors.[21]

4. Fred Meyer's Power, Whether Alone Or Jointly, Or Directly Or Indirectly, To Hire Or Fire Or Modify The Employment Conditions Of The Individuals.[22]

Mr. Ezzo also states in his declaration at CP 1058:

> 13. Supervision also correlates with effecting discipline. The individuals who review the work and interact with the janitor are the ones who can start the corrective or disciplinary process.

That is just what happened when a Fred Meyer manager complained about two plaintiffs which led to them being fired. CP 1224. Moreover, the owner of All Janitorial assured Expert that he would make sure that janitors "trespassed" by Fred Meyer would not be hired back. CP 1395-1396. *See also* CP 777-781.

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[20] DOL opinion letter. *See also Antenor* at 937; *Charles* at 1332-33; *Zheng* at 72, *Torres-Lopez* at 644.

[21] For example, at CP 823, Fred Meyer Manager Lee Wyatt opined that:

> Supplies such as cleaning fluid, toilet paper, and paper towels are used both by the service providers' janitors on graveyard shift and by Fred Meyer lower-level union employees during the day to clean up spills and periodically clean and resupply the restrooms. (Emphasis added.)

Numerous other Fred Meyer managers made the same statement word for word. *See, e.g.,* pp. 764, 769, 785, 790, 823, and 828.

[22] *Torres-Lopez* at 642; *Antenor* at 935; *Hodgson at 237; and* DOL opinion letter.

5. The Responsibility Under The Contracts Passed From One Subcontractor To Another Without Material Change.[23]

On January 15, 2010, All Janitorial stopped doing work for 19 Fred Meyer stores while All American Janitorial began working the same stores the next day using the same janitors. CP 1264-70, 1277-1278, 1285-86. The agreements signed by the two companies with Expert were substantively identical. CP 1378-1393.

6. Whether the Contractor Corporation Had A Business That Could Or Did Shift As A Unit From One Putative Joint Employer To Another.[24]

In the first three months of 2010, All American Janitorial's "only janitorial work was for Fred Meyer." CP 1275. In that time period, therefore, All American Janitorial could not shift as "a unit from one putative joint employer to another."

7. The Degree Of Permanency Of The Plaintiffs' Working At Fred Meyer.[25]

At CP 2068, Fred Meyer incorporated "by reference Expert's discussion of the non-regulatory factors" set forth in *Torrez-Lopez.* Expert's discussion of those factors relied on the facts set forth at CP 193-198 which showed the length of service for each of the plaintiffs, and which is discussed at footnote 30.

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[23] *Rutherford* at 730; *Torres-Lopez at 644; Zheng at 72.*

[24] *Rutherford at 730; Zheng* at 72.

[25] DOL opinion letter, *Torres-Lopez at 644; Charles* at 1331.

8. Plaintiffs Had No Opportunity For Profit Or Loss Depending On Managerial Skill.[26]

At CP 2068, Fred Meyer incorporated "by reference Expert's discussion of the non-regulatory factors" set forth in *Torrez-Lopez*. The incorporated discussion by Expert relied on the facts set forth at CP 193-198 which showed that managerial skill was totally irrelevant to plaintiffs' earnings. Indeed, Expert conceded that "individual plaintiffs did not have an opportunity for profit or loss depending on their managerial skills." CP 1998.

9. Piecework And The Level Of Skill Involved.[27]

Fred Meyer submitted a declaration from Marcos Flores, a supervisor for All Janitorial and All American Janitorial, stating that "[t]he janitors hired by All Janitorial from 2007 through April 2010 spoke Spanish and did not speak English." CP 703. Fred Meyer also submitted declarations from close to a dozen supervisors at Fred Meyer stores in Western Washington during the 2007-2011 time periods stating that none of the janitors at Fred Meyer stores with whom they worked spoke English, and that Fred Meyer employees provided many of the same janitorial services. CP 699-700, CP 711, CP 716-717, CP 763-764, CP 768-769, CP 785, CP 822-823, and CP 827-828.

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[26] *Torres-Lopez* at 644; *Rutherford* at 640.

[27] *Torres-Lopez* at 644; *Rutherford* at 730; *Charles* at 1332; DOL opinion letter.

10. Control Rates And Method of Payment.[28]

Evidence on this is contained a CP 1930, 1407-1408, 1251, 1058, and 1082-1083.

11. Fred Meyer Subcontractors Had Limited Income And Assets.

Mr. Ezzo states at CP 1059-1060 that All American Janitorial started as "(a) 'baby' company in early 2010, with no tools, and was immediately awarded a 19 store Fred Meyer contract," and that Mr. Campos, as of his deposition in 2011, "testified that All American had not yet earned a profit." *See* CP 1276 (relevant portion of Campos deposition).

Mr. Ezzo also at CP 1060 pointed out a declaration of Mr. Chaban and explained "it indicates that All Janitorial has no assets and that Mr. Chaban will be filing for personal bankruptcy within two weeks. It is common in this Building One model that the 2nd tier subcontractors who are willing to take the risk of misclassification and long hours without overtime do so because they have relatively little to lose; they go out of business when their practices come to light."[29]

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[28] *Antenor* at 932; *Bonnette* at 1470; *Torres-Lopez* at 640.

[29] While it had not happened by the time of Fred Meyer's summary judgment, the record before this Court demonstrates that shortly after Fred Meyer was granted summary judgment, the All American Janitorial contract for cleaning the Fred Meyer stores was pulled from it. *See* RP 1/17/12, pp. 65-71.

12. Knowledge of Wage and Hour Violations.

The evidence of Fred Meyer's knowledge of wage and hour violations for janitors working at its stores in the Pacific Northwest includes, but is not limited to evidence contained at CP 770-781, 1031-1032, and 1036.

B. Facts Relating To Expert's Summary Judgment.

1. Facts Relating To Plaintiffs' Hours Of Work, Pay, and Employment Status.

Plaintiffs provided substantial evidence that each of the plaintiffs worked as unskilled janitors 7 days a week, more than 8 hours a day, received no overtime and typically worked for less than minimum wage.[30] Fred Meyer and Expert Janitorial each successfully moved for summary judgment on the grounds that it was not a joint employer. All Janitorial and Sergey Chaban denied in their answer that the plaintiffs were employees. CP 476. All American Janitorial did the same, and had workers sign agreements stating that they were independent contractors not employees. CP 405, 443-62.

2. Facts Relating To Expert's "Business Model For Janitors" Including Plaintiffs.

Plaintiffs opposed Expert's Motion for Summary Judgment with a May 1, 2011 Declaration of John Ezzo, an expert witness whose testimony

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[30] At CP 193-198, Expert introduced into the record, plaintiffs' calculations of hours worked by the plaintiffs and amounts owed to plaintiffs for minimum wage and overtime. The calculations were "based on an average 8.5 hour shift, 7-night workweek, i.e., 59.5 hours per week." CP 194. *See also* CP 427-441 (All Janitorial Labor Records listing days worked); CP 217, 219 (Flores Dep); CP 226, 229 (Ventura Reyes Dep.); CP 96, 98 (Chaban Dec. And spreadsheet). 56 hours/week and monthly pay of $ 1,900 equals $ 442/week and $ 7.89 per hour. The minimum wage between 2010 and 2007 varied between $8.55 and $7.93. http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp.

was considered by the trial court. CP 549-642. Mr. Ezzo explained at CP 555-560 that using the Building One model provides retailers "with substantial savings" by not paying taxes and overtime and also prices out of the market those janitorial companies who treat their janitors as employees and pay overtime.[31]

At paragraphs 55-58 of his May 1st declaration (CP 567-68), Mr. Ezzo opined that "Expert was operating in a Building One Model" with respect to the plaintiffs and that:

> 56. Seven day workweeks and non-payment of overtime is another defining characteristic of the model. ....
>
> 57. The above factors lead toward putting Expert and All Janitorial in a model that encourages and leads to janitorial misclassification and, as a typical consequence, wage and hour violations. (Emphasis added.)

3. Expert's Payment To Its Subcontractors Did Not Permit Them To Comply With The MWA.

The amounts being paid by Expert to the second tier subcontractors All Janitorial and All American Janitorial was insufficient for them to pay plaintiffs minimum wages and overtime as required by Washington law. Mr. Ezzo not only opined at paragraph 58 that "there is little or no room to

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[31] 28. The prices they [the retailers] were willing to pay to janitorial contractors priced many janitorial contractors out of the retail market - those companies that treated their janitors as employees, managed their hours worked and complied with overtime and minimum wage laws. ....

....

30. A 2nd tier subcontractor typically can "save" 20% right away by classifying its janitors as independent contractors. It does so by not having to pay payroll taxes (Social Security, Medicare, FUTA, Unemployment Insurance and other taxes), industrial insurance and by not paying overtime and/or minimum wages. ....

reduce labor hours as a way to make the contract more profitable," but concluded at CP 568:

> 59. I have applied my knowledge of industry bidding practices, productivity, square footage, overhead costs, and the other costs of running a business. I have looked at actual labor expenses paid by All Janitorial and, as discussed above the lack of ability to further reduce labor hours. Based on these factors I am of the opinion that the payment offered by Expert are unlikely to attract 2nd tier subcontractors whose business practice has built into it regular compliance with classification and wage and hour laws. (Emphasis added.)

Mr. Ezzo's testimony on this issue was substantiated by Mr. Chaban who testified that he could not have made a profit from the money he received from Expert if he treated his workers as employees and paid them overtime. CP 240-241.[32] The owner of All American Janitorial admitted

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[32] Q. You had a contract with Expert involving Fred Meyer stores, right?

A. Yes.

....

Q. Sure. With respect to the waxers and janitors who worked at Fred Meyer, did you attempt to set up an independent contract relationship with them?

A. Yes.

....

Q. And I may have follow-up questions, but can you explain, generally, what the connection was between the amount of money you were being paid by Expert and your structuring the relationship between All Janitorial and the waxers and janitors as an independent contractor relationship.

A. We ran the numbers, and the amount we were getting paid, we couldn't -- we would be -- we would go negative if we would treat them as employees.

....

Q. ... And you were not paying overtime; is that correct?

A. No.

Q. Yes, I'm correct?

A. You are correct.

....

Q. And as you ran the numbers, if you had been paying those various taxes, you would have lost money from your contract with Expert?

A. Yes.

CP 240-241 (emphasis added).

the same thing. CP 548 recounted a January 16, 2010 telephone conversation with Raul Campos, the owner of All American Janitorial, in which he "explained that the company [All American Janitorial] was new and could not afford to have the workers treated as employees." (Emphasis added.)[33] Furthermore, All Janitorial was not a long-term concern and filed for bankruptcy (CP 1316) while All American Janitorial only did work for Expert and Fred Meyer, and was severely undercapitalized. CP 1276.

4. Expert Had The Indirect Right To Hire Or Fire Plaintiffs And Other Janitors.

Mr. Chaban testified at CP 238 that if Expert communicated to him that a janitor be let go, it was his "typical practice" to let the janitor go.

5. Expert's Right To Control Plaintiffs' Wages.

Expert admitted at CP 1981 that its contracts with Fred Meyer gave Expert the right and obligation to require that plaintiffs' work comply with wage and hour laws:

> [E]xpert's contract with Fred Meyer requires that the work performed comply with all applicable laws and regulations, including the federal Fair Labor Standards Act. Pacey Decl. Ex. A, § 9.2. (Emphasis added.)[34]

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[33] That was also substantiated by Mr. Campos who, in his deposition at CP 1276, testified that as of the Fall of 2011, All American Janitorial had not yet made a profit.

[34] At CP 47, Expert's CFO also admits that his understanding of the purpose of section 9.2 of Expert's contract with Fred Meyer was that it was to obligate Expert to prevent Expert and its subcontractors from violating the law, *i.e.,* to protect Fred Meyer from "negative publicity that might result if contractors or subcontractors were to violate the law, which could hurt Fred Meyer's reputation and sales." (Emphasis added.) CP 53-54 includes §9.2 of the contract between Expert and Fred Meyer.

6. Plaintiffs' Work Is An Integral Part Of Expert's Business.

Expert concedes that "the janitorial work performed by plaintiffs was an integral part of Expert's business." CP 1999 (emphasis added).

7. Plaintiffs Had No Opportunity For Profit Or Loss From From Their Work.

Expert also admits that "individual plaintiffs did not have an opportunity for profit or loss depending on their managerial skill." CP 1998.

8. Plaintiffs' Work Involved Little Skill Or Judgment.

Expert further admits that "the work performed by plaintiffs did not require significant initiative and judgment." CP 1998.

9. Plaintiffs' Work Was Relatively Permanent.

Exhibit F to the Youmans Declaration shows that plaintiffs worked virtually seven days a week for long periods of time. CP 193-199.[35]

10. Expert Was Repeatedly Informed Of Evidence Of Wage And Hour Violations By Its Second Tier Subcontractors Including All Janitorial And All American And Its Response To Such Information.

Expert received notice of second tier subcontractor independent contractor classification issues and wage/hour law compliance problems

[35] CP 193-199 showed that Carolina Becerra Becerra worked 315 days in eleven consecutive months, and Heriberto Ventura Saturnino worked 152 days in six consecutive months, and then 410 days in fifteen consecutive months. Jose Luis Coronado worked 357 days in twelve consecutive months, and Julio Cesar Martinez Martinez worked 323 days in eleven consecutive months, and then fourteen days in one month. Orlando Ventura Reyes worked 157 days in six consecutive months, and then 430 days in fifteen consecutive months. Alma Becerra Becerra worked 332 days in twelve consecutive months. Adelene Mendoza Solorio worked 68 days in three consecutive months. A full-time worker working five days a week and taking a two-week vacation, works about 250 days a year (50 weeks x 5 days a week). Many of the plaintiffs not only worked a year or more, but put in well over 325 work days a year.

from the DOL,[36] lawsuits,[37] Fred Meyer,[38] All Janitorial,[39] and a JMS District Manager.[40] It did not even investigate defendant All American Janitorial after April 2010 when suit was filed herein even though All American admitted in discovery (CP 405) that it was violating its promise to Expert that it would use employees to work at the Fred Meyer stores. *See* CP 83. Expert has done nothing to investigate wage and hour law compliance by its second tier subcontractors. CP 259-260; CP 325.

11. Responsibility Passed From One Subcontractor To Another.

The facts set forth at CP 1996, 101, and 396-397 are essentially the same as the facts with regard to Fred Meyer's discussion at page *12, *supra.*

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[36] CP 364-365 (DLI discussions with Vermeer re two service providers with a history of complaints, failure to pay industrial insurance premiums and overtime problems). Expert Supervisor Vermeer also tells L&I that another of Expert's 2nd tiers is treating janitors as independent contractors. CP 367. L&I produced 275 pages regarding 2nd tier investigations – the first 54 pages referring to Vermeer. CP 209.

[37] The present case and a May 2009 lawsuit, *Alcantara v. JMS* (CP 368-377).

[38] CP 381 (Tuggle Dep., pp. 62 & 64-65; Fred Meyer store director, human resources and maintenance manager believed a janitor had been working 6-7 nights/week; relayed to Expert Manager Susan Vermeer to remedy).

[39] CP 245 (Chaban Dep. 82:4 – 82:24 & 83:25 – 84:9).

[40] District Manager William Suen told Ms. Vermeer in 2006 or 2007 that janitors were working seven nights a week, to which Vermeer said it was the service provider's responsibility to give them the day off. CP 391.

V. ARGUMENT

A. Fred Meyer Was Not Entitled To A Summary Judgment Finding That It Was Not Plaintiffs' Employer Or Joint Employer.

1. Introduction To Argument.

In *Reyes*, 495 F.3d at 409, the Seventh Circuit made the crucial point that "if everyone abides by the law, treating a firm ... as a joint employer will not increase its costs ...." Here, Fred Meyer formed contractual relationships, structured the relationships to give it control over the janitors' work, supervision and wage/hour compliance, had evidence of the violations and then failed to act to correct them. Now, All Janitorial has no assets, its owner is in bankruptcy (CP 1674-1676), and All American never made a profit. *See also* trial testimony Raul Campos (RP 1/17/12, pp. 65-71). Fred Meyer is trying to escape responsibility for a plan which it set up when it got rid of its employee janitors in 2004, saved money in doing so, obtained all new, non-English speaking janitors who it controlled and who it knew were not being paid in accordance with Washington law. Under the FLSA and MWA Fred Meyer should not be permitted to do so.[41]

[41] Fred Meyer argued to the trial court in connection with its motion for summary judgment that the court should "assume" that "the five plaintiffs were employed by All American and All Janitorial as alleged" by plaintiffs. CP 2048. However, while that assumption would benefit Fred Meyer, assumptions during summary judgment should not be made to benefit the moving party.

2. Relevant Authority On Fred Meyer As An Employer Or Joint Employment.

As discussed above, the Supreme Court in *Rutherford* laid out six factors relevant to determine joint employment and, following *Rutherford*, both the DOL and the various courts of appeals have set out similar but not identical lists of relevant factors. For example, the Ninth Circuit in *Torrez-Lopez,* 111 F.3d at 640-641 laid out 13 factors drawn from *Rutherford,* from the then-existing Agricultural Worker Protection Act ("AWPA") regulations,[42] and from prior Ninth Circuit cases. For example, the court included factors such as whether the service rendered requires a special skill, whether the employee had an opportunity for profit or loss depending upon managerial skill, and whether there was permanence in the working relationship. *Torres-Lopez,* 111 F.3d at 645. The Second Circuit in *Zheng,* 355 F.3d at 72, listed five factors drawn closely from *Rutherford*, and added as a sixth factor "whether plaintiffs worked exclusively or predominantly for the Liberty Defendants." The relationship between various Second Circuit tests was discussed in *Barfield*, 537 F.3d at 143. The Eleventh Circuit in *Antenor,* 88 F.3d at 932, listed eight factors that appear to be drawn both from *Rutherford* and by the DOL regulations.[43]

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[42] Those regulations have since been modified. *See Torres-Lopez* at 641, n. 6.

[43] Furthermore, the economic realities here as well as many of the relevant factors parallel *Flores v. Albertsons,* at a time when the 2nd tier subcontracting model, with wage and hour abuses, has come to define the retail janitorial market. *Flores* involved the same business model present herein. Building One did not have its own janitors, but instead subcontracted with 2nd tier companies to provide janitors for supermarkets in Southern California. The Court held there were material disputes of fact regarding

The DOL's May 11, 2001 Opinion Letter laid out factors which the DOL, which administers the FLSA program, believes are particularly relevant and puts those factors into a context. The DOL Opinion Letter stated:

> Factors that are relevant to the determination of whether an entity is a joint employer include, but are not limited to: [1] the power to control or supervise the workers or the work performed; [2] the power, whether alone or jointly or directly or indirectly, to hire or fire or modify the employment conditions of the individual; [3] the degree of permanency and duration of the relationship; [4] the level of skill involved; [5] whether the activities the workers perform are an integral part of the overall business operations; [6] where the work is performed and whose equipment is used; and [7] who performs payroll and similar functions. None of the factors standing alone is dispositive. Moreover, because the ultimate question is one of economic dependence, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis.

The DOL's list of factors is particularly helpful because it generalizes the factors without regard to a specific fact pattern.[44]

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whether the supermarkets were FLSA joint employment, under *Bonnette, Moreau* and *Torres-Lopez* criteria. The basic relationships in *Flores* closely parallel the present case. The Court opined that "excessive 'indirect' supervision of the employees' performance can constitute control for purposes of the FLSA." *Id.* at 4 (*citing Torres-Lopez,* 111 F.3[d] at 1183.

In denying summary judgment, the *Flores* court found permanence in the employment relationship. It held that a "'Daily Ticket' documenting the quality of the janitorial services ... provided the supermarkets with a level of control ... determining when the store had been satisfactorily serviced pursuant to the agreement" *Slip* at 5 (emphasis added). It noted that some of the supermarkets followed up with Building One regarding the alleged wage and hour violations. *Id.* The court denied summary judgment noting "significant disagreement over the level of control the Supermarket Defendants exerted over the [janitors]." *Slip* at 6. The court wanted to see a "complete picture of the 'circumstances of the whole activity' ... to effectively determine the economic and workplace realities ...." *Id.*

[44] The Washington Supreme Court interprets the MWA in light of "Washington's long and proud history of being a pioneer in the protection of employee rights." See *Drinkwitz*

3. Evidence On Many Relevant Factors Created Disputed Issues Of Fact As To Whether Fred Meyer Was An Employer Or Joint Employer Of Plaintiffs.

All of the following factors have been found relevant to the issue of joint employment by at least one and typically multiple federal appellate courts and/or the DOL. Plaintiffs have found no directly applicable authority under the MWA on joint employment although *Anfinson, supra*, adopts a number of these factors on the related issue of determining, under the MWA, whether a worker is an employee or an independent contractor. That related issue is relevant here since all of the defendants, including Fred Meyer, denied being plaintiffs' employer. At this summary judgment stage of the litigation, plaintiffs, rather than Fred Meyer, should be given the benefit of the evidence and inferences therefrom. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005). Given that standard, there is no assurance that any of defendants in this case will be held to be plaintiffs' employer. That would leave this Court with the determination as to whether, for summary judgment purposes, plaintiffs are employed by Fred Meyer or employed by no one and are independent contractors. That, in turn, directly implicates the *Anfinson* factors.

(rejecting restrictive FLSA salary basis pay rule); *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846, 852 (2007)(MWA applied to out-of-state hours, despite contrary WAC). Here, Fred Meyer maintains control over the janitors sufficient to satisfy joint employment criteria. It does so as part of a system in which the janitors in its stores suffer egregious abuses. The MWA, with its expansive definition of "employer" and its public policy, is sufficient to address this system, by holding Fred Meyer responsible as a joint employer under the facts herein.

(1) Plaintiffs Worked On Fred Meyer Premises Using Mostly Fred Meyer Supplies Favors Fred Meyer Being A Joint Employer.

This factor is relied upon, *inter alia*, by the Supreme Court and by the Second, Ninth and Eleventh Circuits as well as by the DOL. It is relevant:

> For the obvious reason that without the land, the worker might not have work, and because a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors." *Antenor*, 88 F.3d at 937 (*citing Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 513-14 (5th Cir. 1969)). Similarly, the grower's investment in "equipment and facilities" is probative of the "workers' economic dependence on the person who supplies the equipment or facilities. *Id.*

Torres-Lopez, 111 F.3d at 640-41. In *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154 (C.D. Cal. 2003), the District Court quoted the same portion of *Torrez-Lopez,* but distinguished it because under the facts in *Zhao*, the work was not done on the putative joint employer's premises. *See Zhao*, 247 F. Supp. 2d at 1160. Here, the work was done on Fred Meyer premises using primarily Fred Meyer supplies, which supports Fred Meyer being at least a joint employer. [45]

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[45] Fred Meyer argued in the trial court that its supervision was analogous to that in *Moneau* since it was done for safety reasons and to ensure contractual compliance. A similar argument was rejected in *Lemus v. Timberland Apartments, L.L.C.,* 2011 WL 7069078 (D. Or. 2011), where the Magistrate Judge explained:

> This case differs from Moreau in one important respect. Unlike in *Moneau,* where Air France monitored ground contractors' performance on a regular basis but only communicated with those contracts once a month about potential problems, *see Moreau*, 356 F.3d at 949, here Polygon had at least daily interaction with JC Builders about its employees' work, leading to much more pronounced control of JC Builders' daily activity.

(2) Fred Meyer Directly Supervised And Controlled Plaintiffs' Work.

Every plaintiff testified that Fred Meyer managed or supervised his or her work. CP 1039, 1032, 1192, 1202-03, and 910.[46] Plaintiffs also set forth at pages 7-9 herein abundant additional evidence that Fred Meyer supervisors conducted daily, detailed inspections of their work and that they were not able to leave until that supervisor signed off. Fred Meyer did not dispute this evidence in the trial court, but instead attempted to convince the Court to disregard this evidence even though plaintiffs, as non-moving parties, are entitled to the benefit of the evidence and reasonable inference therefrom. *Owen,* 153 Wn.2d at 787. None of those attempts should be successful.

a. Fred Meyer argues in the trial court that while plaintiffs had to track down a Fred Meyer manager to initial the night's work "[t]hese Fred Meyer 'supervisors' couldn't possibly have supervised plaintiffs on the 11 p.m. to 7 a.m. graveyard shift, because they arrived to open the store

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The *Lemus* court also distinguished *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 686 (D. Md. 2010) and *Zhao*, and found the supervision similar to that in *Torrez-Lopez*. The same is true in this case. The facts in this case are also far apart from the facts in *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 775 (D.Md. 2008), where "[i]f Regal has an issue or a concern about the cleaning being done by Sparkle at a particular theater, then Regal would contact one of Sparkle's managers" and "no employee of Regal supervises, trains, or instructs the members of Sparkle's crews with respect to the performance of cleaning services." Here, the Fred Meyer employees interacted with the janitors daily and kept them in the store until the work was done to their satisfaction.

[46] In ruling that Expert was not plaintiffs' joint employer, the trial court found it important that the "plaintiffs admit that nobody from Expert even told them what to do or how to do their jobs." CP 196. Plaintiffs' testimony regarding their supervision by Fred Meyer employees should be equally important in showing that Fred Meyer was their employer. CP 1039, 1032, 1192, 1202-1203, and 910.

at 7 a.m." CP 2066-2067. The evidence is that plaintiffs tracked down their Fred Meyer supervisors after they finished their Schedule A work at 7:00 a.m., at which point the inspections, corrections and signing took place – before the janitors could go. That is direct "supervision" of these plaintiffs by Fred Meyer.

b. Fred Meyer argued in the trial court that "[i]f Fred Meyer had a concern about the janitorial work, it addressed the concerns either to Expert or to Mr. Flores. Flores Dec., ¶11." CP 2064. The accuracy of that assertion is disputed by all of the evidence cited and quoted by plaintiffs above. Expert was called in only when Fred Meyer decided the problems were too serious to address in house. *See also* CP 1051.

c. Fred Meyer argued in the trial court that the "work orders" that plaintiffs were required to have signed were requirements only of Expert Janitorial, All Janitorial, or All American Janitorial, *i.e.,* served no function for Fred Meyer. CP 2066. However, inspections were written into the Fred Meyer contracts at ¶4.1 – a prompt daily inspection and acceptance of the Schedule A Work. Moreover, store cleanliness was an "essential responsibility" for a Fred Meyer Store Director (CP 1051), with Fred Meyer directors and their designees dutifully carrying out that responsibility. CP 1034-1035 (Store Director challenging thoroughness of inspection); CP 1051-1053; *see also* plaintiffs' descriptions of the inspections.

d. Fred Meyer submitted declarations from numerous store directors to the effect that they were seldom in the stores during the time that the janitors were working there – apparently suggesting nobody else could supervise janitors in their absence. CP 713-764. However, there is contradictory evidence both from the plaintiffs and from other Fred Meyer managers that Store Directors either did the inspection themselves or designated the janitor supervision role to their managers and then held them accountable for performing this "essential responsibility" of having a clean store. CP 1051-1052; CP 1034-1035. *See also* CP 768 (opening department manager).[47] There is abundant evidence that Fred Meyer controlled the day-to-day inspection and review of the janitors' work.

e. Paragraph 11 of most Store Directors' declarations contain essentially the same assertions that they did not speak with janitors because all of the janitors only spoke Spanish. Presumably this is offered as proof that the Store Directors (or any non-Spanish-speaking manager) would be unable to conduct an end-of-shift inspection and instruction the janitors on corrections. However, in real life, the Fred Meyer Directors and managers were able to conduct their inspections, point out problem areas and use a few English words or gestures to get the point across – the janitors

[47] *See also* evidence discussed above in which plaintiffs explained how they were signed out each morning by a Fred Meyer manager. CP 910, 1039, 1032, 1192, 1202-1203.

understood. *E.g.,* CP 1050-1053; CP 1032, 1035, 1039, 1051, 1196, 1203. CP 1196, 1203.[48]

In *Flores* v. *Albertson,* 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003), the court held that the same type of supervision in a supermarket setting as exercised herein can be "control" for FLSA purposes. Fred Meyer relies instead, *inter alia,* on *Moreau* and *Zheng* to argue it did not really have control over the janitors' work. CP 2065-2066. These cases, however, are factually distinguishable and otherwise fail to support Fred Meyer's position. In *Moreau* there was "no indication that Air France had the authority to directly 'control' any of the workers, but would instead communicate any complaints about performance to the service company's supervisors." 356 F.3d at 950-51.[49] That is very different from the daily inspection/correction process here by Fred Meyer personnel, where outside communication came on the rare occasions when in-store correction was not feasible. CP 1052-1053.[50] Furthermore, the facts here differ

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[48] Fred Meyer also argued throughout its motion that the real supervision of the janitors' work was done by All American, All Janitorial and/or Expert. However, from the evidence presented, a rational trier of fact could conclude that neither All Janitorial nor Expert provided in-store supervision of the janitors' work and that Fred Meyer provided the only meaningful supervision. The evidence from Fred Meyer showing that every janitor appeared to be an immigrant from a Spanish speaking country also dovetails with Mr. Ezzo's opinion that this is the labor pool most vulnerable to wage and hour abuse.

[49] Moreau also concluded that "the supervisor/controlled by Air France was minimal in contrast to numerous other factors which negate finding a joint employment relationship on those facts." Those factors include that the work was primarily done at the ground handling facilities rather than the Air France premises, there was no indication that the contractor "could simply be passed to another contractor", and the "ground service company did have an opportunity for profit or promotion based on their managerial skills." 356 F.3d at 951-52. As discussed, supra, none of those factors are true in this case.

[50] Fred Meyer's reliance on the Court of Appeals opinion in *Zheng* also was odd because the District Court on remand from the Second Circuit denied the employee's motion for summary judgment finding that:

considerably from the facts in *Zhao* in which no joint employment was found because the acknowledged employer "Apex had its own supervisors who were primarily responsible for the day to day management of its employees, unlike the nominal employer in *Torres-Lopez*." *Id.* at 1160. Unlike the facts in *Zhao,* Marcos Flores, who worked at both All Janitorial and All American Janitorial, was the only supervisor for janitors in 19 Fred Meyer stores, and neither could have been nor was "primarily responsible for the day to day management" of the janitors. Rather, as discussed above, it was the Fred Meyer employees at each store that carried out such function. [51]

> [T]here is a genuine dispute as to the facts underlying this factor-namely, whether plaintiffs' work was "integral" to Liberty Apparel's process of production as well as whether the "contracting device" at issue "has developed in response to and as a means to avoid applicable labor laws," and therefore may be construed as an attempt to evade regulation. *Zheng,* 355 F.3d at 73;

Zheng v. Liberty Apparel Co., Inc., 556 F.Supp.2d 284, 291 (S.D.N.Y. 2008). At trial, the jury found Liberty Apparel to be a joint employer, a verdict affirmed by the Second Circuit. *Zheng v. Liberty Apparel Co.,* 617 F.3d 182 (2d Cir. 2010).

[51] As discussed below, this comes up particularly with the factors relating to permanence and duration of employment, level of skill needed to do the work, and investment in equipment, for which there is some authority to the effect that such factors are of limited relevance when it is established that the worker is someone's employee and the issue in the case is whether the worker is also an employee of a different company. *See, e.g., Aimable v. Long & Scott Farms*, 20 F.3d 434, 443-44 (11th Cir. 1994) (concluding that investment in equipment, opportunity for profit or loss due to initiative or managerial skill, permanency and exclusivity of employment and degree of skill required to perform the job were not relevant to whether plaintiffs were joint employees even though relevant to whether they were employees of someone. Unlike, *Aimable*, where the trial court generally found on summary judgment that the plaintiffs were employees of someone, *i.e.*, the former labor contractor (*see* 20 F.3d 437, n. 4), no such finding has been made or proven in the present case. *See also Zheng*, 355 F.3d at 67-68 (degree of skill and instruction required by workers does "not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer. Instead, they help courts determine if particular workers are independent of all employers." (Emphasis added.)

(3) There Is At Least Disputed Evidence That The Activities That Plaintiffs Performed Are An Integral Part Of Fred Meyer's Overall Business Operations, Which Favors A Finding Of Joint Employer.

In *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985), the Court explained that "integral" means an "essential part",

> The factor relates not to the percentage of total work done by the workers at issue but to the nature of the work performed by the workers: does that work constitute an "essential part" of the alleged employer's business?

The "integral" factor is mentioned by the Supreme Court, the Second, Ninth and Eleventh Circuits, as well as the DOL. Plaintiffs present evidence that Fred Meyer sells food and quite properly concluded that having its floor and bathrooms clean and sanitary was an essential part of its operations. CP 1051. Indeed, many customers would agree. Moreover, this work is so integral to its business operations that Fred Meyer's employees do the same work during the day. CP 823, 764, 769, 790, 823, 826.[52]

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[52] As explained in *Lemus v. Timberland Apartments, L.L.C.*, 2011 WL 7069078 (D.Or.,2011):

> [W]hether the service that the employee rendered, no matter how mundane, was necessary to the overall business operation. *See Torres-Lopez*, 111 F.3d at 644 (picking cucumbers was integral to the farmer's business because farmer could not realize any economic benefits of this investment in the cucumbers without having them picked). Here, it cannot be disputed that farming is integral to the construction process. (Emphasis added.)

(4) There Is Disputed Evidence About Fred Meyer's Power Directly Or Indirectly To Hire, Fire Or Modify Employment Conditions.

Fred Meyer agrees that this is a relevant factor in determining joint employment under *Bonnette*. CP 2061. The evidence also shows Fred Meyer's loss prevention officer has probably "trespassed" 20-30 employees of building maintenance or janitorial vendors" between 2007 and June 2011, who therefore can never work or even go into a Fred Meyer store. CP 771-772. That is direct power to at least modify the employment conditions of janitors. Moreover, that likely would at least indirectly lead to their being fired. *See* CP 1395 in which Mr. Chaban promises to create a "black list on people who are non-hirable to make sure these people never come back to FM stores or any other in my company ...." (Emphasis added.) Mr. Ezzo properly opined that such power "is the customer acting as the immediate supervisor." CP 1058. Last, but not least, Alma Becerra testified that she was told by All Janitorial that she and her brother-in-law, Julio, were fired because "the manager of the store didn't want us there anymore." CP 1224.[53]

(5) The Responsibility Under The Contracts Passed From One Subcontractor To Another Without Material Changes.

In 2010, All Janitorial stopped doing work for 19 Fred Meyer stores on January 15th while All American Janitorial began working the same stores the next day using the same janitors. CP 1264-70, 1277-1278,

[53] While Fred Meyer presents evidence disputing that, plaintiffs' evidence must be accepted for summary judgment purposes. *See Owen, supra.*

1285-86. The agreements signed by the two companies with Expert were substantively identical. CP 1378-1393. This is substantively identical to *Rutherford.*

(6) Whether the Contractor Corporation Had A Business That Could Or Did Shift As A Unit From One Putative Joint Employer To Another.

As discussed earlier, CP 1275 shows that during the first three months of 2010, All American Janitorial's "only janitorial work was for Fred Meyer," and therefore, neither All American Janitorial (not janitors working for it) could or did shift as "a unit from one putative joint employer to another." This *Rutherford* factor thus supports plaintiffs' position that Fred Meyer is a joint employer at least, vis-à-vis, janitors working at All American Janitorial.

(7) The Degree Of Permanency And Duration Of The Plaintiffs Working At Fred Meyer.

Torrez-Lopez, 111 F.3d at 644, *Charles*, 169 F.3d at 133, and DOL regulations cited in *Charles* as well as the 2001 DOL Opinion letter all considered the degree of permanency and duration relevant to determining joint employment. Moreover, as discussed above, virtually all courts consider this a relevant factor in distinguishing employees from independent contractors. That issue has never been decided in this case since it was disputed by all defendants, the trial court concluded that neither Fred Meyer nor Expert was plaintiffs' employer and it was not resolved as to the other defendants in this case. As such, it is relevant and

supports reversal of the summary judgment.[54] Four of the five plaintiffs worked between 9 and 26 months exclusively in Fred Meyer stores. *See* CP 1031-32; CP 1198-1199; CP 1208.

(8) Plaintiffs Had No Opportunity For Profit Or Loss Based On Managerial Skill.

Expert conceded that factor at CP 1998 and Fred Meyer adopted Expert's analysis at CP 2068.

(9) The "Level Of Skill Involved"[55] In Plaintiffs' Work Was Low.

Expert acknowledged that "the work performed by plaintiffs did not require significant initiative and judgment" (CP 1998), and Fred Meyer adopted Expert's position. CP 2068. It required minimal training (CP 1233, 1222, 1210-1211, 1192) and, as discussed above, did not require speaking or understanding English.

(10) There Is Disputed Evidence As To Whether Fred Meyer Had The Power To Determine Plaintiffs' Rate And Method Of Payment.

Evidence supporting that factor, including the *Quinteros* trial court, at CP 693 ruled "it may be reasonable to infer that when Expert explicitly promised Fred Meyer that its subcontractors would comply with wage and hour laws, the parties intended that Expert would, in fact, assert control over how the subcontractors paid their employees," and at trial concluded only Fred Meyer could force Expert to do that. CP 1930. *See also* CP 1407-1408 (January 2008 Scott Jones instruction to Tuggle and others to

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[54] This also applies to factors 8 and 9 as well.

[55] DOL Opinion Letter.

obtain "adequate detailed responses" confirming overtime pay and compliance with "U.S. Labor Laws" from janitorial management companies). All Janitorial would have classified plaintiffs as "employees" if directed to do so. *See* CP 1251 (classified individuals as "employees" when required by a first tier subcontractor).

Mr. Ezzo also opined that Fred Meyer had the contract right and power to require compliance – plaintiffs would have been properly paid if All American understood what was really expected, and Fred Meyer could have easily confirmed compliance with a simple audit. CP 1058, 1082-1083. That power to require compliance is an important "joint employer" consideration. *Torres-Lopez,* 111 F.3d at 640 (joint employer factors focus on ability to prevent labor law violations).[56] The fact that Fred Meyer chose not to use that authority to demand payment of minimum wages and overtime does not negate the authority. *See, e.g., Torres-Lopez,* 111 F.3d at 642-44.[57]

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[56] Fred Meyer also had the knowledge of likely widespread violations from the industry and other sources, including *inter alia* the Scheid/Tuggle/Stein October 2008 email. CP 1400-1404. Moreover, uncovering All Janitorial's violations would have required little effort. CP 1083, 1136-1142, 1147-1159.

[57] All American Janitorial could not even meet payroll until Fred Meyer paid Expert, who then paid it. CP 1480-1505.

The fourth *Bonnette* factor assumes some entity "maintained employment records." Here, plaintiffs were not claimed as employees by any entity, so no entity kept employment records of them. The simple audit discussed *supra* would have revealed to Fred Meyer that neither All Janitorial nor All American kept records.

(11) Fred Meyer's Subcontractors Did Not Have Sufficient Assets To Care If Plaintiffs Were Not Properly Paid Under The MWA.

All of the above facts and opinions laid out at CP 1059-1060 and 1270 fit precisely within the situation described by the Seventh Circuit quoted at page 15 as calling for joint employment to be found so workers can be properly paid and the purposes of the FLSA and MWA can be carried out. This also supports a conclusion that Fred Meyer was at least a joint employer of the plaintiffs.

4. Fred Meyer And The Trial Court's Reliance On *Bonnette* Was Misplaced And Summary Judgment Should Be Reversed Even Assuming That Only The *Bonnette* Factors Should Have Been Used.

The trial court relied only on the *Bonnette* factors in ruling in Expert's favor on summary judgment (CP 1414), and at least implied it did so in ruling on Fred Meyer's motion. RP 36-37 (9/2/11). Fred Meyer's motion relied primarily for the substantive test for joint employment on *Bonnette,* which it incorrectly characterizes as being the "most widely followed test for evaluating the 'economic reality' of a purported joint employment relationship." CP 2061.

Limiting consideration of joint employment to the four *Bonnette* factors, however, is inconsistent with the Supreme Court's opinion in *Rutherford,* 331 U.S. at 730. *Rutherford* was a joint employment case in which boners were employed by a boning supervisor who subcontracted with the slaughterhouse. The boning supervisor exercised the prerogatives

of an employer, including hiring workers, managing their work, and paying them. *Rutherford* held that a company can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them. The Supreme Court did so based upon a number of factors not included among the four *Bonnette* factors. *Rutherford,* 331 U.S. at 730.[58] Thus, Fred Meyer's and the trial court's position is contrary to the holding of the U.S. Supreme Court.

The Ninth Circuit in *Torrez-Lopez* itself also rejected reliance solely on the four factors discussed in *Bonnette* as a basis for determining joint employment. For example, in *Torres-Lopez*, the Ninth Circuit rejected the portion of the District Court opinion in which the District Court "relied heavily on the five regulatory factors listed in 29 C.F.R. § 500.20(h)(4)(ii) ... and ruled that most of the non-regulatory factors were not helpful." *Id.* at 640. Those five regulatory factors were very similar to the four *Bonnette* factors, while the eight non-regulatory factors not relied

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[58] *See also Zheng*, 355 F.3d at 70, n. 7:

> Rutherford thus held that, in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them.[7]

[7] There is no discussion in the Supreme Court's opinion in Rutherford about whether the slaughterhouse kept employment records for the workers in the de-boning operation, but the Tenth Circuit's earlier decision in the case indicates that it did not. *See Walling v. Rutherford Food Corp.*, 156 F.2d 513, 515-16 (10th Cir. 1946) (noting that the boners were not mentioned in any union contracts, that the slaughterhouse did not collect their union dues, and that "[t]he plant operator never included the boners in its Workmen's Compensation liability policy and never made any deductions for unemployment compensation or withholding taxes").

upon by the District Court were utilized by the Ninth Circuit in *Torres-Lopez* in reversing the District Court decision:

> [T]he non-regulatory factors play an important role in revealing the economic reality of the farmworkers' alleged employment relationship with Bear Creek Farms. For example, a grower's ownership of farmland is relevant "for the obvious reason that without the land, the worker might not have work, and because a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors." *Antenor*, 88 F.3d at 937 (*citing Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 513-14 (5th Cir.1969)). Similarly, the grower's investment in "equipment and facilities" is probative of the "workers' economic dependence on the person who supplies the equipment or facilities." *Id.*

Torres-Lopez, 111 F.3d at 640-641. The Ninth Circuit also pointed out that *Bonnette* never held that those four factors were the only relevant factors. *See, e.g.*, 111 F.3d at 641.[59]

The Second, Seventh and Eleventh Circuits also properly rejected relying only on the *Bonnette* factors. The Second Circuit in *Zheng*, 355 F.3d at 69, rejected the exclusive use of the four *Bonnette* factors, which had been utilized by the Second Circuit in an earlier case - *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984). *Zheng* cited but rejected the District Court's reliance on *Carter* (and thus on *Bonnette*) when it explained that:

> We conclude, for the reasons set forth below, that the District Court erred when, based exclusively on the four factors

[59] The Ninth Circuit in *Moreau v. Air France*, 356 F.3d 942, 950 (9th Cir. 2004), began "[b]y considering the *Bonnette* factors, which roughly correspond to the *Torres-Lopez* 'regulatory factors.' *Bonnette,* 704 F.2d at 1470; *Torres-Lopez,* 111 F.3d at 642." However, the Ninth Circuit in *Moreau* also relied on "the non-regulatory factors of *Torres-Lopez." Id.* at 951.

mentioned in *Carter*, it determined that the Liberty Defendants were not, as a matter of law, joint employers under the FLSA.

Zheng instead held that there were six pertinent factors regarding whether the defendant was a joint employer, discussed *infra*. The Seventh Circuit disagrees with using only the four *Bonnette* factors. In *Moldenhauer*, 536 F.3d at 644, the Seventh Circuit held that "it would be foolhardy to suggest that [the four *Bonnette* factors] are the only relevant factors or even the most important." (Emphasis in original.) Moreover, even if this Court only used the four *Bonnette* factors, three of those four factors support joint employment as explained in the discussion of factors 2, 4 and 10 of the preceding subsection.

B. There Are Material Disputed Issues Of Fact Concerning Whether Expert Is Plaintiffs' Employer Or Joint Employer.

1. Expert's Indirect Power to Fire Janitors.

Mr. Chaban's deposition testimony provides material disputed issues of fact on Expert having the power, directly or indirectly, to fire plaintiffs. Mr. Chaban testified at CP 238 that if Expert communicated to him that a janitor be let go, it was his typical practice to let the janitor go. See also CP 218 in which Mr. Flores, the supervisor at All Janitorial admitted that janitors were fired but denied that they were fired by All Janitorial ("well, it wasn't like we fired them. They stole from the store." (Emphasis added)).

2. Expert's Control Of Work Schedules.

There is substantial evidence that Expert supervised and controlled plaintiffs' work schedules or conditions of employment. For example, at

CP 386, Mr. Suen testified about a typical day for him at a Fred Meyer store as follows:

> A typical day I would start at 7:00. I would go into a Fred Meyer store, and my responsibility is to make sure that the janitorial crew had completed the scope of work and has been signed off by the MOD, manager on duty, and making sure that there is no other issues or challenges that the Fred Meyer stores have or need. And I will go to the different locations. So, you know, when I visit each location, I would, you know, see the crew. (Emphasis added.)

That is direct supervision analogous to the supervision in *Rutherford* and *Torres-Lopez.*

3. Janitorial Work Was An Integral Part of Expert's Business.

Expert admits that "the janitorial work performed by plaintiffs was an integral part of Expert's business." CP 1999. Expert then argues that this factor should be outweighed by other factors. *Id.* The weight to be given to this factor is articulated in *Zheng,* 355 F.3d at 73-74, which explained:

> [I]n determining the weight and degree of [that factor] factor (3), we believe that both industry custom and historical practice should be consulted. .... [H]istorical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws. (Emphasis added).

Such historical evidence relevant to this case is contained in the Ezzo declaration at CP 549-642. That declaration is also similar to the evidence utilized by the District Court in *Zheng* on remand from the Second Circuit,

when denying defendants' motion for summary judgment. *Zheng*, 556 F. Supp. 2d at 291-92.

4. Passing Of Responsibility From One Subcontractor To Another.

Another relevant factor is whether responsibility under contracts between a contractor and an employer passes from one contractor to another without "material changes." *See Torres-Lopez*, 111 F.3d at 640; *Zheng*, 355 F.3d at 61 (referring to this factor set forth in *Rutherford*). The facts of the passing of responsibility between All American Janitorial and All Janitorial as contractors for Expert working at essentially the same Fred Meyer stores illustrate that factor. CP 1996, 101, 396-397. The facts fit well within *Rutherford* where the putative joint employer (here Expert) replaced its subcontractor (here All Janitorial and All American), but the same employees continued to do the same work for the putative employer. *See* 331 U.S. at 725.[60] *See also Zheng*, 355 F.3d at 374 which supports plaintiffs' position under the facts provided here:

> Under *Rutherford*, therefore, this factor weighs in favor of a determination of joint employment when employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor. In such circumstances, it is difficult not to draw the inference that a subterfuge arrangement exists.

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[60] Furthermore, *Lepkowski v. Telatron Marketing Group, Inc.*, 766 F. Supp. 2d 572 (W.D. Pa. 2011), a case relied upon by Expert in the trial court, states:

> As applied to the instant case, the relevant inquiry is whether Plaintiffs would continue to perform the same customer management services for BoA in the same manner, even if BoA terminated its relationship with Telatron and engaged another customer relationship company to handle their client accounts.

5. Little Need For Initiative And Judgment.

Expert admits that "the work performed by plaintiffs did not require significant initiative and judgment." However, citing *Torres-Lopez*, 111 F.3d at 644, it argues that this factor was not met in this case because janitorial work is not "piecework." CP 1998. That misreads *Torres-Lopez*, which actually said:

> Fifth, the job of picking cucumbers is "piecework" that requires no great "initiative, judgment, or foresight," *id.* or "special skill," *Real*, 603 F.2d at 754.

The significant part of the statement in *Torres-Lopez* related to the lack of initiative, judgment, foresight or special skill. It would make no sense to prevent non-piecework workers from being considered joint employees. Indeed, the workers in *Rutherford* were not piecework workers although the court did say the work was like piecework. 331 U.S. at 730.

6. No Opportunity For Profit Or Loss.

Expert also admits that "individual plaintiffs did not have an opportunity for profit or loss depending on their managerial skill." *Id.* Defendant, however, argues that this is not a useful factor and also argues that because All Janitorial and All American could make a profit, plaintiffs' inability to do so is somehow irrelevant. Importantly, defendant also fails to cite *Flores v. Albertson, supra,* in its argument on this or the preceding factor. *Flores* is on point to this case because it also involved janitors at grocery stores asserting that they were joint employees. The court in *Flores* rejects Expert's position on both of those factors, holding:

> The janitorial services performed by the plaintiff class was piecework, requiring little skill, and there is no evidence of opportunity for profit or loss depending on the employee's managerial skills.

Id. at *4 (emphasis added).

7. Permanence Of The Working Relationships.

Another relevant factor is whether there was "permanence [in] the working relationship." *Citing* CP 193-199, Expert implied that the plaintiffs could not be found to have the degree of permanence required under this test. CP 1999. To the contrary, that evidence shows that plaintiffs worked virtually seven days a week for long periods of time.[61] This is far more permanent work than the cases cited by Expert finding no permanence in their work. *See, e..g., Gonzales v. Sterling Builders, Inc.*, 2010 WL 1875620, at *8 (D. Or. 2010):

> Here Defendants note Plaintiffs worked on this project for three months in 2006 and have never worked for them on any project again, and, therefore, there is not any permanence in their relationship. The Court agrees. This record does not reflect Plaintiffs and Defendants had any kind of recurring or relatively permanent relationship. (Emphasis added.)

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[61] Carolina Becerra Becerra worked 315 days in eleven consecutive months. Heriberto Ventura Saturnino worked 152 days in six consecutive months, and then 410 days in fifteen consecutive months. Jose Luis Coronado worked 357 days in twelve consecutive months. Julio Cesar Martinez Martinez worked 323 days in eleven consecutive months, and then fourteen days in one month. Orlando Ventura Reyes worked 157 days in six consecutive months, and then 430 days in fifteen consecutive months. Alma Becerra Becerra worked 332 days in twelve consecutive months. Adelene Mendoza Solorio worked 68 days in three consecutive months. A full-time worker working five days a week and taking a two-week vacation, works about 250 days a year (50 weeks x 5 days a week). Many of the plaintiffs not only worked a year or more, but put in well over 325 work days a year.

Furthermore, unlike, *Moreau*, 356 F.3d at 952, where most of the warehouse employees "turned over rather frequently," all but one of plaintiffs in this case worked from 11 months up to 20 months.

8. The Fact That Expert's Payment To Its Subcontractors Did Not Permit Them To Comply With The MWA Is A Strong Basis For Concluding That Expert Was At Least A Joint Employer.

In *Castillo v. Givens,* 704 F.2d 181, 192 (5th Cir. 1983), the court explained the significance of the purported joint employer's inadequate payments:

> Of particular importance is the fact that defendant did not pay Tonche enough for Tonche himself to pay the workers minimum wage; it was therefore impossible for Tonche to comply with the FLSA. *See Mitchell*, 292 F.2d at 109.

The Fifth Circuit in *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961), also held that:

> If a specific individual regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business, the Act will ordinarily regard him as an employee. *Mitchell v. Strickland Transportation Co.*, 5 Cir., 1955, 228 F.2d 124, at page 127; *Fahs v. Tree-Gold Co-op. Growers of Florida*, 5 Cir., 1948, 166 F.2d 40, at page 44; *Rutherford Food Corp. v. McComb*, 1947, 331 U.S. 772, at page 729, 67 S.Ct. 1473, at page 1476, 91 L.Ed. 1772.

See also Bureerong v. Uvawas, 922 F. Supp. 1450, 1468 (C.D. Cal. 1996) (relevance of inadequate payment from putative joint employer to subcontractor).

The substantial evidence in this case discussed above at page 17 strongly calls for Expert to be considered at least a joint employer of plaintiffs. That is not only consistent with the holdings of *Castillo* and *Bureerong,* but is directly supported by the Seventh Circuit opinion in *Reyes* quoted above which emphasizes in the ordinary case a company would not contract for an amount that would cause it to lose money if it paid it workers as required by the MWA. Expert's payment to its subcontractors of amounts which Mr. Chaban understood and Mr. Ezzo opined would not allow the workers to be fairly paid, is strong evidence that Expert was engaged in the Building One model. That, in turn, demonstrates that as a matter of "economic reality" plaintiffs were dependent on Expert to be paid in accordance with the MWA, and calls for Expert to have been found to have taken on that obligation similar to what was done in *Castillo* and what was proposed in *Reyes*.

C. Plaintiffs Should Be Awarded Fees and Expenses.

Pursuant to RAP 18.1, and based upon RCW 49.46.090 and 49.48.030, plaintiffs-appellants should be awarded their attorneys fees and expenses incurred in connection with this appeal.

VI. CONCLUSION

For the foregoing reasons, the trial court's granting of summary judgment on behalf of Fred Meyer and Expert should be reversed, and the case should be remanded for trial.

DATED this 16th day of July, 2012.

Respectfully submitted,

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