68528.7

68528.7

No. 68528-7-1

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

---

CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ MARTINEZ, ORLANDO VENTURA REYES, ALMA A. BECERRA, and ADELENE MENDOZA SOLORIO,

Appellants/Plaintiffs,

v.

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

Respondents/Defendants.

---

# RESPONDENT/DEFENDANT FRED MEYER'S APPEAL BRIEF

---



Francis L. Van Dusen, Jr.
Ian M. Messerle
MILLER NASH LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101
(206) 622-8484

Attorneys for Defendant
Fred Meyer Stores, Inc.

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(continued)**

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

## TABLE OF AUTHORITIES

**Page**

**FEDERAL CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**



**STATE CASES**



**BANKRUPTCY CASES**

## TABLE OF AUTHORITIES
## (continued)

**Page**

**FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS**



**STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS**

## I. INTRODUCTION

Five[1] janitors, all of whose claims against defendant Fred Meyer Stores, Inc. ("Fred Meyer") were dismissed on Sept. 2, 2011, are appealing the summary judgment dismissal of their joint employment claims under the Washington Minimum Wage Act ("MWA"), RCW 49.46 *et seq.*, for overtime, missed lunch and meal breaks, fees, etc. The Washington courts follow cases interpreting the Fair Labor Standards Act of 1938 ("FLSA") when interpreting the MWA. 29 U.S.C. § 201 *et seq.*; *Innis v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2006).

Fred Meyer did not exercise control over the five appealing janitors' work at the eight Fred Meyer stores where their actual employers[2] assigned them and where they cleaned between 11:00 p.m. and 7:00 a.m. when the stores were closed to the public and no Fred Meyer supervisor was present. None of the five appealing janitors raised a genuine factual dispute

---

[1] Carolina B. Becerra, Julio C.M. Martinez, Orlando Ventura Reyes, Alma A. Becerra, and Adelene M. Solorio.

[2] The Second Amended Complaint alleges defendants All American, LLC ("All American") and All Janitorial, LLC ("All Janitorial") and their respective owners, defendants Sergey Chaban and Raul Campos, misclassified the janitors as independent contractors, when they were actually employees. CP 4-5. To rule on Fred Meyer's joint employer summary judgment motion, the trial court had to assume the five plaintiffs were employed by All American and All Janitorial as alleged, because employment by an actual employer is an element of a joint employment claim. *See* 29 C.F.R. §791.2(2), (3).

regarding any of the four *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), factors in any of the eight stores where they worked. King County Superior Court Judge Marianne Spearman dismissed all the janitors' claims on Sept. 2, 2011. The five janitors only appealed dismissal of the MWA claim of joint employment.

## II. ISSUE PRESENTED ON APPEAL

Did the admissible evidence before Judge Spearman on Sept. 2, 2011 raise a genuine dispute regarding a material fact that Fred Meyer was a joint employer of any of the appealing plaintiffs at any of the Fred Meyer stores where they worked?

## III. PROCEDURAL HISTORY

Although this lawsuit was filed in March 2010, Fred Meyer first appeared on September 13, 2010, after Fred Meyer was added as a defendant in the first amended complaint. CP 2119-29. The Second Amended Complaint named seven janitor plaintiffs. CP 1, 2. The one waxer plaintiff, Moises Santos Gonzales, asserted no claims against Fred Meyer. CP 2. On May 27, 2011, Judge Spearman granted Expert Janitorial LLC's ("Expert") partial summary judgment, holding that Expert was not a joint employer of plaintiffs under the MWA. CP 1960-63. All plaintiffs

Saturnino's and Coronado's claims against both Fred Meyer and Expert were dismissed on June 14, 2011. CP 688-690. The remaining five janitors' claims against Fred Meyer were dismissed on Sept. 2, 2011, when Judge Spearman held that Fred Meyer was not a joint employer of the five appealing janitors, based on "the entire relationship and determin[ing] the economic reality and what is the relationship between the plaintiffs and the defendants." RP (9/2/11) at 36.

The two plaintiffs with claims against defendants All American, one of the two actual employers, and Raul Campos, owner of All American, were settled and dismissed on Jan. 17, 2012, shortly before trial. CP 1908-09. All claims against defendant Sergey Chaban, owner of defendant All Janitorial, were stayed by his bankruptcy in 2011. CP 1674-1676. U.S. Bankr. Judge Timothy Dore terminated the stay and ruled that the janitors' MWA claims against Mr. Chaban were non-dischargeable. *In re Chaban*, Judgment, 11-20583-TWD (W.D. Wash. Bankr. June 8, 2012). The five janitors had not requested a trial date on their MWA claims against Mr. Chaban and their actual employer, All Janitorial, as of the filing of this brief.

## IV. STATEMENT OF FACTS IN THE RECORD

### A. FRED MEYER HAS OUTSOURCED STORE MAINTENANCE SINCE 1997 AND JANITORIAL SERVICES SINCE 2004.

Fred Meyer operates large retail stores of at least 100,000 square feet in Washington, Alaska, Oregon, and elsewhere in the Pacific Northwest. In the 1990s, Fred Meyer decided to outsource building maintenance and repairs for its retail stores to regional management companies. CP 719. In 1997, Fred Meyer outsourced the building repair, refrigeration maintenance, lighting and electrical services, snow removal, window washing, pressure washing sidewalks, and landscaping services so its store directors could concentrate on Fred Meyer's core business – selling its retail customers grocery, apparel, home improvement, electronic, garden, and other products under Fred Meyer's "one stop" shopping concept. *Id.* Fred Meyer's 30,000 employees are represented by multiple unions, and the stores sell a wide variety of products, yet only one store employee has wall-to-wall responsibility for all Fred Meyer retail operations– the store director. CP 788-89.

Scott Jones, Fred Meyer Vice President of Facilities, implemented the outsourcing of cleaning/housekeeping functions for all 230 (est.) Fred Meyer stores in 2004 through online competitive bidding for regional

management contracts. CP 718-20, 788. The Kroger Corporation, which purchased Fred Meyer in 1999, pre-qualified potential bidders in 2004 for Fred Meyer's housekeeping management contracts verifying each bidder's financial capability and expertise to perform the management contracts. CP 720. Fred Meyer established the specifications for housekeeping services in the "Scope of Work" or "Scope of Services" section of the management contract. CP 726-754 (hereafter "Contract").

The first management contract to clean the 42[3] Fred Meyer Puget Sound area stores daily between 11 p.m. and 7 a.m. was awarded in 2004 to Industrial Cleaning Management ("ICM") of Florida. CP 727. Most of the Fred Meyer janitorial employees who worked in the Puget Sound stores in 2004 were offered other Fred Meyer positions primarily in grocery union night-stocking positions. CP 790-91. Fred Meyer assigned responsibility for enforcing its management contracts for building repair, energy conservation, maintenance, and housekeeping in all 42 Puget Sound stores, including the eight stores where the five plaintiffs worked, to Puget Sound zone Regional Facilities Manager Steve Tuggle from 2005 to the present.

---

[3] Because Fred Meyer phased out smaller stores that did not have food or other retail products and built new larger stores with a full range of products in the Puget Sound region, the 42 number is approximate for the three years at issue, March 2007 to April 2010. CP 720-21; 1446.

CP 790-91. The Fred Meyer Contract limited the housekeeping duties to wall and floor cleaning, floor waxing, restroom cleaning, and other housekeeping tasks that were not integral to Fred Meyer's retail business. CP 1440-1445. Fred Meyer did not contract out housekeeping functions substantially related to retailing, such as cleaning food preparation areas, cutting surfaces, produce shelves and bins, product shelves, and implements in the deli, meat, and seafood departments. CP 1440-45, 1667.

In early 2007, Fred Meyer's Contract for cleaning Puget Sound stores was with defendant Janitorial Maintenance Supply, LLC ("JMS"). CP 720-21. In August of 2007, Fred Meyer approved JMS' assignment of its Contract to clean Fred Meyer's Puget Sound stores to Expert, based in Tennessee. CP 745-46.

## B. EXPERT SUBCONTRACTED OUT THE HOUSEKEEPING WORK FOR 42 PUGET SOUND STORES TO NINE SUBCONTRACTORS.

Fred Meyer's management Contract with Expert is a form agreement that Fred Meyer adapts for all its management companies to purchase building maintenance and housekeeping services for all its stores, so Fred Meyer store directors can concentrate on retailing and supervising the 30,000 store employees, rather than maintaining a building. CP 746,

788. The Contract's "Scope of Work" describes what parts of the store are to be cleaned, which floors waxed, the frequency of waxings and cleanings, the restroom cleaning standards, and other cleaning specifications all of which must be completed while Fred Meyer is closed from 11 p.m. to 7 a.m. CP 792-93, 798-803. The Contract required more cleaning, waxing and polishing functions for tile floors than concrete floors. *Id.* Unlike Fred Meyer's management companies in Oregon who hired their own janitors or franchised the housekeeping work, Expert subcontracted the cleaning to "at least nine different service providers" to provide housekeeping services at the 42 Puget Sound stores between 2007 and March 2010. CP 68-69.

Plaintiffs sued two of these service providers (and their owners) as their actual employers, alleging that they were misclassified as independent contractors: defendants All Janitorial (Chaban) and All American Janitorial (Campos). CP 1, 2. All American employed only one janitor/appellant for two months in 2010 (Ventura-Reyes); All Janitorial employed all five janitor/appellants at different times. *Id.*

All American and All Janitorial maintained, repaired, and replaced all the mechanized equipment for cleaning, waxing, stripping, and polishing the floors. CP 703, 1012, 1016. Janitors locked the service providers'

mechanized equipment during the day with bicycle locks, and Fred Meyer store personnel were not told the combinations. CP 887. Waxers hauled mechanized waxers on trailers from store to store. CP at 1269.

Under the contract, Fred Meyer provided JMS and Expert with the consumable restroom and cleaning items such as toilet paper, paper towels, hand soap, and cleaning fluids. CP 721, 726-27, 752-54. Fred Meyer employees used the same cleaning materials and restroom supplies during the day to clean up spills in the store aisles and resupply the restrooms. CP 721. In some stores, both Fred Meyer and the service providers maintained separate vacuum cleaners.[4] The cleaning fluids were specified in the Contract for safety reasons, in part, because grocery produce is exposed to cleaning fluid fumes. CP 721, 752-54. The janitors' primary duty was to use the service providers' mechanized equipment to scrub and buff the floors when the store was closed. CP 720-21, 793, 798-803. When the janitors needed more supplies, they contracted Marcos Flores, the janitors' supervisor at both All Janitorial and All American. CP, 868, 875, 882, 894.

---

[4] Portions of the store were locked at night, such as Fred Meyer Jewelers, whose carpets were cleaned by Fred Meyer employees when the store was open. CP 721.

Janitors and employees for other building maintenance vendors worked when the stores were closed. CP 721. "Time of completion of the Work is of the essence of this Agreement." CP 727. The five janitor appellants testified they arrived when the stores closed at 11 p.m. and were still there as the stores reopened at 7 a.m. After they completed the cleaning, they asked arriving Fred Meyer employees to initial Expert work orders certifying completion. CP 842, 858, 878, 899, 913.

## C. EXPERT'S PERFORMANCE OF THE FRED MEYER CONTRACT.

Susan Vermeer is Expert's western regional Vice President. CP 68, 69. Her responsibilities included managing Expert's housekeeping contract with Fred Meyer. *Id.* Since 2007, one or two Expert district managers who (like her) are based in Washington report to her and assist with the Fred Meyer Contract. CP 70.

Ms. Vermeer and her district managers periodically visited each Fred Meyer store and met with the Fred Meyer store directors. CP 70. Mr. Tuggle, the Fred Meyer regional manager, relayed housekeeping concerns from Fred Meyer stores to Expert's supervisors, such as Ms. Vermeer. CP 794, 95. Because Ms. Vermeer and Mr. Tuggle are

married, Ms. Vermeer was the most accessible Expert supervisor to Mr. Tuggle. CP 795-96.

The plaintiffs' actual employers maintained all of the personnel and pay records relating to its janitors. CP 96. Fred Meyer never saw any of All Janitorial's or All American's payroll or personnel records for the janitors, but required Expert to audit I-9 forms for compliance with federal immigration law. CP 72, 91, 729, 730-31. Fred Meyer required Expert to confirm that the janitorial service providers complied with all labor, employment, and safety laws. CP 730-31, 817. Expert and All Janitorial terminated their subcontracting relationship in January 2010, when Expert replaced All Janitorial with All American as Expert's service provider for 19 of the Puget Sound stores under Fred Meyer's contract. CP 96, 101.

When Fred Meyer decided that one of Expert's service providers failed to meet the Contract's performance standards in a store, it directed Expert to replace the failing service provider in that store with a crew from another service provider. CP 722.

The five janitors all testified that no Fred Meyer store employee reviewed or commented on the janitorial work until asked to sign the Expert

work order at 7 a.m. or later.[5] CP 842, 861, 885-86, 899. Plaintiffs testified that one of the two janitors in each store presented an Expert work order form at the end of every shift to any Fred Meyer employee who would sign them. *Id.* Plaintiffs testified Fred Meyer approval was routine, once a Fred Meyer employee was located who would sign the Expert form. CP 842, 859, 885-86, 899, 905, 914. All Janitorial and All American used the Expert work orders as vouchers for payment by Expert. CP 703-704. All American and All Janitorial, not Fred Meyer, retained the filled-out Expert work orders. CP 794. If the store directors later complained to Mr. Tuggle that the work was not completed, Fred Meyer told Expert to address the problem. CP 793, 794. For example, All Janitorial supervisor Marcos Flores called janitors back to clean the Fred Meyer Burien store during the day after receiving store director complaints. CP 896. The janitors testified that their work was excellent, and they rarely had to correct mistakes. CP 867, 905, 914.

[5] An e-mail shows Steve Tuggle of Fred Meyer and Expert supervisors once scheduled night visits at stores with the concrete floors to make sure the correct buffers were used to preserve the warranty on the concrete floor finish. CP 815. The five janitors worked at eight stores with tile floors, and never cleaned concrete floors. CP 1667.

## D. ALL JANITORIAL EMPLOYED ALL FIVE JANITORS TO CLEAN FRED MEYER STORES AND ALL JANITORIAL ALSO CLEANED THE STORES OF FIVE OTHER RETAILERS.

From 2007 to January 2010, defendant All Janitorial was one of nine subcontractors that contracted with Expert to clean Fred Meyer's Puget Sound stores. CP 71. Defendant Sergey Chaban owned and operated All Janitorial. CP 94. In 2007, Expert contracted with All Janitorial to clean seven or eight Puget Sound Fred Meyer stores; by the end of 2009, All Janitorial cleaned 19 Fred Meyer and additional Rite Aid stores in Washington for Expert. CP 1015.

All Janitorial cleaned stores for six other retailers in western Washington and Oregon . CP 95. Most of Fred Meyer's 42 Puget Sound stores were cleaned by Expert's other service providers. CP 69.

All Janitorial cleaned Top Foods/Haggen, Ross, TJ Maxx, Office Depot, and Michaels stores under agreements unrelated to its contract with Expert to clean Fred Meyer and Rite Aid stores. CP 95. Under its various contracts, All Janitorial cleaned a total of 60 stores in 2009, only 1/3 of which were Fred Meyer stores. CP 1015. Less than half of All Janitorial's revenues came from its contract with Expert to clean the Fred Meyer stores. *Id.*

All Janitorial employed all five appealing janitors who worked in eight different Fred Meyer stores, only one of whom worked for a full year (Mr. Reyes); Ms. Solorio worked for just ten weeks, according to plaintiffs' interrogatory answers. CP 195-98. Mr. Martinez testified that he worked for All Janitorial at two separate times and was hired and fired twice by All Janitorial supervisor Marcos Flores. CP at 876-77, 1199.

## E. FIVE JANITOR/APPELLANTS TESTIFIED THAT THEY WERE HIRED, TRAINED, TRANSFERRED, PAID, AND FIRED BY ALL JANITORIAL.

The five appealing janitors were all hired and trained by All Janitorial and were assigned and transferred by Mr. Flores at All Janitorial to clean eight Fred Meyer stores during different time periods between March 2007 and January 2010. CP 838, 846, 854-55, 874-75, 893-95, 902, 910-12, 915, 979-88. Adelene Solorio worked for just ten weeks at two stores. CP 913. Plaintiffs Reyes and Martinez testified Mr. Marcos hired and fired them at All Janitorial and then they returned months later to work for All Janitorial a second time cleaning Fred Meyer stores. CP 873, 876-77, 897. All Janitorial transferred every plaintiff to a different Fred Meyer at least once; plaintiffs Reyes, Martinez and C. Becerra were assigned to work at four different stores. CP 897, 979-88. A. Becerra testified All

Janitorial had a constant turnover in janitors: "one after the other after the other." CP 1224.

Four of the five janitor/appellants were trained and supervised by Mr. Flores, the All Janitorial supervisor. CP 701, 702, 847, 855, 875, 894, 1014-15. Ms. Solorio testified that her janitor husband, not Mr. Flores, hired, trained, and supervised her at the two Fred Meyer stores where she worked with her husband during her 10 weeks as an All Janitorial janitor. CP 910-11. Four janitors called Mr. Flores if they wanted to take a day off and get a substitute for their shift. CP 858, 898. Ms. Solorio only communicated with her husband. CP 912. The plaintiffs called the Fred Meyer store personnel who signed the Expert workers certifying completion of the night's work their "managers," but not a single plaintiff testified that anyone at Fred Meyer told them what to do while working at night. *See* CP 806.

Four of the janitor/appellants testified that they were hired and fired by Mr. Flores at All Janitorial and All American. CP 841, 857, 876, 897. Ms. Solorio only worked at All Janitorial and quit after ten weeks. CP 913. Only Mr. Reyes worked for both defendants All Janitorial and All

American; he claimed that he was fired by All American, not by Fred Meyer. CP 1040-1041.

Ms. A. Becerra testified that Mr. Flores fired her and her husband, plaintiff Martinez, in 2008. CP 1224. She said that Mr. Flores said that her store manager "didn't want us there anymore" because they were late to work. *Id.* Both Mr. Flores and store manager Mark Scheid testified under oath that her hearsay statement was false; Mr. Scheid said in his declaration that he never asked to have any janitor fired. CP 705, 777. Plaintiffs' brief relies on this inadmissible hearsay. Brief of Appellants at 12.

All five janitors admit that they were paid by All Janitorial and All American, not by Fred Meyer. CP 847, 856, 875, 896, 910. All Janitorial and All American set the pay rates. CP 702, 1015. The five janitors also testified that All Janitorial and All American told them where to work and transferred them from store to store. CP 846, 861, 875, 895, 911. Plaintiffs admit that if they had a problem at work or needed new supplies or equipment, they would call Mr. Flores. CP 855, 875, 894. They would also call Mr. Flores if they wanted to take a day off and have someone else cover their shift. CP 898, 858.

The janitor/appellants testified that they considered All American or All Janitorial to be their employer. CP 129, 148, 164, 860, 880, 901. The five janitors admitted that they have never referred to Fred Meyer as their employer and never listed a Fred Meyer employee as a job reference or supervisor on any employment application. CP 963-977.

Not surprisingly, none of the plaintiffs could identify a single Fred Meyer employee who supervised them on the graveyard shift. CP 912, 947-48, 951, 957, 960. Mr. Reyes was the only plaintiff to identify by name at a deposition or in an interrogatory answer any Fred Meyer supervisor: "Pix" or "Pete," who is presumably Store Director Peter Laudadio. CP 954. Mr. Laudadio said he starts his workday at 8 a.m. or 11 a.m. and is not in the store between 11 p.m. and 7 a.m. CP 761. The five plaintiffs speak Spanish, not English. CP 837, 852, 872, 890, 909. The store directors cited the language barrier as obstructing any communication with janitors. CP 1000, 1004, 1009, 1029, 699, 711, 716, 759, 763, 785, 822, 827.[6]

---

[6] The store directors who signed declarations all worked when at least one plaintiff was assigned to each director's store. Twelve of the 14 Fred Meyer present and former store directors address the same topics in each numbered paragraph, although details on scheduling, etc., differ. Decls. Ayers, Bowers, Laudadio, Johnson, Stout, Kappert, Ellis, Brackenbush, Wyatt, Derry, Fortin, Zoch. More limited is the declaration of Mark Scheid, a former store director who suffered a stroke and is in a part-time clerical position while he recovers. CP 776-81. Former Fred Meyer Store Director Robert Fazio submitted a declaration drafted by plaintiffs' counsel. CP 1050. Mr. Fazio sued Fred Meyer for age

Janitor A. Becerra apparently did talk to Maria McGuiness, Fred Meyer's Spanish-speaking loss prevention officer, who has no store supervisory authority. CP 770-75. Ms. McGuiness and other security officers, who speak Spanish, were typically the only Spanish-speaking Fred Meyer employees assigned to stores where the five janitors worked other than the occasional Spanish-speaking grocery clerk. CP 771.

## F. ALL AMERICAN EMPLOYED MR. REYES TO CLEAN A FRED MEYER STORE FOR TEN WEEKS BEFORE FIRING HIM IN 2010.

All American took over Expert's subcontract from All Janitorial to provide housekeeping services at 19 Puget Sound Fred Meyer stores in January 2010, but hired only one of the five appealing janitors: Mr. Reyes. CP 2, 71, 82-91, 1011-12.

Like All Janitorial, All American hired, fired, and trained its janitors; assigned them to particular Fred Meyer stores; scheduled their work and hours; set their pay; and issued their paychecks. CP 702-3, 1012. All American supervised its janitors on a day-to-day basis. CP 702,

---

discrimination after being terminated for violation of Fred Meyer's EEO policy. Judge Hollis Hill dismissed his claim on a summary judgment motion four months before he signed his declaration. CP 1652-53. His declaration does not substantively disagree with the other 13 store director declarations. Plaintiffs also submitted the declaration of Mr. Dedmon, a former department manager who never worked at any store where any of the five plaintiffs was working. CP 1033-36, 1667-69.

1011-12. All American maintained and replaced the mechanized equipment used by its janitors in Fred Meyer stores. CP 703, 1012. All American retains all of its janitors' personnel and pay records, although Expert audited the I-9 records. CP 96, 102. Fred Meyer has no personnel records for any of the plaintiffs. CP 788. Expert is charged with making certain that All Janitorial and All American performed the scope of work under Fred Meyer's Contract with Expert. CP 70-71.

## G. FRED MEYER STORE DIRECTORS WERE AT HOME BUT RESPONSIBLE FOR THE CLOSED STORES DURING THE GRAVEYARD SHIFT.

As the only Fred Meyer store-based supervisors responsible for the entire store, the store directors alone had authority over the eight stores when they were closed to the public and cleaned by janitor/appellants during the graveyard shift, even though the store directors were at home asleep. CP 697, 708, 714, 756, 761, 783, 820, 822, 825, 998, 1003, 1007. The store directors rarely, if ever, saw the janitors assigned to their stores by All American and All Janitorial because store directors typically arrive at work after 8:00 a.m. and leave the store before 11:00 p.m. CP 710, 715, 757-58, 762-63, 784, 821-22, 826-27, 999-1000, 1004, 1008. The store directors at the eight stores where plaintiffs worked were responsible for

inspecting the stores after the janitors had left the premises and reporting any deficiencies to Fred Meyer Regional Manager Tuggle or Expert's regional manager, Susan Vermeer, or one of her subordinates. CP 699, 715, 758, 763, 785, 793-94, 822, 827, 1000, 1008-1009. Store directors occasionally spoke directly with Marcos Flores, the service provider supervisor in charge of the Fred Meyer store cleaning for both All American and All Janitorial. *Id.* During the graveyard shift, Fred Meyer only scheduled grocery-union, night stockers who reported to a union person in charge ("PIC"). CP 789.

## H. JANITORS OBSERVED SLEEPING BY FRED MEYER STORE PERSONNEL WERE ALLOWED TO SLEEP.

Store directors at all the stores where janitor/appellants worked all received reports from the union graveyard-shift employees that janitors were sleeping in the break room or elsewhere during the graveyard shift. CP 699, 716, 758, 763, 784, 822, 827, 1000, 1004, 1009. No Fred Meyer store director or department manager took any steps to have the night crew wake the janitors up. *Id.* In response to night crew complaints about janitors sleeping on the job, Fred Meyer Facilities Regional Manager Tuggle told Fred Meyer store directors that janitors sleeping in the break room were not a Fred Meyer concern. CP 795. Mr. Flores testified that

no janitors assigned to Fred Meyer stores were ever fired by All Janitorial or All American for sleeping on the job, although four of the five janitors alleged Mr. Flores fired them without cause or for filing this lawsuit. CP 12, 918.

## I. JANITORS VIDEOED STEALING WERE TREATED THE SAME AS SHOPLIFTING CUSTOMERS.

Each morning, Fred Meyer security personnel arrived at the stores and reviewed digital recordings from store cameras of Fred Meyer night stockers and employees of building maintenance and janitorial contractors who worked during the graveyard shift. CP 771. The cameras are motion-activated, so the security officers can quickly review the night's digital recordings, because most of the store is vacant at night. *Id.* During the 2007-2010 period, Fred Meyer treated service provider employees recorded stealing the same as it treated customers caught shoplifting. CP 771-72. A loss prevention officer confronted the suspect as quickly as possible and "trespasses" him/her during the 2007-2010 time frame. *Id.* A person "trespassed" is no longer welcome in a Fred Meyer store and will be reported to the police for trespassing if he returns to any Fred Meyer store. *Id.*

Fred Meyer notified Expert regarding janitors recorded shoplifting; Expert asks its subcontractor to identify the janitor who is then barred from Fred Meyer stores. CP 705, 771-72. Ms. McGuiness, the bilingual Fred Meyer loss prevention officer, said she has the service provider identify the employee recorded stealing and then interviews or translates interviews of all Spanish-speaking employees of service providers recorded stealing on the graveyard shift. CP 771-72. The service provider then decides whether to reassign its janitor to clean a different retailer's store or to terminate the janitor's employment. For example, All Janitorial owner Chaban said he would transfer the "trespassed" employee to clean another retailer's store if he thought Fred Meyer was "unfair" in its theft accusation. CP 1017.

Fred Meyer treats its own employees caught stealing differently. Fred Meyer terminates the employment of all employees caught stealing, and their names and social security numbers are placed in a "no-rehire" data bank. CP 771. Fred Meyer does not place the names of customers or service provider employees caught shoplifting in this "no rehire" data bank and cannot do so, because Fred Meyer does not have social security numbers for its customers or for service provider employees. *Id.*

## J. ONLY TWO JANITORS SUBMITTED DECLARATIONS, AND NEITHER RAISES A MATERIAL FACTUAL DISPUTE.

Of the five appealing janitors, only Alma Becerra and Mr. Ventura-Reyes submitted declarations. CP 1031-32, 1039-1041. Judge Spearman correctly determined that neither janitor's declaration disputes any fact material to their joint employment claim against Fred Meyer.

## K. "EXPERT" JOHN EZZO'S DECLARATION ALLEGES FACTS WITHOUT FOUNDATION.

Plaintiffs filed hundreds of pages of newspaper articles and other hearsay-filled exhibits attached to multiple declarations of John Ezzo, a Michigan janitorial competitor of Expert, as part of the clerk's papers. CP 549-642, 1054-1182. Many, if not all, of the Ezzo citations in plaintiffs' appeal brief are inadmissible as either hearsay, due to lack of foundation or lack of relevance. Mr. Ezzo identified several companies whom he alleged operate as shams for retail chains seeking to violate overtime and minimum wage laws. CP 1074. None of these companies qualified to bid on Fred Meyer's contract. CP 720. Mr. Ezzo alleged that he knew what restroom supplies and cleaning fluid that Fred Meyer purchased for use by Expert "could cost," although he conceded the cost could be lower with "effective purchasing." CP 1056; *see* Brief of

Appellants at 10. However, the record on appeal only contains Fred Meyer's payments to Expert; there is no evidence stating the amount of any other Fred Meyer costs from 2007 to 2010. CP 1446. Mr. Ezzo opined that Fred Meyer saved money on janitor wages when it outsourced the janitor work in 2004. CP 1073. The undisputed record before Judge Spearman showed that Fred Meyer's top priority in outsourcing maintenance and housekeeping was to allow store directors to focus on merchandising, not building maintenance. CP 719. The only savings to Fred Meyer in the record on appeal arose out of reduced overhead costs by not having to negotiate with unionized janitorial workers and by terminating payments to Taft Hartley (union) Trusts, including potential withdrawal liability. CP 788.

Ezzo's declaration also states that the janitors only needed one type of equipment to clean and wax the floors in these stores, "the only significant piece of equipment required" for the cleaning contract. CP 1059; *see* Appellants' brief at 10 n.17. However, the janitors' actual employers, All Janitorial and All American, locked their scrubbers in the stores during the day after using them at night, while All Janitorial and All

American waxers hauled separate waxing equipment on trailers from store to store each night. CP 887, 1269.

Moreover, Mr. Ezzo's declarations do not indicate that he has ever set foot in Alaska, Oregon, or Washington, let alone in a Fred Meyer store. For example, he never discusses the lower cost of cleaning the concrete floors in Fred Meyer's new stores. CP at 1084, 1054-1182. His purported facts rely on hearsay, and his opinions include legal opinions, and are therefore inadmissible.[7] *See, e.g., King Cty. Fire Protection Dists. No. 16, No. 36, and No. 40 v. Housing Auth. of King Cty.*, 123 Wn.2d 819, 825, 872 P.2d 516 (1992).

## V. ARGUMENT

### A. OVERVIEW OF ARGUMENT.

Fred Meyer neither functionally nor formally controlled the employees of the janitorial subcontractors who cleaned its stores while they were closed to the public. Fred Meyer did not hire the janitors, assign them to its stores, set their schedules, discipline them, maintain their employment records, instruct them how to clean, train them, fire them, tell

[7] Mr. Ezzo, for example, makes sweeping assumptions who "hired" and "employed" the janitors. *See* CP at 1059. These are legal decisions for the court to make based on evidence that Mr. Ezzo was not shown, such as the plaintiffs' declarations and deposition testimony.

them when or where to take their breaks, record their working time, maintain or replace their floor-cleaning equipment, pay them, or set their pay. Fred Meyer personnel only interacted with the janitors after the janitors had completed their work. After completing their work, the janitors found a Fred Meyer employee to initial an Expert work order that the work was completed. Consequently, the economic reality is that Fred Meyer is not a joint employer of the janitors within the meaning of the MWA. RCW 49.46 *et seq.*

The five janitors' arguments to the contrary ignore the record, as no material facts are disputed—any disagreement in this case is to the application of the MWA to those undisputed facts.[8] Also, appellants make significant legal errors. They confuse the "economic reality" test for joint employment with the test for independent contracting. Further, when appellants do discuss the joint employment economic reality test, their brief relies substantially on Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, *et seq.* ("AWPA"), cases and regulation

[8] For instance, appellants argue that there is a factual dispute as to whether the janitors were "supervised" by the Fred Meyer employees who signed Expert "work orders" that the janitors had completed the required cleaning. Appellant's Brief at 10-11. This is not a factual dispute. There is no disagreement that the janitors, after completing their work, asked a Fred Meyer employee arriving to open the store to sign the Expert "work order." Whether signing an Expert work order amounted to "supervision" is a question of law.

(quoting CR 56(c)). "Where no dispute as to the material facts exists, summary judgment is proper." *Id.*

## C. RELEVANT AUTHORITY ON JOINT EMPLOYMENT.

### 1. Washington courts look to the FLSA to interpret MWA.

The MWA "is based on the Fair Labor Standards Act of 1938," and "when a state statute is 'taken substantially verbatim' from [a] federal statute, it carries the same construction as the federal law and the same interpretation as federal case law.'" *Anfinson v. FedEx Ground Package System, Inc.*, __ Wn.2d __, 281 P.3d 289, 298 (2012). Thus, Washington courts look to federal cases applying the "economic reality" test under the FLSA.

### 2. Joint employment under the FLSA is an issue of law for the court and differs from joint employment under the AWPA and independent contractor cases.

Whether a party is "a joint employer is a legal question . . ." *Moreau v. Air France*, 356 F.3d 942, 945 (9th Cir. 2004) (citation omitted); *Bonnette*, 704 F.2d at 1469 (joint employer an issue of law).

Appellants rely substantially on cases interpreting the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 *et seq.*, implicitly arguing that because parts of the AWPA are based upon the

> Whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

*Id.*

Inexplicably, appellants deny the applicability of *Bonnette*, although the overwhelming majority of federal courts use this FLSA test or an equivalent.[9] Some courts have considered additional factors, as well, and the leading case on this is *Zheng*. As the Second Circuit explained in *Zheng*, the test "ensures that the statute is not interpreted to subsume typical outsourcing relationships." 355 F.3d at 76. Thus, weighing additional factors may indicate when "an entity has functional control over workers even in the absence of the formal control measured" by the *Bonnette* test, and reveal those arrangements, such as in the *Rutherford*

---

[9]*See, e.g., In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3rd Cir. 2012) (citing *Bonnette* and adopting similar four factor test); *Schultz v. Capital Int'l Security, Inc.*, 466 F.3d 298 (4th Cir. 2006) (citing *Bonnette*); *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003) (citing *Bonnette* test and analyzing using "additional" factors beyond *Bonnette*); *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998) (adopting *Bonnette* test);*Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) (adopting *Bonnette* test); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (D. Md. 2010) (applying *Bonnette*); *Zachary v. Rescare Okla., Inc.*, 471 F. Supp. 2d 1175 (N.D. Okla. 2006) (applying *Bonnette*); *Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000) (applying *Bonnette*); *Davis v. B&S, Inc.*, 38 F. Supp. 2d 707 (N.D. Ind. 1998) ("Indeed, while not mentioning the *Bonnette* factors by name, several courts faced with factual scenarios somewhat similar to the one at bar have analyzed whether an individual is an "employer" under the FLSA using substantially similar criteria").

chicken-boning case, that are "most likely . . . subterfuge[s] meant to evade the FLSA or other labor laws."[10] *Id.* at 72. Many of the additional *Zheng* factors do not apply to "run-of-the mill subcontracting relationships."[11] *Id.* at 74.

No one factor is determinative, so that even if one or more factors favors the janitors, Fred Meyer may still be entitled to judgment as a matter of law, as "the Court need not decide that *every* factor weighs" in Fred Meyer's favor. *Id.* at 77. Likewise, factual disputes—assuming there even were any in this case—that relate to one or more functional factors wouldn't necessarily prevent summary judgment; the economic reality is that Fred Meyer is not a joint employer and is therefore entitled to judgment as a matter of law.

## D. THE ECONOMIC REALITY IS THAT FRED MEYER DID NOT EMPLOY THE FIVE JANITOR PLAINTIFFS.

Whether the court analyzes only the *Bonnette* factors or considers additional factors, as Judge Spearman did, the result is the same: Fred Meyer did not jointly employ the janitors. The *Bonnette* factors will uncover most employer subterfuges to avoid FLSA compliance, but courts

---

[10] *See, e.g., Itzep v. Target Corp.*, 543 F. Supp. 2d 646 (W.D. Tex. 2008), for an example of a janitorial case that was likely a subterfuge to avoid FLSA liability.

[11] *See* discussion of additional factors, *infra*, § V.D(2).

have looked to additional factors, when the *Bonnette* factors alone do not uncover the "economic reality" of the relationship. *See, e.g. Zheng* (explaining that the four *Bonnette* factors measure "formal" control and additional factors measure "functional" control); *Enterprise*, 683 F.3d at 468 (*Bonnette* inquiries "serve to identify whether the alleged joint employer exerts significant control over the relevant employees"). The janitors worked the graveyard shift unsupervised by Fred Meyer. When the janitors needed assistance, they contacted Marcos Flores at All Janitorial. CP 855, 875, 894. The janitors had no relationship with Fred Meyer, except that their actual employers assigned them to clean Fred Meyer stores. The five janitors could just as easily have been assigned by their actual employer All Janitorial to Rite Aid, Office Depot, Ross, Haggen/Top Foods, Marshall's, TJ Maxx, or other All Janitorial clients. CP 69, 95, 1015. As one court put it:

> If what Plaintiffs argue were to prevail, it would virtually have the effect of converting every business entity that contracts with a janitorial cleaning company into its own "janitorial maintenance operation" after normal business hours, thus improperly subjecting it to the obligations under the FLSA.

*Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 776 (D. Md. 2008) (cleaning company employees sued movie theater operator as joint employer).

1. Every *Bonnette* factor favors Fred Meyer.

a. Fred Meyer had no power to hire or fire the workers employed by All Janitorial and All American.

All Janitorial hired each of the janitors.[12] CP 838, 846, 855, 874, 910-11. This has never been disputed. Moreover, most of the stores All Janitorial cleaned belonged to clients other than Fred Meyer. CP 1015. It was only by happenstance All American assigned the five appellant janitors to clean Fred Meyer stores.

Fred Meyer also did not fire janitors. Even when janitors were caught on camera stealing, Fred Meyer did not insist the service providers fire the dishonest janitors. CP 705, 771-72. Instead, Fred Meyer treated these janitors the same as it treated shoplifting customers: Fred Meyer barred all shoplifters from its stores. *Id.* This differed markedly from Fred Meyer's treatment of Fred Meyer employees recorded stealing; the Fred Meyer employees were targeted for continued surveillance, then

[12] Orlando Ventura-Reyes was the only janitor-plaintiff to work for All American, but he too was hired first by All Janitorial. CP 1, 2.

fired, and placed into a Fred Meyer database marking them ineligible for rehire. CP 771.

Decisions to fire janitors caught stealing rested with the service provider. CP 1017. Sometimes, the service provider fired janitors for stealing, but sometimes the service provider did not. *Id.* In cases where the service provider chose not to fire a janitor caught stealing, it simply moved that janitor to another retail client. *Id.* In fact, a former JMS supervisor assigned to supervise service providers at 40 Fred Meyer stores in 2007 testified that a janitor caught stealing was transferred by the service provider to a different store in the same retail chain without the retailer ever realizing it. CP 927-28.

Four of the five janitorial appellants in this case allege that they were fired by All American or All Janitorial, not Fred Meyer.[13] CP 12, 918, 1040, 1224. Plaintiff Solorio testified she quit.

When other FLSA defendants recommended that their contractors' employees be fired, such a recommendation did not, by itself, amount to control over that worker's hiring and firing. *Lepkowski v. Telatron*

---

[13]A. Becerra's accusation that she was told by Marcos Flores that Fred Meyer had a role in her termination is inadmissible hearsay, and may not be considered. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

*Marketing Group, Inc.*, 766 F. Supp. 2d 572, 578 (W.D. Pa. 2011) (citing *Braden v. County of Washington*, 2010 WL 1664895 at *7 (W.D. Pa. 2010)). *See also Enterprise*, 683 F.3d at 470 (explaining that a putative joint employer's "recommendations were [nothing] more than recommendations," and therefore not indicative of joint employment). There is no admissible evidence that Fred Meyer ever recommended a janitor's termination.

b. Fred Meyer did not supervise or control the janitors' work schedules or conditions of employment.

Fred Meyer paid Expert to clean its stores, so its store directors and other supervisors could focus on Fred Meyer's core mission: retail sales. CP 745-46. For this reason, Fred Meyer personnel were expected not to supervise janitors. Fred Meyer paid Expert to do the cleaning. Appellant C. Becerra testified: "Fred Meyer never cared . . . which person was working. They only cared about having the job well done." CP 864.

The undisputed facts show this to be the case. All Janitorial, not Fred Meyer, trained the janitors. CP 701-02, 847, 855, 875, 894, 910-11, 1014-15. Mr. Flores, the All Janitorial and All American supervisor, assigned and transferred the janitors from store to store and set their schedules. CP 846, 861, 875, 895, 911. If the janitors needed additional

supplies or had a problem, they called Mr. Flores by telephone rather than speak to any Fred Meyer employees. CP 855, 875, 894.

Janitors took their breaks where and when they wanted, without oversight or direction from Fred Meyer. CP 858-59, 879, 900. Fred Meyer night stockers repeatedly reported seeing janitors sleeping in Fred Meyer stores, but Fred Meyer store directors did nothing about these complaints. CP 699, 715-16, 758, 762-63, 784, 822, 827, 1000, 1004, 1008-09. Janitors did not "swipe" or "clock" in and out of work, unlike hourly Fred Meyer store employees. CP 789, 858-59, 878, 899. Whenever a janitor wanted a day off from work, he or she arranged for a substitute without notifying Fred Meyer. CP 858, 898.

The janitors only interacted with Fred Meyer employees after they had finished cleaning. Then, they would search for a Fred Meyer employee to sign an Expert work order which verified that the janitorial work had been completed. CP 842, 861, 885-86, 899, 913. This is the essence of appellant's contention that Fred Meyer "supervised" them.[14]

[14]Appellants' conclusory assertions that Fred Meyer "managers" who signed work orders supervised them did not create factual issues sufficient to preclude summary judgment. *Grimwood*, 110 Wn.2d at 360.

Not a single appellant testified that anyone at Fred Meyer told them what to do while they cleaned at night. *Id.*

As a matter of law, "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry." *Zheng*, 355 F.3d at 75. This is the case even when the putative joint employer monitors the worker in real-time. *Jacobson*, 40 F. Supp. 2d at 686, 691. In *Jacobson*, Comcast contracted with installation companies to install cable equipment in customer residences. *Id.* at 686. Comcast's monitoring of the contractor's technicians included "regularly monitor[ing] the location of technicians, specif[ying] the time at which they [were] supposed to arrive at appointments, and regularly evaluat[ing] completed work to ensure that it me[t] standards." *Id.* at 691. Some of this monitoring was in real-time. *Id.* at 686. But even this degree of supervision, far beyond what Fred Meyer store employees did when signing Expert work orders, failed to establish joint employment under the FLSA. The emphasis on quality control made the monitoring "qualitatively different from the control exercised by employers over employees." *Id.* at 692; *see also Moreau*, 356 F.3d at 951 (9th Cir. 2004).

inconsistent with the record. As appellants all testified, they addressed all problems and questions to Mr. Flores, typically by cell phone. CP 705-06, 793, 795, 845, 855, 868, 875, 877, 882, 894. They uniformly testified that their only interaction with Fred Meyer "supervisors" came after they had finished their work, when one of the janitors in each store asked a Fred Meyer employee to sign the Expert work order. CP 842, 861, 885-86, 899, 913.

In sum, appellant's characterization of the undisputed facts as "supervision" is not supported by any court's interpretation of the FLSA. Supervising and controlling employee work schedules or conditions of employment means actual supervision and control, not contract compliance concerning quality control, which is "perfectly consistent with a typical, legitimate subcontracting arrangement." *Zheng*, 355 F.3d at 75. The second *Bonnette* factor favors Fred Meyer.

c. Fred Meyer did not determine the janitors' method or rate of payment.

This factor has never been in dispute and favors Fred Meyer. All American and All Janitorial chose how, when, and how much to pay the janitors. CP 702, 1015. The janitors received payment directly from All American or All Janitorial. CP 138, 158-60, 846, 856, 875. When All

Janitorial gave the janitors a weekly pay raise, the contract price Fred Meyer paid to Expert did not change. The price was originally set by a reverse auction years before any of the appellants worked in a Fred Meyer store, and was renegotiated as old stores closed and new stores came on line. CP 64, 718-20, 722, 788.

d. Fred Meyer did not maintain the janitors' employment records.

This factor has also never been in dispute and favors Fred Meyer. All American and All Janitorial, not Fred Meyer, maintained the janitors' employment records. CP 96. Fred Meyer did not know who the janitors were and was not informed about the frequent transfers.

2. "Additional" factors also favor Fred Meyer.

a. Additional economic reality factors expose sham outsourcing relationships, and should not affect normal subcontracting relationships.

Because the economic reality test is designed to consider the "total employment situation" (*Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33, 81 S. Ct. 933 (1961)), courts sometimes look beyond the four factors of the *Bonnette* test. In considering additional factors, the central issue is still the same: whether an entity has control over the workers. *Zheng*, 355 F.3d at 72. As the *Zheng* court explained, "the

'economic reality test' . . . is intended to expose outsourcing relationships that lack a substantial economic purpose." *Id.* at 76. In "legitimate subcontracting arrangements" where the putative joint employer has neither functional nor formal control over the worker, the subcontractor alone is responsible for paying its employees. *Id.* at 71-76.

Fred Meyer's decision to contract out its facilities work—including janitorial services—is the type of "legitimate subcontracting arrangement" to which the *Zheng* court referred. Fred Meyer selected its management contractor based on an online auction in which all of the participants were pre-screened by Kroger for sufficient capitalization and janitorial service expertise. CP 720. Fred Meyer's decision to outsource janitorial services, so store management could focus on retail sales, was consistent with its decision to outsource all of its facilities work: e.g., snow removal, building maintenance, energy conservation, landscaping, and more. CP 719.

Many of the additional factors are inapplicable because Fred Meyer's contracting arrangement is not a sham. The most critical factors favor Fred Meyer, precisely because Fred Meyer was acting on legitimate business objectives. The courts distinguish and apply the factors as a tool

to expose subterfuges to avoid compliance with the FLSA, not as a scorecard to see which party tallies the most factors.

> "[A] joint employment relationship is not determined by a mathematical formula.... The purpose of weighing the factors is not to place in either the contractor or the [alleged employer's] column, but to view them qualitatively to assess the evidence ...."

*Layton v. DHL Express*, 686 F.3d at 1178, quoting *Antenor v. D&S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).

b. Janitorial work is not integral to Fred Meyer's business of consumer sales.

Fred Meyer is in the business of selling consumer goods, not cleaning buildings. Appellants mistakenly assert that because it is "essential" for Fred Meyer to have clean stores, that janitorial services are "integral" to Fred Meyer's business.[15] Appellants confuse "necessary" or "important" with "integral." While it is important for Fred Meyer to have clean stores, the Expert contract was no more integral to retailing than snow removal for Fred Meyer's parking lots.

---

[15] Appellants base this on the declaration of former Fred Meyer store director Robert Fazio. Appellant's Brief at 12. Facts, not personal opinions, create factual issues sufficient to defeat summary judgment. *Grimwood*, 110 Wn.2d at 360. More importantly, Mr. Fazio's declaration does not link the cleaning to Fred Meyer's retail functions. CP 1050-53.

was limited to contract compliance. *See* discussion of supervision, *supra*, Section V.D(1)(b). Thus, this factor also favors Fred Meyer.

d. Janitors could have shifted as a business unit to other retail clients.

All Janitorial's clients included six other retailers in addition to Fred Meyer. CP 95, 1015. Any of the five appealing janitors, therefore, could have shifted as a business unit to clean the store of a different All Janitorial client. All Janitorial repeatedly moved janitors between Fred Meyer stores and could just as easily moved them to, for example, a Top Foods or Haggen store. CP 95. To the degree this factor has relevance, it also favors Fred Meyer.

e. Independent contractor, AWPA, and other regulatory factors are irrelevant or favor Fred Meyer.

Some of the additional *Zheng* factors may superficially appear to favor the janitors. But closer inspection reveals they are inapplicable or favor Fred Meyer. For example, while it is undisputed that appellants performed their work on Fred Meyer premises, this is also, in the words of the *Zheng* court, "perfectly consistent with a legitimate subcontracting relationship." 355 F.3d at 72. Moreover, the significance of this factor is only that it "<u>may</u> support the inference that a putative joint employer has

functional control" over a worker, *id.* (emphasis added). In other words, it is a proxy for actual evidence about control. The evidentiary record, however, makes it impossible for that inference to be drawn in favor of any of the five appealing janitors. The record is clear that no Fred Meyer graveyard shift employee supervised the janitors while they performed their work; no Fred Meyer employee told them how to do their work, or trained them; the appealing janitors called Mr. Flores, not anyone from Fred Meyer, when they needed assistance. CP 701-02, 842, 847, 855, 861, 875, 885-86, 894, 899, 913, 1014-15.

And while it was possible for responsibility under the service provider contracts to pass from one subcontractor to another without material changes, the *Zheng* court explained that that factor only favored a finding of joint employment when the workers were tied exclusively to a single, putative joint employer, like the chicken boners who worked in the plant in *Rutherford.* The Second Circuit court went on to explain that when "employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity, this factor does not in any way support the determination that a joint employment relationship exists." 355 F. 3d at 74. Such is the case here. The

appellants worked at Fred Meyer only because their direct employer—All Janitorial or All American—was hired by Expert to provide janitorial services in Fred Meyer stores. Thus, this factor favors Fred Meyer.

Finally, the *Zheng* court noted that in cases where workers work exclusively or predominantly for a putative joint employer,[16] that putative joint employer "may *de facto* become responsible" for the worker's pay and schedules, "traditional indicia of employment." *Id.* at 75. There is no evidence of that in this case. All American and All Janitorial retained complete control over the appellants' pay and schedules; All Janitorial gave the janitors raises even though Fred Meyer's payments to Expert did not change. All Janitorial, not Fred Meyer, set the schedules and transferred janitors from store to store. If janitors took time off and arranged for substitutes, they called Mr. Flores to make arrangements, not Fred Meyer. CP 722, 846, 856, 858, 861, 875, 895, 898, 911.

In sum, an analysis of the additional factors reveals two things. First, Fred Meyer's contractual relationship with Expert does not have the

---

[16] This factor and other factors cited by plaintiffs (the opportunity for profit and loss and degree of skill required to perform the job) have been rejected as irrelevant to the FLSA joint employment analysis. They are factors for distinguishing independent contractors from employees. *Aimable v. Long & Scott Farms*, 20 F.3d 434, 443-44 (11th Cir. 1994). The Department of Labor included these factors in its 1997 joint employment AWPA regulation for farm workers, not in the FLSA regulation applicable to janitors and other non-agricultural workers. *Layton v. DHL Express*, 686 F.3d at 1176-77.

hallmarks of the sham operations seen in the *Rutherford* or *Itzep* cases. Second, the most critical of the additional factors all favor Fred Meyer, because Fred Meyer did not contract out its janitorial services as a "subterfuge" to violate the FLSA. 355 F.3d at 74.

## VI. CONCLUSION

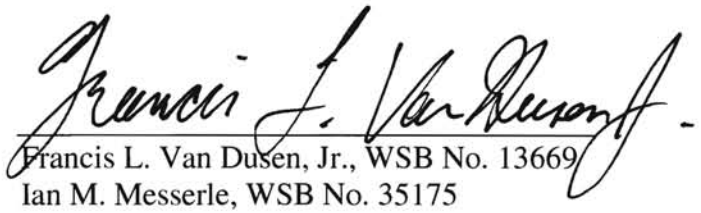
Fred Meyer exercised absolutely no control or supervision over the janitors cleaning the closed stores at night. Fred Meyer did not pay them, hire them, fire them, tell them how to do their jobs, assign them to stores, evaluate any individual janitor's performance, require them to clock in or out of the Fred Meyer stores, issue them uniforms or badges, maintain any employment records, or do any of the other things that an employer does with its actual employees. Fred Meyer didn't know the janitors' names, and the janitors did not know the Fred Meyer store management. Fred Meyer took no disciplinary action when janitors slept in the store break rooms. Fred Meyer interacted with the janitors after the janitors had finished cleaning, and only to verify that the cleaning had been completed. As numerous courts have held, that type of minimal interaction does not transform a worker into an employee under the FLSA.

Instead of applying the appropriate analysis to the undisputed factual record, the janitors' brief confuses the joint employment economic reality test with the independent contractor test, and introduces inapplicable factors from AWPA regulations, while totally ignoring the FLSA regulation on joint employment. The parties do not dispute the material facts. They dispute the application of the appropriate factors to the undisputed facts. Judge Spearman correctly resolved the dispute.

Summary judgment should be affirmed.

DATED this 31st day of August, 2012.

MILLER NASH LLP



Francis L. Van Dusen, Jr., WSB No. 13669
Ian M. Messerle, WSB No. 35175

Attorneys for Defendant/Respondent
Fred Meyer Stores, Inc.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that the above and foregoing RESPONDENT/ DEFENDANT FRED MEYER'S APPEAL BRIEF was filed with the Washington Court of Appeals, Division I, and copies were served via Hand-Delivery on:

Jeffrey B. Youmans
Melissa K. Mordy
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Attorneys for Respondent
Expert Janitorial LLC

William Rutzick
Schroeter Goldmark & Bender
810 Third Avenue Suite 500
Seattle, WA 98104

and

David N. Mark
Law Office of David N. Mark
810 Third Avenue, Suite 500
Seattle, WA 98104

Attorneys for Appellants

DATED this 31ST day of August, 2012.

Francis L. Van Dusen, Jr.

SEADOCS:448318.2