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No. 635182

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

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
No. 04-2-39981-5 SEA

2009 NOV 25 PM 1:50

COURT OF APPEALS
STATE OF WASHINGTON
FILED

**BRIEF OF RESPONDENT
FEDEX GROUND PACKAGE SYSTEM, INC.**

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ORIGINAL

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I. STATEMENT OF THE CASE

A. **Introduction/Procedural Background.**

Plaintiffs/appellants (hereinafter “plaintiffs”) appeal from a month-long jury trial presided over by the Honorable John P. Erlick. The jury heard the testimony of 49 witnesses and considered 228 exhibits before rejecting plaintiffs’ contention that a class of independent contractors who contracted with defendant FedEx Ground Package System, Inc. (“FXG”) were actually misclassified “employees” under RCW 49.46.130 and RCW 49.12.450. CP 2188, 2220.

Plaintiffs do not challenge a single instance in which Judge Erlick excluded or admitted evidence, and instead limit their assignments of error to jury instructions and the verdict form. The focus of plaintiffs’ argument (27 pages of their brief) is the Court’s Instruction No. 9 setting forth eight non-exclusive factors to be considered by the jury in determining whether the class members were independent contractors or employees.

Notably, the eight factors in that instruction included *all six factors* in the Ninth Circuit case plaintiffs themselves urged Judge Erlick to follow. Despite this, plaintiffs complain that Instruction No. 9 should have directed the jury to view those factors through the lens of “economic reality” or “economic dependence” rather than the “right to control” language contained in the instruction’s introductory paragraph. This is a

curious position for plaintiffs to take given that (1) it conflicts directly with what plaintiffs argued when Judge Canova granted their motion to certify the class based on the “right to control” test; (2) unlike “right to control,” the terms “economic realities” and “economic dependence” are not listed as factors in any Washington or federal Fair Labor Standards Act (“FLSA”) test; and (3) in any event, plaintiffs took full advantage of the Court’s instructions by presenting evidence and argument on all issues and theories they now claim to have been precluded from discussing.

B. Factual Background.

FXG is a motor carrier licensed by the U.S. Department of Transportation, and, among other things, provides small package pick-up and delivery services. FedEx Ground (“Ground”) focuses on business-to-business pick-ups and deliveries, while FedEx Home Delivery (“Home”) primarily deals with residential deliveries. Exs. 91B, p. 5, 91C, p. 3. Ground and Home provide these pick-up and delivery services through a nationwide network of independent contractors, each of whom enters into an Operating Agreement (“OA”) with FXG with respect to the specific geographic area the contractor owns and agrees to service.¹ Exs. 91B, p. 20; RP 3/17/09 pp. 183-184, 186, 215.

These independent contractors own or lease their vehicles,

¹ “FXG” refers to both Ground and Home unless otherwise indicated.

maintain their vehicles, decide how best to accomplish pick-ups and deliveries, participate in growing the customer base, manage their own books and expenses, often operate as corporations or licensed sole proprietorships, sign and renew contracts affirming their independent contractor status, and file income tax returns as self-employed. Ex. 91B, p. 13-14; Ex. 91C, p. 5; Ex. 505; Ex. 673; RP 3/9/09 pp. 44, 49; RP 3/10/09 pp. 104-11, 120-22. Contractors have a proprietary interest in their routes, and many contractors realize profits on the sale of their routes, or portions of their routes. *See, e.g.*, RP 3/5/09 p. 67 (Tim Cork: \$51,000 profit); RP 3/12/09 p. 240 (Nick Prets: \$22,000 profit). Some contractors own multiple routes. RP 3/17/09 p. 180.² Both single and multiple-route independent contractors can and often do hire others to drive part or all of their routes. RP 3/17/09 p. 180. Some contractors are “absentee owners” who in certain cases even live in other states. RP 3/9/09 p. 127; RP 3/19/09 p. 223. Contractors are essentially paid by the piece and number of stops, not by the hour. RP 3/19/09 pp. 71-72. Contractors’ incomes vary significantly. *See e.g.*, RP 3/18/09 pp. 160-61 (Jon Timmer: \$94,000); RP 3/11/09 p. 142 (Steve Goodwin: \$37,000).

FXG is just one of many entities which use the independent contractor business model. The U.S. Postal Service contracts with 17,000

² Multiple-route contractors were not part of the class in this case.

independent contractors across the country. RP 3/24/09 p. 35. Many major trucking companies, including Landstar, Pacer, and J.B. Hunt, also use independent contractors. RP 3/24/09 pp. 36, 38.

C. Certification of the Class Under the “Right to Control” Test Set Forth in *Ebling and Hollingbery*.

On August 6, 2007, the named plaintiffs, Randy Anfinson, Steven Hardie, and James Geiger, all former FXG contractors, moved for class certification before the Hon. Gregory P. Canova. Sub No. 56A.³ In so moving, plaintiffs represented to the Court that the Washington common law “right to control” test is the applicable legal standard for determining whether the class members were independent contractors or employees:

Under Washington law, an employee is defined as “one whose physical conduct in the performance of the service is subject to the other’s right of control.” In contrast, an independent contractor is one who contracts to perform services for another, “but is not subject to the other’s right to control his physical conduct in performing the services.” *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 497-98, 663 P.2d 132 (1983), *citing Hollingbery, Jr., v. Dunn*, 68 W.2d 75, 79, 411 P.2d 431 (1966).

Id., p. 6. In *Hollingbery*, the Washington Supreme Court had adopted and applied a 10-factor test derived from the Restatement (Second) of Agency for determining whether a worker is an independent contractor or an

³ Documents identified by “Sub No.” have been designated in FedEx Ground Package System Inc.’s Designation of Clerk’s Papers, but have not yet been assigned CP numbers. Once CP numbers are assigned, FXG will submit an Errata that provides corrected citations. See RAP 9.6(a) (permitting a party to supplement the designation of clerk’s papers “prior to or with the filing of the party’s last brief”).

employee. 68 Wn.2d at 80-81. The Court of Appeals in *Ebling* expressly applied the rule of *Hollingbery* to a dispute arising, like this case, under Washington wage and hour law. 34 Wn. App. at 478-98. In recognition of that fact, plaintiffs stressed in their class certification motion that *Ebling* is “particularly on point because it distinguishes between employees and independent contractors in the context of the Washington wage statutes.” Sub No. 56A, p. 6; *see also* CP 2846-2861 (plaintiffs’ reply brief citing *Ebling* and *Hollingbery* for the “crucial factor” of “right to control”). Plaintiffs represented that “[t]he proof here will be that [FXG] both had the right of control, and routinely exercised that right.” *Id.* Nowhere in their class certification briefing did plaintiffs suggest, as they do now, that this case is controlled by FLSA law, nor did they suggest that the inquiry should be focused on “economic realities” or “economic dependence.”

On January 28, 2008, Judge Canova signed a proposed class certification order that had been drafted and submitted *by the plaintiffs*.⁴ CP 209-219. That order again expressly identified the “critical test” as

whether FedEx had the “right to control” the manner and means of the work performed. *See, e.g., Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 497-98, 663 P.2d 132 (1983), *citing Hollingbery, Jr., v. Dunn*, 68 Wn.2d 75, 79, 411 P.2d 431 (1966); *see also Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-120, 52 P.3d 472 (2002).

⁴ Judge Canova did make a few handwritten changes to the proposed order; those changes are not material to this appeal.

CP 211.⁵ Again, missing from plaintiffs' proposed order was any mention of the FLSA, "economic realities" or "economic dependence."

Following certification of the class, plaintiffs distributed to the class members an "opt-out" notice allowed under Washington law. CP 218, 225-228. This "opt-out" procedure was far more favorable to plaintiffs than the "opt-in" notice required under the FLSA. *See Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 348 (4th Cir. 2008). Not until immediately before trial did plaintiffs suggest that this class action should be governed by the FLSA test or focused on "economic realities" or "economic dependence."

D. The Trial.

The case was bifurcated into liability and damages phases by stipulated order dated May 5, 2008. CP 223-224. The liability phase commenced before Judge Erlick on March 3, 2009, and continued through March 31, 2009. The issue tried to the jury was whether the class members were independent contractors or employees of FXG. CP 2220.

⁵ The class as certified was defined as follows: "all persons who performed services as a pick up and delivery driver, or 'contractor,' for defendant during the class period (December 21, 2001 through December 31, 2005) who signed (or did so through a personal corporate entity) a FedEx operating agreement and who handled a single route at some point during the class period; excluding persons who only performed or filled one or more of the following positions during the class period: multiple route contractors, temporary drivers, line-haul drivers, or who worked for another contractor." CP 217.

1. The Parties' Proposed Jury Instructions on the Test for Independent Contractor vs. Employee Status.

In its initial and supplemental trial briefing, FXG pointed out that *Ebling*—the only Washington wage and hour case on point—is controlling law. Therefore, because this case had been certified (and an opt-out class created) pursuant to the Washington common law test of *Hollingbery* and *Ebling*, the jury instruction directed to employment status should be grounded in that 10-factor Washington test. CP 1014-1016; 1270-1273. Additionally, given that federal FLSA authorities are “persuasive”—but not controlling—in Washington Minimum Wage Act (“MWA”) cases,⁶ and that the Washington common law test does not preclude the consideration of other factors, FXG proposed that a further factor taken from the Ninth Circuit FLSA test,⁷ “the class member’s opportunity for profit or loss depending on his or her managerial skill,” be added to the instruction. See FXG’s proposed Instruction No. 16, CP 994-995. Alternatively, in the event that Judge Erlick was not inclined to charge on the 10-factor Washington test, FXG proposed that the Court combine the six factors in the Ninth Circuit FLSA test (most of which are substantially identical to corresponding factors in the *Hollingbery* right to control test) with two non-overlapping factors from the Washington common law

⁶ *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523-24, 7 P.3d 807 (2000).

⁷ See, e.g., *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

standard, “belief of the parties” and “method of payment.” See FXG’s proposed alternative Instruction No. 16A, CP 1843; 1824-1829.⁸

As their *primary* proposed instruction, plaintiffs submitted a one-factor instruction, purportedly based on *Ebling*, focused exclusively on “right of control over the physical conduct of the services performed.” See plaintiffs’ proposed instruction 13, CP 1077. *Alternatively*, and “only in the event the Court choose [sic] not to follow Ebling as providing the test for employment status” (emphasis in original), plaintiffs submitted proposed *alternate* instruction 13A, which combined certain FLSA factors with a narrative statement featuring two phrases, “economic reality” and “economic dependence,” that are not listed as factors in any common law or FLSA test. CP 1078. Starting shortly before trial, plaintiffs submitted additional iterations of their proposed alternative instruction cobbling together FLSA factors with a narrative again constructed around the terms “economic reality” and “economic dependence.” See CP 1078; 1783; 1819-1820.

2. Judge Erlick’s Careful Fashioning of a Legal Standard Instruction.

On three occasions prior to the start of trial (Feb. 19, Feb. 26 and

⁸ Under either alternative, the use of relevant Washington factors was particularly appropriate because, in addition to their overtime claim, plaintiffs also asserted a uniform reimbursement claim under RCW 49.12.450, for which there is no equivalent under the FLSA. See CP 7, 12.

Mar. 2, 2009), the Court heard extensive argument on the legal standard instruction. Judge Erlick also went beyond the materials and arguments submitted by the parties and did his own research into “treatises and case law.” RP 03/02/09 p. 23.

In fashioning an appropriate legal standard instruction, the Court took pains to ensure, first, that the factors on which the jurors were instructed were reasonably related to the evidence and, second, that each party was given sufficient latitude to argue its theory of the case. *See, e.g.*, RP 3/02/09 at p. 25 (analyzing “intent of the parties” factor in light of the evidence to be introduced), and at pp. 13-15 (addressing the competing theories of the parties). Judge Erlick also emphasized the overriding principle that “[n]o single factor is controlling. An evaluation of all incidents of the work relationship is required.” RP 3/02/09 p. 24.

In colloquy with counsel, the Court noted that *Ebling*, the sole Washington case in which an independent contractor versus employee determination was made in the context of wage and hour statutes, “appears to approve of the *Hollingbery v. Dunn* factors.” RP 02/26/09 p. 23. Judge Erlick did not, however, end his analysis there:

That said, I think that the *Inniss* case, which allows the Court to look at parallel law, interpretive law under similar legislation, such as the FLSA . . . is appropriate.

Id. at 23-24. After considering a wide range of federal authorities, the

Court observed that the six-factor Ninth Circuit formulation of the FLSA test in *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) closely overlapped with a number of factors in the *Hollingbery* common law test. RP 02/19/09 pp. 44-45, 48. He noted in particular the striking overlap between “controlling Washington case law” and the “first [*Sureway*] factor . . . the degree of the alleged employer’s right to control the manner in which the work is to be performed,” *id.* at 44-45,⁹ and also remarked that the *Sureway* test “allows for the entrepreneurial aspect to be raised, which I know is a big issue for both sides.” *Id.* at 48. Notably, use of the *Sureway* test was proposed by *plaintiffs* just days before the start of trial, RP 02/26/09 p. 11, and in fact the 6-factor *Sureway* test was incorporated nearly verbatim into the final iteration of plaintiffs’ proposed alternate instruction on the appropriate legal standard. CP 1819-1820.¹⁰

Judge Erlick ultimately adopted the *Sureway* test as the centerpiece of an instruction that was framed by the introductory and concluding language of Washington Pattern Instruction (“WPI”) 50.11.01 based on *Hollingbery*. The Court declined to adopt plaintiffs’ additional

⁹ As this factor in the Ninth Circuit FLSA test amply demonstrates, plaintiffs’ assertion that “right of control” has no place in employment status determinations under the FLSA (*see, e.g.*, App. Br., p. 29) is wrong.

¹⁰ The sole difference between the six factors in the Ninth Circuit *Sureway* test and the six factors in plaintiffs’ proposed instruction 13C was plaintiffs’ attempted substitution of “the relative investment of the parties” for *Sureway* factor number 3, which reads, “the alleged employee’s investment in equipment or materials required for their tasks, or their employment of others.” *Compare* CP 1819-1820 *with* 656 F.2d at 1370. As discussed *infra*, the Court correctly rejected plaintiffs’ attempt to alter this factor.

argumentative paragraph on “economic realities” and “economic dependence” on the ground that those terms were not factors included in any published jury instruction, and instead were just labels picked from certain federal-court opinions. RP 3/26/09 p. 107. He did, however, emphasize that plaintiffs were free to argue their theory of the case to the jury. *See, e.g.*, RP 3/27/09 pp. 19-20.

Judge Erlick also added two non-overlapping *Hollingbery* factors to the six *Sureway* factors—namely “method of payment” and “belief of the parties.” He observed that “method of payment” is “very much a control issue” and “very much an economic reality issue.” RP 02/26/09 p. 11. With respect to “belief of the parties,” he noted that this factor was used in some FLSA cases as well as in *Ebling*. RP 3/02/09 p. 23.¹¹

Thus, the following jury instruction regarding the legal standard for employment status was given at the outset of the case (RP 03/03/09 pp. 25-26) as well as before closing argument¹²:

¹¹ The Court emphasized that “belief of the parties” was but one of eight non-exclusive factors—the parties were free to argue to the jury what, if any, weight should be given to each factor in the context of the entire record. *See, e.g.*, RP 3/26/09 pp. 73-74.

¹² Plaintiffs requested a preliminary instruction on the legal standard. CP 1760-65. Further arguments on the appropriate legal standard instruction took place over the course of the trial. *See, e.g.*, RP 3/26/09 pp. 69-139. After considering those arguments and the many authorities cited by both parties, the Court decided to leave the wording of the preliminary legal standard instruction unchanged in his final instructions to the jury given just prior to closing argument. *See* RP 3/27/09 pp. 19-20, where Judge Erlick summarizes the basis for his conclusion that Instruction No. 9 is “an appropriate and correct statement of the law” that “allows each side to argue its theory of the case,” noting that he took into consideration a wide range of authorities including *Ebling*, *Hollingbery*, WPI 50.11.01, federal FLSA authorities, and California authorities.

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controlled or had the right to control the details of the class members' performance of the work.

In deciding control or right to control, you should consider all the evidence bearing on the question and may consider the following factors, among others:

- (1) The degree of FedEx Ground's right to control the manner in which the work is to be performed;
- (2) The class members' opportunity for profit or loss depending upon each one's managerial skill;
- (3) The class members' investment in equipment or materials required for their tasks, or their employment of others;
- (4) Whether the service rendered requires a special skill;
- (5) The degree of permanence of the working relationship;
- (6) Whether the service rendered is an integral part of FedEx Ground's business;
- (7) The method of payment, whether by the time or by the job; and
- (8) Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.

Neither the presence nor the absence of any individual factor is determinative.

3. The Evidence Introduced at Trial Allowing Each Party to Argue Its Theory of the Case.

a. The Witnesses Called by Each Side.

Plaintiffs called a total of 25 fact and expert witnesses live or via deposition at trial, including 9 FXG executives or terminal management employees. FXG called a total of 24 fact and expert witnesses. Twenty-seven current or former FXG independent contractors testified. Plaintiffs did not call a single *current* contractor. Instead, plaintiffs called 15 *former* contractors—fewer than 5% of the class members. And, although they purported to represent a statewide class, plaintiffs failed to call a single contractor witness from 6 (or 40%) of FXG’s 15 Washington terminals.¹³

Several of plaintiffs’ ex-contractor witnesses flatly contradicted plaintiffs’ contentions by testifying that they never had any reason to consider themselves “employees.” For example, class member Steve Peckham testified that he “continued to believe” throughout the approximately four years he was a contractor that he was an independent businessperson and not an employee of FXG. RP 3/9/09 p. 49. Ronald

¹³ One of the three named plaintiffs, Steven Hardie, never testified at all. The other two named plaintiffs admitted before the jury that they had made false statements under oath. Lead plaintiff Anfinson acknowledged on cross-examination that he wrote off foreign vacation and other personal expenses as “business expenses” on his tax returns signed under oath in connection with his contractor business—an indiscretion that prompted his counsel to acknowledge in closing that he might “owe some taxes.” RP 3/10/09 p. 110-11, 120-21; RP 03/30/09 p. 35. Named plaintiff Geiger admitted he signed false discovery responses in this case. RP 3/04/09 pp. 233-236.

Reinhardt, who was on plaintiffs' witness list,¹⁴ admitted in video deposition testimony played for the jury that he always believed he was an independent contractor because he "didn't have any reason" to believe otherwise. Sub No. 512, Ex. 3. The current contractors who testified likewise confirmed that they have always been independent contractors.¹⁵

b. The Documentary Record.

Plaintiffs were allowed to introduce virtually all of the evidence they offered; thus, they do not appeal any evidentiary rulings. Over FXG's objection, plaintiffs introduced 141 separate "contract discussion notes" ("CDNs"), which are records kept by FXG managers of discussions with individual contractors regarding their businesses. *See, e.g.*, RP 3/19/09 pp. 225-226; 231-232; RP 3/19/09 pp. 88-89. Plaintiffs claimed that these records constituted evidence of a retained "right of control" on the part of FXG and also demonstrated the contractors' alleged "economic dependence" on FXG. *See, e.g.*, plaintiffs' closing at RP 3/30/09 p. 55: "All they have to say to someone who's bought a truck and is in over his head is we're going to take away your route . . . and they will do their very best to fly right as quickly as they can."¹⁶ Judge Erlick also admitted

¹⁴ CP 786-790 (Joint Statement of Evidence).

¹⁵ *See, e.g.*, Jon Timmer (RP 3/18/09 p.177), Jason Hemmig (RP 3/3/17/09 p. 93), Nick Prets (RP 3/16/09 p. 31), and Travis Mickelson (RP 3/16/09 p. 228).

¹⁶ The jury clearly rejected plaintiffs' view of the CDNs, which was refuted by FXG terminal manager John Schnebeck (RP 3/19/09 pp. 225-226; 231-232), as well as by contractors including Jon Timmer who testified that he considered his business

multiple policy manuals, emails, and other company documents, to which plaintiffs cited frequently. *See, e.g.*, Exs. 65, 331; RP 3/30/09 p. 41.

c. Plaintiffs' Presentation of Their Theories.

Judge Erlick's jury instructions and evidentiary rulings afforded plaintiffs an open field to argue their theories—an opportunity they did not pass up. For example, at the very beginning of their opening statement, plaintiffs stated (referring to class member Suzette Solheim): “This promise of *independence* did not match the *reality* that Ms. Solheim soon found herself in.” RP 3/03/09 p. 27. Plaintiffs continued:

[The class members] literally could not work—a single route driver simply couldn't work for someone else. They're working 10 to 12 hours a day . . . [Y]ou couldn't contract with any other package delivery company . . . So it was literally impossible.

RP 03/03/09 pp. 49-50. Plaintiffs further asserted that “opportunity for profit or loss [is e]ntirely within the control of FedEx.” *Id.* at p. 39.¹⁷

Plaintiffs continued to press their view of “economic realities” in their case-in-chief. For example, named plaintiff Geiger testified that “we were literally trapped into being FedEx package delivery drivers only,”

relationship with FXG “a pleasure” (RP 3/18/09 pp. 171-174), and who was the subject of CDNs that, far from coercive or threatening, were in fact glowingly positive. *See* Ex. 946. Nonetheless, a negative view of the CDNs was a central aspect of plaintiffs' case, and Judge Erlick gave them free rein to present that theory to the jury.

¹⁷This is precisely the argument that plaintiffs now contend they were prevented from making. *See* App. Br., p. 26: “Thus, had plaintiffs been permitted, they would have argued that the combination of these FedEx rules and federal hours-of-work limitations demonstrated the utterly economic dependent relationship between driver and FedEx.”

and that he could not hire additional help because his delivery area was too rural and to do so was not “economically feasible.” RP 03/04/09 pp. 179-80, 184-185.¹⁸ These themes were echoed throughout plaintiffs’ closing argument. For example, counsel quoted an FXG terminal manager’s deposition testimony that contractors needed to be “available” for “all the time during the day,” RP 3/30/09 p. 161, and argued that the concept of a market for routes “is flatly contradicted by the reality of things,” RP 3/30/09 p. 178. FXG never objected to, nor did Judge Erlick in any way foreclose or limit, such argument by plaintiffs. Instead, as the Court noted, the non-exclusive eight-factor test within Instruction No. 9 allowed “each side to argue its theory of the case.” RP 3/27/09 pp. 19-20.

In short, plaintiffs’ argument of “material prejudice” caused by purported limits on their ability to develop an “economic dependence”

¹⁸ As further examples, Ms. Solheim testified that she was economically dependent on FXG because she had paid \$25,000 for her route and had a five-year lease on her truck. RP 03/04/09 p. 96. Mr. Anfinson testified that part of his contractual performance bonus was based on terminal-wide performance. RP 03/10/09 pp. 35. Class member Steven Goodwin claimed that he had no ability to grow his route because “there’s no time” and because FXG did not allow him to split it. RP 03/11/09 pp. 84-85. Another ex-contractor class member, Jeff Cesta, claimed that FXG prevented him from selling his route to an individual willing to pay cash for it. RP 03/12/09 pp. 83-84. And plaintiffs highlighted multiple FXG documents, including an email written by a former FXG executive in which he stated “we have bled these contractors as long as we can.” RP 03/12/09 p. 177. Plaintiffs’ rebuttal case was no different. Business valuation expert Paul Regan’s testimony was largely focused on a study he prepared purporting to show that FXG independent contractors received less income than industry averages for employees. RP 3/25/09 pp. 90-92. Mr. Regan also claimed there was no genuine “market” for contractor route sales. RP 3/25/09 pp. 182-183. Mr. Regan’s bottom-line opinion was that contractors did not receive “adequate and competitive compensation for the number of hours that they need to invest” (RP 3/25/09 p. 73)—an opinion offered squarely in support of plaintiffs’ economic realities/dependence theories.

theory does not square with the record. Rather, the jury's verdict is explained by the overwhelming body of evidence contradicting plaintiffs' theory of economic dependence and instead demonstrating the uniquely *non-employee* independence—and revenue and profit opportunities—available to class members. See subsection (d) *infra*.¹⁹

d. The Evidence Supporting the Jury's Verdict on Each of the Eight Factors in Judge Erlick's Legal Standard Instruction.

The jury reached their 11-1 verdict 24 hours after the case was submitted to them. Their conclusion that the class members were independent contractors and not employees was supported by ample evidence on each contested factor in Jury Instruction No. 9:

Factor 1: “The degree of FedEx Ground’s right to control the manner in which the work is to be performed.” The jurors were provided the Operating Agreement (“OA”) signed by each of contractors and FXG, which expressly provides that:

the manner and means [of achieving the contracted-for] results are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor’s continued operation which is contrary to this understanding.

¹⁹ Plaintiffs’ argument on prejudice is ironic in light of their argument to *exclude* FXG’s evidence of the economic opportunities available to single-route contractors to become multiple-route contractors, on the basis that the relevant test was *right of control*. See RP 3/12/09 pp. 231-32 (plaintiffs successfully strike from the record testimony regarding the expansion opportunities for contractor Nick Prets, arguing, “It’s not what the law is. *The law is whether there’s a right to control.*” (emphasis added)).

Ex. 505, pp. 50-51. No contractor testified that he or she ever brought a claim for breach of that or any other provision of the OA. In fact, several ex-contractors on plaintiffs' witness list testified that FXG never breached *any* provision of the contract. For example, Mr. Reinhardt testified that FXG was "upstanding and abiding by the contract." Sub No. 512, Ex. 3.

Many current and former contractors—both plaintiff and defense witnesses—testified to the multitude of ways in which "right to control" was reserved to the *contractors*. Mr. Anfinson himself admitted that he wasn't even required to come into the terminal at any set time in the morning. RP 3/10/09 p. 94.²⁰ And multiple class members testified that they and other contractors routinely made the decision to hire drivers for their routes so that they could pursue other interests or work only part time. Plaintiffs' witness Sherri Feeney, a single-route contractor, testified that for extended periods she worked only about 1 day a month while her route was driven by a full-time driver she hired. RP 3/11/09 pp. 31-32, 49-50. This allowed her to devote the bulk of her time to raising her

²⁰ Similarly, several contractors including Brian Olson and Jon Michael Harrison testified that the manner in which packages were pre-loaded into their delivery vans was something that they, and not FXG management, determined. RP 3/19/09 p. 195; RP 3/23/09 p. 243. Plaintiffs' witness Ernest Hirsch was among the former contractors who testified that he alone decided whether to "informally flex" (that is, trade packages) with other contractors. RP 3/25/09 pp. 233-234. Plaintiffs' witness Steve Peckham similarly testified that he alone decided which delivery route to take. RP 3/9/09 p. 61. And class member Mr. Prets refuted plaintiffs' claim (based on a misinterpretation of an FXG document, Ex. 331) that there was a 9.5-hour minimum daily work requirement, testifying that he was never directed "to work any specific minimum number of hours," nor "whether or when to take breaks," nor "what route you're to follow," nor "other details of performance." RP 3/16/09 p. 20.

children and pursuing her hobby (dog shows), while still making a profit off of her contractor business. RP 3/11/09 pp. 32-33, 41, 49-51.

Factor 2: “The class members’ opportunity for profit or loss depending upon each one’s managerial skill.” The jury heard evidence that contractors make multiple managerial decisions that can affect their profit and loss.²¹ The jurors also heard that class members had the opportunity to increase the profitability of their businesses through the purchase or sale of routes, or of portions of a route. Lead plaintiff Anfinson purchased part of another contractor’s route. RP 3/10/09 p. 37. Another plaintiffs’ witness, Tim Cork, realized a route-sale profit of over \$50,000 at the age of 26. RP 3/5/09 p. 67. FedEx Home contractor Jason Hemmig testified that FXG never “interfered in any way” with his ability to grow his business. RP 3/17/09 p. 88. Plaintiffs’ witness Steve Peckham admitted the money was “very good,” and that he was certainly not “complaining about the level of profits.” RP 3/9/09 pp. 52-53.

Factor 3: “The class members’ investment in equipment or materials required for their tasks, or their employment of others.”

²¹ These decisions include the choice of available routes (*e.g.*, RP 3/12/09 p. 205), negotiation of the route purchase price with the selling contractor (RP 3/12/09 pp. 208-209), the organization of the business—*i.e.*, whether an S-Corporation, a sole proprietorship, partnership, etc. (RP 3/4/09 pp. 117, 119-120), whether to purchase or lease a vehicle (RP 3/19/09 p. 192; RP 3/10/09 p. 32), whether to hire others, and the management of those hired (RP 3/11/09 p. 49), whether to “flex” packages (RP 3/25/09 p. 233), and efficient route management (RP 3/23/09 pp. 246-248).

Significant investments by FXG contractors included the purchase of routes, leases or purchases of trucks, insurance, and periodic maintenance costs. RP 3/9/09 p. 42; RP 3/9/09 pp. 118-119; RP 3/16/09 pp. 230-231. Mr. Anfinson's initial investment was \$40,000—which “was not a small sum of money.” RP 3/10/09 p. 99. CPA expert Charles Pietka analyzed “employment of others” through contractor tax returns and found that about a third incurred annual labor costs of more than \$3,000. RP 3/24/09 p. 96. As contractor Jon Michael Harrison testified, “[T]here's lots of [single-route] contractors that had drivers . . . I could give you so many examples. We wouldn't have time for it here.” RP 3/23/09 p. 240.

Factor 4: “Whether the service rendered requires a special skill.” Plaintiffs' witness Peckham *admitted* that he brought “special skills” to his work. RP 3/9/09 p. 57. Mr. Prets likewise testified that his “excellent” customer relation skills and “very good organizational skills” contributed to his success. *See* RP 3/12/09 pp. 244-46.

Factor 5: “The degree of permanence of the working relationship.” The evidence was undisputed that FXG contractors, unlike typical employees, have contract expiration dates. Pursuant to paragraph 11 of the OA, the contractor has a choice of an initial term of one, two or three years. Ex. 505, p. 80-81. The contract can be periodically renewed—although the contractor (but not FXG) can terminate at any time

for any reason (or no reason) on 30 days' notice. *Id.* at p. 81.

Factor 6: “Whether the service rendered is an integral part of FedEx Ground’s Business.” FXG did not dispute this factor for purposes of Washington law.

Factor 7: “The method of payment, whether by the time or by the job.” Plaintiffs admitted that contractors were not paid by the hour like employees, and instead were basically paid piecemeal, per package and stop—by the job. *See, e.g.*, the testimony of lead plaintiff Anfinson (RP 3/10/09 p. 98) and of Mr. Peckham (RP 3/9/09 p. 56).

Factor 8: “Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship.” The jury heard substantial evidence that both the class members and FXG believed they were creating an independent contractor relationship—and continued to hold that belief throughout their business relationship. The OA states that “[b]oth FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee.” Ex. 505, p. 51. Multiple witnesses testified that they were independent contractors running their own businesses throughout the class period.²² Mr. Harrison summed it up (RP 3/23/09 pp. 237-38):

²² *See, e.g.*, the testimony of Todd Vice (RP 3/17/09 p. 37), Travis Mickelson (RP

There's no question in my mind I own my own business and call my own shots. I'm an independent contractor. There's absolutely no question in my mind.

II. ARGUMENT

A. **The Jury's Verdict Should Not Be Disturbed so Long as The Court's Instructions Afforded Plaintiffs a Fair Opportunity to Argue Their Theory of the Case and Did Not Constitute a Clear Misstatement of the Law.**

Jury instructions are "sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000) (citations omitted).

Asserted errors of law in jury instructions that were given by the Court are reviewed *de novo*. *Stevens v. Gordon*, 118 Wn. App. 43, 53, 74 P.3d 653 (2003). The specific language of instructions, the number of instructions given, and whether to give a particular instruction, however, are all matters of the court's discretion. *Id.* Refusal to give a particular instruction is an abuse of discretion only if the court was "manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons." *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). "If a party's theory of the case can be argued under

3/16/09 p. 228), Jon Timmer (RP 3/18/09 p. 177), Jason Hemmig (RP 3/17/09 p. 93). Class members reaffirmed that belief annually through their sworn representations on their tax returns, on which they deducted depreciation and business expenses and otherwise represented to the IRS that they were independent businesspeople. *See, e.g.*, Mr. Peckham's testimony (RP 3/9/09 p. 49).

the instructions given when read as a whole, then a trial court's refusal to give a requested instruction is not reversible error." *Hammond v. Braden*, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977). "The trial court is to be commended rather than criticized for limiting its instructions to general statements of the applicable law. The specific applications can be made by counsel in their arguments." *Vangemert v. McCalmon*, 68 Wn.2d 618, 628, 414 P.2d 617 (1966).

It is also long-established rule in Washington that "[l]anguage used by [a] court in the course of an opinion is not ordinarily designed or intended as a model for jury instructions." *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968). Nor does the mere fact that a statement appears in a court opinion "mean it can be properly incorporated into a jury instruction." *Hammond*, 16 Wn. App. at 776; *see also Braxton v. Rotec Indus., Inc.*, 30 Wn. App. 221, 227, 633 P.2d 897 (1981) (same).

An error in either giving or refusing to give a particular instruction is only reversible if it is prejudicial. *Stevens*, 118 Wn. App. at 53; *Boeing*, 93 Wn. App. at 186. While clear misstatements of the law carry a presumption of prejudice, if review of the full record reveals that the error would not have affected the result, the jury's verdict should be upheld. *State v. Britton*, 27 Wn.2d 336, 341-42, 178 P.2d 341 (1947).

B. Instruction No. 9 Was an Appropriate Blend of Washington Wage-and-Hour Law and Relevant FLSA Factors, and Did Not Cause Prejudice to Plaintiffs.

1. FLSA Cases are “Persuasive” But Not Controlling; Thus, the Inclusion of Factors From Both the *Hollingbery* Right to Control Test and the *Sureway* FLSA Test in Instruction No. 9 Was Within the Sound Discretion of the Trial Court.

Judge Erlick’s exercise of his discretion in fashioning the jury charge was particularly reasonable given that under Washington law FLSA cases are persuasive but not controlling. Plaintiffs misread *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523-24, 7 P.3d 807 (2000), when they suggest that the Supreme Court’s decision required Judge Erlick to blindly “follow” FLSA law. In fact, the Court in *Inniss* specifically held that Washington courts “may” consider case law interpreting comparable provisions of the FLSA as “persuasive authority” in the MWA context. 141 Wn.2d at 524. Nowhere did the Supreme Court say such federal case law was “controlling.” That distinction was further explicated in *Stahl v. Delicor of Puget Sound, Inc.*, 109 Wn. App. 98, 109, 34 P.3d 259 (2001). *rev’d on other grounds*, 148 Wn.2d 876 (2003):

Because the MWA is based upon the FLSA, federal authority often provides helpful guidance, *although federal FLSA authority does not bind Washington courts*. Here the federal cases are not helpful.

(Emphasis added; footnote omitted.)²³ Courts in other states agree.²⁴

Thus, Judge Erlick was well within his discretion in including factors from both the *Sureway* and *Hollingbery* tests in Instruction No. 9.²⁵

2. Instruction No. 9 Contained All Six Factors From the FLSA Case on Which Plaintiffs Place Primary Reliance.

There could be no more eloquent commentary on the fair and evenhanded nature of Judge Erlick's oversight of the trial than the fact that plaintiffs' central argument on appeal concerns a jury instruction that ***incorporated verbatim all six factors enunciated in the very FLSA decision on which plaintiffs place primary reliance. Compare the recitation of factors in *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) with factors 1-6 in the trial court's Instruction No. 9, CP 2195. Thus, far from giving short shrift to FLSA authorities as***

²³ In Washington, the common law is presumed to be controlling in the absence of an express statutory directive to the contrary. See RCW 4.04.010, *Extent to which common law prevails*: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." See also *In re Parentage of L.B.*, 155 Wn.2d 679, 689, 122 P.3d 161 (2005): "Early in our state's history, this court construed RCW 4.04.010 to mean that, in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law"

²⁴ See, e.g., *Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668, 677, 814 N.E.2d 198, 268 Ill. Dec. 548 (App. Ct. 2004) ("Because the FLSA's definition of 'employer' and the Wage Act's definition of 'employer' are identical, we find [a federal case] provides *some guidance* to the issues before us." (emphasis added)); *Director of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987) ("While in no way bound by these cases, federal law does provide some useful guidance in formulating a coherent state law concept."); *Garcia v. Amer. Furniture Co.*, 101 N.M. 785, 788, 689 P.2d 934 (Ct. App. 1984) (appropriate to consider federal decision as "persuasive authority").

²⁵ The incorporation of relevant Washington factors was particularly appropriate in this case given that one of plaintiffs' claims, for uniform reimbursement under RCW 49.12.450, has no equivalent under the FLSA.

plaintiffs would have this Court believe, Judge Erlick painstakingly followed the Washington Supreme Court's directive in *Inniss*, 141 Wn.2d at 523-24, by including "persuasive" FLSA factors in Instruction No. 9.

3. Plaintiffs' New Position on "Right to Control" is Flatly Contradicted by Washington Wage-and-Hour Law— And By Plaintiffs' Prior Representations to the Trial Court.

Plaintiffs' assertion that the *Hollingbery* right to control test has been relegated by Washington courts exclusively to the tort context²⁶ is just plain wrong. Nowhere in the Argument section of their brief do plaintiffs even mention *Ebling*, the case they once represented to Judge Canova as being "particularly on point because it distinguishes between employees and independent contractors in the context of the Washington wage statutes." Sub No. 56A, p.6. That statement was, of course, correct: the Court of Appeals in *Ebling* expressly adopted the *Hollingbery* common law "right to control" test in the wage-and-hour context:

An independent contractor is one who contracts to perform services for another, but is not subject to the other's right to control his physical conduct in performing the services. *Hollingbery v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966). See also *Restatement (Second) of Agency* § 2(3) (1958). An employee is one whose physical conduct in the performance of the service is subject to the other's right of control. *Hollingbery*, at 79

²⁶ See, e.g., App. Br., p. 13: "Washington tort law utilizes [the right to control] test." (Emphasis in original.)

Ebling, 34 Wn. App. at 498.²⁷ Given their use of *Ebling* to procure class certification, plaintiffs should not now be allowed to read this Court's holding in *Ebling* out of Washington law.²⁸

4. Courts in Other Jurisdictions Have Similarly Combined Common Law and FLSA Factors in Fashioning Appropriate Jury Instructions.

Plaintiffs argue that Judge Erlick's melding of Washington and FLSA factors in Instruction No. 9 flies in the face of what they portray as a monolithic rejection of common law principles such as "right to control" by federal and state courts. *See* App. Br., pp. 17-23. As an initial matter, plaintiffs ignore that the FLSA test set forth in *Sureway* actually incorporates many common law factors. *Compare Sureway*, 656 F.2d at 1370 (9th Cir. 1981) *with Hollingbery*, 68 Wn.2d at 80-81. Indeed, as

²⁷ In *Ebling*, the plaintiff claimed damages for wages (commissions) withheld under RCW 49.52.050(2). 34 Wn.App. at 497. It stands to reason that Washington would have an equally strong public policy against the improper withholding of an employee's wages as against the improper withholding of overtime pay or uniform reimbursement, and thus that the independent contractor versus employee definition should be the same in both instances.

²⁸ Judicial estoppel is "an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). While Washington cases appear to apply judicial estoppel primarily to inconsistent factual assertions, many courts apply judicial estoppel to inconsistent legal positions as well, so as to prevent an "affront to judicial dignity" and "a means of obtaining unfair advantage." *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 663 (7th Cir. 2004) ("They prevailed in the present litigation, until the settlement was finally rejected, by arguing that *Buford* was wrong. They are estopped to argue now that it was right."). The doctrine "is intended to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *Id.*; *see also New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."). That is precisely what has occurred here.

Judge Erlick expressly noted, both tests begin with an assessment of the “right to control.” *Id.* Thus, the notion that federal courts interpreting the FLSA have roundly rejected “right to control” is not true.²⁹ Plaintiffs’ assertion also runs contrary to their own arguments at trial to exclude FXG evidence of contractors’ economic opportunities. *See, e.g.*, RP 3/12/09 pp. 231-32 (plaintiffs’ counsel arguing for exclusion of evidence concerning single-route contractor opportunities to become multiple-route contractors: “It’s not what the law is. The law is whether there’s a right to control.”).

Moreover, state and federal courts have interpreted state statutes based on the FLSA to create a hybrid test incorporating common law factors as well as FLSA factors. *See, e.g.*, *S.G. Borello & Sons Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341, 354-55, 769 P.2d 399, 256 Cal. Rptr. 543 (1989);³⁰ *Estrada v. FedEx Ground Package System, Inc.*,

²⁹ Plaintiffs take similar liberties in their reliance on federal authorities supposedly supporting their reasoning. For example, plaintiffs place heavy reliance on the United States Supreme Court’s decision in *Nat’l Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), *see* App. Br. at p. 18, but fail to mention that the Supreme Court’s rejection of state common law interpretations in *Hearst* was primarily based on the fact that the statutory scheme in question, the Wagner Act, was “federal legislation, administered by a national agency, intended to solve a national problem on a national scale.” *Id.* at 123. Accordingly, the Court expressed its determination to avoid a “patchwork” of different state interpretations in favor of one unified national standard: “Congress . . . is not making the application of the federal act dependent on state law . . . Consequently, so far as the meaning of ‘employee’ in this statute is concerned, ‘the federal law must prevail no matter what name is given to the interest or right by state law.’” *Id.* at 123-24 (citations omitted). In this case, *Washington* law is at issue, not uniform federal law.

³⁰ Plaintiffs attempt to distinguish cases from other states by arguing that those cases arose in the context of wage and hour laws with no statutory definition of the term “employee.” *See* App. Br. p. 23 n. 21. This blanket distinction fails to account for the California Supreme Court’s holding in *Borello*, which mixed a right-to-control based Restatement test with FLSA factors in the context of a statute in which the term “employee” was defined. Like Judge Erlick, the court in *Borello* recognized that “there

154 Cal. App. 4th 1, 10, 64 Cal. Rptr. 3d 327 (Ct. App. 2007);³¹ *Baltimore Harbor Charters Ltd. v. Ayd*, 365 Md. 366, 392, 780 A.2d 303 (2001); *Mathis v. Housing Authority of Umatilla Cty*, 242 F. Supp. 2d 777, 782-83 (D. Or. 2002); *State ex rel. Roberts v. Acropolis McLoughlin, Inc.*, 150 Or. App. 180, 183-94, 945 P.2d 647 (Ct. App. 1997).

5. Judge Erlick Struck an Appropriate Balance Between Washington Law and FLSA Authorities By Combining Two Non-Overlapping *Hollingbery* Factors With the Six Factors of the *Sureway* Test.

Five of the six *Sureway* FLSA factors overlap with *Hollingbery* factors. *Compare* factors 1, 3, 4, 5 and 6 in *Sureway*, 656 F.2d at 1370, with factors (a), (e), (d), (f) and (h) in *Hollingbery*, 68 Wn.2d at 80-81. The Court added two non-overlapping *Hollingbery* factors to Instruction No. 9: “The method of payment, whether by the time or by the job”

are many points of individual similarity between [the Ninth Circuit FLSA] guidelines and our own traditional Restatement tests.” 48 Cal.3d at 355. More fundamentally, plaintiffs’ argument fails because both the FLSA and the MWA define “employee” with circular definitions that give no true definition at all. *See Nicastro v. Clinton*, 882 F. Supp. 1128, 1130 (D.D.C. 1995) (calling the FLSA’s definition of employee “vague” and “generally unhelpful”). When a definition is unhelpful, the United States Supreme Court has deemed it to be the same as no definition at all—and, therefore, properly interpreted by reference to the common law. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-24, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (holding ERISA’s circular definition of employee—which is identical to that given in the FLSA and MWA—to be circular and, therefore, looking to traditional agency principles including Restatement § 220 to interpret the word).

³¹ Notably, plaintiffs argued before Judge Canova that the legal standard in *Estrada*, a “mixed” FLSA and common law right to control test based on *Borello*, was sufficiently “identical” to the legal standard in the instant case to give rise to a collateral estoppel judgment in their favor. This is yet another example of the profound disconnect between plaintiffs’ earlier assertions in this case and their convenient after-the-fact conversion to the notion that common law principles have no place in the legal standard. *Compare* Sub No. 154 (Plaintiffs’ Motion for Partial Summary Judgment Based on Collateral Estoppel), p. 6 with App. Br., pp. 17-20.

(Factor 7); and “Whether or not the class members and FedEx Ground believed they were creating an employment relationship or an independent contractor relationship” (Factor 8). Since both the Washington common law test and the FLSA test are non-exclusive, *see* Restatement (Second) of Agency § 220, *Sureway*, 656 F.2d 1370, it was well within Judge Erlick’s discretion to include additional factors that were relevant to the jury’s determination—particularly in light of the substantial evidence in the record relating to each of them. “Considerable discretion is allowed when tailoring instructions to fit case facts.” *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955 (2006).

Plaintiffs have not appealed from the Court’s inclusion of Factor 7, “method of payment,” in Instruction No. 9.³² With respect to Factor 8, the record is replete with evidence of both FXG and the contractors’ strong belief that they were creating, and maintained throughout their business relationship, an independent contractor relationship. This evidence goes well beyond the mountain of documentary proof—the OAs signed by each contractor (*e.g.*, Exs. 505 and 673), the annual statements under oath in tax returns (*e.g.*, RP 3/9/09 pp. 44, 49, 71; RP 3/10/09 pp. 104-111, 120-122), the sworn representations on insurance applications (*e.g.*, Exs. 508 and

³² In any event, it was undisputed that FXG contractors were paid not by the hour but by the job—a fact that, to use plaintiffs’ parlance, reflected the “economic realities” of an independent contractor relationship. *See, e.g.*, RP 3/10/09 p. 98.

677)—and in fact includes the admissions of plaintiffs’ witnesses. *See, e.g.,* Mr. Peckham’s testimony at RP 3/9/09 p. 49.

Judge Erlick noted that the “belief of the parties” factor was expressly adopted by this Court in *Ebling*, 34 Wn. App. at 498, and was included in WPI 50.11.01 and *Hollingbery*. *See* RP 03/26/09 pp. 83-84. The Court also observed that “Washington has a strong tendency to follow California law” and looked to *Borello* and *Estrada* as additional support for this factor’s inclusion. *See* RP 3/26/09 p.79.³³

Plaintiffs’ argument that belief of the parties is irrelevant, in addition to being contrary to the law of Washington and other jurisdictions, misconstrues the expansive nature of the jury’s inquiry. As indicated by introductory and concluding language of Instruction No. 9—language that came directly from WPI 50.11.01—the jury’s inquiry is supposed to be broad and open-ended, and the factors in the jury instruction are expressly non-exclusive:

[Y]ou should consider all the evidence bearing on the question. You may consider the following factors, ***among others***.

³³ Courts in FLSA cases have also evaluated belief of the parties. *See, e.g., Carrell v. Sunland Construction Inc.*, 998 F.2d 330, 334, n.4 (5th Cir. 1993) (“the Welders worked while aware that Sunland classified them as independent contractors, and many of them classified themselves as self-employed . . . The Welders’ arrangement with Sunland is relevant”); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983) (fact that plaintiffs “signed contracts stating that they were independent contractors, *while relevant*, is not dispositive” (emphasis added)).

.....
Neither the presence or the absence of any individual factor is determinative.

RP 3/30/09 pp. 23-24 (emphasis added)³⁴; cf. *Hi-Tech Video*

Productions, Inc. v. Capital Cities/ABC, Inc., 58 F.3d 1093, 1096 (6th

Cir. 1995) (“It does not necessarily follow that because no one factor

is dispositive all factors are equally important, or indeed that all

factors will have relevance in every case. The factors should not

merely be tallied but should be weighed according to their

significance in the case”).³⁵

6. Judge Erlick Correctly Declined to Substitute the Term “Relative Investment” into the *Sureway* Factors.

While purporting to rely on *Sureway*, plaintiffs argue that the Court should have substituted into his charge to the jury a concept that appears nowhere in the *Sureway* test, “the relative investments of the parties.” The Court instead used the actual *Sureway* factor, “the class

³⁴ The factors of the FLSA test are similarly intended to be non-exclusive and “any relevant evidence may be considered.” *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). See also *Sureway*, 656 F.2d at 1370 (“Whether an employer-employee relationship exists depends upon the circumstances of the whole activity.”).

³⁵ In addition, plaintiffs waived their right to contest the “belief of the parties” factor by affirmatively introducing their own evidence of belief at trial. Plaintiffs’ counsel offered deposition testimony “as to the advantages of FedEx of the independent contractor model, as to the intent that FedEx had in creating the model in forming these agreements.” RP 3/10/09 p. 15. When warned by the Court that they would be “opening the door” to other evidence on the same topic, plaintiffs flatly stated: “We’re prepared to open that door, Your Honor.” RP 3/10/09 p. 18. Plaintiffs were then permitted to introduce such evidence, and did so. See RP 3/12/09 pp. 31, 37 (Callahan deposition); RP 3/18/09 pp. 121-22 (inquiring about cost savings to FXG with the independent contractor model); see also RP 3/30/09 pp. 40, 65 (arguing in closing about FXG’s motive and intent to shift costs to the drivers and to improperly label them). Plaintiffs cannot argue this factor to their advantage at trial, and then contest it post-judgment. See *Sevener v. Northwest Tractor & Equip. Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952) (finding waiver by introduction of evidence “similar to that already objected to”).

members' investment in equipment or materials required for their tasks, or their employment of others." See App. Br., pp. 33-34; Factor 3 of Instruction No. 9, CP 2195. This decision was well within the Court's discretion because, as Judge Erlick recognized, "relative investment" would be meaningful, if at all, only in the context of a small enterprise, whereas in the case of a large corporation like FXG, the overall investment—*i.e.* capitalization—of the corporation would always dwarf that of any contractor with whom the corporation was doing business. RP 3/23/09 pp. 11-12. Moreover, "relative investment" is inconsistent with Washington wage-and-hour law as expressed in *Ebling*,³⁶ as well as with the approach of a number of federal courts who likewise do not discuss the relative investment of the parties, analyzing instead the straight investment of the worker. See, e.g., *Freund v. Hi-Tech Satellite Inc.*, 2006 WL 1490154, at *2 (11th Cir. 2006); *Boudreaux v. Bantec Inc.*, 366 F. Supp. 2d 425, 434-35 (E.D. La. 2005); *Herman v. Mid-Atlantic Installation Services, Inc.*, 164 F. Supp. 2d 667, 675 (D. Md. 2000). Thus, the Court's refusal to include "relative investments" was not error.

³⁶ *Ebling* expressly relied on *Hollingbery*. 34 Wn. App. at 498. The 10-factor *Hollingbery* test does not include the specific term "investment." Factor (e) of that test reads as follows: "Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work." 68 Wn.2d at 80 (*citing* the Restatement (Second) of Agency § 220(2)); *see also* WPI 50.11.01 (including same factor). FXG clearly would have prevailed had this instruction been given because the contractors supplied their own vehicles to service their routes.

7. “Economic Reality” and “Economic Dependence” are Mere Labels That are Largely Devoid of Meaning Except as Expressed Through the Actual Factors of the FLSA Test.

Plaintiffs repeatedly argue that the labels “economic realities” and/or “economic dependence” should have been the “focal point” of Judge Erlick’s legal standard instruction. *See, e.g.*, App. Br., p. 20. To instruct the jury in this manner would have been error. To begin with, the “focal point” of the key Washington wage-and-hour decision, *Ebling*—as plaintiffs argued so effectively to Judge Canova at the class certification stage—is the “right to control” test. As discussed in Footnote 28 above, plaintiffs should be estopped from taking a contrary position now.

Even if Ninth Circuit FLSA law controlled, Judge Erlick’s decision not to include “economic realities” and/or “economic dependence” within Instruction No. 9 would be well within his discretion. Those terms are mere labels used as shorthand by courts and are therefore largely devoid of meaning except as expressed through the actual factors of the test.³⁷

Neither of those terms is listed as a factor in the Ninth Circuit test. *See Sureway*, 656 F.2d at 1370. As Judge Erlick remarked, this distinction is important:

³⁷ *See* the concurrence of Judge Easterbrook in *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (a concurrence that was cited by plaintiffs at p. 25 of their brief), on the inherent limitations of the term “economic reality”: “But ‘reality’ encompasses millions of facts, and unless we have a legal rule with which to sift the material from immaterial, we might as well examine the facts through a kaleidoscope.”

[T]he Court does want to acknowledge that there is significant case law out there, including FLSA case law, which references economic reality test. However, that said, everything stated in a case is not necessarily appropriate in a jury instruction.

RP 03/27/09 p. 36. *Accord Hammond*, 16 Wn. App. at 776. The Court went on to observe that economic reality is “one of those truisms that I think is not appropriately given as an instruction.” *Id.* And indeed, the “truisms” of “economic realities” and “economic dependence” are, by definition, already fully expressed by the six factors of the FLSA test that was incorporated into Instruction No. 9. In *Sureway*, the Ninth Circuit made it clear that these concepts are subsumed within the enumerated six factors of the test:

After reviewing each of the six factors . . . we agree with the district court that Sureway’s “agents” were, as a matter of economic reality, dependent on Sureway and therefore within the protections and benefits afforded by the Act.

656 F.2d 1371 (emphasis added).³⁸

Courts interpreting the FLSA have emphasized that the second *Sureway* factor, “the alleged employee’s opportunity for profit or loss depending upon his managerial skill,” is a strong indicator of the

³⁸ Plaintiffs attempt to make much of Judge Erlick’s use of the word “dicta” in explaining that “economic dependence or economic reality” is “not one of the *actual factors* considered by the courts” in FLSA cases. *See* App. Br., p. 30, *quoting* RP 3/26/07 p. 107 (emphasis added). While the term “dicta” may have been imprecise, a fair reading of the Court’s remarks indicates that he was simply conveying—like the Ninth Circuit in *Sureway*—that those labels are not included as factors. The impropriety of using them as such is confirmed by plaintiffs’ own view of the actual issues the jury would be asked to decide. *See, e.g.*, plaintiffs’ proposed verdict form (requesting a finding as to the six *Sureway* factors, but making no mention of economic dependence). CP 2175-76.

dependence were subsumed in the Court’s Instruction No. 9, for Judge Erlick to have adopted the additional paragraph in plaintiffs’ proposed instruction 13C would have been redundant. Such redundancy would have unfairly highlighted plaintiffs’ theory of the case and constituted improper comment on the evidence. *Harris v. Groth*, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982) (instructions that overemphasize certain aspects of the case may amount to comment on the evidence).⁴⁰

Further juror confusion and prejudice to FXG would have been caused by the argumentative directive in plaintiffs’ proposed additional paragraph that jurors “may consider other evidence bearing on this matter (including whether the alleged employer and alleged employees believed or stated that they were creating an employment relationship or an independent contractor relationship) *only to the extent that such statements or beliefs mirror economic reality.*” CP 1819-1820 (emphasis added). In addition to standing the jury’s inquiry on its head—the actual factors within the test suddenly becoming subservient to some preconceived but

⁴⁰ Judge Erlick took this principle into account in rejecting plaintiffs’ companion proposed instruction 4, which would have expressly directed the jury that the use of the term “independent contractor” within the OA (evidence going to the “belief of the parties”—Factor 8) was not dispositive. *See* RP 3/26/09 pp. 71-72: “[THE COURT:] My principal concern with number four is that it takes one of the eight factors, none of which are supposed to be weighted, and in my opinion overemphasizes one of the factors and in essence is a restatement of what the factor already provides. . . . [N]either the presence nor the absence of any individual factor is determinative. So, I read plaintiffs’ proposed instruction saying it doesn’t matter what you label these people, it’s not dispositive. I read the Court’s proposed instruction as accomplishing the same thing. And I think that it is fairer and more prudent not to overemphasize one of the eight factors.” By taking this evenhanded approach, the Court gave ample “room to both sides to argue what they want with respect to the contract.” RP 3/26/09 p. 71.

wholly undefined notion of what “economic reality” might be—this language would have improperly invaded the province of the jury, whose exclusive job it was to consider the entirety of the evidence, and who had the right and responsibility to make their own decision regarding what, if any, weight to give each of the factors. *See, e.g., Powell v. Tanner*, 59 P.3d 246, 252-253 (Alaska 2002) (“the jury must consider the evidence relating to each of the factors and decide how to weigh the factors in determining the nature of the working relationship between [the parties]”).

The overarching flaw of the final paragraph in plaintiffs’ proposed instruction 13C is that it is hardly a neutral statement of the law; instead, it is loaded with highly slanted propositions, such as:

No one factor is controlling but you should weigh them all to determine whether or not the class members are so dependent upon defendant’s business such that class members are not, as a matter of economic reality, in business for themselves.

CP 1819-1820. Plaintiffs cite no case in which this argumentative sentence—nor the entirety of plaintiffs’ proposed addition to the *Sureway* test—was included in any jury instruction or FLSA test formulation. It is instead plaintiffs’ very own confusing concoction, drawing on snippets from published opinions and mixing them in with an advocate’s verbiage. It has no place in a jury instruction. “Current practice is to avoid slanted or argumentative instructions. A jury instruction should be a statement of

the law only. It is the function of argument by the lawyers to persuade the jury that the legal principle fits their version of the evidence or their theory of the case.” *Watson v. Hockett*, 107 Wn.2d 158, 163, 727 P.2d 669 (1986) (citing Wash. Pattern Jury Instrs., 6 Wash. Prac. VII (2d ed. 1980)).

9. Plaintiffs Suffered No Prejudice Because Judge Erlick’s Legal Standard Instruction Allowed Them the Freedom to Introduce Evidence and Argue Their Theory of the Case.

As discussed in detail above, plaintiffs had a full and fair opportunity to present evidence and argument supporting their economic realities/economic dependence theory of the case to the jury, and they did so. They likewise were not prevented from introducing evidence and argument regarding the sole alteration they proposed to the six *Sureway* factors, namely the concept of “relative investment.” *See, e.g.*, RP 3/23/09 p. 11, where Judge Erlick allowed cross-examination of FXG’s former Seattle terminal manager on the millions of dollars the company invested:

[An individual contractor’s investment of] \$35,000, \$40,000 for a truck . . . needs to be put into context. Whether you call it relativity or contextual, it cannot be looked at in a vacuum. . . . [E]ven if I don’t give an instruction on relativity, plaintiffs should be allowed to argue that theory”

The utter lack of prejudice is underscored by, first, plaintiffs’ inability to come up with a single evidentiary ruling they consider significant enough to appeal, and second, the consistent principle of

Washington *and* FLSA law—accurately expressed in Instruction No. 9—that the listed factors are not meant to be exclusive and instead the jury should consider “all the evidence bearing on the question.”

C. The Court’s Instruction No. 8 Correctly Stated the Law, and Was Not Unfairly Prejudicial to Plaintiffs.

1. Instruction No. 8 Properly Required Plaintiffs to Prove that Employee Status was Common to the Class.

Instruction No. 8 was given as follows (RP 3/30/09 p. 23):

Plaintiffs have the burden of proving that “employee” status was common to the class members during the class period. You should not consider individualized actions, conduct, or work experience unless you find that they reflect policies, procedures, or practices common to the class members during the class period.

Plaintiffs argue that Instruction No. 8 was a misstatement of the law because it required Plaintiffs “to show that every single worker has the same status” and that this misstatement created prejudice by permitting FXG “to argue that ‘common’ means that the evidence must apply to all class members.” App. Br. at 40-41.⁴¹ Plaintiffs neglect to mention, however, that Judge Erlick removed the word “all” from his original proposed instruction (“plaintiffs have the burden of proving that ‘employee’ status was common to all the class members”) specifically to

⁴¹ Plaintiffs similarly suggest that this instruction somehow caused the jury to allow “evidence from one out of 320 class members to override the evidence of 319 such class members.” App. Br., p. 8. In fact, a total of only 27—8% of the class members—testified at trial, and of those, over half gave testimony that contradicted part or all of plaintiffs’ case.

allow plaintiffs to argue their theory that “common” meant less than “all.” RP 3/26/09 pp. 103, 106-107. And in their closing argument, plaintiffs did exactly that: they highlighted that Instruction No. 8 did not include the word “all,” and argued that “common” did not require “all.”⁴²

Moreover, Instruction No. 8 is a correct statement of the law. It was plaintiffs’ undisputed burden at trial to demonstrate they were employees, not independent contractors, on a class-wide basis. Plaintiffs could not meet this burden with individualized, non-common evidence. *See, e.g., Oda v. State*, 111 Wn. App. 79, 99-100, 44 P.3d 8 (2002) (holding that class representatives’ individualized experiences “cannot be assumed to represent a common and typical course of conduct” where decisions were made at a localized level). Likewise, individualized experiences were only relevant here where they related to a common course of conduct or established that plaintiffs had failed to meet their burden of common proof of employee status.

⁴² Plaintiffs made this argument more than once in closing. *See, e.g.*, RP 3/30/09 p. 152 (“Plaintiffs have the burden of proving that employee status was common to the class members during the class period. *The word all appears nowhere in that definition – in that instruction.* It is was it common. Was it more usual than unusual. Was it typical that they were treated as an employee.” (emphasis added)); *see also* RP 3/30/09 p. 56 (“Instruction number eight says plaintiffs have the burden of proof to prove that employee status was common to class members through the class period. Now, common, of course, means frequent and widespread. So that means if the practices of FedEx, the rules and the operating agreement, which we know are all standardized was widespread to the class, were frequent to the class. That’s enough.”).

**2. Plaintiffs' Proposed Instruction Nos. 11A and 12A
Would Have Been Improper.**

In place of Instruction No. 8, plaintiffs would have had the Court instruct on “pattern or practice” or “representative evidence.” *See* plaintiffs’ proposed instructions 11A and 12A, CP 2170-2171. This issue was thoroughly briefed and argued below, culminating in Judge Erlick’s pointed request that plaintiffs’ counsel identify *a single FLSA or minimum wage case* adopting their proposed standard. Plaintiffs could not do so:

THE COURT: Let me ask you this: There have been probably hundreds, if not thousands, of class actions litigated across this country in FLSA and minimum wage cases. Is there a single case, one case that you can cite to me, which adopts a pattern and practice evidence rule? A single case? I can cite for you hundreds of discrimination cases that adopt pattern and practice. I’m well aware that that’s the standard.

PLAINTIFFS’ COUNSEL: *I’m not aware of one . . .* that contains the language pattern or practice.

RP 3/26/09, p. 93 (emphasis added). In briefing before this Court, plaintiffs stubbornly continue to rely on the same irrelevant case law.

a. Pattern or Practice.

Plaintiffs’ claim that the Court erred by refusing to follow the “pattern or practice” approach taken in Title VII cases, pointing specifically to *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). But *Teamsters* required an

initial showing that the defendant employed a widespread employment *policy* of discrimination before the pattern and practice analysis was conducted. 431 U.S. at 358-362. Only after the plaintiff proved the existence of such a policy (and that it was actually followed), did a presumption of discrimination arise. *Id.*

Moreover, plaintiffs remain unable to point to a single MWA or FLSA case adopting the Title VII approach. And, as Judge Erlick correctly recognized, the pattern and practice approach makes no sense in this context, where the ultimate question is employment status of an entire class.⁴³ Other courts have reached the same conclusion.⁴⁴

b. Representative Evidence.

Plaintiffs claim that federal FLSA case law following *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), supports both their “pattern or practice” and “representative evidence” proposed instructions. App. Br. at 45-48. In *Mt. Clemens*, the

⁴³ See RP 3/27/09 p. 33 (THE COURT: “[For t]he reasons stated previously, the Court does not find the Title 7 cases to guide the Court in that the widespread discrimination is very distinguishable from trying to determine the employment status of an entire class of persons. And I think it is significant that there is an absence of any case law that [ha]s ever adopted a pattern or practice standard for determining class wide employment status. The Court declines to do so in this case.”).

⁴⁴ See *Torres v. Gristede’s Operating Corp.*, 628 F. Supp. 2d 447, 463-64 (S.D.N.Y. 2008) (“[T]he cases upon which Appellants rely apply the pattern-or-practice burden-shifting analysis solely within the context of Title VII employment discrimination cases. In the absence of case law applying *Teamsters*-style burden shifting to FLSA violations, the Court will not apply that analysis to the present case.”); *Hickman v. United States*, 8 Cl.Ct. 748, 752 (1985) (denying motion to compel as follows: “Presumably the information sought is to show the type of ‘pattern or practice’ which is the grist of Civil Rights Act cases. However, the FLSA, unlike the Civil Rights Act, does not attach liability to the existence of a ‘pattern or practice.’”).

Supreme Court authorized the use of representative evidence to prove an FLSA overtime payment violation where the defendant employer failed to maintain proper employment records required by statute (*i.e.*, hours worked and amount of pay), noting that, in the absence of such records, uncompensated employees would find it difficult to establish FLSA claims. 328 U.S. at 686-88. But, while *Mt. Clemens* has been interpreted to authorize representative evidence to establish the *number* of hours worked for purposes of damage calculations, it has *never* been interpreted to allow representative evidence to establish *whether* workers are employees or independent contractors. There are excellent reasons why this is the case.

To begin with, the use of representative evidence is justified only when the evidence offered is, in fact, representative. If there is variability across a class of workers, representative evidence is not permitted. *Reich v. Southern New Eng. Telcoms. Corp.*, 121 F.3d 58, 68 (2d Cir. 1997) (permitting the use of representative evidence where there was “actual consistency” among the testimony of the workers, the employer “offered no contradictory testimony,” and the abuse arose from the consistent application of an admitted employer policy).⁴⁵ As this case illustrates,

⁴⁵ *Cf. Proctor v. Allsup's Convenience Stores, Inc.*, 250 F.R.D. 278, 283-84 (N.D. Tex. 2008) (precluding representative evidence for a lack of consistent testimony and a lack of a consistently applied policy).

variability is inevitable under the multi-factor tests used to assess employment status: the supposedly “representative” evidence offered by plaintiffs concerning the work experiences of individual contractors was flatly contradicted by evidence of other contractors’ experiences. In the face of such inconsistency, evidence concerning individual contractor’s work experiences cannot be “representative.”

In addition, *Mt. Clemens* allows for a burden-shifting approach, such that once a “just and reasonable inference” as to the amount and/or quantification of uncompensated work is established by representative evidence, the employer is permitted to rebut by showing, employee-by-employee, the actual amount of hours or pay. 328 U.S. at 687-88.

Providing this opportunity to employers under a multi-factor test would be too complex to be workable, particularly in a large class action setting.

Plaintiffs nevertheless assert that “[r]epresentative evidence is *commonly used* in determining employment status.” App. Br. at 47 (emphasis added). This is a misstatement of the law. In fact, there is a glaring absence of *any* case law that supports plaintiffs’ claim. The very first case cited by plaintiffs—*Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989), App. Br. at 47—is one in which the parties *stipulated* that the testimony of a particular class member was representative of the method of payment and the type of work and circumstances of the class. *Id.* at 803. This is

hardly the case here, where virtually every factor relating to employment status was hotly contested and subject to wide variability among class members. Most of the other cases cited by plaintiffs do not even discuss representative evidence. Those that do use it only to establish hours worked and rate of pay.⁴⁶ Thus, plaintiffs' claim is clearly without merit—courts *do not* allow FLSA plaintiffs to establish class-wide *employment status* by use of representative evidence. Judge Erlick correctly refused to give plaintiffs' proposed instructions 11A and 12A.

Plaintiffs were not required to bring this action as a class proceeding. That was a tactical decision on their part. By doing so, they accepted the burden of proving their case with evidence that was common to the class. They cannot proceed as a class and then, when faced with the burden of proof attendant to such a claim, ask the Court to relieve them of that burden at the expense of FXG's legal rights.

3. In any Event, Instruction No. 8 Caused Plaintiffs No Prejudice.

Judge Erlick's Instruction No. 8 in no way inhibited plaintiffs' ability to introduce individualized evidence, nor did it impede plaintiffs'

⁴⁶ See, e.g., *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (App. Br. at p. 39, 44, 45, 47) ("Under *Mt. Clemens*, the Secretary need only produce sufficient evidence to show the amount and extent of the work improperly compensated."); *Donovan v. Tehco*, 642 F.2d 141, 144 (5th Cir. 1981) (App. Br. at 40, 45, 48) ("The government . . . introduce[d] wage transcriptions based on [the defendant employer]'s payroll records showing the number of hours each of these [employees] worked for [the employer] and their rate of pay.")

counsel in arguing that such evidence was representative of the experiences of the entire class. Indeed, evidence concerning the individual work experiences of particular contractors made up the great bulk of plaintiffs' case, *e.g.*, the voluminous CDNs, which recorded interactions between FXG terminal managers and individual contractors. Judge Erlick explicitly admitted these exhibits to allow plaintiffs to argue commonality:

[T]he Court finds the CDNs to be highly probative, specifically with regard to the issue of commonality . . . The CDNs are offered by plaintiff to show the application of Federal Express' right to control across terminals in the state and across class members to prove both policy and commonality.⁴⁷

RP 3/23/09 pp. 130-31. In their closing, Plaintiffs forcefully argued that the jury should consider these CDNs as evidence of the exercise of "right to control" across the entire class.

Plaintiffs now claim it was error to require anecdotal evidence presented at trial to reflect policies, procedures, or practices common to the class, but plaintiffs themselves stated in opening that they would "be presenting a representative sample of class members from each of the various terminals who will be describing the common policies and practices of FedEx that gave them the right of control and the control over

⁴⁷ See also RP 3/24/09 p. 13 (THE COURT: "The Plaintiffs have a distinct burden . . . to show commonality. And . . . unless we bring in contractors from every terminal in the state of Washington, then they may have a challenging burden of showing commonality. And I think the CDNs are admissible to show that commonality among the terminals and among the class members.")

their duties and their jobs.” RP 3/3/09 pp. 29-30. And virtually every piece of “common” evidence that plaintiffs sought to introduce was admitted at trial, including: CDNs, individualized testimony of multiple contractors, and evidence of FXG policies and procedures. Even with all this evidence, however, plaintiffs were unable to convince the jury that individual work experiences supposedly demonstrating “employee” status were common, rather than anecdotal. This is simply a failure of proof that cannot be attributed to any alleged error by the Court.

D. The Determination Whether the Class Members Were Employees or Independent Contractors was For the Jury.

Plaintiffs assign error to the verdict form, which simply asked the jury to determine whether the class members were independent contractors or employees. The proposed verdict form submitted by plaintiffs contained six separate questions, each one asking the jury to determine whether there was a “pattern or practice” established with respect to each of several factors. CP 2175-2176. Plaintiffs contend that the answers to these questions should somehow have directed a decision by the Court on the ultimate issue of employment status. App. Br., pp. 48-49.

The verdict form was not error. Employment status is decided by the jury unless there are no facts in dispute and the facts are susceptible to only one interpretation. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-

303, 616 P.2d 1223 (1980).⁴⁸ Courts applying the FLSA test use the same approach:

Normally a judge will be able to make this determination [whether “employee” or “independent contractor”] as a matter of law. However, where there is a genuine issue or conflicting inferences can be drawn from the disputed facts, the question is to be resolved by the finder of fact in accordance with the appropriate rules of law.

Wilson v. Guardian Angel Nursing, Inc., 2008 WL 2944661, at *10 (M.D. Tenn. July 31, 2008).⁴⁹ The fact that the Washington Pattern Jury Instructions include a specific instruction directing the jury (not the Court) to determine employment status further supports the propriety of sending this question to the jury. WPI §§ 50.11, 50.11.01. In argument, plaintiffs’ counsel *admitted* that adopting plaintiffs’ verdict form would contradict WPI 50.11.01. RP 3/27/09 p. 24.⁵⁰

In almost every case cited by plaintiffs, the case was tried to the bench, not a jury. Thus, whether employee status was a matter of fact or law was discussed solely in the context of determining the appropriate

⁴⁸ See also Restatement (Second) of Agency § 220, comment (c) (“If the inference is clear that there is, or is not, a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to matters of fact to be considered”); *Carter v. Amer. Oil Co.*, 139 F.3d 1158, 1162 (7th Cir. 1998) (“whether an individual acts as an employee or an independent contractor is generally a question of fact, courts may make this determination as a matter of law in cases in which the relevant facts are undisputed” (internal citations omitted)).

⁴⁹ See also *Whiting v. W & R Corp.*, 2005 WL 1027467, at *2 (S.D. W. Va. Apr. 2005) (“The parties have presented the court with conflicting factual descriptions of the hallmarks of the plaintiff’s employment . . . and such factual disputes are best resolved by a jury.”).

⁵⁰ Counsel also admitted that there is no Washington case in which a court made a legal determination as to employment status following factual findings by a jury. RP 3/27/09 p 23.

standard of review on appeal. In the only *jury* case cited by plaintiffs, *Castillo v. Givens*, 704 F.2d 181, 187-88 (5th Cir. 1983), the court held merely that employment status should not have been tried to a jury because there were *no disputed issues of fact*. There were hotly contested factual disputes in this case, so Judge Erlick was correct when he stated, “Ultimately it’s a factual decision. The jury’s going to decide whether these are employees or independent contractors.” RP 3/02/09 p. 34.

III. CONCLUSION

For all the foregoing reasons, plaintiffs’ appeal is without merit, and the judgment of the trial Court should be affirmed.

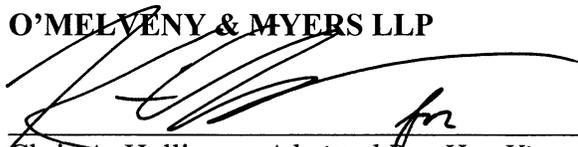
DATED this 25th day of November, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for record for Respondent/Defendant FedEx herein.

On November 25, 2009, I caused a true and correct copy of the foregoing document to be: 1) filed in the Washington State Court of Appeals, Division I; and 2) duly served via Legal Messenger on the following parties:

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Attorneys for Appellants/Plaintiffs

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 25, 2009, at Seattle, Washington.



Antesha Esteves

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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No. 635182

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

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
No. 04-2-39981-5 SEA

**ERRATA RE: BRIEF OF RESPONDENT
FEDEX GROUND PACKAGE SYSTEM, INC.**

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Package System, Inc.

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STATE OF WASHINGTON
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Citations to Sub Numbers contained in the Brief of Respondents

FedEx Ground Package System, Inc. should be replaced as follows:

<u>Brief Page Number</u>	<u>Line Number or Footnote</u>	<u>Sub No. Citation</u>	<u>CP Citation</u>
Page 4	Line 8	Sub No. 56A	CP 2862-2880
Page 5	Line 7	Sub No. 56A	CP 2867
Page 14	Line 4	Sub No. 512	CP 2962
Page 18	Line 5	Sub No. 512	CP 2963
Page 26	Line 14	Sub No. 56A	CP 2867
Page 29	Footnote 31	Sub No. 154	CP 2890

DATED this 10th day of December, 2009.

**CORR CRONIN MICHELSON
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Attorneys for Appellants/Plaintiffs

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: December 10, 2009, at Seattle, Washington.



Antesha Esteves

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RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIE,
individually and on behalf of others similarly situated,

Appellant/Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
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APPENDIX OF NON-WASHINGTON AUTHORITIES

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STATE OF WASHINGTON
2009 NOV 25 PM 1:50

ORIGINAL

Respondent/Defendant Fedex Ground Package System, Inc. hereby submits copies of the following non-Washington authorities in support of its Response Brief:

CASES

1. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946);
2. *Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668 (App. Ct. 2004);
3. *Baltimore Harbor Charters Ltd. v. Ayd*, 365 Md. 366 (2001);
4. *Boudreaux v. Bantec Inc.*, 366 F. Supp. 2d 425 (E.D. La. 2005);
5. *Braxton v. Rotec Indus., Inc.*, 30 Wn. App. 221 (1981);
6. *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988);
7. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004);
8. *Carrell v. Sunland Construction Inc.*, 998 F.2d 330 (5th Cir. 1993);
9. *Carter v. Amer. Oil Co.*, 139 F.3d 1158 (7th Cir. 1998);
10. *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983);
11. *Director of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297 (Me. 1987);
12. *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989);
13. *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985);
14. *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981);
15. *Donovan v. Tehco*, 642 F.2d 141 (5th Cir. 1981);
16. *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1 (Ct. App. 2007);

17. *FedEx Home Delivery v. Nat'l Labor Relations Board*, 563 F.3d 492 (D.C. Cir. 2009);
18. *Freund v. Hi-Tech Satellite Inc.*, 2006 WL 1490154 (11th Cir. 2006);
19. *Garcia v. Amer. Furniture Co.*, 101 N.M. 785 (Ct. App. 1984);
20. *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998);
21. *Herman v. Mid-Atlantic Installation Services, Inc.*, 164 F. Supp. 2d 667 (D. Md. 2000);
22. *Hickman v. United States*, 8 Cl.Ct. 748 (1985);
23. *Hi-Tech Video Productions v. Capital Cities/ABC, Inc.*, 58 F.3d 1093 (6th Cir. 1995);
24. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977);
25. *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008);
26. *Mathis v. Housing Authority of Umatilla Cty*, 242 F. Supp. 2d 777 (D. Or. 2002);
27. *Nat'l Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944);
28. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992);
29. *New Hampshire v. Maine*, 532 U.S. 742 (2001);
30. *Nicastro v. Clinton*, 882 F. Supp. 1128 (D.D.C. 1995);
31. *Powell v. Tanner*, 59 P.3d 246 (Alaska 2002);
32. *Proctor v. Allsup's Convenience Stores, Inc.*, 250 F.R.D. 278 (N.D. Tex. 2008);
33. *Reich v. Southern New Eng. Telcoms. Corp.*, 121 F.3d 58 (2nd Cir. 1997);
34. *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir. 1983);

35. *Rockwell Int'l Corp v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208 (9th Cir. 1988);
36. *S.G. Borello & Sons Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989);
37. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987);
38. *State ex rel. Roberts v. Acropolis McLoughlin, Inc.*, 150 Or. App. 180 (Ct. App. 1997);
39. *Torres v. Gristede's Operating Corp.*, 628 F.Supp.2d 447 (S.D.N.Y. 2008);
40. *Whiting v. W & R Corp.*, 2005 WL 1027467 (S.D. W. Va. 2005); and
41. *Wilson v. Guardian Angel Nursing Inc.*, 2008 WL 2944661 (M.D. Tenn. 2008).

OTHER AUTHORITIES

42. Restatement (Second) of Agency § 220.

DATED this 25th day of November, 2009.

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Attorneys for Appellants/Plaintiffs

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 25, 2009, at Seattle, Washington.



Antesha Esteves

LEXSEE

ANDERSON ET AL. v. MT. CLEMENS POTTERY CO.

No. 342

SUPREME COURT OF THE UNITED STATES

328 U.S. 680; 66 S. Ct. 1187; 90 L. Ed. 1515; 1946 U.S. LEXIS 3065; 11 Lab. Cas. (CCH) P51,233

January 29, 1946, Argued

June 10, 1946, Decided

PRIOR HISTORY: CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Employees brought suit in the District Court against their employer to recover sums claimed to be due them under the Fair Labor Standards Act. The District Court gave judgment in favor of the employees. 60 F.Supp. 146. The Circuit Court of Appeals reversed and ordered the suit dismissed. 149 F.2d 461. This Court granted certiorari. 326 U.S. 706. Reversed and remanded, p. 694.

DISPOSITION: 149 F.2d 461, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Certiorari was granted to the United States Circuit Court of Appeals for the Sixth Circuit to review that court's reversal of a judgment awarding petitioner factory employees compensation under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., for time spent in preliminary activities at the beginning of work shifts in respondent's factory.

OVERVIEW: Factory employees were entitled to receive compensation pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., for time spent in preliminary activities at the beginning of their work shifts. Respondent employer did not pay on the basis of time shown on the time clock, but instead subtracted some time for walking to work areas and other preliminary activities. The appellate court reversed the district court's award of additional compensation to petitioners. The Supreme Court reversed the appellate court's decision because activities controlled by the employer and performed solely for the employer's benefit, such as walking to a work area and preparing equipment, were compensable. Approximate damages could be awarded

to petitioners despite their lack of exact records. The Court remanded for a determination of the amount of time reasonably spent in preliminary activities.

OUTCOME: The Court reversed because preliminary activities, where controlled by the employer and performed entirely for the employer's benefit, were properly included in the statutory workweek. The Court remanded for calculation of time spent in such activities.

CORE TERMS: minute, productive, time clocks, walking, time spent, scheduled, plant, punch, compensable, places of work, starting, workweek, formula, punching, punched, compensated, overtime, clock, spent, putting, quitting, Fair Labor Standards Act, work performed, employer's premises, minimis, waiting, custom, quarter hour, reasonable inference, special master

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN1]An employee who brings suit under § 16(b) of the Fair Labor Standards Act of 1938 (Act), 29 U.S.C.S. § 201 et seq., for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep

such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN2]When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. In such a situation, an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN3]The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes recovery of uncertain and speculative damages. That rule applies where the fact of damage is itself uncertain. Where the employee has proved that he has performed work and has not been paid in accordance with the statute, the damage is certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. A reasonable inference may be made as to the extent of damages.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN4]Time clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employers

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN5]The statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace. Time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, is working time within the scope of § 7(a) of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq. Such time is under the complete control of the employer, being dependent solely upon the physical arrangements in the factory. Without such walking on the part of the employees, the productive aims of the employer cannot be achieved. Time spent in walking to work on the employer's premises, after the time clocks are punched, involves physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business. Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN6]The workweek contemplated by § 7(a) of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN7]Preliminary activities after arriving at places of work involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work. There is nothing in such activities that partakes only of the personal convenience or needs of the employees. Hence they constitute work that must be accorded appropriate compensation under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq. It is appropriate to apply a de minimis doctrine so that insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

EVIDENCE, §384

burden of proof -- action under Fair Labor Standards Act. --

Headnote:[1]

An employee bringing suit under 16(b) of the Federal Fair Labor Standards Act for unpaid minimum wages or overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated, although, since proper records of the work are usually in the hands of the employer only, this burden should not be made an impossible one, but rather a proper and fair standard should be erected for the employee to meet.

[***LEdHN2]

EVIDENCE, §961

sufficiency -- action under Fair Labor Standards Act. --

Headnote:[2]

An employee bringing suit under 16(b) of the Federal Fair Labor Standards Act sustains the burden of proof resting on him if he proves that he has in fact performed the work for which he was not properly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

[***LEdHN3]

EVIDENCE, §384

burden of proof -- action under Fair Labor Standards Act. --

Headnote:[3]

Where an employee, in an action under 16(b) of the Federal Fair Labor Standards Act, shows that he has performed work for which he was not properly compensated and produces evidence to show the amount and extent of that work as a matter of just and reasonable inference, the burden of proof then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.

[***LEdHN4]

DAMAGES, §1

UNCERTAINTY; ESTOPPEL, §63

by own fault -- action under Fair Labor Standards Act -- employer's failure to keep records. --

Headnote:[4]

An employer who has failed to keep the records required by 11(c) of the Federal Fair Labor Standards Act cannot be heard to complain, in an action by an employee under the Act for unpaid minimum wages or overtime compensation, that the damages lack the exactness and precision of measurement that would be possible if the records had been properly kept.

[***LEdHN5]

ESTOPPEL, §87

by receiving benefits -- action under Fair Labor Standards Act -- right to pay for certain activities. --

Headnote:[5]

An employer who has received the benefits of the work of an employee cannot, in an action by him under the Federal Fair Labor Standards Act for unpaid minimum wages or overtime compensation, object to payment for the work on the most accurate basis possible under the circumstances where there are no accurate records of the work, due to a bona fide mistake as to whether certain activities or nonactivities constituted work.

[***LEdHN6]

DAMAGES, §1

UNCERTAINTY; EVIDENCE, §960

sufficiency -- damages -- action under Fair Labor Standards Act -- amount of work as uncertain and speculative. --

Headnote:[6]

Inability of an employee to produce accurate records of certain work claimed by him to be compensable, in an action under the Federal Fair Labor Standards Act for unpaid minimum wages or overtime compensation, does not make the case one for the application of the rule precluding the recovery of uncertain and speculative damages, since the uncertainty is only in the amount, not the existence, of the damages.

[***LEdHN7]

DAMAGES, §1

EVIDENCE, §958

sufficiency -- damages -- uncertain and speculative damages. --

Headnote:[7]

The rule precluding the recovery of uncertain and speculative damages applies only where the fact of damage is itself uncertain, not where the uncertainty lies only in the amount of the damages, it being sufficient in such case if there is a basis for a reasonable inference as to the extent of the damage.

[***LEdHN8]

EVIDENCE, §961

sufficiency -- action under Fair Labor Standards Act -- time of commencement of work. --

Headnote:[8]

Evidence held sufficient to sustain a finding of a master, in an action under the Federal Fair Labor Standards Act for unpaid minimum wages and overtime compensation based on the time spent by employees in punching time clocks and walking through the plant to their place of work, that actual productive work did not begin before the scheduled hours, except in a few instances which were counterbalanced by occasions when work began after the scheduled hours or ended before the scheduled cessation of productive work.

[***LEdHN9]

REFERENCE, §23

findings -- review -- action under Fair Labor Standards Act -- time of commencement of work. --

Headnote:[9]

A Federal district court errs, in an action for unpaid minimum wages or overtime compensation under the Federal Fair Labor Standards Act, in failing to accept the findings of a master as to the time of commencement of productive work, and in creating a formula of compensa-

tion based upon a contrary view, where the findings are supported by substantial evidence and are not clearly erroneous.

[***LEdHN10]

EVIDENCE, §961

weight -- time clocks as conclusive evidence of time worked. --

Headnote:[10]

Time clock records are not conclusive evidence of the actual time worked by employees where the employee is required to be on the premises or on duty at a time different from that shown by such records, or where the payroll records or other facts indicate that work starts at an earlier or later period than that recorded by the time clock.

[***LEdHN11]

LABOR STANDARDS, §1

compensable time -- walking to work after punching time clock. --

Headnote:[11]

Time necessarily spent by employees in walking to work on the employer's premises after they have punched the time clock, constitutes working time for which the employee must be compensated under 7(a) of the Federal Fair Labor Standards Act, where such walking is a necessary result of the physical arrangements made by the employer in its plant for employees commencing and leaving work, although such compensable time is to be limited to the time necessarily spent in walking at an ordinary rate along the most direct route from the time clock to the work bench, not including any time consumed in round-about journeys or in stopping off en route for purely personal reasons.

[***LEdHN12]

LABOR STANDARDS, §1

time compensable -- walking to work -- application of de minimis rule. --

Headnote:[12A][12B]

The de minimis rule is applicable in an action under the Federal Fair Labor Standards Act for compensation for time spent in walking to work after punching the time clock and in preparing to start actual work, where the time involved concerns only a few seconds or minutes of work beyond the scheduled working hours, although an employee cannot be required to give up a substantial

measure of his time and effort in walking to his work without compensation.

[***LEdHN13]

LABOR STANDARDS, §1

time compensable -- preliminary activities preparatory to actual work. --

Headnote:[13]

An employee is entitled, under 7(a) of the Federal Fair Labor Standards Act, to compensation for time spent in preliminary activities preparatory to the commencement of actual productive work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing equipment for work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools.

[***LEdHN14]

REFERENCE, §23

findings -- conclusiveness -- action under Fair Labor Standards Act. --

Headnote:[14]

The presence of substantial evidence to support a master's finding, in an action under the Federal Fair Labor Standards Act for unpaid minimum wages or overtime compensation, that the employees had failed to show that the waiting time before and after the shift period, for which they claimed compensation, was not entirely their own time, makes the finding conclusive on appeal.

SYLLABUS

Respondent produces pottery for interstate commerce. Its employees enter the plant and punch time clocks during a period of 14 minutes before the regular starting time for productive work. They walk from the time clocks to their places of work within the plant and make various preparations for the start of productive work. After the regular quitting time, they were allowed a 14-minute period to punch out and leave the plant. They were compensated for their time from the next even quarter hour after punching in until the next even quarter hour prior to punching out. Similar provision was made for punching out and in before and after the lunch hour. Thus an employee might be credited with as much as 56 minutes per day less than the time recorded by the time clocks. Employees brought suit under § 16 (b) of the Fair Labor Standards Act to recover amounts allegedly owing to them under the overtime provisions of § 7 (a) of the Act. *Held:*

1. An employee who brings suit under § 16 (b) for unpaid minimum wages or overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. P. 686.

2. This burden is met by proof that he has in fact performed work for which he was not properly compensated and by sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. P. 687.

3. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. P. 687.

4. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. Pp. 688, 693.

W5. An employer who has not kept the records required by § 11 (c) cannot be heard to complain that damages assessed against him lack the precision of measurement that would be possible had he kept such records. P. 688.

6. The findings of a special master on the purely factual issue of the amount of actual productive work performed, being supported by substantial evidence and not clearly erroneous, should have been accepted by the District Court; and it erred in rejecting these findings and creating a formula of compensation based on a contrary view. Rule 53 (e) (2) of the Federal Rules of Civil Procedure. P. 689.

7. Since there was no requirement that an employee check in or be on the premises at any particular time during the 14-minute interval, the time clock records could not form the sole basis of determining the statutory workweek. Pp. 689-690.

8. Time necessarily spent by the employees in walking to work on the employer's premises is working time within the scope of § 7 (a), and must be compensated accordingly, regardless of contrary custom or contract. However, application of the *de minimis* rule is not precluded where the minimum walking time is such as to be negligible. Pp. 691-692.

9. Time necessarily spent by employees in preliminary activities after arriving at their places of work -- such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools -- must be included within the workweek and compensated accordingly. However, ap-

plication of the *de minimis* rule to insubstantial and insignificant periods of time spent in such activities is not precluded. Pp. 692-693.

10. Unless the employer can provide accurate estimates as to the amount of time spent in such activities in excess of the productive working time it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence. P. 693.

11. As to waiting time before and after the shift periods, the findings of the special master, that the employees had not proved that they were in fact forced to wait or that they were not free to spend such time on their own behalf, were supported by substantial evidence and must be sustained. P. 694.

COUNSEL: Edward Lamb argued the cause for petitioners. With him on the brief was Lee Pressman.

Frank E. Cooper and Bert V. Nunneley argued the cause and filed a brief for respondent.

Solicitor General McGrath, William S. Tyson and Bessie Margolin filed a brief for the Wage and Hour Administrator, United States Department of Labor, as amicus curiae, in support of petitioners.

JUDGES: Black, Reed, Frankfurter, Douglas, Murphy, Rutledge, Burton; Jackson took no part in the consideration or decision of this case.

OPINION BY: MURPHY

OPINION

[*682] [**1190] [***1520] MR. JUSTICE MURPHY delivered the opinion of the Court.

Several important issues are raised by this case concerning the proper determination of working time for purposes of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 et seq.

The Mt. Clemens Pottery Company, the respondent, employs approximately 1,200 persons at its pottery plant at Mt. Clemens, Michigan; about 95% of them are compensated upon a piece work basis. The plant covers more than eight acres of ground and is about a quarter of a mile in length. The employees' entrance is at the northeast corner. Immediately adjacent to that entrance are cloak and rest rooms where employees may change to their working clothes and place their street clothes in lockers. Different shifts begin at different times during the day, with whistles frequently indicating the starting time for productive work. The whistles which blow at 6:55 and 7:00 a. m., however, are the most commonly used. An [*683] interval of 14 minutes prior to the

scheduled starting time for each shift permits the employees to punch time clocks, walk to their respective places of work and prepare for the start of productive work. Approximately 200 employees use each time clock during each 14-minute period and an average of 25 employees can punch the clock per minute. Thus a minimum of 8 minutes is necessary for the employees to get by the time clock. The employees then walk to their working places along clean, painted floors of the brightly illuminated and well ventilated building. They are free to take whatever course through the plant they desire and may stop off at any portion of the journey to converse with other employees and to do whatever else [***1521] they may desire. The minimum distances between time clocks and working places, however, vary from 130 feet to 890 feet, the estimated walking time ranging from 30 seconds to 3 minutes. Some of the estimates as to walking time, however, go as high as 6 to 8 minutes. Upon arriving at their places of work, the employees perform various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools. Such activities, it is claimed, consume 3 or 4 minutes at the most. The employees are also allowed a 14-minute period at the completion of the established working periods to leave the plant and punch out at the time clocks.

Working time is calculated by respondent on the basis of the time cards punched by the clocks. Compensable working time extends from the succeeding even quarter hour after employees punch in to the quarter hour immediately preceding the time when they punch out. Thus an employee who punches in at 6:46 a. m., [**1191] punches out at 12:14 p. m., punches in again at 12:46 p. m. and finally [*684] punches out at 4:14 p. m. is credited with having worked the 8 hours between 7 a. m. and 12 noon and between 1 p. m. and 4 p. m. -- a total of 56 minutes less than the time recorded by the time clocks.

Seven employees and their local union, on behalf of themselves and others similarly situated, brought this suit under § 16 (b) of the Fair Labor Standards Act, alleging that the foregoing method of computation did not accurately reflect all the time actually worked and that they were thereby deprived of the proper overtime compensation guaranteed them by § 7 (a) of the Act. They claimed *inter alia* that all employees worked approximately 56 minutes more per day than credited by respondent and that, in any event, all the time between the hours punched on the time cards constituted compensable working time.

The District Court referred the case to a special master. After hearing testimony and making findings, the master recommended that the case be dismissed since the complaining employees "have not established by a fair preponderance of evidence" a violation of the Act by respondent. He found that the employees were not required to, and did not, work approximately 56 minutes more per day than credited to them. He further found that the employees "have not sustained their burden to prove that all the time between the punched entries on the clock was spent in working and that conversely none of the time in advance of the starting time spent by employees arriving early was their own time." Production work, he concluded, "did not regularly commence until the established starting time; and, if in some instances it was commenced shortly prior thereto, it was counterbalanced by occasions when it was started after the hour and by admitted occasions when it was stopped several minutes before quitting time."

[*685] As to the time between the punching of the clocks and the start of the productive work, the master made the following determinations:

(1) The time spent in walking from the time clocks to the places of work was not compensable working time in view of the established custom in the industry and in respondent's plant to that effect.

(2) The time consumed in preliminary duties after arriving at the places of work was not compensable here since the employees had produced no reliable evidence from which the amount of such work could be determined with reasonable definiteness.

[***1522] (3) The time spent in waiting before and after the shift periods was not compensable since the employees failed to prove that if they came in early enough to have waiting time they were required to do so or were not free to spend such time on their own behalf.

The District Court agreed "in the main" with the master's findings and conclusions with one exception. It felt that the evidence demonstrated that practically all of the employees had punched in, walked to their places of work and were ready for productive work at from 5 to 7 minutes before the scheduled starting time, "and it does not seem probable that with compensation set by piece work, and the crew ready, that these employees didn't start to work immediately." The court accordingly established a formula, applicable to all employees, for computing this additional time spent in productive work. Under the formula, 5 minutes were allowed for punching the clock and 2 minutes for walking from the clock to the place of work -- a total of 7 minutes which were not to be considered as working time. All minutes over those 7 as shown by the time cards in the morning and all over 5 at the beginning of the afternoon were to be computed as

part of the hours worked. The court found no evidence of productive work [*686] after the scheduled quitting time at noon or night. In other words, working time under this formula extended from the time punched in the morning, less 7 minutes, to the scheduled quitting time at noon and from the time punched at the beginning of [**1192] the afternoon, less 5 minutes, to the scheduled quitting time for the day. No reason was given for the 2-minute differential between the morning and afternoon punch-ins. The use of this formula led the District Court to enter a judgment against respondent in the amount of \$ 2,415.74 plus costs. 60 F.Supp. 146.

Only the respondent appealed. The Sixth Circuit Court of Appeals made a careful examination of the master's findings and conclusions, holding that they were all supported by substantial evidence and were not clearly erroneous. It stated that the District Court erred in failing to accept the finding of the master that productive work did not actually start until the scheduled time and that the formula devised for computing additional productive work was unsustainable because based upon surmise and conjecture. The Circuit Court of Appeals further held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled under the Act and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked. The cause of action accordingly was ordered to be dismissed. 149 F.2d 461.

[***LEdHR1] [1]But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. [HN1]An employee who brings suit under § 16 (b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, [*687] has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11 (c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position [***1523] to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

[**LEdHR2] [2] [**LEdHR3] [3][HN2]When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence [*688] to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. See Note, 43 Col. L. Rev. 355.

[**LEdHR4] [4] [**LEdHR5] [5] [**LEdHR6] [6] [**LEdHR7] [7][HN3]The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11 [**1193] (c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S.

359, 377-379; *Palmer v. Connecticut R. Co.*, 311 U.S. 544, 560-561; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 263-266.

We therefore turn to the facts of this case to determine what the petitioning [***1524] employees have proved and are entitled to in light of the foregoing considerations:

[*689] [**LEdHR8] [8] [**LEdHR9] [9](1) On the issue as to the extent of the actual productive work performed, we are constrained to agree with the special master that it began and ended at the scheduled hours. This was purely a factual issue. The master made his findings in this respect through the weighing of conflicting evidence, the judging of the reliability of witnesses and the consideration of the general conduct of the parties to the suit. The master thereby concluded that productive work did not begin before the scheduled hours except in a few instances which were counterbalanced by occasions when work began after the scheduled hours or ended before the scheduled cessation of productive work. Our examination of the record leads us to acquiesce in these findings since they are supported by substantial evidence and are not clearly erroneous. And the court below correctly held that the District Court erred in failing to accept these findings and in creating a formula of compensation based upon a contrary view. Rule 53 (e) (2) of the Federal Rules of Civil Procedure. See *Tilghman v. Proctor*, 125 U.S. 136, 149-150; *Davis v. Schwartz*, 155 U.S. 631, 636-637.

(2) The employees did not prove that they were engaged in work from the moment when they punched in at the time clocks to the moment when they punched out. They were required to be ready for work at their benches at the scheduled starting times. They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But there was no requirement that an employee check in or be on the premises at any particular time during that 14-minute interval. As noted by the District Court, there was no evidence "that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven." 60 F.Supp. at 149. Indeed, it would have been impossible for all members of a particular [*690] shift to be checked in at the same time in view of the rate at which the time clocks were punched. The first person in line at the clock would be checked in at least 8 minutes before the last person. It would be manifestly unfair to credit the first person with 8 minutes more working time than credited to the last person due to the fortuitous circumstance of his position in line.

[**LEdHR10] [10]Moreover, it is generally recognized that [HN4]time clocks do not necessarily

[**1194] record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked. In this case, however, the evidence fails to indicate that the time clock records did so mirror the working time. They did not show the time during which the employees were compelled to be on the premises or at any prescribed place of work. They thus could not form the sole basis of determining the statutory workweek. See Interpretative Bulletin No. 13, paragraphs 2 and 3, issued by the Administrator of the Wage and Hour Division, U.S. Department of Labor; Wage and Hour Manual, Cumulative Edition, 1944-1945, p. 234.

(3) The employees did prove, however, that it was necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours. The employer required them to punch [***1525] in, walk to their work benches and perform preliminary duties during the 14-minute periods preceding productive work; the same activities in reverse occurred in the 14-minute periods subsequent to the completion of productive work. Since [HN5]the statutory workweek includes all time during which [*691] an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation.

[***LEdHR11] [11]No claim is here made, though, as to the time spent in waiting to punch the time clocks and we need not explore that aspect of the situation. See Cameron v. Bendix Aviation Corp., 65 F.Supp. 510. But the time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time within the scope of § 7 (a). Ballard v. Consolidated Steel Corp., 61 F.Supp. 996; Ulle v. Diamond Alkali Co., 8 WHR 1042. Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent in traveling from workers' homes to the factory. Dollar v. Caddo River Lumber Co., 43 F.Supp.

822; Walling v. Peavy-Wilson Lumber Co., 49 F.Supp. 846. Cf. Commissioner v. Flowers, 326 U.S. 465. It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer [*692] and his business." Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 598; Jewell Ridge Corp. v. Local, 325 U.S. 161, 164-166. Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.

But under the conditions prevalent in respondent's plant, compensable working time was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route from time clock to work bench. Many employees took roundabout journeys and stopped off en route for purely personal reasons. It would be unfair and impractical to compensate them for doing that which they [**1195] were not required to do. Especially is this so in view of the fact that precise calculation of the minimum walking time is easily obtainable in the ordinary situation.

[***LEdHR12A] [12A]

We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. [HN6]The workweek contemplated by § 7 (a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the [***1526] Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

[***LEdHR12B] [12B] [***LEdHR13] [13] (4) The employees proved, in addition, that they pursued certain [HN7]preliminary activities after arriving at their places of work, such as putting on aprons and overalls, [*693] removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools. These activities are clearly work falling within the definition enunciated and applied in the Tennessee Coal and Jewell Ridge cases. They involve exertion of a physical

nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work. There is nothing in such activities that partakes only of the personal convenience or needs of the employees. Hence they constitute work that must be accorded appropriate compensation under the statute. See *Walling v. Frank*, 62 F.Supp. 261; *Philpott v. Standard Oil Co.*, 53 F.Supp. 833. Here again, however, it is appropriate to apply a *de minimis* doctrine so that insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek.

The master did not deny that such activities must be included within the employees' compensable workweek or that the evidence demonstrated that the employees did in fact engage in such activities. He denied recovery solely because the amount of time taken up by the activities and the proportion of it spent in advance of the established starting time had not been proved by the employees with any degree of reliability or accuracy. But, as previously noted, the employees cannot be barred from their statutory rights on such a basis. Unless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time.

[*694] [***LEdHR14] [14](5) As to waiting time before and after the shift periods, the special master found that the employees had not proved that they were in fact forced to wait or that they were not free to spend such time on their own behalf. This was also a question of fact and the presence of substantial evidence to support the master's finding precludes any different result.

Thus we remand the case for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages under the Act. We have considered the other points raised by the petitioners but find no errors.

Reversed and remanded.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

DISSENT BY: BURTON

DISSENT

[**1196] MR. JUSTICE BURTON dissenting, with whom MR. JUSTICE FRANKFURTER concurs.

The opinion of the Court in this case has gone far toward affirming the Circuit Court of Appeals. I believe it should go the rest of the way.

This Court has agreed largely [***1527] with the Court of Appeals in holding that the District Court was in error in not accepting the master's findings of fact in the face of Rule 53 (e) (2) of the Federal Rules of Civil Procedure which requires that: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." 28 U. S. C. following § 723 (c).

This Court, accordingly, agrees that the trial court must accept as findings of fact in this case that the productive work performed by the employees began and ended at the regularly scheduled hours of work, on the even quarter-hours; that the time clocks were not controlling in [*695] establishing the exact minute of starting or stopping work; that the time spent in punching time clocks did not constitute compensable work; and that the "waiting time," if any, before and after the shift periods was not compensable time.

This Court also agrees that the District Court was in error in creating a formula of compensation not in accordance with the findings of the master.

The only questions remaining are whether the moments spent in walking from the time clocks to the employees' respective places of productive work within the plant, and the minutes sometimes spent by some of the employees in miscellaneous "preliminary activities" before the scheduled starting times, must be added, as a matter of law "regardless of contrary custom or contract," to the compensatory time of "the statutory week," and, if so, how such additional time can be proved to have been so used in order to make it the basis for additional compensation.

The master determined that the time spent in walking from the time clocks to the places of work was not compensable working time in view of the established custom in the industry and in the plant. Moreover, the employees were free to take whatever course through the plant they desired and to stop off at any point to talk with other employees or to do whatever else they liked. Some workers came to the time clocks as late as one minute before the time to reach their place of productive work. The so-called "preliminary activities" are identified in this case as those of "putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." The master found that the employees had not offered proof of the time used for these purposes with a sufficient degree [*696] of reliability or accuracy for it to become the

basis for recovery of overtime compensation. The employer would have still greater difficulty in keeping an accurate record of the time spent by each employee in such activities. These activities are of such a nature that the knowledge of them and the time spent in doing them rests particularly with the employees themselves. Such activities are of quite a different character from those made the basis of compensable time in the coal mine portal-to-portal cases. *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590; *Jewell Ridge Corp. v. Local*, 325 U.S. 161.

Some idea of the shortness of the time and the smallness of the compensation involved in the "preliminary activities," in comparison with the cumbersomeness of any system for accurately recording the time spent in doing them, is apparent from the formula to which the District Court resorted in attempting to reach its solution of the difficulty. Under that formula, for example, the District Court found no basis for compensation for such activities after [**1197] the scheduled quitting time. Compensable time spent in such activities [***1528] was limited to a short period before the scheduled hours of beginning productive work in the morning and again on resuming work after lunch. Employees were allowed, or encouraged, to come to the plant 14 minutes ahead of the quarter hour at which their scheduled productive work began. The District Court estimated that, on an average, seven minutes should be allowed, each morning, for punching a time clock and walking from it to the employee's place of productive work. As to the "walking time" the court said, "the preparation even after punching the clock wouldn't take more than one or one and a half minutes and to the farthest point in the plant from the time clock wouldn't take more than 2 minutes." 60 F.Supp. 146, 149. If an employee came to the plant 14 minutes ahead [*697] of time, this left a maximum of seven minutes, plus "walking time," as the basis for a compensatory claim. The compensatory time in many cases would be much less. Similarly, under the District Court formula, employees returning to work after lunch were estimated to consume five minutes in punching the clock and walking to their places of productive work. This would leave a maximum of nine minutes, plus "walking time." At that hour of the day the workers already would be in their work clothes and there rarely would be more than a minute or two required for the preliminary activities for which compensation was claimed.

The amounts at issue, therefore, might not average as much as five to ten minutes a day a person and would not apply at all to many of the employees. None of this time would have been spent at productive work. The futility of requiring an employer to record these minutes and the unfairness of penalizing him, for failure to do a

futile thing, by imposing arbitrary allowances for "overtime" and liquidated damages is apparent.

While conditions vary widely and there may be cases where time records of "preliminary activities" or "walking time" may be appropriate, yet here we have a case where the obvious, long established and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. These items are appropriate for consideration in collective bargaining.

To sustain the position of the Court in requiring these additional moments to be recorded and computed as overtime, it is necessary to hold that Congress, in using the word "workweek," meant to give that word a statutory meaning different from its commonly understood reference to the working hours between "starting" and "quitting" time -- or from "whistle to whistle." There is no evidence [*698] that Congress meant to redefine this common term and to set aside long established contracts or customs which had absorbed in the rate of pay of the respective jobs recognition of whatever preliminary activities might be required of the worker by that particular job. For example, if the plant be one located at an inconvenient place, or if the workers have to change into working clothes at the plant, or have to grease or tape their arms before going to work, these are items peculiar to the job, and compensation for them easily can be made in the rate of pay per hour, per week or per piece, and all special stop-watch recording of them eliminated.

In interpreting "workweek" as applied to the industries of America, it is important to consider the term as applicable not merely to large and organized industries where activities may be formalized and easily measured on a split-second basis. The term must be applied equally to the hundreds of thousands of small businesses and small plants employing less than 200, and often less than 50 workers, where the recording of occasional minutes of preliminary activities [***1529] and walking time would be highly impractical and the penalties of liquidated damages for a neglect to do so would be unreasonable. Such a universal requirement of recording would lead to innumerable unnecessary minor controversies between employers and employees. "Workweek" [**1198] is a simple term used by Congress in accordance with the common understanding of it. For this Court to include in it items that have been customarily and generally absorbed in the rate of pay but excluded from measured working time is not justified in the absence of affirmative legislative action.

For these reasons, I believe that the judgment of the Court of Appeals should be affirmed.

LEXSEE

NANCY P. ANDREWS; GLEN T. BLANTON; DOROTHY SPENCER BROMAN;
RONALD S. BYERS; JAMES F. CLARK; ROBERT W. CONSTANS; JULIE D.
CROUCH; JAMES A. CZAJKOWSKI; JERRY EDWARDS; JOSEPH E.
EICKHOFF; GREGORY D. FEGETT; JAMES C. GIBBONS; MARILYN
GOOCH; RICHARD L. GREENLEE; DAVID GUYMON; ORMAL S. HANDLEY,
JR.; JERRY W. HARPER; MARY M. HIRES; KAREN S. JOHNSON; DAVID L.
KELLEY, NELLIE M. KNAPP; SHARON KRAMER; WARDER E. McCORD;
GLENN MICHAELSON; RONALD NIKEL; BRUCE M. OVERSTREET;
ARTHUR J. POWELL; CHARLOTTE R. QUICK; MICHAEL L. RIBBINGS;
LINDA L. SANDS; SHIRLEY G. SMITH; JAMIE A. STAFFORD; MICHAEL G.
WALKER; LOIS J. WILLIAMS; and JOSEPH F. YOUNG, Plaintiffs-Appellees, v.
KOWA PRINTING CORPORATION, an Illinois Corporation; THOMAS W.
KOWA, Personally; and HUSTON-PATTERSON CORPORATION, an Illinois
Corporation, Defendants-Appellants.

NO. 4-03-0885

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

351 Ill. App. 3d 668; 814 N.E.2d 198; 2004 Ill. App. LEXIS 946; 286 Ill. Dec. 548

August 4, 2004, Decided

SUBSEQUENT HISTORY: [***1] Released for
Publication September 7, 2004.

Appeal granted by Andrews v. Kowa Printing Corp., 212
Ill. 2d 528, 824 N.E.2d 282, 2004 Ill. LEXIS 1853, 291
Ill. Dec. 706 (2004)

Affirmed by Andrews v. Kowa Printing Corp., 2005 Ill.
LEXIS 1608 (Ill., Oct. 20, 2005)

PRIOR HISTORY: Appeal from Circuit Court of
Vermilion County. No. 00L14. Honorable Craig H.
DeArmond, Judge Presiding.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, a printing
corporation, its sole owner and director, and a subsidiary
corporation, appealed the judgment of the Circuit Court
of Vermilion County (Illinois), which awarded plaintiff
former employees vacation and severance pay pursuant
to the Illinois Wage Payment and Collection Act, 820 Ill.
Comp. Stat. Ann. 115/1 through 15 (2000), in the em-
ployees' action, alleging they were due unpaid compen-
sation.

OVERVIEW: The corporation and its subsidiary were
distinct, separate entities, yet they were intertwined for
business purposes. A bookkeeper of the printing corpora-
tion embezzled significant amounts of money and the
payroll functions were given to a bank. The printing cor-
poration was closed and the former employees were sent
home. Defendants argued that the former employees'
claims were preempted by federal law due to the exis-
tence of a collective-bargaining agreement, and that the
provisions of federal law required the employees to ex-
haust all grievance procedures before filing suit. Further,
defendants contended that they were not "employers"
within the meaning of the Wage Act. The court held that
preemption was not required and that the Wage Act was
the proper vehicle to address the claims. The court found
that the collective bargaining agreements at issue did not
contemplate vacation or severance pay when the business
was closed down. The sole owner and director was not
personally liable for the pay because there was no evi-
dence that he knowingly or wilfully aided the printing
corporation to violate the Wage Act. The subsidiary was
not found to be an employer that was liable for the pay.

OUTCOME: The court affirmed the judgment as
against the printing corporation, including the award of
interest and attorney fees to the former employees. The
court reversed, in part, that part of the judgment that held

both the sole owner and director and the subsidiary liable on the judgment.

CORE TERMS: printing, Wage Act, collective-bargaining, attorney fees, severance pay, vacation, individually liable, unpaid, corporate officer, federal law, definition of employer, preemption, preempted, wilfully, personal liability, entitlement, awarding, owing, state law, final compensation, personally liable, indirectly, corporate law, prejudgment interest, looked, sole shareholder, corporate veil, failure to pay, economic reality, operational

LexisNexis(R) Headnotes

*Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees
Labor & Employment Law > Wage & Hour Laws > Remedies > Judgment Interest*

[HN1]Where an appellate court decides questions of law, its review is de novo.

*Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview
Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption*

[HN2]An employee's claim is not always preempted by federal law when there is a collective-bargaining agreement. Federal preemption occurs only when the terms of the collective-bargaining agreements are at issue and must be interpreted.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Holiday, Sick & Vacation Pay

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN3]Section 5 (820 Ill. Comp. Stat. Ann. 115/5 (2000)) of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), provides that every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday." "Final compensation" is defined as wages, salaries, and the monetary equivalent of earned vacation and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the two parties.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

[HN4]Preemption occurs when an interpretation of the collective-bargaining agreement is necessary. The parties must engage in a good-faith dispute or debate over the meaning of terms within the contract in order for preemption to be triggered. The mere existence of a contract is not enough for preemption.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

[HN5]If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law, which might lead to inconsistent results since there could be as many state-law principles as there are states, is preempted and federal labor-law principles, necessarily uniform throughout the nation, must be employed to resolve the dispute.

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Judicial Review of Awards > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement

Labor & Employment Law > Collective Bargaining & Labor Relations > Interpretation of Agreements

[HN6]Where the parties present a court with a stipulation that they have already interpreted collective bargaining agreements, a court does not construe the various provisions of the collective-bargaining agreements.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN7]A duty to pay plaintiff union workers final compensation on the date of separation is a matter of state law rather than of contract interpretation when there is no dispute about the amounts due.

Evidence > Procedural Considerations > Burdens of Proof > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN8]Section 5 (820 Ill. Comp. Stat. Ann. 115/5 (2000)) of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), does not require that plaintiffs prove that an employer wilfully failed to pay final compensation. It is enough that plain-

tiffs were simply not paid by the next regularly scheduled payday after separation.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN9]Section 2 (820 Ill. Comp. Stat. Ann. 115/5 (2000)) of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), defines an "employer" as any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed.

Governments > Courts > Court Personnel
Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > Enforcement

[HN10]An officer of a corporation is an "employer" within the meaning of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.S. §§ 201 through 219. Under the FLSA, an "employer" is any person acting directly or indirectly in the interest of an employer in relation to an employee. § 203(d).

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview
Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview
Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

[HN11]Piercing a corporate veil is not necessary to hold an officer individually liable as an employer. A corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.S. §§ 201 through 219, for unpaid wages. The basic insulation from personal liability normally afforded individuals when they do business in corporate form is stripped away where the corporation-controlling individual has opted to prefer the payment of other corporate debts to the payment of obligations running to corporate employees, and given special statutory recognition by the United States

Congress. An individual who controls corporate operations, and the terms and conditions of employees' employment therein, is an "employer" under the FLSA.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN12]Section 13 (820 Ill. Comp. Stat. Ann. 115/13 (2000)) of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), provides that an officer or agent of a corporation is deemed to be an employer if he or she knowingly permits an employer to violate the Wage Act. Section 14(a) of the Wage Act provides that an employer or agent of an employer is guilty of misdemeanor if he is able yet wilfully fails to pay an employee of the Wage Act, 820 Ill. Comp. Stat. Ann. 115/14(a).

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview
Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN13]A corporation's officers are not individually liable for unpaid wages to the employees under Colorado's Wage Claim Act, Colo. Rev. Stat. §§ 8-4-101 through 8-4-127 (2002). The Act's definition of "employer" is ambiguous on the question of an officer's personal liability.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview
Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN14]In the Colorado's Wage Claim Act, Colo. Rev. Stat. §§ 8-4-101 through 8-4-127 (2002), and specifically at Colo. Rev. Stat. § 8-4-101(6) (2002), the definition of "employer" includes every person, firm, partnership, association, corporation, and any agent or officer thereof, of the above mentioned classes, employing any person in Colorado. Colorado's definition does not include any words stating that officers and agents of a corporation are individually liable for wage and compensation payment due under the employment contract.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Holiday, Sick & Vacation Pay

[HN15]If a legislature intends for corporate officers or agents to be personally liable in all situations where that officer or agent exercises operational control over a corporation and its employees, it would have to state so and it would not limit that personal liability to situations where a plaintiff must prove an officer or agent knowingly or wilfully aided the corporation in a violation of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), as set forth in §§ 13 and 14(a) of the Wage Act, 820 Ill. Comp. Stat. Ann. 115/13, 14(a) (2000). Individual officers or agents of a corporation are not "employers" within the meaning of § 5 of the Wage Act, 820 Ill. Comp. Stat. Ann. 115/5 (2000) without first implicating the officers' personal liability under 820 Ill. Comp. Stat. Ann. 115/13 or 14(a).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN16]In order to determine whether companies are joint employers, it must focus on the economic reality of the situation and consider the following factors issued by the Wage and Hour Administrator, 29 C.F.R. § 791.2(a) (1989), in evaluating the existence of a joint employment relationship: (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or, (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or, (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Civil Procedure > Remedies > Judgment Interest > General Overview

Trademark Law > Protection of Rights > Registration > General Overview

Trademark Law > Special Marks > Service Marks > General Overview

[HN17]Merely hiring a firm to perform a service for an employer for remuneration does not make that hired firm an "employer" to the employees of the hiring company. A corporation, despite being registered under the same servicemark as an employer and despite being owned and operated by the same individual, is a completely separate corporation with its own employees, duties, and records. It is not an "employer" within the meaning of the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. 115/1 through 15 (2000), as set forth in §§ 13 and 14(a) of the Wage Act, 820 Ill. Comp. Stat. Ann. 115/13, 14(a) (2000), with respect to unpaid employees and is not liable for the employees' unpaid compensation.

Civil Procedure > Remedies > Judgment Interest > General Overview

[HN18]See 735 Ill. Comp. Stat. Ann. 5/2-1303 (2000).

Civil Procedure > Remedies > Judgment Interest > General Overview

[HN19]Under 735 Ill. Comp. Stat. Ann. 5/2-1303 (2000), the date an award, report, or verdict is rendered is the date on which interest begins to accrue. If there is a delay between the rendering of the award, report, or verdict and entry of judgment thereon, interest shall be assessed from the date the award is made and included in the judgment when it is entered. From the date of that judgment forward, post-judgment interest applies until the judgment debtor tenders full payment along with any accrued interest.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN20]See 705 Ill. Comp. Stat. Ann. 225/1 (2000).

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Governments > Courts > Common Law

Governments > Legislation > Interpretation

[HN21]The Attorney Fees Act, 705 Ill. Comp. Stat. Ann. 225/1 (2000), must be considered in derogation of the common law and is to be strictly construed. Section 225/1 must be complied with in every particular to entitle a plaintiff to recover attorney fees.

JUDGES: JUSTICE APPLETON delivered the opinion of the court. COOK and McCULLOUGH, JJ., concur.

OPINION BY: APPLETON

OPINION

[*670] [**200] JUSTICE APPLETON delivered the opinion of the court:

Defendants, Kowa Printing Corporation (Kowa Printing), Thomas W. Kowa, and Huston-Patterson Corporation (Huston-Patterson), appeal the trial court's judgment awarding plaintiffs vacation and severance pay. Plaintiffs are former union employees of Kowa Printing. Defendants argue plaintiffs' claims are preempted by federal law due to the existence of a collective-bargaining agreement and that the provisions of federal law require the employees to exhaust all grievance procedures before filing suit. In the alternative, defendants Kowa and Huston-Patterson claim they are not "employers" within the meaning of the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 through 15 (West 2000)). [**201] Kowa Printing claims it did not wilfully violate the Wage Act, [***2] and all defendants claim the trial court erred in awarding plaintiffs prejudgment interest and attorney fees. We affirm in part and reverse in part.

I. BACKGROUND

Robert Kowa owned and operated Huston-Patterson in Decatur, Illinois, and Kowa Printing in Danville, Illinois. Upon Robert Kowa's death in November 1991, his son, Thomas Kowa, purchased 100% of the shares of Kowa Printing and 97% of the shares of Huston-Patterson (the remaining 3% are owned by Kowa's brother, Steve, who is not individually involved in this appeal).

Since his purchases of the businesses, Kowa has been the sole officer and director of both Kowa Printing and Huston-Patterson. Kowa also owned 100% of the shares of Sygma Graphics Corporation (Sygma Graphics) in Ottawa, Illinois, and Kowa Graphics, Inc., in Champaign, Illinois. In February 1996, Kowa merged Kowa Graphics, Inc., and Kowa Printing and operated the merged companies out of Kowa Printing's facility in Danville. Kowa Printing, Huston-Patterson, and Sygma Graphics, all printing companies, were known under the servicemark The Kowa Group.

The three companies were distinct, separate entities, yet were intertwined for business purposes. For example, [***3] sales representatives for each company would market all three companies within The Kowa Group depending on the type of job desired by the customer. Each company performed different printing services.

Huston-Patterson provided management services, including payroll and accounting services, to Kowa Printing and Sygma Graphics under a written management-services agreement. According to [*671] Kowa,

Huston-Patterson was also considered one of Kowa Printing's biggest customers.

Plaintiffs were all employees of Kowa Printing and were members of one of two union groups, Graphic Communications International Union Local No. 257-C (Local 257-C) and Graphic Communications International Union Local No. 171-B (Local 171-B). Each union had a collective-bargaining agreement with Kowa Printing.

In 1996, it was discovered that Kowa Printing's bookkeeper, an employee of Huston-Patterson, had embezzled over \$ 500,000 from Kowa Printing since 1991. After several months of analyzing the status of the corporation, Kowa discovered that Kowa Printing was in dire financial straits. The company's 1996 tax return showed a loss of \$ 2,267,072.

Kowa Printing's only secured creditor was BankIllinois. As of June 1997, [***4] Kowa Printing was in default on the bank's loans, but the bank had agreed in writing to temporarily delay foreclosure. Kowa located a buyer for Kowa Printing. He and the prospective buyer reached an agreement with regard to the sale. Kowa presented a proposal to the two employees' unions involved, but they rejected both that proposal and several modified proposals. Thereafter, the sale fell through.

BankIllinois foreclosed on the loans and seized all of the assets of Kowa Printing on April 16, 1998. Bank representatives arrived at Kowa Printing escorted by officers of the Danville police department, took possession of the facility, and sent the employees home. The closing did not directly affect the operation of Huston-Patterson or Sygma Graphics.

On December 30, 1998, the Illinois Department of Labor (Department), on behalf of plaintiffs, found Kowa Printing, Kowa, and Huston-Patterson liable for [**202] \$ 5,274.70 unpaid wages. According to the Department, it had no jurisdiction to evaluate the employees' claims for vacation or severance pay because entitlement to those amounts was covered by the collective-bargaining agreements and thus fell within the jurisdiction of the federal court [***5] system pursuant to section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185 (1994)), also known as the Taft-Hartley Act.

On January 23, 2000, plaintiffs, 35 former employees of Kowa Printing, filed a complaint, alleging they were due unpaid vacation and severance pay under their respective collective-bargaining agreements.

On February 25, 2000, defendants filed a notice that they were removing the lawsuit to federal court, claiming plaintiffs' complaint was governed by the LMRA and was thus under the jurisdiction of the [*672] United

States District Court. On August 9, 2000, the federal court remanded the suit to state court, finding the LMRA did not preempt plaintiffs' claims.

In March 2002, the parties filed cross-motions for summary judgment. Both were denied. The trial court conducted a bench trial on April 29, 2002. Because we summarize the facts and other evidence throughout this decision, a detailed summary of the evidence presented at trial is not necessary. However, it is important to note that at the trial, the parties presented the court with a stipulation of the amounts due each plaintiff.

Approximately one year after the trial, on [***6] April 21, 2003, the court entered its decision, finding defendants Kowa and Huston-Patterson "employers" within the meaning of the Wage Act and liable, along with Kowa Printing, to all plaintiffs for the amounts stipulated.

On April 30, 2003, plaintiffs moved for an award of attorney fees and prejudgment interest. On September 29, 2003, the trial court entered the final judgment, incorporating its findings from its April 21, 2003, decision and adding prejudgment interest from April 21, 2003, to September 29, 2003. The judgment also awarded plaintiffs David L. Kelley and Bruce M. Overstreet \$ 28,289.53 in attorney fees pursuant to section 1 of the Attorneys Fees in Wage Actions Act (Attorney Fees Act) (705 ILCS 225/1 (West 2000)) because the judgment amount awarded to those plaintiffs exceeded their presuit demand. This appeal followed.

II. ANALYSIS

A. Standard of Review

Because [HN1] we decide questions of law--whether the state court had subject-matter jurisdiction, whether defendants were "employers" within the meaning of the Wage Act, whether defendants wilfully violated the Wage Act, and whether the awards of prejudgment interest and attorney fees [***7] were proper, our review is *de novo*. Metzger v. DaRosa, 209 Ill. 2d 30, 34, 805 N.E.2d 1165, 1167, 282 Ill. Dec. 148 (2004).

B. Preemption by Federal Law

Defendants appeal the trial court's judgment, arguing that it erred in applying the Wage Act and by not finding that the LMRA preempted plaintiffs' suit. Defendants rely on National Metalcrafters v. McNeil, 784 F.2d 817 (7th Cir. 1986), for their argument that the existence of the collective-bargaining agreements between plaintiffs and their employer placed disputes between the two within the purview of the LMRA, not state law.

Plaintiffs, on the other hand, rely, *inter alia*, on Livadas v. Bradshaw, [*673] 512 U.S. 107, 123, [**203] 129 L. Ed. 2d 93, 110, 114 S. Ct. 2068, 2078 (1994), Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 409-10, 100 L. Ed. 2d 410, 421, 108 S. Ct. 1877, 1883 (1988), and Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211, 85 L. Ed. 2d 206, 215, 105 S. Ct. 1904, 1911 (1985), which held [HN2] an employee's claim is not always preempted by federal law when there is a collective-bargaining agreement. Each case held that federal [***8] preemption occurs only when the terms of the collective-bargaining agreements are at issue and must be interpreted. Livadas, 512 U.S. at 125, 129 L. Ed. 2d at 110, 114 S. Ct. at 2079; Lingle, 486 U.S. at 411, 100 L. Ed. 2d at 423, 108 S. Ct. at 1884; Lueck, 471 U.S. at 218-19, 85 L. Ed. 2d at 220, 105 S. Ct. at 1915. Plaintiffs maintain that defendants' liability is a statutory question rather than a matter of contract interpretation.

Plaintiffs' claim was brought pursuant to section 5 of the Wage Act (820 ILCS 115/5 (West 2000)), which provides that [HN3] "every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday." "Final compensation" is defined as "wages, salaries, *** and the monetary equivalent of earned vacation *** and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the [two] parties." 820 ILCS 115/2 (West 2000).

We agree with plaintiffs and hold that under the specific facts of this case, [***9] their claim under the Wage Act was a proper vehicle for their requested relief and federal preemption was not required. Accordingly, we find the trial court had subject-matter jurisdiction over plaintiffs' claims.

National Metalcrafters, Livadas, Lueck, and Lingle make it clear that [HN4] preemption occurs when an interpretation of the collective-bargaining agreement is necessary. National Metalcrafters, 784 F.2d at 824; Livadas, 512 U.S. at 125, 129 L. Ed. 2d at 110, 114 S. Ct. at 2079; Lingle, 486 U.S. at 411, 100 L. Ed. 2d at 423, 108 S. Ct. at 1884; Lueck, 471 U.S. at 218-19, 85 L. Ed. 2d at 220, 105 S. Ct. at 1915. The parties must engage in a good-faith dispute or debate over the meaning of terms within the contract in order for preemption to be triggered. The mere existence of a contract is not enough for preemption. Indeed, the National Metalcrafters court stated:

"Section 301 expresses a strongly held policy in favor of applying uniform federal principles to the *interpretation of* collective[-] bargaining contracts. This policy reflects the national commitment to

limiting state regulation [***10] of labor relations that grows out of the history of hostility in some states to the labor movement." (Emphasis added.) National Metalcrafters, 784 F.2d at 825-26.

[*674] As we have stated, plaintiffs are members of two unions. Entitlement to vacation and severance pay is set forth in the provisions of the respective collective-bargaining agreements. The following is language from Local 257-C's collective-bargaining agreement relating to severance pay:

"25.01. The employer agrees that in the event of the closing of the plant due to a consolidation or liquidation, two weeks severance pay consisting of 75 hours pay at the employee's straight time hourly rate of pay will be given to all employees who have been employed for more than a year and who lost their jobs due to such closing."

It is agreed among the parties that Local 171-B's agreement does not contemplate severance pay for the employees under the situation at issue. Both agreements set [*204] forth the number of vacation days to which each employee is entitled based upon his or her length of service.

Because plaintiffs' entitlement to vacation and/or severance pay stems from the collective-bargaining agreements, [***11] it would be necessary, in most circumstances, to look to the respective agreements and interpret the meaning of the terms stated therein. The success of plaintiffs' claims for pay would depend entirely on the terms of the agreements, not on state law. A contested issue as to whether each plaintiff was entitled to pay and if so, how much, would require a court to look to the provisions in the agreements, evaluate the employee status of each plaintiff, and calculate the amount due according to the terms in the agreements. Congress has mandated that federal law governs such situations in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes. Lingle, 486 U.S. at 404, 100 L. Ed. 2d at 417, 108 S. Ct. at 1880.

Typically, plaintiffs' state-law claims, such as those presented here, would be preempted by federal law because their claims depend entirely upon interpretation of the agreements. Entitlement to the pay requested is governed by the agreements, not state law, prompting the

notion of section 301 preemption, which follows the principle developed in Local 174 v. Lucas Flour Co., 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962): [***12]

[HN5]"If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is pre[empted] and federal labor-law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute." Lingle, 486 U.S. at 405-06, 100 L. Ed. 2d at 418-19, 108 S. Ct. at 1881.

[*675] National Metalcrafters, Livadas, Lueck, and Lingle consistently follow the same analysis in determining whether the plaintiff's claim was preempted by federal law: Does the claim require a court to interpret any term of a collective-bargaining agreement? Even though plaintiffs' claims, which were based upon the collective-bargaining agreements, would normally require interpretation, such is not the case here.

On the facts of the case before us, we find there is no need to invoke the national uniform policy of the LMRA for the trial court did not interpret, nor do we, plaintiffs' collective-bargaining agreements. [HN6]The parties presented the court with a stipulation that had already interpreted the [***13] agreements. Because of the stipulation, plaintiffs' claims do not require a court to construe the various provisions of the collective-bargaining agreements.

Had there been no stipulation, interpretation would have been necessary. The court would have had to refer to the agreements to determine the validity of each plaintiff's claim and, if valid, how much each plaintiff was due. With the stipulation, however, the court need not engage in that analysis. The court had before it the agreed amount due each plaintiff.

The stipulation presented to the trial court did not contain any reservations or limitations on defendants' part as to liability. The body of the stipulation read, in its entirety, as follows:

"Plaintiffs, by counsel, *** and defendants, by counsel, *** hereby stipulate to the court that plaintiffs were not paid severance pay and vacation pay, or its monetary equivalent[,] and that the amounts owed to each of the individual [*205]

plaintiffs are recited in Exhibits 1 and 2, which are attached hereto."

The stipulation was signed by the parties' respective counsel and had attached a list of plaintiffs' names with the corresponding amounts due. We note the stipulation was [***14] signed only by Kowa Printing's counsel and was not entered into by Kowa or Huston-Patterson. On its face, the stipulation sets forth (1) that plaintiffs were each owed severance and/or vacation pay, and (2) the amounts due each plaintiff. The trial court entered judgment in favor of plaintiffs, incorporating the stipulation presented. Both entitlement and the amounts due were nonissues; and therefore, no analysis or interpretation of the agreements was required.

As a result, plaintiffs were merely seeking payment of "wages" due and owing, a request that falls squarely within the Wage Act. The purpose of the Wage Act is to provide employees with a cause of action for the timely and complete payment of earned wages or final compensation. *Miller v. J.M. Jones Co.*, 198 Ill. App. 3d 151, 152, 555 [*676] N.E.2d 820, 821, 144 Ill. Dec. 461 (1990) (Fourth District). We find [HN7] the duty to pay plaintiffs' final compensation on the date of separation was a matter of state law rather than of contract interpretation when there was no dispute about the amounts due. We affirm the trial court's decision that plaintiffs' claims were based on a violation of section 5 of the Wage Act and were [***15] not preempted by the LMRA.

Because we find plaintiffs' claims were not preempted by federal law, defendants' argument that plaintiffs failed to exhaust all grievance procedures is moot and need not be addressed. See *Nagel v. Gerald Dennen & Co.*, 272 Ill. App. 3d 516, 524, 650 N.E.2d 547, 553, 208 Ill. Dec. 853 (1995) (exhaustion of nonjudicial remedies is not required prior to filing suit).

C. Application of the Wage Act

Defendants next contend plaintiffs failed to prove entitlement to a claim under the Wage Act because there was no evidence that (1) Kowa Printing wilfully violated the Wage Act and (2) Kowa and Huston-Patterson were "employers" within the meaning of the Wage Act.

Section 5 of the Wage Act [HN8] does not require that plaintiffs prove that the employer wilfully failed to pay the final compensation. It is enough, according to the statute, that plaintiffs were simply not paid by the next regularly scheduled payday after separation. See 820 ILCS 115/5 (West 2000). Kowa Printing acknowledges that plaintiffs were not paid; however, it argues that it was unable to pay the amounts due because the bank seized the business and all [***16] of its assets. That

unfortunate situation does not relieve the employer, Kowa Printing, of its responsibility to pay its employees their final compensation due. As a practical matter, Bank Illinois, as creditor, seized Kowa Printing's business and assets. Nonetheless, we affirm the trial court's judgment finding defendant Kowa Printing liable to plaintiffs for vacation and severance pay due.

Next, we decide whether Kowa, individually, and Huston-Patterson are liable as employers within the meaning of the Wage Act. Section 2 of the Wage Act [HN9] defines an "employer" as "any individual, partnership, association, corporation, business trust, *** or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed." 820 ILCS 115/2 (West 2000).

1. Kowa's Liability

Defendants contend that to include Kowa as an "employer" within the meaning of the Wage Act, the court would have to pierce the corporate veil of Kowa Printing. [**206] On the other hand, plaintiffs contend [**677] Kowa meets the definition of "employer" based on his role as the sole shareholder, officer, [***17] and director of Kowa Printing. Kowa, plaintiffs argue, had operational control over Kowa Printing and acted directly and indirectly in the interest of Kowa Printing in relation to the employees.

In *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 920, 923 (N.D. Ill. 1989), the court held [HN10] the officer of a corporation was an "employer" within the meaning of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§ 201 through 219 (1988)). There, the Secretary of Labor brought suit against the employer defendants for various violations of the FLSA. In determining whether the individual corporate officer, Richard Lunde, was liable for the violations, the court looked to the FLSA's definitions, which provided that an "employer" was "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1988).

Because the FLSA's definition of "employer" and the Wage Act's definition of "employer" are identical, we find *McLaughlin* provides some guidance to the issues before us. In *McLaughlin*, the court dispensed with the defendants' argument that [HN11] piercing the corporate [***18] veil was necessary to hold the officer individually liable as an employer. In so doing, the court, quoting *Gambino v. Index Sales Corp.*, 673 F. Supp. 1450, 1455 (N.D. Ill. 1987), said:

"[]The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered

enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.

* * *

This court is of course aware of the basic insulation from personal liability normally afforded individuals when they do business in corporate form. But the uniform judicial reading of the FLSA definition of 'employer' has been that such a broad-sweep definition was intended to strip away that insulation where the corporation-controlling individual has opted to prefer the payment of other corporate debts to the payment of obligations running to corporate employees and given special statutory recognition by Congress.["] McLaughlin, 714 F. Supp. at 923.

Applying this analysis, the court employed an expansive reading of "employer," rejected the piercing-the-corporate-veil, common-law interpretation offered by the defendants, [***19] and held that an individual who controls corporate operations (and the terms and conditions of employees' employment therein) is an "employer" under the FLSA. McLaughlin, 714 F. Supp. at 923.

[*678] Likewise, in Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983), David Agnew, the individual officer, was held to be an employer within the meaning of the FLSA and was liable to the employees for the company's failure to pay overtime and minimum wage for three weeks. In Gambino, 673 F. Supp. at 1456, Donald Keenan, the president, director, and sole shareholder of the corporation employer was individually liable for the company's failure to make timely contributions to the employees' pension trust for over two years.

We find significant a major distinction between the facts of McLaughlin, Donovan, and Gambino and the facts before us. In McLaughlin, Donovan, and Gambino, the corporate officer knew, or should have known by the nature of his involvement with the company, that the company was [**207] not paying the employees as it should, yet he allowed the practice to continue. He was aware of the company's violations and arguably [***20] made the conscious decision to not comply with the FLSA. Here, we have a completely different situation. Kowa Printing paid its employees until the bank took control of the business. The evidence did not indicate that Kowa knew of the bank's plan to seize the company that day and terminate the employees. Kowa most likely

knew the situation was inevitable, but he did not opt to pay others in lieu of paying plaintiffs. They were paid through their last pay period before being asked to leave.

Plaintiffs cite no authority factually similar to the case *sub judice*, which holds a corporate officer individually liable without the requisite *scienter* implicated in sections 13 [HN12](officer or agent of corporation is deemed to be an employer if he or she *knowingly* permits employer to violate the Wage Act) and 14(a) (employer or agent of employer is guilty of misdemeanor if he is able yet wilfully fails to pay employee) of the Wage Act. 820 ILCS 115/13, 14(a) (West 2000). The parties have not cited, nor has our own research disclosed, any case holding an "innocent" corporate officer individually liable under section 5 of the Wage Act.

Due to the lack of authority [***21] in Illinois, we have looked to decisions of other states and found a Colorado case of particular interest. In Leonard v. McMorris, 63 P.3d 323 (Colo. 2003), the Colorado Supreme Court held [HN13]the corporation's officers were not individually liable for unpaid wages to the employees under Colorado's Wage Claim Act (Act) (Colo. Rev. Stat. §§ 8-4-101 through 8-4-127 (2002)). The court held the Act's definition of "employer" was ambiguous on the question of an officer's personal liability.

In Leonard, the employer, NationsWay, a trucking firm, filed for bankruptcy protection under Chapter 11 (11 U.S.C § 1101 *et seq.* (2000)). Upon the filing of the petition, NationsWay terminated several [*679] employees and did not pay wages and other compensation that became due thereafter because the Bankruptcy Code's automatic stay provision prevented the corporation from making the payments. Leonard, 63 P.3d at 325. Leonard claimed the officers of NationsWay were personally liable for the unpaid wages. The federal court found the officers individually liable. The officers appealed to the United States Court of Appeals [***22] for the Tenth Circuit, which certified questions of Colorado law to the Colorado Supreme Court due to the lack of controlling precedent. The Colorado Supreme Court looked to the Act to ascertain the legislative intent. Leonard, 63 P.3d at 326.

[HN14]In Colorado's Act, the definition of "employer" included "every person, firm, partnership, association, corporation, *** and any agent or officer thereof, of the above mentioned classes, employing any person in Colorado." Colo. Rev. Stat. § 8-4-101(6) (2002). Comparing section 13 of our Wage Act and the relevant section of Kansas's statute, the court found that Colorado's definition did not include "any words stating that officers and agents of a corporation are individually liable for wage and compensation payment due under the employment contract." Leonard, 63 P.3d at 327. The court noted

that Illinois's Wage Act demonstrated how a legislature may choose to pierce the corporate veil and make some officers and agents personally liable *in particular circumstances* for payment of unpaid wages. *Leonard*, 63 P.3d at 327. Due to the absence of such language in Colorado's [***23] Act and due to the general principles of corporate law that provide personal immunity to corporate officers and agents, the court refused to [**208] read into the statute the ability to hold an officer or agent individually liable. *Leonard*, 63 P.3d at 327.

The court then looked to the legislature's intent on the question of joint and several officer liability and concluded that the legislature did not intend to impose personal liability on officers and agents that is equal to the corporation's liability. *Leonard*, 63 P.3d at 328. This conclusion was based upon the language actually utilized in the statute and the principles set forth in Colorado's long-standing corporate law, which, the court found, the legislature did not intend to supersede. *Leonard*, 63 P.3d at 328.

The court found that Colorado's Act, unlike those of Illinois and Kansas, did not contain words making officers and agents personally liable for wage payment. *Leonard*, 63 P.3d at 330. Citing many cases that reiterate the inherent purpose of incorporation with respect to insulating an officer from personal liability, the court held the legislature intended the [***24] principles of corporate law to function in the context of the Act, not to displace them without specifically saying so. *Leonard*, 63 P.3d at 332. The court stated:

[*680] "Personal liability of officers for wages in the event of business insolvency would be a sharp departure from corporate law principles, and we would expect the General Assembly to state such intent specifically or by necessary implication. No such language or evident intent appears in Colorado's Wage Claim Act." *Leonard*, 63 P.3d at 332.

We borrow from the Colorado Supreme Court's analysis and hold that [HN15]if the legislature intended for corporate officers or agents to be personally liable in *all* situations where that officer or agent exercises operational control over the corporation and its employees, it would have so stated and it would not have limited that personal liability to situations where a plaintiff must prove the officer or agent knowingly or wilfully aided the corporation in a violation of the Wage Act, the situation that is specifically set forth in sections 13 and 14(a). See 820 ILCS 115/13, 14(a) (West 2000).

We hold individual officers [***25] or agents of a corporation are not "employers" within the meaning of section 5 of the Wage Act without first implicating the officers' personal liability under section 13 or 14(a). Because there was no evidence that Kowa knowingly or wilfully aided or allowed Kowa Printing to violate provisions of the Wage Act by not paying the vacation or severance pay due, we find he is not personally liable for the compensation due plaintiffs upon BankIllinois's takeover of the business. We reverse the trial court's judgment finding Kowa individually liable to plaintiffs.

2. Huston-Patterson's Liability

Defendants argue that Huston-Patterson is a completely separate entity from Kowa Printing and is not deemed plaintiffs' "employer" within the meaning of the Wage Act. Plaintiffs claim that because Huston-Patterson and Kowa Printing did business under the same service-mark, The Kowa Group, and because Huston-Patterson performed all of the administrative duties, including payroll for Kowa Printing, it meets the definition of "employer" and is liable to plaintiffs for unpaid compensation.

Although the decision was made in the context of the FLSA, *McLaughlin* is instructive on this issue. [***26] In *McLaughlin*, the plaintiffs claimed two separate corporations were joint employers and thus responsible for the FLSA violations. *McLaughlin*, 714 F. Supp. at 923. The two corporations, Lunde Truck Sales (Sales) [**209] and Lunde Leasing (Leasing), shared employees in that all employees were technically employed by Sales, but some were directed to work at Leasing's facility and performed duties at Leasing's directions. Sales and Leasing were under the common control of LTS, Inc., a holding company, which was in turn controlled by Lunde, the corporate officer and manager of [*681] day-to-day operations of all corporations. *McLaughlin*, 714 F. Supp. at 924.

In determining whether Sales and Leasing were joint employers, the court referred to the Seventh Circuit's decision in *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205 (7th Cir. 1986). The *Karr* court held that [HN16]in order to determine whether companies were joint employers, it must focus on the "economic reality" of the situation and consider the following factors issued by the Wage and Hour Administrator (29 C.F.R. § 791.2(a) (1989)) in evaluating the existence [***27] of a joint employment relationship:

""(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." McLaughlin, 714 F. Supp. at 924, quoting Karr, 787 F.2d at 1207.

In McLaughlin, the court held that the economic reality of the case was that Leasing exercised control over the employees at its site, even though those employees were technically employed by Sales, and thus were joint employers, both liable to plaintiffs. McLaughlin, 714 F. Supp. at 924-25.

Following the reasoning in McLaughlin, we consider the "economic reality" of the relationship between Huston-Patterson and Kowa Printing. [***28] Huston-Patterson and Kowa Printing were separate corporate entities doing business out of separate facilities in different cities. However, Kowa Printing hired Huston-Patterson to exclusively perform its administrative duties, including payroll and bookkeeping. Each corporation had separate employees, even though, due to the management agreement, some Huston-Patterson employees worked out of the Kowa Printing facility. No evidence was presented that the Huston-Patterson employees who worked out of the Kowa Printing facility had any control over Kowa Printing employees. The Huston-Patterson employees were merely performing a service for Kowa Printing and had no authority over Kowa Printing's day-to-day operations or its employees.

Based on the facts before us, we find that [HN17]merely hiring a firm to perform a service for an employer for remuneration does not make [*682] that hired firm an "employer" to the employees of the hiring company. We find Huston-Patterson, despite being registered under the same servicemark as Kowa Printing and despite being owned and operated by the same individual, is a completely separate corporation with its own employees, duties, and records. It is not an "employer" [***29] within the meaning of the Wage Act with respect to plaintiffs and, therefore, is not liable for plaintiffs' unpaid compensation. We reverse the trial court's judgment finding Huston-Patterson liable for the unpaid compensation of Kowa Printing's employees.

[**210] D. Award of Prejudgment Interest

Defendants claim the trial court erred in awarding 5% interest from April 21, 2003, the date of the trial court's written decision, through September 29, 2003, the date of entry of the judgment. Defendants claim the court was without authority to award the interest under section 2 of the Illinois Interest Act (815 ILCS 205/2 (West 2000)) because defendants' failure to pay plaintiffs immediately upon the trial court's decision did not constitute an "unreasonable and vexatious delay in payment."

Plaintiffs argue that the trial court was correct in awarding interest because as of the date of the court's decision and despite the fact the final judgment was not entered until September 29, 2003, the issues of liability and the amounts due had been determined, and defendants' failure to pay thereafter was "unreasonable and vexatious."

We find authority for the trial court's [***30] award in section 2-1303 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1303 (West 2000)), which states in relevant part:

[HN18]"Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied ***. When judgment is entered upon any award, report[,] or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment."

Our supreme court has also held, in construing section 2-1303, that

[HN19]"under the judgment interest statute, the date an award, report, or verdict is rendered is the date on which interest begins to accrue. If there is a delay between the rendering of the award, report, or verdict and entry of judgment thereon, interest shall be assessed from the date the award is made and included in the judgment when it is entered. From the date of that judgment forward, 'post[.]judgment' interest applies until the judgment debtor tenders full payment along with any accrued interest." (Emphasis omitted.) Illinois [*683] State Toll Highway Authority v. Heritage Standard Bank & Trust

Co., 157 Ill. 2d 282, 301, 626 N.E.2d 213, 223, 193 Ill. Dec. 180 (1993). [***31]

Neither party argued the applicability of section 2-1303, which addresses and resolves the contention of error. The trial court's decision, reflected in an 11-page written opinion dated April 21, 2003, was an "award, report, or verdict" within the meaning of the Code; thus, the trial court was correct in awarding interest from April 21, 2003. Plaintiffs did not cross-appeal. We affirm the trial court's judgment.

E. Award of Attorney Fees

Finally, defendants argue the trial court erred in awarding two plaintiffs, David L. Kelley and Bruce M. Overstreet, attorney fees pursuant to the Attorney Fees Act (705 ILCS 225/0.01 through 1 (West 2000)). The trial court awarded these two plaintiffs \$ 28,289.53 in attorney fees because the amounts awarded to them exceeded their pre-suit demand.

Section 1 of the Attorney Fees Act sets forth as follows:

[HN20]"Whenever an *** employee brings an action for wages earned and due and owing according to the terms of the employment, and establishes by the decision of the court or jury that the amount for which he or she has brought the action is justly due and owing, and that a demand was made in writing at least [three] [***32] days before the action was brought, for a sum not exceeding the amount so found due and owing, then [**211] the court shall allow to the plaintiff a reasonable attorney fee of not less than \$ 10[.00], in addition to the amount found due and owing for wages, to be taxed as costs of the action." 705 ILCS 225/1 (West 2000).

The well-accepted rule in Illinois is that the Attorney Fees Act at issue [HN21] must be considered in derogation of the common law and is therefore to be strictly construed. Swanson v. Village of Lake in Hills, 233 Ill. App. 3d 58, 67, 598 N.E.2d 430, 436, 174 Ill. Dec. 233 (1992). The "statute must be complied with in every particular to entitle the plaintiff to recover attorney fees." Swanson, 233 Ill. App. 3d at 67, 598 N.E.2d at 436, quoting Caruso v. Board of Trustees of the Public School Teachers' Pension & Retirement Fund, 129 Ill. App. 3d 1083, 1087, 473 N.E.2d 417, 420, 85 Ill. Dec. 49 (1984).

On August 10, 1999, plaintiffs collaboratively sent a demand letter to Kowa and to Huston-Patterson. Attached to the letters were listings of the name, address, and amount claimed due for each [***33] plaintiff. Plaintiffs' complaint was filed January 26, 2000. Of the 35 plaintiffs' demands, only 2, David L. Kelley and Bruce M. Overstreet, were awarded more than they demanded.

Defendants argue that plaintiffs' demand letters were not sent to plaintiffs' employer. Because Kowa Printing was no longer in business [*684] at the time the demand letters were sent, we find it was proper to demand payment from the sole shareholder, officer, and director of the former employer. Kowa Printing cannot claim it did not receive notice because the letters were sent to Kowa. Kowa was the owner and operator of the employer and the only one to whom demand would have been logical.

Strictly construing the statute requires affirming the trial court's award of attorney fees. Plaintiffs Kelley and Overstreet made a written demand directly to the employer at least three days prior to filing suit for a sum not exceeding the amount found due and owing. We find no error in the court's award.

III. CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part.

Affirmed in part and reversed in part.

COOK and McCULLOUGH, JJ., concur.

LEXSEE

BALTIMORE HARBOR CHARTERS, LTD. v. FRANK JOSEPH AYD, III

No. 114, September Term, 2000,

COURT OF APPEALS OF MARYLAND

365 Md. 366; 780 A.2d 303; 2001 Md. LEXIS 613

September 12, 2001, Filed

DISPOSITION: [***1] JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH INSTRUCTION TO VACATE THAT PART OF THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY DISMISSING RESPONDENT'S CLAIM UNDER THE MARYLAND WAGE PAYMENT AND COLLECTION ACT AND TO REMAND THE CASE TO THE CIRCUIT COURT FOR A NEW TRIAL OF THAT CLAIM IN ACCORDANCE WITH THIS OPINION. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY THE PETITIONER.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner corporation challenged the decision of the Court of Special Appeals (Maryland), which ordered a new trial on the issue of whether the corporation violated the Maryland Wage Payment and Collection Law (Wage Act), Md. Code Ann., Lab. & Empl. § 3-501 et seq., with regard to respondent, a former employee and shareholder. The reviewing court granted the petition for a writ of certiorari.

OVERVIEW: The jury returned a verdict in favor of the employee/shareholder on his breach of contract and unjust enrichment claim. The jury returned a verdict for the corporation on its claim of breach of fiduciary duty. The reviewing court held that the employee/shareholder's claim should have been reinstated under the Wage Act. The reviewing court adopted particular factors with respect to determining whether the employee/shareholder was an employee within the meaning of the Wage Act, and that issue was for the jury to decide. It would have been possible for a reasonable trier of fact to conclude that the corporation did not withhold payment of wages owed to the employee/shareholder at the time he termi-

nated his employment as a result of a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1.

OUTCOME: The judgment of the appellate court was affirmed in part and vacated in part. The case was remanded with instruction to vacate that part of the circuit court judgment dismissing the employee/shareholder's claim under the Wage Act and to remand the case to the circuit court.

CORE TERMS: Wage Act BHC, salary, charter, bona fide, owed, servant, regular, boat, remittitur, informal, weekly, termination of employment, independent contractors, termination, terminated, pay period, occupation, COLLECTION ACT, treble damages, trier of fact, consulting, ownership, payroll, unpaid, finder, Collection Law, good faith, classified, trip, Wage Act

LexisNexis(R) Headnotes

Banking Law > Bank Holding Companies > General Overview

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN1]Although a plaintiff who accepts a remittitur would ordinarily be barred from seeking appellate review, Md. Code Ann., Cts. & Jud. Proc. § 12-301 states that a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

Banking Law > Bank Holding Companies > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[HN2]See Md. R. 2-519(a).

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[HN3]The issue traditionally presented by a motion for judgment is a purely legal one--whether, as a matter of law, the evidence produced during the non-moving party's case, viewed in a light most favorable to the non-moving party, is legally sufficient to permit a trier of fact to find that the elements required to be proved by the non-moving party in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to the non-moving party; it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts in the evidence.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[HN4]In cases tried by a jury, a trial court entertaining a motion for judgment must view the evidence and inferences to be made from the evidence in the light most favorable to the non-moving party.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN5]See Md. Code Ann., Lab. & Empl. § 3-501.

Governments > Legislation > Interpretation

[HN6]Because the words of a statute cannot be given full and complete meaning if viewed in isolation, the court considers a statute as a whole rather than analyzing the components as separate and distinct from one another, so as to not render any portion of the statutory scheme meaningless, surplusage, superfluous or nugatory.

Governments > Legislation > Interpretation

[HN7]When the court pursues the context of statutory language, it is not limited to the words of the statute as they are printed. It may and often must consider other external manifestations or persuasive evidence, including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which the court reads the particular language before it in a given case.

Governments > Legislation > Interpretation

[HN8]When the words of the statute are plain and unambiguous, according to their commonly understood meaning, the court need not look to external sources and our inquiry ends. The court may always consider, however, relevant case law, legislative history, and other material concerning the drafting of the statute in order to understand the context in which it was enacted.

Governments > Legislation > Interpretation

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN9]In construing the statute, it is important to understand the particular problem or problems the legislature was addressing, and the objectives it sought to attain with the creation of the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN10]The enactment of the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq., gave the State the ability to litigate wage disputes on behalf of private citizens who were suffering the abuse of non-payment of wages from their employers.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN11]See Md. Ann. Code art. 100, § 94 (1957, 1966 Cum. Supp.).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN12]See 1991 Md. Laws ch. 8, § 2, codified at Md. Code Ann., Lab. & Empl. § 3-502.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN13]See 1991 Md. Laws ch. 8, § 2, codified at Md. Code Ann., Lab. & Empl. § 3-505.

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits
[HN14]See Md. Code Ann., Lab. & Empl. § 3-507.1.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN15] Md. Code Ann., Lab. & Empl. § 3-502 relates solely to the frequency of payment to administrative, executive, and professional employees; it does not obviate the Maryland Wage Payment and Collection Law's, Md. Code Ann., Lab. & Empl. § 3-501 et seq., protection for such employees. The court may consider the Maryland Legislature's explicit exception of administrative, executive, or professional employees in § 3-502 as evidence that the absence of a similar exception in Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-505, -507.1 reflects the legislature's intent that those provisions would cover all employees.

Governments > Legislation > Interpretation

[HN16]The court has long applied the principle of statutory construction, *expressio unius est exclusio alterius*--the expression of one thing is the exclusion of another.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Governmental Employees

[HN17]Even where a state has not provided a definition of "employee" in a wage statute, the application of the statute may be limited through an exclusionary provision.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Torts > Vicarious Liability > Independent Contractors Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors

[HN18]Where a statute applies to "employees" but fails to provide a definition for the term "employee," this term may be interpreted in harmony with the common-law distinctions observed between the terms employees or agents, and those classified as independent contractors. In the context of the doctrine of respondeat superior, the test in determining whether a person is a servant or an

independent contractor is whether the employer has the right of control over the employee in respect to the work to be performed. Also, in the context of the former Maryland Workmen's Compensation Act, Md. Code Ann. art. 101 (1985), (repealed in its entirety by 1996 Md. Laws ch. 10, § 15), the words "employer" and "employee" in the statute were equivalent to and synonymous with the words master and servant.

Governments > Courts > Common Law

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employers

[HN19]The test for determining the existence of an employer and employee relationship under the former Maryland Workmen's Compensation Act, Md. Code Ann. art. 101 (1985), (repealed in its entirety by 1996 Md. Laws ch. 10, § 15), is the same as the common law rules for ascertaining the relation of master and servant. That test inquires whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. In administering this test, we have established five criteria to consult for guidance. These include: (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer.

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > Vicarious Liability > Employers

[HN20]The doctrine of respondeat superior was founded on the principle that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer it. The courts, however, have confined the doctrine within limits as narrow as are consistent with the true interests of society. Later, it was held that the doctrine does not apply to independent contractors. The doctrine is not applicable where the employee is a contractor, pursuing an independent employment, and by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done.

Business & Corporate Law > Agency Relationships > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

Torts > Vicarious Liability > Employers

[HN21]The theory upon which liability under the doctrine of respondeat superior is predicated is that the master is constructively present, so that the negligence of the servant is the negligence of the master. An essential element of the relation of master and servant is that the master shall have control of the employment and all of its details.

Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN22]In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN23]In determining whether one who performs services for another is an employee or an independent contractor, factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN24]In applying the factors relevant to determining whether one who performs services for another is an employee or an independent contractor, the most crucial consideration is the right to exercise complete control over the work, including its details. Maryland courts have applied with equal force, an emphasis on the element concerning the master or employer's right to control the work of the servant or employee in cases relating to other statutes and common-law causes of action.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN25]A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN26]In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Independent Contractors

[HN27]The factors considered in opinions regarding the doctrine of respondeat superior and construction of the term "employee" under the common law principles, as

well as the case law interpreting the term "employee" under the wage act statutes of other jurisdictions provide an appropriate framework for determining whether an individual is an employee covered by the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees

Torts > Vicarious Liability > Employers

Torts > Vicarious Liability > Employers > Activities & Conditions > Intentional Torts

[HN28]The factors applicable to determining whether an individual is an employee covered by the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq., include whether the employer actually exercised or had the right to exercise control over the performance of the individual's work; whether the individual's service is either outside all the usual course of business of the enterprise for which such service is performed; whether the individual is customarily engaged in an independently established trade, occupation, profession, or business; whether it is the employer or the employee who supplies the instrumentalities, tools, and location for the work to be performed; whether the individual receives wages directly from the employer or from a third party for work performed on the employer's behalf; and whether the individual held an ownership interest in the business such that the individual had the ability and discretion to affect the general policies and procedures of the business.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN29]The Maryland Wage Payment and Collection Law (Wage Act), Md. Code Ann., Lab. & Empl. § 3-501 et seq., contains no provision which would exclude someone who is otherwise an employee from statutory protection based on the employer's failure to set regular pay periods. Md. Code Ann., Lab. & Empl. § 3-502. To follow an argument that the absence of a regular pattern of payment should preclude an individual from being classified as an employee would undermine the protective purposes of the Wage Act by leaving those employees who suffer the most egregious abuse of non-payment of wages by their employers from ever recovering the money owed to them for services rendered.

Governments > Legislation > Interpretation

[HN30]The court avoids construing a statute so as to lead to results that are unreasonable, illogical, or inconsistent with common sense.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN31]If a trier of fact concludes that a party is an employee entitled to protection under the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq., the employer cannot escape liability for the wages owed based on the employee's conduct in refraining from taking his salary during the employer's protracted periods of financial instability.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

[HN32]The existence of a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1 is a question of fact left for resolution by the jury, not the trial judge.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN33]In the context of finding whether there is a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1, all of the definitions articulated by the courts focus really on whether the party making or resisting the claim has a good faith basis for doing so, whether there is a legitimate dispute over the validity of the claim or the amount that is owing. The issue is not whether a party acted fraudulently; fraud is certainly inconsistent with the notion of "bona fide" or "good faith," but it is not required to establish an absence of good faith. The question, simply, is whether there was sufficient evidence adduced to permit a trier of fact to determine that the employer did not act in good faith when it refused to pay the employee.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

[HN34]The existence of a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1 affects whether treble damages, attorneys' fees, and costs may be awarded at the discretion of the jury. A jury may find that a bona fide dispute existed between an employer and an employee over the amount of wages owed to the employee at the time of termination of employment while also finding that the employer owes the employee money for services rendered. A finding by the jury that a bona fide dispute existed at the time of termination of employment ends any inquiry as to whether the employee would be entitled to receive additional damages according to the provisions of § 3-507.1.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN35]The failure to pay an employee wages conceded to be owed to him for work performed prior to the termination of his employment is a violation of Md. Code Ann., Lab. & Empl. § 3-505 of the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501 et seq., regardless of which party terminates the employment arrangement, and regardless of whether the termination was in violation of an employment contract. The jury however, may consider the employer's ability to pay the disputed amount at the time of discharge in determining whether the employer acted with good faith concerning the existence of a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1.

Banking Law > Bank Holding Companies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN36]The "bona fide dispute" provision of Md. Code Ann., Lab. & Empl. § 3-507.1 contains no language which would permit an employer to withhold the amounts it conceded it owed to an employee. Thus, where an employer alleges the existence of a bona fide dispute as to the total amount of wages owed to an employee, yet concedes that a certain amount of wages are due, the employer acts at his or her peril in failing to pay the conceded amount. Even where the finder of fact agrees with the employer concerning the total sum owed, the penalty provision of § 3-507.1, which allows for an

employee to be awarded up to three times the amount of wages owed, will apply to those amounts which were not in dispute but for which the employer failed to make timely payment upon termination as specified in Md. Code Ann., Lab. & Empl. § 3-505.

Banking Law > Bank Holding Companies > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN37]Matters of witness credibility and a weighing of the facts to determine the existence of a bona fide dispute under Md. Code Ann., Lab. & Empl. § 3-507.1 are properly left for resolution by the jury on remand.

JUDGES: Bell, C.J. Eldridge Raker Wilner Cathell Harrell Battaglia, JJ. Opinion by Battaglia, J.

OPINION BY: BATTAGLIA

OPINION

[**305] [*369] Petitioner Baltimore Harbor Charters, Ltd. challenges the decision of the Court of Special Appeals, Baltimore Harbor Charters v. Ayd, 134 Md. App. 188, 759 A.2d 1091 (2000), which ordered a new trial on the issue of whether BHC violated the Maryland Wage Payment and Collection Law, Maryland Code, § 3-501, et seq. of the Labor and Employment Article (1991, 1999 Repl. Vol.), with regard to a former employee and former [*370] shareholder of BHC, respondent Frank Joseph Ayd, III (hereinafter "Ayd").

I. Facts

In 1983, Ayd, who had a long-standing interest in boating and mechanics, [***2] purchased *Summer Flight*, a fifty-three foot Pacemaker boat. After a five year period of repair and restoration, *Summer Flight* finally received certification by the United States Coast Guard, permitting it to be used in a charter boat business in the Baltimore and Annapolis area. In 1989, Ayd and a friend, Suzanne Edwards, formed Baltimore Harbor Charters, Ltd. ("BHC"), to which Ayd's new wife, Carol, acceded as a shareholder and board member in 1991. In the same year, pursuant to an informal action of the Board of Directors of BHC, Ayd was "employed to perform management and consulting services on a part-time basis for the Corporation in consideration of the sum of \$ 200.00 per month, payable monthly until terminated by him or the Corporation on ninety (90) days notice."

By 1993, the Ayds began divorce proceedings, precipitating an effort to sell their respective interests in

BHC. Additionally, Edwards had resolved to leave BHC. During the same period, Robert Berman, a high school friend of both Ayd and his brother, was attempting to explore new investment opportunities. He purchased all of the outstanding shares of common stock of BHC from Ayd, Carol Ayd, and Suzanne Edwards [***3] for approximately \$ 3,500. The purchase of the common stock of BHC, however, did not include use of Ayd's boat, *Summer Flight*, in the charter boat business.

In the Spring of 1994, Berman purchased a seventy-five foot yacht, *The Wrecking Crew*, for \$ 365,000 from a boat dealer in Fort Lauderdale, Florida, to be used in BHC. Ayd organized and performed substantial improvements to *The Wrecking Crew*, later renamed *The Royal Blue*, in order to bring the vessel within the appropriate standards for Coast Guard certification and prepare it for use in the charter business.

[*371] After the purchase of the stock of BHC, Berman became Vice President of BHC, named Ayd as President and Treasurer of the company, and made Rita O'Brennan, Ayd's sister, the Corporate Secretary. Throughout the transition of ownership of BHC, Ayd continued to perform the same managerial and consulting functions he had performed for BHC since the time of the company's formation in 1989. From the winter of 1994 until August of 1996, Ayd was the sole signatory on BHC's checking account. Berman, however, believed that during this time period he was also an authorized user of the account.

Both BHC and Ayd agreed [***4] that from the time Berman purchased BHC in February [**306] 1994 to the day Ayd resigned from the corporation, Ayd was entitled to compensation in the amount of a \$ 200 captain's fee per charter and a \$ 200 per month administrative fee. ¹ Ayd, however, asserted that pursuant to an "Informal Action of the Board of Directors of Baltimore Harbor Charters, Ltd.," which was memorialized on February 25, 1994, he was to be paid the sum of \$ 576.92 per week for management, consulting and other services, as well as for performing his functions as President and Treasurer of BHC. ² The original executed document, which was to be [*372] placed in the minute book of the corporation following its execution, was not located at the time of trial in this matter. Berman maintained that the informal action of the board on February 25, 1994 never took place. A copy of the executed document was produced by Rita O'Brennan pursuant to a BHC subpoena in November of 1997. ³

1 In July 1992, Ayd, his wife, and Edwards signed a document entitled "Informal Action of the Board of Directors of Baltimore Harbor Charters, Ltd.," which provided in relevant part as follows:

"Further Resolved: that Frank J. Ayd, III is hereby employed to perform management and consulting service on a part-time basis for the Corporation in consideration of the sum of \$ 200.00 per month, payable monthly until terminated by him or the Corporation on ninety (90) days notice."

This agreement referring to the \$ 200.00 per month administrative fee to be paid to Ayd for his "management and consulting services" remained in effect at the time Berman purchased BHC. The parties also had an oral agreement, which is not in dispute, concerning Ayd's entitlement to a fee of \$ 200.00 per charter trip that he captained.

[***5]

2 The informal action of February 25, 1994, signed by Berman, Ayd, and O'Brennan declared:

"The undersigned, constituting the members of the Board of Directors of Baltimore Harbor Charters, Ltd., (BHC), a Maryland Corporation, in accordance with Section 2-408(c) of the Corporations and Associations Article of the Annotated Code of Maryland, do hereby take the actions below set forth, and to evidence their waiver of any right to dissent from such actions, do hereby consent as follows:

RESOLVED: that Frank J. Ayd, III is hereby employed by BHC to perform management, consulting, and such other services as the Board of Directors may direct, and to serve as President of BHC, in consideration of the sum of \$ 576.92 per week, payable weekly until terminated by him or the Corporation on ninety (90) days notice.

The above resolution constitutes the Informal Action of the Board of Directors of Baltimore Harbor Charters, Ltd., as of the 25th day of February, 1994."

3 In addition to the various agreements concerning Ayd's salary, the parties also had an oral agreement by which Berman sublet a boat slip at Tindeco Wharf from Ayd for \$ 430.00 per month for *The Royal Blue*.

[***6] Under the terms of the informal board action of February 25, 1994, Ayd did, in fact, receive six payments of the \$ 576.92 salary for his services in the winter of 1994. BHC, however, did not have an adequate cash flow thereafter, which resulted in Ayd being paid only sporadically for his administrative services and captain's fees and not receiving any further payments of the \$ 576.92 weekly salary.

In March of 1994, Ayd's boat, *Summer Flight*, which also served as his residence, had to go into drydock for repairs. Berman gave Ayd permission to stay onboard *The Royal Blue*, because Ayd was without funds and needed a place to live. Pursuant to this oral arrangement, Ayd designed and built small living quarters onboard *The Royal Blue*. Berman never objected to the modifications made by Ayd to *The Royal Blue*, nor did he ask Ayd for payment for living on the boat. At trial, however, Berman asserted that Ayd's residence on *The Royal Blue* served as a form of compensation for his services.

[**307] BHC continued to experience financial difficulties throughout 1995 and 1996. In August of 1996, Ayd received a letter from Berman explaining that Berman would be taking over [*373] the financial [***7] operation of BHC. Berman stated that he began asking Ayd for the company's books in the Spring of 1996, but perceived that Ayd was stalling him by not turning them over. Ayd asserted that prior to receiving the August 1996 letter, he received no indication that Berman was displeased with his work for the company. In late August of 1996, Berman closed the existing bank accounts for BHC and opened a new account without Ayd as a signatory.

After futile attempts to resolve their differences, Ayd sent a letter to Berman on August 26, 1996, indicating that if the two could not arrive at a mutual agreement by September 9, 1996 at 9:00 pm regarding the future of Ayd's position in the company, then Ayd would resign from BHC. The parties had one meeting to discuss Ayd's continued employment with BHC, with the issue of Ayd's salary being a point of contention. The parties failed to reach an agreement, and Ayd terminated his employment with BHC, as promised, on September 9, 1996. When he left BHC, Ayd took with him his personal effects, tools and other belongings which he had brought onto *The Royal Blue* from his boat, *Summer Flight*, as well as materials he had installed onto *The Royal Blue* [***8] *Blue* from *Summer Flight* so that *The Royal Blue* could use the boating slip Ayd rented for *Summer Flight*.

On July 9, 1997, Ayd sued BHC in the Circuit Court for Baltimore City, alleging breach of contract, *quantum meruit*, unjust enrichment, and a claim for unpaid wages in violation of the Maryland Wage Payment and Collec-

tion Act, (the "Wage Act"), Md. Code, Lab. & Emp. § 3-501 et seq. (1991, 1999 Repl. Vol.). The complaint alleged that Ayd had only been paid a total of \$ 9,861.55 in salary and administrative fees during the period of February 1994 to September 9, 1996. He alleged that he was entitled to payment of the \$ 576.92 weekly salary as specified in the informal action of the board, as well as unpaid tip fees of \$ 40.00 (twenty percent of the crew fee) per charter trip that he captained. Ayd sought a total of \$ 81,187.28 in unpaid wages under his breach of contract claim, treble damages totaling \$ 243,561.84 under the Wage Act, and \$ 300,000 on his claims of unjust enrichment and *quantum* [*374] *meruit*. BHC filed a counterclaim against Ayd alleging breach of a fiduciary duty, conversion, and trespass to chattels.

On January 13, 1999, a four-day jury trial began. [***9] At the close of Ayd's case-in-chief, both Ayd and BHC presented motions for judgment pursuant to Md. Rule 2-519 (1999), which were denied, with the exception of BHC's motion regarding Ayd's claims under the Wage Act. The trial court reserved decision on the Wage Act claim. Prior to instructing the jury, the trial judge ruled on the reserved issue and dismissed Ayd's claim under the Wage Act, stating as follows:

Alright [sic]. The Court is going to dismiss the Count. It's in the Court's view that the statute was not designed to cover the situation as outlined in the Plaintiff's case. The statute contemplates (1) a regular pay period, (2) where an employee is generally paid bi-weekly, and (3) in check or currency. In a light most favorable to the Plaintiff, the facts in this case show, that there was no regular pay periods. The Defendant controlled the, excuse me. The Plaintiff controlled the Defendant's accounts up to and including the date, in 1996, when the Defendant took over the books. He had the, he being the Plaintiff, had the control to write payroll [**308] checks himself and to pay himself whenever the cash was available. His testimony is that he voluntarily deferred during the [***10] time that he worked with Baltimore Harbor Charters, did not take any commissions or tips which may have been due him, voluntarily. The only thing of value that was consistently used during the period of 1994 to 1996 was a place to stay. That is the charter boat itself, and it is the view of this Court that these are not the facts, the types of situations that were covered by the wage and hour law. There-

fore, I'm going to dismiss Plaintiff's Count II.

The jury returned a verdict in favor of Ayd on his breach of contract claim and unjust enrichment claim, awarding him \$ 76,099.33 on each count. The jury returned a verdict in favor of BHC on the breach of fiduciary duty claim in the amount of \$ 4,000.00.

[*375] In response to the jury award, BHC filed a motion for a new trial, judgment notwithstanding the verdict, and remittitur. A hearing was held on the motions on February 26, 1999. The trial judge ruled that she would grant a new trial unless Ayd agreed to accept a remittitur reducing the jury award to \$ 66,237.78. On March 5, 1999, Ayd accepted the remittitur.

Thereafter, BHC filed an appeal and Ayd filed a cross-appeal with the Court of Special Appeals. ⁴ Ayd argued, *inter* [*376] *alia*, [***11] that the trial court erred as a matter of law in dismissing his claim for treble damages for BHC's violation of the Wage Act. In a reported decision, *Baltimore Harbor Charters, Ltd. v. Ayd*, 134 Md. App. 188, 759 A.2d 1091 (2000), the Court of Special Appeals held that, "administrative, executive, and professional employees, who under the Act may be paid irregularly or less frequently than the standard two-week pay period, are entitled to prompt payment of wages upon termination in accordance with section 3-505, and are entitled to the enforcement remedies provided in section 3-507.1." *Id.* at 208, 759 A.2d at 1101.

4 In the Court of Special Appeals, BHC argued that the Circuit Court for Baltimore City erred in denying its motion for a judgment notwithstanding the verdict based on BHC's failure to renew its motion for judgment at the close of all evidence. 134 Md. App. 188, 196, 759 A.2d 1091, 1095 (2000). BHC also argued that the trial court erred by failing to credit the full amount of money shown on Ayd's W-2 forms against the jury's award on Ayd's breach of contract claim in ordering the remittitur. *Id.* at 203, 759 A.2d at 1099. BHC also challenged the trial court's decision to admit a photocopy of the Informal Board Action of February 25, 1994 in evidence. *Id.* at 211, 759 A.2d at 1103. In his cross-appeal, Ayd challenged the trial court's decision to order a remittitur, and to dismiss his claim under the Wage Act. *Id.* at 193, 759 A.2d at 1093.

The Court of Special Appeals held that the trial court did not err in denying BHC's motion for a judgment notwithstanding the verdict. *Id.* at

198, 759 A.2d at 1096. With regard to both parties' issues concerning the remittitur, the Court of Special Appeals affirmed the trial court. *Id.* at 199, 759 A.2d at 1096.

The copy of the Informal Board Action of February 25, 1994 had been admitted in a group of corporate records without objection by counsel for BHC. BHC objected to submission of the copy to the jury, and the trial court overruled the untimely objection. The Court of Special Appeals affirmed the trial court's decision. *Id.* at 216, 759 A.2d at 1106. It remanded the case for a determination solely on Ayd's claim under the Wage Act. *Id.* at 211, 759 A.2d at 1103.

[HN1] Although a plaintiff who accepts a remittitur would ordinarily be barred from seeking appellate review, *see Kneas v. Hecht Company*, 257 Md. 121, 123-24, 262 A.2d 518, 520 (1970), § 12-301 of the Courts and Judicial Proceedings Article of the Maryland Code (1974, 1998 Repl. Vol.) states that "a plaintiff who has accepted a remittitur may cross-appeal from the final judgment." When BHC appealed the judgment of the Circuit Court to the Court of Special Appeals, it opened the door for Ayd's cross-appeal on the Wage Payment and Collection Act. *See Surratt v. Prince George's County*, 320 Md. 439, 461, 578 A.2d 745, 756 (holding that "a plaintiff who has accepted a remittitur may cross-appeal if the defendant in the case has noted an appeal, at least when the plaintiff has not accepted payment of the reduced judgment and filed an order of satisfaction"). Although Ayd accepted the remittitur, Ayd never received payment on the judgment and did not file an order of satisfaction in this case.

[***12] BHC filed a Petition for Writ of Certiorari pursuant to § 12-203 of the Maryland Code, Courts and Judicial Proceedings Article (1974, 1998 Repl. Vol.) and Maryland Rule 8-301 (2001), arguing that the trial court properly dismissed Ayd's claim under the Wage Act. We granted the petition and issued a writ of certiorari to consider that issue. ⁵ We hold that the trial court erred as a matter of law in dismissing the Wage Act claim, and accordingly, we affirm the decision of the Court of Special Appeals to reinstate Ayd's claim under the Wage Act. Therefore, we order that this case be remanded to the Circuit Court for Baltimore City for a trial on Ayd's Wage Act claim.

5 BHC presented the following questions in its Petition for Writ of Certiorari:

1. Did the Circuit Court properly dismiss the employee's claim under the Wage Collection Act?

2. Did the Circuit Court err in permitting into evidence a crucial document supposedly indicating a weekly salary for the employee, which document was challenged as a fabrication and which initially was excluded from evidence, because the employer's trial counsel supposedly failed to object to the inclusion of this same item in another exhibit containing corporate documents, which exhibit was admitted?

3. Did the Circuit Court err in failing to credit, against the revised judgment, the full amount represented by W-2 statements entered into evidence and establishing wages paid to the employee?

This Court, however, limited the order granting the petition to consideration of Ayd's claims under the Wage Act.

[***13] [*377] **II. Discussion**

In the case *sub judice*, the trial court dismissed Count II of Ayd's complaint, relating to the Wage Act, by partially granting BHC's motion for judgment. Pursuant to [HN2]Md. Rule 2-519(a), "A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." We have explained the formalities of the motion for judgment as follows:

[HN3]The issue traditionally presented by such a motion is a purely legal one - whether, as a matter of law, the evidence produced during [the non-moving party's] case, viewed in a light most favorable to [the non-moving party], is legally sufficient to permit a trier of fact to find that the elements required to be proved by [the non-moving party] in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to [the non-moving party]; it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts [***14] in the evidence.

The Driggs Corp. v. Maryland Aviation Admin., 348 Md. 389, 402, 704 A.2d 433, 440 (1998).

[HN4]In cases tried by a jury, a trial court entertaining a motion for judgment must view the evidence and inferences to be made from the evidence in the light most favorable to the non-moving party. See Metromedia Co. v. WCBM Maryland, Inc., 327 Md. 514, 518, 610 A.2d 791, 793 (1992)(quoting Md. Rule 2-519(b)); Allstate Ins. v. Miller, 315 Md. 182, 186, 553 A.2d 1268, 1270 (1989); Impala Platinum [*310] Ltd. v. Impala Sales, Inc., 283 Md. 296, 327, 389 A.2d 887, 905 (1978). Therefore, in reviewing the trial court's decision to grant BHC's motion for judgment, we must examine the elements of a cause of action under the Wage Act to determine whether there were any disputed issues of material fact or inferences to be made therefrom which would allow a jury to conclude [*378] that Ayd was an employee of BHC entitled to the protections of the Wage Act, and if so, whether Ayd would be entitled to receive treble damages for a violation of the Act along with court costs and reasonable attorneys' fees. See Nelson v. Carroll, 355 Md. 593, 600, 735 A.2d 1096, 1099 (1999). [***15]

The central component of both parties' arguments before this Court, and the argument which was dispositive for the trial court's dismissal of Ayd's Wage Act claim, is whether Ayd may properly be classified as an employee of BHC entitled to protection under the Wage Act. If Ayd is considered an employee for purposes of the Act, BHC argues that Ayd would not be entitled to treble damages, attorneys' fees, and costs in a successful action to recover his unpaid wages since there was a "bona fide dispute" as to the amount of wages owed to Ayd at the time he resigned his employment with BHC. The resolution of both arguments on this issue is a matter of statutory interpretation.

A. Ayd's Status as an Employee of BHC

We begin the process of interpretation by examining the plain meaning of the words of the statute to determine if it would be possible for a trier of fact to find that Ayd was an employee of BHC. See Mid-Atlantic Power Supply Ass'n v. Public Service Comm'n of Maryland, 361 Md. 196, 203-204, 760 A.2d 1087, 1091 (2000). The "definitions" portion of the Wage Act states as follows:

[HN5](a) *In general.* - In this subtitle the following words have the meanings [***16] indicated.

(b) *Employer.* - "Employer" includes any person who employs an individual in the State or a successor of the person.

(c) *Wage*. - (1) "Wage" means all compensation that is due to an employee for employment.

(2) "Wage" includes:

(i) a bonus;

(ii) a commission;

(iii) a fringe benefit; or

[*379] (iv) any other remuneration promised for service.

Maryland Code, § 3-501 of the Labor and Employment Article (1991, 1999 Repl. Vol.). The statute does not, however, contain a definition of the term "employee" as used therein.

[HN6]Because the words of a statute cannot be given full and complete meaning if viewed in isolation, we consider the statute as a whole rather than analyzing the components as separate and distinct from one another, so as to not render any portion of the statutory scheme "meaningless, surplusage, superfluous or nugatory." Government Employees Insurance Co. v. Insurance Comm'r, 332 Md. 124, 132, 630 A.2d 713, 717 (1993). As we have stated before,

[HN7]"when we pursue the context of statutory language, we are not limited to the words of the statute as they are printed.... We may and often must consider [***17] other external manifestations or persuasive evidence, including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, [**311] which becomes the context within which we read the particular language before us in a given case."

Tipton v. Partner's Management Co., 364 Md. 419, 435, 773 A.2d 488, 497-98 (2001)(quoting Kaczorowski v. Mayor & City Council of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628, 632-33 (1987)(internal quotations omitted). [HN8]When the words of the statute are plain and unambiguous, "according to their commonly understood meaning," we need not look to external sources and our inquiry ends. Chesapeake Amusements, Inc. v.

Riddle, 363 Md. 16, 28, 766 A.2d 1036, 1042 (2001)(quoting Chesapeake & Potomac Tel. Co. of Maryland v. Dir. of Fin. for Mayor and City Council of Baltimore, 343 Md. 567, 578, 683 A.2d 512, 517 (1996)). We may always consider, however, relevant case law, legislative history, and other material [***18] concerning the drafting of the statute in order to understand the context in which it was enacted. See Mayor & City Council of Baltimore v. Chase, 360 Md. 121, 131, 756 A.2d 987, 993 [*380] (2000)("the resort to legislative history is a confirmatory process; it is not undertaken to contradict the plain meaning of the statute."). [HN9]It is important to understand the "particular problem or problems the legislature was addressing, and the objectives it sought to attain" with the creation of the Wage Act. Sinai Hosp. of Baltimore v. Department of Employment and Training, 309 Md. 28, 40, 522 A.2d 382, 388 (1987).

In 1966, the General Assembly enacted the Wage Act, codified at Code, Art. 100, § 94 (1957, 1966 Cum. Supp.), relating generally "to wage payment and collection, imposing requirements as to the regularity, frequency and medium of wage payments and permissible deductions therefrom; providing for penalties, and conferring enforcement duties and powers on the Commissioner of the Department of Labor and Industry." 1966 Md. Laws, ch. 686. ⁶ Thus, [HN10]the enactment of [*381] the Wage Act gave the State the ability to litigate wage disputes on behalf of private citizens [***19] who were suffering the abuse of [**312] non-payment of wages from their employers.

⁶ [HN11]The 1966 version of the Maryland Wage Payment and Collection Law states as follows:

(a) *Pay periods; payment on termination of employment*. - All employers engaged in the operation of any business establishment shall establish regular pay periods and shall pay salaried employees, except executive, administrative, and professional employees, and employees paid on an hourly rate at least once every two weeks or twice in each month. Upon termination of employment an employee shall be paid all wages or salaries due him for work performed prior thereto; such payment shall be made to said employee, or to his authorized agent, on or before the date on which he would have been paid for such work had his employment not been terminated.

(b) *Method of payment*. - Payment of wages or salaries shall be in lawful money of the United

States or check payable at face value upon demand in lawful money of the United States.

(c) *Authorization to withhold part of wages or salaries; statement of gross wages and deductions.* - No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. An employer, upon request of his employee, shall furnish the latter a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deductions therefrom.

(d) *Penalty.* - An employer who violates this section shall be fined not less than fifty dollars nor more than three hundred dollars.

(e) *Proceedings to enforce compliance with section.* - The Commissioner of Labor and Industry may require a written complaint of the violation of this section and, with the written and signed consent of an employee, may institute proceedings on behalf of an employee to enforce compliance with this section, and to collect any moneys unlawfully withheld from such employee which shall be paid to the employee entitled thereto.

Maryland Code, Art. 100, § 94 (1957, 1966 Cum. Supp.)

[***20] The laws relating to Labor and Employment under the Wage Act were recodified in 1991 as part of the general code revision effort. The Overview to House Bill 1, which was enacted as the Labor and Employment Article of the Maryland Code, described the revisions as follows:

The goal in revising is to rewrite the law in a more clear and concise manner without making any substantive changes. Where there is clear legislative intent, inconsistent provisions are reconciled, obsolete language is deleted, and gaps in the statute are filled. Thus, while the language of a revision differs from the derivative statute, the legislative intent does not change.

The General Assembly amended the relevant portions of the Wage Act as to include the definitions of § 3-501, *supra*, as well as the following:

[HN12] § 3-502. Payment of wage.

(a) *Pay periods.*

(1) Each employer:

(i) shall set regular pay periods; and

(ii) except as provided in paragraph (2) of this subsection, shall pay each employee at least once in every 2 weeks or twice in each month.

(2) An employer may pay an administrative, executive, or professional employee less frequently than required under paragraph (1)(ii) [***21] of this subsection.

(b) *Paydays.* If the regular payday of an employee is a nonworkday, an employer shall pay the employee on the preceding workday.

[*382] (c) *Form of payment.* - Each employer shall pay a wage:

(1) in United States currency; or

(2) by a check that, on demand, is convertible at face value into United States currency.

(d) *Effect of section.* This section does not prohibit the direct deposit of the wage of an employee into a personal bank account of the employee in accordance with an authorization of the employee.

[HN13] § 3-505. Payment on termination of employment.

Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

1991 Md. Laws, ch. 8, § 2, codified at Maryland Code, §§ 3-502 and 3-505 of the Labor and Employment Article (1991).

Although the Act provided for public sanctions against employers who failed to pay employees' wages for the work which they [***22] had performed already, budgetary constraints in 1991 rendered State enforcement of the Act a virtual nullity. *See* Hearings on H.B. 1006 Before the House Economic Matters Committee, Floor Report. It then became necessary for the General Assembly to revisit the Wage Act and fashion a new

remedy for employees to obtain the wages owed to them by their employers. ⁷ In 1993, the General Assembly [***313] amended [*383] the Wage Act to provide employees with a private cause of action against employers for failure to pay wages owed to the employee upon termination of the employment relationship. 1993 Md. Laws, ch. 578. [HN14]The statute, effective October 1, 1993, states:

(a) *In general.* - Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

(b) *Award and costs.* - If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this [***23] subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

⁷ The Fiscal Note for House Bill 1006, dated March 1, 1993, contained the following statement:

"The Wage Payment and Collection Law was enforced by the Employment Standards Service of the Division of Labor and Industry. However, all funding for the Employment Standards Service was eliminated on November 1, 1991, which in turn eliminated the Commissioner of Labor's ability to investigate complaints and determine whether the Law had been violated. Because the Law did not give employees the option of bringing action against their employer, employees have had to rely on general statutes relating to contract disputes. This bill allows employees to bring actions for violations of the Wage Payment and Collection Law."

Maryland Code, § 3-507.1 of the Labor and Employment Article. ⁸ Writing for the Court [***24] in Battaglia v. Clinical Perfusionists, Inc., 338 Md. 352, 658 A.2d 680 (1995), Judge Rodowsky noted that the treble damages, costs and fees provisions of § 3-507.1 provide greater

incentives for employers to pay employees in-full for services rendered than the common law causes of action in *quantum meruit* or breach of contract. See 338 Md. at 358-59, 658 A.2d at 683.

⁸ The definitions in § 3-501 were not amended or altered.

The primary argument raised by BHC is that the trial court properly dismissed Ayd's claim under the Wage Act because Ayd was not an employee of BHC, but rather, an officer and did not qualify for the Act's protections. In support of its argument, BHC notes that Ayd served as the President and Treasurer of the corporation, acted in an executive capacity with regard to the operation and activities of *The Royal Blue*, controlled the checkbook of the company, and acted without the daily supervision of Mr. Berman. In essence, Ayd could [*384] have and should have [***25] paid himself. Additionally, BHC asserts that in the absence of an actual pattern of payment, Ayd cannot establish that he was an employee entitled to the protections of the Wage Act.

As noted above, the Wage Act defines the term "employer" as used in the statute, but does not provide a specific definition of an "employee." ⁹ BHC contends [***314] that as President and Treasurer of the corporation, Ayd is properly classified as an "administrative, executive, or professional employee," as set forth in Md. Code, Lab. & Emp. § 3-502(a)(2), a classification which BHC argues should somehow bar Ayd from the protections of the Wage Act's provisions concerning payment upon termination of employment as set forth in § 3-505. [HN15]Section 3-502, however, relates solely to the frequency of payment to administrative, executive, and professional employees; [*385] it does not obviate the Act's protection for such employees. As the Court of Special Appeals noted in its decision below, "we may consider the Legislature's explicit exception of 'administrative, executive, or professional employees' in section 3-502 as evidence that the absence of a similar exception in sections 3-505 and 3-507.1 reflects the Legislature's [***26] intent that those provisions would cover all employees." Baltimore Harbor Charters, Ltd. v. Ayd, 134 Md. App. at 209, 759 A.2d at 1102. [HN16]We have long applied the principle of statutory construction, "*expressio unius est exclusio alterius*"-the expression of one thing is the exclusion of another. See Stanford v. Maryland Police Training and Correctional Comm'n, 346 Md. 374, 383, 697 A.2d 424, 428 (1997); Biggus v. Ford Motor Credit Co., 328 Md. 188, 214, 613 A.2d 986, 999 (1992); Gay Investment Co. v. Comi, 230 Md. 433, 438, 187 A.2d 463, 466 (1963); Johns v. Hodges, 62 Md. 525, 538 (1884). Thus, if the General Assembly had intended to exclude administrative, executive and professional employees from the provisions of §§ 3-505 and 3-507.1,

or otherwise limit the application of these provisions to that class of employees, it would have expressly done so.

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9 The term "employee," however, has been defined legislatively in various forms throughout the Maryland Code to fit the context in which it is used within a given piece of legislation. See Maryland Code, § 12-101 of the Business Regulations Article (secondhand precious metal object dealers and pawnbrokers); § 3-405 of the Commercial Law I Article (employer liability for fraudulent endorsement by an employee); § 15-601 of the Commercial Law II Article (attachment of wages); § 5-301 of the Courts and Judicial Proceedings Article (local government tort claims act); § 5-560 of the Family Law Article (child care facilities); § 9-101 of the Financial Institutions Article (savings and loan associations); § 15-302 of the Insurance Article (group health insurance plans); § 15-1102 of the Insurance Article (franchise health insurance policies); § 5-101 of the Labor and Employment Article (railroad safety and health); § 5-101 of the Labor and Employment Article (occupational safety and health); § 5-401 of the Labor and Employment Article (access to information about hazardous and toxic substances); § 4-501 of the Labor and Employment Article (employment rights for public safety officers); § 4-601 of the Labor and Employment Article (firefighters and emergency medical personnel); § 17-201 of the State Finance and Procedure Article (public work contracts); § 11-101 of the State Personnel and Pensions Article (employees of the University of Maryland System); § 31-101 of the State Personnel and Pensions Article (participation in Employees' Systems); § 6-102.1 of the Transportation I Article (Drug-free workplace programs for ports); § 7-601 of the Transportation I Article (labor contracts); Art. 24, § 1-107 (1957, 1998 Repl. Vol.) (residency requirements for county or municipal employment); Art. 49B, § 15 (1957, 1998 Repl. Vol.) (Human Relations Commission); Art. 88B, § 2 (1957, 1998 Repl. Vol.) (state police department).

[***27]

10 For example, the Wage Acts of the District of Columbia and Kentucky exempted individuals employed "in a bona fide executive, administrative, supervisory, or professional capacity" Ky. Rev. Stat. Ann. § 337.010(2)(a) 2 (Michie 1995); D.C. Code Ann. § 36-101(2) (1997).

Because the Wage Act is silent with regard to a definition of the word "employee" as used in the statute,

and the legislative history does not provide sufficient guidance as to the scope and meaning of the term "employee," we will consider the legislative and interpretive wisdom of other jurisdictions regarding analogous legislative themes. See Williams v. Mayor & City Council of Baltimore, 359 Md. 101, 146, 753 A.2d 41, 65-66 (2000) (examining case law of other jurisdictions for factors to be considered in determining whether a "special relationship" exists for tort claims arising out of police action or inaction); Chevy Chase Land Co. v. United States, 355 Md. 110, 124, 733 A.2d 1055, 1062 (1999) (considering definitions of [*386] the railroad term "right of way" as used in other jurisdictions [***28] for purposes of interpreting parties' rights under a deed).

In drafting the Wage Act, the Maryland General Assembly neither provided a definition for the term "employee," as used in the statute, nor did it limit the potential [***315] scope of the term.¹¹ In addition to Maryland, forty-two states and the District of Columbia have enacted legislation concerning the payment of wages to employees upon termination of employment.¹² A majority of the jurisdictions provide a definition for the term "employee" as used in the statutes.¹³ The remaining jurisdictions use the word "employee" in their statutes, but do not provide specific definitions for the term.¹⁴ Many states include [*387] a broad definition of employee, such as "any person suffered or permitted to work by an employer." See e.g. Conn. Gen. Stat. § 31-71a(2) (1997). [HN17] Even where a state has not provided a definition of employee in the statute, the application of the statute may be limited through an exclusionary provision. See Utah Code Ann. § 34-28-1 (1997) (excluding employees of the state or local governments, and household domestic service from the statutory provision concerning payment of wages at separation from payroll). [***29]

11 Webster's New World College Dictionary (4th Ed. 1997) defines employee as "a person hired by another, or by a business firm, etc., to work for wages or salary."

12 The following states have not enacted wage payment and collection legislation comparable to the Maryland Wage Payment and Collection Act: Alabama, Arkansas, Florida, Georgia, Mississippi, and Virginia.

13 Ariz. Rev. Stat. Ann. § 23-350 (West 1995); Colo. Rev. Stat. Ann. § 8-4-101 (West 1994); Conn. Gen. Stat. § 31-71a (1997); Del. Code Ann. tit. 19, § 1101 (1995); D.C. Code Ann. § 36-101 (1997); Haw. Rev. Stat. § 388-1 (1993); Idaho Code § 45-601 (2000); 820 Ill. Comp. Stat. 115/2-2 (West 1999); Iowa Code Ann. § 91A.2 (West 1996); Kan. Stat. Ann. § 44-313 (2000); Ky. Rev. Stat. Ann. § 337.010 (Michie 1995); Me. Rev. Stat. Ann. tit. 26, § 626 (West 2000);

Mass. Gen. Laws Ann. ch. 149, § 148B (Lexis 1999); Mich. Comp. Laws Ann. § 408.471 (West 1999); Mont. Code Ann. § 39-3-201 (1999); Neb. Rev. Stat. § 48-1229 (1998); Nev. Rev. Stat. Ann. § 608.010 (Michie 2000); N.H. Rev. Stat. Ann. § 275:42 (2000); N.J. Stat. Ann. § 34:11-4.1(b) (West 2000); N.M. Stat. Ann. § 50-4-1 (Michie 2000); N.Y. Lab. Law § 190 (Consol. 1983); N.C. Gen. Stat. § 95-25.2(4) (1999); Ohio Rev. Code Ann. § 4111.01 (Anderson 2000); Okla. Stat. Ann. tit. 40, § 165.1 (West 1991); Or. Rev. Stat. § 652.210 (1999); R.I. Gen. Laws § 28-14-1 (2000); S.D. Codified Laws § 60-11-2 (Michie 1993); Vt. Stat. Ann. tit. 21, § 341 (2000); W. Va. Code § 21-5-1 (1996).

The District of Columbia and Kentucky statutory provisions define "employee" to exempt any individual employed "in a bona fide executive, administrative, supervisory, or professional capacity" Ky. Rev. Stat. Ann. § 337.010(2)(a) 2 (Michie 1995); D.C. Code Ann. § 36-101(2) (1997).

[***30]

14 Alaska Stat. § 23.05.140 (Lexis 2000); Cal. Lab. Code § 200 et seq. (West 2001); Ind. Code Ann. § 22-2-9-1 et seq. (Michie 1997); La. Rev. Stat. Ann. § 23:631 (West 1998); Minn. Stat. Ann. § 181.13 (West 2001); Mo. Ann. Stat. § 290.110 (West 1993); N.D. Cent. Code § 34-14-03 (1987); Pa. Stat. Ann. tit. 43, § 260.1 et seq. (West 1992); S.C. Code Ann. § 41-10-10 et seq. (West 2000); Tenn. Code Ann. § 50-2-103 (1999); Tex. Lab. Code Ann. § 61.014 (West 1996); Utah Code Ann. § 34-28-1 et seq. (1997); Wash. Rev. Code § 49.48.010 (2000); Wis. Stat. Ann. § 109.01 et seq. (West 1997); Wyo. Stat. Ann. § 27-4-101 et seq. (Lexis 1999).

[HN18]Where a statute applies to "employees" but fails to provide a definition for the term "employee," the United States Supreme Court has recognized that this term may be interpreted in harmony with the common-law distinctions observed between the terms employees or agents, and those classified as independent contractors. See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40, 109 S. Ct. 2166, 2172, 104 L. Ed. 2d 811, 824 (1989). [***31] In the context of the doctrine of *respondet superior*, we have stated that "we definitely decided that the test in determining whether a person is a servant or an independent contractor is whether the employer has the right of control over the employee in respect to the work to be [**316] performed." Henkelmann v. Metropolitan Life Insurance Company, 180 Md. 591, 599, 26 A.2d 418, 422 (1942)(citing State, to use of Boznango v. Blumenthal-

Kahn Electric Co., 162 Md. 84, 92, 159 A. 106, 109 (1932)).¹⁵ We have also [*388] concluded that in the context of the former Maryland Workmen's Compensation Act, Maryland Code (1957, 1985 Repl. Vol.), Art. 101, (repealed in its entirety by 1996 Md. Laws ch. 10, § 15), "the words 'employer' and 'employee' in the statute are equivalent to and synonymous with the words 'master' and 'servant.'" Brady v. Ralph Parsons Co., 308 Md. 486, 499, 520 A.2d 717, 724 (1987). We continued, as follows:

...the [HN19]test for determining the existence of an employer and employee relationship under the Act is the same as the common law rules for ascertaining the relation of master and servant. That test inquires whether the employer [***32] has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. In administering this test, we have established five criteria to consult for guidance. These include: (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control [*389] the employee's conduct, and (5) whether the work is part of the regular business of the employer.

Id. (internal citations omitted).

15 The Court further discussed its historical analysis and development of the construction of the term "employee" in this context as follows:

[HN20][The doctrine of *respondet superior*] was founded on the principle that "every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer it." Farwell v. Boston & Worcester R.R. Corp., 4 Metc., Mass., 49, 55, 38 Am. Dec. 339, 340. The courts, however, have regarded the doctrine with jealousy and have confined it within limits as narrow as are consistent with the true interests of society. Wood, Master and Servant, 2d Ed., Sec. 277. In 1840 the courts in England began to relax the doctrine by holding that it does not apply to independent contractors. In 1869 the Court of Appeals of Maryland, in an opinion by Judge Alvey, observed that the doctrine had been modified by the English decisions, and held that it is not applicable where the employee is "a contractor, pursuing an independent

employment, and by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done." *Deford v. State, to use of Keyser*, 30 Md. 179, 203. In 1884 the Court of Appeals said that [HN21]the theory upon which liability under the doctrine is predicated is that the master is constructively present, so that the negligence of the servant is the negligence of the master. *Adams v. Cost*, 62 Md. 264, 267, 50 Am. Rep. 211. In 1901 this Court stated that an essential element of the relation of master and servant is that the master shall have control of the employment and all of its details. *Baltimore Boot & Shoe Mfg. Co. v. Jamar*, 93 Md. 404, 413, 49 A. 847, 850, 86 Am. St. Rep. 428.

Henkelmann v. Metropolitan Life Insurance Company, 180 Md. at 598-99, 26 A.2d at 422.

[***33] The analysis employed by this Court in defining the term "employee" under the doctrine of *respondeat superior*, and the factors emphasized in *Brady* have been discussed in the context of Wage Act claims in other jurisdictions. While none of the wage payment and collection statutes of other jurisdictions contains the same language as Maryland's Wage Act, California's statute does contain provisions similar in force and effect to the language contained in the Maryland Act. See *Cal. Labor Code § 200 et seq.* (West 2001). Like the Maryland Wage Act, California does not define the term "employee" in its statute, and it defines the term "wages" as [**317] "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." *Cal. Lab. Code § 200* (West 2001). Regarding the termination of employment by an employer, the California statute states that, "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." *Cal. Lab. Code § 201*. Where an employee has resigned his or her employment, the California [***34] statute provides that, "If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than seventy-two hours thereafter, unless the employee has given seventy-two hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting." *Cal. Lab. Code § 202*.

In case law interpreting whether a person is an employee entitled to protection under the California statute, the Superior Court of California stated as follows:

In determining whether one is an employee or an independent contractor, the California Supreme Court has adopted the test of the Restatement of Agency, section 220: [HN22]In determining whether one who performs services for another [*390] is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, [***35] without cause. [HN23]Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Zaremba v. Miller, 113 Cal. App. 3d Supp. 1, 169 Cal. Rptr. 688, 689 (Cal. App. Dep't Super. Ct. 1980)(internal citations and quotations omitted).¹⁶ [HN24]In [*391] applying [**318] these factors, the court emphasized that "the most crucial consideration is the right to exercise complete control over the work, including its details." *Id.* We have applied with equal [***36] force, an emphasis on the element concerning the master or employer's right to control the work of the servant or employee in cases relating to other statutes and common-law causes of action. See *Mackall v. Zayre Corp.*, 293 Md. 221, 230, 443 A.2d 98, 103 (1982); *Gallagher's Estate v. Battle*, 209 Md. 592, 602, 122 A.2d 93, 97-98 (1956).

16 As commonly used in modern statutes, the term "employee" is analogous to the class of person historically described or defined as a servant. See Restatement (Second) of Agency, § 2, comment d.

Restatement (Second) of Agency, § 220 defines a servant as follows:

(1) [HN25]A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) [HN26]In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

[***37] Other jurisdictions have applied factors similar to those used by the California court in determining the existence of an employer-employee relationship for purposes of wage collection actions brought by former employees. See Cavic v. Pioneer Astro Industries, Inc., 825 F.2d 1421, 1426 (10th Cir. 1987); Doherty v. Kahn, 289 Ill. App. 3d 544, 682 N.E.2d 163, 173, 224 Ill. Dec. 602 (Ill. App. 1 Dist. 1997)(explaining that the statute does not apply to employees who are free from control and direction over the performance of their work); Lorentz v. Coblentz, 600 So. 2d 1376, 1381 (La. App. 1st Cir. 1992)(focusing on "selection and engagement, payment of wages, power of dismissal, and control" in resolving a person's employment status); Taylor v. Kennedy, 1998 ME 234, 719 A.2d 525, 527-28 (Me. 1998)(applying common law "right to control" test to determine if plaintiff was an employee within the statute as set forth in Murray's Case, 130 Me. 181, 154 A. 352, 354 (Me. 1931)); Cook v. Burke, 693 S.W.2d 857, 861 (Mo. App. 1985)(finding plaintiff was an employee where although [***38] [*392] she served in a management capacity, she had no ownership in the business and no share in the profits, and no "discretion to affect the general policy of the business").

[HN27]The factors considered in this Court's opinions regarding the doctrine of *respondeat superior* and construction of the term "employee" under the principles enumerated in Restatement (Second) of Agency, as well as the case law interpreting the term "employee" under the wage act statutes of other jurisdictions provide an appropriate framework for determining whether an individual is an employee covered by the Maryland Wage Payment and Collection Act. [HN28]Such factors include:

1. Whether the employer actually exercised or had the right to exercise control over the performance of the individual's work;

2. Whether the individual's service is either outside all the usual course of business of the enterprise for which such service is performed;

3. Whether the individual is customarily engaged in an independently estab-

lished trade, occupation, profession, or business;

4. Whether it is the employer or the employee who supplies the instrumentalities, tools, and location for the work to be performed;

5. Whether the individual [***39] receives wages directly from the employer or from a third party for work performed [**319] on the employer's behalf; and

6. Whether the individual held an ownership interest in the business such that the individual had the ability and discretion to affect the general policies and procedures of the business.

See Brady, 308 Md. at 499, 510, 520 A.2d at 724, 730; *Mackall*, 293 Md. at 230, 443 A.2d at 103; *Gallagher's Estate*, 209 Md. at 600-601, 122 A.2d at 97; *Henkelmann*, 180 Md. at 598-99, 26 A.2d at 422; Restatement (Second) of Agency § 2, comment d, and § 220.

[*393] On remand, there are many factual nuances for the finder of fact to consider in applying these six factors to determine whether Ayd should be classified as an employee of BHC. First, did Berman, as the Vice President and sole shareholder of BHC have the right to exercise control over the performance of Ayd's work? The emphasis on the right to exercise control is whether Berman could have exercised control over Ayd, not whether he actually did. If believed by the fact finder, testimony adduced by Ayd at trial supported the proposition that throughout his [***40] ownership of BHC, Berman had the ability to direct and exercise control over Ayd.

Second, did the services Ayd performed for BHC, including but not limited to administrative services, repairs, maintenance, sales, and captaining *The Royal Blue* fall within the usual course of operating a charter boat business? According to other evidence at trial, if credited by the fact finder, Berman named Ayd as President of BHC in order to give potential customers the sense that they were dealing with someone who had greater authority in the operation of BHC. Acting in his capacity as President, Ayd worked as a salesman for BHC. He also performed all necessary repairs and maintenance on *The Royal Blue* to prepare the vessel for charter trips.

The third factor concerns whether Ayd was customarily working in his own interest, albeit also being beneficial to BHC. In other words, was his status similar to that of an independent contractor? It is clear, if the testi-

mony adduced at trial is accepted by the fact finder, that Ayd was not an independent contractor.

The fourth factor asks, did Ayd use any of his own equipment in providing maintenance for *The Royal Blue*, which also served as [***41] his residence? There was testimony at trial indicating that Ayd used some of his own equipment in repairing and maintaining *The Royal Blue*, and also used a computer and software belonging to BHC in performing his bookkeeping and administrative functions.

[*394] In examining the fifth factor concerning the payment of wages, BHC argues that the payments which it made to Ayd from the winter of 1994 until Ayd ceased working for BHC in September 1996 do not suffice to establish a pattern of payment by which a finder of fact could determine that Ayd was an employee of BHC entitled to the protections of the Wage Act. We disagree. The facts of this case indicate that Ayd had received some payment for his services in the form of the monthly administrative salary of \$ 200.00, several payments of the disputed weekly salary amount of \$ 576.92, and captain's fees in the amount of \$ 200.00 per charter, albeit not on a regular schedule and not in the full amount owed for services performed. [HN29]The Wage Act contains no provision which would exclude someone who is otherwise an employee from statutory protection based on the employer's failure to set regular pay periods. *See* § 3-502. To follow BHC's [***42] argument that the absence of a regular pattern of payment should preclude an individual from being classified as [**320] an employee would undermine the protective purposes of the Wage Act by leaving those employees who suffer the most egregious abuse of non-payment of wages by their employers from ever recovering the money owed to them for services rendered. *See Edgewater Liquors, Inc. v. Liston*, 349 Md. 803, 808, 709 A.2d 1301, 1303 (1998)("we [HN30]avoid construing a statute so as to lead to results that are unreasonable, illogical, or inconsistent with common sense")(citing *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445, 697 A.2d 455, 459 (1997); *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994); *Holman v. Kelly Catering*, 334 Md. 480, 487, 639 A.2d 701, 705 (1994); *Kaczorowski*, 309 Md. at 516, 525 A.2d at 633).

BHC contends that Ayd is not entitled to the salary which he should have been paid during his employment with BHC because Ayd controlled the accounting books and checking account for the corporation and refrained from paying himself a regular salary. The testimony [***43] at trial showed that Berman knew that Ayd had not been paid due to BHC's financial difficulties. As the business relationship between Berman and Ayd deteriorated during the summer of 1996, Berman sought [*395] control of the checking account. When Ayd resolved to

terminate his employment with BHC, Berman had sole authority over the checking account. Thus, when he left his employment with BHC, Ayd did not have the access by which to pay himself the money owed to him by the company.

The Missouri Court of Appeals examined an argument factually similar to the payment issues involved in the instant case in *Cook v. Burke*, 693 S.W.2d 857 (Mo. App. 1985). In *Cook*, the former employee, who had been in charge of payroll and timekeeping as part of her work responsibilities, held her payroll checks for a period of three months with her employer's knowledge, because the business experienced chronic financial difficulties leaving insufficient funds in the business's bank account to cover payment of her salary. *Id.* at 859. When the former employee was discharged, however, the Missouri court found that she ceased being payroll manager, and became unable to pay herself [***44] the wages which she was owed; thus the employer remained responsible for the payment of all wages due on the date of discharge. 693 S.W.2d at 860-61. The reasoning applied by the Missouri court in *Cook* may be applied with equal force and effect to the matter now before us. [HN31]If a trier of fact concludes that Ayd is an employee entitled to protection under the Wage Act, BHC cannot escape liability for the wages owed based on Ayd's conduct in refraining from taking his salary during BHC's protracted periods of financial instability.

Finally, under the sixth factor of the employee analysis, the trier of fact would have to determine if Ayd did have an ownership interest in BHC which would have given him the ability and discretion to affect the general policies and procedures of the business. At trial, both parties admitted that from February 1994 to September 9, 1996, Ayd held no ownership interest in BHC whatsoever.

We hold, therefore, that the issue of whether Ayd was an employee under the Wage Act was withheld improperly from the jury by the trial court's dismissal.

[*396] B. Bona Fide Dispute

BHC's final contention is that the treble damages, attorneys' fees and costs [***45] provisions of § 3-507.1 of the Wage Act do not apply to situations such as the case at bar, where a bona fide dispute exists between the employer and the employee. [HN32]The existence of a bona fide dispute under § 3-507.1 is a question of fact [**321] left for resolution by the jury, not the trial judge. See *Admiral Mortgage v. Cooper*, 357 Md. 533, 551, 745 A.2d 1026, 1035 (2000). In *Admiral Mortgage*, we explained the definition and existence of a "bona fide dispute" as follows:

[HN33]All of the definitions articulated by the courts focus really on whether the party making or resisting the claim has a good faith basis for doing so, whether there is a legitimate dispute over the validity of the claim or the amount that is owing. The issue is not whether a party acted fraudulently; fraud is certainly inconsistent with the notion of "bona fide" or "good faith," but it is not required to establish an absence of good faith. The question, simply, is whether there was sufficient evidence adduced to permit a trier of fact to determine that [the employer] did not act in good faith when it refused to pay... [the employee]...

Id. at 543, 745 A.2d at 1031. [***46]

In *Admiral Mortgage*, we also explained that [HN34]the existence of a bona fide dispute under § 3-507.1 affects whether treble damages, attorneys' fees and costs may be awarded at the discretion of the jury. *Id.* at 542, 745 A.2d at 1030-31. A jury may find that a bona fide dispute existed between an employer and an employee over the amount of wages owed to the employee at the time of termination of employment while also finding that the employer owes the employee money for services rendered. Ayd's recovery of the weekly salary of \$ 576.92, however, is not dependant upon the existence of a bona fide dispute between Ayd and BHC. 357 Md. at 541, 745 A.2d at 1030. A finding by the jury that a bona fide dispute existed at the time of termination of employment ends any inquiry as [*397] to whether the employee would be entitled to receive additional damages according to the provisions of § 3-507.1.

At trial, both Ayd and Berman agreed that Ayd was to be paid \$ 200.00 per month for administrative services, and \$ 200.00 each time he captained a charter trip on *The Royal Blue*, but disputed that Ayd was owed a \$ 576.92 weekly salary. [***47] The statute clearly states that when employment is terminated, employers must pay employees "all wages due for work that the employee performed before the termination of employment." § 3-505. Although BHC paid the monthly administrative fee and captain's fees to Ayd on a more regular basis than the contested \$ 576.92 weekly salary, BHC had not paid the undisputed amounts in full to Ayd at the time of termination of employment. [HN35]The failure to pay an employee wages conceded to be owed to him for work performed prior to the termination of his employment is a violation of § 3-505 of the Wage Act, regardless of which party terminates the employment arrangement, and regardless of whether the termination

was in violation of an employment contract. See *Battaglia*, 338 Md. at 362-63, 658 A.2d at 685-86. The jury however, may consider the employer's ability to pay the disputed amount at the time of discharge in determining whether the employer acted with good faith concerning the existence of a bona fide dispute under § 3-507.1.

In addition, [HN36]the "bona fide dispute" provision of § 3-507.1 contains no language which would permit BHC to withhold the amounts it conceded it owed [***48] to Ayd. Thus, where an employer alleges the existence of a bona fide dispute as to the total amount of wages owed to an employee (in this case, the weekly salary of \$ 576.92) yet concedes that a certain amount of wages are due (the \$ 200.00 per month for administrative services and \$ 200.00 per charter trip that captained), the employer acts at his or her peril in failing to pay the conceded amount. Even [**322] where the finder of fact agrees with the employer concerning the total sum owed, the penalty provision of § 3-507.1, which allows for an employee to be awarded up to three times the amount of wages owed, will apply to those [*398] amounts which were not in dispute but for which the employer failed to make timely payment upon termination as specified in § 3-505.

Based on certain facts the evidence presented at trial, it would be possible for a reasonable trier of fact to conclude that BHC did not withhold payment of the wages owed to Ayd at the time he terminated his employment as a result of a bona fide dispute. [HN37]Matters of witness credibility and a weighing of the facts to determine the existence of a bona fide dispute are properly left for resolution by the jury on remand.

Accordingly, [***49] we remand this case for a trial solely on Ayd's claim under the Maryland Wage Payment and Collection Law.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH INSTRUCTION TO VACATE THAT PART OF THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY DISMISSING RESPONDENT'S CLAIM UNDER THE MARYLAND WAGE PAYMENT AND COLLECTION ACT AND TO REMAND THE CASE TO THE CIRCUIT COURT FOR A NEW TRIAL OF THAT CLAIM IN ACCORDANCE WITH THIS OPINION. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY THE PETITIONER.

LEXSEE

KENNETH M. BOUDREAUX AND WILLIAM J. NOLAN versus BANTEC, INC.

CIVIL ACTION NO. 03-2111 SECTION "C" (4)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA

366 F. Supp. 2d 425; 2005 U.S. Dist. LEXIS 3323

February 22, 2005, Decided

February 22, 2005, Filed; February 23, 2005, Entered

DISPOSITION: [**1] Plaintiffs's Motion for Partial Summary Judgment DENIED. Defendant's Motion for Partial Summary Judgment DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff computer repair technicians sued defendant employer, alleging, inter alia, that they were entitled to compensation under the Fair Labor Standards Act (FLSA) for time spent doing administrative work, traveling, working through lunch, and preparing and taking a computer certification exam and that the employer violated the FLSA willfully and in bad faith. The parties filed cross-motions for partial summary judgment.

OVERVIEW: Summary judgment was denied on the administrative work claim as there were issues of fact as to which activities were principal activities, e.g., whether boxing up parts at home after a service call was a principal activity. Summary judgment was also denied on the travel time claim as there were issues of fact as to whether a principal activity was being performed at home. There were also issues of fact as to whether the technicians' lunch time was predominantly for the benefit of the employer. Summary judgment was denied on whether the time preparing and taking the certification was compensable as there were conflicting accounts as to whether employees were allowed to bill for the time. Summary judgment was also improper on the issue of whether one technician was an independent contractor as there were issues of fact as to the amount of control the employer exerted over him and who had greater opportunities for profit or loss. Summary judgment was denied on the 29 U.S.C.S. § 216(b) claim as the employer's actual knowledge and reasonableness remained issues of

fact. Summary judgment was inappropriate on the remaining claims.

OUTCOME: The cross-motions for partial summary judgment were denied.

CORE TERMS: service calls, independent contractors, summary judgment, compensable, time spent, overtime, genuine, principal activities, protected activity, issue of material fact, technician, classified, partial, compensated, travel time, lunch, meal, boxing, opinion letter, locomotive, prima facie case, termination, checking, unpaid, customer, citations omitted, liquidated damages, de minimus, retaliation, permanency

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

[HN1]A district court can grant a motion for summary judgment only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Opposition > General Overview

[HN2]When considering a motion for summary judgment, the district court will review the facts drawing all inferences most favorable to the party opposing the motion. The court must find that a reasonable jury could return a verdict for the nonmoving party and a fact to be material if it might affect the outcome of the suit under the governing substantive law. If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial. The mere argued existence of a factual dispute will not defeat an otherwise properly supported motion. If the evidence is merely colorable, or it is significantly probative, summary judgment is not appropriate.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN3]Any work from which the employer derives a significant benefit or that is an integral and indispensable part of the principal activities for which covered workmen are employed is compensable under the Fair Labor Standards Act, even if done outside of the regular work shift. The United States Court of Appeals for the Fifth Circuit defines integral and indispensable activity as that which is necessary to the principal work performed and done for the benefit of the employer. However, preliminary activity, such as waiting to check in and out of work, turning on machinery, or waiting in line to receive checks, is non-compensable.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN4]The United States Court of Appeals for the Fifth Circuit deems activities performed by electricians before their 8:00 a.m. start time, such as filling out daily time, material and requisition sheets, checking job locations for the day, and preparing for that day's job, to be compensable principal activities under the Fair Labor Standards Act. The Fifth Circuit broadly defines compensable principal activities as those that are performed as part of the regular work of the employees in the ordinary course of business and performed at the employer's behest and for the benefit of the business.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN5]For purposes of the Fair Labor Standards Act, preliminary activities, as cited in precedent from the United States Court of Appeals for the Fifth Circuit, in-

clude checking in or out and waiting in line to do so, changing clothes, washing up or showering, putting on aprons or overalls, removing shirts, taping arms, and turning on switches for lights.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Governmental Employees Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN6]Lunch time can be compensable under the Fair Labor Standards Act so long as it is not a bona fide meal period. 29 C.F.R. § 785.19. The Code of Federal Regulations provides that an employee must be completely relieved from duty for the purpose of eating meals during a bona fide meal period. The United States Court of Appeals for the Fifth Circuit determines this using a predominant benefit test. The critical question is whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee. The employer bears the burden to show that meal time qualifies for this exception from compensation.

Labor & Employment Law > Employment Relationships > Independent Contractors

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN7]Whether a worker is covered by the Fair Labor Standards Act (FLSA) is not as simple as whether he fits under the common law concepts of employee or independent contractor. For the purposes of the FLSA, an employee is determined by whether as a matter of economic reality, the person is dependent upon the business to which the person renders service. The factors to consider in determining economic dependence are (1) degree of control, (2) opportunities for profit or loss, (3) investment in facilities, (4) permanency of relation, and (5) skill required. None of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor, economic dependence.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN8]See 29 U.S.C.S. § 216(b).

Labor & Employment Law > Wage & Hour Laws > Remedies > Backpay

[HN9]Under 29 U.S.C.S. § 216(b), liquidated damages in an amount equal to the unpaid wages due must be awarded unless the trial court finds that the acts of the

employer giving rise to the suit were both in good faith and reasonable.

Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Fair Labor Standards Act

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN10]The Fair Labor Standards Act (FLSA) provides that it shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to the FLSA, or he has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. 29 U.S.C.S. § 215(a)(3). Claims of retaliatory discharge are analyzed using a burden shifting framework.

Labor & Employment Law > Discrimination > Retaliation > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN11]To make a prima facie case of retaliatory discharge under 29 U.S.C.S. § 215(a)(3), a plaintiff must demonstrate (1) that he engaged in a protected activity, (2) an employment action that disadvantaged him, and (3) a causal connection between the protected activity and the adverse employment action.

Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Fair Labor Standards Act

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN12]For purposes of a retaliatory discharge claim under the Fair Labor Standards Act, protected activity consists of filing an official complaint, instituting a proceeding, testifying in a proceeding, or serving on an industry committee. 29 U.S.C.S. § 215(a)(3).

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities

Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Fair Labor Standards Act

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN13]Given the lack of binding authority and conflicting persuasive authority, the United States District Court

for the Eastern District of Louisiana finds that it will adopt a broader interpretation of protected activities. The court agrees with the rationale of the United States Court of Appeals for the Eleventh Circuit, which holds that the Fair Labor Standards Act (FLSA) in general is remedial in purpose. Congress sought to secure compliance with the substantive provisions of the labor statute by having employees seeking to vindicate rights claimed to have been denied lodge complaints or supply information to officials regarding allegedly substandard employment practices and conditions. The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who choose to voice such a grievance. By giving a broad construction to the anti-retaliation provision to include the form of protest engaged in here by the charging parties, its purpose will be further promoted.

Labor & Employment Law > Discrimination > Retaliation > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN14]Should a plaintiff be able to establish a prima facie case of retaliatory discharge under 29 U.S.C.S. § 215(a)(3) at trial, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the plaintiff's termination. The burden would then shift back to the plaintiff to show that the defendant's nondiscriminatory reason is merely a pretext.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

Labor & Employment Law > Wage & Hour Laws > Statutes of Limitations

[HN15]In order to recover for a violation of the overtime provisions of the Fair Labor Standards Act (FLSA), a plaintiff must show that he was employed in the sense used in the FLSA for the periods of time for which he claims overtime. A worker is employed during those hours if the employer has knowledge, actual or constructive, that he was working.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN16]Under the de minimus rule applicable to cases brought under the Fair Labor Standards Act, it is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. By contrast, when the matter in issue concerns only a few seconds or minutes of work beyond

the scheduled working hours, such trifles may be disregarded.

COUNSEL: For Kenneth M Boudreaux, Willard J Nolan, Plaintiffs: Edward K. Newman, Julie Marie Richard-Spencer, Karen Maria Torre, Robein, Urann & Lurye, APLC, Metairie, LA.

For BancTec Inc, Defendant: F. Barham Lewis, Jr., Jeffrey C. Londa, Ruth M. Willars, Ogletree, Deakins, Nash, Smoak & Stewart, PC, Houston, TX; Benjamin H. Banta, The Kullman Firm, New Orleans, LA; John E. McFall, Ogletree, Deakins, Nash, Smoak & Stewart, PC, Dallas, TX.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION

[*428] ORDER AND REASONS

Before the Court are cross-motions for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, both motions are DENIED.

Background

Kenneth M. Boudreaux and William J. Nolan (collectively "Plaintiffs") worked for BanTec, Inc. ("Defendant") as computer repair technicians ("CRT"). Defendant assigns computer-repair work, or "service calls," to its various CRTs who work out of [*429] their home offices. Before leaving their home for a [*2] service call, a CRT must perform, as Plaintiffs call them, "administrative duties." According to Plaintiffs, these are time-consuming duties that include the daily receipt and review of emails containing the days assignments, organizing the assignments into an efficient route, and then calling the computer owners to make an appointment. (Rec. doc. 45, p. 2-3). CRTs are also required to track parts as they are being shipped and pick them up from courier services, update service calls based on the availability of parts, and match parts with the proper service call. (Rec. doc. 45, p. 3). Finally, after the last service call of the day, CRTs must close and update service calls with the BanTec base operator, box parts and fill out accompanying paperwork, and respond to after hour service calls from customers. (Rec. doc. 45, p. 4).

Boudreaux began working for defendant in September, 2001. From September until December, 2001, Boudreaux worked as a CRT under a Temporary Employee Agreement. (Rec. doc. 46, memorandum p. 2).

Under this agreement, Boudreaux was an employee of Defendant and compensated by the service call rather than hourly. (Id.).

In June, 2001, Defendant's CEO and CFO questioned [*3] why the company did not classify its technicians as independent contractors. (Rec. doc. 45, p. 5). Defendant's inside-counsel, Richard McDonough, sought an opinion from outside-counsel, Stuart B. Johnston, Jr. of Vinson & Elkins. Johnston relied on information provided by Defendant's Director of Human Resources, Cindy MacFarlane, to prepare an opinion letter. (Id.). Johnston concluded that the technicians could be classified as independent contractors.

Relying in part on Johnston's opinion letter, in December, 2001, Defendant asked its CRTs to enter contracts as independent contractors. Under the Independent Contractor Agreement, Defendant claims, technicians were entitled to turn down service calls, and were only required to accept one service call per month. (Rec. doc. 46, memorandum, p. 3-4). Independent contractors continued to be paid by service call.

In August, 2002, Boudreaux formed his own company, PC Physicians. According to tax returns, PC Physicians reported deductions of \$ 43,806 on 2002 federal tax records.

In May, 2003, Defendant cancelled its independent contractor arrangement. Technicians once again become employees, and went by the new title "Incentive Based Technician" [*4] ("IBT"). This change followed a November, 2002 determination by the IRS that a BanTec technician in Oregon was not an independent contractor and was to be treated as an employee. (Rec. doc. 45, p. 7). Job duties remained the same, and IBTs continued to be paid by service call. By this point, Boudreaux had for some time been complaining to his superiors, John Croft and Rick Neff, about the method of compensation. Boudreaux felt he should be getting paid for the time spent performing "administrative duties," and also, because he otherwise had been working full weeks, that the "administrative time" should go towards the computation for overtime.

On July 1, 2003, a tropical had downed trees and flooded the streets by Boudreaux's home, allegedly preventing him from performing service calls. When a customer returned a call to schedule an appointment, Boudreaux explained that he could not leave his neighborhood, but that even if he could he would not perform the service call that day because it would be his only one. In his eyes, if he were to run the call he would be paid at a rate less [*430] than minimum wage for his hours worked because he was not being paid for "administrative work." (Rec. [*5] doc. 45, p. 15). The customer complained to Boudreaux's boss, John Croft, as

well as Croft's boss, Rick Neff, the District Manager. Both then spoke to Boudreaux and directed him to perform the service call. Boudreaux reiterated his complaints about the compensation arrangement and made it clear that even if he could leave his house, he would not do so just to run one service call. Neff then fired Boudreaux for insubordination.

Willard Nolan began working for Defendant in 1997. He was a Customer Engineer, paid hourly for 40 hours a week, until he was reclassified as an IBT on April 15, 2003. At all times Nolan was an employee of Defendant, he did not take part in Defendant's short-lived independent contractor arrangement. Prior to April 15, 2003, as a Customer Engineer, Nolan was told to report 40 hours a week on his time sheets and to put in for overtime when applicable. (Rec. doc. 46, memorandum p. 7). He did not count "administrative time" on his time sheet, his lunch hour which he now claims to have worked through it each day, travel time from his last job site to his home, the time spent boxing up parts, or the time spent to close service calls. (Rec. doc. 46, memorandum, p. 7-8). [**6] Nolan now claims that he should be compensated for such time, and the time should factor into overtime calculations.

Standard of Review

[HN1]A district court can grant a motion for summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). [HN2]When considering a motion for summary judgment, the district court "will review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). The court must find that a reasonable jury could return a verdict for the nonmoving party...[and a] fact...[to be] 'material' if it might affect the outcome of the suit under the governing substantive law." Beck v. Somerset Techs., Inc., 882 F.2d 993, 996 (5th Cir. 1989) (citing [**7] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing Celotex, 477 U.S. at 322-24, 104 S. Ct. at 2552-53, 91 L. Ed. 2d 265 and Fed.R.Civ.P. 56(e)). The mere argued existence of a fac-

tual dispute will not defeat an otherwise properly supported motion. See Anderson, 477 U.S. at 248, 106 S. Ct. at 2510, 91 L. Ed. 2d 202. "If the evidence is merely colorable, or it is significantly probative, 'summary judgment is not appropriate.'" Id., at 249-50, 106 S. Ct. at 2511, 91 L. Ed. 2d 202 (citations omitted).

I. Plaintiffs's Motion for Partial Summary Judgment

The Court will first address Plaintiffs's motion for partial summary judgment before turning to Defendant's motion.

[**8] *Compensation for Work Time*

Plaintiffs each claim that the time spent doing "administrative work," traveling, working through lunch, and preparing and taking the Dell certification exam is compensable [*431] time for which Defendant has not paid them. Plaintiffs further argue that Boudreaux was always an employee and never an independent contractor. Plaintiffs further allege the Defendant has violated the Fair Labor Standards Act (FLSA) willfully and in bad faith. Finally, Plaintiffs argue that the Court should accept Plaintiffs's compensation calculations as reasonable and award Nolan \$ 57,042.34 in unpaid overtime and an equal amount in liquidated damages and Boudreaux \$ 15,104.27 in unpaid overtime and an equal amount in liquidated damages, and Defendant owes Plaintiffs reasonable attorney's fees. (Rec. doc. 46, p. 1-2).

1. Administrative Duties

Plaintiffs claim that the FLSA requires employers to compensate employees for all the time which the employer requires or permits employees to work. (Rec. doc. 45, p. 21), See Tenn. Coal, Iron, & R.R. Co. v. Muscorder Local No. 123, 321 U.S. 590, 598, 88 L. Ed. 949, 64 S. Ct. 698 (1944). [HN3]Any work from which the employer derives a significant benefit [**9] or that is an integral and indispensable part of the principal activities for which covered workmen are employed is compensable, even if done outside of the regular work shift. See Steiner v. Mitchell, 350 U.S. 247, 256, 76 S. Ct. 330, 335, 100 L. Ed. 267, 273 (1956). The Fifth Circuit has defined "integral and indispensable" activity as that which is necessary to the principal work performed and done for the benefit of the employer. See Barrentine v. Arkansas-Best Freight Sup., Inc., 750 F.2d 47, 50 (5th Cir. 1984), cert. denied, 471 U.S. 1054, 85 L. Ed. 2d 480, 105 S. Ct. 2116. However, "preliminary" activity, such as waiting to check in and out of work, turning on machinery, or waiting in line to receive checks, is non-compensable. See Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946).

Plaintiffs claim that the instant case is factually similar to *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976). [HN4]In *Dunlop*, the Fifth Circuit deemed activities performed by electricians before their 8:00 a.m. start time, such as filling out daily time, material and requisition sheets, checking job locations for the day, and [**10] preparing for that day's job, to be compensable "principal activities." *Id.* at 401. *Dunlop* broadly defines compensable principal activities as those that are "performed as part of the regular work of the employees in the ordinary course of business" and "performed at the employer's behest and for the benefit of the business." *Id.*

Defendant counters that the notion of "administrative time" is vague, as is the distinction between preliminary activities and principal activities. It cites *Carter v. Panama Canal Co.* and *Vega v. Gasper* to show that time spent receiving assignments is not necessarily compensable under the FLSA. In *Carter*, the Court of Appeals for the D.C. Circuit held that checking assignments was a preliminary activity under the Portal-to-Portal Act.

The "principal activity" of the appellants is the operation of the towing locomotives and the "actual place of performance" of this activity is the locomotive itself. Checking the assignments on the board is an activity "preliminary to" that "principal activity" and the daily walk to the locomotive certainly constitutes "walking to the actual place of performance of the principal [**11] activity." In addition, there is neither "an express provision of a written or nonwritten contract in effect," nor "a custom or practice in effect" under which the operators were being paid for these activities. Accordingly, we find that if the Canal Company [*432] were a private employer subjected to the FLSA, the Portal-to-Portal Act would block the locomotive operators' attempt to recover overtime compensation for the time spent in checking the assignment board and walking to the locomotives prior to the commencement of their "principal activity" in operating the locomotives.

150 U.S. App. D.C. 198, 463 F.2d 1289, 1294 (D.C. Cir. 1972). In *Vega*, while workers rode a bus to the fields they were told in which field they would work and what the pay rate would be. The Fifth Circuit held that "merely receiving this information is not enough instruction from Gasper to render the time compensable." 36 F.3d 417, 425 (5th Cir. 1994).

The Court finds that *Dunlop* is the controlling precedent in the Fifth Circuit about administrative time. *Vega*, by contrast, is distinguishable because it is primarily a case about travel time, not administrative time. Accordingly, "principal [**12] activities" must be interpreted broadly, pursuant to *Dunlop*, as opposed to the more narrow interpretations used by other circuits. The Court finds that some of the "administrative activities" Plaintiffs claim to have performed are not preliminary activities. [HN5]Preliminary activities, as cited in *Dunlop*, include checking in or out and waiting in line to do so, changing clothes, washing up or showering, putting on aprons or overalls, removing shirts, taping arms, and turning on switches for lights. *Dunlop*, 527 F.2d at 399, citing S.Rep.No. 48, 80th Cong., 1st Sess. p. 47 (1947); *Anderson v. Mt. Clemens Pottery Company*, 1946, 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946). Rather, some of the activities Plaintiffs allegedly were performing could be considered "integral and indispensable" activities akin to those performed by the electricians in *Dunlop*. *Dunlop*, 527 F.2d at 400. As in *Dunlop*, Plaintiffs were, if factually correct, doing the tasks necessary to prepare for service calls. See *Id.*, at 397 ("These duties were to be completed before 8:00 a.m. to enable the men to depart from the shop by the beginning of their paid workday. [**13] ").

However, there remains a genuine issue of material fact as to which of the activities for which Plaintiffs seek compensation are actually principal activities. For example, there is a question as to whether boxing up parts at home after a service call is a principal activity or merely non-compensable *de minimus* tasks. (Rec. doc. 46, p. 24), See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946). Accordingly, the jury will need to hear and decide which "administrative duties" are compensable principal activities, based on the disputed evidence to be presented.

2. Travel time

Plaintiffs argue that the time spent traveling to and from home is compensable under the FLSA. (Rec. doc. 45, p. 23). Defendant points out that "ordinary home-to-work travel is clearly not compensable under the Portal-to-Portal Act unless a contract or custom of compensation exists between the employer and the employees. ¹ (Rec. doc. 48, p. 4), See 29 C.F.R. §§ 785.34-35, 790.8(f). With regard to driving to and from home, Plaintiffs essentially argue that the administrative duties performed at home both before and after work make the home a home [**14] office, and thus the trips from home to a service call and back is not ordinary home-to-work-travel. [*433] They cite a Fifth Circuit case involving truck drivers who were compensated for their time spent returning to the truckyard from their last job site, and for the post-travel cleaning and refueling the

trucks at the yard. *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961). Plaintiffs also cite a case in which police officers were compensated for travel time from home to work when carrying their police dogs that were boarded at their homes. *Graham v. City of Chicago*, 828 F.Supp. 576 (N.D. Ill. 1993). Also, whether such travel time is compensable depends on whether a principal activity is being performed at home. Accordingly, for the reasons stated already, the Court finds a genuine issue of material fact as to whether principal activity took place at home which would allow travel time from home to be compensable in the instant matter. With regard to time spent traveling between service calls, the Court finds that whether such time is compensable is also a genuine issue of material fact due to the lack of supporting legal precedent.

1 Defendants argue the issue of travel time both in its opposition to Plaintiffs's motion (Rec. doc. 48) and its own Motion for Summary Judgment (Rec. doc. 46), as well as its Reply to Plaintiff's opposition (Rec. doc. 53).

[**15] 3. Lunch Time

Plaintiffs each claim that they regularly worked through lunch and were not able to record that time on their time sheets. [HN6]Lunch time can be compensable so long as it is not a "bona fide meal period." 29 C.F.R. § 785.19. The Code of Federal Regulations provides that an employee "must be completely relieved from duty for the purpose of eating meals" during a bona fide meal period. *Id.* The Fifth Circuit has determined this using a "predominant benefit test." *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 264 (1998). "The critical question is whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee. The employer bears the burden to show that meal time qualifies for this exception from compensation *Id.* at 264-65 (citations omitted). The Court questions whether the facts in the instant matter are analogous to *Bernard*, however. Whether meal time is predominantly for the benefit of the employer presupposes that there is an identifiable mealtime. In *Bernard*, the plaintiffs were members of a Teamsters union who were allowed one thirty [**16] minute meal break during each shift. *Id.* at 262. Here, unlike *Bernard*, we are not dealing with a particular meal period; Plaintiffs would take lunch whenever the opportunity arose. If they opted to skip lunch and work or eat while doing job duties, it is compensable. If they put work aside to eat lunch, it is not. These are disputed issues of material facts.

4. Time Preparing for and Taking Dell Certification Exams

Plaintiffs claim that time spent in training programs and preparing for post-training certification exams must be counted as time worked and compensated accordingly. (Rec. doc. 45, p. 25). Defendant provides a deposition from John Croft, the Field Service Supervisor, that says employees of Bantec were allowed to bill for the time spent on conference calls and training. Due to these conflicting accounts, the Court finds that this remains a genuine issue of material fact.

5. Estimates of Time

Plaintiffs assert that each has calculated a reasonable estimate of the time spent doing the aforementioned activities. These clearly constitute issues of fact for the jury to determine.

Independent Contractor

Boudreaux claims that he was [**17] an employee at all times while working with Defendant, and therefore was at all times [*434] covered by the FLSA and subject to the FLSA overtime provision. (Rec. doc. 45, p. 27), see 29 U.S.C. § 207(a). Defendant, by contrast, asserts that Boudreaux was not covered by the FLSA while classified as an independent contractor from December, 2001 to May, 2003.

[HN7]Whether a worker is covered by the FLSA is not as simple as whether he fits under the common law concepts of "employee" or "independent contractor." See *W.J. Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308, 1311 (1976) ("The common law concepts of 'employee' and independent contractor' have been specifically rejected as determinants of who is protected by the Act."). For the purposes of the FLSA, an "employee" is determined by whether "as a matter of economic reality, (they) are dependent upon the business to which the render service." *Id.* The factors to consider in determining economic dependence are 1) degree of control; 2) opportunities for profit or loss; 3) investment in facilities; 4) permanency of relation; and 5) skill required. *Id.* "None of these considerations can become [**18] the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor -- economic dependence." *Id.*

1. Degree of Control

Plaintiffs assert that Defendant exerted significant control over their daily routine. For example, in Boudreaux's case, Defendant allegedly set all service calls, required that they be done according to "detailed procedures" (Rec. doc. 45, p. 27), required Boudreaux to account for all of his travel time, time on site, and mileage, and also required Boudreaux to complete all BanTec assignments before he could do any outside work. De-

fendant counters that the Independent Contractor Agreement specifically stated that the contractor has "the freedom of accepting or rejecting assignments under [the] Agreement and determining the specific manner in which the services are provided under [the] Agreement." (Rec. doc. 46, Ex. 2, P9). Accordingly, the Court finds that the amount of control exerted over Boudreaux is a genuine issue of material fact.

2. Opportunities for Profit or Loss

Boudreaux claims that Defendant had the bigger opportunity for profit or loss because Defendant [**19] was the one who set the charges and fees. (Rec. doc. 45, p. 27). Defendant argues that Boudreaux had the opportunity to accept or reject service calls, which would determine his daily income (Rec. doc. 46, p. 15). As noted above, Boudreaux disputes that he had the ability to turn down service calls. Defendant also asserts that Boudreaux had the ability to organize his daily route of service calls in the most efficient manner, thereby enabling him to be more productive and make more money. Boudreaux counters that Defendant required him to organize the most efficient routes, and in fact "audited to ensure such compliance." (Rec. doc. 47, p. 9). Given these unresolved disputes, the Court finds that the question of who had the greater opportunity for profit or loss remains a genuine issue of material fact.

3. Investment in Facilities

Boudreaux notes that he had to buy some "minor" tools of his own, but this was also the case at the times Defendant classified him as an employee. (Rec. doc. 45, p. 27-28). Similarly, Defendant has not adequately demonstrated that the investments Boudreaux made when classified as an independent contractor were any different than those made by BenTec [**20] technicians classified as employees, or by [*435] Boudreaux himself when he was classified as an employee.

4. Permanency of Relation

Defendant argues its relationship with Boudreaux was indicative of an independent contractor because either party could terminate the Independent Contractor Agreement at will and because many of the technicians who participated in the independent contractor program were transitory. The Court notes that, generally, employees also work at will and can terminate their relationship any time. Boudreaux argues that the permanency of relationship consideration is actually a question of economic relationship rather than temporal one, though Boudreaux offers no support for this interpretation. Neither side has persuaded the Court that the permanency of Boudreaux's relationship with Defendant indicates either that he is an independent contractor or an employee while participating in the independent contractor program.

5. Skill Required

Given the fact that Boudreaux was classified first as an employee, then as an independent contractor, then again as an employee, all apparently without any change in duties or skills, the Court finds that this factor does not [**21] weigh in favor of finding that Boudreaux was an independent contractor.

Though the factor of skill required cuts toward finding that Boudreaux was an employee of BanTec even when classified as an independent contractor, this factor is not conclusive, and genuine issues of material fact in other factors prevent the Court from making a determination at this time. For example, whether Boudreaux really had the ability to decline service calls and whether he had a genuine ability to make decisions that would increase his own profit margins are questions that remain unresolved. Accordingly, the Court cannot conclude that Boudreaux was an independent contractor when he was classified as such, nor can it conclude that he was not. In other words, the real issue -- whether Boudreaux was economically independent -- remains unproven.

Good Faith

Section 216(b) of the FLSA provides that [HN8]"any employer who violates the provisions of section 206 or 207 of this title shall be held liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) [**22] . [HN9]Liquidated damages in an amount equal to the unpaid wages due *must* be awarded unless the trial court finds that the acts of the employer giving rise to the suit were both in good faith and reasonable. *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407 (5th Cir. 1990). Plaintiffs argue that Defendant did not act in good faith when it prevented them from reporting various hours spent working which would have amounted to overtime. "In this case, BanTec knew that its actions were governed by the Act prior to contacting outside counsel. ² BanTec had deemed full-time regular employees, like Nolan, eligible for overtime. Further, Vinson & Elkins' opinion letter explicitly referred to the FLSA. Further, BanTec knew that [*436] Plaintiffs were working hours for which they were not being compensated." (Rec. doc. 45, p. 30). Plaintiffs further allege that Defendant knowingly, and in bad faith, provided false and misleading information to Mr. Johnston of Vinson & Elkins about the Flex Tech program. (Rec. doc. 45, pp. 5, 30). The Court finds that Johnston's opinion letter provides evidence that Defendant was aware or had reason to know of the FLSA provisions, at least after receiving [**23] Johnston's opinion letter. However, Plaintiffs' allegations that Defendant lacked good faith in believing the FLSA to be inapplica-

ble are unsubstantiated and argumentative. Defendant's actual knowledge and its reasonableness remains a genuine issue of material fact.

2 Johnston wrote in his opinion letter, "if it is determined that Flex Techs are employees rather than independent contractors, the company could be liable, under various employment related law. For example this change may subject BanTec to liability for (I) failure to pay minimum wages or overtime (in addition to liquidated damages . . .) under the Fair Labor Standards Act."

Having considered all of the arguments put forth by Plaintiffs both individually and collectively, the Court finds that their motion for partial summary judgment must be denied. Accordingly, a determination regarding attorney's fees is not appropriate. The Court now turns to the arguments put forth by Defendant in its motion for partial summary judgment.

[**24]

Defendant claims in its motion for partial summary judgment that 1) Boudreaux cannot make a prima facie case of retaliation under the FLSA; 2) it had a legitimate nondiscriminatory reason for terminating Boudreaux; 3) Boudreaux cannot demonstrate pretext; 4) Boudreaux was not covered by the FLSA while he was an independent contractor; 5) Plaintiffs are estopped from claiming overtime wages; 6) Plaintiffs's travel to and from home is noncompensable; 7) Plaintiffs's lunchtime is noncompensable; and 8) time spent boxing up parts at home is not compensable.

The Court has already addressed arguments four, six, and seven in course of considering Plaintiffs's motion for partial summary judgment. To reiterate, for the reasons stated above, there remains a genuine issue of material fact as to whether Boudreaux could properly be considered an independent contractor even though he was temporarily classified as such, and whether Plaintiffs's travel time and lunch time is compensable. Just as the Court cannot grant summary judgment in favor of the Plaintiffs on these issues, it cannot grant summary judgment in favor of Defendant.

Prima Facie Case of Retaliation

[**25] [HN10]The FLSA provides, in pertinent part, that it shall be unlawful for any person:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this chapter, or he has testified or is about to testify

in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). Claims of retaliatory discharge are analyzed using a burden shifting framework. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Thus, Boudreaux must make a *prima facie* case of retaliation before the burden can shift to Defendant. [HN11]To make a *prima facie* case, Boudreaux must demonstrate 1) that he engaged in a protected activity, 2) an employment action that disadvantaged him, and 3) a causal connection between the protected activity and the adverse employment action. *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1225-26 (5th Cir. 1996). Defendant concedes that Boudreaux was subject to an adverse employment action, but contends that he never engaged in a protected [**26] activity, and even if he did, there was no causal connection [*437] between his complaints and his termination.

[HN12]Protected activity consists of filing an official complaint, instituting a proceeding, testifying in a proceeding, or serving on an industry committee. 29 U.S.C. § 215(a)(3). Defendant argues that Boudreaux, though he complained repeatedly to his bosses, never even filed an official complaint, and therefore did not engage in protected activity. Defendant notes two cases, *Dronet* and *Booth*, in which this Court has held that making informal complaints to company officials does not rise to the level of protected activity under the FLSA. *Dronet v. LaFarge Corp.*, No. 00-2656, 2001 U.S. Dist. LEXIS 8565 (E.D. La. June 19, 2001) (Clement) (plaintiff did not engage in protected activity under FLSA even though he lodged verbal complaints over the last two years of his employment, wrote a letter to his supervisor, and contacted an unspecified governmental agency to inquire about how vacation pay should be calculated); *Booth v. Intertrans Corp.*, No. 94-2359, 1995 U.S. Dist. LEXIS 7593 (E.D. La. May 26, 1995) (Vance) (informal [**27] complaints to company officials do not constitute protected activity). Boudreaux's complaints, Defendant argues, were similarly informal and thus not protected activity.

Boudreaux does not dispute that he did not file a formal complaint, institute a proceeding, or testify, nor does he dispute Defendant's characterizations of *Dronet* and *Booth*. Rather, Boudreaux asserts that *Dronet* and *Booth*, are "contrary to the remedial purposes of the Act and are not binding on this Court." (Rec. doc. 47, p. 6). As district court cases, *Dronet* and *Booth* are not binding authority. They are persuasive authority, as are the numerous cases cited from other district courts and circuit courts which embrace a broader interpretation of the FLSA and do allow for the possibility that unofficial

complaints can be protected activity. (Rec. doc. 47, p. 3, footnote 16). The parties do not provide, nor is the Court aware, of any binding authority from the Fifth Circuit on whether the narrow interpretation of the statute used in *Dronet* and *Booth* is appropriate, or instead use of a broader interpretation that would apply the FLSA's anti-retaliatory provisions in situation where employees [**28] simply make unofficial complaints.

[HN13] Given the lack of binding authority and conflicting persuasive authority, the Court finds that it will adopt a broader interpretation of "protected activities." The Court agrees with the rationale of Eleventh Circuit Court of Appeals, which held in *Equal Employment Opportunity Commission v. White and Son Enterprises* that

The FLSA in general is remedial in purpose (citations omitted) ... Congress sought to secure compliance with the substantive provisions of the labor statute by having 'employees seeking to vindicate rights claimed to have been denied' lodge complaints or supply information to officials regarding allegedly substandard employment practices and conditions. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 4 L. Ed. 2d 323, 80 S. Ct. 332 (1960). The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who choose to voice such a grievance. *Id.* By giving a broad construction to the anti-retaliation provision to include the form of protest engaged in here by the charging parties, its purpose will be further promoted (citations omitted).

881 F.2d 1006, 1011 (1989). [**29] Pursuant to this interpretation, the Court finds that [*438] Boudreaux's repeated informal complaints to BanTec officers can be considered protected activity under the statute.

Defendant argues that there is no causal connection between Boudreaux's protected activity of expressing his grievances to his bosses and his termination. The facts indicate that Boudreaux was fired while having a conversation with Rick Neff during which; among other things, he reiterated his complaints about his compensation structure. This was not long after Boudreaux allegedly told Neff he had complained to the Louisiana Department of Labor. The Court finds that a reasonable jury could determine that Boudreaux's termination was causally connected to the complaints expressed in these conversations. Therefore summary judgment in favor of De-

fendant on the question of whether Boudreaux's termination was causally connected to his protected activities is inappropriate.

Burden Shifting

[HN14] Should Boudreaux be able to establish a prima facie case at trial, the burden would shift to Defendant to provide a legitimate, non-discriminatory reason for Boudreaux's termination. The burden would then shift back to Boudreaux to [**30] show that Defendant's non-discriminatory reason is merely a pretext. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). The Court finds there is a dispute as to whether Boudreaux was fired for insubordination or for complaining that he was not being compensated fairly. A reasonable jury could disagree on whether Defendant's reason for firing Boudreaux is believable or simply a pretext. Again, summary judgment is not proper at this time.

Estoppel

Defendant next claims that Plaintiff Nolan is estopped from alleging that he was not paid overtime. (Rec. doc. 46, p. 18-19). [HN15] In order to recover for a violation of the FLSA, Nolan must show that he was "employed" in the sense used in the FLSA for the periods of time for which he claims overtime. *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995). A worker is employed during those hours if the employer has knowledge, actual or constructive, that he was working. *Id.* Defendant claims that Nolan is estopped from claiming overtime now because he never reported the hours he is now claiming, never complained, and thus Defendant had no actual or constructive knowledge that he was [**31] working. The facts reveal that Boudreaux and other technicians, though apparently not Nolan, repeatedly complained to Croft about not being compensated for "administrative time." According to Boudreaux, Croft told him that technicians are not compensated for such time because "it was part of the job." (Rec. doc. 45, p. 11). A reasonable juror could conclude, the Court finds, that these occurrences put Croft on constructive notice that those technicians who performed service calls, including Nolan, were working additional hours that could be construed as either overtime or "just part of the job." Accordingly, there remains a genuine issue of material fact.

Time Spent Boxing up Parts at Home

Finally, Defendant asks the Court to decide on summary judgment that the time spent boxing up parts at home is *de minimus* and therefore not compensable. (Rec. doc. 46, p. 24). The United States Supreme Court has recognized a *de minimus* rule in FLSA cases.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946). It held that [HN16]"it is only when an employee is required to give up a substantial [*439] measure of his time and effort that compensable working time is involved. [**32] " *Id.* By contrast, "when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Id.* The Court finds that the evidence does not provide a clear, undisputed picture of the steps involved in boxing and recording parts, how much total time was spent on this process, and how regularly this process took place. Therefore the Court cannot determine at this time that the time spent boxing parts was *de minimus*.

Conclusion

The Court finds that genuine issues of material facts remain as to all issues brought by Plaintiffs and Defendant in their motions for partial summary judgment.

Accordingly,

IT IS ORDERED that Plaintiffs's Motion for Partial Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment is **DENIED**.

New Orleans, Louisiana, this 22nd day of February, 2005.

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

LEXSEE

Wardell Braxton, et al, Plaintiffs, Michael Huntington, Appellant, v. Rotec Industries, Inc., Respondent

No. 4291-0-III

COURT OF APPEALS OF WASHINGTON, Division Three

30 Wn. App. 221; 633 P.2d 897; 1981 Wash. App. LEXIS 2693

August 25, 1981

SUBSEQUENT HISTORY: [***1] Reconsideration Denied September 16, 1981. Review Denied by Supreme Court December 18, 1981.

jury instructions, trier of fact, burden of proving, manufacturer's, manufactured, faultlessly

CASE SUMMARY:

LexisNexis(R) Headnotes

PROCEDURAL POSTURE: Plaintiff employee sought review of a decision from the Superior Court for Benton County (Washington), which entered a judgment in favor of defendant seller in a products liability action.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

OVERVIEW: The employees brought a products liability action against the seller. The trial court entered a judgment in favor of the seller. Only one of the employees sought review of the trial court's decision. On appeal, the employee contended that the trial court erred when it refused to give the employee's proposed jury instructions. The court affirmed the judgment of the trial court. The court held that: (1) the wording of an instruction was within the trial court's discretion and an instruction could be refused even though it correctly stated the law; (2) the jury instructions provided by the trial court were broad enough to allow the employee to argue his theory that the seller owed a duty to the employee as the ultimate user of the product; and (3) the fact that certain language was used in an appellate court decision did not mean that it had to be incorporated into a jury instruction.

[HN1]Jury instructions must be considered in their entirety. The wording of an instruction is within a court's discretion and an instruction may be refused even though it correctly states the law. Instructions are sufficient if they (1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

[HN2]The fact that certain language is used in an appellate court decision does not mean it must be incorporated into a jury instruction.

OUTCOME: The court affirmed the decision of the trial court, which entered a judgment in favor of the seller in a products liability action.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Products Liability > Duty to Warn

CORE TERMS: warning, user, duty to warn, wire, guy, swinger, manual, safe, unreasonably dangerous, conveyor, consumer, cable, adequate warnings, proposed instructions, warn, pogo stick, instruct, correctly, adequacy, latent, concrete, supplied, seller, applicable law,

[HN3]A warning may not be adequate as a matter of law where the dangers associated with a product are clearly latent. A manufacturer's negligence is not a factor in determining the adequacy of a warning. In most cases both the question of whether instructions or warnings are adequate to insure safe use of a product, as well as that of whether the dangers involved are so obvious or well known as to eliminate the necessity for detailed warnings, are for the trier of fact.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Products Liability > Duty to Warn

[HN4]Except in cases where the danger is clearly latent, the adequacy of both the content and prominence of warnings accompanying a product is a question for a jury, and a court need not furnish guidelines to aid the jury in its determination.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Evidence > Inferences & Presumptions > General Overview

[HN5]A jury is presumed to have followed instructions.

SUMMARY:

Nature of Action: Injured employees brought a products liability action against the manufacturer of a concrete conveyor system which had collapsed.

Superior Court: The Superior Court for Benton County, No. 32991, Richard G. Patrick, J., on January 7, 1980, entered a judgment on a verdict in favor of the defendant.

Court of Appeals: Finding no prejudicial error in the instructions given by the trial court or in its refusal to give other requested instructions, the court *affirms* the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Trial -- Instructions -- Refusal of Correct Instruction -- Effect The refusal to give an instruction which correctly states the law does not constitute error if the instructions given are sufficient when considered as a whole.

[2] Trial -- Instructions -- Sufficiency -- Test Instructions are sufficient if they permit the parties to argue their theories of the case, are not misleading, and when read as a whole correctly state the applicable law.

[3] Trial -- Instructions -- Unnecessary Instruction -- Effect An instruction regarding a matter which is not at issue constitutes harmless error if it could not have misled the jury or restricted the ability of the parties to argue their theories of the case.

[4] Trial -- Instructions -- Language of Appellate Court There is no requirement that language from an

appellate court opinion be included in subsequent jury instructions.

[5] Products Liability -- Strict Liability -- Warning -- Adequacy -- Instruction -- Necessity Instructions informing the jury that a manufacturer may be held strictly liable for its failure to provide adequate warnings need not further define the meaning of "adequate warning."

[6] Trial -- Instructions -- Adherence by Jury -- Presumption A jury is presumed to follow the trial court's instructions.

COUNSEL: *Michael E. de Grasse and Critchlow & Williams*, for appellant.

Robert R. Redman and Gavin, Robinson, Kendrick, Redman & Mays, for respondent.

JUDGES: Green, J. Roe, A.C.J., and Munson, J., concur.

OPINION BY: GREEN

OPINION

[*222] [****898**] Michael Huntington, one of the plaintiffs in this products liability action, appeals from a jury verdict in favor of defendant, Rotec Industries. The issues presented are whether the court erred in (1) giving and failing to give certain instructions concerning Rotec's duty to warn, and (2) refusing to instruct the [*****2**] jury that negligence is not an element of Mr. Huntington's case. We affirm.

[*223] Hoffman Construction Co. purchased a concrete conveyor system, referred to as a "swinger" from Rotec Industries for use in constructing a nuclear reactor in Benton County. The swinger is a revolving conveyor belt system supported by a vertical column referred to as a "pogo stick." In its instruction manual, Rotec suggested the pogo stick could be mounted by embedding it in cement or bolting it to a concrete slab through a baseplate. It could also be supported by guy wires. If guy wires were used, the manual supplied the suggested cable size, breaking strength, tension and weave for the cables depending upon the height of the pogo. The pogo stick, guy wires and hardware to support the swinger were to be supplied by the purchaser, Hoffman.

In the spring of 1976, Hoffman's supervisors and engineers erected the swinger, which arrived at the construction site unassembled. A pogo stick between 20 and 30 feet tall was mounted to a baseplate and supported by guy wires. One of Rotec's employees aided in assembling the system and instructed some of Hoffman's employees,

including Mr. Huntington, regarding [***3] its operation and maintenance. However, he did not instruct them concerning the erection of the supporting structure. The Hoffman employees who were present while the swinger was being assembled and erected each received the instruction manual.

In the course of its normal use, over a period of several months, the system was disassembled and reassembled. On September 16, 1976, the system collapsed injuring three employees. They brought this action for personal injuries, alleging the system was unreasonably dangerous and Rotec was strictly liable for defective design, manufacture, installation and service. Rotec answered, alleging the injuries were caused by the acts or omissions of Hoffman and the injured employees.

[**899] The testimony at trial was conflicting as to the cause of the accident. The record shows the cable used for the guy wires was smaller in diameter than the cable size suggested by the manual. Rotec's expert testified a guy wire was improperly spliced. An employee testified Mr. Huntington [*224] was aware of and concerned about this splice while operating the system. On the other hand, Mr. Huntington's expert testified the manual did not instruct [***4] when guy wires should be used or specify the type of steel required. It was also his opinion the manual should have warned of the consequences resulting from the use of improper cables.

The jury returned a verdict in favor of Rotec as to all plaintiffs. In its answer to a special interrogatory as to Mr. Huntington, the jury found the swinger was not unreasonably dangerous. He appeals.

First, Mr. Huntington contends the court erred in refusing to give his proposed instructions which state:

Each plaintiff was an ultimate user or consumer of the defendant's product. That the defendant might have warned the plaintiffs' employer does not satisfy its obligation to warn the plaintiffs.

Any knowledge on the part of the plaintiffs' employer of the hazards or dangers presented by the defendant's product is not a defense to the plaintiffs' claims.¹

He argues failure to give these instructions may have confused the jury about Rotec's duty to Huntington as an ultimate user of the conveyor system.

¹ Another instruction proposed by Huntington was similar:

"Defendant cannot avoid its responsibility to warn persons such as the plaintiffs of its product's dangers by delegation of those responsibilities to the plaintiffs' employer.

"Any warning the defendant made to the plaintiffs' employer does not satisfy the defendant's responsibility to warn the plaintiffs of the product's dangers."

[***5] [1] [2] It is well established that [HN1]instructions must be considered in their entirety. State v. Fernandez, 28 Wn. App. 944, 954, 628 P.2d 818 (1980). The wording of an instruction is within the court's discretion and an instruction may be refused even though it correctly states the law. Bryant v. Department of Labor & Indus., 23 Wn. App. 509, 512, 596 P.2d 291 (1979); Enslow v. Helmcke, 26 Wn. App. 101, 104, 611 P.2d 1338 (1980); State v. Evans, 26 Wn. App. 251, 262, 612 P.2d 442 (1980). Instructions are sufficient if they (1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, [*225] properly inform the trier of fact of the applicable law. State v. Mark, 94 Wn.2d 520, 522, 618 P.2d 73 (1980); State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).

Here, the court, in other instructions informed the jury Rotec had a duty to the ultimate user of its product:

(1) One who sells any product that is not reasonably safe to the *user or consumer* is liable for physical harm thereby proximately caused to [***6] the *ultimate user or consumer*, if (a) the seller is engaged in the business of selling such product; and (b) the product is expected to and does reach the *user or consumer* without substantial change in the condition in which it was sold.

(2) This rule applies although (a) the seller has exercised all possible care in the preparation and sale of its product; and (b) *the user or consumer* has not bought the product from or entered into any contractual relationship with the seller.

(Italics ours.) Another instruction given by the court stated:

A product may be faultlessly manufactured and designed, yet still not be reasonably safe *when placed in the hands of the ultimate user* without first giving adequate instructions or warnings concerning

the manner in which to use the product safely.

(Italics ours.) These instructions were broad enough to allow Mr. Huntington to argue his theory that Rotec owed a duty to him as the ultimate user of the swinger.

[**900] Huntington further contends his proposed instructions were necessary in light of other instructions given by the court:

The defendant is under no duty to instruct or warn the user of any dangers [***7] associated with defendant's product if such dangers are obvious or known to the user.

If you find that any dangers associated with defendant's product were obvious or known to the user then you cannot find that the product was rendered unreasonably dangerous because of inadequate instructions or warnings.

The defendant was under no duty to warn plaintiffs' employer regarding any dangers resulting from the improper use or assembly of the product defendant sold to plaintiffs' employer if you find that plaintiffs' [*226] employer knew or should have known of such dangers.

He argues it was error to give these instructions because they permitted the jury to conclude Rotec's duty to warn was owed only to the employer, Hoffman. Further, he argues the instructions erroneously imply Hoffman was an intermediary or superseding cause of the injury, cutting off Rotec's duty to warn the employees. We disagree.

[3] These instructions are accurate statements of the law. See *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 573 P.2d 785, 93 A.L.R.3d 86 (1978); *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 123, 594 P.2d 911 (1979). Although the [***8] instruction regarding Rotec's duty to warn the employer was unnecessary since Hoffman was not a party to the action, it could not have misled the jury. Huntington was not precluded from arguing that even though the dangers associated with Rotec's product may have been obvious to the employer, Rotec's duty to warn was not absolved unless those dangers were also obvious to the employees operating the conveyor system. Considering the instructions as a whole, it is clear Rotec's duty to warn Huntington was separate from its duty

to warn his employer. We therefore find any error in submitting that instruction was harmless.

Second, Mr. Huntington contends the court erred in refusing to give his proposed instructions which state:

One who introduces a product into the stream of commerce must see that the product is accompanied by an adequate or sufficient warning of the dangers presented by the use of that product.

Such a warning must be sufficient to catch the attention of persons who could be expected to use the product and to apprise them of its dangers and to advise them of the measures to take to avoid those dangers.

Concerning the product sold by the defendant here, directions [***9] and warnings serve different purposes. Directions (or instructions) are for the purpose of assuring an *effective* use of the product. On the other hand, warnings are for the purpose of assuring a *safe* use of the product.

That the defendant might have given appropriate directions (or instructions) for the use of its product is not a defense to the plaintiffs' claims and has no bearing [*227] on the question of whether the defendant is liable to the plaintiffs.

He argues these instructions should have been given because they are supported by language contained in *McCully v. Fuller Brush Co.*, 68 Wn.2d 675, 678, 415 P.2d 7 (1966); and *Little v. PPG Indus., Inc.*, *supra*. We disagree.

[4] [5] [HN2]The fact that certain language is used in an appellate court decision does not mean it must be incorporated into a jury instruction. *Turner v. Tacoma*, 72 Wn.2d 1029, 435 P.2d 927 (1967); *State v. Williams*, 28 Wn. App. 209, 212, 622 P.2d 885 (1981). In *McCully* it was held [HN3]a warning may not be adequate as a matter of law where the dangers associated with the product are clearly latent. The court [***10] in *Little* held a manufacturer's negligence is not a factor in determining the adequacy of a warning. Neither court stated an instruction must be submitted *defining* an adequate warning. In fact, the *Little* court recited its prior decision in *Haysom v. Coleman Lantern Co.*, *supra* at 480, where it was held in most cases

[**901] both the question of whether instructions or warnings are adequate to insure safe use of a product, as well as that of whether the dangers involved are so obvious or well known as to eliminate the necessity for detailed warnings, are for the trier of fact.

In *Berry v. Coleman Sys. Co.*, 23 Wn. App. 622, 627, 596 P.2d 1365 (1979), we held [HN4]except in cases where the danger is clearly latent, "the adequacy of both the content and prominence of warnings accompanying a product is a question for the jury, and the court need not furnish guidelines to aid the jury in its determination."

Here, the dangers associated with using inadequate guy wires to support the concrete conveyor system are not latent. It was for the jury to determine whether the instructions given in Rotec's manual were adequate or whether [***11] additional warnings should have been supplied. The court instructed the jury a product may not be reasonably safe

without first giving adequate instructions or warnings [*228] concerning the manner in which to use the product safely.

Warnings and instructions may or may not be the same depending upon the circumstances.

The court's instructions were broad enough to allow Huntington to argue adequate warnings were not given. There was no error in refusing to give Huntington's proffered instructions.

Finally, Huntington argues the court erred in refusing to give his proposed instruction, which states:

Negligence of the defendant is not a part of the plaintiffs' case. Therefore, you need not find the defendant negligent, or to have acted without ordinary care, in order to find the defendant liable for the plaintiffs' injuries.

He argues negligence as a superseding or intervening cause was in issue as a defense. Without this instruction, Huntington contends, the jury could have erroneously concluded he had the burden of proving negligence as a part of his prima facie case. We disagree.

[6] The court instructed the jury:

The plaintiff [***12] has the burden of proving each of the following propositions:

First, that the product sold by the defendant was unreasonably dangerous, though faultlessly manufactured, by reason of the distribution of that product without suitable and adequate warnings or instructions concerning the safe manner in which to use it;

Second, that the plaintiff was injured;

Third, that the unreasonably dangerous condition of the defendant's product was a proximate cause of the injury to the plaintiff.

This instruction does not place any burden upon Mr. Huntington to prove Rotec was negligent. [HN5]The jury is presumed to have followed that instruction. *State v. Hale*, 26 Wn. App. 211, 216, 611 P.2d 1370 (1980). There was no error.

[*229] Affirmed.

LEXSEE

William E. Brock, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee, v. Superior Care, Inc.; National Nursing Services, Inc.; Ann T. Mittasch, Individually and as President; and Robert M. Rubin, Individually and as Secretary and Treasurer, Defendants-Appellants

No. 87-6195

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

840 F.2d 1054; 1988 U.S. App. LEXIS 2089; 108 Lab. Cas. (CCH) P35,029; 28 Wage & Hour Cas. (BNA) 801; 28 Wage & Hour Cas. (BNA) 940

December 1, 1987, Argued
February 16, 1988, Decided

SUBSEQUENT HISTORY: [**1] Reported at: 840 F.2d 1054 at 1064. Opinion on Motion to Clarify April 5, 1988.

PRIOR HISTORY: Appeal from a judgment of the District Court for the Eastern District of New York (Leonard D. Wexler, Judge), after a bench trial, enjoining defendants from violating the record-keeping and overtime pay provisions of the Fair Labor Standards Act and awarding unpaid overtime plus liquidated damages.

DISPOSITION: Affirmed as modified to delete liquidated damages.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant health-care service appealed from a judgment of the United States District Court for the Eastern District of New York, which enjoined it from violating the record-keeping and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C.S. §§ 207, 211(c), 215(a)(2), and 215(a)(5), and awarded back pay and liquidated damages to nurses who worked for defendant.

OVERVIEW: Defendant health-care service provided nurses to health care institutions. Defendant considered some nurses employees, but treated other nurses who did the same work as independent contractors and did not pay them time and a half for overtime worked. The Secretary of Labor brought suit against defendant under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 217 for paying straight-time wages for overtime hours. The district court found that the nurses were employees, that no exemption was available, and that defendant's violations

were willful. The district court enjoined defendant from withholding back pay and awarded statutory liquidated damages. On appeal, the court found that the nurses were employees under the economic reality test and they were not exempt from the FLSA as bona fide employees because they were paid on an hourly basis. The court found that defendant knowingly violated or showed reckless disregard for the provisions of the FLSA. The court found that liquidated damages were improper because the secretary framed his complaint under § 217, which did not permit such damages. The court deleted that award and affirmed the rest of the judgment.

OUTCOME: The court deleted the award of liquidated damages because such an award was not permitted by the provision of the Fair Labor Standards Act under which plaintiff, the Secretary of Labor brought the suit, but affirmed the injunction against defendant health-care service because its nurses were employees within the meaning of the act and should have been paid overtime rates.

CORE TERMS: nurse's, liquidated damages, overtime, independent contractors, willful, statute of limitations, unpaid, economic reality, willfulness, patient, jury trial, overtime wages, cause of action, payroll, bona fide, injunction, taxed, skill, present case, withholding, initiative, nontaxed, hourly, weigh, equal amount, job sites, reckless disregard, permanence, injunctive, nursing

LexisNexis(R) Headnotes

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ

[HN1]The Fair Labor Standards Act (FLSA) defines "employee" as any individual employed by an employer, and to "employ" as including to suffer or permit to work. 29 U.S.C.S. §§ 203(e)(1), 203(g). The definition is necessarily a broad one in accordance with the remedial purpose of the act.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors

[HN2]Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the Fair Labor Standards Act. These factors, known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.

Administrative Law > Judicial Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Labor & Employment Law > Employment Relationships > Independent Contractors

[HN3]The existence and degree of each factor in the economic reality test is a question of fact while the legal conclusion to be drawn from those facts -- whether workers are employees or independent contractors -- is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is de novo.

Labor & Employment Law > Employment Relationships > Independent Contractors

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN4]The factors that have been identified by various courts in applying the economic reality test are not exclusive. Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.

Though an employer's self-serving label of workers as independent contractors is not controlling, an employer's admission that his workers are employees covered by the Fair Labor Standards Act is highly probative.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview

[HN5]The Fair Labor Standards Act, 29 U.S.C.S. § 213(a)(1) provides an exemption for any employee employed in a bona fide professional capacity (as such terms are defined and delimited by regulations of the Secretary of Labor. One of the criteria in the regulations for bona fide professional employees is compensation for services on a salary or fee basis at a rate of not less than \$ 170 per week. 29 C.F.R. § 541.3 (1987). Compensation on a salaried basis occurs when an employee regularly receives, each pay period, a predetermined amount, not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.118 (1987). An employee is paid on a fee basis when he receives a fixed sum for a single job regardless of the time required for its completion. 29 C.F.R. § 541.313 (1987).

Governments > Legislation > Statutes of Limitations > Time Limitations

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > General Overview

Labor & Employment Law > Wage & Hour Laws > Statutes of Limitations

[HN6]The Fair Labor Standards Act provides a statute of limitations of two years unless the cause of action arises from a "willful violation," in which case a three-year limitations period applies. 29 U.S.C.S. § 255(a). Thus, the Secretary of Labor may recover an additional year of back wages when a violation is willful.

Governments > Legislation > Statutes of Limitations > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > Statutes of Limitations

[HN7]A violation is willful for purposes of the Fair Labor Standards Act limitations provision only if the employer knowingly violates or shows reckless disregard for the provisions of the Act.

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > Injunctions

[HN8]When the Secretary of Labor sues under The Fair Labor Standards Act, 29 U.S.C.S. § 217 for injunctive relief, liquidated damages are unavailable.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Labor & Employment Law > Wage & Hour Laws > Remedies > Liquidated Damages

[HN9]The Fair Labor Standards Act does not allow liquidated damages where, as here, the employer has no right to a jury on the underlying issue of unpaid overtime compensation. Congress has limited the remedy of liquidated damages to actions under 29 U.S.C.S. § 216 where the employer has a right to a jury trial on the back pay issue. Although the judge always has discretion to reduce the amount of liquidated damages for which a defendant is liable if the employer shows good faith, the statutory scheme sets the maximum amount of liquidated damages at the amount of the back pay award, which the employer is entitled to have the jury determine. 29 U.S.C.S. §§ 216, 260. If the Secretary of labor is permitted to collect § 216 liquidated damages in an action where the overtime wage issues are determined by the judge pursuant to 29 U.S.C.S. § 217, then the employer is stripped of the protection that the Act provides by limiting the amount of liquidated damages to the amount of the jury's back pay award.

COUNSEL: Ronald M. Green, (Epstein Becker Borsody & Green, on the brief), for Defendants-Appellants.

William J. Stone, U.S. Dept. of Justice, (Patricia M. Rodenhause, Regional Solicitor, George R. Salem, Solicitor of Labor, Monica Gallagher, Assoc. Solicitor, Linda Jan S. Pack, U.S. Dept. of Justice, on the brief), for Plaintiff-Appellee.

JUDGES: Newman and Cardamone, Circuit Judges, and Gray, District Judge. *

* The Honorable William P. Gray of the United States District Court for the Central District of California, sitting by designation.

OPINION BY: NEWMAN

OPINION

[*1057] JON O. NEWMAN, Circuit Judge:

Defendant Superior Care, Inc., two of its officers, and its wholly owned subsidiary (collectively "Superior Care") [****2**] appeal from a judgment of the District Court for the Eastern District of New York (Leonard D. Wexler, Judge), entered after a bench trial, enjoining it from violating the record-keeping and overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207, 211(c), 215(a)(2), and 215(a)(5) (1982 & Supp. III 1985), and awarding liquidated damages. Superior Care is a health-care service that provides nurses to individuals, hospitals, and nursing homes. The District Court found that the nurses were "employees" subject to the FLSA and that the defendants' violations were willful for purposes of the three-year statute of limitations. The Court enjoined Superior Care from withholding \$ 697,140.66 of unpaid overtime compensation and awarded an equal amount as statutory liquidated damages. We agree with the District Court that the nurses are employees covered by the FLSA and that Superior Care's violations of the Act were willful. However, we conclude that the Secretary may not collect liquidated damages because the Secretary did not bring this action under the provision authorizing such damages.

BACKGROUND

Superior Care is a New York corporation [****3**] engaged in the business of referring temporary health-care personnel, primarily nurses, to individual patients, hospitals, nursing homes, and other health care institutions. Nurses who wish to work for Superior Care are interviewed and placed on a roster. As work opportunities become available, Superior Care assigns nurses from the list. The nurses are free to decline a proposed referral for any reason. Once an assignment is accepted, the nurse reports directly to the patient, where treatment is prescribed by the patient's physician. Superior Care supervises its nurses through visits to the job sites once or twice a month. Nurses are also required to submit to Superior Care patient care notes that the nurses keep pursuant to state and federal law. The length of a particular assignment depends primarily upon the patient's condition and may vary from less than a week to several months.

Patients contract directly with Superior Care, not with the nurses, and the nurses are prohibited from entering into private pay arrangements with the patients. The nurses are paid an hourly wage by Superior Care. Most of the time, the hourly wage is set by Superior Care, depending on the market conditions [****4**] in the local geographic area. Occasionally, if an assignment involves special patient treatment or an inconvenient location, nurses may be able to negotiate a pay rate just for that job. Superior Care permits its nurses to hold other jobs,

including positions with other nursing-care providers. Many of the nurses take advantage of this opportunity and are listed with several health-care providers simultaneously. Thus, many of the nurses work for Superior Care only several weeks a year, and few rely on Superior Care for their primary source of income.

During the relevant time periods, Superior Care maintained two payrolls for its nursing staff. One payroll included nurses for whom employee payroll taxes were deducted ("taxed nurses"), and the other payroll included nurses for whom no payroll taxes were deducted ("nontaxed nurses"). Superior Care considered the taxed nurses to be employees and did not permit them to work overtime. The nontaxed nurses were permitted to work overtime, but they were considered to be independent contractors and consequently were not paid time and a half for overtime hours. The determination whether a nurse appeared on the taxed or nontaxed payroll was usually [**5] made unilaterally by Superior Care or, at times, at a [*1058] nurse's request. The parties stipulated that the two sets of nurses perform exactly the same work.

Superior Care was first investigated by the Department of Labor in 1979 at which time no FLSA violations were found. In February 1980 and January 1981, additional investigations were conducted, overtime violations were discovered, and Superior Care agreed to pay approximately \$ 32,000 in back wages and to comply with the FLSA in the future. Richard Mormile, the Department of Labor compliance officer who conducted the 1980 and 1981 investigations, testified that during those investigations he was shown the records of only the taxed employee nurses. Superior Care inquired of Mormile whether the taxed nurses could be treated as independent contractors rather than employees. Mormile advised that the nurses were employees. He suggested that if Superior Care disagreed, it could obtain a formal opinion on the matter from the Department of Labor's Regional Solicitor's office. Superior Care never sought such an opinion.

The existence of the two separate payrolls was discovered during a subsequent investigation conducted from [**6] November of 1981 until mid-1982. During this investigation, Mormile learned that several hundred nontaxed nurses were being paid straight-time wages for overtime hours. On the basis of this investigation, the Secretary of Labor initiated the present suit. The Secretary's complaint alleged jurisdiction under section 17 of the FLSA, 29 U.S.C. § 217, and asked for an injunction restraining Superior Care from withholding the unpaid overtime wages. The complaint also alluded to the possibility of liquidated damages, although it did not mention section 16 of the Act, which authorizes such a remedy.

The District Court found that the nurses were "employees" within the meaning of the FLSA and that the exemption for bona fide professional employees, 29 U.S.C. § 213(a)(1) (1982), was unavailable. The District Court further determined that Superior Care's overtime and record-keeping violations were willful, thereby making applicable a three-year statute of limitations period, 29 U.S.C. § 255(a) (1982). The Court enjoined Superior Care from withholding \$ 697,140.66 in back pay owed from December 1980. The Court also awarded [**7] an equal amount as statutory liquidated damages. 29 U.S.C. § 216(c) (1982).

DISCUSSION

On this appeal, Superior Care contends that (1) the nurses are independent contractors, not subject to the FLSA, (2) even if the nurses are employees, they are bona fide professional employees exempt from the Act's overtime pay requirements, (3) any violations of the Act were not willful and should therefore have been subject to a two-year statute of limitations, and (4) liquidated damages should not have been awarded because the Secretary failed to allege a violation of section 16 of the Act authorizing such an award. We conclude that only Superior Care's contention as to liquidated damages has merit; the decision of the District Court was in all other respects correct.

A. Employment Status

[HN1]The FLSA defines "employee" as "any individual employed by an employer," and to "employ" as including "to suffer or permit to work." 29 U.S.C. §§ 203(e)(1), 203(g) (1982 & Supp. III 1985). The definition is necessarily a broad one in accordance with the remedial purpose of the Act. See United States v. Rosenwasser, 323 U.S. 360, 363, 89 L. Ed. 301, 65 S. Ct. 295 (1945); [**8] Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).

[HN2]Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the FLSA. These factors, derived from United States v. Silk, 331 U.S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947) (Social Security Act), and known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent [*1059] initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. See id. at 716; Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947); Donovan v. Dia-
America Marketing, Inc., 757 F.2d 1376, 1382-83 (3d

Cir.), *cert. denied*, 474 U.S. 919, 88 L. Ed. 2d 255, 106 S. Ct. 246 (1985); *Real v. Driscoll Strawberry Associates, Inc.*, *supra*, 603 F.2d at 754; [**9] *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir.), *cert. denied*, 429 U.S. 826, 50 L. Ed. 2d 89, 97 S. Ct. 82 (1976); *cf. Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984) (considering somewhat different factors in "economic reality" test where question was whether an employment relationship existed between a prison inmate and an outside employer). No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. See *Rutherford Food Corp. v. McComb*, *supra*, 331 U.S. at 730; *Usery v. Pilgrim Equipment Co., Inc.*, *supra*, 527 F.2d at 1311. The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves. See *Bartels v. Birmingham*, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947) (Social Security Act); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981) (FLSA).

[HN3]The existence and degree of each factor is a question of fact while the legal conclusion to be drawn [**10] from those facts -- whether workers are employees or independent contractors -- is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is *de novo*. See *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043-45 (5th Cir.), *cert. denied*, 484 U.S. 924, 108 S. Ct. 286, 98 L. Ed. 2d 246 (1987); *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). In the present case, the District Judge properly looked to the economic reality test and the *Silk* factors in deciding that the nurses were employees. Superior Care contends that some of his findings of fact were clearly erroneous and that he relied on irrelevant evidence. We disagree.

At the outset, we reject Superior Care's claim that the trial judge impermissibly relied on evidence of employee status beyond the five economic reality factors set forth in *Silk* and subsequent cases. The District Judge thought it significant that Superior Care had treated its taxed nurses as employees and that these nurses perform exactly the [**11] same work as the nontaxed nurses. We agree. [HN4]The factors that have been identified by various courts in applying the economic reality test are not exclusive. Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided. See *Brock v. Mr. W. Fireworks, Inc.*, *supra*, 814 F.2d at 1043; *Usery v. Pilgrim Equipment Co., Inc.*, *supra*, 527 F.2d at 1311. Though an employer's self-serving label of workers as independent contractors is not controlling,

see, e.g., Real v. Driscoll Strawberry Associates, Inc., *supra*, 603 F.2d at 755; *Usery v. Pilgrim Equipment Co., Inc.*, *supra*, 527 F.2d at 1315, an employer's admission that his workers are employees covered by the FLSA is highly probative. See *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 268 n.5 (5th Cir.), *modified on other grounds on rehearing*, 826 F.2d 2 (1987).

Analysis of the five economic reality factors fully supports the District Court's conclusion that the nurses are employees. The District Judge found, without dispute, that the nurses [**12] had no opportunity for profit or loss and that their investment in the business was negligible. With respect to the importance of the nurse's role, Judge Wexler found that "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request." Both of these findings are amply supported in the record, and both weigh heavily in favor of the District [**1060] Judge's conclusion that the nurses are employees.

As to control, the District Court found that Superior Care unilaterally dictated the nurses' hourly wage, limited working hours to 40 per week where nurses claimed they were owed overtime, and supervised the nurses by monitoring their patient care notes and by visiting job sites. Superior Care argues that the finding of control is clearly erroneous because the parties stipulated that supervisory visits to the job sites were infrequent. Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing [**13] notes. An employer does not need to look over his workers' shoulders every day in order to exercise control. See *Donovan v. DialAmerica Marketing, Inc.*, *supra*, 757 F.2d at 1383-84 (where nature of home research industry precludes direct supervision, lack of direct control over manner of work does not weigh in favor of independent contractor status).

The remaining two factors, skill and independent initiative, and permanence of the work relationship, were not expressly considered by the District Court. Superior Care argues that these factors weigh decisively in its favor. We conclude that though these factors may weigh slightly in favor of independent contractor status, they do not tip the balance in favor of Superior Care.

As the Secretary concedes, the nurses are skilled workers who require several years of specialized training. However, the fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be

employees under the FLSA. See, e.g., *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666-67 (5th Cir. 1983) [**14] (welders); *Walling v. Twyeffort, Inc.*, 158 F.2d 944 (2d Cir.), cert. denied, 331 U.S. 851, 91 L. Ed. 1859, 67 S. Ct. 1727 (1947) (tailors); *Dunlop v. Imperial Tool and Manufacturing, Inc.*, 77 Lab. Cas. para. 33,304 (N.D. Tex. 1975) (tool and die maker); cf. *Donovan v. DialAmerica Marketing, Inc.*, supra, 757 F.2d at 1387 (where distributors in home research business exercised "business-like initiative," in recruiting new home researchers, skill factor weighed in favor of independent contractor status). The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way. Rather, they depended entirely on referrals to find job assignments, and Superior Care in turn controlled the terms and conditions of the employment relationship. As a matter of economic reality, the nurses' training does not weigh significantly in favor of independent contractor status.

With respect to permanence of the working relationship, the record indicates that the nurses are a transient work force. They typically work for several employers, most work for Superior Care [**15] only a small percentage of the time (78% worked 13 weeks or less in 1982), they earn relatively little from Superior Care (88% earned less than \$ 5,000 from Superior Care in 1982), and few maintain continuing relationships with Superior Care (90% turnover rate in three-year period). Nevertheless, these facts are not dispositive of independent contractor status. We have previously said that employees may work for more than one employer without losing their benefits under the FLSA. *Walling v. Twyeffort, Inc.*, supra, 158 F.2d at 947; see also 29 C.F.R. § 791.2 (1987). Nor has the fact that the worker does not rely on the employer for his primary source of income nor require a finding of independent contractor status. See *Donovan v. DialAmerica Marketing, Inc.*, supra, 757 F.2d at 1385 (home researchers); *Halferty v. Pulse Drug Co., Inc.*, supra, 821 F.2d at 267-68 (night ambulance dispatcher). Finally, even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own [*1061] business initiative, [**16] see *Brock v. Mr. W. Fireworks, Inc.*, supra, 814 F.2d at 1053-54 (firework stand operators employees notwithstanding 80% turnover because of seasonal nature of work). In the present case, the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently.

The totality of the circumstances reveals that as a matter of economic reality the nurses are employees. Superior Care treats them as employees. Superior Care exercises substantial control over the manner and condi-

tions of their work. They have no opportunity for profit or loss, nor do they have any independent investment in the business. Their services are the most integral part of Superior Care's operation. Under these circumstances, it cannot be said that the nurses are in business for themselves.

B. Professional Exemption

Superior Care next argues that even if the nurses are "employees" under the FLSA, they are bona fide professional employees exempt from the overtime pay requirements of the FLSA pursuant to section 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1) (1982). [HN5]Section 13(a)(1) provides [**17] an exemption for "any employee employed in a bona fide . . . professional capacity . . . (as such terms are defined and delimited . . . by regulations of the Secretary . . .)." One of the criteria in the regulations for bona fide professional employees is compensation for services "on a salary or fee basis at a rate of not less than \$ 170 per week. . . ." 29 C.F.R. § 541.3 (1987).¹ Compensation on a salaried basis occurs when an employee regularly receives, each pay period, a predetermined amount, not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.118 (1987). An employee is paid on a fee basis when he receives a fixed sum for a single job regardless of the time required for its completion. 29 C.F.R. § 541.313 (1987). Here, the nurses do not come within the definition of bona fide professional employees in section 541.3 because they are paid on an hourly basis and not by fee or salary. See *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) (pharmacists paid an hourly rate).

1 Payment on a salary or fee basis is not a requisite to bona fide professional employee status in the case of "an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof. . . ." 29 C.F.R. § 541.3(e) (1987). However, this exception does not apply to nurses. 29 C.F.R. § 541.314(c) (1987).

[**18] C. Statute of Limitations

[HN6]The FLSA provides a statute of limitations of two years unless the cause of action arises from a "willful violation," in which case a three-year limitations period applies. 29 U.S.C. § 255(a) (1982). Thus, the Secretary may recover an additional year of back wages when a violation is willful. In the present case, the District Court determined that Superior Care's violations were willful because it had been put on notice of its noncompliance with the Act during the 1980 and 1981 investiga-

tions, yet had continued to pay nurses at straight time rates for overtime work. The District Court awarded back pay for violations from December 1980, three years prior to the filing of the Secretary's suit.

Superior Care argues that the District Judge applied the incorrect legal standard in deciding whether the violations were willful for purposes of the FLSA statute of limitations. The District Court applied the standard established by this Court in *Donovan v. Carls Drug Co., Inc.*, *supra*, which ruled that "employers 'willfully' violate the FLSA when (1) they know that their business is subject to FLSA and (2) their practices [**19] do not conform to FLSA requirements." 703 F.2d at 652. Superior Care points out that subsequent to *Carls Drug* the Supreme Court adopted a slightly more rigorous test of "willfulness" for purposes of determining whether a plaintiff is entitled to an award of liquidated damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) [*1062] (1982). *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985). Under this test, an ADEA violation is "willful" for purposes of awarding liquidated damages if the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126. In *Thurston*, the Court made no ruling as to whether its "willfulness" standard applies to the FLSA. The Court emphasized the difference between the liquidated damages provisions of the ADEA and the FLSA, noting that the former requires proof of willfulness and the latter provides that such damages are mandatory. *Id.* at 125. The Court also noted without comment that the courts of appeals are divided on the issue [**20] whether the "willfulness" standard applicable to liquidated damages under the ADEA applies to the determination of the applicable ADEA statute of limitations. *Id.* at 128 n.21.

This Court recently considered the appropriate "willfulness" standard for purposes of the ADEA statute of limitations in light of *Thurston*. *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40 (2d Cir. 1988). We held that the *Thurston* standard of willfulness for ADEA liquidated damages applies to willfulness for the ADEA statute of limitations. In making that determination, we acknowledged that, in light of *Thurston*, we were not applying the "willfulness" standard that *Carls Drug* had established for purposes of the FLSA statute of limitations. We reckoned with the *Carls Drug* "willfulness" standard in *Russo* because we recognized that the limitations provisions of both the ADEA and the FLSA are identical; the limitations provision for FLSA actions is contained in section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255(a) (1982), and the ADEA incorporates section 6 by explicit reference, *id.* § 626(e)(1). Now that *Russo* [**21] has applied the *Thurston* stan-

dard to the ADEA statute of limitations, we are obliged to apply that same standard to the FLSA statute of limitations, since the two limitations provisions not only use identical wording, they are in fact the same provision. Thus, as in *Russo*, [HN7] a violation is willful for purposes of the FLSA limitations provision only if the employer knowingly violates or shows reckless disregard for the provisions of the Act. See *Russo v. Trifari, Krussman & Fishel, Inc.*, *supra*, slip. op. at 964-66; *Halferty v. Pulse Drug Co., Inc.*, 826 F.2d 2 (5th Cir. 1987) (on rehearing); *Brock v. Richland Shoe Co.*, 799 F.2d 80 (3d Cir. 1986), *cert. granted*, 484 U.S. 813, 108 S. Ct. 63, 98 L. Ed. 2d 27 (1987).

Even under the somewhat heightened standard of "reckless disregard," however, Superior Care's violations of the FLSA were unquestionably willful. It is undisputed that Superior Care was on actual notice of the requirements of the FLSA by virtue of its earlier violations, its agreement to pay \$ 32,000 in back pay, and its promise to comply with the Act in the future. Moreover, the Department of Labor [**22] compliance officer who conducted the 1980 and 1981 investigations specifically advised Superior Care officials at that time that the nurses were employees. The compliance officer even suggested that Superior Care obtain an opinion letter from the Department if it disagreed, but Superior Care never pursued this option. Failure to obtain a ruling, even when one has not been suggested, has resulted in a determination of willful violation under the reckless disregard standard. See *Brock v. Wilamowsky*, 833 F.2d 11 (2d Cir. 1987).

D. Liquidated Damages

Finally, Superior Care contends that the District Court's award of liquidated damages was improper because the Secretary framed his complaint under a provision of the FLSA that does not permit such damages. Superior Care argues that because the choice of remedies implicates a defendant's constitutional right to a jury trial, the Secretary is limited to the specific cause of action that he alleges. We agree.

The FLSA establishes three distinct causes of action against employers who have committed violations of the Act: (1) an injured employee may sue under section 16(b), 29 U.S.C. § 216(b) (1982), [**23] for unpaid overtime or minimum wages, plus an equal amount as liquidated damages; (2) the Secretary of Labor may sue under section 16(c), 29 U.S.C. § 216(c) (1982), on behalf of an employee, for unpaid overtime or minimum wages, plus an equal amount as liquidated damages; and (3) the Secretary may sue under section 17, 29 U.S.C. § 217 (1982), for injunctive relief, including an injunction against the withholding of previously unpaid minimum or overtime wages. ² [*1063] See *Castillo v. Givens*,

704 F.2d 181, 186 n.11 (5th Cir.), *cert. denied*, 464 U.S. 850, 78 L. Ed. 2d 147, 104 S. Ct. 160 (1983); *Marshall v. Hanioti Hotel Corp.*, 490 F. Supp. 1020, 1022 (N.D. Ga. 1980). Under sections 16(b) and 16(c) employers "shall be liable" for liquidated damages in an amount equal to unpaid back wages, but the district judge, in his discretion, may reduce the amount if the employer shows that his violations were in good faith. ³ 29 U.S.C. § 260 (1982). In no case may the trial judge award liquidated damages greater than the amount of underlying back pay liability. [**24] *Id.* The legislative history of the FLSA reveals that Congress intended to permit recovery of liquidated damages only in suits under sections 16(b) and 16(c), the two provisions expressly authorizing such damages; [HN8]when the Secretary sues under section 17 for injunctive relief, liquidated damages are unavailable. See S. Rep. No. 145, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S. Code Cong. & Admin. News 1620, 1659; *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982); *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 991 (4th Cir. 1980).

2 Section 17 is framed as a jurisdictional provision, providing the district courts with jurisdiction for suits by the Secretary seeking an injunction. Sections 16(b) and 16(c) create causes of action for damages, authorizing such suits "in any court of competent jurisdiction." 29 U.S.C. § 216(c) (1982).

3 As used in the FLSA "liquidated damages" is something of a misnomer. It is not a sum certain, determined in advance as a means of liquidating damages that might be incurred in the future. It is an award of special or exemplary damages added to the normal damages.

[**25] The defendant's right to a jury trial depends upon which of the three FLSA causes of action is pursued. Suits under section 17 for injunctive relief, even though they may result in an order requiring the employer to remit unpaid wages, have been considered equitable in nature; the award of back pay, without liquidated damages, is in the nature of restitution, and the defendant has no right to a jury trial. See, e.g., *In re Don Hamilton Oil Co.*, 783 F.2d 151 (8th Cir. 1986); *Paradise Valley Investigation and Patrol Services, Inc. v. United States District Court, District of Arizona*, 521 F.2d 1342 (9th Cir. 1975); *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965); *Marshall v. Kreten Char-Broil, Inc.*, 507 F. Supp. 445 (E.D.N.Y. 1980). Suits by an employee or by the Secretary for back wages under section 16, in contrast, have been considered to be actions at law, and the employer has a right to a jury. See *Lorillard v. Pons*, 434 U.S. 575, 580 & n.7, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978); *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983); *Marshall v. Hanioti Hotel*

Corp., *supra*, 490 F. Supp. at 1023; [**26] 5 *Moore's Federal Practice* para. 38.27, at 38-220 to 38-221 (2d ed. 1986). However, since an award of liquidated damages under section 16 is within the discretion of the district judge, 29 U.S.C. § 260, no right to a jury is available on that issue. See *McClanahan v. Mathews*, 440 F.2d 320, 322 (6th Cir. 1971); *Donovan v. River City Construction Co.*, 101 Lab. Cas. (CCH) para. 34,591 (E.D.N.C. 1984). The jury is required only to determine liability for and the amount of an award of back pay. The statutory scheme gives the Secretary a choice: If he wants to recover liquidated damages, he can sue under section 16(c), in which case the employer is entitled to a jury trial on the back pay award; if the Secretary prefers not to have a jury trial, he can sue for an injunction under section 17 and obtain a back pay award as an equitable remedy incidental to the injunction.

In the present case, the Secretary's complaint stated that "jurisdiction of this action is conferred upon the Court by section 17 of the Act." The complaint did not make any reference to section 16, although in the claim for relief it stated that "additional [**27] amounts of backwages [*sic*] and liquidated damages may be owed to certain present and former employees . . . who are presently unknown to plaintiff. . . ." (Emphasis added). Moreover, a list of injured employees was annexed to the complaint, a procedural requirement of section 16 but not section 17. Prior to trial, Superior Care filed a motion *in limine* seeking to exclude any evidence pertaining to liquidated damages on the theory that the Secretary had failed to proceed under the section authorizing such an award. The motion was denied and the trial judge, construing the Secretary's complaint as alleging a cause of action under both sections 16(c) and 17, ultimately ordered Superior Care to pay liquidated damages in an amount equal to the unpaid overtime compensation.

The Secretary, acknowledging that liquidated damages are available only under section 16, argues that the complaint should be read as invoking section 17 for an injunction against withholding back pay and section 16 for the additional remedy of liquidated damages. Although the Secretary's position would have been clearer in the District Court if the complaint had invoked section 16 as the basis for liquidated [**28] damages, we agree that the failure to cite [*1064] this provision does not necessarily preclude relief to which the Secretary would otherwise be entitled. See *Fed. R. Civ. P. 8, 54(c)*. The question remains, however, whether liquidated damages are available in a suit seeking back pay as an equitable remedy under section 17.

[HN9]The FLSA does not allow liquidated damages where, as here, the employer has no right to a jury on the underlying issue of unpaid overtime compensation. As indicated above, Congress has limited the remedy of

liquidated damages to actions under section 16 where the employer has a right to a jury trial on the back pay issue. Although the judge always has discretion to reduce the amount of liquidated damages for which a defendant is liable if the employer shows good faith, the statutory scheme sets the maximum amount of liquidated damages at the amount of the back pay award, which the employer is entitled to have the jury determine. See 29 U.S.C. §§ 216, 260. If the Secretary is permitted to collect section 16 liquidated damages in an action where the overtime wage issues are determined by the judge pursuant to section 17, then the [**29] employer is stripped of the protection that the Act provides by limiting the amount of liquidated damages to the amount of the jury's back pay award. Marshall v. Hanioti Hotel Corp., supra, 490 F. Supp. at 1024.

The Secretary contends that Superior Care's objections to the liquidated damages are not properly raised because Superior Care never requested a jury to determine the overtime wage award. But Superior Care had no right to ask for a jury. When confronted with the Secretary's complaint, which sought overtime wages exclusively under section 17, Superior Care correctly concluded that no jury right was available and took the position that the Secretary was thereby precluded from seeking liquidated damages, whether or not his complaint could be viewed as seeking liquidated damages under section 16. Superior Care expressed its position in its

motion *in limine*. Had the Secretary wanted to be sure he could get liquidated damages, he could have amended his complaint to seek overtime wages under section 16(c). Having elected to pursue overtime wages only under section 17, and gained what he apparently thought was the advantage of avoiding a jury trial on that component [**30] of relief, ⁴ the Secretary has no valid claim for liquidated damages.

4 The Secretary has indicated that the complaint in this action follows the form that has long been used in actions to recover unpaid overtime and minimum wages under the FLSA. When asked at oral argument the reasons for this long-standing practice, counsel was unable to offer an explanation. In other litigation where the Secretary has similarly attempted to split his cause of action between the injunctive provisions of section 17 and the liquidated damages provision of section 16(c), counsel has conceded, perhaps more candidly than here, that the Secretary finds jury trials too time consuming and so frames the complaint in order to try the case as expeditiously as possible. See Marshall v. Hanioti Hotel Corp., supra, 490 F. Supp. at 1025.

The judgment of the District Court is modified to delete the award of liquidated damages and, as modified, is affirmed.

LEXSEE

LYNNE A. CARNEGIE, on behalf of herself and all others similarly situated, Plaintiff-Appellee, v. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants-Appellants.

Nos. 04-8008, 04-8009

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

376 F.3d 656; 2004 U.S. App. LEXIS 14635

**May 15, 2004, Submitted
July 16, 2004, Decided**

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by H&R Block, Inc. v. Carnegie, 160 L. Ed. 2d 772, 125 S. Ct. 877, 2005 U.S. LEXIS 465 (U.S., 2005)

PRIOR HISTORY: [**1] Petitions for Permission to Appeal an Order Granting Class Certification. No. 98 C 2178. Elaine E. Bucklo, Judge. Carnegie v. Household Int'l, 220 F.R.D. 542, 2004 U.S. Dist. LEXIS 5284 (N.D. Ill., 2004)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee consumer, on behalf of herself and all others similarly situated, sued appellant lenders regarding certain refund application loans. After a proposed settlement was rejected, the United States District Court for the Northern District of Illinois certified the same class that had been contemplated by the rejected settlement. The lenders contested the certification and filed a motion for leave to appeal the order certifying the class.

OVERVIEW: The refund anticipation loans gave consumers the amount of an anticipated tax refund for the period between the filing of the claim and the receipt of the refund. The loan was arranged by a tax preparer. The consumers contended that the lenders misled them to believe that the tax preparer was their fiduciary in this transaction, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., and other laws. On appeal, the lenders objected to the class and to the procedures employed in certification. Because the appeal raised novel and important issues, the court granted the petition for leave to appeal. However,

the court affirmed the district court's order. Prior to the rejected settlement, the lenders had argued that the class was appropriate. The doctrine of judicial estoppel prevented the lenders from arguing against the class certification at this juncture. Further, the district court did not improperly alter the burden of proof regarding class certification. The class certification was not barred by collateral estoppel. In addition, class certification was appropriate because there was substantial compliance with Fed. R. Civ. P. 23(a).

OUTCOME: The court affirmed the district court's order certifying the class.

CORE TERMS: settlement, class action, class members, tax preparer, certification, refund, class certification, judicial estoppel, anticipation, borrowers, adequacy, customer, collateral estoppel, repudiate, charging, lawsuit, global, anyway, prompt resolution, settlement agreement, earlier proceedings, obtains a judgment, collateral estoppel, misrepresentations, manageability, unmanageable, disapproved, wire-fraud, pronounced, manageable

LexisNexis(R) Headnotes

*Civil Procedure > Class Actions > Appellate Review
Civil Procedure > Class Actions > Compromises
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders*

[HN1] Fed. R. Civ. P. 23(f) authorizes courts to entertain interlocutory appeals. The rule does not state criteria for the exercise of this discretionary authority. But the case law teaches that the more novel the issue presented by the appeal and so the less likely that the district court's resolution of it will stand, the more important the resolu-

tion of the issue is either to the particular litigation or to the general development of class action law, and the more likely the prompt resolution of the issue is to expedite the litigation and prevent a coercive settlement, the stronger the case for allowing the appeal.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN2]A reversal need not affect the application of judicial estoppel.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN3]A party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions. In other words, the purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN4]The doctrine of judicial estoppel requires that the party sought to be estopped have obtained a favorable judgment or settlement on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise it would be inconsistent with the rule that permits inconsistent pleadings.

Civil Procedure > Class Actions > Judicial Discretion

[HN5]A class might be suitable for settlement but not for litigation. The class might be unmanageable if the case were actually tried yet manageable as a settlement class because the settlement might eliminate all the thorny issues that the court would have to resolve if the parties fought out the case.

Civil Procedure > Class Actions > Compromises

Civil Procedure > Judicial Officers > Masters > Appointments

Civil Procedure > Judicial Officers > References

[HN6]Fed. R. Civ. P. 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages

issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries, (2) appointing a magistrate judge or special master to preside over individual damages proceedings, (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages, (4) creating subclasses, or (5) altering or amending the class.

Contracts Law > Statutes of Frauds > General Overview

Criminal Law & Procedure > Criminal Offenses > Fraud > Wire Fraud > Elements

Securities Law > Liability > RICO Actions > Elements of Proof > Pattern > Fraud as Predicate Act

[HN7]Whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., has been violated is separate from the question whether the targets of the violation have been injured by the violation. 18 U.S.C.S. § 1964(c). The predicate acts in a RICO claim are violations of the mail- and wire-fraud statutes, and these statutes are violated by a "scheme or artifice to defraud," 18 U.S.C.S. §§ 1341, 1343, whether or not the scheme succeeds and therefore causes injury.

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN8]The criteria for class certification, besides adequacy of representation of the class, are whether (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a).

COUNSEL: For HOUSEHOLD INTERNATIONAL, INCORPORATED, HOUSEHOLD BAND F.S.B., successor in interest to BENEFICIAL NATIONAL BANK, HOUSEHOLD TAX MASTERS, INCORPORATED, formerly known, as BENEFICIAL TAX MASTERS, INC., BENEFICIAL FRANCHISE COMPANY, INCORPORATED, Petitioners: Scott R. Lassar, SIDLEY AUSTIN BROWN & WOOD, Chicago IL, USA

For LYNNE CARNEGIE, on behalf of herself and all other similarly situated, Respondent: Ronald L. Futterman, FUTTERMAN & HOWARD, Chicago IL, USA

For H&R BLOCK, INCORPORATED, H&R BLOCK SERVICES INCORPORATED, H&R BLOCK TAX SERVICES, INCORPORATED, H&R BLOCK

EASTERN TAX SERVICES, INCORPORATED, BLOCK FINANCIAL CORPORATION, HRB ROYALTY, INCORPORATED, Petitioners: Anton R. Valukas, JENNER & BLOCK, Chicago IL, USA

For LYNNE CARNEGIE, Respondent: Ronald L. Futterman, FUTTERMAN & HOWARD, Chicago IL, USA

JUDGES: Before CUDAHY, POSNER, and ROVNER, Circuit Judges.

OPINION BY: POSNER

OPINION

[*658] POSNER, *Circuit Judge*. We have consolidated for decision petitions, by two groups of defendants in a consumer-finance class action litigation, for leave to appeal an order by the district court certifying a plaintiff class. Fed. R. Civ. P. 23(f) [HN1] authorizes us to entertain such interlocutory appeals. The rule does not state criteria for the exercise of this discretionary authority. But the case law teaches that the more novel the issue presented by the appeal and so the less likely that the district court's resolution of it will stand, the more important the resolution of the issue is either to the particular litigation or to the general development of class action law, and the more likely the prompt resolution of the issue is to expedite the litigation and prevent a coercive settlement, the stronger the case for allowing the appeal. E.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999); [**2] *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). The issues that the petitions ask us to consider, in the setting of a class of millions, concern, first, the procedures and criteria for converting a settlement class into a litigation class when having initially been approved the settlement is later disapproved, and, second, the bearing of the doctrine of judicial estoppel on class action litigation. These are novel issues whose prompt resolution is important to the development of the law of class actions as well as to the resolution of the present case. The petitions to appeal are therefore granted. The merits of the appeals have been fully briefed and we can therefore proceed to decide them without requiring further briefing.

The litigation arose out of refund anticipation loans made jointly by the defendants, who for simplicity we'll refer to as "the bank" and "the tax preparer." When the tax preparer files a refund claim with the Internal Revenue Service [**3] on behalf of [*659] one of its cus-

tomers, the customer can expect to receive the refund within a few weeks unless the IRS decides to investigate the return. Even a few weeks is too long for the most necessitous taxpayers, and so the bank will lend the customer the amount of the refund for the period between the filing of the claim and the receipt of the refund. The annual interest rate on such a "refund anticipation loan" (RAL) will often exceed 100 percent. Although the bank is the lender, the tax preparer arranges the loan. It is contended that the customer is told neither that the bank pays the tax preparer a fee for having generated the loan nor that the tax preparer receives an ownership interest in the loan.

Beginning in 1990 a number of class-action suits were brought against the defendants on behalf of a total of 17 million refund-anticipation borrowers, charging violations of various state and federal laws, including RICO. The basic claim is that the defendants lead the borrowers to believe that the tax preparer is their fiduciary, much as if they had hired a lawyer or an accountant to prepare their income tax returns, as affluent people do, whereas, unbeknownst to them, the tax [**4] preparer is engaged in self-dealing. This conduct is alleged to constitute a scheme to defraud in violation of the federal mail- and wire-fraud statutes. Violations of those statutes are "predicate offenses" that can form the basis of a RICO charge.

In 1999 the named plaintiff in one of the suits entered into a settlement agreement with the bank and the tax preparer. This was to be a "global" settlement: the members of all the classes would divide up a \$ 25 million fund put up by the defendants in exchange for the release of all claims arising out of the RALs. The district judge approved the settlement and enjoined (with one exception) the other RAL class actions, *Zawikowski v. Beneficial National Bank*, 2000 U.S. Dist. LEXIS 11535, No. 98 C 2178, 2000 WL 1051879 (N.D. Ill. July 28, 2000), but we reversed, *Reynolds v. Benefit National Bank*, 288 F.3d 277 (7th Cir. 2002), on the ground that the district judge had failed to scrutinize the fairness of the settlement adequately. We were concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees.

The district [**5] judge to whom the case was reassigned on remand concluded that the settlement had indeed been unfair and disapproved it. 260 F. Supp. 2d 680 (N.D. Ill. 2003). There was no appeal. The proceedings continued in the district court, with both the named plaintiff and the class counsel replaced. Although no class had formally been certified in the earlier proceedings, rather than require the new plaintiff to move for certification the judge asked the defendants for their objections to certification, and they responded. She agreed

with some of the objections, rejected others, and, in effect, certified the same class that had been contemplated by the rejected settlement, which is to say all RAL borrowers (with a few exceptions) whose claims weren't barred by the statute of limitations. But she limited the certification to prosecution of just the RICO claim, plus one breach of contract claim involving the law of only one state.

The defendants object mainly to the procedure the judge employed and to the brevity with which she pronounced the class manageable despite its vast size. In the previous round of this protracted litigation the defendants had urged the district court to [*6] accept the giant class as appropriate for a global settlement, had prevailed in their urging, and so are now precluded by the doctrine of judicial estoppel, see, e.g., *New Hampshire v. Maine*, [*660] 532 U.S. 742, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001), from challenging its adequacy, at least as a settlement class (the significance of this qualification will appear in due course). It is true that we reversed the district court's approval of the settlement, but [HN2] a reversal need not affect the application of judicial estoppel. *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 398-99 (5th Cir. 2003); *U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 597 (Fed. Cir. 1995); cf. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (2d ed. 2002). The reason lies in the purpose of the doctrine. The canonical statement of that purpose is that it is "to protect the integrity of the judicial process." E.g., *New Hampshire v. Maine*, *supra*, 532 U.S. at 749-50; *United States v. Christian*, 342 F.3d 744, 747 (7th Cir. 2003). [*7] But we have been a little more precise. We have said that [HN3] "a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions." *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998) (citations omitted). In other words, "the purpose of the doctrine . . . is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant." *Ladd v. ITT Corp.*, 148 F.3d 753, 756 (7th Cir. 1998); see also *Bethesda Lutheran Homes & Services, Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001).

The antifraud policy that animates the doctrine is fully engaged when a party obtains a judgment on a ground that it later repudiates, even if his opponent, the loser in that first case, is able, obviously at some expense

to itself but [*8] also placing a demand on judicial resources, to get the judgment reversed. Anyway the defendants benefited from the temporary approval of the settlement, which they used to enjoin other RAL litigation against them; and having reaped a benefit from their pertinacious defense of the class treatment of the case for purposes of settlement they cannot now be permitted to seek a further benefit from reversing their position.

It is true that we went on to say in *McNamara* that [HN4] "the doctrine of judicial estoppel requires . . . that the party sought to be estopped have obtained a favorable judgment or settlement on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise it would be inconsistent with the rule that permits inconsistent pleadings." 138 F.3d at 1225. But the defendants did obtain a judgment. The fact that it was reversed on appeal has nothing to do with a party's right to explore inconsistent alternative positions in the early stages of a lawsuit.

The defendants are correct, however, that [HN5] a class might be suitable for settlement but not for litigation. The class might be unmanageable if the case were actually [*9] tried yet manageable as a settlement class because the settlement might eliminate all the thorny issues that the court would have to resolve if the parties fought out the case. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). But although the district judge might have said more about manageability, the defendants have said nothing against it except that there are millions of class members. That [*61] is no argument at all. The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of \$ 15 to \$ 30. The rejected settlement capped damages at these amounts for single and multiple RALs respectively, and while the amounts may be too low they are indicative of the modest stakes of the individual class members. The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$ 30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative--no matter how massive the [*10] fraud or other wrongdoing that will go unpunished if class treatment is denied--to no litigation at all.

Often, and possibly in this case as well, there is a big difference from the standpoint of manageability between the liability and remedy phases of a class action. The number of class members need have no bearing on the burdensomeness of litigating a violation of RICO. Whether particular members of the class were defrauded and if so what their damages were are another matter, and it may be that if and when the defendants are deter-

mined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief. Fed. R. Civ. P. 23(c)(4)(A); Allen v. International Truck & Engine Corp., 358 F.3d 469 (7th Cir. 2004); Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 307 n. 16 (5th Cir. 2003); In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 141 (2d Cir. 2001); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 168-69 (2d Cir. 2001). That prospect need not defeat class treatment of the [**11] question whether the defendants violated RICO. Once that question is answered, if it is answered in favor of the class, a global settlement along the lines originally negotiated (though presumably with different dollar figures) will be a natural and appropriate sequel. And if there is no settlement, that won't be the end of the world. Rule 23 [HN6] allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include "(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." In re Visa Check/MasterMoney Antitrust Litigation, *supra*, 280 F.3d at 141.

We did note in our previous decision an unremarked conflict of interest between those class members who took out one or two refund anticipation loans and those who took out more than two and would thus, because [**12] of the \$ 30 cap that we just mentioned, receive no compensation for the additional harm that they suffered. 288 F.3d at 282. But we went on to say that "in light of the modesty of the stakes even of class members who had multiple refund anticipation loans and the expense of subdividing the class (and how many subdivisions would be necessary to reflect the full range of damages?), we are not disposed to regard this particular defect in the settlement as fatal."

The defendants argue that by requiring them to present their objections to class certification rather than requiring the plaintiff to move for certification, the district judge improperly altered the burden of proof on the question whether the [*662] class should be certified. Not so. Although the plaintiff class had not formally been certified in the earlier proceedings, that was indeed a formal defect--a technical oversight that was surprising but from a practical standpoint inconsequential. The case had been settled as a class action, notices had been sent, objections had been considered and rejected--all on the assumption that a class had been certified. This was de facto certification, albeit of a settlement class [**13]

only, and that was enough, we think, to empower Judge Bucklo, in the exercise of her discretion to manage litigation before her in an efficient and expeditious manner, to require the defendants to list their objections to the certification of a litigation class, especially since she was explicit that the burden of persuasion on the validity of the objections would remain on the plaintiffs. They carried the burden easily. Remember that the defendants themselves had argued that the class was appropriate for settlement purposes. That did not conclude the question whether it was appropriate for litigation if the settlement fell through, as we have explained and as the district judge recognized. But it was some indication that there were issues appropriate for determination on a class basis.

The defendants argue that the named plaintiff has not been shown to be an adequate representative of the class, but the district judge thought otherwise on sufficient grounds. The defendants also argue that class certification is barred by collateral estoppel, and this argument requires a fuller discussion.

In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763 (7th Cir. 2003), [**14] holds that a judicial finding that a class should not be certified is, at least in some circumstances, entitled to collateral estoppel effect--and in Buford v. H&R Block, Inc., 168 F.R.D. 340 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997) (per curiam), a federal district judge refused to certify a nationwide class action charging, just as in this case, that our defendants' practices with respect to RALs violated RICO. The judge recognized that the question [HN7] whether RICO was violated was separate from the question whether the targets of the violation had been injured by the violation. 18 U.S.C. § 1964(c); Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 267-68, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). The predicate acts in the RICO claim are violations of the mail- and wire-fraud statutes, and these statutes are violated by a "scheme or artifice to defraud," 18 U.S.C. §§ 1341, 1343, whether or not the scheme succeeds and therefore causes injury. E.g., United States v. Tadros, 310 F.3d 999, 1006 (7th Cir. 2002); United States v. Coffman, 94 F.3d 330, 333-34 (7th Cir. 1996); [**15] United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003). The separation of liability and injury issues is illustrated by the suggestion in Moore v. PaineWebber, Inc., 306 F.3d 1247, 1255-56 (2d Cir. 2002), that in a suit charging "uniform misrepresentations" the question whether they were indeed misrepresentations would be appropriate for class treatment, with the question of reliance, and damages suffered, by individual class members left for satellite proceedings. See also In re Prudential Ins. Co. of America Sales Practice Litigation, 148 F.3d 283 (3d Cir. 1998).

The judge in *Buford* thought, however, that the issue of violation would be swamped by issues concerning whether the borrowers had been deceived--had relied on the fraud, and thus had been injured, whether directly, as in *American Chiropractic Ass'n, Inc. v. Trigon Health-care Inc.*, 367 F.3d 212, 233 (4th Cir. 2004); *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004); *Byrne v. Nezhat*, 261 F.3d 1075, 1109-10 [*663] (11th Cir. 2001), and *Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), [*16] or perhaps, as in *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002), indirectly. Those issues would have to be resolved separately for each class member. In deciding that therefore the case was inappropriate for class treatment, the judge was applying the presumption against class action certification in RICO cases that has been articulated by the Fifth Circuit in *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003). We are dubious about such a presumption. The question whether RICO was violated can be separated from the question whether particular intended victims were injured, and thus can--or so a district court could determine without being thought to have abused its discretion--be resolved in a single proceeding with the issue of injury parceled out to satellite proceedings, as is frequently done in class action tort litigation, see, e.g., *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575-76 (9th Cir. 1995); *In re Bendectin Litigation*, 857 F.2d 290, 308-13 (6th Cir. 1988), of which the RAL class litigation is a species.

The adequacy of the judge's [*17] reasoning in *Buford* is not important, however, if, as the defendants contend, his ruling is entitled to collateral estoppel effect. But they overread *Bridgestone/Firestone* to hold that any ruling denying class certification is binding in future litigation. Our decision was more nuanced. See 333 F.3d at 767-69. For example, we pointed out that the binding effect of such a ruling would depend on whether the class members who would be affected by it had been adequately protected by the class representatives and class counsel in the proceeding in which the ruling was made. The judge in *Buford* discussed the issue of adequacy at some length, however, 168 F.R.D. at 352-55, and we are not disposed to reexamine his ruling. But it is too late for the defendants to plead collateral estoppel when, though knowing of the *Buford* decision, which was issued in 1996 and affirmed the following year, they insisted until last year, when the district court on remand from our decision threw out the settlement, that class

treatment of the RICO claim was entirely appropriate. Until then they desperately wanted the RICO claim included in the class settlement so [*18] that they wouldn't have to face it in any other RAL suits. They prevailed in the present litigation, until the settlement was finally rejected, by arguing that *Buford* was wrong. They are estopped to argue now that it was right. And anyway collateral estoppel is an affirmative defense that is forfeited if not raised in timely manner, and it was not raised in a timely manner in this case.

The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. They say that defendants have settled class actions "in the past secure in the knowledge that if the settlement agreement should unravel, they would be restored to the pre-certification position and remain free to defend against any future effort to certify a class for litigation purposes." But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense. Anyway their argument is unrealistic. The pressures for settlement of class actions are enormous and will not be lessened significantly by our upholding the class certification.

We are mindful that no district judge has [*19] as yet explicitly addressed whether the other criteria for class certification, besides adequacy of representation of the class, have been met in this case. [HN8]Those criteria are whether "(1) the class is so [*664] numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)*. There is no need for a remand on these questions, however. Criteria (1) and (2) have been met; and the satisfaction of (3) is implicit in Judge Bucklo's rejection of the defendants' contention that to handle their dispute with the class members in the class action format would be unmanageable. There has been substantial compliance with the requirements of the rule, and no more is required, *Shvartsman v. Apfel*, 138 F.3d 1196, 1201 (7th Cir. 1998); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 269 U.S. App. D.C. 67, 843 F.2d 1395, 1401 (D.C. Cir. 1988), especially in a case in which the defendants were enthusiastic proponents of class treatment until their opportunistic [*20] change of heart.

AFFIRMED.

LEXSEE

Bennis CARRELL, et al., Plaintiffs-Appellants, v. SUNLAND CONSTRUCTION, INC., Defendant-Appellee.

No. 92-4948.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

998 F.2d 330; 1993 U.S. App. LEXIS 21595; 126 Lab. Cas. (CCH) P33,005

August 25, 1993, Decided

SUBSEQUENT HISTORY: AS CORRECTED

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Western District of Louisiana. D.C. DOCKET NUMBER CA-90-0139-"L". JUDGE Richard T. Haik, Sr.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant welders sought review of the decision of the United States District Court for the Western District of Louisiana, which dismissed the welders' lawsuit against appellee contractor for overtime pay on the ground that they were not "employees" within the meaning of the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-291.

OVERVIEW: The contractor constructed pipelines for natural gas companies. For each project, the contractor hired pipe welders and classified them as independent contractors. The welders brought an action pursuant to § 16(b) of the FLSA, 29 U.S.C.S. § 216(b). The district court ruled that the welders were independent contractors and not "employees" covered by the FLSA. The court affirmed and held that the welders were independent contractors, not employees. In making the determination, the court relied on the following: the welders' relationship with the contractor was on a project-by-project basis; the welders worked from job to job and from company to company; many of the welders spent little time working for the contractor; the welders worked while aware that the contractor classified them as independent contractors, and many of them classified themselves as self-employed; the welders were highly skilled; the gas companies tested and certified each welder before each project; the contractor had no control over the methods

or details of the welding work; when on a job for the contractor, the welders performed only welding services; and, the welders supplied their own equipment.

OUTCOME: The court affirmed the district court's dismissal of the welders' complaint under the FLSA for overtime and held that the welders were independent contractors after considering the following five factors: the degree of control, the extent of the relative investments of the worker, the degree to which the worker's opportunity for profit was determined by the contractor, the skill and initiative required, and the permanency of the relationship.

CORE TERMS: welder, welding, independent contractors, pipe, hourly rate, classified, employee status, skill, construction project, economic reality, initiative, specialized, depended, grinders, overtime compensation, pipeline, averaged, lawsuit, customer, deducted, tested, helpers, trucks, failing to pay, hours per week, hours worked, profit and loss, period of time, project-by-project, semi-skilled

LexisNexis(R) Headnotes

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

[HN1]To determine employee status under the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-291, the courts focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he renders his services. Essentially, the task is to determine whether the individual is, as a matter of economic reality, in business for himself. To gauge the degree of the worker's dependency on the alleged employer, the courts consider five factors: the degree of control exercised by the alleged employer, the extent of

the relative investments of the worker and alleged employer, the degree to which the worker's opportunity for profit and loss is determined by the alleged employer, the skill and initiative required to perform the job, and the permanency of the relationship. These factors are merely aids in determining the question of dependency, and no single factor is determinative.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

[HN2]The court reviews de novo the district court's conclusion that the welders were independent contractors.

COUNSEL: For Plaintiffs-Appellants: GARDNER, ROBEIN & URANN, William Lurye, Metairie, LA. O'DONOGHUE & O'DONOGHUE, Francis J. Martorana, Ellen O. Boardman, WA/DC.

For Defendant-Appellee: ONEBANE, DONOHOE, BERNARD, TORIAN, DIAZ, MCNAMARA & ABELL, Greg Guidry, Steven C. Lanza, Lafayette, LA.

JUDGES: Before REAVLEY, DUHE and BARKSDALE, Circuit Judges.

OPINION BY: REAVLEY

OPINION

[*332] REAVLEY, Circuit Judge:

Twenty welders sued Sunland Construction Inc. (Sunland), claiming that Sunland violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201-291, by failing to pay them overtime compensation. The district court dismissed the welders' lawsuit on the ground that they were not "employees" within the meaning of the FLSA. We affirm.

I. BACKGROUND

Sunland constructs transmission pipelines for natural gas companies. For each pipeline construction project, Sunland hires pipe welders and classifies them as independent contractors. The welders typically work 60 hours per week and are fully aware that Sunland considers them independent contractors. Twenty former welders (the Welders), who worked for Sunland at various times from 1987 to 1990, brought this action pursuant to section 16(b) of the FLSA. See 29 U.S.C. § 216(b). They claim that Sunland violated §§ 7(a)(1) of the FLSA by failing to pay them overtime compensation. See 29 U.S.C. § 207 [**2] (a)(1) (requiring employers to pay employees at least 1.5 times the regular rate for hours

worked in excess of 40 hours per week). The parties stipulated to many facts and filed cross-motions for summary judgment on the issue of employee status. The district court ruled that the Welders were independent contractors and not "employees" covered by the FLSA. Based on this ruling, the court dismissed the Welders' FLSA claims. The Welders appeal.

II. ANALYSIS

[HN1]To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he renders his services. Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043, 1054 (5th Cir.), cert. denied, 484 U.S. 924, 108 S. Ct. 286, 98 L. Ed. 2d 246 (1987). Essentially, our task is to determine whether the individual is, as a matter of economic reality, in business for himself. Donovan v. Te-hco, Inc., 642 F.2d 141, 143 (5th Cir.1981). To gauge the degree of the worker's dependency on the alleged employer, we consider five factors: the degree [**3] of control exercised by the alleged employer, the extent of the relative investments of the worker and alleged employer, the degree to which the worker's opportunity for profit and loss is determined by the alleged employer, the skill and initiative required to perform the job, and the permanency of the relationship. Mr. W Fireworks, 814 F.2d at 1043. These factors are merely aids in determining the question of dependency, and no single factor is determinative. Id. at 1054. [HN2]We review de novo the district court's conclusion that the Welders were independent contractors. Id. at 1045. The parties have stipulated to the relevant facts underlying our determination.

a. Permanency of the relationship

During each of the years relevant to this lawsuit, none of the Welders worked exclusively for Sunland. To work consistently throughout the construction season, which lasts six to nine months, the Welders moved from job to job, company to company, and state to state. Sunland hired the Welders on a project-by-project basis, but made an effort to move the Welders to subsequent projects. [**4] The duration of Sunland's construction projects averaged six weeks, but some projects lasted only a few days. The average number of weeks that each Welder worked per year for Sunland varied from approximately 3 weeks to 16 weeks. ¹

¹ We approximated these averages from the record. The lead plaintiff in this lawsuit worked for Sunland approximately 20 weeks in 1987 and 8 weeks in 1988, an average of 14 weeks per year.

Carrell worked approximately 188 hours of over-time in 1987 and 165 hours in 1988.

b. Degree of control exercised by the alleged employer

The parties agree that pipe welding requires specialized skills and that Sunland had no control over the manner or method of the pipe welding. Instead, Sunland's customers dictated the specific welding procedures and the type of welding rods required for each construction project. Before each project, the gas company customer, not Sunland, tested [*333] and certified each Welder. Sunland was prohibited from participating in the test's administration. Each Welder [**5] placed his identification number on each weld so that the gas companies could determine who was responsible for any improper welds. Either the gas company or Sunland could unilaterally remove a Welder.

While working for Sunland, the Welders performed only pipe-welding work. Sunland assigned the Welders to specific welding work and maintained daily time records for each Welder. Sunland, however, did not specify the amount of time that a Welder could spend on an assignment. Sunland required the Welders to work the same days and hours as the remainder of Sunland's crew, including taking the same daily break periods.

c. Skill and initiative required

Pipe welding, unlike other types of welding, requires specialized skills. That the gas companies tested and certified each Welder before a job demonstrates the specialized nature of the work. As for the initiative required, a Welder's success depended on his ability to find consistent work by moving from job to job and from company to company. But once on a job, a Welder's initiative was limited to decisions regarding his welding equipment and the details of his welding work.

*d. Relative investments of worker and alleged [**6] employer*

The Welders supplied their own trucks, welding machines that were mounted on the trucks, and various other specialized welding tools (e.g., grinders, cutting torches, welding leads, welding hoods, and gloves). The Welders' investment in their welding machines, trucks, and tools averaged \$ 15,000 per Welder. The Welders also assumed all costs associated with operating, repairing, and maintaining their welding equipment. The Welders provided their own lodging and meals on all

Sunland projects, including the out-of-town projects. Sunland maintained a policy requiring the Welders to provide their own general liability and workers' compensation insurance, but Sunland rarely enforced that policy.

Although Sunland generally did not supply any essential equipment or welding tools to its welders, it did supply blades for the grinders² and some equipment to assist in cutting, supporting, and clamping pipes. Sunland also owned a "tack rig" which the Welders utilized in areas where they could not physically utilize their own rigs (approximately 17 of the time). Sunland employed "welder helpers" to assist the Welders,³ and occasionally provided the necessary pipe jacks and welding [**7] rods. We further recognize that Sunland's overall investment in each pipeline construction project was obviously significant.

2 Welders use grinders to smooth the surface of the pipe before it is welded.

3 The Welders often brought their own helpers, who appear to have been unskilled or semi-skilled laborers. Sunland classified and compensated these helpers as its employees.

e. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Sunland did not solicit bids or proposals from the Welders. It paid the Welders a fixed hourly rate of \$ 23, plus \$ 10 per day for rental of their grinders. Sunland intended approximately 40% of the \$ 23 hourly rate to compensate the Welders for supplying their own welding equipment. Sunland required the Welders to submit invoices for work performed on Sunland projects. On appeal, the Welders stress that Sunland exclusively controlled the Welders' compensation while they worked on a Sunland project: Sunland rarely deviated [**8] from its hourly rate, and it controlled the number of hours that the Welders worked.

Sunland, however, explains that a Welder's year-end profits or losses as a welder depended on his ability to consistently find welding work with other companies and to minimize welding costs. Sunland refers us to the income tax returns filed by the lead plaintiff, Bennis Carrell. From 1987 to 1989, Carrell derived his welding income from companies that classified him as an employee [*334] as well as from companies, such as Sunland, that classified him as an independent contractor. For 1987, Carrell reported \$ 31,923 in income for his contract welding work and deducted \$ 26,273 for costs attributable to his contract work, leaving him with taxable profit

of \$ 5,650. For 1988, he reported contract income of \$ 12,072 and deducted \$ 11,659, leaving him with a net taxable profit of \$ 413. For 1989, he reported \$ 5,713 in contract income and deducted \$ 12,094, leaving him with a net loss of \$ 6,381. Like Carrell, many of the other Welders classified themselves as self-employed on their income tax returns.

Sunland exerted some control over the Welders' opportunity for profits by fixing the hourly rate and the hours [**9] of work. Yet, the tax returns of Carrell indicate that the Welders' profits also depended on their ability to control their own costs. Moreover, the Welders worked for numerous companies in each of the years relevant to this dispute.

Our determination of employee status is very fact dependent. And, as with most employee-status cases, there are facts pointing in both directions. Several facts weigh in favor of employee status; for example, Sunland dictated the Welders' schedule, including the timing of their breaks; Sunland assigned the Welders to specific work crews; Sunland paid the Welders an hourly rate that was rarely negotiable; the Welders' compensation while working for Sunland depended on the hourly rate and number of hours worked, both of which Sunland controlled. Despite the facts indicative of an employment relationship, we are convinced that the Welders were independent contractors, not employees. In making our determination, we rely on the following: the Welders' relationship with Sunland was on a project-by-project basis; the Welders worked from job to job and from company to company; many of the Welders spent little time working for Sunland; the Welders worked while [**10] aware that Sunland classified them as independent contractors, and many of them classified themselves as self-employed; ⁴ the Welders were highly skilled; Sunland's customers, the gas companies, tested and certified each welder before each project; Sunland had no

control over the methods or details of the welding work; when on a Sunland job, the Welders performed only welding services; the Welders supplied their own welding equipment; and their investments in welding equipment averaged \$ 15,000 per Welder. The economic realities are consistent with Sunland's traditional practice of classifying its welders as independent contractors. The Welders are, as a matter of economic reality, in business for themselves.

4 The Welders' arrangement with Sunland is relevant, but not dispositive. See *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir.1983) ("The fact that the [workers] signed contracts stating that they were independent contractors, while relevant, is not dispositive.").

[**11] This court has previously faced the issue of whether welders are employees under the FLSA. In *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir.1983), this court concluded that five welders who worked for Radcliff Material, Inc. were employees, and thus entitled to overtime compensation. *Id.* at 667. But the *Robicheaux* court's determination of employee status was based on several significant facts that are absent from this case: the welders worked a substantial period of time exclusively with Radcliff Material, ranging from ten months to three years; the welding required only "moderate" skills; Radcliff Material told the welders how long a welding assignment should take; the welders spent only 507 of their time welding, and the remaining time cleaning and performing semi-skilled mechanical work; and Radcliff Material provided the welders with "steady reliable work over a substantial period of time." *Id.* A careful examination of *Robicheaux* reinforces our conclusion that the Welders in our case were independent contractors.

AFFIRMED.

139 F.3d 1158
 (Cite as: 139 F.3d 1158)

United States Court of Appeals,
 Seventh Circuit.
 Betty CARTER, Individually and as Administratrix
 of the Estate of John Wallace Carter, Deceased,
 Plaintiff-Appellant,
 v.
 AMERICAN OIL COMPANY, et al., Defendants-
 Appellees.
 No. 97-1816.

Argued Sept. 23, 1997.
 Decided March 26, 1998.
 Rehearing Denied May 8, 1998.

Decedent's widow filed wrongful death action against oil refinery for which decedent's employer maintained tank cars, refinery's customer, and company that stored customer's mineral oil shipments, alleging that defendants negligently caused decedent's death by asphyxiation, which occurred while he was working on tank car used for mineral oil shipment. Defendants moved for summary judgment. The United States District Court for the Northern District of Indiana, Andrew P. Rodovich, United States Magistrate Judge, granted motions. Widow appealed. The Court of Appeals, Flaum, Circuit Judge, held that: (1) decedent's employer was independent contractor; (2) refinery did not assume duty to protect employer's employees; (3) refinery was not negligent for failing to warn decedent of hazardous conditions posed by tank cars; and (4) company storing customer's shipments had no duty to warn decedent of hazards of nitrogen in tank car.

Affirmed.

West Headnotes

[1] Labor and Employment 231H 30

231H Labor and Employment
 231HI In General
 231Hk28 Independent Contractors and Their
 Employees
 231Hk30 k. Particular Cases. Most Cited
 Cases
 (Formerly 255k5 Master and Servant)

Under Indiana law, decedent's employer was independent contractor of refinery for which it cleaned and maintained tank cars; refinery exercised no control over employer's work, employer had own safety procedures and its employees were not required to follow refinery's procedures, employer provided own equipment and was paid by the job, and parties believed they had independent contractor relationship.

[2] Labor and Employment 231H 29

231H Labor and Employment
 231HI In General
 231Hk28 Independent Contractors and Their
 Employees
 231Hk29 k. In General. Most Cited Cases
 (Formerly 255k5 Master and Servant)
 Independent contractor, as opposed to employee, generally controls method and details of his task and is answerable to principal as to results only.

[3] Labor and Employment 231H 29

231H Labor and Employment
 231HI In General
 231Hk28 Independent Contractors and Their
 Employees
 231Hk29 k. In General. Most Cited Cases
 (Formerly 255k5, 255k1 Master and Servant)
 To determine whether individual is independent contractor or employee, Indiana courts consider, among other things, ten non-exhaustive factors: extent of control that principal exercises over details of work, whether individual employed is engaged in distinct operation or business, whether work usually is done under direction of employer or by specialist without supervision, skill required in particular occupation, who supplies instrumentalities, tools, and place of work, length of time that individual is employed, whether individual is paid by job or by hour, whether work is part of regular business of employer, whether parties believe that they have created master/servant relationship, and whether principal is in business. Restatement (Second) of Agency § 220.

[4] Labor and Employment 231H 58

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231H Labor and Employment
 231HI In General
 231Hk58 k. Questions of Law and Fact as to
 Employment Status. Most Cited Cases
 (Formerly 255k5, 255k1 Master and Servant)
 While, under Indiana law, no single factor is dispo-
 sitive, and whether individual acts as employee or in-
 dependent contractor generally is question of fact,
 courts may make this determination as matter of law
 in cases in which relevant facts are undisputed.

[5] Federal Civil Procedure 170A ↪2543

170A Federal Civil Procedure
 170AXVII Judgment
 170AXVII(C) Summary Judgment
 170AXVII(C)3 Proceedings
 170Ak2542 Evidence
 170Ak2543 k. Presumptions. Most
 Cited Cases

Federal Civil Procedure 170A ↪2552

170A Federal Civil Procedure
 170AXVII Judgment
 170AXVII(C) Summary Judgment
 170AXVII(C)3 Proceedings
 170Ak2547 Hearing and Determination
 170Ak2552 k. Ascertaining Exis-
 tence of Fact Issue. Most Cited Cases

Federal Courts 170B ↪766

170B Federal Courts
 170BVIII Courts of Appeals
 170BVIII(K) Scope, Standards, and Extent
 170BVIII(K)1 In General
 170Bk763 Extent of Review Dependent
 on Nature of Decision Appealed from
 170Bk766 k. Summary Judgment.
 Most Cited Cases

Federal Courts 170B ↪802

170B Federal Courts
 170BVIII Courts of Appeals
 170BVIII(K) Scope, Standards, and Extent
 170BVIII(K)3 Presumptions
 170Bk802 k. Summary Judgment. Most
 Cited Cases

Neither district court nor Court of Appeals is obli-
 gated, in considering motion for summary judgment,
 to assume truth of nonmovant's conclusory allega-
 tions on faith or to scour the record to unearth mate-
 rial factual disputes.

[6] Negligence 272 ↪1010

272 Negligence
 272XVII Premises Liability
 272XVII(B) Necessity and Existence of Duty
 272k1010 k. In General. Most Cited Cases
 (Formerly 272k29)

Refinery did not, through its actions, assume duty to
 protect employees of independent contractor that
 maintained and cleaned its tank cars on refinery
 premises, so as to become liable in negligence for
 alleged breach of duty; independent contractor used
 its own safety equipment, followed its own safety
 procedures, was not subject to refinery's safety pro-
 cedures, and informed employees not to rely on re-
 finery's tags marking cars as "safe" as alternative to
 conducting own safety tests.

[7] Negligence 272 ↪1037(7)

272 Negligence
 272XVII Premises Liability
 272XVII(C) Standard of Care
 272k1034 Status of Entrant
 272k1037 Invitees
 272k1037(7) k. Persons Working on
 Property. Most Cited Cases
 (Formerly 272k32(2.10))

As general matter, under Indiana law, property own-
 ers have no duty to provide independent contractors
 with safe place to work, although they do have duty
 to maintain their property in reasonably safe condi-
 tion.

[8] Negligence 272 ↪1037(7)

272 Negligence
 272XVII Premises Liability
 272XVII(C) Standard of Care
 272k1034 Status of Entrant
 272k1037 Invitees
 272k1037(7) k. Persons Working on
 Property. Most Cited Cases
 (Formerly 272k52, 272k32(2.10))

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Under Indiana law, landowners generally are required to warn independent contractors of latent or concealed perils on premises, and they may also become liable to independent contractors if they gratuitously assume duty to provide safe work place.

[9] Negligence 272 ↪1204(1)

272 Negligence

272XVII Premises Liability

272XVII(G) Liabilities Relating to Construction, Demolition and Repair

272k1204 Accidents and Injuries in General

272k1204(1) k. In General. Most Cited Cases

(Formerly 272k29)

Under Indiana law, landowner does not assume duty to provide for safety of independent contractors simply by requiring those contractors to administer and comply with safety rules.

[10] Negligence 272 ↪306

272 Negligence

272VIII Dangerous Situations and Strict Liability

272k306 k. Dangerous Substances. Most Cited Cases

(Formerly 272k25)

Under Indiana law, refinery was not negligent in failing to warn employee of independent contractor regarding hazardous conditions posed by refinery's railroad tank cars that were cleaned and maintained by contractor; refinery did not know that tank car in which employee died of asphyxiation contained nitrogen, and nothing suggested that refinery should have known that contractor's employees would disregard commonly known risks posed by entry into confined spaces.

[11] Negligence 272 ↪1086

272 Negligence

272XVII Premises Liability

272XVII(D) Breach of Duty

272k1086 k. Defect or Dangerous Conditions Generally. Most Cited Cases

(Formerly 272k28)

In Indiana, landowner is not liable for injuries that are caused by conditions that are known or obvious

unless landowner can anticipate that injury despite obviousness of risk.

[12] Negligence 272 ↪306

272 Negligence

272VIII Dangerous Situations and Strict Liability

272k306 k. Dangerous Substances. Most Cited Cases

(Formerly 272k25)

Under Indiana law, company to which refinery shipped mineral oil in tank car had no independent duty to warn employee of refinery's independent contractor, which was responsible for cleaning and maintaining refinery's railroad tank cars, of hazards posed by nitrogen in tank car, given that employee had worked in industry for many years, had received instruction and training concerning safety procedures for entry into confined spaces, and was aware of risk of asphyxiation posed by entry into confined space.

[13] Negligence 272 ↪254

272 Negligence

272IV Breach of Duty

272k254 k. Lack of or Inadequate Warning. Most Cited Cases

(Formerly 272k16)

To prevail on her claim, under Indiana law, that company which received mineral oil shipment negligently failed to warn her husband, as employee of contractor responsible for cleaning refinery's railroad tank car used for shipment, of presence of nitrogen in car, widow was required to establish (1) that company owed duty to husband, (2) that company breached that duty by negligently failing to conform its conduct to requisite standard of care, and (3) that company's negligence caused, both proximately and in fact, husband's injury.

[14] Federal Courts 170B ↪759.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk759 Theory and Grounds of Decision of Lower Court

170Bk759.1 k. In General. Most Cited Cases

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Court of Appeals may affirm award of summary judgment on any ground that appears in the record.

[15] Negligence 272 ↪221

272 Negligence

272II Necessity and Existence of Duty
272k221 k. Duty to Warn. Most Cited Cases
(Formerly 272k2)

Duty to warn is predicated upon understanding that individuals who have superior knowledge of dangers posed by hazard must warn those who lack similar knowledge; when individual is already aware of danger, warning is not necessary.

[16] Negligence 272 ↪221

272 Negligence

272II Necessity and Existence of Duty
272k221 k. Duty to Warn. Most Cited Cases
(Formerly 272k2)

Duty to warn exists only when those to whom warning would go can reasonably be assumed to be ignorant of facts which warning would communicate; if it is unreasonable to assume they are ignorant of those facts, there is no duty to warn.

*1160 Robert G. Berger (argued), Highland, IN, John R. Stanish, Edward J. Raskosky, Hammond, IN, for Plaintiff-Appellant.

Anthony DeBonis, Jr. (argued), Terrance L. Smith, Smith & DeBonis, Highland, In, for American Oil Company.

Before BAUER, FLAUM, and EASTERBROOK, Circuit Judges.

FLAUM, Circuit Judge.

John Wallace Carter, an employee of the Union Tank Car Company (UTLX), died of asphyxiation inside a railroad tank car that was filled with pure nitrogen. His widow, Betty J. Carter, filed this wrongful death claim in the district court, pursuant to the court's diversity jurisdiction. She alleged that American Oil Company (Amoco), at whose refinery Carter was working, as well as Lyondell Petrochemical Company (Lyondell) and Tri-Central Marine Terminal, Inc. (Tri-Central), which were both allegedly responsible for storing the nitrogen in the tank car, negli-

gently caused her husband's death. Magistrate Judge Rodovich, presiding over the case with the parties' consent, granted summary judgment to all of the defendants. We affirm.

I. Background

The basic facts surrounding John Carter's tragic death are not in dispute. Carter, a veteran of nearly forty years in the railroad and petroleum industries, was a UTLX employee at the time of his death in 1989. He was permanently assigned to Amoco's refinery in Whiting, Indiana, where UTLX had its own office and was under contract with Amoco to clean, repair, and maintain Amoco's tank cars. The mineral oil that Amoco shipped to its customers in the tank cars sometimes left behind residue or sediment in the car. When the amount of residue in a tank car was small, Amoco would arrange to have the car "wiped down" manually with rags, rather than request a full steam or chemical cleaning. This wipe-down procedure required workers to operate inside the confined space of the tank car. When Amoco wanted UTLX to wipe down one of its cars, an Amoco employee would telephone the UTLX office and notify UTLX that a wipe-down was requested.

At Amoco's Whiting refinery, UTLX employed a manager and two other employees along with Carter. UTLX maintained a confined space entry policy that detailed the procedures that UTLX employees were required to follow before entering confined spaces such as tank cars. The policy prohibited employees from entering any confined spaces that were not tagged with a "Safe to Enter" card, and it directed employees to assume that any confined space that did not have a UTLX tag was hazardous to their lives, irrespective of whether another company had tagged a car "safe". In order to determine that a confined space was in fact safe, UTLX employees were required to use an "Ecolyzer 400" machine to test the oxygen sufficiency of the atmosphere inside the confined space. Carter was aware of these policies, and UTLX trained him to use an Ecolyzer 400. According to Betty Carter, her husband "was very safety-minded"-just one month before his accident, Carter had refused to enter a tank car that did not indicate that it was safe to enter.

On June 1, 1989, Amoco had shipped tank car GATX 40998, which contained 24,000 gallons of white min-

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eral oil, from its Whiting plant to Tri-Central, located in Lemont, Illinois. The mineral oil actually had been purchased from Amoco by Lyondell; pursuant to a contract with Lyondell, Tri-Central would accept Lyondell's shipments of mineral oil, store them, and transfer the oil directly to Lyondell's customers. Tri-Central typically off-loaded mineral oil from a tank car by injecting nitrogen gas into a pipe at the top of the car. This created sufficient pressure to force the oil out of a pipe at the bottom of *1161 the tank car. While the method effectively preserved the purity of the mineral oil, it was also quite dangerous, since nitrogen gas displaces air to create an oxygen-deficient atmosphere. Because of the heightened danger posed by using nitrogen in this manner, Tri-Central sometimes used compressed air instead of nitrogen prior to 1989. In October 1988, Lyondell directed Tri-Central to use nitrogen exclusively.

After off-loading all of the mineral oil from car GATX 40998, Tri-Central made arrangements to ship the now oxygen-deficient car back to Amoco's plant in Whiting. The car arrived at the plant sometime on or before August 1, 1989. Although Tri-Central's stated practice was to affix paper tags warning "Danger Nitrogen Blanket" on tank cars that had been off-loaded with nitrogen, no tags were on the car when it returned to Whiting. Amoco was not otherwise made aware that the car contained nitrogen; Amoco did not use nitrogen at its Whiting plant for either loading or off-loading mineral oil. Two Amoco employees examined the inside of the tank car and noticed debris at the bottom of the tank. They determined that the car needed a wipe-down; they sealed the car and notified their supervisor. The employees did not notice any warning tags, and they did not place any of Amoco's tags or signs on the car, since they were not aware that the car contained nitrogen and they knew that both Amoco and UTLX employees adhered to their own confined space entry procedures.

Barbara Tomko, an Amoco employee, left a message on the telephone answering machine in the UTLX office requesting that UTLX wipe down tank car GATX 40998. UTLX manager Tom Gruener apparently assigned the task to Carter and Doug Anderson.^{FN1} Later that day, both Carter and Anderson were found lying unconscious at the bottom of the car. Carter died from asphyxiation due to the oxygen-deficient atmosphere in the tank car. While Anderson survived, he had no memory of the incident. No tags

were found on the car indicating that it had been tested or that it was safe to enter; UTLX's Ecolyzer 400 was found in the UTLX office, which was about half a mile away from the tank car. The Ecolyzer 400 subsequently was tested and found to be working properly; tank car GATX 40998 was also tested and found to have an oxygen-deficient atmosphere.

FN1. Tom Gruener died before the appellant filed suit in the district court.

In the district court, the appellant claimed that Amoco, along with Tri-Central and Lyondell, negligently caused her husband's death. The district court awarded summary judgment to all three defendants. The court found as a matter of law that UTLX was an independent contractor, and it found that Carter had presented no evidence to support a contrary inference. The court then determined that Amoco had not otherwise assumed a duty to protect UTLX employees. Furthermore, the court held that as a landowner Amoco did not have a duty to warn Carter of the known hazards posed by entry into confined spaces. The district court awarded summary judgment to Tri-Central because the evidence did not create an inference that Tri-Central's negligence-in failing to attach durable nitrogen warning tags to the tank car-proximately caused Carter's death. Because Lyondell's liability was premised vicariously on Tri-Central's liability, the court awarded summary judgment to Lyondell as well.

II. Discussion

As always, we review an award of summary judgment by the district court *de novo*. We construe the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to Carter, the nonmoving party. *See, e.g., Bruner Corp. v. R.A. Bruner Co.*, 133 F.3d 491, 495 (7th Cir.1998). Applying these principles, summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Newell v. Westinghouse Elec. Corp.*, 36 F.3d 576, 578 (7th Cir.1994). Carter argues that the record contains considerable evidence that establishes genuine issues of fact with respect *1162 to the liability of each of the defendants. We address these

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contentions in turn.

A. Amoco's Liability

Carter argues that summary judgment was inappropriately granted to Amoco for two reasons. First, she asserts, substantial evidence in the record indicates that Amoco exercised sufficient control over UTLX employees to establish an agency relationship, as opposed to an independent contractor arrangement.^{FN2} Second, she argues that even if UTLX was an independent contractor, Amoco independently assumed a duty to protect UTLX employees. Viewing the evidence in the light most favorable to Carter, we reject these arguments.

FN2. The thrust of Carter's argument is that UTLX was not an independent contractor, but rather an Amoco employee. The Court is puzzled as to why Amoco chose not to raise the defense that, as an employee, Carter's sole remedy is provided by the Indiana Worker's Compensation Act. *See Ind.Code* § 22-3-2-6 (stating that the statutory remedies provided to employees under the Act "shall exclude all other rights and remedies of such employee, ... at common law or otherwise"). However, Amoco has chosen not to raise the defense and has repudiated it at oral argument. We shall accordingly address the merits of Carter's contention.

1. UTLX's Independent Contractor Status

[1][2][3][4] An independent contractor, as opposed to an employee, generally "controls the method and details of his task and is answerable to the principal as to results only." *Mortgage Consultants, Inc. v. Mahaney*, 655 N.E.2d 493, 495 (Ind.1995) (internal quotation omitted). To determine whether an individual is an independent contractor or an employee, Indiana courts consider, among other things, ten non-exhaustive factors: the extent of control that the principal exercises over the details of the work; whether the individual employed is engaged in a distinct operation or business; whether the work usually is done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; who supplies the instrumentalities, tools, and the place of work; the length of time that the individual is employed; whether the individual is

paid by the job or by the hour; whether the work is part of the regular business of the employer; whether the parties believe that they have created a master/servant relationship; and whether the principal is in business. *Id.* at 495-96; *see also Restatement (Second) of Agency* § 220 (1958). While no single factor is dispositive, and whether an individual acts as an employee or an independent contractor generally is a question of fact, *see* 655 N.E.2d at 496, courts may make this determination as a matter of law in cases in which the relevant facts are undisputed. *See, e.g., Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 480-81 (Ind.Ct.App.1993).

In support of her argument that UTLX was not an independent contractor, Carter must "set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). The district court found that Carter did not set forth specific facts to create a genuine issue on this matter:

The plaintiff's only relevant argument supporting her position ... is that Amoco exercised control over UTLX. The plaintiff contends that the UTLX employees at Amoco had no active supervisor and that their instructions came directly from Amoco. However, the plaintiff has not cited to any evidence that would support these allegations.

[5] Similarly, in her brief to this Court, Carter failed to identify particular facts in the record that support an inference that UTLX was not an independent contractor. Instead, her brief contains conclusory assertions such as "The business of wiping out tank cars is not a distinct operation or business", and "Very little skill appears to be required for this particular operation. Amoco had control over the tank car and the place of work, although the UTLX crew had its own tester. The job of wiping out a tank car takes a very short time, only a few minutes. It is not entirely clear how the job was paid...." Such conclusions do not provide the court with the specific substantiating facts that we require under Rule 56 to create a genuine issue of material fact. *See Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir.1998); *cf. Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. *1163 3177, 3188, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."). Neither the district court nor this Court is obli-

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gated in considering a motion for summary judgment to assume the truth of a nonmovant's conclusory allegations on faith or to scour the record to unearth material factual disputes. *See, e.g., Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1135-36 (7th Cir.1997).

Amoco, on the other hand, has pointed to evidence in the record supporting its assertion that UTLX was an independent contractor, and we shall consider it briefly. The evidence indicates that Amoco exercised no control over UTLX's work, as it did not supervise or instruct UTLX on how to perform the requested work. The extent of Amoco's involvement was merely to tell UTLX which tank cars needed work and to determine that the work was completed satisfactorily. As indicated above, UTLX had its own safety and tagging procedures, and UTLX employees were not required to follow Amoco safety procedures. In addition, UTLX provided its own equipment to clean and repair tank cars, tasks that are distinct from Amoco's business as a refinery. Amoco paid UTLX by the job, and the parties believed that they had established an independent contractor relationship. In light of this evidence and the factors discussed in *Mahaney*, the only reasonable inference that we can make is that UTLX was an independent contractor.

2. Amoco's Duty to Protect UTLX Employees

[6][7][8] Even if UTLX was an independent contractor, Carter argues that Amoco through its actions assumed a duty to protect UTLX employees, and that there exists a genuine issue as to whether Amoco breached that duty in this case. As a general matter, property owners have no duty to provide independent contractors with a safe place to work, although they do have a duty to maintain their property in a reasonably safe condition. *See, e.g., Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind.1991); *Adams v. Inland Steel Co.*, 611 N.E.2d 141, 143 (Ind.Ct.App.1993). “[L]andowners generally are required to warn independent contractors of latent or concealed perils on the premises, and they may also become liable to independent contractors if they gratuitously assume a duty to provide a safe work place.” *McClure v. Strother*, 570 N.E.2d 1319, 1321 (Ind.Ct.App.1991) (citation omitted).

[9] The evidence does not create a reasonable infer-

ence that Amoco assumed a duty to provide a safe work place for UTLX employees. On this point, the district court concluded that “there is no evidence of probative value, nor reasonable inferences which could be drawn therefrom, which could cause reasonable minds to differ regarding whether Amoco assumed a duty to protect Carter.” Carter has provided similarly sparse evidence on this point on appeal. She has pointed to evidence indicating that Amoco required its independent contractors, which included UTLX, to implement *some* safety procedures. However, the law is clear that a landowner does not assume a duty to provide for the safety of independent contractors simply by requiring those contractors to administer and comply with safety rules. *See, e.g., Adams*, 611 N.E.2d at 144 (“A landowner who does not control the ‘manner or means’ by which a contractor performs does not reserve the control of job site safety so as to render the landowner liable for a contractor's injuries merely because the owner contractually requires compliance with safety rules.”). Carter has not demonstrated that Amoco provided the significant level of supervision necessary to support an inference that Amoco assumed a duty to protect UTLX workers' safety. *See, e.g. Bateman v. Central Foundry Div.*, 992 F.2d 722, 725 (7th Cir.1993). Rather, the evidence, including the deposition testimony of UTLX employees Anderson and Danny Bouchee, indicates that UTLX used its own safety equipment, followed its own safety procedures, was not subject to Amoco's safety procedures, and informed its employees not to rely on Amoco “safe” tags as an alternative to conducting their own safety tests. Thus, we conclude that the evidence does not establish a reasonable inference that Amoco assumed a duty to protect UTLX employees' safety.

*1164 [10][11] Moreover, the evidence does not create an inference that Amoco was otherwise negligent in failing to warn Carter regarding the hazardous conditions posed by the tank cars. In Indiana, a landowner is not liable for injuries that are caused by conditions that are known or obvious unless the landowner can anticipate that injury despite the obviousness of the risk. *See Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind.1990). Notwithstanding the evidence indicating that Amoco did not know that tank car GATX 40998 contained nitrogen, there is no evidence in the record to suggest that Amoco should have known that UTLX employees would disregard the risks posed by entry into confined spaces. Amoco hired UTLX to maintain its tank cars, and UTLX

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implemented safe entry procedures to safeguard against risks that were common knowledge in the industry. There is no evidence indicating that Amoco breached any duty that it may have owed Carter.

B. Tri-Central and Lyondell's Liability

[12][13][14] Carter argues that Tri-Central and, vicariously, Lyondell, negligently failed to warn of the presence of nitrogen in the tank car. In order to prevail on her claim, Carter must establish (1) that Tri-Central owed a duty to her husband; (2) that Tri-Central breached that duty by negligently failing to conform its conduct to the requisite standard of care; and (3) that Tri-Central's negligence caused (both proximately and in fact) her husband's injury. *See, e.g., Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind.Ct.App.1993). The district court concluded after a lengthy analysis that any negligence that occurred did not proximately cause Carter's death. While the appellees agree with the district court that Tri-Central's negligence was not the proximate cause of Carter's death, they also argue that Tri-Central did not have a duty to warn Carter. We may affirm an award of summary judgment on any ground that appears in the record. *See, e.g., United States v. Winthrop Towers*, 628 F.2d 1028, 1037 & n. 4 (7th Cir.1980). We agree with the appellees' argument that they had no duty to warn Carter of the hazards posed by the tank car. Therefore, we need not reach the issue of proximate causation.

[15][16] A duty to warn is predicated upon the understanding that individuals who have superior knowledge of the dangers posed by a hazard must warn those who lack similar knowledge. When an individual is already aware of the danger, a warning is not necessary. "A duty to warn exists only when those to whom the warning would go can reasonably be assumed to be ignorant of the facts which a warning would communicate. If it is unreasonable to assume they are ignorant of those facts, there is no duty to warn." *Burton v. L.O. Smith Foundry Prods. Co.*, 529 F.2d 108, 111 (7th Cir.1976) (per curiam) (applying Indiana law); *see also Czarnecki v. Hagenow*, 477 N.E.2d 964, 968 (Ind.Ct.App.1985) ("Our decisions recognize that there is no 'duty' to warn concerning dangers which are open and obvious or known to the party injured.").

Applying this principle to the facts of the instant

case, Carter cannot establish that Tri-Central had a duty to warn her husband about the hazards posed by nitrogen stored in a tank car. John Carter had worked in the industry for many years and had received instructions and training concerning safety procedures for entry into confined spaces. Indeed, Carter even refused to enter a tank car that he did not know to be safe only a month before his death. While this fact may establish an inference that Carter would not have entered tank car GATX 40998 intentionally without having tested it first, and that he may have fallen in, or fallen victim to the nitrogen while attempting to rescue his partner Anderson, these inferences are not relevant to the issue of whether Tri-Central had a duty to warn Carter. The only reasonable inference supported by the evidence is that Carter was well aware of the risk of asphyxiation posed by entry into any confined space. Thus, Carter's knowledge of the danger indicates that Tri-Central had no independent duty to warn him that this particular tank car was dangerous. *See id.*

Carter has conceded that if we affirm the district court's award of summary judgment in favor of Tri-Central, Lyondell cannot be held independently liable. Accordingly, we *1165 affirm the district court's award of summary judgment in favor of both Tri-Central and Lyondell.

III. Conclusion

For the reasons stated herein, we affirm the district court's entry of summary judgment in favor of the appellees.

C.A.7 (Ind.),1998.
 Carter v. American Oil Co.
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END OF DOCUMENT

704 F.2d 181, 26 Wage & Hour Cas. (BNA) 184, 97 Lab.Cas. P 34,382
(Cite as: 704 F.2d 181)

United States Court of Appeals,
Fifth Circuit.
Paulina CASTILLO, et al., Plaintiffs-Appellants,
v.
Ercell GIVENS, Defendant-Appellee.
No. 81-1520.

May 6, 1983.

Field workers brought action against farm owner under Fair Labor Standards Act for unpaid minimum wages and liquidated damages and also under Farm Labor Contractor Registration Act for liquidated damages. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, entered judgment for farm owner on both claims, and workers appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) person who farm owner hired to procure and supervise field workers to chop cotton was an employee of farm owner for purposes of Fair Labor Standards Act and therefore field workers were also employees of farm owner for purposes of the Act; (2) violations of Fair Labor Standards Act by farm owner were willful within meaning of three-year statute of limitations for willful violations of the Act; and (3) farm owner violated Farm Labor Contractor Registration Act by not maintaining payroll records on his field workers and those violations were intentional within meaning of Act.

Reversed and remanded.

Higginbotham, Circuit Judge, specially concurred and filed opinion.

West Headnotes

[1] Labor and Employment 231H ⚡2397(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)6 Actions
231Hk2395 Trial

231Hk2397 Questions of Law or
Fact

231Hk2397(1) k. In General.
Most Cited Cases
(Formerly 232Ak1562.1, 232Ak1562 Labor Relations)

Ultimate conclusion that an individual is an “employee” within meaning of Fair Labor Standards Act is a legal determination rather than a factual one. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[2] Labor and Employment 231H ⚡2233

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations
231Hk2231 Employees Included
231Hk2233 k. Particular Employees.

Most Cited Cases
(Formerly 232Ak1124, 232Ak1121 Labor Relations)

Person who farm owner hired to procure and supervise field workers to chop cotton, who was illiterate with only two years of schooling, who kept his “records” of the number of field workers and the number of hours they worked on parts of paper sacks which he brought to farm owner’s bank, who was not paid enough to pay the field workers minimum wage and who was registered as a farm labor contractor, was an employee of farm owner for purposes of Fair Labor Standards Act and therefore field workers were also employees of farm owner for purposes of the Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 231H ⚡2232

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations

704 F.2d 181, 26 Wage & Hour Cas. (BNA) 184, 97 Lab.Cas. P 34,382
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231Hk2231 Employees Included
 231Hk2232 k. In General. Most

Cited Cases

(Formerly 232Ak1124 Labor Relations)

In determining an individual's status as "employee" within meaning of Fair Labor Standards Act, a defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the economic realities of the relationship. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[4] Labor and Employment 231H ↪2371

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)6 Actions
 231Hk2368 Time to Sue and Limitations
 231Hk2371 k. Willful Violations.

Most Cited Cases

(Formerly 232Ak1479 Labor Relations)

Standard for willfulness, for purposes of section of Portal-to-Portal Act providing a three-year statute of limitations for willful violations of Fair Labor Standards Act, requires that employer have nothing more than awareness of the possible applicability of the Act; if an employer merely suspects that his actions might violate the Act, the violation is willful. Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

[5] Labor and Employment 231H ↪2371

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)6 Actions
 231Hk2368 Time to Sue and Limitations
 231Hk2371 k. Willful Violations.

Most Cited Cases

(Formerly 232Ak1479 Labor Relations)

Violations of Fair Labor Standards Act by farm owner, who had been in banking business for 55 years and who knew of existence of minimum wage law and paid minimum wage to his bank employees, were willful within meaning of three-year statute of limitations for willful violations of the Act. Portal-to-

Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

[6] Labor and Employment 231H ↪2232

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)2 Persons and Employments
 Within Regulations
 231Hk2231 Employees Included
 231Hk2232 k. In General. Most

Cited Cases

(Formerly 232Ak1124 Labor Relations)

Labor and Employment 231H ↪2313

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)4 Operation and Effect of
 Regulations
 231Hk2311 Working Time
 231Hk2313 k. Work Week. Most

Cited Cases

(Formerly 232Ak1124 Labor Relations)

Labor and Employment 231H ↪2333

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)4 Operation and Effect of
 Regulations
 231Hk2331 Records and Reports
 231Hk2333 k. Duty to Keep Records. Most Cited Cases

(Formerly 232Ak1301 Labor Relations)

An employer cannot escape record-keeping provisions of Fair Labor Standards Act by delegating that duty to his employees; furthermore, an employee must decide at his peril which employees are covered by the Act. Fair Labor Standards Act of 1933, § 11(c), 29 U.S.C.A. § 211(c).

[7] Federal Courts 170B ↪630.1

170B Federal Courts

704 F.2d 181, 26 Wage & Hour Cas. (BNA) 184, 97 Lab.Cas. P 34,382
(Cite as: 704 F.2d 181)

170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in
Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk630 Instructions
170Bk630.1 k. In General. Most
Cited Cases
(Formerly 232Ak1567 Labor Relations)
In suit charging violations of Fair Labor Standards
Act, district court committed plain error in failing to
specify burden of proof with regard to determination
of number of hours worked by each employee. Fair
Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A.
§ 201 et seq.

[8] Labor and Employment 231H ↪ 2718(2)

231H Labor and Employment
231HXVI Agricultural Labor
231Hk2716 Labor Contractors
231Hk2718 Who Are Contractors; Exemp-
tions
231Hk2718(2) k. Compensation or Fees.
Most Cited Cases
(Formerly 232Ak1672(2) Labor Relations,
238k11(5))
Person who farm owner hired to procure and super-
vise field workers to chop cotton worked "for a fee"
within meaning of Farm Labor Contractor Registra-
tion Act and was therefore a farm labor contractor
within meaning of the statute. Farm Labor Contractor
Registration Act of 1963, § 3(b), as amended, 7
U.S.C. (1976 Ed.), § 2042(b).

[9] Labor and Employment 231H ↪ 2527

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(E) Offenses and Prosecutions
231Hk2524 Offenses
231Hk2527 k. False or Inadequate Re-
cords. Most Cited Cases
(Formerly 232Ak1645 Labor Relations)
Farm owner violated Farm Labor Contractor Regis-
tration Act by not maintaining payroll records on his
field workers and those violations were intentional
within meaning of Act. Farm Labor Contractor Reg-
istration Act of 1963, § 2 et seq., as amended, 7
U.S.C. (1976 Ed.) § 2041 et seq.
*182 Edward J. Tuddenham, Tex. Rural Legal Aid,
Inc., Farm Worker Div., Hereford, Tex., for plain-

tiffs-appellants.

Beate Bloch, Assoc. Sol., Sandra D. Lord, U.S. Dept.
of Labor, Washington, D.C., amicus curiae.

Crenshaw, Dupree & Milam, Tom S. Milam, Lub-
bock, Tex., for defendant-appellee.

Appeal from the United States District Court for the
Northern District of Texas.

Before THORNBERRY, JOHNSON and
HIGGINBOTHAM, Circuit Judges.

*183 JOHNSON, Circuit Judge:

Plaintiffs, thirty-nine Mexican and Mexican-
American migrant farm laborers who chopped cotton
in defendant's fields during the summers of 1977 and
1978, brought this action under section 216(b) of the
Fair Labor Standards Act (FLSA) for unpaid mini-
mum wages and liquidated damages and under sec-
tion 2050a of the Farm Labor Contractor Registration
Act (FLCRA) for liquidated damages. The district
court entered judgment for defendant on both claims,
based on the jury's answers to nine special issues.
Plaintiffs appeal from the court's denial of their mo-
tions for judgment n.o.v. and alternatively for a new
trial. With regard to the FLSA claim, this Court re-
verses and remands for a new trial on the number of
hours worked by the individual plaintiffs and for a
finding by the Court as to an award of liquidated
damages.^{FN1} With regard to the FLCRA claim, this
Court reverses and remands for a determination of
the number of violations committed and the award of
liquidated damages in an amount of up to \$500 per
violation.

FN1. The district court has discretion in
whether to award liquidated damages and, if
it does, in the amount of the award if the
court determines that the defendant's failure
to pay minimum wage was in good faith and
that he had reasonable grounds to believe
that his failure to pay minimum wage was
not a violation of the FLSA:

In any action commenced prior to or on or
after May 14, 1947 to recover unpaid
minimum wages, unpaid overtime com-

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pensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260 (1975).

This Court has interpreted the statutory language as follows:

Section 11 of the Portal-to-Portal Act [29 U.S.C. § 260], imposes upon an employer seeking to escape liquidated damages the plain and substantial burden of proving that its violation was “both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.”

Reeves v. International Telephone & Telegraph Corp., 616 F.2d 1342, 1352 (5th Cir.1980) [citing *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir.1979)]. In discussing the “reasonable good faith” requirement, this Court made the following statements:

[W]e also doubt the validity of ignorance as a defense to liability for liquidated damages under Section 11. We do not believe an employer may rely on ignorance alone as reasonable grounds for believing that its actions were not in violation of the Act. Further, we feel that good faith requires some duty to investigate potential liability under the FLSA. Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a

reasonable belief.

Barcellona, 597 F.2d at 468-69.

A successful showing by defendant under 29 U.S.C. § 260 does not preclude the award of liquidated damages. Under the language of the statute, even if the court determines that defendant has met the “reasonable good faith” requirement, the court nonetheless has discretion to award liquidated damages.

I. Facts

Defendant Ercell Givens, President of the First State Bank of Abernathy for twenty-six years, owned a farm of approximately 4000 acres, of which about 1800 acres in 1977 and 2000 acres in 1978 were devoted to cotton production. Defendant employed five fulltime “hands” to run his farm as well as seasonal temporary hands to perform jobs such as operating tractors and feeding cattle. Defendant himself made the decisions of when and where to prepare the fields, when to plough, when to plant, when to cultivate, and when to harvest. In order to produce a good cotton crop, cotton should be chopped in the summertime^{FN2}-the job simply involves chopping or hoeing the weeds out of the rows of growing cotton. It is a menial, unskilled task which requires no aptitude, no training, and no ability to reason. It is a work of drudgery *184 which can be performed by persons ranging from very young to quite old; it is accomplished with a simple instrument-the hoe. Defendant employed Manuel Tonche to furnish him with a crew of field workers and to chop his cotton.^{FN3} Defendant knew that Tonche was registered with the Department of Labor (DOL) as a farm labor contractor, and defendant required Tonche to show him his identification card from the DOL at the beginning of each season. Tonche, an illiterate with only a second-grade education who “junked” cars (cut up the bodies and sold the metal as scrap iron) in the winter, worked only for the defendant. In search of field work, the workers contacted Tonche. Tonche provided transportation to the fields for most of the workers in his used school bus, but some came in their own vans or pickups. Tonche's son brought the hoes to the fields in his pickup.

FN2. The cotton chopping season in the area

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involved runs from around June 20 to mid-August.

FN3. Although defendant claims that he "contracted with" Tonche only to chop his cotton-not to furnish him with cotton choppers-defendant admitted at trial that Tonche could not chop the cotton on a 2000-acre farm all by himself.

Tonche provided defendant with workers to chop his cotton for four years ending in 1978.^{FN4} The crew varied in size, ranging from around thirty or forty up to fifty persons on any one day. In addition to Tonche's crew, defendant also hired the wives, children, and friends of his fulltime hands to chop cotton. Although defendant always paid his bank employees minimum wage, he paid his cotton choppers, including Tonche, \$1.65 an hour in 1977 and \$1.75 an hour in 1978. The minimum wage was \$2.20 an hour in 1977 and \$2.65 an hour in 1978. Although defendant was aware of the minimum wage law and the amount of the minimum wage in 1977 and 1978, he stated that he did not realize that the law required him to pay minimum wage to his farm workers as well as to his bank employees.

FN4. Plaintiffs ask for unpaid minimum wages for the years 1977 and 1978.

On each Friday, defendant would give Tonche a check based on the number of hands and the number of hours Tonche reported to him had been worked. Tonche would then mete out the wages to the individual workers in cash. Tonche kept track of the number of hands and the number of hours worked on a daily basis and brought these figures to defendant on a piece of a paper sack.^{FN5} Defendant would then copy Tonche's figures into his own record book. Significantly, defendant did not keep any further records other than his cancelled paychecks to Tonche. In particular, defendant did not keep any records of the individual plaintiffs' names, their hours of work, or their wages.

FN5. Tonche, with the help of his own children, kept a notebook of the individual workers' names (many were listed by nickname) and the number of hours they worked. The names and figures were often but not always transcribed into this notebook from

loose pieces of paper where Tonche, his son, or daughter had written them while in the fields.

Both the exigencies of running a farm and his serving as bank president prevented defendant from physically supervising the work of his farm employees at all times. Nevertheless, defendant went to the fields three or four times a week to make sure the workers were in the right fields (his fields), to check up on the number of hands working, and to make sure how his entire farming operation was progressing. It was defendant who made the decision on when to start chopping in the season, on which fields to chop, and in what order the fields were to be chopped. Moreover, defendant directed Tonche which weeds were to be chopped and which weeds were not to be chopped; defendant determined when a job was finished.

In September 1978, the DOL investigated defendant's farming operation and determined that defendant owed back FLSA minimum wages to nine members of Tonche's crew who chopped cotton in defendant's fields in 1977 and 1978; defendant paid those nine workers. The DOL also investigated defendant for violations of the FLCRA; defendant was advised by letter in March 1979 that the DOL was not contemplating any further action on the violations indicated. In addition to Tonche, the *185 plaintiffs who filed the instant action on February 14, 1980,^{FN6} were members of Tonche's crew who did not receive back minimum wages.^{FN7}

FN6. These plaintiffs include those who were later added by filing a written consent.

FN7. Tonche, who was not a plaintiff under the FLCRA claim, died at the age of fifty-six before the trial began on June 15, 1981. Tonche's wife was substituted as his representative.

The case was tried to a jury. At the close of all the evidence, plaintiffs moved for a directed verdict on all issues except the calculation of the number of hours of work performed by plaintiffs. The jury found against plaintiffs on each of nine special issues submitted to it.^{FN8} On June 19, 1981, the court entered judgment for defendant on both claims. Plaintiffs moved for judgment n.o.v. with respect to all

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issues and alternatively for a new trial with regard to the hours they worked. In an order of October 7, 1981, the court denied both the motion for judgment n.o.v. and the motion for a new trial. With respect to the FLSA claim, the court concluded that the jury's finding that plaintiffs were not engaged in the production of goods for commerce was not supported by the evidence. The court stated, however, that the jury could have reasonably found that defendant was not plaintiffs' employer. With respect to the FLCRA claim, the court held that the jury's finding that plaintiffs were not migrant laborers was not supported by the evidence. Nevertheless, the court stated that the jury could have reasonably found that Tonche was not a farm labor contractor. Plaintiffs appeal from this order.

FN8. In response to the special issues relating to the FLSA claim, the jury found that (1) plaintiffs were not engaged in the production of goods for commerce, (2) plaintiffs were not employees of defendant, and (3) defendant's failure to pay the minimum wage was not willful in 1977 or in 1978. Special Issues 4 and 5 related to the number of hours the individual plaintiffs worked in 1977 and 1978. On the FLCRA claim the jury found that (1) plaintiffs were not migrant workers; (2) Tonche was not a farm labor contractor; (3) defendant did not fail to maintain payroll records of the individual plaintiffs showing all of the following information: total earnings in each payroll period, all withholdings from wages, net earnings, number of units of time employed, rate per unit of time, a statement of all sums paid to Tonche on account of the labor of the worker, a statement of all sums withheld by Tonche from the amount he received on account of the worker, and the purpose of the above withholding; (4) any failure of defendant to comply with the FLCRA was not willful.

II. FLSA Claim

The issues this Court must address concerning the FLSA claim relate to the status of plaintiffs vis-a-vis defendant, the willfulness of any violation of section 16(b), and the number of hours plaintiffs worked.

A. Plaintiffs' Status

1. A Question of Law

[1] This Court has repeatedly held that the ultimate conclusion that an individual is an "employee" within the meaning of the FLSA is a legal determination rather than a factual one.^{FN9} Most recently, in *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 at 666 (5th Cir.1983), this Court dealt directly with the standard of review for the determination of employee status:

FN9. Any subsidiary factual issues leading to this conclusion are, of course, questions of fact for the jury.

We review the district court's determination [that the plaintiff welders are employees within the meaning of the FLSA] as being one of mixed law and fact. (citation omitted). As to the trial court's underlying factual findings and factual inferences deduced therefrom, we are bound by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* However, as to the legal conclusion reached by the district court based upon this factual data, *i.e.*, here that these welders are employees rather than independent contractors, we may review this as an issue of law.

Prior to *Robicheaux*, this Court had occasion to address the standard of review for the "employee" status determination in *Donovan v. American Airlines, Inc.*, 686 F.2d *186 267 (5th Cir.1982). There, this Court stated:

The standard of review of the district court's decision is that of a legal, and not a factual, determination. Thus, although we are bound by the clearly erroneous standard in reviewing the individual findings of fact leading to the district court's conclusions, we review the determination that the students here were not employees as we review any determination of law.

(citations omitted). The *American Airlines* holding is in accord with this Court's opinion in *Donovan v. Tehco*, 642 F.2d 141, 143 n. 4 (5th Cir.1981) where we stated:

In reviewing the district court's ultimate findings that the workers at issue were independent contractors, we are not constrained by the "clearly erroneous"

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standard. Rather, these ultimate findings are treated as legal determinations.

Donovan v. Tehco, Inc., 642 F.2d 141, 143 n. 4 (5th Cir.1981). Prior to the *Tehco* decision, this Court in *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 n. 11 (5th Cir.1979), had stated:

In reviewing the Trial Court's ultimate finding that Weisel was not an employee, we are not constrained by the "clearly erroneous" test. Rather, that finding is treated as a legal determination. (citation omitted). However, the individual findings of fact leading to that conclusion are examined under the "clearly erroneous" test. *See Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 126 (5th Cir.1955).

The initial decision of this Circuit holding that the employee/independent contractor status determination is a legal one was *Shultz v. Hinojoso*, 432 F.2d 259 (5th Cir.1970). In *Shultz*, this Court stated:

There is no dispute as to the basic facts relating to the engagement of Jiminez for the performance of the cleanup work after he finished his day's work as a slaughterer. The trial court's determination that these facts created the relationship of an independent contractor ... is not a finding of fact which is bolstered by the clearly erroneous rule when reviewed by this court. In the early case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772, the Supreme Court as well as the Court of Appeals for the Tenth Circuit, *Walling v. Rutherford Food Corp.*, 156 F.2d 513 [10th Cir.], treated such a finding as being subject to review as a matter of law, notwithstanding an elaborate disagreement on this point by Judge Phillips in the Court of Appeals. *See* 156 F.2d 513 at page 517. It is clear that the definition of employment, as used in the Fair Labor Standards Act, is "the broadest definition that has ever been included in one act."

Id. at 264.^{FN10}

FN10. The Eleventh Circuit has also held that the issue of employee status is a legal one which is not subject to the clearly erroneous standard of review, but that the individual findings of fact which lead to that legal determination must be examined under

the clearly erroneous standard. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n. 4 (11th Cir.1982).

Although the above-mentioned cases were tried to the Court rather than to a jury, there is no basis to differentiate between a jury and a nonjury case regarding the status of an employee determination as legal or factual. The substantive provisions of the Act at issue—violations of minimum wage, overtime, and record keeping provisions—are the same in both jury and nonjury cases. If the employee/independent contractor determination is a legal one in a case tried to the court, it must also be a legal one in a case tried to a jury. Indeed, *Robicheaux*, although tried to the court, was a section 216(b) suit in which the plaintiff-welders were entitled to a jury trial.^{FN11} *187 A plaintiff's decision to exercise his right to a jury trial does not change the standard of review to be applied by this Court.^{FN12}

FN11. The FLSA establishes three separate statutory causes of action: (1) under Section 16(b), 29 U.S.C. § 216(b), an employee may sue his employer for unpaid overtime compensation, unpaid minimum wages, and an additional equal amount in liquidated damages; (2) under Section 16(c) the Secretary may sue on behalf of an employee or employees to recover unpaid overtime, unpaid minimum wages, and an additional equal amount as liquidated damages; and (3) under Section 17 the Secretary may seek to enjoin violations of the FLSA and to restrain the withholding of payment of minimum wages and overtime compensation which are due employees under the Act.

Actions brought under Section 16(c) by the Secretary or under Section 16(b) by an employee have been consistently recognized as analogous to actions at law. A party in those actions has the right to a jury trial. *Lewis v. Times Publishing Co.*, 185 F.2d 457 (5th Cir.1950); 5 Moore's Federal Practice ¶ 38.27, p. 213-14. Section 11 of the Portal-to-Portal Act provides, however, that the issue of liquidated damages is triable to the court. *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir.1971).

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Marshall v. Hanioti Hotel Corp., 490 F.Supp. 1020, 1022 & 1023 (N.D.Ga.1980) (footnote omitted).

FN12. Although the substantial line of authority in this Circuit has held that the question of employee determination is a legal one, it must be noted that there is contrary authority within the Circuit. In the recent case of *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir.1983), this Court stated:

[1] An “employer” is defined under Section 3(d) of the Act as including “any person acting directly in the interest of an employer in relation to an employee.” This term has been interpreted to encompass one or more joint employers, *Falk v. Brennan*, 414 U.S. 190, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), cert. denied, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir.1968). 29 C.F.R. § 791.2 (1982). Whether a party is an employer or joint employer for purposes of the FSLA [sic] is essentially a question of fact; accordingly, appellate review is subject to the clearly erroneous standard.

The two cases cited by this Court in *Sabine* stated that “[w]hether a person or corporation is an employer or joint employer is essentially a question of fact” and therefore subject to review under the “clearly erroneous” standard. *Griffin and Brand*, 471 F.2d at 237-38 (citing *Lone Star Steel*); *Lone Star Steel*, 405 F.2d at 669-70 [citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964)]. Two points need to be made. First, the *Sabine*, *Griffin and Brand*, and *Lone Star Steel* opinions all use the less-than-precise terminology “essentially a question of fact.” At least in *Lone Star Steel*, this terminology was probably totally consistent with the line of cases in this Circuit holding that the ultimate de-

termination of employee status is a question of law. The trial court’s “findings of fact,” held to be not clearly erroneous, were attached to the Court’s opinion in *Lone Star Steel* as an appendix. All of these findings of fact were individual or underlying findings from which the Court could draw its legal conclusion as to employee status. In *Griffin and Brand*, where this Court reviewed the district court’s conclusion that defendant was a joint employer under the clearly erroneous standard, the Court may have been misled by the imprecise “essentially a question of fact” language in *Lone Star Steel*. The determination is “essentially a question of fact” only if there are unresolved, underlying factual questions. The application of the rule of law regarding employee status to the underlying facts remains a conclusion of law.

Secondly, the *Lone Star Steel* opinion relied upon the Supreme Court’s opinion in *Greyhound*, 84 S.Ct. at 899; the *Griffin and Brand* opinion also cited *Greyhound*. The Supreme Court in that case, however, did not state that the determination whether a person is an employer (and that plaintiffs therefore are employees) is essentially a question of fact. What the Supreme Court stated was that the question “whether *Greyhound* possessed sufficient *indicia of control* to be an ‘employer’ is essentially a factual issue.” *Id.* (emphasis added). Findings regarding indications of control would, of course, be findings of fact. Most importantly, however, the Supreme Court’s statement must be read in context. *Greyhound* involved the circumstances under which a district court can undertake a plenary review of orders of the National Labor Relations Board (Board) in certification proceedings. The Court in *Greyhound* was making a contrast between *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), upon which the district court in *Greyhound* had predicated its jurisdiction, and the factual situation in *Greyhound*. The district court in *Greyhound* had held that the Board’s findings in the certification

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proceeding were insufficient as a matter of law to establish a joint employer relationship and that those findings established, as a matter of law, that Floors, Inc. was the sole employer of the employees in question; the court held that the Board had violated the National Labor Relations Act (NLRA) by attempting to conduct a representation election where no employment relationship existed. The Court of Appeals had affirmed. The Supreme Court reversed, stating that the case did not fall within the narrow and extraordinary limits of the *Kyne* exception which allows district court review of orders entered in certification proceedings. In *Kyne*, the Board conceded that it had acted in excess of its delegated powers, and the Board's order was contrary to a specific prohibition in the NLRA. The Court in *Greyhound* stated:

And whether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute. The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

Greyhound, 84 S.Ct. at 899.

Furthermore, Greyhound had argued that the Board had acted in excess of its statutory powers when it found that Greyhound was an employer of employees who were hired, paid, transferred, and promoted by an independent contractor (Floors). In rejecting Greyhound's argument, the Supreme Court attempted to clarify that Greyhound's possible employer status was

unaffected by any determination as to the status of Floors as an independent contractor, *i.e.*, a finding that Floors was an independent contractor did not preclude the existence of factual questions concerning Greyhound's status as an employer. The Court's point was that underlying factual issues regarding Greyhound's status as an employer could still remain despite a determination that Floors was an independent contractor-independent contractor status does not necessarily mean that the contractor is the sole person responsible for his employees under the Act. Placed in context, the "essentially a factual issue" statement in *Greyhound* does not undermine this Circuit's decision to review the ultimate conclusion as to employer status under the FLSA as a question of law.

Given the record testimony in the instant case, there are no unresolved issues of fact which would alter this Court's conclusion *188 that plaintiffs were employees of defendant. The sole question is whether the facts satisfy the statutory standard for an "employee" under the FLSA. Since employee status was established as a matter of law, the district court erred in submitting it to the jury.

2. Employee Status

[2] In order to resolve the question whether plaintiffs were employees of defendant, this Court will examine the relationship between Tonche and defendant. If Tonche was an employee of defendant, the plaintiff field workers were also defendant's employees. Even in the event that Tonche were an independent contractor, this Court could conclude that Tonche was a joint employer with the defendant; in this instance, the field workers would still be employees of the defendant. *Hodgson v. Griffin & Brand*, 471 F.2d 235, 237 (5th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). In this hypothetical situation, the Court could, of course, conclude that Tonche was not a joint employer with the defendant. Since this Court concludes that Tonche was an employee of defendant, we do not examine the possibility of a joint employer status.

[3] Defendant maintains that he hired Tonche as an independent contractor to chop his cotton ^{FN13} and

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that plaintiff field workers were therefore employees of Tonche. In determining an individual's status as "employee" within the meaning of the FLSA, however, defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the "economic realities" of the relationship. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947); *Donovan v. Tehco*, 642 F.2d at 143; *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1315 (5th Cir.), cert. denied, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); *Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 126 (5th Cir.1955). Employee/independent contractor status under federal social welfare legislation is determined in light of the purposes of the legislation:^{FN14} *189 "[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947 (1947).^{FN15} As this Court noted in *Fahs v. Tree-Gold Co-Op Growers*, 166 F.2d 40, 44 (5th Cir.1948):

FN13. Defendant argues that he contracted with Tonche to chop his cotton-not to furnish him with cotton choppers. This verbal distinction represents nothing more than an attempt at label attachment; the distinction is significant only insofar as it mirrors the economic reality of the relationship. See *Donovan v. Tehco*, 642 F.2d at 143. Not surprisingly, defendant admitted at trial that he expected Tonche to get the cotton chopped and that Tonche could not do the chopping all by himself, that he had to get others to chop.

FN14. The Supreme Court in *Rutherford*, 331 U.S. at 727, 67 S.Ct. at 1475 explained the purpose of the FLSA:

The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maxi-

imum hour provisions and the requirement that records of employees' services be kept by the employer.

FN15. The critical decisions interpreting the term "employee" in federal social welfare legislation are as follows: *NLRB v. Hearst*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (for purposes of the National Labor Relations Act); *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), and *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947) (for purposes of employment taxes on employers under the Social Security Act, as amended); and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (for purposes of the Fair Labor Standards Act).

Under these decisions, the act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings. The statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service.

Although defendant acknowledges that the common-law control test is not conclusive, defendant argues that the common-law control factors are material in defining an individual's status for purposes of the FLSA. Defendant places great weight on various specific control elements-defendant did not decide how many or which workers to hire and fire,^{FN16} did not supervise the details of their work,^{FN17} did not furnish the hoes, did not provide transportation, did not decide when the workers arrived at the fields and when they quit, and, defendant argues, did not determine their rate of pay.^{FN18}

FN16. Defendant conceded at trial that he had the authority to fire a crew of workers.

FN17. Although defendant did not supervise the minor, regular tasks, the record demonstrates that he did exercise control over the

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significant aspects of the farming operations. Defendant showed Tonche where the fields were located; defendant determined which fields would be hoed and in what order; he gave instructions regarding which weeds to chop and which to leave in the ground; he determined when the workers had finished a job. Defendant went to the fields three to four times a week to check up on Tonche and the workers. He would make sure that they were in the right fields and he would often doublecheck Tonche's count of the number of workers in the fields on a particular day. Defendant admitted that it is the nature of the farming business that the farmer has to depend on his workers-the farmer cannot be in the fields supervising at all times.

FN18. Defendant argued at trial that Tonche set the workers' wages. Defendant testified that he asked Tonche how he wanted to "figure it" and Tonche replied he would figure \$1.65 an hour (in 1977). Defendant also testified that he had no agreement with Tonche as to how much Tonche would pay the workers and that defendant had no idea how much Tonche did in fact pay them. Defendant also testified, however, as follows: "We [the farmers in the community] paid them the same amount all over the place for hoeing. All community-wide, it was the same.... I know what they [the farmers who were customers of defendant's bank] do. I know what they pay. They ask me what I am paying, and we are all the same." In addition, defendant testified that he gave money to Tonche for each day according to the number of hands he had listed as working on that day and the number of hours they worked. That is, defendant multiplied the number of workers times the number of hours worked times \$1.65 an hour and on Fridays gave Tonche one check for the total number of hours worked. Moreover, defendant testified as follows:

Q. You also hired friends of the wives of your full-time hands to hoe cotton, didn't you?

A. Sometimes they would have a girl with them.

Q. And you paid them \$1.65 in 1977?

A. I paid them the same.

Q. And you paid them \$1.75 in 1978?

A. Right.

Q. In fact, you paid all your cotton hoers \$1.65 in '77 and \$1.75 in '78, isn't that true?

A. That's true.

Q. I believe, though, in your deposition you said that there was one person you felt sorry for a little bit and you had given her \$2.00 an hour?

A. Well, there may be.

Q. Do you recall that?

A. I won't doubt but what that is true. I think that's right. I think I have. I don't remember it offhand, who it was. But may have a special daughter-in-law or son-in-law or something that you give \$2.00 to. I don't know. I don't know. I paid \$2.00 maybe to somebody.

Assuming, *arguendo*, the existence of an issue of fact concerning who set the workers' wages, this Court would still come to the same legal conclusion even if the jury resolved the issue in favor of defendant.

***190** By focusing on selected and isolated control factors, however, defendant loses sight of the circumstances of the whole activity. *See Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477. This Court has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship, *e.g.*, the right to set hours, hire and fire, or determine wages. *Usery*, 527 F.2d at 1312 (finding that "[i]n the total context of the rela-

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tionship neither the right to hire employees nor the right to set hours” indicated such lack of control by [defendant] as would show that the laundry operators were independent contractors); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301 (5th Cir.1975) (stating that “the courts have had little difficulty in finding employment status though the employee could hire others within his own discretion”); *Fahs*, 166 F.2d at 43 (concluding that contractors at defendant's packing house were employees of defendant even though defendant had no right to control the number of employees, their wages or the hours they worked). As this Court stated in *Mednick*, 508 F.2d at 300, the “ultimate criteria” for the determination of employee status are found in the purposes of the Act. The presence of some indications of independent contractor status, however, must not obscure the focal inquiry—is the individual whose status is in question the “kind of *person*” meant to be protected by the FLSA? *Id.* at 301.

The presence of certain elements of control is not necessarily determinative. Whether Tonche was exposed “to the evils the statute [FLSA] was designed to eradicate,” *see id.* at 300, hinges upon whether he was dependent upon defendant's farming operation. Indeed, “[t]he touchstone of ‘economic reality’ in analyzing a possible employee/employer relationship for purposes of the FLSA is dependency.” *Weisel*, 602 F.2d at 1189. The determinative question is whether the person is “dependent upon finding employment in the business of others.” *Fahs*, 166 F.2d at 44. Two factors have emerged as critically significant in answering this question: (1) how specialized the nature of the work is, and (2) whether the individual is “in business for himself.”^{FN19} *191 *Mitchell v. John R. Cowley & Brothers, Inc.*, 292 F.2d 105, 108 (5th Cir.1961). The first factor looks to whether the individual “regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business.” If so, the Act ordinarily regards him as an employee. *Id.* The record unquestionably demonstrates the rote nature of Tonche's work. Cotton chopping involves one piece of equipment and one task: taking a hoe and chopping the weeds out of cotton. It is such a simple task that even children can do it—it requires no aptitude, no training, no skill, and no experience. Moreover, the evidence demonstrates that cotton chopping was merely a phase of the normal operation of defendant's cotton farming business. Cotton chopping constituted a part of an “integrated economic unit” devoted to the

growing of cotton. *See Rutherford*, 67 S.Ct. at 1475 & 1476; *Shultz*, 432 F.2d at 264; *Fahs*, 166 F.2d at 44. Chopping the cotton made it grow and produce better, and made it easier to harvest. Chopping the cotton was an integral phase of defendant's entire farming operations. Although the chopping season only runs from mid-June to mid-August, the work is recurring and of relative permanence—it has to be done every year during the growing season in order to harvest a good cotton crop. In addition to chopping cotton,^{FN20} Tonche supervised the workers in the field, provided transportation for some, kept what records there were of the number of workers and their hours, received a check from defendant every Friday, and meted out the earnings to the individual workers. All of these tasks were routine. The first inquiry, therefore, points strongly to employee status for Tonche and therefore for the field workers.

FN19. *Rutherford*, 67 S.Ct. at 1477 and its companion case, *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947) (dealing with the meaning of employee for purposes of social security taxes), set out criteria for distinguishing employees from independent contractors. The *Rutherford* criteria are as follows:

- (1) The workers did a specialty job on a production line.
- (2) The contractual terms did not vary in any material way as one worker succeeded another.
- (3) The premises and equipment were those of the proprietor.
- (4) The workers had no “business organization” that could offer their services to others.
- (5) The proprietor's manager kept close watch over the workers' activities.
- (6) The workers could profit from “efficiency,” but it was the efficiency of the pieceworker, not that of an “enterprise that actually depended for success upon the initiative, judgment or foresight of the

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typical independent contractor.”

Mednick, 508 F.2d at 300 (citing *Rutherford*). The *Silk* criteria are as follows: “(1) the permanency of the working relationship, (2) the opportunity for profit and loss, (3) investment in material, (4) the degree of control, and (5) the individual's skill.” *Donovan v. Tehco*, 642 F.2d at 143 (citing *Silk*). Obviously, some of these 11 criteria overlap and some might not be relevant depending upon the particular case. This Court has stated that it is not possible to assign each of these factors a specific weight and that it is not necessary that evidence exist with respect to each factor in order to determine whether an employment relationship exists. *Hickey v. Arkla Industries, Inc.*, 688 F.2d 1009, 1012 (5th Cir.1982). The cases tend to crystallize the criteria into the two basic inquiries listed above. Indeed, this Court in *Mednick*, 508 F.2d at 300, cautioned against placing too much emphasis on the *Rutherford* and *Silk* criteria, thereby losing sight of the ultimate criteria (the dependency question).

FN20. See, note 3, *supra*.

The second factor is the “focal inquiry in the characterization process”: “whether the individual is or is not, as a matter of economic fact, in business for himself.” *Donovan v. Tehco*, 642 F.2d at 143. The record here does not indicate that Tonche had anything that could be called an independent business as distinguished from personal labor.^{FN21} Tonche was an illiterate with only two years of schooling. He could not read or write in either Spanish or English; he only knew how to write his name and numbers and how to figure. He kept his “records” of the number of field workers and the number of hours they worked on parts of paper sacks which he brought to defendant's bank. Some of these “records” were later transcribed into Tonche's record book by Tonche's son or daughter. The workers *192 were often listed in Tonche's book by nicknames or by families. Tonche had “no experience or qualifications to distinguish him from the general run of workers.” See *Mednick*, 508 F.2d at 303. Although Tonche did exercise some control over the field workers, there was no “economic sub-

stance” behind his power. See *id.* at 302. The fact that Tonche supervised minor, routine tasks cannot be “bootstrapped into an appearance of real independence.” See *Usery*, 527 F.2d at 1312. Neither minor record keeping nor rote work, even if the work requires industriousness, is indicative of independence and nonemployee status. *Id.* at 1314. Any decisions involving judgment, initiative, or basic control were made by defendant, not Tonche. Tonche did not exert control over any meaningful part of defendant's business such that Tonche's “part” stood as a separate economic entity. See *id.* at 1312-13. Given the rate of pay and method of payment (by the hour) there was no real opportunity for Tonche to make any profit or loss. Except for the one simple and virtually indestructible instrument utilized—the hoe—all investment or risk capital was provided by defendant. Tonche's investment in hoes was “minimal in comparison with the total investment in land, heavy machinery and supplies necessary for growing” cotton. See *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir.1979). Tonche's relationship with defendant was of limited duration but of a permanent nature, recurring every year.^{FN22} Significantly, Tonche did not work or provide workers for any grower other than defendant. The record here does not supply any indicia whatsoever of a business operated by Tonche whereby he offered crews of workers to other growers. Indeed, Tonche did not recruit the workers as an independent businessman would. Instead, the workers, who were Hispanic, called Tonche from South Texas to inquire about work. Tonche did not operate with recognizable or consistent crews in that the hands varied in number from day-to-day. In short, Tonche had little to transfer but his own labor. See *id.* at 1314.

FN21. This Court in *Donovan v. Tehco*, 642 F.2d at 144, held that, given the exceptionally broad definition of employee in the FLSA, evidence introduced by the Secretary of Labor that the individuals in question were on the defendant-employer's payroll was sufficient to shift the burden of producing evidence to defendant. (The evidence consisted of wage transcriptions based on defendant's payroll records showing the number of hours each individual worked for defendant and his rate of pay.) This Court concluded that since defendant introduced little or no evidence to show that the individuals on its payroll were “in fact in busi-

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ness for themselves,” the district court should have found that the Government had established the employee status of these individuals by the necessary preponderance of the evidence. In the instant case, plaintiffs introduced the checks that were given by defendant to Tonche in 1977 and 1978 as well as defendant's notebook in which defendant had recorded on a daily basis the information imparted to him by Tonche—the number of hands and the number of hours they worked. This evidence was sufficient to shift the burden of producing evidence that Tonche was in fact in business for himself to defendant. Defendant totally failed to carry this burden with regard to the issue before the Court—whether Tonche, as an independent businessman, was engaged in the business of offering crews of workers to defendant *and other growers*. (emphasis added). Assuming, *arguendo*, the relevance of the fact that Tonche junked cars in the winter, defendant likewise wholly failed to carry his burden of producing evidence that Tonche was not dependent on defendant's farming operation for his livelihood.

FN22. The work done by the packing house contractors (determined to be employees) in *Fahs*, 166 F.2d at 45, was also seasonal.

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. Tonche, as an economic entity, was not capable of doing business elsewhere. *See Usery*, 527 F.2d at 1315. The economic reality of the situation was that the workers were dependent upon defendant—not Tonche—to pay them the minimum wage. They were dependent upon defendant's cotton growing business—not any “business” of Tonche's.^{FN23} As this Court stated in *Mednick*, 508 F.2d at 303:

FN23. Of course, these facts also support the conclusion that the field workers were employees of defendant. Since this Court has concluded that Tonche was an employee of defendant, we do not separately discuss the relationship of the employees to defendant.

An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.

This approximately fifty-four year old illiterate cotton chopper cannot be said to be an independent businessman in any meaningful sense.

One last point is in order. Defendant cannot rely on Tonche's registration as a “farm labor contractor” to establish independent contractor status for Tonche for purposes of the FLSA, thereby insulating himself from the FLSA requirements. As the Court in *Marshall v. Presidio Valley Farms, Inc.*, 512 F.Supp. 1195, 1197 (W.D.Tex.1981), stated: “This interpretation would permit wholesale evasion of the requirements of the F.L.S.A. Nothing in the Farm Labor Contractors Act suggests that this court must apply that Act to the exclusion of the F.L.S.A.” The answer to the *193 question of employee status lies in the “economic realities” of the situation. In the case at hand, those economic realities allow only one conclusion: Tonche was an employee of defendant.

B. Willfulness

[4] Section 255(a)^{FN24} of the Portal-to-Portal Act provides a three-year statute of limitations for willful violations of the FLSA.^{FN25} The standard for willfulness was established by this Circuit in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972). This Court in *Jiffy June* stated that the test is whether the employer knew the FLSA was in the picture. *Id.* This standard requires that employers have nothing more than “awareness of the possible applicability of the FLSA.” *Id.* If an employer merely suspects that his actions might violate the Act, the violation is willful. The Court explained the necessity for this standard as follows:

FN24. 29 U.S.C. § 255(a) provides as follows:

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action

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for unpaid minimum wages, ... under the Fair Labor Standards Act of 1938, as amended, ...

(a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

FN25. Plaintiffs in this case do not request recovery of unpaid wages for three years back. The significance of the willfulness issue relates to (1) whether plaintiffs' 1977 wage claims are barred (a two-year statute would bar any claims that accrued prior to February 14, 1978), and (2) whether plaintiff Reynaldo Arriolas' (added as a plaintiff in February 1981 by an amended complaint) 1978 wage claim is barred.

The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent.

Id.

[5] On appeal, defendant makes two arguments. First he contends that he had no reason to believe the FLSA was "in the picture" because he hired Tonche as an independent contractor and therefore assumed plaintiffs were employees of Tonche. This argument is without merit. It is little more than an attempt to exculpate himself by portraying Tonche in the guise of an independent contractor, by attaching a label to him. The *Jiffy June* standard mandates the rejection of defendant's argument: a violation committed in good faith can indeed be "willful." *Id.* at 1141.

Secondly, defendant argues that his violation was not willful because he had no knowledge that the FLSA was applicable. The *Jiffy June* standard does not require that defendant know that his actions are governed by the FLSA. It requires only that the employer

have an "awareness of the possible applicability" of the Act. Indeed, this Court has unequivocally rejected the argument of "lack of knowledge" of the applicability of the FLSA: "An ostrichlike cultivation of ignorance has never been considered a defense to liability for willful violation of the Act." *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir.1974).

This Court turns to the record in the instant case to determine whether defendant had reason to suspect the FLSA was "in the picture." Defendant testified that he had been in the banking business for fifty-five years. Defendant had held the position of President of the First State Bank in Abernathy for twenty-six years and owned stock in the bank. As president of the bank, defendant worked in that business five days a week; he was aware of the minimum wage law and what the minimum wage was in 1976, 1977, and 1978. Defendant admitted that he had always paid his bank employees minimum wage, but protested that he did not know the minimum wage applied to his farm workers. Defendant used a particular law firm for legal *194 advice, but testified that he had never even made inquiry of his attorneys whether his farm employees were covered by the minimum wage law.

Given this record testimony, defendant may not assume "an ostrichlike cultivation of ignorance" and urge it as a defense. Good faith ignorance will not shield a defendant from his obligation to make "further inquiries" and to "determine the exact parameters of his statutory obligation." *See id.* In *Jiffy June*, the defendant had even sought and secured legal advice that his employees were exempt from the FLSA. *Jiffy June*, 458 F.2d at 1141-42. Even so, his violation was held to be willful. Here, the fact that defendant knew of the existence of the minimum wage law and paid minimum wage to his bank employees compels a finding of willfulness under the *Jiffy June* standard.

C. Number of Hours Worked

[6] Defendant failed to keep records of the hours worked by the individual plaintiffs^{FN26} as required by 29 U.S.C. § 211(c).^{FN27} This section places on the employer the obligation of keeping accurate records of the hours worked by his employees; the employer cannot transfer his statutory duty to his employees. *Goldberg v. Cockrell*, 303 F.2d 811, 812 n. 1 (5th Cir.1962).

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FN26. The only records kept by defendant were his weekly paychecks to Tonche and a notebook which contained a tally of the hours worked each week (listing the number of hands and the number of hours worked) in 1978.

FN27. 29 U.S.C. § 211(c) provides as follows:

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

Defendant argues on appeal that his failure to keep records was mitigated by the fact that Tonche kept records which were introduced into evidence. Tonche's records were clearly incomplete and insufficient to satisfy the record keeping provisions of the Act. Moreover, this Court in *Goldberg, id.*, stated that "while there is nothing to prevent an employer from delegating to his employees the duty of keeping a record of their hours, the employer does so at his peril. He cannot escape the record keeping provisions of the Act by delegating that duty to his employees." (citing *Mitchell v. Reynolds*, 125 F.Supp. 337, 340 (W.D.Ark.1954)). Furthermore, an employer must decide at his peril which employees are covered by the Act. *George Lawley & Son Corp. v. South*, 140 F.2d 439 (1st Cir.), cert. denied, 322 U.S. 746, 64 S.Ct. 1156, 88 L.Ed. 1578 (1944).

In *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946), the Supreme Court specified the burden of proof in cases where the employer has failed to maintain the records required by the FLSA:

In such a situation, we hold that an employee has

carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

A number of Fifth Circuit cases have applied this standard. See, e.g., *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 419-20 (5th Cir.1975); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir.1973); *Shultz*, 432 F.2d at 261.

In formulating this standard, the Court was concerned that employees not be penalized by an employer's failure to comply *195 with its statutory duty to maintain accurate records:

When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act.

Anderson, 66 S.Ct. at 1192.

[7] In the instant case, plaintiffs met their burden of proof by demonstrating that they performed work and were not compensated in accordance with the statute. Thirteen plaintiffs testified regarding the hours they and members of their families worked. Plaintiffs' witness Walter Johnston, a Ph.D. candidate in statistics, calculated a minimum and maximum number of hours each plaintiff worked, basing his calculations

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on plaintiffs' testimony. Defendant calculated his payments to Tonche based on the rate of \$1.65 per man hour in 1977 and \$1.75 per man hour in 1978. The court took judicial notice of the minimum wage in these two years: \$2.20 an hour in 1977 and \$2.65 an hour in 1978. At that point, the burden of proof shifted to defendant to prove the precise amount of work plaintiffs performed or to negative^{FN28} the reasonableness of the inferences to be drawn from plaintiffs' evidence.^{FN29}

FN28. Webster's defines "negative" as follows: "to demonstrate the falsity of: disprove" or "contradict." Webster's Third New International Dictionary (1976).

FN29. In the instant case, defendant's efforts to impeach plaintiffs' testimony were minimal. Defendant attempted to show that the names of certain plaintiffs did not appear in Tonche's records and that Tonche's record books accounted for fewer hours than were paid for by defendant in his checks to Tonche. Plaintiffs' own testimony, however, had already established that Tonche's records were incomplete. Otherwise, testimony by defendant's fulltime hands (who planted, ploughed, and harvested) merely made general allegations that the field workers were lazy and misrepresented the number of hours they worked. This testimony did not identify any particular worker or workers.

The court, however, failed to properly place the burden of proof. The court's only instruction to the jury in this regard was that "it is the duty of an employer to keep and maintain accurate records of the number of hours that an employee works for said employer and it is not the duty of the employee to keep such records."

Plaintiffs did not object to the court's instruction. The burden of proof, however, is "always of major importance," *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir.1969) and this Court is persuaded that proper placement of the burden of proof in this case could have made a substantial difference in the determination of the number of hours worked by each plaintiff. This Court therefore concludes that the district court's charge constituted plain

error and reviews the instruction on appeal despite plaintiffs' failure to object at the trial level. Because the court failed to properly place the burden of proof, this Court reverses and remands for a new trial on the number of hours worked by plaintiffs.

C. Conclusion

This Court has concluded that Tonche was an employee of defendant and that therefore plaintiffs were defendant's employees, that defendant's failure to pay minimum wage was willful, and that the district court's erroneous instruction which failed to specify the burden of proof necessitates a new trial on the number of hours worked by the individual plaintiffs.

II. The FLCRA Claim

The issues this Court must address concerning the FLCRA claim involve the questions*196 whether Tonche was a farm labor contractor and whether defendant's violation of the Act was intentional.

A. The Fee Issue

[8] The FLCRA requires that a farmer who uses a contractor (1) verify that the contractor is registered before hiring him^{FN30} and (2) maintain wage and hour records of the individual members of the contractor's crew.^{FN31} Defendant made certain that Tonche was registered as a farm labor contractor but made no effort to maintain the statutorily-required payroll records on plaintiffs. The jury's response to Special Issue 8 that defendant did not fail to obtain and maintain payroll records finds no support in the evidence.

FN30. 7 U.S.C. § 2043(c) provides as follows:

(c) No person shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.

FN31. 7 U.S.C. § 2050c provides as follows:

704 F.2d 181, 26 Wage & Hour Cas. (BNA) 184, 97 Lab.Cas. P 34,382
 (Cite as: 704 F.2d 181)

§ 2050c. Recordkeeping

Any person who is furnished any migrant worker by a farm labor contractor shall maintain all payroll records required to be kept by such person under Federal law, and with respect to migrant workers paid by a farm labor contractor such person shall also obtain from the contractor and maintain records containing the information required to be provided to him by the contractor under section 2045(e) of this title.

Section 2045(e) provides that “[e]very farm labor contractor shall-

(e) in the event he pays migrant workers engaged in interstate agricultural employment, either on his own behalf or on behalf of another person, keep payroll records which shall show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and the rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece rate basis, the number of units of work performed and the rate per unit shall be recorded on such records. In addition he shall provide to each migrant worker engaged in interstate agricultural employment with whom he deals in a capacity as a farm labor contractor a statement of all sums paid to him (including sums received on behalf of such migrant worker) on account of the labor of such migrant worker. He shall also provide each such worker with an itemized statement showing all sums withheld by him from the amount he received on account of the labor of such worker, and the purpose for which withheld. The Secretary may prescribe an appropriate form for recording such information.

The question on appeal is whether defendant used a farm labor contractor within the statutory definition of the term. The FLCRA defines a farm labor con-

tractor as follows: “any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment.” 7 U.S.C. § 2042(b). During the period when defendant dealt with Tonche, Tonche was registered with the DOL as a farm labor contractor pursuant to 7 U.S.C. § 2043(a). Defendant conceded that each year Tonche worked for him, he asked Tonche to show him Tonche's registration card ^{FN32} before Tonche first started working and before paying him. ^{FN33}

FN32. The fact that Tonche carried a farm labor contractor identification card does not confer independent contractor status upon him for purposes of the FLSA.

FN33. Defendant testified as follows:

Q. When he showed you-he showed you his card, didn't he?

A. I asked him if he had a card to pay him with, and he said yes, and he showed me this card.

Q. Okay. And that happened in both 1977 and 1978?

A. Yes, happened every year that he worked for me.

Q. And you wrote down the '78 registration number inside the cover of the book, isn't that correct?

A. Inside this?

Q. Yes.... Okay. And you did that when Mr. Tonche first started working for you in '78?

A. Well, that's when he started working, I asked him if he had his card, and he said, “Yes,” and that's what we put down, was '78, because it was '78.

Q. Okay. You wrote the registration num-

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ber down?

A. Yes, I put this down here.

The only question in ascertaining Tonche's status is whether Tonche worked *197 “for a fee” as required by section 2042(b).^{FN34} The term “fee” as used in the Act “includes any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor.” 7 U.S.C. § 2042(c). It is undisputed that Tonche received consideration for his services. The record evidence demonstrates that Tonche received \$1.65 an hour for his services in 1977 and \$1.75 an hour in 1978—the same amount that defendant paid almost all of his hands. FLCRA regulations make clear that salary or wages suffice as a “fee” when paid to a person for services as a farm labor contractor. 29 C.F.R. § 41.5 (1982). This Court has no difficulty in viewing the consideration received by Tonche as a “fee” for the management and supervision of the workers. The record reveals no evidence of an agreement that Tonche's hourly wage was solely for chopping cotton;^{FN35} moreover, even if Tonche's hourly wage were viewed as compensation for chopping, it would still constitute a “fee” within the meaning of the Act. Tonche's “chopping job” existed by virtue of his furnishing a crew for defendant, *i.e.*, Tonche furnished defendant with a crew because of defendant's offer of a steady chopping job for Tonche and his family. Tonche's wages constituted a “fee” for his services; Tonche was a farm labor contractor within the meaning of the statute.

FN34. When the district court denied plaintiffs' motion for a judgment n.o.v., the court stated that “[r]easonable minds could have differed as to whether Tonche's compensation constituted a fee for recruiting and furnishing migrant workers or a payment for services he performed as an hourly paid laborer. The district court, however, erred in submitting the question of Tonche's status as a farm labor contractor to the jury. There was no unresolved issue of fact—it was undisputed that Tonche received consideration for his services. Whether this consideration constituted “a fee” within the statutory definition is a question of law. *See Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1220-21 (7th Cir.1981) (treating the fee issue as a

question of law); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521, 523-24 (9th Cir.1979) (treating the fee issue as a question of law); *Soliz v. Plunkett*, 615 F.2d 272, 275 (5th Cir.1980) (holding that the issue of whether the putative farm labor contractor “furnished” migrant workers to the farmers was a question of law).

FN35. Indeed, defendant's argument that Tonche was paid an hourly wage for his labor chopping cotton, not for furnishing defendant with migrant workers to hoe the cotton, is reminiscent of his argument on the “employee” issue under the FLSA claim. *See supra*, note 13. Surely Congress could not have intended application of the FLCRA to depend on how the farmer characterizes his agreement with the farm labor contractor. Such an interpretation would be inconsistent with the remedial nature of the Act. *See Soliz*, 615 F.2d at 275 (5th Cir.1980) (stating that the “Act should be broadly construed because it is remedial in nature”). Allowing compliance with the Act to rest on the farmer's characterization of his agreement with the farm labor contractor (he hired the farm labor contractor to perform a task, not to furnish the workers necessary for the performance of the task) would permit wholesale evasion of the Act.

B. Intentional Violation

[9] 7 U.S.C. § 2050a(b) provides for either actual damages or liquidated damages^{FN36} of up to \$500^{FN37} for each intentional violation of the Act.^{FN38} The term “intentional” within this section means “conscious or deliberate” and does not require a specific *198 intent to violate the Act. *Joan of Arc*, 658 F.2d at 1224.^{FN39} The standard for an intentional violation has also been referred to as “the common civil standard which holds a person liable for the natural consequences of his or her acts.” *DeLeon v. Ramirez*, 465 F.Supp. 698, 705 (S.D.N.Y.1979) (stating that the courts have adopted this interpretation because of the remedial purposes of the Act).

FN36. Plaintiffs in the instant case have requested liquidated damages.

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FN37. There is some dispute among district courts as to whether a court must award each plaintiff \$500 per violation or may in its discretion award up to \$500 per violation. *See Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 539 (7th Cir.), *overruled, Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1221 (7th Cir.), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981). The sounder position espoused by the Seventh Circuit in *Joan of Arc*, 658 F.2d at 1224 is that § 2050a(b) permits a district court to award liquidated damages of up to \$500 for each violation of the Act.

FN38. 7 U.S.C. § 2050a(b) provides in pertinent part as follows:

If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or \$500 for each violation, or other equitable relief.

FN39. The Seventh Circuit in *Joan of Arc* upheld the district court's finding that defendant's "harmless technical" violation of the Act fell within the meaning of the term "intentional." The defendant in that case was a farm labor contractor who did not have a specific intent to violate the FLCRA. His violation consisted of inadvertently not applying for registration with the DOL until April 1978 although the DOL and the Texas Employment Commission had earlier approved defendant's recruitment of migrant workers which began in late 1977.

Applying this standard of intentionality to the instant case, this Court concludes that defendant's admission at trial establishes that his violation of section 2050c (failure to maintain payroll records on plaintiffs) was intentional within the meaning of section 2050a(b). In response to questions by plaintiffs' attorney, defendant admitted that in both 1977 and 1978 when Tonche started working for him, he asked Tonche if Tonche had a card "to pay him with" and that Tonche showed defendant his farm labor contractor identification card.^{FN40} Defendant's testimony establishes

that he was aware of the existence of a law requiring farm labor contractors to carry identification cards in order to be paid. Under the intentionality standard of section 2050a(b) defendant is held liable for the natural consequences of his acts. Defendant's own testimony reveals that his failure to keep payroll records on the individual plaintiffs was intentional within the meaning of the Act.^{FN41}

FN40. *See* defendant's quoted testimony, *supra*, note 33.

FN41. Concluding that defendant's violation was intentional is especially appropriate in view of the fact that Tonche's farm labor contractor activities were performed exclusively for defendant. Allowing the farm operator to "go untouched" in such circumstances "could lead to the full scale evisceration of the Act." *See DeLeon*, 465 F.Supp. at 705 (involving a failure to require that the farm labor contractor be validly registered).

Such a conclusion is also appropriate given that the recordkeeping obligation imposed (by the 1974 amendments to the Act) on farmers who use contractors was part of an attempt by the legislature to provide a more effective enforcement mechanism for violations of the Act. *See* S.Rep. No. 1295, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News 6441, 6443 & 6445-46.

Furthermore, the standard this Court has adopted for an intentional violation is particularly appropriate in light of the interrelationship between the FLCRA and the FLSA—the former can be used to enforce rights conferred by the latter:

In addition to helping the farmworker remedy FLCRA violations, the FLCRA requirements aid the farm worker under other federal statutes. For example, FLCRA interrelates with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), to provide important protections and remedies for farmworkers. Although FLSA requires all agricultural employers to maintain payroll records show-

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ing the hours worked and the wages paid, *id* § 211(c); Records To Be Kept By Employers, 29 C.F.R. § 16.33 (1980), it contains no private enforcement mechanism if the employer fails to maintain such records. Since workers rarely keep similar records on their own, farmworker minimum wage actions under FLSA § 206 usually dissolve into swearing matches in which farmworkers are at a great disadvantage. FLCRA, however, requires contractors and users of contractors to maintain the payroll records prescribed by FLCRA itself and payroll records required by *any other federal statute* 7 U.S.C. § 2050c (1976). Thus the FLCRA \$500 penalty per violation can be used to address the failure to maintain FLSA records. *See, e.g., Cantu v. Owatonna Canning Co.*, 90 Lab.Cas. ¶ 33,968 (D.Minn.1980). An employer forced to maintain proper payroll records is not likely to maintain records showing him to be guilty of minimum wage violations. Thus, he is deterred from committing FLSA violations. In this manner FLCRA functions to enforce rights created by, but unenforceable under, FLSA.

Note, A Defense of the Farm Labor Contractor Registration Act, 59 Tex.L.Rev. 531, 537 n. 61 (1981).

C. Conclusion

This Court has concluded that the record establishes as a matter of law that defendant*199 used a farm labor contractor, that defendant violated the FLCRA by not maintaining payroll records on plaintiffs, and that defendant's violations were intentional within the meaning of the Act. On remand, the district court must determine the number of violations defendant has committed,^{FN42} and may, in its discretion, award each plaintiff liquidated damages of up to \$500 per violation.^{FN43}

FN42. Section 2050c requires defendant to maintain both FLCRA payroll records and FLSA records. On remand, the district court must decide whether defendant's failure to maintain these records constitutes one or

more violations.

FN43. In deciding on the amount of liquidated damages to award per violation, the district court should keep in mind that, although plaintiffs did not prove out-of-pocket losses on their FLCRA claim, they were clearly prejudiced by defendant's failure to maintain records in their ability to establish their FLSA wage claims.

This Court reverses and remands for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

HIGGINBOTHAM, Circuit Judge, specially concurring:

I concur, but add this note, not for qualification but for caveat. Our efforts to justify appellate review by attempting to separate intertwined subsidiary facts and ultimate legal conclusions inevitably cast surrealistic shadows. The exercise can, and occasionally does, do little more than serve as a covering cape for the exercise of the trial court function by an appellate court. That transfer can frustrate assignments of institutional responsibility and deny efficacy to the Seventh Amendment.

I do not here need the comfort of the exercise. Genuinely undisputed facts at trial permit no conclusion but that Manuel Tonche was Ercell Givens' employee, or that Givens' conduct was wilful under *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972).

C.A.Tex.,1983.

Castillo v. Givens

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LEXSEE

Director Of the Bureau Of Labor Standards v. Kenneth Cormier, et al.

No. KEN-86-365

Supreme Judicial Court of Maine

527 A.2d 1297; 1987 Me. LEXIS 765; 28 Wage & Hour Cas. (BNA) 480

March 4, 1987, Argued

June 24, 1987, Decided

PRIOR HISTORY: **[**1]** Appeal from Superior Court, Kennebec County.

DISPOSITION: Judgment with respect to Lucre, Inc. vacated and remanded for further proceedings consistent with the opinion herein. In all other respects, judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employers appealed from the decision of the Superior Court, Kennebec County (Maine), which required them to pay overtime wages, damages and fines to certain employees and to the state for 1982 and 1983 in an action filed by plaintiff Director of the Bureau of Labor Standards (labor bureau).

OVERVIEW: Several employees worked an aggregate of more than 40 hours in one week for two or more of the employers at an amusement park. The employers were a collection of entities with shared ownership and management. The employees were compensated separately by each entity at regular wage rates. The labor bureau filed suit against the employers. The lower court found that, except for the outside employer, the employers were in fact a single employer for purposes of enforcing Maine's wage and hour law, Me. Rev. Stat. Ann. tit. 26 tit. 26 § 664 and that the employees were entitled to overtime wages if their hours totalled in excess of 40 in one week even if those hours were divided between two or more entities. The employers appealed. The court held that, with respect to the outside employer, the lower court erred in emphasizing the form of ownership over operational economic reality in evaluating the status of the outside employer. The court found that, other than form of ownership and accounting arrangements, the operational status of the outside employer was virtually indistinguishable from the other employers.

OUTCOME: The court vacated and remanded the decision of the lower court with respect to the outside employer, but in all other respects affirmed the decision of the lower court, which required the employers to pay overtime wages, damages and fines to certain employees and to the state for the years 1982 and 1983.

CORE TERMS: entity, overtime, compulsion, enforcing, overtime wages, work overtime, partnership, balancing, ownership, economic realities, minimum wage, remedial purposes, interpreting, tending, overt, accounting, hours worked, regular rate, amusement park, plain meaning, rollercoaster, operational, separately, amusements, investors, regular, times, sham, facts adduced, labor organization

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN1]26 Me. Rev. Stat. Ann. tit. 26 § 664 reads in part: By reason of the declaration of policy set forth in 26 Me. Rev. Stat. Ann. tit. § 661 and in the protection of the industry or business and in the enhancement of public interest, health, safety and welfare, it is declared unlawful for any employer to require any employee to work more than 40 hours in one week, unless one and one half times the regular hourly rate is paid for all work done over 40 hours in any one week.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers
[HN2]Section 203(d) of the federal Fair Labor Standards Act (FLSA), 29 U.S.C.S. §§ 201-203(d), defines the term "employer" and 29 U.S.C.S. § 207 sets forth in detail the federal maximum hour and overtime wage law. The eco-

conomic reality and the totality of the factual circumstances in a particular case must guide a court's determination of the employers' status rather than formalistic labels or common law notions of employment relationships.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

[HN3]29 U.S.C.S. § 203(d) defines "employer" as including any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview

[HN4]Amusements are under certain conditions exempt from complying with 29 U.S.C.S. §§ 206 (minimum wages) and 207 (maximum hours) of the Fair Labor Standards Act. 29 U.S.C.S. § 213(a)(3).

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

[HN5]Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Statutory Application > General Overview

[HN6]29 U.S.C.S. § 664 states that it is unlawful for any employer to require any employee to work in excess of 40 hours in one week unless the employee is paid 1-1/2 times the regular rate for hours worked over 40. To the extent that the time-and-a-half provision is designed to penalize employers for failing to hire extra employees to work the extra hours, the term require cannot reasonably be read as containing a proof of overt compulsion requirement. Viewed in the context of the wage and hour statute as a whole, and keeping in mind its remedial purposes, the plain meaning of the term "require" in 29 U.S.C.S. § 664 cannot reasonably include a compulsion component.

Governments > Legislation > Interpretation

[HN7]In interpreting a statute courts must presume that the legislature did not intend unreasonable or absurd consequences, nor results inimical to the public interest. Moreover, the terms of a statute must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

[HN8]A determination of joint employer status is based on an evaluation of facts adduced at trial, and the appellate court will not disturb the superior court's factual findings unless they are clearly erroneous. The ultimate question of whether certain employers are "joint" is a legal issue and is reviewed for legal error.

Communications Law > Ownership > General Overview

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

[HN9]Dispersed ownership and separate accounting services are factors that may properly be considered in evaluating joint employer status.

COUNSEL: James E. Tierney, Esq., Attorney General, Leanne Robbin, Esq., Assistant Attorney General, for plaintiff.

Peter H. Jacobs, Esq., Peter Culley, Esq., Gregory D. Woodworth, Esq., Pierce, Atwood, Scribner, Allen, Smith & Lancaster, for defendant.

JUDGES: McKusick, C.J., Nichols, Roberts, Wathen, Glassman and Scolnik, JJ.

OPINION BY: ROBERTS

OPINION

[*1297] Kenneth Cormier and various corporate and partnership entities comprising what is popularly known as "Funtown USA" appeal from a judgment entered by the Superior Court, Kennebec County, requiring those entities to pay overtime wages, damages and fines to certain employees and to the State for the years 1982 and 1983. Numerous employees had worked an aggregate of more than forty hours in one week for two or more of the entities at Funtown but were compensated by each entity separately, at regular wage rates. The Supe-

rior Court determined that the defendant entities were in fact a single employer for purposes of enforcing [**2] Maine's wage and hour law, 26 M.R.S.A. § 664 (Supp. 1986).¹ The Superior Court reasoned that because the defendants were in fact one "employer," the employees were entitled [*1298] to overtime wages if their hours totalled in excess of forty in one week even if those hours were divided between two entities and the employees never worked over forty hours in one week for any one entity. The defendants contend on appeal 1) that the court erred in applying a "joint employer" test to determine a violation of section 664 and 2) that under section 664 an employer must pay an employee overtime wages only if the employer "requires," in the sense of compulsion, the employee to work those overtime hours. On his appeal, the Director of the Bureau of Labor Standards challenges the portion of the court's order declining to find one of the named defendants, Lucre, Inc., a "joint employer" in conjunction with the other defendants for purposes of enforcing section 664. For the reasons hereinafter set forth we vacate the judgment with respect to Lucre, Inc. and affirm the judgment as to the remaining defendants.

1 [HN1] Section 664 reads in pertinent part:

By reason of the declaration of policy set forth in section 661 and in the protection of the industry or business and in the enhancement of public interest, health, safety and welfare, it is declared unlawful for any employer . . . to require any employee to work more than 40 hours in one week, unless 1 1/2 times the regular hourly rate is paid for all work done over 40 hours in any one week

[**3] I.

The underlying facts in this case are not in dispute. "Funtown USA" is an amusement park located in Saco. There is no corporate entity known as Funtown USA. Rather, Funtown USA is a collection of corporate and partnership entities that run various aspects of the amusement park. This case concerns those entities owned, controlled or in some way directed by members of the Cormier family. In 1982 and 1983 employees working for the Cormier-related corporations and partnerships worked in excess of forty hours for two or more of those entities. They did not, however, receive overtime compensation unless they worked in excess of forty hours for just *one* entity. Thus, an employee who in one

week would work 27 3/4 hours for Red Baron and 23 3/4 hours for Dalcors received wages for 51 1/2 hours of work at a regular rate of pay instead of 40 hours of regular pay and 11 1/2 hours of overtime (1 1/2 times the regular rate). The director, after discovering these apparent violations following an audit, filed suit against the various Cormier-related entities. The director sought to enjoin the entities from continuing this practice as well as seeking fines, damages and the payment of overtime [**4] due numerous employees for the years 1982 and 1983. The corporate and partnership relationships among and between the Cormier-related enterprises are set forth in a diagram in an appendix to this opinion.

At trial, the director introduced documents and elicited testimony that established the factual basis of its claim with respect to overtime hours worked at two or more of the defendant-entities and the intertwined relationships among those entities. The defense case centered on establishing that the various entities were all duly constituted for legitimate business and family reasons and that they were not sham or shell corporations. The defense also elicited testimony from the Cormiers tending to establish that no employee was ever compelled or forced to work overtime.

The director brought out at trial that Kenneth Cormier and corporations he was involved with had been subject to prior investigations by the Bureau of Labor Standards and had paid back-overtime to employees in a factually similar situation in 1980. In that case the two corporations, Dalcors and Ken-Ted,² were effectively controlled by Kenneth and Violet Cormier. It was Kenneth Cormier's understanding at that time [**5] that assessments were levied on the two corporations because of that joint ownership. Thus, it is still Kenneth Cormier's position that employees who work for both Baseball, Inc. and Dalcors, Inc. in a single week are to be paid overtime if their combined employment time for both entities exceeds forty hours. Consistent with this view, the appellants concede that the violations involving Baseball and Dalcors are not at issue on appeal. The defendants contend, however, that actual legal control over an entity is necessary to establish joint employer status. Hence, because Astrosphere, Inc. is effectively owned by William Cormier, and Red Baron Amusement, Inc. is effectively owned by Kevin Cormier, employees who, for example, work 20 hours for Red Baron and 30 hours for [*1299] Dalcors in a single week are not paid overtime wages.

2 Ken-Ted is now dissolved.

Following a bench trial the court ordered the defendants to pay the employees \$972.35 in back overtime and \$972.35 in liquidated damages. The court also [**6] ordered civil penalties to be paid to the State in accord

with 26 M.R.S.A. § 671 (1974) in the amount of \$4725 (63 violations of section 664 assessed at \$75 per violation).

II.

The defendants first contend that the court failed to apply the correct legal standard in determining the status of the Cormier-related enterprises. They argue that the court erred when it undertook a balancing process to decide whether the defendants were joint employers for purposes related to enforcing section 664. The defendants do not contest the factual findings utilized by the court in its balancing. Rather, the defendants contend that Maine law does not contemplate or permit any such balancing, that the "joint employer" concept is foreign to Maine law, and is not set forth or described in any state statute. The defendants argue that once it is established that the entities are legally distinct and not shams, the inquiry should end.

The court considered the following factors as tending to establish joint employer status: 1) Kenneth Cormier and the corporation he and his wife control, Dalcors, exercise overall direction and control of the Funtown USA operation which includes all the other business entities [**7] at issue; 2) hiring and payment of employees is coordinated in one central office which, when necessary, also advertises jobs, provides initial screening of job applicants, and conducts orientation for applicants after they are hired; 3) all entities operate within the same defined piece of real estate, for the same general purpose -- amusements -- under the single overall name Funtown USA; and 4) most entities have some interlocking financial relationships that result, or have resulted, in some providing other guarantees to aid financing and that resulted, in the 1982-1983 period at issue, in the entities controlled by the sons receiving indirect subsidies for the land use and other overhead costs from Dalcors.

The court also considered several factors tending to support the view that the Funtown USA defendants were not joint employers for purposes of enforcing section 664; 1) hiring generally is done by those individuals who control the entity for which the work is to be performed; and, in addition, employees punch time cards for and are separately paid by each entity for which they work; 2) the separate entities are, in fact, separately owned and controlled and are not sham operations [**8] all controlled, in reality, by Kenneth Cormier and Dalcors; and 3) the separate entities of the Cormier family operate within the park along with other entities owned and controlled completely outside the Cormier family. After balancing these factors, the court concluded that the Cormier-related enterprises acted as one employer for the purposes of enforcing section 664.

The term "employer" is not defined in the relevant state statutory provisions. See 26 M.R.S.A. §§ 661-672 (1974 and Pamph. 1986). Recognizing this, the court analyzed the economic realities of the interlocking Funtown USA entities, and determined that although they were legitimate, separate, legal entities, they were so interrelated as to be, in effect, one employer under section 664.

The court, in fashioning its joint employer analysis, referred to [HN2]the federal Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201-19 (1978 & Supp. 1987), in particular section 203(d) which defines the term "employer" ³ and section 207 which sets forth in detail the federal maximum hour and overtime wage law. ⁴ Cases interpreting [*1300] these sections of the FLSA uniformly recognize that the economic reality and the totality [**9] of the factual circumstances in a particular case must guide a court's determination of the employers' status rather than formalistic labels or common law notions of employment relationships. See, e.g., *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983) (interpreting term "employer" in context of minimum wage and overtime hours enforcement action); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir.), cert. denied, 463 U.S. 1207, 103 S. Ct. 3537, 77 L. Ed. 2d 1387 (1983) (interpreting term "employer" in context of minimum wage enforcement action). While in no way bound by these cases, federal law does provide some useful guidance in formulating a coherent state law concept of "employer" for purposes of enforcing section 664. The trial court therefore committed no error in examining the economic realities of the Cormier-related corporate and partnership entities and determining based on that examination that those entities acted as one employer for purposes of enforcing section 664. We find particularly compelling the fact that Dalcors exercises, in effect, overall operational and administrative direction over the other Funtown USA defendants through its centralized [**10] management functions. The court's balancing of the several factors that resulted in its ultimate conclusion was a logical, coherent and legally sufficient mode of analysis.

3 [HN3]Section 203(d) defines "employer" as follows:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

4 [HN4]Amusements, like that operated at Funtown, are under certain conditions exempt from complying with sections 206 (minimum wages) and 207 (maximum hours) of the FLSA. See 29 U.S.C.A. § 213(a)(3) (Supp. 1987).

Moreover, to interpret section 664 in this manner is consistent with the overall remedial nature of the minimum wage and overtime laws. Section 661 states that:

It is the declared public policy of the State of Maine that workers employed in any [**11] occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered.

[HN5]Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted. See, e.g., Brooks v. Smith, 356 A.2d 723, 729 (Me. 1976). The Superior Court's application of the term "employer" in section 664 to the several Cormier-related Funtown USA entities engaged in the business of operating that amusement park effectuates the remedial purposes of that statute.

III.

[HN6]Section 664 states that it is unlawful for any employer "to require any employee to work" in excess of 40 hours in one week unless the employee is paid 1 1/2 times the regular rate for hours worked over 40. With respect to the statute's reference to the term "require" and the degree or type of proof that the director must present, the trial court ruled that

No compulsion need be proven. Considering the subtle pressures that may exist when an employee is asked to work overtime, imposition of such a proof of compulsion requirement would seriously undermine the purpose of the overtime law.

The [**12] defendants contend that the employees who worked overtime in the 1982-1983 period did so voluntarily and without compulsion. They argue that the Superior Court erred when it ruled that the director did not have to prove that the various defendants overtly compelled their employees to work overtime. In the defen-

dants' view, the term require must be given its plain meaning, i.e., to compel.

The director, in support of the judgment, argues that any proof of compulsion inferred from the term "require" in section 664 is implicitly and automatically satisfied by virtue of the inherently coercive employment setting and that overt physical or mental compulsion need not be proven. The director contends that if a proof of overt compulsion requirement is read into section 664, the wage and hour laws would be effectively rendered unenforceable.

The legislative history underlying the present statute is scanty with respect to this issue other than to indicate that a general remedial purpose of the time-and-a-half provision is to create more jobs by encouraging employers to hire additional employees to work the extra hours, rather [*1301] than to use the same pool of employees to work [**13] overtime. To the extent the time-and-a-half provision is designed to penalize employers for failing to hire extra employees to work the extra hours, the term require cannot reasonably be read as containing a proof of overt compulsion requirement. Rather, assuming such a purpose, the payment of overtime wages for hours worked over 40 should be automatic.

The defendants argue, however, that the legislative history and intent is silent on the specific question of how to interpret the term "require" in section 664. Absent any legislative intent to the contrary, and unless such a construction would lead to an absurd result, the defendants contend that the statute must be construed in accordance with its plain meaning. Viewed in the context of the wage and hour statute as a whole, however, and keeping in mind its remedial purposes, the plain meaning of the term require in section 664 cannot reasonably include a compulsion component.

[HN7]"In interpreting a statute courts must presume that the Legislature did not intend unreasonable or absurd consequences, nor results inimical to the public interest." Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980). Moreover, the terms of a statute "must [**14] be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation." Finks v. Maine State Highway Comm'n, 328 A.2d 791, 798 (Me. 1974).

Funtown USA employees did not set or control their own hours, but rather, were "assigned" or "asked" to work overtime when it was needed. In the context of this employee-employer relationship, to assign an employee to work in excess of 40 hours in one week is tantamount to requiring that employee to work those extra hours. Indeed, the various Cormier-related entities shared this

view in certain contexts since they regularly paid overtime to employees who worked over forty hours for one entity, regardless of whether the employee had previously requested that extra work. We therefore agree with the trial court that to require proof of overt compulsion would seriously undermine the underlying remedial purposes of the overtime law expressed in section 664.

IV.

The director challenges⁵ that portion of the trial court's order declining to find Lucre, Inc. (a rollercoaster ride) [**15] a joint employer along with the other Cormier-related Funtown USA entities. The trial court found that Lucre, Inc. was not "sufficiently related" to the other employers. Specifically, the court determined that Lucre, Inc. is a corporation composed of a number of independent investors and that these investors finance and operate the rollercoaster. The court concluded that Lucre, Inc. "has less attributes of close relationship than other parts of the family enterprises." [HN8] A determination of joint employer status is based on an evaluation of facts adduced at trial, and we will not disturb the Superior Court's factual findings unless they are clearly erroneous. See Harmon v. Emerson, 425 A.2d 978, 981-82 (Me. 1981). The ultimate question of whether certain employers are in fact "joint" is, however, a legal issue and is reviewed for legal error. See, e.g., Patel v. Wargo, 803 F.2d 632, 634 n. 1 (11th Cir. 1986); Karr v. Strong Detective Agency, Inc., 787 F.2d 1205, 1206-1207 (7th Cir. 1986).

5 The director styled his appeal of the Superior Court's decision with respect to Lucre, Inc. as a "Cross-appeal." Because Lucre, Inc. is not a party to this appeal, the director's designation is incorrect. Because no party has objected to this procedural irregularity and because the appeal is otherwise timely we treat the "cross-appeal" as a M.R. Civ. P. 73(a) appeal by an "other party."

[**16] Lucre, Inc. was established by an investment club interested in maintaining and operating a rollercoaster ride at Funtown USA. There were 25 inves-

tors, each with a four percent share. Eighty-eight percent of all shares were owned independently of any Cormier family involvement. Lucre, Inc. arranged for its own separate accounting services, apart from the other Cormier-related entities.

[*1302] Other facts adduced at trial revealed that Dalcour manages Lucre's daily operations and that Lucre's payroll and personnel functions are handled through Dalcour's central office to the same extent as those functions are handled by Dalcour for the other defendants.

The Superior Court hinged its decision with respect to Lucre, Inc. on the fact that ownership was widely dispersed. The only other evidence in the record tending to establish Lucre, Inc.'s "separateness" is the fact that it retains independent accounting services. While [HN9] dispersed ownership and separate accounting services are factors that may properly be considered in evaluating joint employer status, they are not sufficient as a matter of law to distinguish Lucre, Inc. from the other defendant entities.

As the record demonstrates, [**17] Lucre, Inc. is operationally integrated with the other Cormier-controlled entities. Of particular importance in our view is the fact that Lucre, Inc. benefits substantially from the central administrative functions performed by Dalcour for all of the defendant entities. The Superior Court erred in emphasizing form of ownership over operational economic reality in evaluating the status of Lucre, Inc. Other than form of ownership and accounting arrangements, the operational status of Lucre, Inc. is virtually indistinguishable from the other Cormier-related entities.

Judgment with respect to Lucre, Inc. vacated and remanded for further proceedings consistent with the opinion herein.

In all other respects, judgment affirmed. [*1303]
APPENDIX

[SEE ILLUSTRATION IN ORIGINAL]

All concurring.

LEXSEE

ELIZABETH DOLE, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, Plaintiffs/Appellants, v. KAREN SNELL and GERALD SNELL, individuals doing business as CAKES BY KAREN, Defendants/Appellees

No. 87-1500

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

875 F.2d 802; 1989 U.S. App. LEXIS 7152; 111 Lab. Cas. (CCH) P35,216; 29 Wage & Hour Cas. (BNA) 465

May 23, 1989, Filed

SUBSEQUENT HISTORY: As Amended July 10, 1989.

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Colorado, D.C. No. 86-F-443, D.C. Judge, Sherman G. Finesilver.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant United States Department of Labor challenged an order of the United States District Court for the District of Colorado, which held that the cake decorators of appellees, employers, were independent contractors for purposes of coverage under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

OVERVIEW: Appellant United States Department of Labor brought the action seeking to enjoin appellees, employers, from violating the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq. Appellees had one bakery and eight retail stores and employed 32 individuals as cake decorators. The court reversed the decision of the district court, finding that the cake decorators were independent contractors, and remanded for further proceedings. The court found that the demands of the business controlled the decorators; they did not act autonomously. The decorators had no input into the amount that they received for each cake, except on rare occasion. They had no control over the essential determinants of profits in a business and no direct share in the success of the business. Their earnings did not depend upon their judgment or initiative, but on the needs of appellees. They had no investment in appellees' business. They worked indefinitely for appellees, rather than moving from place

to place, and their work was an integral part of the business of appellees.

OUTCOME: The order of the district court, holding that the cake decorators of appellees, employers, were independent contractors for purposes of the Fair Labor Standards Act of 1938, was reversed and remanded for further proceedings. Appellant United States Department of Labor was correct in finding that the cake decorators were employees because they were controlled by and economically dependent upon the business of appellees.

CORE TERMS: cake, decorator, decorate, decorating, skill, independent contractors, bakery, sheet, morning, started, decorated, employee status, dairy, overtime, work schedules, integral part, finished, counter, machine, retail, pretty, time clock, work force, o'clock, night, punch, retail outlets, working relationship, per year, finished products

LexisNexis(R) Headnotes

*Governments > Legislation > Interpretation
Labor & Employment Law > Employment Relationships > Independent Contractors
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors*
[HN1] Courts have adopted an expansive interpretation of the definitions relating to employment status under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., in order to effectuate its broad remedial purposes. Courts are not limited by contractual terminology used by the parties or by the traditional common law concepts of employee or independent contractor. Rather, economic realities of the relationship govern, and the focal

point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN2]See 29 U.S.C.S. § 203.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN3]In determining whether an individual is an employee or an independent contractor under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., courts generally consider (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work. An additional commonly considered factor is the extent to which the work is an integral part of the employer's business. It is well established that no one of these factors in isolation is dispositive. Rather, the test is based upon a totality of the circumstances.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > De Novo Review

Labor & Employment Law > Employment Relationships > Independent Contractors
[HN4]The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts, whether workers are employees or independent contractors, is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is de novo.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN5]A relatively flexible work schedule alone does not make an individual an independent contractor rather than an employee for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN6]Employees within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN7]The court applies the rule that it is not what the workers could have done that counts, but as a matter of economic reality what they actually do that is dispositive of their status as employees or independent contractors under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN8]Courts generally hold that the fact that a worker supplies his or her own tools or equipment does not preclude a finding of employee status under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN9]The lack of the requirement of specialized skills is indicative of employee status under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

Labor & Employment Law > Employment Relationships > Independent Contractors
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN10]Independent contractors often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas employees usually work for only one employer and such relationship is continuous and of indefinite duration for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

COUNSEL: Ellen R. Edmond (Tedrick A. Housh, Jr., Regional Solicitor, Henry C. Mahlman, Associate Regional Solicitor, George R. Salem, Solicitor of Labor, Monica Gallagher, Associate Solicitor, Linda Jan S. Pack, Counsel for Appellate Litigation, and Anne Payne Fugett, Attorney, on the briefs), U.S. Department of Labor, Washington, District of Columbia, for Plaintiffs/Appellants.

Timothy LaQuey (Raymond J. Miller with him on the brief), Attorneys at Law, Denver, Colorado, for Defendants/Appellees.

Cynthia G. Schneider, Migrant Legal Action Program, Inc., Washington, District of Columbia, and David F. Steinhoff, Colorado Rural Legal Services, Denver, Colorado, Amicus Curiae.

JUDGES: Holloway, Chief Judge, Anderson, Circuit Judge, and Earl E. O'Connor, * District Judge.

* Hon. Earl E. O'Connor, Chief Judge, United States District Court, Kansas, sitting by designation.

OPINION BY: ANDERSON

OPINION

[*803] ANDERSON, Circuit Judge

The sole issue in this case is whether cake decorators at a bakery known as "Cakes by Karen" are employees or independent contractors for purposes of coverage under the Fair Labor Standards Act [**2] of 1938, as amended ("FLSA"), 29 U.S.C. § 201, *et. seq.* The district court held that they were independent contractors. We conclude that they are employees.

I.

Karen and Gerald Snell own and operate a bakery and decorated cake sales business called "Cakes by Karen." It is composed of one bakery and eight retail stores, one of which is connected to the bakery. The cake decorators in question, consisting of thirty-two individuals over the period of time at issue, decorated cakes at the bakery/retail store, which is located in Northglenn, Colorado. From that location they supplied all eight retail outlets.

After an investigation, the Department of Labor ("DOL") determined that the decorators were employees of the Snells, and sued to enjoin the Snells from violating the overtime and record keeping provisions of the FLSA (sections 15(a)(2) and 15(a)(5)), and to enjoin the continued withholding of overtime pay alleged to be due. R. Vol. I at Tab 1 (Complaint).

At trial, the DOL's case consisted of the testimony of Lisa Novak, one of the cake decorators, and Donald Klein, a compliance officer of the Wage and Hour Division of the DOL. The Snells did not call any witnesses, and rested their [**3] case after the presentation of the DOL's case. The parties stipulated that the testimony of Novak was representative of the method of payment and

the type of work and circumstances of the other decorators. R. Vol. II at 47.

Novak began working at the bakery in August of 1982. When she started she had no prior experience or skills in cake decorating. She testified that new decorators without experience learned how to decorate cakes while on the job. She noted that "some" of the decorators took a decorating class. *Id.* at 7.

Novak testified that the Snells' cake decorators are paid on a piecework basis, by the cake. In 1983 the Snells established a pay sheet to determine the amount paid per cake. At the time it was established, the decorators were paid approximately 20% of the price of the cake. Novak testified that [*804] at the present time their rate of pay is less than 20% of the price of the cakes because of rising prices. *Id.* at 14, 45.

The decorators have no say in determining the prices on the pay sheet or the prices of the finished products. R. Vol. II at 14. However, when they decorate cakes which are especially large or unusual they negotiate the rate at which they are paid. [**4] Novak testified that there were not "too many" of these unusual requests. *Id.* at 15. In most cases, the counter workers, who are employees of the Snells and who take in the orders, decide if the cake requires an extra decorating charge according to a few basic shop rules. If for some reason, the counter worker fails to place an additional charge on the cake, Karen Snell intervenes and pays the cake decorators an additional \$ 2.00 per cake. *Id.* at 40.

Novak testified that the cake decorators are generally free to choose the cakes they wish to decorate. *Id.* at 12. However, the Snells determine who is to decorate the wedding cakes. *Id.* at 19.

The decorators are required to purchase some of their own equipment, including pastry bags, couplers, an air brush, books, spatulas, aprons, and towels. *Id.* at 18, 37. Such equipment costs approximately \$ 400.00 per year. R. Vol. II at 18. The Snells supply everything else and pay all the operating expenses of the business. *Id.* at 19.

Novak worked an average of 50-60 hours a week at the bakery. *Id.* at 9. The number of working hours is determined in large part by the volume of orders for cakes that come in. The hours are [**5] much longer during holiday periods. *Id.* at 10-11. Although the decorators have some flexibility in determining their working hours, if they come in during the mornings they have to be in by 9:00 a.m. Generally, the Snells require that unless permission is obtained from Karen Snell to leave early, the decorators must stay until 6:00 p.m. or until all the cakes have been decorated.

The decorators are free to work for other employers. Novak testified that she works for a dairy approximately four times a year. *Id.* at 20, 45. The decorators are also free to decorate cakes at home for sale to third parties. Novak testified further that, although some decorators do decorate cakes at home, she chooses not to. *Id.* at 35-36.

II.

[HN1] Courts have adopted an expansive interpretation of the definitions relating to employment status under the FLSA, ¹ in order to effectuate its broad remedial purposes. See Patel v. Quality Inn South, 846 F.2d 700, 702 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011, 109 S. Ct. 1120, 103 L. Ed. 2d 182 (1989); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058 (2nd Cir. 1988), modified, 1988 U.S. App. LEXIS 4338 (1988); Donovan v. Williams Oil, Co., 717 F.2d 503, 504-05 (10th Cir. [**6] 1983); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979); Shultz v. Mistletoe Express Service, Inc., 434 F.2d 1267, 1270 (10th Cir. 1970). Courts are not limited by any contractual terminology used by the parties or by the traditional common law concepts of "employee" or "independent contractor." McLaughlin v. Seafood, Inc., 861 F.2d 450, 452 (5th Cir. 1988), modified, 867 F.2d 875 (1989); Donovan v. Williams Oil Co., 717 F.2d at 505. Rather, as we noted in Doty v. Elias, 733 F.2d 720, 722-23 (10th Cir. 1984), the Supreme Court has directed that the economic realities of the relationship govern, and the focal point is "whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself." See Bartels v. Birmingham, [*805] 332 U.S. 126, 130, 67 S. Ct. 1547, 1549, 91 L. Ed. 1947 (1947).

1 [HN2] Section 3 of the FLSA provides the following pertinent definitions:

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . .

(e)(1) . . . the term "employee" means any individual employed by an employer.

....

(g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203.

[**7] In Doty we listed five factors derived from United States v. Silk, 331 U.S. 704, 716, 67 S. Ct. 1463,

1469, 91 L. Ed. 1757 (1947), which [HN3] courts generally consider in applying this test:

"(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work."

Id. at 723. See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947); Brock v. Superior Care, Inc., 840 F.2d at 1058-59; Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987), *cert. denied*, 488 U.S. 898, 109 S. Ct. 243, 102 L. Ed. 2d 232 (1988); Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir.), *cert. denied*, 484 U.S. 924, 108 S. Ct. 286, 98 L. Ed. 2d 246 (1987); Doty v. Elias, 733 F.2d at 723; Real v. Driscoll Strawberry Associates, Inc., 603 F.2d at 754; Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1382 (3rd Cir.), *cert. denied*, 474 U.S. 919, 88 L. Ed. 2d 255, 106 S. Ct. 246 (1985); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981). An additional commonly considered factor is the extent to which the [**8] work is an integral part of the alleged employer's business. See, e.g., Brock v. Superior Care, Inc., 840 F.2d at 1059; Sec'y of Labor v. Lauritzen, 835 F.2d at 1535; Real v. Driscoll Strawberry Associates, Inc., 603 F.2d at 754; Donovan v. DialAmerica Marketing, Inc., 757 F.2d at 1382; Donovan v. Sureway Cleaners, 656 F.2d at 1370. ² It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances. Rutherford Food Corp. v. McComb, 331 U.S. at 730.

2 Although we did not list this factor in Doty, we implicitly considered it a determinative factor in Shultz v. Mistletoe Express Service, Inc., 434 F.2d at 1271 ("The terminal operators are an integral part of the Mistletoe transportation business."). In any event, since factors such as the ones listed are simply analytical tools, their weight, number and composition are variable. All relevant evidence may be considered.

The parties disagree with respect to the standard of review which governs our analysis of this case. This circuit has not as yet explicitly articulated a standard of review governing FLSA cases. [**9] However, we believe the proper standard, followed by most courts, is that

expressed by the Second Circuit in *Brock v. Superior Care, Inc.*, 840 F.2d at 1059, as follows:

[HN4]"The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts -- whether workers are employees or independent contractors -- is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is *de novo*."

See McLaughlin v. Seafood, Inc., 861 F.2d at 452; *Sec'y of Labor v. Lauritzen*, 835 F.2d at 1535; *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d at 1044-45; *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181, 185-86 (5th Cir.), *cert. denied*, 464 U.S. 850, 78 L. Ed. 2d 147, 104 S. Ct. 160 (1983); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n. 4 (11th Cir. 1982).

III.

The district court carefully addressed and made findings with respect to all but two of the factors listed above. Nevertheless, in each instance we are left with a definite and firm conviction that a mistake has [**10] been made, and that the findings are clearly erroneous. Specifically, we conclude that the circumstances of this case show that the cake decorators more closely resemble employees of this business than independent contractors engaged in their own business.

A. Control.

The district court found that --

[*806] "Defendants lack significant control over the decorators' work. In particular, defendants do not establish rigid working schedules; thus, decorators are free, within limits, to determine their work hours. Neither do defendants oversee or supervise the actual decorating of cakes. Decorators select, design, and prepare cakes solely upon their skill and desire. Defendants merely inspect the finished product and see that it meets the established quality standards. Decorators are

free to and do offer their services to outside and third parties while working for defendants. In fact, Ms. Novak occasionally works for a dairy."

R. Vol. I, Tab 2 at 8.

At trial, counsel for the Snells emphasized continually that these decorators enjoyed some flexibility in work schedules and choice of hours, and that they could choose their cakes and manner of decoration. R. Vol. II at 26, 29, 31, 32, 37, 39, [**11] 41, 42. Of course, flexibility in work schedules is common to many businesses and is not significant in and of itself. *See Doty v. Elias*, 733 F.2d at 723 [HN5] ("A relatively flexible work schedule alone . . . does not make an individual an independent contractor rather than an employee."). More to the point, however, the record does not support any inference that these decorators acted autonomously, or with any degree of independence which would set them apart from what one would consider normal employee status. Certainly the business operations were not subject to the whims or choices of the decorators. Quite the opposite was true. The demands of the business controlled the decorators.

The record establishes the following facts beyond reasonable dispute. The decorator work force consisted of never less than ten and up to fourteen individuals. R. Vol. II at 43. They work at separate tables in a single room at one location. *Id.* at 23. Novak testified that she worked ten to twelve hours a day, and fifty to sixty hours per week, five days a week. *Id.* at 8-9, 28. By preference, in the recent past she worked nights, alone, from 8:00 p.m. to approximately 6:00 a.m. *Id.* at 8. [**12] She was free to leave early only if there was "not a ton of work to do." *Id.* at 29. Apparently the rest of the decorators worked days. They were *required* by Karen Snell to be at work by a time certain in the morning, at or before 9:00 a.m. *Id.* at 31. They punched a time clock before they began decorating in the morning, when they left for breaks, and when they finished decorating at the end of the day. *Id.* at 8. Undecorated cakes were placed on racks from which, at random, the decorators selected cakes which they wanted to decorate during the day. *Id.* at 12. But toward the end of the day when there were a limited number of cakes remaining, the decorators were required to work on those remaining cakes. *Id.*

The volume of cake orders determined the length of the work day, including long overtime hours whenever necessary. *Id.* at 8-12, 31-32. It was an absolute requirement that sufficient decorators stay to complete the cakes. *Id.* And, while the decorators might trade among

themselves, or arrange with Karen Snell for early or normal time departure, it was out of the question for the entire work force, or any necessary part of it, to choose to leave before the [**13] cakes were done. *Id.* The workers were totally controlled in this regard. *Id.* Thus, on one holiday occasion the entire staff was required to work thirty-two hours straight because of an unexpected volume of orders. *Id.* at 10-11. On another occasion an individual was fired for refusing to work overtime on a Friday night. *Id.* at 12.

Vacations and any special work schedules or hours, or time off, were required to be approved by Karen Snell. *Id.* at 11, 41-42. The decorators worked without direct supervision, but Karen Snell was almost always there, and cakes deemed unsatisfactory by the Snells were rejected. *Id.* at 9, 12-13.

As the foregoing indicates, this, in fact, was a highly regulated work force absolutely controlled by the Snells with regard to the production and quality demands of the business. It is utterly inconceivable, for instance, that the Snells would have [*807] tolerated a decorator work force composed of individuals who came and went as they alone pleased, leaving this volume-driven business with uncertainty in its production capacity. The following portions of Novak's testimony illustrate these points:

"THE COURT: You said 6:00 or 7:00 in the morning [**14] until everything was finished. What time would that be, please, ordinarily?

"THE WITNESS: Well, they don't stop taking orders. They have a series of other stores, and as long as they keep calling in the orders, the cakes have to be decorated, so say the other stores close at 6:00 o'clock, *you wouldn't be able to leave until everything was done.*

"If they call in an order at 6:00 o'clock, *you have to stay* and do those orders.

"THE COURT: What would your ordinary day be?

"THE WITNESS: Until about 6:00 in the evening.

BY MS. BISSEGGGER:

"Q Okay. When you arrived in the morning, when did you punch the time clock?

"A When they put in the time clock we were instructed to come in, (sic) get all our equipment ready and punch the time

clock when we started decorating. Then you would decorate, punch out for breaks, and then punch out and clean up your equipment and go home.

....

"Q How many days a week did you work?

"A Five.

"Q And your average number of hours were per day?

"A Well, I would say an average number would be ten to twelve hours.

"Q Okay. Was Karen Snell present during the hours that you worked?

"A Most of the time.

....

"Q Who informed decorators [**15] of their hours?

"A Well, if a decorator had a reason to leave then that was all right, but basically *the rules are, you know, the caks (sic) have to be finished before you can go home.*

....

"Q Who requested decorators to stay until all cakes were decorated?

"A Karen Snell.

"Q And when you needed to take some time off *from whom did you seek permission?*

"A *From Karen Snell.*

"Q Okay. If there were cakes to be done, and decorators wanted to leave before the cakes were done, how did Karen Snell react to that?

"A Well, as long as somebody was going to stay and finish them, the situation now they deliver right after -- right in the evening. They used to wait until morning to deliver the cakes. So that *people had to stay and decorate the cakes until they were finished.*

"Now they deliver the cakes in the evening, and so you have to have a certain amount done before you can go, and *the*

basic rule is somebody has to stay and finish the work.

....

"A Well, *you have to be in by a certain time in the morning* if you work during the day. You have to be in by a certain time to get that day's cakes started so people don't come in to pick up their [**16] cakes and nobody has done them, *so you have to be there* by -- some people prefer to come early, some people prefer to come in by 9:00 o'clock, but *somebody has to be there.*

"Q Well, is it fair that volume dictates?

"A Pretty much.

"Q Of necessity?

"A The amounts of hours you have to stay, sure.

"Q Okay. Now, you testified regarding St. Patrick's Day and an all night.

"A Um-hm.

"Q Is this common?

"A Well, when I worked during the day, *it was common you would have to stay until pretty small hours in the morning*, but that's the only time I had stayed all night and into the next day."

....

[*808] "Q So really one can't make any broad generalizations?

"A As to the hours that one works, no, it can fluctuate a great deal.

"Q Is that pretty much up to the decorators?

"A Well, *the decorators, of course, want to work, you know, at least a normal number of hours a week*, and so they are there and they are available to work, and the only time that *you have to work*, you know, *overtime or extra hours* or whatever you want to call it is *when you have got a lot of orders.*

"Q Okay. But sometimes it can work just the opposite?

"A It can work [**17] the opposite, and there can be nothing to do and you can stand around.

"Q *Are you free to leave?*

"A Well, *no, somebody has to be up there until 6:00 o'clock* in case an order comes in for a cake to be decorated, but say on Monday it won't be as busy because people order cakes for Saturday, so Fridays people put in a lot of hours so on Monday everybody can clean up and leave by 7:00 and you can go home."

R. Vol. II at 8, 9, 10, 11-12, 31-32, 38-39 (emphasis added).

Under circumstances involving considerably more latitude and less supervision than that demonstrated in the case before us, the Supreme Court determined that homeworkers can be [HN6]employees within the FLSA, stating: "[The workers] are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates." Goldberg v. Whitaker House Cooperative, 366 U.S. 28, 32, 6 L. Ed. 2d 100, 81 S. Ct. 933 (1961). See Donovan v. DialAmerica Marketing, Inc., 757 F.2d at 1384. See also McLaughlin v. Seafood, Inc., 861 F.2d at 452; Real v. Driscoll Strawberry Associates, Inc., 603 F.2d at 756; Silent Woman, Ltd. v. Donovan, 585 F. Supp. 447, 450-51 (E.D. Wis. 1984).

The record [**18] does support the district court's finding that the decorators were free to offer their services to third parties while working for the Snells, and did so. However, they did so to a virtually insignificant degree insofar as there is anything shown in the record, with no indication of any income from such activity, and, in any event, nothing to indicate that incidental decorating for others involved an effort greater than might be done by any employee on his or her own time after hours, on weekends, or days off. R. Vol. II at 35-36. Thus, Novak testified that although she is free to work for other employers she has only worked for one other employer, Wheatridge Dairy, and only does so four times per year. R. Vol. II at 19-20, 45. She also testified that although she is free to decorate cakes at home for sale to third parties, she chooses not to. R. Vol. II at 35-36.³ Under these circumstances [HN7]we apply the rule that: "It is not what the [workers] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive." Brock v. Mr. W. Fireworks, Inc., 814 F.2d at 1047.

3 The record does not indicate whether Novak used her cake decorating skills at the Wheatridge Dairy. If she did not, then this additional employment would be more like a second job than an example of an independent contractor performing her work for different employers. This other work may have minimally supplemented Novak's income but "minor additional income made from work which is not connected with the actual business under examination is not relevant to a court's determination of employee status." Brock v. Mr. W. Fireworks, Inc., 814 F.2d at 1049 (citing Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1313 (5th Cir.), cert. denied, 429 U.S. 826, 97 S. Ct. 82, 50 L. Ed. 2d 89 (1976)).

[**19] In short, the individuals in question were basically hiring out their labor. In doing so, they were regimented with respect to the time and place, and, in essential respects, as to the quality and the manner in which they performed that labor. It is virtually impossible to look upon these individuals as having the independence which characterizes a person conducting their own business.

B. Opportunity for Profit or Loss.

The district court found that: "Essentially, decorators determine their wages and [*809] thus control their profit potential. Decorators decide their hours, choose which cakes to decorate and are compensated at approximately 20% of the cake's cost, and negotiate prices on large or unique cakes." R. Vol. I, Tab 2 at 8.

As previously indicated, these individuals are paid on a piecework basis, by the cake. Thus, it is true that the more cakes a decorator can do, the more the decorator will make. But toiling for money on a piecework basis is more like wages than an opportunity for "profit." See Brock v. Mr. W. Fireworks, Inc., 814 F.2d at 1050-51; Usery v. Pilgrim Equipment, 527 F.2d at 1313. See also Rutherford Food Corp. v. McComb, 331 U.S. at 730. Clearly, these [**20] individuals did not share in the profits of this business. Although, as the district court noted, the decorators were paid approximately 20% of the price of each cake, that was only in 1982 and for a short time thereafter. As time went on, the prices of the cakes changed, but the amount received by the decorators did not, and the decorators had no input whatsoever into the amount which they were to receive for each cake except on the rare occasion where an unusual cake was involved. R. Vol. II at 14-15. Novak's testimony in this regard is significant:

"Q How are you paid at Cakes by Karen?

"A I am paid by the cake.

"Q Were you always paid during your term of employment -- did the pay structure ever change?

"A When I first started, we were paid twenty percent of each cake, and then the cakes over the last five years, the retail price of cakes has risen, but our wage has stayed the same as when I first started.

"Q Ms. Novak, could you please refer to Exhibit Number 1, please. Could you identify that for me?

"A This is the sheet that determines the amount we get paid for each cake.

"Q And were you always paid on the basis of that sheet?

"A No. This is within the last two [**21] years we were given this.

"Q To whom did the pay sheet apply?

"A The decorators.

"Q To all decorators?

"A To all the decorators.

"Q What, if any, say did you have in setting the price on this decorator's pay sheet?

"A This was news to me. I had no say in this at all.

"Q What, if any, say did you have in setting the retail price of the cakes?

"A None.

"Q Did you have the opportunity to bargain or discuss any of the prices with the Snells?

"A Well, at present, if I do a cake that's an especially large cake or an especially strange cake, we do a lot of real strange cakes, and if you do something like that, there is really no set price for that, and I can say well, I think my time is worth such and such an amount, and you can pretty much set what you are going to get paid, *but that's rare; usually get paid by what's on this sheet.*

"THE COURT: What do you mean by strange cakes, unique cakes?"

"THE WITNESS: Well, really large cakes or a cake shaped like a building or something dumb.

"THE COURT: Like a courthouse or a football field, something irregular like that?"

"THE WITNESS: Yes, something very much out of the ordinary.

"THE COURT: Many orders were like that?"

"THE [**22] WITNESS: No, *there aren't too many, but that at that time is the only time I really set the rate that I make on a cake, because it's something you haven't done before. If you put five full sheets together to decorate it and look like a boat, there is no set price for something like that.*"

R. Vol. II at 13-15 (emphasis added).

With respect to the things upon which the volume of cakes depended, such as the number of retail outlets, and the quality and attractiveness of their decor, the selection and efficiency of the counter help, [*810] advertising for the business, the quality of the ingredients in the cakes, and so forth, the decorators had absolutely no input. Nor did they have any say with respect to the quality of their fellow workers or their finished products. In short, the decorators had no control over the essential determinants of profits in a business, and no direct share in the success of the business. Their earnings did not depend upon their judgment or initiative, but on the Snell's need for their work. See *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666-67 (5th Cir. 1983).

Furthermore, there was no way that the decorators could experience a business loss. [**23] A reduction in money earned by the decorators is not a "loss" sufficient to satisfy the criteria for independent contractor status. *Sec'y of Labor v. Lauritzen*, 835 F.2d at 1536. Certainly, the decorators did not undertake the risks usually associated with an independent business.

C. Investment in the Business.

The district court found that the "decorators initially invest \$ 400 in equipment and approximately the same sum every year thereafter. Defendants simply provide

icing, tables, turntables, mats, and a copy cake machine. Except for the icing, decorators are, therefore, capable of decorating defendants' cakes without these items." R. Vol. I, Tab 2 at 8-9.

[HN8] Courts have generally held that the fact that a worker supplies his or her own tools or equipment does not preclude a finding of employee status. See *Rutherford Food Corp. v. McComb*, 331 U.S. at 725 (meat boners own their own hooks, knives, and leather belts (aprons) and were still found to be employees); *McLaughlin v. Seafood, Inc.*, 861 F.2d at 451 (seafood processors supply their own hairnets, aprons, gloves and seafood knives); *Sec'y of Labor v. Lauritzen*, 835 F.2d at 1537 (pickle pickers provide their own [**24] gloves); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d at 666 ("Although each of the welders had invested his own money in purchasing a welding machine, the district court concluded that a relatively minor portion of the compensation was paid to the employees based upon their furnishing the equipment and that the major part of the compensation was paid for the services of these . . . employees."); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d at 752 (migrant farmworkers furnish their own hoes, shovels, pruning clippers and hand carts); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981) (worker supplies hand tools); *Schultz v. Mistletoe Express Service, Inc.*, 434 F.2d at 1270-71 (terminal operators furnish local trucks); *Silent Woman, Ltd. v. Donovan*, 585 F. Supp. at 451 (Seamstresses who work at home and supply their own sewing machines are considered employees. "The only 'expenditure' for which the . . . seamstresses obtain a return is their own labor.").

The fact is that these decorators had no investment at all in the Snell's business, as such. As Novak testified:

"Q Did you invest or how did you invest in the business of the Snells?"

"A [**25] No, I haven't invested in the business."

R. Vol. II at 17. The Snells maintained the eight retail outlets and the bakery, including the making of lease payments for the physical facilities. They supply the cakes, the icing, novelty items to be put on the cakes, doilies, boxes and boards, and provide a copy cake machine (to shine pictures on the cakes), food coloring, a set of pictures, turntables, and mats to stand on. R. Vol. II at 18-19, 46. They pay all the advertising and other operating expenses of the business including phone service, utilities, water, counter help, and all other necessary help. As courts have noted, the "investment," which must be considered as a factor is the amount of large capital expenditures, such as risk capital and capital invest-

ments, not negligible items, or labor itself. The relative investment of the decorators in their own tools compared with the investment of the Snells simply does not qualify as an investment in this business. See Brock v. Mr. W. Fireworks, Inc., 814 F.2d at 1052; Sec'y of Labor v. Lauritzen, 835 F.2d at 1537. And, comparing the decorator's \$ 400.00 annual investment to their annual income suggests no [*811] different conclusion. [**26] Novak earned approximately \$ 25,000 per year, which was above average, R. Vol. II at 27, but one would hardly refer to such income as the return on an annual investment of \$ 400 in tools or equipment.

D. Skill.

With regard to the factor concerning the skill of the decorators the district court held that "although not every decorator is highly skilled when starting, through native ability, time, and experience, decorators acquire and develop the necessary skills to design and decorate cakes according to the customer's wishes." R. Vol. I, Tab 2 at 8. Although this finding is certainly not clearly erroneous it is nonetheless irrelevant in determining whether the cake decorators are employees or independent contractors. As the court noted in Sec'y of Labor v. Lauritzen, 835 F.2d at 1537: "This development of occupational skills is no different from what any good employee in any line of work must do."

[HN9]The lack of the requirement of specialized skills is indicative of employee status. Doty v. Elias, 733 F.2d at 723. Novak's testimony makes it clear that the Snells do not require the decorators to have any specialized skills or prior experience when they start to work for the [**27] Snells. R. Vol. II at 6. They merely develop their skills on the job. Id. at 30.

The district court found that the "majority of the decorators have at the very least taken a course in cake decorating." R. Vol. I, Tab 2 at 2. Because Novak, whose testimony was stipulated by the parties to be representative of the group of decorators, testified that she had no experience in cake decorating when she started and that only "some" of the decorators had taken a class, this finding is clearly erroneous.

E. Permanence of the Working Relationship.

Although the district court listed the permanence of the working relationship as a factor in determining employee status, it made no findings regarding this factor. [HN10]"Independent contractors" often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas "employees" usually work for only one employer and such relation-

ship is continuous and of indefinite duration. Donovan v. Sureway Cleaners, 656 F.2d at 1372.

A careful examination of the record indicates that with regard to this factor the cake decorators are much more like employees than independent contractors. Novak testified that she [**28] had been working for the Snells for approximately four and a half years. R. Vol. II at 5. At the time she started working for the Snells she expected to work there "indefinitely." R. Vol. II at 20. She works an average of 50-60 hours a week at the bakery. R. Vol. II at 9. Cf. Brock v. Superior Care, Inc., 840 F.2d at 1060 (transient nurses who work for several employers found to be employees); Sec'y of Labor v. Lauritzen, 835 F.2d at 1537 (seasonal migrant farmworkers found to be employees).

4 As discussed above, Novak also sometimes works at the Wheatridge Dairy. This is relevant here because it relates to the issue of economic independence. However, because Novak works 50-60 hours a week for the Snells and only four times a year for the dairy it is clear that her relationship with the Snells is "permanent" and that she is economically dependent on her employment there.

F. Integral Part of the Business.

As mentioned earlier, in determining employee status many courts have examined whether or not the type of work performed by the alleged employees is an integral part of the business. Rutherford Food Corp. v. McComb, 331 U.S. at 726; Brock v. Superior Care, Inc., 840 F.2d at 1059; Shultz v. Mistletoe Express Service, Inc., 434 F.2d at 1271.

Although the district court did not address this factor, the work performed by the decorators is obviously integral to the business of the Snells. The Snells, as indicated by the name of their company, "Cakes by Karen," are in the business of selling cakes which are custom decorated.

[*812] IV.

Our consideration of the relevant factors in the discussion above indicates that the cake decorators, as a matter of "economic reality," are "economically dependent" on the business to which they supply their services and are therefore "employees," not "independent contractors," within the protection of the FLSA. We therefore REVERSE the judgment of the district court and REMAND for further proceedings.

780 F.2d 1113, 27 Wage & Hour Cas. (BNA) 745, 54 USLW 2379, 103 Lab.Cas. P 34,724
(Cite as: 780 F.2d 1113)

United States Court of Appeals,
Fourth Circuit.
Raymond J. DONOVAN, Secretary of Labor, United
States Department of Labor, Appellee,
v.
BEL-LOC DINER, INC; William Doxanas, Indi-
vidually and as an officer of the Corporation, Appel-
lants.
No. 85-1081.

Argued Oct. 7, 1985.
Decided Dec. 18, 1985.

Secretary of Labor initiated action alleging that restaurant, as employer, and officer of that restaurant, failed to pay minimum wages and overtime and neglected to maintain records as required by Fair Labor Standards Act. The United States District Court for the District of Maryland, at Baltimore, Norman P. Ramsey, J., entered judgment determining that employer had violated Act, and enjoined employer from further violations and from withholding back wages owed 98 employees, and employer appealed. The Court of Appeals, James Dickson Phillips, Circuit Judge, held that: (1) finding that day and twilight shift employees did not receive 30-minute noncompensable break times was not clearly erroneous; (2) applicable standard for determining willfulness for purposes of three-year, rather than two-year statute of limitations for award of back pay was whether employer knew that Act was in picture, and thus might govern employee's conduct; (3) employer's violations were willful for purposes of applying three-year, rather than two-year statute of limitations; and (4) employer failed to carry its burden of proof on affirmative defense to liquidated damages that it had shown good faith and reasonable grounds for believing it was not in violation of Act.

Affirmed.

West Headnotes

[1] Labor and Employment 231H 2387(6)

231H Labor and Employment

231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)6 Actions
231Hk2383 Evidence
231Hk2387 Weight and Sufficiency
231Hk2387(6) k. Working Time.

Most Cited Cases

(Formerly 232Ak1533 Labor Relations)

District court's finding that day and twilight shift employees of restaurant did not receive 30-minute non-compensable break times was not clearly erroneous; court had heard testimony of 22 witnesses and three compliance officers produced by Secretary of Labor.

[2] Labor and Employment 231H 2387(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)6 Actions
231Hk2383 Evidence
231Hk2387 Weight and Sufficiency
231Hk2387(1) k. In General.

Most Cited Cases

(Formerly 232Ak1521.1, 232Ak1521 Labor Relations)

In order to establish pattern or practice of violation of Fair Labor Standards Act, it is not required that testimony of violation refer to all employees. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 231H 2387(6)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)6 Actions
231Hk2383 Evidence
231Hk2387 Weight and Sufficiency
231Hk2387(6) k. Working Time.

Most Cited Cases

(Formerly 232Ak1533 Labor Relations)

In order to establish, through evidence of pattern or

780 F.2d 1113, 27 Wage & Hour Cas. (BNA) 745, 54 USLW 2379, 103 Lab.Cas. P 34,724
(Cite as: 780 F.2d 1113)

practice, that day and twilight employees of restaurant did not take 30-minute compensable break times during eight-hour shift, and that therefore employer violated Fair Labor Standards Act by paying employees for seven and half-hour rather than eight-hour shift, Secretary of Labor was not obligated to present testimony from each shift of entire back pay period. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[4] Labor and Employment 231H ↻2371

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2368 Time to Sue and Limitations
231Hk2371 k. Willful Violations.

Most Cited Cases

(Formerly 232Ak1479 Labor Relations)

Stringent “willfulness” definition applicable to liquidated damages under Age Discrimination in Employment Act was not applicable to statute of limitations provisions of Fair Labor Standards Act, but rather, more liberal standard of whether employer knew that Fair Labor Standards Act was “in picture,” and thus, might govern employer’s conduct was applicable. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

[5] Labor and Employment 231H ↻2371

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2368 Time to Sue and Limitations
231Hk2371 k. Willful Violations.

Most Cited Cases

(Formerly 232Ak1479 Labor Relations)

Employer’s violations of Fair Labor Standards Act were willful for purposes of applying three-year, rather than two-year, statute of limitations for back pay, where two prior Labor Department investiga-

tions had put employer on actual notice of Fair Labor Standards Act provisions. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

[6] Labor and Employment 231H ↻2394

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions
231Hk2388 Damages and Amount of Recovery
231Hk2394 k. Evidence. Most Cited Cases

(Formerly 231Hk2387(1), 232Ak1521.1, 232Ak1521 Labor Relations)

Employer failed to carry its burden of proof on defense to liquidated damages for willful violations of Fair Labor Standards Act that employer had shown good faith and reasonable grounds for believing it was not in violation of Act, where employer paid little more than lip service to Act requirements, made no attempt to insure that new policy in compliance with Act was enforced, followed suggestions of its attorney and accountant and chose deliberately to disregard contrary advice of Labor Department. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

*1115 Frances E. Kanterman (Jeffrey Rockman; Frank, Bernstein, Conaway & Goldman, Baltimore, Md., on brief), for appellants.

Barbara E. Kahl (Francis X. Lilly, Sol. of Labor, Monica Gallagher, Acting Associate Sol., Linda Jan S. Pack, Washington, D.C., for appellate litigation, U.S. Dept. of Labor on brief), for appellee.

Before PHILLIPS and SNEEDEN, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

This appeal arises from a judgment against appellant-employers for minimum wage, overtime, and record-keeping violations of the Fair Labor Standards Act,

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(Cite as: 780 F.2d 1113)

29 U.S.C. § 201 et seq. (hereinafter FLSA). The court enjoined the appellants from further FLSA violations and from withholding back wages owed to ninety-eight employees. The appellants challenge the court's conclusion that because employees failed to receive thirty minute noncompensable break time, they must be compensated for eight hour rather than seven and one-half hour days. In addition, the appellants contest the lower court's grant of liquidated damages and the court's application of the three year, rather than the two year, statute of limitations for back wages liability under the FLSA. We affirm.

I

The Secretary of Labor initiated this action in 1979, alleging that defendants Bel-Loc Diner, Inc. and William Doxanas, Jr., individually and as an officer of the corporate defendant had failed to pay minimum wages and overtime and had neglected to maintain records as required by FLSA, from May 1976 to the date of the complaint's filing.

Bel-Loc, a twenty-four hour diner, operates on "day," "twilight," and "night" shifts. Doxanas manages the diner, which is staffed by waitresses and kitchen employees. Bel-Loc kept no records of specific hours worked by employees. Rather, Bel-Loc compensated employees on the assumption that if the employee worked, he or she worked the regular eight hour shift minus an unpaid thirty minute "meal break."

The court heard a wealth of evidence regarding the break habits of Bel-Loc's employees. Bel-Loc presented as witnesses eight employees, the manager of waitresses, and Doxanas. The Secretary produced twenty-two witnesses and three compliance officers. After hearing the evidence, the district court concluded that while night shift employees enjoyed uninterrupted half hour breaks, day and twilight shift workers did not receive such bona fide noncompensable breaks.^{FN1} Accordingly, the court held that the day and twilight employees should be considered to have worked eight hour, rather than seven and one-half hour, days.

FN1. To qualify as a bona fide noncompensable break, the respite must be uninterrupted and at least thirty minutes in duration, and the employee must be completely relieved from duty. See 29 C.F.R. § 785.19.

Based on these and other findings, the court held that Bel-Loc's employees received wages below the statutory minimum, and that Bel-Loc also committed overtime and recordkeeping violations. The district court also determined that Bel-Loc's conduct was "willful" for purposes of the FLSA three year statute of limitations for back wages, 29 U.S.C. § 255. Finally, the court awarded liquidated damages in an equal amount to the \$43,660.15 of back wages, as Bel-Loc had failed to carry the burden of proof on a proffered good faith defense under 29 U.S.C. § 260.

This appeal followed, challenging all of the above rulings except those related to the overtime and recordkeeping violations.

II

[1] We deal first with the appellants' contention that the court's finding of fact that day and twilight shift employees did *1116 not receive thirty minute noncompensable break times was clearly erroneous. We disagree. The district court held that minimum wage violations were established by testimony establishing a "pattern or practice" of employees' failure to take bona fide meal periods under the proof scheme prescribed in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Under *Mt. Clemens*, the Secretary need only produce sufficient evidence to show the amount and extent of the work improperly compensated for "as a matter of just and reasonable inference." 328 U.S. at 687. The burden then shifts to the employer to rebut the prima facie case by coming forward "with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn" from the Secretary's evidence. 328 U.S. at 687, 66 S.Ct. at 1192. Measuring the testimony against this standard, we could not hold the lower court's finding of a pattern of failure to take noncompensable breaks clearly erroneous.

[2] Bel-Loc contends that the Secretary failed to make a *Mt. Clemens* prima facie showing upon a number of grounds. We find none persuasive. First, the contention that no evidence was introduced regarding the break habits of nontestifying employees lacks merit. There is no requirement that to establish a *Mt. Clemens* pattern or practice, testimony must refer to all nontestifying employees. Such a require-

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ment would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*. Furthermore, the record reveals that some testifying employees did, in fact, testify to the habits of other non-testifying employees.

[3] Bel-Loc's second assertion, that the Secretary was obliged to present testimony from each shift of the entire back pay period from August 1976 through February 1981 to establish the requisite pattern, is equally groundless. The law makes no such requirement. Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees.^{FN2} See, e.g., *Donovan v. Burger King Corp.*, 672 F.2d 221, 224 (1st Cir.1982). The requirement is only that the testimony be fairly representational. The district court properly considered that requirement met.

FN2. The case law clearly holds that the Secretary can rely on the testimony of representative employees as prima facie proof of a pattern or practice. See, e.g., *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir.1973).

Also meritless is Bel-Loc's contention that the inconsistency of the alleged evidence of pattern or practice makes the court's factual determination clearly erroneous. The evidence as a whole clearly suffices to establish the existence of a pattern or practice, at least as a "just and reasonable inference." Though some employees testified that they received thirty minute breaks, that testimony pales in comparison to the much more extensive testimony that the pattern of conduct was to the contrary.

Neither can we hold clearly erroneous the district court's determination that Bel-Loc neither negated the reasonableness of the inference nor came forward with evidence of the precise work performed to rebut it. Both in volume and content, the evidence as to precise work performed actually preponderated against Bel-Loc. While, again, there was some evidence tending to show that some employees may not have been victims of the general pattern that was established prima facie, it clearly did not constitute the sort of evidence of precise work performed which, under the *Mt. Clemens* proof scheme would suffice, much less compel, a determination that the prima

facie case had been effectively negated or rebutted.

III

We also reject appellants' contention that the court's findings of fact as to the amount of back wages owed to certain employees was clearly erroneous. Bel-Loc's attack rests upon three grounds: (1) *1117 that based upon their own testimony, seven employees received proper meal breaks and were not entitled to back wages; (2) that based upon the lack of evidence as to which shift eleven employees worked, those eleven were not entitled to back wages, and (3) that based upon their testimony as to their own peculiar schedules or wages, the awards to certain employees was miscalculated or not justified in any amount. Our review of the evidence, however, reveals no basis for a finding of clear error in the lower court's back wages calculations as to these particular awards.

IV

We turn next to the defendants' claim that the court erred as a matter of law in holding that Bel-Loc's violations were "willful" as the basis for setting the period for which back pay awards were to be made. Under the Portal-to-Portal Act, a finding of "willful" violation subjects the employer to a three year, rather than a two year, statute of limitations for back wages liability. 29 U.S.C. § 255. The appellants argue that the district court erred in its determination of willfulness by refusing to apply the standard recently established in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

The district court applied the traditional, pre-*TWA* definition of willfulness under 29 U.S.C. § 255(a), the statute of limitations provision applicable to both FLSA and the Age Discrimination in Employment Act (ADEA). Under this definition, a violation was willful if the employer knew that the FLSA or the ADEA was "in the picture" and, thus, might govern the employer's conduct. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.1972); approved by this court in *Brennan v. Air Terminal Parking of Columbia, Inc.*, 21 WH Cases 475 (D.S.C.1973), *aff'd without pub. op.*, 498 F.2d 1397 (4th Cir.1974).

Unlike *Jiffy June*, which construed willfulness under the statute of limitations provision, *TWA* involved the interpretation of § 7(b) of the ADEA, which permits

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(Cite as: 780 F.2d 1113)

the award of liquidated damages to the prevailing plaintiff “only in cases of willful violations.” 29 U.S.C. § 626(b). The Court in *TWA* expressly rejected, for liquidated damages purposes, the *Jiffy June* “in the picture” analysis in favor of a more stringent willfulness standard: whether the employer knew or showed reckless disregard for whether the ADEA prohibited its conduct.

[4] We hold that *TWA* 's more stringent willfulness definition does not apply as well to the statute of limitations provision of § 255(a). We think this differentiating interpretation is consistent with the quite different purposes intended to be served by the limitations and liquidated damage provisions: the latter to punish, the former merely to extend the period of restitutionary recovery of back wages wrongly withheld. To reflect those different purposes, the willfulness standard under the statute of limitations should be less stringent than that applied under its quasi-criminal liquidated damages counterpart. The Supreme Court in *TWA* seems to have recognized the basis for such a distinction, though the specific question was not before the Court, in its observation that “even if the ‘in the picture’ standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages.” 469 U.S. at ----, 105 S.Ct. at 625.

[5] Accordingly, we affirm the lower court's application of the *Jiffy June* standard to the FLSA limitations provision. Under this standard, there can be no doubt that Bel-Loc's violations were willful, as two prior Labor Department investigations had put Bel-Loc on actual notice of the FLSA provisions.

V

Finally, we find no error in the district court's determination that Bel-Loc failed to carry its burden of proof on the Portal-to-Portal Act defense, and, accordingly, we affirm the lower court's award of liquidated damages.

***1118** Unlike the ADEA's discretionary grant of liquidated damages for willful statutory violations, the FLSA provides for mandatory liquidated damages.^{FN3} Section 11 of the Portal-to-Portal Act, however, provides a defense to such an award if the employer can show good faith and reasonable grounds for believing that it was not in violation of the FLSA. 29 U.S.C. §

260. The employer has the burden of proof on this defense. *Richard v. Marriott Corp.*, 549 F.2d 303 (4th Cir.1977).

FN3. 29 U.S.C. § 216(b) provides that whenever the employer is liable to employees for unpaid minimum wages or unpaid overtime compensation, an additional equal amount of liquidated damages must also be awarded.

[6] Before this action was brought against it, Bel-Loc had engaged in numerous discussions with the Labor Department investigators and in response to their suggestions had initiated some changes. For instance, Bel-Loc promulgated a policy implementing the Department's stance on meal breaks and also hired an accountant and an attorney to ensure compliance with minimum wage requirements. Nonetheless, the court below found that, in truth, Bel-Loc paid little more than lip service to the FLSA requirements. The diner made no attempt to ensure that the meal policy was enforced. Doxanas himself admitted that he did not know if the employees followed the policy and that it was likely that the waitresses' breaks continued to be interrupted by the demands of customers.

Furthermore, Bel-Loc followed the suggestions of its attorney and accountant and chose deliberately to disregard the contrary advice of the Labor Department. In *Mayhew, Inc. v. Wirtz*, 413 F.2d 658 (4th Cir.1969), we noted that following the most favorable advice, in the face of obvious conflict, does not constitute good faith. In light of these considerations, the court below did not abuse its discretion in refusing to mitigate liquidated damages under 29 U.S.C. § 260.

AFFIRMED.

C.A.4 (Md.),1985.
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LEXSEE

**Raymond DONOVAN, * Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee, v. SUREWAY CLEANERS, a corporation, Sexton Cleaners, Inc.,
a corporation, and Pay-Less Cleaners, a corporation, Defendants-Appellants.**

* Pursuant to Federal Rule of Appellate Procedure 43(c), we substitute Secretary
Donovan for former Secretary Ray Marshall.

No. 79-4778

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

656 F.2d 1368; 1981 U.S. App. LEXIS 17568; 92 Lab. Cas. (CCH) P34,075; 25 Wage
& Hour Cas. (BNA) 195

June 11, 1981, Argued
September 21, 1981, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of California.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant corporations sought review of a judgment from the United States District Court for the Eastern District of California, which found appellants in contempt of a prior permanent prospective injunction prohibiting further violations of the Fair Labor Standards Act (FLSA), 29 U.S.C.S. §§ 201-219. The district court held that despite new contracts, appellants' agents were employees entitled to overtime compensation under the FLSA.

OVERVIEW: The district court previously enjoined appellant corporations from future violations of the Fair Labor Standards Act (FLSA), 29 U.S.C.S. §§ 201-219. The district court determined that appellants' agents were in fact employees of appellants for purposes of the FLSA, and were entitled to overtime compensation. Four years later, appellee Secretary of Labor sued to enforce the injunction, arguing that appellants' agents were still employees under the FLSA despite new contracts. The district court agreed that the agents were employees and found appellants in contempt of the injunction. The court affirmed on appeal. First, whether an employer-employee relationship exists for purposes of the FLSA depends upon the circumstances of the whole activity, and ultimately whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service. Here, the agents were still employ-

ees for purposes of the FLSA because they were still dependant on appellants as a matter of economic reality. Second, a civil contempt proceeding is part of the original cause of action and is therefore not subject to the limitation period under 29 U.S.C.S. § 255(a).

OUTCOME: The court affirmed a judgment finding appellant corporations in contempt of a prior permanent prospective injunction holding that appellants' agents were employees entitled to overtime compensation under the Fair Labor Standards Act (FLSA). Appellants' agents were still employees under the FLSA despite new contracts with appellants because they were still dependent on appellants as a matter of economic reality.

CORE TERMS: injunction, contempt proceeding, overtime compensation, cause of action, retail outlets, independent contractors, post-judgment, advertising, cleaning, outlet, unpaid, civil contempt, Fair Labor Standards Act, limitation period, restitutionary, restrain, skill, minimum wages, economic reality, parenthetical, contempt, franchise, commerce, statute of limitations, prospective relief, capital investment, legislative history, commencement, injunctive, unexpected

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN1]See 29 U.S.C.S. § 217.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN2]See 29 U.S.C.S. § 207.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN3]In determining whether a person is an "employee" for purposes of the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-219, a number of factors should be considered. Although the list is not exhaustive, the following are relevant factors: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business. Neither the presence nor the absence of any individual factor is determinative.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN4]Whether an employer-employee relationship exists for purposes of the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-219, depends upon the circumstances of the whole activity, and ultimately, whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN5]In evaluating control for the purposes of determining whether an individual is an employee under the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-219, the test is not what the individual could do but what in fact she does do. Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN6]See 29 U.S.C.S. § 255(a).

Civil Procedure > Remedies > Injunctions > Contempt Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN7] 29 U.S.C.S. § 255(a) does not apply to a contempt proceeding brought to enforce a prospective injunction under the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-219.

COUNSEL: Dennis R. Murphy, Diepenbrock, Wulff, Plant & Hannegan, Sacramento, Cal., for defendants-appellants.

Barbara E. Kahl, Atty., Washington, D. C., for plaintiff-appellee.

JUDGES: Before HUG, POOLE and REINHARDT, Circuit Judges.

OPINION BY: REINHARDT

OPINION

[*1369] Sureway Cleaners ' appeals from a district court determination that (1) despite changes in the contracts with its "agents," the "agents" continue to be "employees" rather than independent contractors within the meaning of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and (2) the statute of limitations, 29 U.S.C. § 255(a), applicable to the underlying overtime violations does not apply to a civil contempt proceeding brought by the Secretary to enforce an outstanding injunction granted in a previous action under section 17 of the Act, 29 U.S.C. § 217. We affirm.

1. The appellants in this action consist of three related corporations: Sureway, Pay-Less Cleaners, and Sexton Cleaners. The shares of all three corporations are owned by one individual and his family with that individual serving as the president and director of the corporations. For purposes of this case, all three corporations are grouped together and referred to as "Sureway."

[**2] Sureway is engaged in the laundry and dry cleaning business. Prior to 1971, Sureway owned or leased a total of 105 retail outlets. Most of these outlets were operated by "agents" pursuant to a written agreement (the pre-judgment contract). Today Sureway owns or leases ninety-one retail outlets. Twenty-five of the outlets are company stores in which Sureway concedes the workers are employees. However, Sureway maintains that the remaining sixty-six are operated by "agents" who are independent contractors and not employees.

In 1971 the Secretary of Labor brought suit under section 17 of the FLSA ² against Sureway, claiming that Sureway had violated the overtime compensation ³ and recordkeeping provisions of the FLSA. The Secretary [*1370] sought an injunction to prevent further violations of the Act by Sureway. On October 29, 1971, the district court held that Sureway's "agents" were employees rather than independent contractors. The court therefore ruled that the employees were entitled to overtime compensation. A permanent prospective injunction was granted.

2. [HN1]Section 17 of the Act provides:

§ 217 Injunction proceedings

The district courts ... shall have jurisdiction ... to restrain violations of ... any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

[**3]

3. [HN2]Section 7(a)(1) of the Act provides:

§ 207 Maximum Hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Thereafter, Sureway issued a new contract (the first post-judgment contract) in an attempt to convert its court-determined "employees" into independent contractors. Of the sixty-six retail outlets, forty now operate pursuant to the first post-judgment contract. The remaining twenty-six operate under a second post-judgment contract (a franchise agreement) which was issued after a 1975 determination by the State of California that Sureway was offering a franchise. ⁴

4. Only the "agents" who contracted with Sureway after the determination issued by the State of California operate pursuant to a franchise contract.

[**4] On September 22, 1975, the Secretary filed an application for enforcement of the 1971 injunction because Sureway had failed to pay overtime compensation to its employees. The Secretary disputed Sureway's assertion that its workers were independent contractors. Instead, the Secretary argued that they were still employees within the meaning of the Act and thus entitled to overtime compensation. The district court agreed with the Secretary and found Sureway in contempt of the 1971 injunction. The court ordered Sureway to pay its employees the withheld overtime compensation.

On appeal, Sureway argues that the post-judgment contracts with its retail outlets had substantially changed the employment relationship so as to make the employees genuine independent contractors. Alternatively, Sureway claims that even if it was properly found in contempt of the 1971 injunction, its liability for unpaid overtime compensation is limited by the statute of limitations contained in section 255(a).

I. EMPLOYEE OR INDEPENDENT CONTRACTOR

[HN3]In determining whether a person is an "employee" for purposes of social legislation such as the FLSA, the courts have identified a number of factors that should [^{**5}] be considered. Although the list is not exhaustive, the court in Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979), identified the following relevant factors:

- 1) The degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship;
- 6) whether the service rendered is an integral part of the alleged employer's business.

Id. at 754 (footnote omitted). ⁵

5. These factors are a summation of what the Supreme Court has deemed relevant. See Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 1550, 91 L. Ed. 1947 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); United States v. Silk, 331 U.S. 704, 716, 67 S. Ct. 1463, 1469, 91 L. Ed. 1757 (1947).

[**6] Neither the presence nor the absence of any individual factor is determinative. [HN4] Whether an employer-employee relationship exists depends "upon the circumstances of the whole activity," Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 1477, 91 L. Ed. 1772 (1947), and ultimately, whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service." Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 1550, 91 L. Ed. 1947 (1947).

The district court, after an extensive analysis of the facts, and under the factors identified in Real v. Driscoll Strawberry, [*1371] *supra*, concluded that Sureway's "agents" were in fact employees within the meaning of the Fair Labor Standards Act. After reviewing each of the six factors considered by the district court, we agree with the district court that Sureway's "agents" were, as a matter of economic reality, dependent on Sureway and therefore within the protections and benefits afforded by the Act.

A. Control

The post-judgment contracts require that all work taken in by the "agents" be performed by Sureway's plants. The "agents" therefore have no control over where [**7] to send the items they receive for cleaning or repair, and are denied the power to search out the best price. In addition, Sureway selects the location of the retail outlets, owns or leases them, supplies the fixtures, furnishes the supplies, pays all real and personal property taxes levied on the outlets, does most of the advertising, ⁶ unilaterally imposes the terms of the contracts, ⁷ pays all utility bills which it then charges to the "agent's" accounts, and requires the "agents" to charge the advertised price on any advertised specials. Further, an agent may not assign his rights under the contract unless Sureway consents. Although the district court found that the "agents" could now set their own hours and retail prices, it also found that in practice most outlets were open similar hours and that Sureway supplied a "suggested price list" which was usually adhered to.

6. Sureway allows individual advertising, and occasionally an "agent" will do so. This is insignificant, however, in light of the substantial advertising done by Sureway (5% 51/2% of gross). Additionally, each "agent" is charged 1% of his or her gross for advertising.

[**8]

7. All 40 "agents" operate under the same contract and all 26 franchise "agents" operate under the same contract.

Sureway argues that the district court failed to recognize the "extensive powers and options" exercised by

several of its "agents." ⁸ This argument, however, ignores the "circumstances of the whole activity" and the "economic reality" of sixty-four "agents" and focuses instead on specific factors relating to two. The district court was correct in its analysis of this factor when it suggested that "[HN5]i)n evaluating control, the test is not what the 'agent' could do but what in fact the 'agent' does do." E.g., Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1312 (5th Cir.), cert. denied, 429 U.S. 826, 97 S. Ct. 82, 50 L. Ed. 2d 89 (1976); Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 302-03 (5th Cir. 1975). Thus, the fact that Sureway's "agents" possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the "agents" work the same hours, charge the same prices, and rely [**9] in the main on Sureway for advertising.

8. One "agent" expanded his retail outlet to include an alterations department, an engraving department, and a name tag/monogramming department. Another "agent" altered her store by joining the laundromat adjacent to her. In addition, she has established an alterations department and changed the name of her business establishment.

Regarding the issue of control in Usery v. Pilgrim, the court there stated: "Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity." 527 F.2d at 1313. In the instant case, we agree with the district court's conclusion that Sureway, rather than its "agents," exercises control over the meaningful aspects of the cleaning business.

B. Risk of Profit and Loss

"Agents" make no capital investment and therefore bear no risk of a significant loss; most of the factors that determine profit (advertising, price setting, location, etc.) are [**10] controlled by Sureway. Although "agents" are responsible for bad checks, theft losses, [*1372] and the disposal of abandoned clothing, the district court found these to be burdens that Sureway chose to place on them. See Usery v. Pilgrim, 527 F.2d at 1313. Thus, the lack of opportunity for loss of capital investment and the control by Sureway of the major factors determining profit indicate that in this respect also the "agents" are economically dependent upon Sureway.

C. Investment

"Agents" make no capital investment. A new "agent" simply buys out the old "agent's" stock, and gets his or her money back when customers pick up their belongings. A similar investment plan was properly character-

ized by the court in Pilgrim as "nothing more than a method of settling accounts between outgoing and incoming operators" and has no relationship to the cost of setting up and operating a retail outlet. 527 F.2d at 1313-14.

The district court further found that while the "agents" pay more rent under the post-judgment contracts, they also get more return on the first \$ 100 of cleaning. The end result of these contractual changes is that the latter change offsets the former. ⁹ Based [**11] on these facts, the district court was correct in concluding that Sureway, and not the "agents," supplies the necessary risk capital to run the retail outlet.

9. Under the pre-judgment contract, rent and use of fixtures cost the "agents" \$ 1. Under the post-judgment contract, rent is presently fixed at \$ 30 per week and the fixtures are leased for \$ 4 per week. Adding this to the advertising and utility charges, the total weekly payment is approximately \$ 48.50 (this figure refers to an example used at trial). Under the pre-judgment contract, the agent received 21% of all revenue from cleaning taken in. Under the first post-judgment contract, the agent receives 68% of the first \$ 100, i. e., \$ 47 more. Thus "agents" are debited an additional \$ 47.50 in weekly fees, but are given \$ 47 more than before from the first \$ 100 taken in.

D. Skills

Neither long training nor highly developed skills are required to run a retail outlet. A new "agent" can be completely trained in five days. Notwithstanding this, [**12] Sureway maintains that the profitability of the various outlets depends upon the initiative and business acumen of each "agent." Sureway apparently overlooks the fact that all major aspects of the business open to initiative advertising, price setting, power to choose cleaning plants and thereby get the best price are controlled by Sureway. Consequently, the only skills required are those minor ones that Sureway initially teaches its "agents."

E. Permanency

Whereas true independent contractors have a fixed employment period and generally offer their services to different employers, the district court found that Sureway's "agents" do not transfer from one place to another as particular jobs are offered to them. In addition, the "agents" have generally worked continuously for Sureway for long periods of time. Thus, the district court properly concluded that these "agents" have nothing to transfer but their own labor, and are dependent upon Sureway's continued employment.

F. Integral Economic Relationship

Finally, the district court determined that Sureway's cleaning plants and its "agent"-run outlet pickup stations function as interdependent economic units. "Agents" do the same [**13] work as those individuals explicitly hired as employees, with the outlets serving as neighborhood collection points. Thus, the "agents" are an essential part of Sureway's operation. Hodgson v. Ellis Transportation Co., 456 F.2d 937, 940 (9th Cir. 1972).

From the foregoing analysis, we are convinced that as a matter of economic reality the "agents" are dependent upon the business to which they render service and therefore are employees within the meaning [*1373] of the Fair Labor Standards Act. Although Sureway has made changes in the contracts with its "agents," the changes have been at most superficial. Sureway's relationship with its "agents" has not changed in any meaningful way since the permanent injunction was granted in 1971. If after altering the contracts Sureway was unsure as to the applicability of the prior injunction, it could have petitioned the court for a modification or clarification of the order. See Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15, 65 S. Ct. 478, 481, 89 L. Ed. 661 (1945). By in effect making its own determination as to what the injunction meant, Sureway acted at its peril. As stated by the Court in McComb v. Jacksonville Paper Co.:

It [**14] does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to (a) program of experimentation with disobedience of the law....

336 U.S. 187, 192, 69 S. Ct. 497, 500, 93 L. Ed. 599 (1949).¹⁰

10. It is not necessary that purposeful evasion of the injunction be shown, as the injunction itself is remedial and not punitive in nature. Jacksonville Paper, 336 U.S. at 191, 69 S. Ct. at 499.

We therefore agree with the lower court's determination that Sureway is in contempt of the 1971 injunction and is thus liable for unpaid overtime compensation.

II. STATUTE OF LIMITATION

Sureway argues that even if it is liable for unpaid overtime compensation, the extent of its liability is limited by section 255(a), 29 U.S.C. § 255(a),¹¹ which requires all actions for unpaid overtime compensation to be

commenced within two years, or three years if the violation is "willful." [**15] In the instant case, the Secretary was granted the permanent injunction on October 29, 1971. Almost four years later, on September 22, 1975, the Secretary filed the civil contempt application. The issue raised is whether, as the Secretary argues, a civil contempt proceeding is part of the original cause of action and is therefore not subject to section 255(a)'s limitation period, or whether, as Sureway maintains, the contempt proceeding is a new independent action itself subject to the limitation period.

11. [HN6]Section 255 states as follows:

§ 255 Statute of Limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for ... unpaid overtime compensation ... under the Fair Labor Standards Act (a) ... may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued....

[**16] If section 255(a) applies to contempt proceedings, then Sureway's liability would be limited to the period commencing on (1) September 22, 1973, two years before the date of filing of the civil contempt application, or (2) September 22, 1972, three years before that date. If a contempt proceeding is not an independent action, then Sureway's liability would commence on October 29, 1971. We would not have thought this issue worthy of serious discussion but for the fact that the Fifth and Sixth Circuits have considered the question and have come to different conclusions.

The better reasoned opinion is the Fifth Circuit's decision in Wirtz v. Ocala Gas Co., 336 F.2d 236 (1964). The court in Ocala Gas held that the limitation provision of section 255(a) does not apply to civil contempt proceedings for violations of FLSA injunctions. The court noted that the filing of a civil contempt petition is not the commencement of an independent cause of action, as is contemplated by the language of section 255(a), but rather is a part of the original cause of action. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452, 52 S. Ct. 238, 240, 76 L. Ed. 389 (1932); Gompers [*1374] v. Bucks Stove Range Co., 221 U.S. 418, 444-45, 31 S. Ct. 492, 499, 55 L. Ed. 797 (1911). Civil contempt is a proceeding instituted in furtherance of an existing cause of action. It merely remedies the disobedience of an injunction already entered by the court. Jacksonville Paper Co., 336 U.S. at 193-94, 69 S.

Ct. at 500-01. In the instant case this is evidenced by the fact that the contempt proceeding was not instituted to seek relief for violations of the FLSA, but instead to enforce the 1971 injunction.

The contrary decision of the Sixth Circuit, Wirtz v. Chase, 400 F.2d 665 (6th Cir. 1968), came after that court had earlier affirmed a district court decision, Tobin v. Frost-Arnett Co., 34 Lab. Cas. P 71,220 (W.D. Tenn.1958), aff'd per curiam, 264 F.2d 246 (6th Cir. 1959), where the district court had faced the same issue we face regarding the application of section 255(a) to contempt proceedings. The district court in Frost-Arnett had unequivocally held section 255(a) inapplicable:

Since this is not a new cause of action but a further step in the original proceeding herein to enforce an equitable remedy for civil contempt, growing out of defendant's noncompliance with the [**18] Court's original decree, the employees herein are entitled to be compensated for the periods set out in the petition, irrespective of any limitations fixed by the (section 255).

Frost-Arnett, 34 Lab. Cas. at P 71,220, quoted in Chase, 400 F.2d at 668. In attempting to explain its apparent about-face in its ruling in Chase, the Sixth Circuit explained that a 1961 amendment to section 17 had "evidenced a purpose to limit the recovery allowable in proceedings brought by the Secretary, including those for civil contempt, by the statute of limitations contained in § 255." 400 F.2d at 668.

Prior to 1961, the Secretary was empowered to bring suits for prospective relief under section 17 of the Act.¹² That section, however, permitted the Secretary to seek only prospective relief, and expressly barred restitutionary injunctions. Section 17 contained the following proviso:

12. The Secretary's authority to seek injunctive relief under § 17 is granted by § 16(c) of the Act, 29 U.S.C. § 216(c).

Provided, [**19] That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

63 Stat. 920 (1949). In 1961 Congress amended section 17, deleted the proviso, and substituted therefor the present statutory language, which affords the district courts the power to grant restitutionary injunctions in cases involving violations of the minimum wage or overtime provisions of the Act:

The district courts ... shall have jurisdiction ... to restrain violations of section 215 of this title, including in the case of (minimum wage or overtime violations) the restraint of any withholding of payment ... found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

29 U.S.C. § 217 (emphasis added to language of 1961 amendment).

As the Sixth Circuit apparently concedes, prior to 1961 the Secretary was not [**20] limited by the limitations period contained in section 255(a) when seeking back compensation as relief in a contempt proceeding for violation of a prospective injunction. When, in 1961, the Secretary was granted the power to seek restitutionary injunctions, the enabling amendment included a parenthetical reference to section 255, stating that the back compensation to be obtained under that amendment was limited to the same [*1375] time period for which the employees could have sought back compensation in a direct suit seeking such relief. The effect of the 1961 amendment was to allow the Secretary, for the first time, to initiate a restitutionary action seeking back compensation on behalf of employees who were entitled to that relief. The parenthetical reference to section 255 was intended to make it clear that in exercising this new power the Secretary could not seek back compensation for a longer period than the employees could have, had they initiated a suit directly.

The purpose of the 1961 amendment was to broaden, not to limit, the Secretary's authority. There is no reason in policy, logic, or in tenets of grammatical construction to deduce that the parenthetical reference [**21] to section 255 was intended to limit the Secretary's preexisting authority to seek back compensation in connection with contempt proceedings for violations of prospective injunctions. Nevertheless, the court in Chase concluded that Congress intended to do so, notwithstand-

ing the absence of any legislative history supporting that result.¹³

13. The court in Chase did not cite any legislative history for its conclusion of Congress's intention and an exhaustive search of the legislative history by this court has failed to locate any evidence of such intention.

We are persuaded not to follow the decision in Chase for several reasons. First, section 255 was adopted in 1947 to protect employers from incurring "wholly unexpected liabilities" which "would bring about financial ruin." 29 U.S.C. § 251(a). At the time that congressional declaration of policy was made, the district courts had authority to grant only prospective injunctive relief, and section 17 consequently contained no reference to any limitations [**22] period. When Congress amended section 17 to allow restitutionary relief, it limited that relief, and only that relief, by the parenthetical subordinate clause referring to section 255. Such would appear consistent with the policy stated in section 251(a) to avoid "wholly unexpected liabilities," as a suit by the Secretary under section 17 is a new action raising claims of which an employer would not have been previously aware. Once a prospective injunction has been issued against an employer, however, the employer is put on notice that future violations will result in civil contempt proceedings to enforce the injunction. Under these circumstances the employer would not incur any "wholly unexpected liabilities." Thus, applying section 255(a) to contempt proceedings would not only be contrary to the purpose of the statute, it would also reward a wrongful employer who violated an injunction and escaped detection by the Secretary for a period of two or three years.

A second reason not to follow the Chase decision was expressed by the court in Ocala Gas. Section 255(a) applies to an "action commenced ... to enforce any cause of action" The Supreme Court has stated that because [**23] a contempt proceeding is merely a court's way of enforcing its prior determination, Jacksonville Paper, 336 U.S. at 193-94, 69 S. Ct. at 500-01, it is not to be regarded as an independent action but as part of the original cause of action. Gompers, 221 U.S. at 444-45, 31 S. Ct. at 499. Because of the plain meaning of the statute, then, we are persuaded that section 255(a) cannot reasonably be found to apply to contempt proceedings.

Finally, to hold that section 255(a) applies to a contempt proceeding would limit the effectiveness of an injunction as a means of providing prospective relief. As recently noted by this court in Marshall v. Chala Enterprises, Inc., 645 F.2d 799, 803-04 (9th Cir. 1981), prospective injunctions are essential in effectuating the policy of the FLSA because they place the risk of non-

compliance squarely on the employer. See also S.Rep.No.145, 87th Cong., 1st Sess. 40, reprinted in (1961) U.S.Code Cong. & Adm.News 1620, 1658. In quoting from Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962), the court in Chala stated that "the manifest [*1376] difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation [**24] weighs heavily in favor of enforcement by injunction" Chala, 645 F.2d at 804. To apply the limitations provision to injunctive enforcement proceedings would shift the risk of the employer's non-compliance to the employees after the limitations period has expired; we have no hesitation in concluding that once a violation has been found, that risk should rest with the employer beyond the two or three year period specified for the original cause of action in section 255.

If section 255(a) applied to contempt proceedings, the Secretary would be required, in order to assure continuing compliance, to investigate, every two or three

years, each employer that was subject to such an injunction. As the district court in the present case pointed out, "(t)he injunction would thus not save the expense of repeated investigations nor would it eliminate the need for bringing such offenders to court every few years." We might add that it would subject the rights of employees under the Act to the vicissitudes of the resources and inclination of the Secretary to conduct such investigations. That result would be contrary to the remedial purpose of the Fair Labor Standards Act.

We therefore [**25] affirm the district court's determination that [HN7]section 255(a) does not apply to a contempt proceeding brought to enforce a prospective injunction. We hold that Sureway is liable for overtime compensation for the time period commencing on October 29, 1971.

AFFIRMED.

642 F.2d 141, 24 Wage & Hour Cas. (BNA) 1362, 91 Lab.Cas. P 34,007
(Cite as: 642 F.2d 141)

United States Court of Appeals,
Fifth Circuit.
Unit A
Raymond J. DONOVAN, Secretary of Labor, U. S.
Department of Labor, Plaintiff-Appellant,
v.
TEHCO, INC., a corporation, and Thomas E. Howell,
III, an Individual, Defendants-Appellees.
No. 79-2658.

April 8, 1981.

Secretary of Labor sued to enjoin recordkeeping and overtime violations of Fair Labor Standards Act and to recover overtime wages due under the Act. The United States District Court for the Western District of Texas, Daniel Holcombe Thomas, J., granted partial relief, and Secretary appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) individual who worked almost exclusively for defendant as, among other things, pump mechanic and supervisor was an "employee," notwithstanding that he exercised prerogatives not customarily possessed by employees such as choosing job assignments and structuring his work patterns; (2) individual who worked for several other contractors during period at issue and worked by job rather than hour and supplied his own materials on occasion and could hire and fire his assistants was an independent contractor; and (3) wage transcriptions based on defendants' payroll records showing number of hours each of several individuals worked for defendant and their rate of pay was enough to shift burden of producing evidence to defendant and since defendant produced little or no evidence to show that such individuals were in fact in business for themselves they were "employees."

Affirmed in part and reversed in part.

West Headnotes

[1] Labor and Employment 231H 2232

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2231 Employees Included

231Hk2232 k. In General. Most

Cited Cases

(Formerly 232Ak1121 Labor Relations)

In deciding whether an individual is an "employee" within meaning of Fair Labor Standards Act, the label attached to the relationship is dispositive only to the degree that it mirrors the economic reality of the relationship. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[2] Labor and Employment 231H 2235

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2234 Independent Contractors

231Hk2235 k. In General. Most

Cited Cases

(Formerly 232Ak1121 Labor Relations)

For purposes of Fair Labor Standards Act, the usual path of an employee is one hallmarked by economic necessity of finding employment in the business of others and focal inquiry in characterizing an individual as an employee or independent contractor is whether the individual is or is not, as a matter of economic fact, in business for himself. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[3] Labor and Employment 231H 2235

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2234 Independent Contractors

231Hk2235 k. In General. Most

Cited Cases

642 F.2d 141, 24 Wage & Hour Cas. (BNA) 1362, 91 Lab.Cas. P 34,007
(Cite as: 642 F.2d 141)

(Formerly 232Ak1121 Labor Relations)

Five criteria have emerged to guide the determination of whether individual whose status as “employee” within meaning of Fair Labor Standards Act is in doubt is in “economic reality” an independent businessman: (1) permanency of the working relationship, (2) opportunity for profit and loss, (3) investment in material, (4) degree of control, and (5) the individual's skill. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[4] Federal Courts 170B ↪755

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk754 Review Dependent on Whether Questions Are of Law or of Fact

170Bk755 k. Particular Cases. Most Cited Cases

(Formerly 232Ak1567 Labor Relations)

In reviewing district court's ultimate finding that workers at issue were independent contractors and not employees for purpose of Fair Labor Standards Act the Court of Appeals was not constrained by the clearly erroneous standard but, rather, such ultimate findings were treated as legal determinations. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[5] Labor and Employment 231H ↪2233

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2231 Employees Included

231Hk2233 k. Particular Employees. Most Cited Cases

(Formerly 232Ak1121 Labor Relations)

Individual who worked for defendant as, among other things, a pump mechanic and supervisor, who had no business organization and except for some hand tools supplied nothing but his labor, who supervised defendant's employees and was himself supervised, albeit loosely, by an admitted employee of defendant and who had no power to hire or fire workers assisting him on a particular job was an “employee” for

purpose of Fair Labor Standards Act, notwithstanding that he could choose job assignments, could elect to be paid by the hour and could structure his work patterns. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[6] Labor and Employment 231H ↪2236

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular Employments. Most Cited Cases

(Formerly 232Ak1126 Labor Relations)

Individual who during period at issue worked for several contractors other than defendant, which was in business of building, maintaining and rehabilitating gas service stations, who invariably worked by the job rather than the hour and on occasions supplied his own material and possessed complete independence in hiring and firing those workers he needed to assist him on the job was not an “employee” within meaning of Fair Labor Standards Act but was in business for himself as a concrete subcontractor. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1).

[7] Labor and Employment 231H ↪2385(4)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)6 Actions

231Hk2383 Evidence
231Hk2385 Presumptions and Burden of Proof

231Hk2385(4) k. Persons and Employments Within Regulations in General. Most Cited Cases

(Formerly 232Ak1512 Labor Relations)

Labor and Employment 231H ↪2387(7)

231H Labor and Employment

231HXIII Wages and Hours

642 F.2d 141, 24 Wage & Hour Cas. (BNA) 1362, 91 Lab.Cas. P 34,007
(Cite as: 642 F.2d 141)

231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)6 Actions
231Hk2383 Evidence

231Hk2387 Weight and Sufficiency
231Hk2387(7) k. Persons and
Employments Within Regulations in General. Most
Cited Cases

(Formerly 232Ak1522 Labor Relations)

Where government introduced wage transcriptions based on defendant's payroll records showing the number of hours each of several individuals worked for defendant and their rate of pay, given the exceptionally broad definition of employee in Fair Labor Standards Act, such evidence was enough to shift the burden of producing evidence to defendant and since defendant introduced little or no evidence to show that such individuals on his payroll were in fact in business for themselves they qualified as "employees" for purpose of overtime provisions. Fair Labor Standards Act of 1938, §§ 3(e)(1), (g), 7, 7(a)(1), 29 U.S.C.A. §§ 203(e)(1), (g), 207, 207(a)(1).

*142 Donald S. Shire, U. S. Dept. of Labor, Paula W. Coleman, Washington, D. C., for plaintiff-appellant.

Wolff & Wolff, Walter C. Wolff, Jr., San Antonio, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, THORNBERRY, and WILLIAMS,
Circuit Judges.

THORNBERRY, Circuit Judge:

The Secretary of Labor brought suit against appellee, Tehco, Inc.,[FN1] to enjoin recordkeeping and overtime violations of the Fair Labor Standards Act (FLSA) [FN2] and to recover overtime wages due under the Act. Of the forty-two workers at issue, the district court denied relief to twenty-two on the ground that the Secretary had failed to show that they were "employees" within the meaning of the FLSA. The Secretary challenges the court's conclusion with respect to nine of these workers. We affirm in part and reverse in part.

FN1. The president and manager of Tehco, Inc., Thomas E. Howell, is also named as an appellee. Hereinafter we will refer to appel-

lees as "Tehco."

FN2. 29 U.S.C. s 201 et seq.

Tehco is in the business of building, maintaining, and rehabilitating gas service stations for major oil companies. The oil companies contract with Tehco, but Tehco then in turn contracts with other independent contractors and "contract laborers" to perform much of the work. The Secretary contends that the government sufficiently demonstrated at trial that the nine workers at issue, whom the district court concluded were "independent contractors" and whom Tehco labelled "contract laborers," were more properly characterized as "employees" falling within the overtime-wage protection of the FLSA.[FN3]

FN3. Section 207 provides in part that "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment ... at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. s 207(a) (1) (emphasis added).

The Act defines "employee" as "any individual employed by an employer." s 203(e)(1). "Employ" is defined as including "to suffer or permit to work." s 203(g). The courts, however, have not interpreted these words literally, but rather have tailored them to fit the purposes of the Act. See, e. g., Walling v. Portland Terminal Co., 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947); Isaacson v. Penn Community Services, Inc., 450 F.2d 1306 (4th Cir. 1971).

*143 [1] In deciding whether an individual is an "employee" within the meaning of the FLSA, the label attached to the relationship is dispositive only to the degree that it mirrors the economic reality of the relationship. *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308 (5th Cir.) cert. denied, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975). As the Supreme Court stated in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947): "Where the work done, in its essence, follows the usual path of an em-

642 F.2d 141, 24 Wage & Hour Cas. (BNA) 1362, 91 Lab.Cas. P 34,007
(Cite as: 642 F.2d 141)

ployee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”

[2][3] The “usual path of an employee” is one hallmarked by the economic necessity of “finding employment in the business of others.” *Fahs v. Tree Gold Co-op. Growers of Florida, Inc.*, 166 F.2d 40, 44 (5th Cir. 1948). The focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic fact, in business for himself. See *Mednick, supra*, *Hodgson v. Ellis Transportation Co.*, 456 F.2d 937 (9th Cir. 1972); *Mitchell v. John R. Crowley and Bro., Inc.*, 292 F.2d 105 (5th Cir. 1961); *Wirtz v. Welfare Finance Corp.*, 263 F.Supp. 229 (N.D.W.Va., 1967). Five criteria have emerged to guide the determination of whether the individual whose status is in doubt is in “economic reality” an independent businessman: (1) the permanency of the working relationship, (2) the opportunity for profit and loss, (3) investment in matEerial, (4) the degree of control, and (5) the individual's skill. *United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947); *Pilgrim Equipment, supra*.

[4] With these considerations in mind, we turn to an examination of the individuals here in controversy.[FN4]

FN4. In reviewing the district court's ultimate findings that the workers at issue were independent contractors, we are not constrained by the “clearly erroneous” standard. Rather, these ultimate findings are treated as legal determinations. *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 n.11 (5th Cir. 1979); *Shultz v. Hinojosa*, 432 F.2d 259, 264 (5th Cir. 1970).

A. Josh Topsy

[5] During the period relevant to this suit, Mr. Topsy worked almost solely for Tehco as, among other things, a pump mechanic and supervisor.[FN5] In addition to the permanency of the working relationship, the following facts are inconsistent with the district court's conclusion that Mr. Topsy was an independent contractor: he had no business organization; except for some hand tools, he supplied nothing but his labor; he supervised Tehco employees and

was himself supervised, albeit loosely, by an admitted employee of Tehco; he had no power to hire or fire workers assisting him on particular jobs.

FN5. Mr. Topsy testified that he worked for Tehco “ninety-nine and three-quarters percent of the time.” Trial transcript at 134.

Mr. Topsy did, however, exercise prerogatives not customarily possessed by employees. He could choose the job assignments he wanted. He could elect to be paid by the hour or by the job and thus profit from foresight. His work patterns were unstructured. For example, he could work eighty hours one week and none the next. And although he did not work for others during this period, he was free to do so.

We disagree with the district court's conclusion, however, that Mr. Topsy's discretion in these particulars was sufficient to counterbalance the strong indicia of employee status. The totality of the circumstances convinces us that Mr. Topsy was not an independent businessman in any meaningful sense. When asked how his working relationship with Tehco differed from that when he was a foreman-employee for another construction company, he responded, “I was working under somebody else then.” Trial transcript at 139. And when asked *144 “has the way that you have conducted your work changed since you became an employee (for Tehco) as compared to before (when he was a contract laborer for Tehco),” he answered: “Basically it is the same thing.” *Id.* at 136. We agree and conclude that Mr. Topsy was an employee of Tehco's during the contested period and thus entitled to the overtime wages prescribed by the FLSA. See *Ellis Transportation Co., supra*.

B. Blos Lozano

[6] In contrast to Josh Topsy, Mr. Lozano worked for several other contractors during the period at issue, invariably worked by the job rather than by the hour, supplied his own materials on occasion, and possessed complete independence in hiring and firing those workers whom he needed to assist him on the job. Because we believe that these facts accurately indicate that Mr. Lozano was in business for himself as a concrete subcontractor, we affirm the district court's ruling as to him.

C. Grady Desmuke, Mike Harrison, Emelio Leima,

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(Cite as: 642 F.2d 141)

Lupe Rendon, Rudy Salazar

[7] The district court held that these five individuals were independent contractors because the government had failed to sufficiently show otherwise. [FN6] The government did introduce, however, wage transcriptions based on Tehco's payroll records showing the number of hours each of these men worked for Tehco and their rate of pay. Given the exceptionally broad definition of employee in the FLSA,[FN7] we conclude that this evidence was enough to shift the burden of producing evidence to Tehco. Cf. *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Since Tehco introduced little or no evidence to show that these individuals on its payroll were in fact in business for themselves, the district court should have concluded that the government proved the employee status of these workers by the necessary preponderance of the evidence.[FN8]

FN6. The district court mistakenly included Lupe Rendon in this group of workers. Mr. Rendon, contrary to the district court's assertion, did testify at trial, and that testimony clearly revealed his employee status. In fact, the trial judge himself noted on the record that he was "definitely of the opinion that the rest of the witnesses (one of these being Lupe Rendon) were just plain employees." Trial transcript at 132. Thus, we believe that the court intended to find that Mr. Rendon was an employee, but failed inadvertently to do so. In any event, we conclude that he was an employee.

FN7. The definition is set forth in footnote 3. As the Supreme Court has stated: "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362, 65 S.Ct. 295, 296, 89 L.Ed. 301, 304 (1945).

FN8. This reasoning applies to Kyle Perry as well. The district court found that Mr. Perry was an independent contractor. But Mr. Perry did not testify at trial, and there is no evidence in the record to support this conclusion. Since the government proved that Mr. Perry worked for Tehco, and since Te-

hco failed to produce evidence showing that he was in fact in business for himself, we find that Kyle Perry was also a Tehco employee.

D. Leo Garcia, Johnny Garcia, Doyle Barnes

The district court failed to make any ruling or findings of fact with respect to Leo Garcia and failed to compute correctly the overtime wages found to be due Johnny Garcia and Doyle Barnes. From the record it is clear that Leo Garcia was an employee and that the district court intended to so find. Trial transcript at 132. As to Johnny Garcia and Doyle Barnes, the parties agree that the following additional amounts are due them respectively: \$563.83; \$8.19.

Accordingly, the judgment as to Blos Lozano is AFFIRMED. The judgment as to Johnny Garcia and Doyle Barnes is MODIFIED with respect to back-wage computations. The judgment as to Josh Topsy, Grady Desmuke, Mike Harrison, Emelio Leima, Lupe Rendon, Rudy Salazar, Kyle Perry, and Leo Garcia is REVERSED, and the case is REMANDED for proceedings consistent with this opinion.

C.A.Tex., 1981.
Donovan v. Tehco, Inc.
642 F.2d 141, 24 Wage & Hour Cas. (BNA) 1362, 91 Lab.Cas. P 34,007

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LEXSEE

ANTHONY ESTRADA et al., Plaintiffs and Appellants, v. FEDEX GROUND PACKAGE SYSTEM, INC., Defendant and Appellant.

B189031

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION ONE**

154 Cal. App. 4th 1; 64 Cal. Rptr. 3d 327; 2007 Cal. App. LEXIS 1302; 154 Lab. Cas. (CCH) P60,485

August 13, 2007, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended Estrada v. FedEx Ground Package System, 2007 Cal. LEXIS 13228 (Cal., Nov. 8, 2007)

Review denied by, Application granted by, Request denied by Estrada (Anthony) v. FedEx Ground Package System Inc., 2007 Cal. LEXIS 13422 (Cal., Nov. 28, 2007)

PRIOR HISTORY: [***1]

Superior Court of Los Angeles County, No. BC210130, Howard J. Schwab, Judge, and Bruce Mitchell, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).

Estrada (Anthony) v. Fedex Ground Package System Inc., 2007 Cal. LEXIS 1540 (Cal., Feb. 14, 2007)

DISPOSITION: Affirmed in part, reversed in part, and remanded with directions.

CASE SUMMARY:

PROCEDURAL POSTURE: Cross-appeals were taken from a judgment of the Superior Court of Los Angeles County (California), which, in a class action brought by plaintiff drivers against defendant package delivery company, found that the drivers were employees within the meaning of Lab. Code, § 2802, ordered the company to reimburse some of the drivers' expenses, and awarded costs and attorney fees to the drivers.

OVERVIEW: The drivers worked full time, were paid weekly, had regular schedules and regular routes, received many standard employee benefits, wore uniforms, used company-specific scanners and forms, and were required to work exclusively for the company. The court

held that substantial evidence supported the trial court's finding that the drivers were employees and not independent contractors for purposes of Lab. Code, § 2802, because the company had such extensive control over their work. Class certification was proper because the members of the class reasonably could be identified from the company's records and through discovery. An award of attorney fees under Code Civ. Proc., § 1021.5, was appropriate because the action benefited many drivers; however, the amount of the award had to be reduced because equitable orders previously had been reversed on appeal. The court stated that, if the trial court used a multiplier on remand, it would have to be based on facts other than those triggering § 1021.5. The drivers were entitled to recover their out-of-pocket expenses and work accident insurance premiums, but the company was not required to reimburse them for the cost of their trucks.

OUTCOME: The court reversed the trial court's award of attorney fees and costs, reversed the trial court's disallowance of the drivers' out-of-pocket expenses and work accident insurance premiums, affirmed in all other respects, and remanded with directions to conduct further proceedings to determine the amounts of out-of-pocket expenses and work accident insurance premiums and to determine reasonable attorney fees and costs.

CORE TERMS: driver, truck, package, delivery, terminal, dlse, opinion letter, reimbursement, independent contractors, condition of employment, scanner, customer, manager, bulletin, fee award, contractor, multiplier--, equitable, discovery, route, phase, class certification, wear, ascertainable, assigned, weekly, service area", class action, class members, course of employment

LexisNexis(R) Headnotes

Labor & Employment Law > Employer Liability > Contract Liability > Indemnity

[HN1]See Lab. Code, § 2802, subd. (a).

Labor & Employment Law > Employer Liability > Contract Liability > Indemnity

[HN2]Because the California Labor Code does not expressly define "employee" for purposes of Lab. Code, § 2802, the common law test of employment applies. The essence of the test is the control of details -- that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work - - but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. The parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship.

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Labor & Employment Law > Employer Liability > Contract Liability > Indemnity

[HN3]A determination of employee or independent contractor status under Lab. Code, § 2802, is one of fact and thus must be affirmed if supported by substantial evidence.

Civil Procedure > Class Actions > Appellate Review

[HN4]The decision whether to certify a class is one within the trial court's discretion and will be set aside only upon a showing of abused discretion.

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN5]A class action requires an ascertainable class with a well-defined community of interest among its members. Community of interest, in turn, requires that com-

mon questions of law or fact predominate, and that class representatives (who must be able to adequately represent the class) have claims typical of the class. The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

[HN6]See Code Civ. Proc., § 1021.5.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees

[HN7]While the amount of an attorney fee award is ultimately a decision within the trial court's discretion, the fee must above all else be reasonable and a multiplier, if used, must be based on facts other than those used to trigger the application of Code Civ. Proc., § 1021.5. The starting point of every fee award must be a calculation of the attorney services in terms of the time spent on the case, and the exercise of the court's discretion in awarding fees must bear some reasonable relationship to the lodestar figure of time spent and hourly compensation.

Labor & Employment Law > Employer Liability > Contract Liability > Indemnity

[HN8]It is perfectly lawful for an employer to require its employees to provide their own vehicles as a condition of employment, provided only that the employees must be reimbursed for the expenses thereby incurred. Thus, an employer may require its employees to provide their own trucks. An applicant or employee may be required, as a condition of employment, to furnish his own vehicle to be used in the course of employment. Lab. Code, § 2802, requires an employer to indemnify its employees for all necessary expenses or losses incurred in the course of his duties.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a class action brought by drivers against a package delivery company, the trial court found that the drivers were employees within the meaning of Lab. Code, § 2802, ordered the company to reimburse some of the drivers' expenses, and awarded costs and attorney fees to the drivers. The drivers worked full time, were paid weekly, had regular schedules and regular routes, received many standard employee benefits, wore uniforms, used company-specific scanners and forms, and were required to work exclusively for the company. (Superior

Court of Los Angeles County, No. BC210130, Howard J. Schwab, Judge, and Bruce Mitchell, Temporary Judge.')

* Pursuant to California Constitution, article VI, section 21.

The Court of Appeal reversed the trial court's award of attorney fees and costs, reversed the trial court's disallowance of the drivers' out-of-pocket expenses and work accident insurance premiums, affirmed in all other respects, and remanded with directions to conduct further proceedings to determine the amounts of out-of-pocket expenses and work accident insurance premiums and to determine reasonable attorney fees and costs. The court held that substantial evidence supported the trial court's finding that the drivers were employees and not independent contractors for purposes of Lab. Code, § 2802, because the company had such extensive control over their work. Class certification was proper because the members of the class reasonably could be identified from the company's records and through discovery. An award of attorney fees under Code Civ. Proc., § 1021.5, was appropriate because the action benefited many drivers; however, the amount of the award had to be reduced because equitable orders previously had been reversed on appeal. The court stated that, if the trial court used a multiplier on remand, it would have to be based on facts other than those triggering § 1021.5. The drivers were entitled to recover their out-of-pocket expenses and work accident insurance premiums, but the company was not required to [*2] reimburse them for the cost of their trucks. (Opinion by Vogel, J., with Mallano, Acting P. J., and Jackson, J., concurring.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Labor § 6--Regulation of Working Conditions--Indemnity--Existence of Employment Relationship.--Because the California Labor Code does not expressly define "employee" for purposes of Lab. Code, § 2802, the common law test of employment applies. The essence of the test is the control of details--that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work--but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether

the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. The parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship.

(2) Labor § 6--Regulation of Working Conditions--Indemnity--Existence of Employment Relationship.

Because a package delivery company's drivers worked full time, were paid weekly, had regular schedules and regular routes, received many standard employee benefits, wore uniforms, used company-specific scanners and forms, and were required to work exclusively for the company, substantial evidence supported the trial court's finding that the drivers were employees and not independent contractors for purposes of Lab. Code, § 2802.

[3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 470; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 256; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 226, 238.] [*3]

(3) Parties § 6.3--Class Actions and Class Certification--Community of Interest and Common Questions--Ascertainable Class.

--A class action requires an ascertainable class with a well-defined community of interest among its members. Community of interest, in turn, requires that common questions of law or fact predominate, and that class representatives (who must be able to adequately represent the class) have claims typical of the class. The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.

(4) Costs § 30--Attorney Fees--Procedure--Hearing and Determination--Amount and Discretion--Reasonable Use of Multiplier.

--While the amount of an attorney fee award is ultimately a decision within the trial court's discretion, the fee must above all else be reasonable and a multiplier, if used, must be based on facts other than those used to trigger the application of Code Civ. Proc., § 1021.5. The starting point of every fee award must be a calculation of the attorney services in terms of the time spent on the case, and the exercise of the court's discretion in awarding fees must bear some reasonable relationship to the lodestar figure of time spent and hourly compensation.

(5) Labor § 6--Regulation of Working Conditions--Indemnity--Employee May Be Required to Provide

Truck.--It is perfectly lawful for an employer to require its employees to provide their own vehicles as a condition of employment, provided only that the employees must be reimbursed for the expenses thereby incurred. Thus, an employer may require its employees to provide their own trucks. An applicant or employee may be required, as a condition of employment, to furnish his own vehicle to be used in the course of employment. Lab. Code, § 2802, requires an employer to indemnify its employees for all necessary expenses or losses incurred in the course of his duties.

COUNSEL: Law Offices of Ellen Lake, Ellen Lake; Leonard Carder, Lynn Rossman Faris and Beth A. Ross for Plaintiffs and Appellants.

Seyfarth Shaw, James M. Nelson; O'Melveny & Myers, Walter Dellinger, Robert M. Schwartz, Chris A. Hollinger and Jonathan D. Hacker for Defendant and Appellant.

JUDGES: Vogel, J., with Mallano, Acting P. J., and Jackson, J., concurring.

OPINION BY: Vogel [*4]

OPINION

[**330] **VOGEL, J.**--Three drivers brought this class action against FedEx Ground Package System, Inc., contending that, for the limited purpose of their entitlement to reimbursement for work-related expenses, they were employees, not independent contractors. They sought reimbursement and declaratory and injunctive relief, and obtained class certification for their reimbursement claim. In a trifurcated trial, the court found the drivers were employees within the meaning of Labor Code section 2802 (Phase [**2] I), ordered FedEx to reimburse some (about \$5 million, including prejudgment interest) but not all of their expenses (Phase II), granted most of the equitable relief sought by the drivers (Phase III), and ordered FedEx to pay the drivers' costs and attorneys' fees (about \$12.3 million).

This is the third appeal in this case. In *Estrada I*, we held that orders dismissing some potential class members were not appealable, and dismissed the appeal as premature. (*Estrada v. RPS, Inc.* (2005) 125 Cal.App.4th 976 [23 Cal. Rptr. 3d 261] (*Estrada I*)). In *Estrada II*, we reversed all of the equitable orders, resolving those issues against the drivers and in favor of FedEx. (*Estrada v. FedEx Ground Package System, Inc.* (Nov. 22, 2006, B187951) [nonpub. opn.] (*Estrada II*)). On this appeal, we consider FedEx's challenges to the trial court's class certification order, the court's Phase I finding that the drivers are employees, its Phase II reimbursement

awards, and its posttrial attorneys' [**331] fee award. ¹ On the drivers' cross-appeal, we consider their challenges to limitations imposed on the Phase II reimbursement awards and to the pretrial orders dismissing potential class members (the issue prematurely before us in *Estrada I*). We affirm [**3] the finding that the drivers are employees, the certification order, and the finding that attorneys' fees are recoverable, but reverse the fee award because the amount must be reconsidered, reverse two orders limiting the scope of reimbursable expenses, and remand to the trial court for further proceedings and recalculation of the attorneys' fee award.

1 The trial court defined the certified class to include present and former drivers who personally perform or performed pickup and delivery services for FedEx on a full-time basis in a single work area or route (SWA's). Drivers who operate or operated in multiple work areas or routes (MWA's), corporate entities, and others were excluded from the class. Two of the three named plaintiffs (Anthony Estrada and Jeffrey Morgan) were SWA's; the third named plaintiff (Harvey Roberts) was an MWA and was dismissed on that ground (he is not a party to this appeal). In the end, we are dealing with only the SWA's on appeal and we thus refer to them as drivers except when necessary to distinguish between SWA's and MWA's, and for simplicity use only masculine pronouns.

[*5]

FACTS ²

2 Our statement of facts is based on the evidence (and inferences supporting [***4] the judgment) presented during a nine-week trial. (*Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 937 [59 Cal. Rptr. 3d 37].)

A. *The Evidence at Trial*

1. *The Operating Agreement*

Men and women who apply to FedEx for positions as drivers must complete applications, submit to background checks and strength tests, and satisfy appearance standards. The only required skill is driving and no commercial driving experience is needed. Upon acceptance, a driver must execute a nonnegotiable "Pick-up and Delivery Contractor Operating Agreement" that obligates him to "provide daily pick-up and delivery service, and to conduct his ... business so that it can be identified as being a part of the [FedEx] system." The "Operating Agreement" identifies the driver as an "independent

contractor, and not as an employee ... for any purpose," sets forth the parties' "mutual business objectives," notes that "the manner and means of reaching [these objectives] are within the discretion of the [driver]," and states that "no officer or employee of [FedEx] shall have the authority to impose any term or condition [including hours of work or travel routes] contrary to this understanding."

Under the terms [***5] of the Operating Agreement, the driver must provide his own truck meeting FedEx's specifications, mark the truck with the FedEx logo, pay all costs of operating and maintaining the truck (including repairs, cleaning, fuel, tires, taxes, licenses and insurance), and use the truck exclusively in the service of FedEx (or mask the logo if the truck is used for any other purpose). The driver must provide "fully competitive" service to a "primary service area" assigned by FedEx, and the Operating Agreement acknowledges the driver's "proprietary interest" in his primary service area's customer accounts--but gives FedEx the right to reconfigure primary service areas (and to reassign packages to another driver) if the volume of packages in the driver's primary service area exceeds the amount the driver could reasonably be expected to handle on any given day. In the event of reconfiguration, the driver has a right "to receive payment" from FedEx or the benefited driver. [*6]

[**332] The Operating Agreement obligates the driver to try to "retain and increase" business within his primary service area; to "cooperate" with FedEx's employees, customers, and other drivers for the common goal of efficient pickup [***6] and delivery; to load, handle, and transport packages using methods designed to avoid theft, loss and damage; and to foster FedEx's "professional image" and "good reputation." The driver agrees to drive safely; to prepare driver logs, inspection reports, fuel receipts, and shipping documents; and (on a daily basis) to return these items and any collected charges and undeliverable packages to FedEx. He agrees to wear a FedEx-approved uniform and to maintain his appearance "consistent with reasonable standards of good order," his uniform "in good condition," and his truck in a "clean and presentable fashion."

For its part, FedEx reserves the right to have its management employees travel with the driver four times each year to verify that the driver is meeting FedEx's standards, and agrees to train or "familiarize [the driver] with [its] quality service procedures." FedEx pays or "settles" with a driver weekly based on a stated calculation, and offers the driver a "business support package" to help him obtain and maintain a truck, a scanner, clean uniforms, and other similar items, the cost of which is paid by the driver by deductions from his weekly "settlements."³

3 The scanner, which [***7] is leased from FedEx, is the device used by the driver to obtain signatures when packages are delivered. Every driver's truck has a computer, and the driver must insert the scanner into the computer after each delivery so that customers have immediate access to delivery information via the FedEx Web site.

The driver may elect the initial term of his Operating Agreement (from one to five years), with automatic yearly renewals unless, 30 days before expiration of the term, one party gives the other written notice of termination. The Operating Agreement may be terminated at any time by mutual consent, by FedEx for "intentional misconduct or reckless or willfully negligent operation" of equipment, by either party for breach of the Operating Agreement's obligations, by either party if FedEx stops doing business or reduces its operations at the driver's terminal, and by a driver on 30 days' written notice. The driver has the right to challenge his termination by an arbitration at which, if he prevails, he may be awarded reinstatement or damages or both. A driver in good standing has the right to assign his rights under the Operating Agreement to a replacement contractor acceptable to FedEx. [***8] The Operating Agreement recites that it and its attachments constitute the "entire agreement and understanding between the parties," and that it can be modified only by a writing signed by both parties. [*7]

2. Implementation of the Operating Agreement

Although FedEx claimed at trial that the Operating Agreement (and only the Operating Agreement) determined the drivers' status as independent contractors, both sides presented anecdotal and other evidence through the testimony of numerous drivers, FedEx managers, and experts.

Notwithstanding the merger clause in the Operating Agreement, the drivers' relationship to FedEx is defined by a number of other sources, including the FedEx "Ground Manual" and "Operations Management Handbook," which set forth "policies and procedures" in great detail to ensure the uniform operation of FedEx terminals throughout California, as well as by recruiting materials, welcome packets, memoranda, training videos, bulletin board [**333] posters, roundtable presentations, and similar means of communication.

A new driver leases a scanner and purchases or leases a truck (usually obtained from FedEx preferred vendors) that meets FedEx's size, model and condition specifications, [***9] paints the truck "FedEx White," and applies the FedEx logo to the truck. To pay for these items, drivers may obtain loans through FedEx's business

support programs (with repayment through pay deductions). FedEx offers its drivers a deferred compensation or retirement plan (the record is ambiguous on this point) and other "employee benefits" (including direct deposit, a seniority-based "time-off program" for unpaid leave, and a scholarship program for the drivers' children). As is true of all FedEx employees, drivers are paid weekly at rates set by FedEx without negotiation (the drivers' rate is based on a daily rate, a piece rate for packages handled, and bonuses for length and quality of service).⁴ Customers are billed by FedEx, not the drivers.

⁴ Drivers are paid according to a complex formula that includes \$40 per day for working in uniform and providing a van, \$5 per day for participating in the flex program, a piece-rate component based on the number of stops made and packages handled, and a daily "temporary core zone density" payment, plus a quarterly performance bonus based on years of service and a monthly bonus based on both the individual driver's performance and the performance of [***10] his terminal.

Regional managers supervise terminal managers and have weekly discussions about goals and procedures. Terminal managers, in turn, supervise and train drivers. Drivers work full time and exclusively for FedEx, and must work every day FedEx provides service unless they have preapproved replacements. FedEx sets the drivers' work hours (9.5 to 11 hours a day), and the average driver has worked for FedEx for eight years, with an annual income of \$35,000 to \$50,000 after expenses. The drivers and their trucks are subject to inspection every day (the trucks must be clean, the drivers in uniform and well groomed), and if either fails inspection, the driver may be barred from service. [*8]

Trucks must be parked in assigned spots and loaded by FedEx employees with the packages assigned to the driver by management (the drivers may not refuse an assignment).⁵ FedEx adjusts the number of assigned packages (thereby controlling the driver's hours and pay) by "flexing" from an adjacent route to balance the workload between drivers and in furtherance of its goal--deliver "every package, every day." Almost all drivers participate in the flex program. When necessary (as determined by FedEx), [***11] FedEx reconfigures primary service areas without payment by FedEx to the driver for lost customers.

⁵ Under federal law, the drivers' trucks cannot be used for personal use during the hours they are used to deliver packages for FedEx. (See 49 C.F.R. § 376.12(c) (2007).) Because the drivers must park their trucks in assigned spaces at their

terminals, and because the logos on most of the trucks are difficult if not impossible to conceal, FedEx's assertion that the drivers may use their trucks for other purposes during off-hours is more imagined than real. As a practical matter, most drivers rarely use their trucks for personal matters.

Drivers may not leave the terminal at the beginning of the workday until sorting is completed, and terminal managers may contact drivers during the day about additional assignments. Drivers may "sequence" the order of deliveries and pickups but must meet all pickup and delivery times or "windows" arranged by FedEx's sales representatives and certain customers. These windows affect a driver's ability to sequence his own route. [***334] Drivers must comply with FedEx's rules for obtaining signatures on scanners, releasing packages without signatures, special handling of [***12] overnight and C.O.D. packages, and tracing undelivered or improperly delivered packages. Drivers must place their scanners in their computers after each delivery (fn. 3, *ante*), and at the end of each day must return to their assigned terminal parking spaces, deliver all paperwork and cash from C.O.D. payments, download their scanners, and provide details about any unsuccessful deliveries.

When on any given day a driver makes no attempt to deliver a package, misses a pickup time or window, or is the subject of a complaint, the matter must be discussed with the terminal manager who, in addition, meets with each driver twice each year to communicate and document shortcomings. Several times each year, terminal managers evaluate each driver's performance by means of a "customer service ride" and there are covert checks and security audits conducted in the field. Each driver receives an annual progress review. Terminal managers decide which "failures to service" or alleged breaches of the Operating Agreement to document, and they have discretion (subject to the regional managers' and upper management's approval) to recommend termination or nonrenewal. [*9]

In practice, therefore, the work performed [***13] by the drivers is wholly integrated into FedEx's operation. The drivers look like FedEx employees, act like FedEx employees, are paid like FedEx employees, and receive many employee benefits.

B. The Phase I Statement of Decision

The trial court found, and set forth in its statement of decision, that the drivers were FedEx employees, not independent contractors, and that they had not been indemnified for any of the expenses at issue. The court described the Operating Agreement as "a brilliantly

drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model"--because FedEx "not only has the right to control, but has close to absolute actual control over [the drivers] based upon interpretation and obfuscation." ⁶ The court found that FedEx's management witnesses "differed dramatically in their testimony as to the available remedies" for a driver challenging termination, with the head of contractor relations "admitting that he did not volunteer to [the drivers] any information about [their] rights to arbitrate or sue." In the trial court's view, FedEx's conduct established that the drivers could be terminated "at [***14] will."

6 The court found the drivers' right to control their own routes and schedules was illusive because they were "constrained by customer pick up and delivery windows contracted by the [FedEx] sales force" and by FedEx's paperwork requirements that required the drivers' presence at the terminal.

The court found, in addition, that the drivers are "totally integrated into the [FedEx] operation," that they perform work essential to FedEx's core business, that they are required to work exclusively and full time for FedEx, that their customers are those assigned to them by FedEx, that no specialized skills are required, that they must wear uniforms and conform absolutely to FedEx's standards and that, in the end, each driver has a "job" with "little or no entrepreneurial opportunities." Although the drivers provide their own trucks and equipment, FedEx is involved in the purchasing process, providing funds and recommending vendors.

[**335] The essence of the trial court's statement of decision is that if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck. [*10]

DISCUSSION

FedEx's Appeal

I.

The trial court found that, for purposes of determining the drivers' right [***15] to reimbursement for their expenses, the drivers are employees within the meaning of Labor Code section 2802. ⁷ FedEx contends the trial court is wrong. We disagree.

7 Undesignated section references are to the Labor Code.

A.

Subdivision (a) of section 2802 provides that [HN1]"[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties"

[HN2](1) Because the Labor Code does not expressly define "employee" for purposes of section 2802, the common law test of employment applies. (Reynolds v. Bement (2005) 36 Cal.4th 1075, 1087 [32 Cal. Rptr. 3d 483, 116 P.3d 1162].) The essence of the test is the "control of details"--that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work--but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, [***16] tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. (S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 350-351 [256 Cal. Rptr. 543, 769 P.2d 399] (Borello); Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3d 943, 949 [88 Cal. Rptr. 175, 471 P.2d 975]; Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33, 43-44 [168 P.2d 686]; Air Couriers Internat. v. Employment Development Dept., supra, 150 Cal.App.4th at p. 933 (Air Couriers); JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App.4th 1046, 1064-1065 [48 Cal. Rptr. 3d 563].) ⁸ The parties' label is not dispositive [*11] and will be ignored if their actual conduct establishes a different relationship. (Borello, supra, 48 Cal.3d at p. 349; Toyota [**336] Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 877-878 [269 Cal. Rptr. 647].)

8 Air Couriers and JKH Enterprises both involve package delivery drivers, albeit in different postures. In Air Couriers, a package delivery company sued the Employment Development Department for a refund of employment [***17] taxes, claiming its drivers were independent contractors; the trial court found the drivers were employees and the Third District affirmed. (Air Couriers, supra, 150 Cal.App.4th 923.) In JKH Enterprises, the Department of Industrial Relations found in administrative proceedings that a courier service's drivers were employees for whom workers' compensation insurance had to be

provided; the courier service challenged the order by a petition for a writ of mandate, claiming the drivers were independent contractors. The trial court found the drivers were employees and the Sixth District affirmed. (*JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th 1046.)

[HN3]The determination (employee or independent contractor) is one of fact and thus must be affirmed if supported by substantial evidence. (*Borello, supra*, 48 Cal.3d at p. 349; *Air Couriers, supra*, 150 Cal.App.4th at p. 937; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1367, 1373 [1 Cal. Rptr. 2d 64]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra*, 220 Cal.App.3d at p. 877.) Because the trial court expressly relied on *Borello*, and because FedEx does not dispute the applicability [***18] of the *Borello* test, there is no question of law with regard to this issue, only one of substantial evidence. (*Air Couriers, supra*, 150 Cal.App.4th at pp. 932-933, 937.)

B.

FedEx contends the trial court misapplied the test (by an erroneous analysis of the "right to control" factor and otherwise) and made "insupportable inferences of fact" in determining that the drivers are employees. We disagree.

First, FedEx's assumptions are wrong. Although it is true that the Operating Agreement says "the manner and means" to satisfy the objectives of the contract "are within the discretion of the [drivers]," and that FedEx does not have the "authority to impose any term or condition" to the contrary, the evidence shows unequivocally that FedEx's conduct spoke louder than its words. As noted above, the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship. (*Borello, supra*, 48 Cal.3d at p. 349; *Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra*, 220 Cal.App.3d at pp. 877-878.) The same is true with regard to FedEx's claim that it cannot terminate the drivers at will. Although the Operating Agreement provides for termination with cause, [***19] it also provides for non-renewal without any cause at all--and substantial evidence established that FedEx discharges drivers at will. (*Toyota, at p. 875.*)

Second and most significantly, the trial court's findings are supported by substantial evidence. FedEx's control over every exquisite detail of the [*12] drivers' performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors. ⁹ The drivers must wear uniforms and use specific scanners

and forms, all obtained from FedEx and marked with FedEx's logo. The larger items--trucks and scanners--are obtained from FedEx-approved providers, usually financed through FedEx, and repaid through deductions from the drivers' weekly checks. Many standard employee benefits are provided, and the drivers work full time, with regular schedules and regular routes. The terminal managers are the drivers' immediate supervisors and can unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income. The customers are FedEx's customers, not the [***37] drivers' customers. FedEx has discretion to reject a driver's helper, temporary [***20] replacement, or proposed assignee.

9 The drivers were told they could not wear white shoes or socks; the men were told they could not wear earrings or ponytails, and sometimes that they needed to shave or get a haircut. We summarily reject FedEx's suggestion that constraints such as these are necessary to ensure the drivers' compliance with government regulations. (See *Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 709 [96 Cal. Rptr. 2d 769].)

Drivers--who need no experience to get the job in the first place and whose only required skill is the ability to drive--must be at the terminal at regular times for sorting and packing as well as mandatory meetings, and they may not leave until the process is completed. ¹⁰ The drivers are not engaged in a separate profession or business, and they are paid weekly, not by the job. They must work exclusively for FedEx. Although they have a nominal opportunity to profit, that opportunity may be lost at the discretion of the terminal managers by "flexing" and withheld approvals, and for very slight violations of the rules. Most drivers have worked for FedEx for a long time (an average of eight years), and drivers employed by FedEx's [***21] competitors (UPS, DHL, and FedEx's sister corporation, FedEx Express) are classified as employees.

10 FedEx's reliance on *State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188 [38 Cal. Rptr. 2d 98], is misplaced. Although that case observes that "truck driving--while perhaps not a skilled craft--requires abilities beyond those possessed by a general laborer" (*id.* at pp. 202-203), the finding of independent contractor status in that case is based primarily on the facts that the truckdrivers worked for more than one broker at a time and were compensated on a job-by-job basis, "with no obligation on the part of the [drivers] to accept any assignment and no retribution ... for refusing assignments." (*Id.* at p. 203.)

(2) Based on these facts, we reject FedEx's contention that this is a "true entrepreneurial opportunity depending on how well the [drivers] perform" and conclude that substantial evidence supports the trial court's finding that the drivers are employees, not independent contractors, for purposes of section 2802. (*Air Couriers, supra*, 150 Cal.App.4th at pp. 937-939; *JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at [*13] pp. 1064-1065; *Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra*, 220 Cal.App.3d at pp. 876-878.) [***22] ¹¹

11 The federal cases relied on by FedEx are factually inapposite. The truckers in *Berger Transfer v. Central States* (8th Cir. 1996) 85 F.3d 1374 were paid by the trip, could refuse assignments, and did not have to wear uniforms or paint their trucks with any special marks. The drivers in *C.C. Eastern, Inc. v. N. L. R. B.* (D.C. Cir. 1995) 60 F.3d 855 were paid by the job, did not have to wear uniforms, and could choose any kind of truck. The drivers in *Merchants Home Delivery Serv., Inc. v. N. L. R. B.* (9th Cir. 1978) 580 F.2d 966 were paid by the job, chose their own work hours, could refuse assignments, could sometimes work for other businesses, and operated as partnerships or corporations, not individuals. The drivers in *North American Van Lines, Inc. v. N.L.R.B.* (D.C. Cir. 1989) 869 F.2d 596 selected the frequency of their jobs, the type of loads, and the routes taken, and they did not have to wear uniforms. The drivers in *United States v. Silk* (1947) 331 U.S. 704 [91 L. Ed. 1757, 67 S. Ct. 1463] hired their own helpers and hauled for more than one business. Meanwhile, the drivers in our case are not paid by the job but by a formula established by FedEx and must work only for FedEx, must wear uniforms, must conform their [***23] personal appearance to FedEx's rules and regulations, must work on the days required by FedEx, and must use FedEx's method of delivery.

II.

FedEx contends the drivers' claims were unsuitable for class treatment, and that a classwide judgment is inappropriate on the evidence presented. More specifically, FedEx complains that the class certification order was flawed from the outset because it was based on the incorrect assumption that proof would focus on the terms of the Operating Agreement, when [**338] in fact the drivers offered "anecdotes about various alleged individual violations." In short, the claim is that individual facts predominated over the common issues. We disagree. ¹²

12 We reject FedEx's assertion that the certification order assumed the trial would be limited to the terms of the Operating Agreement. There is nothing in the order itself or FedEx's brief to support this assumption. In fact, the reporters' transcripts of the hearings leading up to and following the certification order include several discussions about the scope of the evidence at trial--and it is clear that everyone understood the drivers were not "going to stand or fall on the operating agreement" but were "going [***24] to put in individual proof of the way things operate, and then we get to the issue of the way they operate at the time at each terminal, or span of time."

A.

[HN4]The decision whether to certify a class is one within the trial court's discretion and will be set aside only upon a showing of abused discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 [17 Cal. Rptr. 3d 906, 96 P.3d 194]; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [97 Cal. Rptr. 2d 179, 2 P.3d 27].) On this record, FedEx cannot make the required showing because it is clear that common issues--whether [*14] the drivers were employees and, if so, which expenses would be reimbursable--predominated. The anecdotal evidence was admitted to show FedEx's power to interpret the Operating Agreement and was relevant to the class as a whole, not just to the drivers who happened to be the subject of a particular anecdote. FedEx's failure to raise this point below suggests it understood that it would fail (it did not at any time during the nine-week trial move for decertification on the basis of the anecdotal evidence). (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1166-1167 [112 Cal. Rptr. 2d 540]; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686 [12 Cal. Rptr. 2d 279].)

B.

In [***25] a related argument, FedEx contends the class "never proved to be ascertainable or manageable in any reasonable sense: 209 distinct 'mini cases' ... were required to ascertain who was actually within the class and ... entitle[d] to reimbursement." We disagree.

[HN5](3) A class action requires an ascertainable class with a well-defined community of interest among its members. Community of interest, in turn, requires that common questions of law or fact predominate, and that class representatives (who must be able to adequately represent the class) have claims typical of the class. The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify

himself as having a right to recover based on the description. (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828 [97 Cal. Rptr. 2d 226].)

After much effort and briefing, the class was limited to SWA drivers who drive (or had driven) full time and who do not (or did not) subcontract their service areas out to others for reasons other than vacation, sick leave, or other commonly excused employment absences. The trial court found that the members [***26] of this class could reasonably be identified from FedEx's records and through discovery and, for the most part, they were. Discovery limited the class to 209 putative members. FedEx's suggestion that the members of this class shifted "in and out, sometimes on a day-to-day basis," is unsupported by a reference to the record and [**339] meaningless in the context of the trial transcript. If FedEx's claim is that every member of the class had to be identified from the outset, FedEx is simply wrong. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 [63 Cal. Rptr. 724, 433 P.2d 732].) [*15]

III.

FedEx contends that, assuming the drivers are employees, FedEx already indemnified them for the expenses due under section 2802. As did the trial court, we disagree.¹³

13 The trial court found that "[n]o evidence was presented to support [FedEx's] position [that the drivers had already been indemnified for the expenses they sought under section 2802] and no language in the [Operating Agreement] would bolster that theory. Rather all witnesses testified that the [drivers] were responsible for their own expenses."

Subdivision (a) of section 2802 obligates an employer to indemnify its employee "for all necessary expenditures or losses incurred by the [***27] employee in direct consequence of the discharge of his or her duties." According to FedEx, the Division of Labor Standards Enforcement requires reimbursement only for "any reasonable amount" (Div. of Lab. Stds. Enforcement Interpretive Bulletin No. 84-7 (Jan. 8, 1985)), and the settlement formula in the Operating Agreement "effectively provided reasonable compensation" for the drivers' business expenses. FedEx is wrong.

The Operating Agreement obligates the drivers to provide their own trucks, scanners, and clean uniforms, and to "bear all costs and expenses incidental to operation" of the trucks, including maintenance, cleaning, depreciation, fuel, oil, tires, repairs, taxes, licenses, tolls, and insurance. The drivers, the terminal managers, and FedEx's upper management all testified that drivers are

expected to bear their own costs. As for the "settlement," the Operating Agreement provides that it is "for services provided," not expenses incurred (for example, "contractor and van availability"). FedEx's suggestion that the settlement formula is keyed to specific expenses and, as such, includes reimbursement for those expenses, is not supported by any evidence.¹⁴

14 We summarily reject FedEx's claim of evidentiary [***28] error. It says it "sought to introduce evidence ... establishing that the settlement was designed *overall* to provide de facto compensation for *all* expenses incurred by contractors," and it says it wanted to do this by "showing that the payments contractors made to their own hired drivers were far less than what contractors received through the settlement system for equivalent work." FedEx's record references do not support this point. Instead, the cited pages show that FedEx tried to ask witnesses about information in their tax returns, and that the trial court properly sustained objections to those questions based on the taxpayer privilege and because FedEx had other means to present the same information. (*Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 6 [123 Cal. Rptr. 283, 538 P.2d 739].) FedEx did not make any offer of proof remotely similar to the argument it offers on this appeal. (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46 [129 Cal. Rptr. 2d 60].)

IV.

FedEx contends the attorneys' fee award is "manifestly improper," that it cannot be justified under Code of Civil Procedure section 1021.5, and that it [*16] must in any event be revisited in light of our reversal of the equitable orders [***29] in *Estrada II*.¹⁵ We reject FedEx's substantive challenges but agree that the amount cannot stand.

15 Subsequent references to section 1021.5 are to that section of the Code of Civil Procedure.

[**340] Code of Civil Procedure section 1021.5 provides as relevant that [HN6]"[u]pon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award appropriate, and (c) such

fees should not in the interest of justice be paid out of the recovery, if any." ¹⁶

16 In addition, subdivision (a) of section 2802 compels an employer to indemnify its employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Subdivision (c) of section 2802 defines "necessary expenditures or losses" to include "all reasonable costs, including but not limited to, attorney's fees incurred by the employee enforcing [***30] the rights granted by this section." Our conclusion that a fee award is justified under Code of Civil Procedure section 1021.5 makes it unnecessary to consider whether the section 2802 fee provision, which was enacted after this lawsuit was filed, applies in this case.

Estrada's motion asked for \$619,691 in costs and \$6,789,325 for his attorneys' fees, a total of \$7,409,016--plus a 2.0 multiplier as compensation for delay and contingency, a total of \$14,818,032. The trial court reduced the fee by 18 percent (finding the amount "slightly bloated") but otherwise granted the motion (including the 2.0 multiplier) and gave Estrada a total of \$12,373,875 for costs and fees, noting the risk inherent in a contingent fee, the "financial burden of private enforcement," and the years of "long, hard-fought" and "labor intensive" litigation involving "enforcement of an important right" that conferred a "significant benefit on a large class." FedEx contends the award is erroneous because Estrada was motivated primarily by his own financial interests, that any benefit to a larger class was incidental, that no significant benefit was conferred on the public or a larger class, and that the trial court's dual use of the same [***31] reasons to both calculate the fee and justify the multiplier created a windfall. We reject FedEx's claim that fees were not recoverable in this case but agree that the amount must be reduced and that the same facts cannot be used to trigger the application of Code of Civil Procedure section 1021.5 and justify a multiplier.

A.

Estrada's personal motivation does not diminish the fact that he pursued this public interest class action not only for himself but on behalf of a class [*17] comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1414 [1 Cal. Rptr. 2d 459]; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 231 [226 Cal. Rptr. 265]; *Braude v. Automobile Club of Southern Cal.* (1986) 178 Cal.App.3d 994, 1005 [223 Cal. Rptr. 914].) No more is required to satisfy the "significant benefit," "public inter-

est," and "large class of persons" requirements of Code of Civil Procedure section 1021.5.

B.

But Estrada did not get everything he sought. In *Estrada II*, we reversed all the equitable orders, finding that Estrada lacked standing to pursue his claims for prospective equitable relief (a) because his relationship with FedEx ended before this lawsuit was filed, and (b) because the class [***32] certification order was expressly limited to the reimbursement issue. (*Estrada II, supra*, B187951.) The equitable orders were a significant [***34] part of the litigation and the resulting judgment.

In Phase III of these proceedings, Estrada sought declaratory relief and a permanent injunction on behalf of "all California single work area pick-up and delivery drivers who at any time since May 11, 1996 worked or currently work or in the future are employed to work under FedEx's Operating Agreement." The trial court rejected FedEx's defenses, finding among other things that it was necessary to address the equitable claims in light of the "importance and recurring nature of the employment issues of the [drivers]." A permanent injunction issued, enjoining FedEx from (1) misclassifying drivers as independent contractors or participating in any agreement to misclassify them as independent contractors, and (2) violating or attempting to violate *any provision of the California Labor Code, Industrial Welfare Commission orders, or other state laws and regulations protecting the drivers as employees--both in the present and for as long as FedEx retained the employment model or substantially similar [***33] employment model used by FedEx at the time of trial.* We reversed all of the equitable orders, finding that Estrada lacked standing to seek prospective declaratory or injunctive relief and that the trial court thus lacked jurisdiction to grant such relief.

When we reversed the equitable orders in *Estrada II*, we disposed of all of the benefits Estrada had obtained in the third phase of trial. Although we agree that Estrada is still the prevailing party, the factual predicate for the trial court's award--that Estrada won on all points, including the far-reaching injunctions--is no longer valid. Estrada concedes as much, noting in his respondent's brief that, under the short-lived injunctions, "the benefits of the instant litigation [would have been] enjoyed by thousands of people who are [*18] not members of the class, including future [drivers] and employees," and that the equitable orders were "[m]ore important" to the trial court than the damages award because "the injunctive and declaratory relief require[d] [FedEx] to treat all its current and future [drivers] as employees and thus provide[d] ongoing relief to a huge group of people."

The \$12,373,875 award is excessive and cannot stand.

C.

(4) In [***34] recalculating an appropriate fee award on remand, the trial court must determine anew whether any multiplier is appropriate in this case. The fee award sans multiplier (\$5,567,246) exceeded the amount of the award to the entire class of plaintiffs (about \$3 million before interest was added, about \$5 million with prejudgment interest). By the time the trial court revisits this issue, the total monetary award to plaintiffs will have increased for the reasons explained below with regard to the drivers' cross-appeal, and the attorneys will have spent more time on this case both on appeal and on the postappeal trial court proceedings. [HN7]While the amount of the fee is ultimately a decision within the trial court's discretion (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132 [104 Cal. Rptr. 2d 377, 17 P.3d 735]), the fee must above all else be reasonable and a multiplier, if used, must be based on facts other than those used to trigger the application of Code of Civil Procedure section 1021.5. (Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615, 626 [98 Cal. Rptr. 2d 388]; and see Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 322-323 [193 Cal. Rptr. 900, 667 P.2d 704] [the starting point of every fee award must be a calculation of the attorney services in terms of the time spent on the case, [***35] and the exercise of the court's discretion in awarding fees must bear [**342] some reasonable relationship to the lodestar figure of time spent and hourly compensation].) ¹⁷

17 The trial court's statement that it was "not double counting" does not change the fact that the reasons justifying any award at all *and* an award based on high hourly rates (to lawyers who took the case on a contingency basis) were the same as those used to justify the multiplier--the benefit to the class, the risk taken, the lawyers' skill, the excellent results.

Estrada's Cross-appeal

V.

Estrada raises five issues on his cross-appeal, four challenging the trial court's rulings vis-à-vis the damages proved during the Phase II trial, the fifth revisiting the dismissal orders that were the subject of *Estrada I*. We address these issues seriatim. [*19]

A.

The August 2, 2001 class certification order recites that "[c]ommon questions of fact clearly predominate in

this case. All members of the proposed class ... incurred the below-listed similar expenses, delineated in the Operating Agreement and certified by the Court as susceptible to proof on a class basis, as a direct consequence of performing services for [FedEx]" Ten [***36] categories of "[e]xpenses the [Operating Agreement] requires" were listed: (1) purchasing or leasing a vehicle for the purpose of performing pickup and delivery services; (2) operating the vehicle, including fuel, oil, tires, repairs, business taxes, cleaning, insurance, registration and tolls; (3) maintaining the vehicle in accordance with federal, state and local law; (4) marking the vehicle with logos, colors, numbers, marks and insignia; (5) licensing the vehicle; (6) paying into the contractor performance escrow account; (7) purchasing, renting and cleaning uniforms; (8) purchasing or otherwise securing communications equipment, including but not limited to scanners and other required equipment; (9) obtaining liability insurance; and (10) obtaining and keeping in force "workers' compensation insurance for themselves."

On September 8, 2004, the trial court limited reimbursement to items actually paid out by the drivers or deducted from their settlement checks, ruled that proof of the claimed expenses would be [*20] "limited to receipts and personal records of the [drivers] ... as well as records in the hands of [FedEx]," and limited some of the categories of recoverable expenses. ¹⁸ [***37] Four of the court's rulings are challenged on the drivers' cross-appeal.

18 In the same order, the trial court found that expenses recoverable under section 2802 included those related to the operation of the vehicle (fuel, oil, tires, repairs, business taxes, cleaning, insurance, registration, and tolls); to maintaining the vehicle in accordance with federal, state and local law; to marking the vehicle; to licensing the vehicle; to purchasing, renting, and cleaning uniforms; to renting scanners; and to obtaining liability insurance. On its own motion, the trial court appointed a referee (Code Civ. Proc., § 639) to take evidence, perform "an accounting as to the expenses and reimbursements claimed by the individual plaintiffs and class members," and to make recommendations to the court.

1.

The trial court refused to permit proof of expenses by expert analysis and lay testimony about FedEx's estimates of the drivers' expenses, limiting the drivers' proof to receipts and records. More specifically, the trial court ruled "that sampling or statistical analysis [would] not suffice, as the amounts of monies that must be the subject of the accounting [would] be too disparate because

of the economic [***38] differences [**343] in the California geographic area. ... [¶] The [drivers] have the burden of proving areas of compensability by means limited to receipts and personal records ... and [FedEx's] records [¶] The [drivers] will present a package to the referee containing the above items as to each [driver]. Upon receipt of said package, [FedEx] can either stipulate as to the amounts sought or file documents or records controverting those amounts." We reject Estrada's challenge to this ruling.

According to the drivers, they should have been permitted to offer "expert analysis computing the [drivers'] damages based on an economic model [that] used actual receipts produced by [the drivers] from around the state, together with expense estimates published in [a FedEx] recruiting booklet entitled, 'Becoming [a FedEx] Pickup and Delivery Contractor' [because the booklet included] data in the form of weekly and annual expense estimates," and a spreadsheet showing "the estimated costs for ten specific expense items projected over a ten-year period." The problem with this argument is that it is premised on a finding that the amounts due to the drivers were not susceptible of exact proof [***39] (*Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 174 [89 P.2d 386] [uncertain consequential damages]; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745 [203 P.2d 778] [future damages]; *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal. Rptr. 811] [lost profit damages]; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 562 [282 Cal. Rptr. 181] [damages for lost commissions])--an assumption directly contradicted by the record the drivers established in proving their damage claims. In short, estimates and educated guesses are allowed where damages cannot be proved. That was not this case.¹⁹

19 Moreover, the notices sent to the putative class members told them quite plainly that they would "be asked to document any expenses for which [they] claim[ed] reimbursement." (See *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 [179 Cal. Rptr. 287]; and see *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-753 [9 Cal. Rptr. 3d 544].)

2.

Although the September 2004 order required proof by receipts and other personal records, Estrada's lawyer--claiming she had an agreement with FedEx's lawyer--prepared spreadsheets listing the drivers' out-of-pocket expenses (such as gasoline and maintenance costs [***40] that were not deducted from the drivers' checks) with Bates-stamp references to each supporting docu-

ment, the idea being that FedEx's lawyers would review the spreadsheets, determine which items were disputed, and request production of receipts for only the disputed items. After the deadline for the submission of evidence passed, FedEx objected to the spreadsheets as incompetent, contending there was no agreement to relieve the drivers of the court-ordered requirement to present all supporting documentation. The referee sustained the objection but found the drivers' lawyers had honestly "believed" an [*21] agreement had existed, and therefore found that the drivers should be allowed to present proper proof--and accepted 40,000 documents (all of which had been produced to FedEx during discovery) which, if allowed, would result in an award to the drivers of about \$5.23 million for these expenses.

FedEx objected to the referee's order. The trial court agreed with the referee [**344] that there had been no agreement,²⁰ found the drivers had offered "incompetent evidence," and approved the referee's decision to allow the drivers to reopen--but only with regard to expenses provable by documents FedEx [***41] had produced during discovery, which necessarily excluded all of the drivers' out-of-pocket expenses provable only by the drivers' documents.

20 The trial court's credibility call is binding on this appeal (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 [243 Cal. Rptr. 902, 749 P.2d 339]; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [122 Cal. Rptr. 79, 536 P.2d 479]) and is supported by the record. In addition to the trial court's requirements (actual receipts and documentation), the referee ordered the parties to present both "calculation sheets and proof packets."

The trial court's reason for allowing the partial reopening--so that FedEx would not obtain a "windfall"--is entirely inconsistent with its order limiting the scope of the allowed reopening. Because the trial court's reasoning was correct (FedEx would indeed obtain a windfall if it was not required to reimburse the drivers for provable expenses that had been part of the case from the beginning, all of which were fully documented and produced to FedEx during discovery), the only possible conclusion is that the trial court's order is wrong and must be reversed. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066 [24 Cal. Rptr. 2d 654].) However wrong Estrada's lawyer might have been in believing she had an agreement [***42] with opposing counsel to use the spreadsheets without the related proof packets, her error caused absolutely no prejudice to FedEx.²¹ Accordingly, the trial court must revisit this issue and conduct such further proceedings as are necessary to determine the amounts to be awarded to the drivers for these expenses.

21 If, as FedEx suggests, the trial court's ruling was in effect a sanction based on its belief that the use of the spreadsheets "was an unauthorized tactic to get around the court's order with which [Estrada's lawyer] disagreed," the result was nonetheless an abuse of discretion--because the sanction, if that is what it was, should have been directed at counsel, not her clients.

3.

The trial court, relying on a January 1985 interpretive bulletin (Bulletin 84-7) issued by the Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), found the drivers were not entitled to reimbursement for expenses related "to purchasing or leasing a vehicle for the purpose of performing pick up and delivery services" because "employers in the pick up and delivery industry in California can require as a condition of [*22] employment that their drivers, at their own expense, [***43] purchase or lease a truck to the employer's specifications." Estrada contends the trial court should instead have relied on a January 2, 1997 DLSE opinion letter (No. 1997.01.02) opining that employees may not be required to purchase a \$50,000 customized truck as a condition of employment. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815 [105 Cal. Rptr. 2d 59] [we do not defer to DLSE bulletins and opinion letters but may nevertheless consider them for what they are worth].) ²² We agree with the trial court.

22 The DLSE's opinion letters may be found at <<http://www.dir.ca.gov/dlse/DLSEOpinionLetter.s.htm>> (as of Aug. 6, 2007).

(a)

Bulletin 84-7 was a response to a question about "whether employers ... may require mechanics or other employees to provide and maintain their own tools, regardless of the wages paid the employees, if it is customary in the industry for mechanics [**345] or other employees to do so." In response, the Labor Commissioner opined that "if an employee is paid at least twice the minimum wage, such employee may, as a condition of employment, be required to provide and maintain his[] own hand tools and equipment customarily required by the trade or craft." In addition, the Labor Commissioner [***44] opined that "[i]f an employee is paid at least twice the minimum wage, he[] may be required, as a condition of employment, to furnish his[] own tools, regardless of the custom or practice in the industry to the contrary."

In that context, the Labor Commissioner was also asked "whether an automobile or truck used in the course

of employment by an employee ... is a 'tool' within the meaning of [section 2802]." The commissioner answered that "neither an automobile nor a truck is considered a tool within the meaning of [section 2802], and an applicant for employment may be required, as a condition of employment, to furnish his[] own automobile or truck to be used in the course of employment, regardless of the amount of wages paid. [¶] Under ... [s]ection 2802, an employer who requires an employee to furnish his[] own car or truck to be used in the course of employment would be obligated to reimburse the employee for the costs necessarily incurred by the employee in using the car or truck in the course of employment." (Italics added.)

(b)

The January 2, 1997 opinion letter is a response to a question based on this situation: " 'An employer hires a sales employee and requires him to purchase [***45] a customized truck for about \$50,000.00, bearing the employer's name, [*23] as a condition of employment. The employer then directs the employee to the vendor who sells the trucks and to a leasing company that will finance the truck. Finally, the employer directs the employee to an insurance company that will insure the truck.' " (DLSE Opinion Letter No. 1997.01.02.) The question was whether section 450 prohibits the employer from requiring the employee to patronize specific and identifiable third persons. ²³ As relevant, the chief counsel for DLSE replied: "California courts have determined that [section] 450 ...' ... promot[es] the right of a wage earner to all wages lawfully accrued to him. ... [¶] Clearly, a condition of employment which requires the employee or applicant to make a \$50,000.00 purchase of a vehicle which advertises the name of the employer and further requires that the vehicle be purchased from one vendor (or any number of vendors) chosen by the employer is violative of [section] 450. [***46] [¶] *While your [question] does not [mention] section 2802 I feel that it is imperative that you also consider [that statute]. ... [¶] [Section 2802] may not be waived. (See ... § 2804[.])* [²⁴] Obviously, even if the practice you describe were not prohibited by the terms of [section] 450, the employer would be liable to the employee for the costs incurred by the employee under [section] 2802. [¶] Quite frankly, the scenario you paint is usually the type of arrangement made in franchise situations, but *the requirement to purchase something of value may not be extended to employer-employee situations [and] is, in my [**346] opinion, clearly prohibited by California law.*" (DLSE Opn. Letter No. 1997.01.02, italics added, fn. omitted.)

23 Section 450 provides: "No employer ... may compel or coerce any employee, or applicant for

employment, to patronize his ... employer, or any other person, in the purchase of any thing of value."

24 Section 2804 provides: "Any contract or agreement, express or implied, made by any employee to waive the benefits of [the article including section 2802] or any part thereof, is null and void"

The essence of Estrada's argument is that, by implication, the 1997 opinion letter is a clarification of Bulletin 84-7, and it is the 1997 opinion letter, not the bulletin, that is factually similar to FedEx's position vis-à-vis its drivers. The problem with this argument is that it fails to consider [***47] the DLSE's other relevant opinion letters.

(c)

According to the 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised) (§ 29.2.3.2, p. 29-2, <<http://www.dir.ca.gov/dlse/Manual-Instructions.htm>> [as of Aug. 6, 2007]), Bulletin 84-7 is still valid and has not been superseded by the 1997 opinion letter.²⁵ More [24] particularly, IWC wage order No. 9-2001, effective July 1, 2004, provides that *in the transportation industry*, "[w]hen tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, *except that an employee whose wages are at least two ... times the minimum wage ... may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.*" (*Id.*, ¶ 9, p. 7.)²⁶ This 2004 statement by the IWC is entirely consistent with the DLSE's Bulletin 84-7, which provides that, because "neither an automobile nor a truck is considered a tool within the meaning of [section 2802], ... *an applicant for employment may be required, as a condition of employment, to furnish his[] own automobile or truck to be used in the course of employment, [***48] regardless of the amount of wages paid.*" (Italics added.)

25 According to section 29.2.3.2 of the manual, orders issued by the Industrial Welfare Commission (IWC) "allow an employer to require that employees furnish 'hand tools and equipment' if the hand tools and equipment are 'customarily required by the trade or craft.' The DLSE has concluded that in the phrase 'hand tools and equipment', the word 'hand' is an adjective which modifies both the word 'tools' and the word 'equipment'. As the Labor Commissioner opined in 1984, an automobile is not the type of equip-

ment contemplated in the IWC Orders." (See Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 581 [94 Cal. Rptr. 2d 3, 995 P.2d 139] [the IWC is the state agency empowered to formulate regulations governing employment in California, and the DLSE is the state agency empowered to enforce California's labor laws, including the IWC's orders].)

26 The same order (at ¶ 2(P), p. 3) defines "transportation industry" to mean "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; and also includes storing [***49] or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles." (IWC Wage Order No. 9-2001.)

Other DLSE opinion letters presume it is proper for an employer to require an employee to provide his own car or truck for use on the job. Thus, a February 25, 1991 opinion letter (No. 1991.02.25-1) opines that when an employee uses his own automobile for his work, the employer must pay for the employee's insurance premiums. An August 30, 1991 opinion letter (No. 1991.08.30) responds to an inquiry about employees in the trucking business who own their own trucks and states that the DLSE's "enforcement policy requires that the employer agree to reimburse the employee for all the costs incurred by the employee in the operation of the equipment." An [***50] August 14, 1994 opinion letter (No. 1994.08.14) states that the reimbursement rates for an employee's use of his own truck differs from the rate applicable to automobiles. An opinion letter dated November 5, 1998 (No. 1998.11.05) [***347] responds to a question about employees who regularly drive their personal vehicles for business purposes and discusses the employer's obligation to pay insurance premiums for coverage above the legal minimum.

(5) Implicit in all of these opinion letters is the assumption that [HN8]it is perfectly lawful for an employer to require its employees to provide their [*25] own vehicles as a condition of employment, provided only that the employees must be reimbursed for the expenses thereby incurred. (And see Lane v. Industrial Acc. Com. (1958) 164 Cal.App.2d 523 [331 P.2d 99].)

The only commentary we have found (none being cited by either party) supports our conclusion that an employer may require its employees to provide their own trucks: "An applicant or employee may be required, as a condition of employment, to furnish his ... own vehicle to be used in the course of employment. [Section] 2802 requires an employer to indemnify its employees for all necessary expenses or losses incurred [***51] in the

course of his ... duties." (Advising California Employers and Employees (Cont.Ed.Bar (2005) § 5.89, p. 454.) In sum, aside from two tangential and conclusory sentences in one DLSE opinion letter, we have not found any authority for Estrada's proposition that an employer cannot require an employee to provide his own truck as a condition of employment. To the contrary, the DLSE's other opinion letters, Bulletin 84-7, and the IWC wage order all assume that an employer can in fact do just that. Accordingly, we conclude that FedEx need not reimburse the drivers for the cost of their trucks.

4.

The certification order and the September 8, 2004 order listed "workers compensation" insurance as a recoverable expense, notwithstanding that virtually all of the drivers carried "work accident" insurance (a form of insurance for self-employed workers). Although this technical error was discovered during discovery (in 2002), the drivers' lawyers failed to clarify the point at that time and the trial court later refused to allow reimbursement for work accident insurance.²⁷ We agree with Estrada's challenge to this ruling.

27 In response to an interrogatory asking for the amount deducted for "workers [***52] compensation" insurance, FedEx responded that there were no deductions for this item because it viewed "each driver to be a self-employed person." In response to an order to provide a further response, FedEx explained that the "parties resolved the ambiguity in the use of the term 'worker's compensation insurance payments' as [that term] is used in the [i]nterrogatory to be a reference to work accident insurance premiums."

Although the drivers' lawyers should have sought clarification instead of assuming that everyone understood that the drivers would be reimbursed for their work accident insurance premiums, the failure to do so does not justify a windfall to FedEx--particularly since it caused the confusion by treating the drivers as independent contractors and was at all times fully aware of the ambiguity in the court's orders (the Operating Agreement itself obligates the drivers "to obtain and keep in force at all times ... work accident and/or workers compensation insurance ..."). (See *Rainer v. Community Memorial* [*26] *Hosp.* (1971) 18 Cal. App. 3d 240, 254 [95 Cal. Rptr. 901]; *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 [69 Cal. Rptr. 568, 442 P.2d 648]; *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 [135 Cal. Rptr. 2d 433]; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565 [176 Cal. Rptr. 704]; [***53] *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1124 [85 Cal. Rptr. 2d

647].) [***348] The drivers are entitled to reimbursement for their work accident insurance premiums.

B.

Estrada contends the trial court erred in "using the class questionnaires as a litmus test to determine which of the 700 absent class members wished to participate rather than ... determin[ing] which fit the class definition" (thus making it a prohibited "opt-in" class action) and then "dismissing all absent class members who did not fully participate in discovery." We disagree.

After the class certification order and after our decision in *Estrada I, Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1543 [27 Cal. Rptr. 3d 839], held that "an 'opt-in' procedure is not authorized by and conflicts with California class action rules." (Capitalization omitted.) But *Hypertouch* does not support Estrada's challenge to his certification order because, as *Hypertouch* notes, "the existence of an ascertainable class is a precondition of class certification" (*Id.* at p. 1549.) In our case, discovery was necessary to determine whether in fact there was an ascertainable class and, if so, whether it was manageable. (*Estrada I, supra*, 125 Cal.App.4th at p. 983.) [***54] More to the point, Estrada's current argument ignores the fact that class certification was granted on the accepted condition that discovery would define the class. When prospective class members failed to respond (or responded inadequately) to the court-approved discovery requests, the court could not determine whether they fit the class definition or had compensable damages. Under these circumstances, there was no error.

DISPOSITION

The judgment is reversed (1) insofar as it awards \$12,373,875 to plaintiffs for their attorneys' fees and costs and (2) insofar as it disallowed the expenses discussed in parts V.A.2 and V.A.4 of this opinion; in all other respects, the judgment is affirmed and the cause is remanded to the trial court with directions to conduct such further proceedings as are necessary to determine the amounts to which the drivers are entitled for out-of-pocket expenses (pt. V.A.2.) and the amounts due for their work accident insurance [*27] premiums (pt. V.A.4.), and to thereafter determine the reasonable amount of fees and costs to be awarded (pt. IV.). Estrada is entitled to his costs of appeal.

Mallano, Acting P. J., and Jackson, J., concurred.

* Judge of the Los Angeles Superior [***55] Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

154 Cal. App. 4th 1, *; 64 Cal. Rptr. 3d 327, **;
2007 Cal. App. LEXIS 1302, ***; 154 Lab. Cas. (CCH) P60,485

The petition of appellant FedEx Ground
Package System, Inc., for review by the Supreme
Court was denied November 28, 2007, S156595.

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
 (Cite as: 563 F.3d 492, 385 U.S.App.D.C. 283)

United States Court of Appeals,
 District of Columbia Circuit.
 FEDEX HOME DELIVERY, a Separate Operating
 Division of FedEx Ground Package System, Incorporated,
 Petitioner
 v.
 NATIONAL LABOR RELATIONS BOARD, Re-
 spondent
 International Brotherhood of Teamsters, Local No.
 25, Intervenor.
Nos. 07-1391, 07-1436.

Argued Nov. 7, 2008.
 Decided April 21, 2009.
 Rehearing and Rehearing En Banc Denied Sept. 4,
 2009.

Background: Small package delivery provider petitioned for review of a determination of the National Labor Relations Board (NLRB), 2007 WL 2858933, that it committed an unfair labor practice in violation of the National Labor Relations Act (NLRA) by refusing to bargain with union certified as the collective bargaining representative of some of its single-route drivers. NLRB cross-applied for an enforcement order.

Holding: The Court of Appeals, Brown, Circuit Judge, held that provider's single-route drivers were independent contractors, rather than "employees" under the NLRA.

Petition granted; cross-application denied.

Garland, Circuit Judge, filed an opinion dissenting in part

West Headnotes

[1] Labor and Employment 231H 978

231H Labor and Employment
 231HXII Labor Relations
 231HXII(A) In General
 231Hk977 Employees Within Acts
 231Hk978 k. In General. Most Cited

Cases

To determine whether a worker should be classified as an "employee" or an "independent contractor" under the NLRA, the National Labor Relations Board (NLRB) and the court of appeals apply the common-law agency test, a requirement that reflects clear congressional will. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[2] Labor and Employment 231H 29

231H Labor and Employment
 231HI In General
 231Hk28 Independent Contractors and Their Employees
 231Hk29 k. In General. Most Cited Cases

Labor and Employment 231H 978

231H Labor and Employment
 231HXII Labor Relations
 231HXII(A) In General
 231Hk977 Employees Within Acts
 231Hk978 k. In General. Most Cited

Cases

The factors utilized in the common-law agency test, which is also used to determine whether a worker should be classified as an "employee" or an "independent contractor" under the NLRA, include, inter alia, the extent of control which, by the agreement, the master may exercise over the details of the work; the kind of occupation; whether the worker supplies the instrumentalities, tools, and the place of work; the method of payment, whether by the time or by the job; the length of time for which the person is employed; whether the work is a part of the regular business of the employer; and the intent of the parties. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[3] Labor and Employment 231H 978

231H Labor and Employment
 231HXII Labor Relations
 231HXII(A) In General
 231Hk977 Employees Within Acts
 231Hk978 k. In General. Most Cited

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
(Cite as: 563 F.3d 492, 385 U.S.App.D.C. 283)

Cases

There is no shorthand formula or magic phrase that can be applied to find the answer to whether a worker should be classified as an “employee” or an “independent contractor” under the NLRA, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive, always bearing in mind the legal distinction between “employees” and “independent contractors” is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[4] Labor and Employment 231H 1666

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1665 Jurisdiction in General
231Hk1666 k. In General. Most Cited Cases

Labor and Employment 231H 1841

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1841 k. In General. Most Cited Cases

The National Labor Relations Board (NLRB) has no authority whatsoever over independent contractors under the NLRA; consequently, it is one of the court of appeals' principal functions to ensure that the NLRB exercises power only within the channels intended by Congress, especially as determining a worker's status from undisputed facts involves no special administrative expertise that a court does not possess. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

[5] Labor and Employment 231H 1870

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1869 Deference to Board

231Hk1870 k. In General. Most

Cited Cases

A court of appeals does not grant great or even normal deference to the determinations of the National Labor Relations Board (NLRB) regarding a worker's status under the NLRA; instead, it will only uphold the NLRB if at least it can be said to have made a choice between two fairly conflicting views. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[6] Labor and Employment 231H 978

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk977 Employees Within Acts
231Hk978 k. In General. Most Cited Cases

While all the considerations at common law remain in play in determining whether a worker should be classified as an “employee” or an “independent contractor” under the NLRA, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[7] Labor and Employment 231H 978

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk977 Employees Within Acts
231Hk978 k. In General. Most Cited

Cases

The common-law agency test, which is also used to determine whether a worker should be classified as an “employee” or an “independent contractor” under the NLRA, is not merely quantitative; a court does not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins, but instead evaluates which factors are determinative in a particular case, and why. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[8] Labor and Employment 231H 979

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
(Cite as: 563 F.3d 492, 385 U.S.App.D.C. 283)

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk977 Employees Within Acts
231Hk979 k. Particular Persons. Most
Cited Cases

Labor and Employment 231H 1870

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement
of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1869 Deference to Board
231Hk1870 k. In General. Most
Cited Cases

Indicia favoring National Labor Relations Board's (NLRB) jurisdictional finding that single-route drivers contracting with small package delivery provider were "employees" of provider under the NLRA was clearly outweighed by evidence of entrepreneurial opportunity favoring the contractors having independent contractor status, and therefore NLRB did not make a choice between two fairly conflicting views, so as to permit court of appeals to defer to the NLRB's decision, in light of the contractors' ability to operate multiple routes, hire additional drivers and helpers, and sell routes without permission, and the parties' intent expressed in the contract. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

[9] Labor and Employment 231H 978

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk977 Employees Within Acts
231Hk978 k. In General. Most Cited
Cases

An incentive system designed to ensure that a delivery driver's overall performance meets the company standards is fully consistent with an independent contractor relationship under the NLRA; at the same time, a contractual willingness to share a small part of the risk, for instance, by providing fuel reimbursements when prices jump sharply, or by guaranteeing a certain minimum amount of income for making a vehicle available, does not an employee make. National Labor Relations Act, § 2(3), 29 U.S.C.A. §

152(3).

[10] Labor and Employment 231H 978

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk977 Employees Within Acts
231Hk978 k. In General. Most Cited
Cases

It is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor under the NLRA. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

*494 R. Ted Cruz argued the cause for petitioner. On the briefs were Charles I. Cohen, Jonathan C. Fritts, and Doreen S. Davis.

Robert Digges Jr., Robin S. Conrad, and Adam C. Sloane were on the brief for amici curiae American Trucking Associations, Inc. and Chamber of Commerce of the United States of America in support of petitioner. Timothy W. Wiseman entered an appearance.

Kellie J. Isbell, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were Ronald E. Meisburg, General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, and Robert J. Englehart, Supervisory Attorney. Julie B. Broido, Supervisory Attorney, entered an appearance.

Renee J. Bushey argued the cause for intervenor International Brotherhood of Teamsters, Local No. 25. With her on the brief were Michael A. Feinberg and Jonathan M. Conti.

Daniel J. Popeo and Richard A. Samp were on the brief for amici curiae Washington Legal Foundation, et al. in support of respondent.

*495 Before: GARLAND and BROWN, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge BROWN.

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
 (Cite as: 563 F.3d 492, 385 U.S.App.D.C. 283)

Opinion dissenting in part filed by Circuit Judge GARLAND.

BROWN, Circuit Judge:

****286** FedEx Ground Package System, Inc. (“FedEx”), a company that provides small package delivery throughout the country, seeks review of the determination of the National Labor Relations Board (“Board”) that FedEx committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining representative of its Wilmington, Massachusetts drivers. The Board cross-applies for enforcement of its order. Because the drivers are independent contractors and not employees, we grant FedEx's petition, vacate the order, and deny the cross-application for enforcement

I.

In 1998, FedEx acquired Roadway Package Systems and changed its name to FedEx Ground Package System, Inc. The company has two operating divisions: the Ground Division and the Home Delivery Division or FedEx Home. The Ground Division delivers packages of up to 150 pounds, principally to and from business customers. FedEx Home delivers packages of up to 75 pounds, mostly to residential customers. The Wilmington terminals are part of FedEx Home, a network that operates 300 stand-alone terminals throughout the United States and shares space in an additional 200 Ground Division facilities. FedEx Home has independent contractor agreements with about 4,000 contractors nationwide with responsibility for over 5,000 routes.

In July 2006, the International Brotherhood of Teamsters, Local Union 25, filed two petitions with the NLRB seeking representation elections at the Jewel Drive and Ballardvale Street terminals in Wilmington, neither of which boasts many contractors. The Union won the elections, prevailing by a vote of 14 to 6 at Jewel Drive and 10 to 2 at Ballardvale Street, and was certified as the collective bargaining representative at both. FedEx refused to bargain with the Union. The company did not contest the vote count; instead, FedEx disputed the preliminary finding that its single-route drivers are “employees” within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3).

The Board rejected FedEx's Request for Review of the Regional Director's Decision and Direction of Election on November 8, 2006. In dissent, Chairman Battista disagreed with “the refusal to permit [FedEx] to introduce system-wide evidence concerning the number of route sales and the amount of profit,” as the information would be relevant to the determination of the drivers' “entrepreneurial interest in their position.” *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, (Nov. 8, 2006) (Battista, C., dissenting). After the election, the Board found FedEx violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by refusing to bargain. Finding FedEx's objection that its contractors are not employees had been raised and rejected in the representation proceedings, the Board issued its order on September 28, 2007. FedEx filed a timely petition for review and the Board filed its cross-application for enforcement. The Union intervened in support of the Board's cross-application.

II.

[1][2][3] To determine whether a worker should be classified as an employee or an ****287 *496** independent contractor, the Board and this court apply the common-law agency test, a requirement that reflects clear congressional will. *See NLRB v. United Ins. Co.*, 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968); *see also St. Joseph News Press*, 345 N.L.R.B. 474, 478 (2005) (“Supreme Court precedent ‘teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*’”) (quoting *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 894 (1998)). While this seems simple enough, the Restatement's non-exhaustive ten-factor test is not especially amenable to any sort of bright-line rule,^{FN1} a long-recognized rub.^{FN2} Thus, “there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive,” *United Ins. Co.*, 390 U.S. at 258, 88 S.Ct. 988, always bearing in mind the “legal distinction between ‘employees’ ... and ‘independent contractors’ ... is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute.” *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C.Cir.1989) (“*NAVL*”).

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
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FN1. The common law factors include, *inter alia*, “the extent of control which, by the agreement, the master may exercise over the details of the work”; “the kind of occupation”; whether the worker “supplies the instrumentalities, tools, and the place of work”; “the method of payment, whether by the time or by the job”; “the length of time for which the person is employed”; whether “the work is a part of the regular business of the employer”; and the intent of the parties. RESTATEMENT (SECOND) OF AGENCY § 220(2).

FN2. See *Kisner v. Jackson*, 159 Miss. 424, 427-28, 132 So. 90 (1931) (“There have been many attempts to define precisely what is meant by the term ‘independent contractor’; but the variations in the wording of these attempts have resulted only in establishing the proposition that it is not possible within the limitations of language to lay down a concise definition that will furnish any universal formula, covering all cases. At last, and in any given case, it gets back to the original proposition whether in fact the contractor was actually independent.”).

[4][5] This potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors. See *id.* at 598. Consequently, it is “one of this court’s principal functions” to “ensur[e] that the Board exercises power only within the channels intended by Congress,” especially as determining status from undisputed facts “involves no special administrative expertise that a court does not possess.” *Id.* We thus do not grant great or even “normal[]” deference to the Board’s status determinations; instead, we will only uphold the Board if at least “it can be said to have ‘made a choice between two fairly conflicting views.’ ” *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C.Cir.1995) (quoting *NAVL*, 869 F.2d at 599).

For a time, when applying this common law test, we spoke in terms of an employer’s right to exercise control, making the extent of actual supervision of the means and manner of the worker’s performance a key consideration in the totality of the circumstances assessment. Though all the common law factors were

considered, the meta-question, as it were, focused on the sorts of controls employers could use without transforming a contractor into an employee. *E.g.*, *NAVL*, 869 F.2d at 599 (“In applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test. The test requires an evaluation of all the circumstances, but the extent of the actual *supervision* exercised ... is the most important element.”). For example, “efforts to monitor, evaluate, and **288 *497 improve” a worker’s performance were deemed compatible with independent contractor status. *Id.* Nor would “restrictions” resulting from “government regulation” mandate a contrary conclusion. *Id.* “[E]vidence of unequal bargaining power” also did not establish “control.” *Id.*

Gradually, however, a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee, a process reflected in cases like *C.C. Eastern* and *NAVL* where we used words like control but struggled to articulate exactly what we meant by them. “Control,” for instance, did not mean *all* kinds of controls, but only *certain* kinds. See, *e.g.*, *C.C. Eastern*, 60 F.3d at 858 (quoting *NAVL*, 869 F.2d at 599). Even though we were sufficiently confident in our judgment that we reversed the Board, long portions of both opinions were dedicated to explaining why some controls were more equal than others. See *id.* at 858-61; *NAVL*, 869 F.2d at 599-604. In other words, “control” was close to what we were trying to capture, but it wasn’t a perfect concurrence. It was as if the sheet music just didn’t quite match the tune.

[6][7] In any event, the process that seems implicit in those cases became explicit—indeed, as explicit as words can be—in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C.Cir.2002). In that case, both this court and the Board, while retaining all of the common law factors, “shift[ed the] emphasis” away from the unwieldy control inquiry in favor of a more accurate proxy: whether the “putative independent contractors have ‘significant entrepreneurial opportunity for gain or loss.’ ” *Id.* at 780 (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. No. 144, at 6 (Dec. 19, 2000)). This subtle refinement was done at the Board’s urging in light of a comment to the Restatement that explains a “ ‘full-time cook is regarded as a servant,’ ”—and not “an independent contractor”—“ ‘although it is understood that the employer will exercise no control over the cooking.’ ”

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
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Id. (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d). Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism. *Id.*^{FN3}

FN3. The common law test, after all, is not merely quantitative. We do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins. Instead, there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why. In *Corporate Express*, we said this qualitative evaluation “focus[es] not upon the employer’s control of the means and manner of the work but instead upon whether the putative independent contractors have a ‘significant entrepreneurial opportunity for gain or loss.’ ” 292 F.3d at 780 (quoting *Corp. Express*, 332 N.L.R.B. at 6).

Although using this “emphasis” does not make applying the test purely mechanical, the line drawing is easier, or at least this court and the Board in *Corporate Express* seem to have so hoped. *See id.* (“We agree with the Board’s suggestion that [entrepreneurial opportunity] better captures the distinction between an employee and an independent contractor.”). In *C.C. Eastern*, for instance, we decided drivers for a cartage company who owned their own tractors, signed an independent contractor agreement, “retain[ed] the rights, as independent entrepreneurs, to hire their own employees” and could “use their tractors during non-business hours,” and who were “paid by the job” and received no employee benefits, should be characterized as independent contractors. 60 F.3d at 858-59. We also noted the company did ****289 *498** not require “specific work hours” or dress codes, nor did it subject workers to conventional employee discipline. *Id.* at 858. Conversely, in *Corporate Express*, emphasizing entrepreneurialism, we straightforwardly concluded that where the owner-operators “were not permitted to employ others to do the Company’s work or to use their own vehicles for other jobs,” they “lacked all entrepreneurial opportunity and consequently functioned as em-

ployees rather than as independent contractors.” 292 F.3d at 780-81.

This struggle to capture and articulate what is meant by abstractions like “independence” and “control” also seems to play a part in the Board’s own cases, though we readily concede the Board’s language has not been as unambiguous as this court’s binding statement in *Corporate Express*. For instance, in the latest but far from only statement of the principle, *see St. Joseph News Press*, 345 N.L.R.B. at 479; *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. at 891; *cf. Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 438-39 (D.C.Cir.1989) (agency action while review is pending in this court can be relevant), and a case where the Board explicitly said it was simply following its own precedent, *Arizona Republic*, 349 N.L.R.B. 1040, 1040 (2007), the Board held that where carriers sign an independent contractor agreement; own, maintain, and control their own vehicles; hire full-time substitutes and control the substitutes’ terms and conditions of employment; are permitted to hold contracts on multiple routes; select the delivery sequence; and are not subject to the employer’s progressive discipline system, the evidence establishes that the carriers are independent contractors, *id.* at 1040-41, 1046. Importantly, the Board, noting many drivers had “multiple routes” and could deliver newspapers for another publisher, also concluded significant entrepreneurial opportunity existed, even if most failed to make the extra effort. “[T]he fact that many carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so.” *Id.* at 1045.

[8] The record here shares many of the same characteristics of entrepreneurial potential.^{FN4} In the underlying representation decision, the Regional Director found the contractors sign a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx “for any purpose” and confirms the “manner and means of reaching mutual business objectives” is within the contractor’s discretion, and FedEx “may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance”; “contractors are not subject to reprimands or other discipline”; contractors must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety require-

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
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ments; and “contractors are responsible for all the costs associated with operating and maintaining their vehicles.” *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 10-14 (First Region, Sept. 20, 2006) (“*Representation Decision*”). They may use the vehicles “for other commercial or personal purposes ... so long as they remove or mask all FedEx Home logos and markings,” and, even on this limited record, some do use **290 *499 them for personal uses like moving family members, and in the past “Alan Douglas[] used his FedEx truck for his ‘Douglas Delivery’ delivery service, in which he delivered items such as lawn mowers for a repair company.” *Id.* at 14, 15. Contractors can independently incorporate, and at least two in Wilmington have done so. At least one contractor has negotiated with FedEx for higher fees. *Id.* at 20.^{FN5}

FN4. FedEx also does not provide benefits or withhold taxes. While unrelated to entrepreneurialism, this goes to party intent. *See C.C. Eastern*, 60 F.3d at 858-59; *St. Joseph News Press*, 345 N.L.R.B. at 479. (“[A] party’s intent with regard to the nature of the relationship created weighs strongly in favor of finding independent contractor status.”). Because we consider *all* the common law factors, *vide supra*, these facts are relevant, just as are any relating to control.

FN5. We recognize FedEx seeks to “make full use of the Contractor’s equipment,” but it is undisputed the contractors are only obligated to provide service five days a week. Our precedent speaks to this: “Moreover, as the drivers work only 40 to 50 hours per week for the Company, it seems that their schedules do not preclude them from taking on additional hauling business during their off-hours.” *C.C. Eastern*, 60 F.3d at 860. Though our colleague contends *C.C. Eastern* does not say very much, *see* Dis. Op. at 516 (“But all *C.C. Eastern* held was that under those circumstances, the Board had erred in ‘discounting to zero’ the significance of that single factor in the traditional multi-factor test.”), he fails to account for the holding. We did not remand for the Board to give this factor the proper weight, but instead held the contractors “are not ‘employ-

ees’ within the meaning of the Act and therefore are not within the jurisdiction of the Board.” *C.C. Eastern*, 60 F.3d at 861.

Tellingly, contractors may contract to serve multiple routes or hire their own employees for their single routes; more than twenty-five percent of contractors have hired their own employees at some point. *See* Resp’ts Br. at 6. “The multiple route contractors have sole authority to hire and dismiss their drivers”; they are responsible for the “drivers’ wages” and “all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance.” *Representation Decision*, slip op. at 27.^{FN6} The drivers’ pay and benefits, as well as responsibility for fuel costs and the like, are negotiated “between the contractors and their drivers.” *Id.* In addition, “both multiple and single route contractors may hire drivers” as “temporary” replacements on their own routes; though they can use FedEx’s “Time Off Program” to find replacement drivers when they are ill or away, they need not use this program, and not all do. *Id.* at 28-29. Thus, contrary to the dissent’s depiction, Dis. Op. at 513, contractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there. “FedEx [also] is not involved in a contractor’s decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx [] they have hired a replacement driver, as long as the driver is ‘qualified.’” *Representation Decision*, slip op. at 29. “Contractors may also choose to hire helpers” without notifying FedEx at all; at least six contractors in Wilmington have done so. *Id.* at 29-30. This ability to hire “others to do the Company’s work” is no small thing in evaluating “entrepreneurial opportunity.” *Corp. Express*, 292 F.3d at 780-81; *see also St. Joseph News Press*, 345 N.L.R.B. at 479 (“Most importantly, the carriers can hire full-time substitutes....”).

FN6. We are aware the Regional Director excluded contractors with multiple routes from the bargaining units as statutory supervisors, even though the “employees” of those “supervisors” do not, in fact, work for FedEx. *Representation Decision*, slip op. at 42-43. This classification is not before us. But what *is* before us is the puzzling argument, adopted but not defended by our col-

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league, *see* Dis. Op. at 515, that because they were excluded, everything about them is somehow irrelevant, as if-poo!-they just vanished. Multi-route contractors signed the same contract as the others, and just as the national data is relevant in assessing the rights available under the contract, *id.* at 517-19, so are the activities of these contractors.

***500 **291** Another aspect of the Operating Agreement is significant, and is novel under our precedent. Contractors can assign at law their contractual rights to their routes, without FedEx's permission. The logical result is they can sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship. In fact, the amount of consideration for the sale of a route is negotiated "strictly between the seller and the buyer," with no FedEx involvement at all other than the new route owner must also be "qualified" under the Operating Agreement, *Representation Decision*, slip op. at 30, with "qualified" merely meaning the new owner of the route also satisfies Department of Transportation ("DOT") regulations, *see id.* at 8-10. Although FedEx assigns routes without nominal charge, the record contains evidence, as the Regional Director expressly found, that at least two contractors were able to sell routes for a profit ranging from \$3,000 to nearly \$16,000. *See id.* at 30-32, 38-39.

In its argument to this court, the Board, echoed by the dissent, discounts this evidence of entrepreneurial opportunity by saying any so-called profit merely represents the value of the vehicles, which were sold along with the routes. But if a vehicle depreciates in value, it is not worth as much as it was before; that is tautological. Here, buyers paid more for a vehicle and route than just the depreciated value of the vehicle-in one instance more than \$10,000 more. Therefore, as the Regional Director did, we find this value *is* profit. *Compare Representation Decision*, slip op. at 38 ("Neal's profit on the sale of his route was only \$3000 to \$6000," and "[a]fter deducting the value of the truck ... it appears that, at best, Ferreira paid Jung somewhere between \$11,000 and \$16,000 for the route.") *with* Dis. Op. at 516 (suggesting no "gain at all" may have been shown). The *amount* of profit may be "murky," as it may be as high as \$6,000 and \$16,000 or as low as \$3,000 or \$11,000, respectively, but the profit is real. *Representation Decision*, slip

op. at 38. That this potential for profit exists is unsurprising: routes are geographically defined, and they likely have value dependent on those geographic specifics which some contractors can better exploit than others. For example, as people move into an area, the ability to profit from that migration varies; some contractors using more efficient methods can continue to serve the entire route, while others cannot.

It is similarly confused to conclude FedEx gives away routes for free. *See* Dis. Op. at 515. A contractor agrees to provide a service in return for compensation, i.e., both sides give consideration. If a contractor does not do what she says, FedEx suffers damages, just as she does if FedEx does not pay what is owed. Servicing a route is not cheap; one needs a truck (which the contractor pays for) and a driver (which the contractor also pays for, either directly or in kind). To say this is giving away a route is to say when one hires a contractor to build a house, one is just giving away a construction opportunity. All of this evidence thus supports finding these contractors to be independent.

The Regional Director, however, thought FedEx's business model distinguishable from those where the Board had concluded the drivers were independent contractors. For example, FedEx requires: contractors to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx's logo in a way larger than that required by DOT regulations. The company insists drivers complete a driving course (or have a year of commercial driving experience, which need not be with FedEx) and be insured, and it ***501 **292** "conducts two customer service rides per year" to audit performance. FedEx provides incentive pay (as well as fuel reimbursements in limited instances) and vehicle availability allotments, and requires contractors have a vehicle and driver available for deliveries Tuesday through Saturday. *Id.* at 508-14. Moreover, FedEx can reconfigure routes if a contractor cannot provide adequate service, though the contractor has five days to prove otherwise, and is entitled to monetary compensation for the diminished value of the route. *Id.* at 512. These aspects of FedEx's operation are distinguishable from the business models in *Dial-A-Mattress*, 326 N.L.R.B. 884 (contractors arranged their own training, could decline work, did not wear uniforms, could use any vehicle, and were provided

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no subsidies or minimum compensation) and *Argix Direct, Inc.*, 343 N.L.R.B. 1017 (2004) (contractors could decline work, delivered to major retailers using any vehicle, and had no guaranteed income).

But those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship. In other words, the distinctions are significant but not sufficient. FedEx Home's business model is somewhat unique. The service is delivering small packages, mostly to residential customers. Unlike some trucking companies, its drivers are not delivering goods that FedEx sells or manufacturers, nor does FedEx move freight for a limited number of large clients. Instead, it is an intermediary between a diffuse group of senders and a broadly diverse group of recipients. With this model comes certain customer demands, including safety. As the Internal Revenue Service ("IRS") persuasively notes, and ordinary experience confirms, a uniform requirement often at least in part "is intended to ensure customer security rather than to control the [driver]." INTERNAL REVENUE SERVICE, EMPLOYMENT TAX GUIDELINES: CLASSIFYING CERTAIN VAN OPERATORS IN THE MOVING INDUSTRY 23, <http://www.irs.gov/pub/irs-utl/van-ops.pdf> (last visited April 3, 2009).^{FN7} And once a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo, for instance by her being a safe and insured driver-which is required by DOT regulations in any event. See *Representation Decision*, slip op. at 8-9, 14, 24.

FN7. We, of course, are *not* deferring to the IRS. See Dis. Op. at 511 n. 10. Our standard of review here is unusual. Though not *de novo*, we must enforce the bounds on the Board's jurisdiction set by Congress. *NAVL*, 869 F.2d at 598. This statement is merely persuasive authority that is relevant in light of our precedent that measures springing from customer demands do not create an employee relationship. *C.C. Eastern*, 60 F.3d at 859.

We have held that constraints imposed by customer demands and government regulations do not determine the employment relationship. See *C.C. Eastern*, 60 F.3d at 859 ("[W]here a company's control over

an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship."); *NAVL*, 869 F.2d at 599 ("[E]mployer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee."); *id.* ("[R]estrictions upon a worker's manner and means of performance that spring from government regulation ... do not necessarily support a conclusion of employment status" because the company "is not controlling the driver," the law is.). As our "emphasis [shifts] to entrepreneurialism," *Corp. Express*, 292 F.3d at 780, these precedents apply *a fortiori*.

*502 293 Likewise, "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards' ... is fully consistent with an independent contractor relationship." *C.C. Eastern*, 60 F.3d at 860 (quoting *NAVL*, 869 F.2d at 603). At the same time, a contractual willingness to share a small part of the risk-for instance, by providing fuel reimbursements when prices jump sharply, or by guaranteeing a certain minimum amount of income for making a vehicle available-does not an employee make. See *Argix Direct, Inc.*, 343 N.L.R.B. at 1019 (contractors were independent even though the "[e]mployer also pays the owner-operators a fuel surcharge when the price of fuel surpasses a preset average").

[10] The Regional Director also emphasized that these "contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages," and that few have seized any of the alleged entrepreneurial opportunities. *Representation Decision*, slip op. at 34, 38. While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors, see *Aurora Packing v. NLRB*, 904 F.2d 73, 76 (D.C.Cir.1990), otherwise companies like FedEx could never hire delivery drivers who *are* independent contractors, a consequence contrary to precedent, see *St. Joseph News Press*, 345 N.L.R.B. at 479. And both the Board and this court have found the failure to take advantage of an opportunity is beside the point. See *C.C. Eastern*, 60 F.3d at 860 (opportunities cannot be ignored unless they are the sort workers "cannot realistically take," and even "one instance" of a driver using such an opportunity can be suffi-

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cient to “show [] there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right”); *Arizona Republic*, 349 N.L.R.B. at 1045. Instead, “it is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.” *C.C. Eastern*, 60 F.3d at 860.^{FN8}

FN8. The Regional Director noted too that “FedEx Home offers what is essentially a take-it-or-leave-it agreement.” But we will “draw no inference of employment status from merely the economic controls which many corporations are able to exercise over independent contractors with whom they contract.” *NAVL*, 869 F.2d at 599.

III.

Our dissenting colleague reads our precedent differently than we do, and thus reaches a different conclusion. Of course the facts in our past holdings are not identical to those here, but there is no reason to distinguish this case from those where we have rejected the Board’s attempt to assert jurisdiction over independent contractors. In fact, this case is relatively straightforward because not only do these contractors have the ability to hire others without FedEx’s participation, only here do they own their routes—as in they can sell them, trade them, or just plain give them away. Moreover, if this court had shown as much deference to the Board as our colleague seems to suggest is its due, we wonder how *C.C. Eastern* and *NAVL* could possibly have been decided the way that they were. Because the dispute turns on precedent, we recommend you read our cases—they are quite short—and see for yourself whether our friend’s fight really is with us at all.

The dissent, for instance, argues that emphasizing entrepreneurialism has only truly begun with this case, and suggests we are doing so here for reasons apart **294 *503 from allegiance to precedent. *See, e.g.*, Dis. Op. at 509-10, 518-19. Lest any be confused, we again quote *Corporate Express*: “[W]e uphold as reasonable the Board’s decision, at the urging of the General Counsel, to focus not upon the employer’s control of the means and manner of the work but instead upon whether the putative inde-

pendent contractors have a ‘significant entrepreneurial opportunity for gain or loss.’ ” 292 F.3d at 780. We explicitly “agree[d] with the Board’s suggestion that the latter factor better captures the distinction between an employee and an independent contractor,” because, as reflected by the Restatement’s comment, it is not “the degree of supervision under which [one] labors but ... the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder,” that better illuminates one’s status. *Id.* We retained the common law test (as is required by the Court’s decision in *United Insurance*), but merely “shift[ed our] emphasis to entrepreneurialism,” using this “emphasis” to evaluate common law factors such as whether the contractor “supplies his own equipment,” *id.* *Corporate Express* is thus doctrinally consistent with *United Insurance* and the Restatement.

Likewise, though conceding ours is a “fair reading of [*Corporate Express*], which contains considerable language regarding entrepreneurial opportunity and the benefits of using such a test,” the dissent nonetheless argues there is a narrower way to understand that case such that it still focuses on the extent of control. Dis. Op. at 508. Put another way, *Corporate Express*—despite its seemingly unambiguous language—to him need not be read as evincing a shift towards entrepreneurialism at all. We cannot adopt that reading because the court affirmatively declined to determine the contractors’ status under a “means and manner test.” *Corp. Express*, 292 F.3d at 780 (“[W]e need not answer that question....”). We take *Corporate Express* at its word.

But even if *Corporate Express* never happened, the result here is unchanged. While on some points *C.C. Eastern* and *NAVL* are distinguishable—for instance, in *C.C. Eastern* there were no appearance requirements for man or machine (though “the tractor must be suitable for the task at hand”), *see* 60 F.3d at 859, as in *NAVL*, 869 F.2d at 600—the overwhelming majority of factors favoring independent contractor status are the same, and, importantly, this case is particularly straightforward because only here can the contractors own and transfer the proprietary interest in their routes. Moreover, all contractors here own their vehicles, something that cannot be said in *NAVL*, where not even the *majority* did. *See id.* True, these drivers—who need not be, and not always are, the same per-

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sons as the contractors—must wear uniforms and the like, but a rule based on concern for customer service does not create an employee relationship. *See C.C. Eastern*, 60 F.3d at 859. And while in *C.C. Eastern* “we [were] able to find ... only one instance of a driver” using an entrepreneurial opportunity, that lone “example show[ed] that there [was] no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right.” *Id.* at 860. In this case, we need not and do not rely on just one example of the exercise of rights. Even on an incomplete record there are many such examples; routes have been sold for a profit; substitutes and helpers have been hired without FedEx's involvement; one contractor has negotiated for higher rates; and contractors have incorporated. Under the fairest reading of our precedent, these *are* independent contractors.

****295 *504 IV.**

We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent. The evidence might have been stronger still had not the Regional Director erroneously excluded the national data. But even as the record stands, the Board's determination was legally erroneous.

Accordingly, we grant the petition, vacate the Board's order, and deny the cross-application for enforcement.

So ordered.

GARLAND, Circuit Judge, dissenting in part:
In *National Labor Relations Board v. United Insurance Co. of America*, the Supreme Court held that

Congress intended “the Board and the courts” to “apply the common-law agency test ... in distinguishing an employee from an independent contractor” under the National Labor Relations Act (NLRA). 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968). In this case, the National Labor Relations Board (NLRB) applied that multi-factor test and concluded that FedEx Home Delivery's drivers are the company's employees. My colleagues disagree, concluding that the drivers are independent contractors.

This is not merely a factual dispute. Underlying my colleagues' conclusion is their view that the common-law test has gradually evolved until one factor—“whether the position presents the opportunities and risks inherent in entrepreneurialism”—has become the focus of the test. *Op.* at 497, 503. Moreover, in their view, this factor can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity. *Id.* at 502.

Although I do not doubt my colleagues' sincerity, I detect no such evolution. To the contrary, the Board and the courts have continued to follow the Supreme Court's injunction that “there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *United Ins.*, 390 U.S. at 258, 88 S.Ct. 988. The common-law test may well be “unwieldy,” *Op.* at 497, but a court of appeals may not “displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*” *United Ins.*, 390 U.S. at 260, 88 S.Ct. 988 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). While the NLRB may have authority to alter the focus of the common-law test, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 863-64, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), this court does not. Because “the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, ... the Court of Appeals should have enforced the Board's order.” *United Ins.*, 390 U.S. at 260, 88 S.Ct. 988. Accordingly, on the ****296 *505** existing record, I cannot join in condemning the Board's determination.

I can and do, however, fault the Board's refusal to give FedEx a fair opportunity to make its case under

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the appropriate test. As the court correctly notes, the Regional Director refused to permit FedEx to introduce evidence that may be relevant to the question of whether its drivers have significant entrepreneurial opportunities. Regardless of whether one considers entrepreneurial opportunity as only one factor (as it is in the common-law test) or as the focus of the test (as my colleagues believe it to be), FedEx surely had the right to introduce the evidence necessary to make its case.

I

A

The NLRA makes it “an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act, provides that the term “employee” “shall not include ... any individual having the status of an independent contractor.” 29 U.S.C. § 152(3). In *United Insurance*, the Supreme Court held that the “obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.... Thus there is no doubt that we should apply the common-law agency test ... in distinguishing an employee from an independent contractor.” *United Ins.*, 390 U.S. at 256, 88 S.Ct. 988. ^{FN1} The Court recognized that “[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.... In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *Id.* at 258, 88 S.Ct. 988.

FN1. See also *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) (noting that “[i]n the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law

agency doctrine” (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989)))).

The cases under review in *United Insurance* presented the question of whether certain agents of an insurance company were employees or independent contractors. The Supreme Court determined that

the decisive factors in these cases become the following: the agents ... perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the “Agent's Commission Plan” that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the **297 *506 agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

Id. at 258-59, 88 S.Ct. 988. The Court confirmed that the Board had “examined all of these facts and found that they showed the debit agents to be employees.” *Id.* at 260, 88 S.Ct. 988. This finding, the Court said, “involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor?” *Id.* Although the Court noted that such a determination “involved no special administrative expertise that a court does not possess,” it nonetheless held that, “‘even as to matters not requiring expertise,’ ” a court of appeals may not “‘displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*’ ” *Id.* (quoting *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. 456). As long as it “can be said for the Board's decision ... that it made a choice between two fairly conflicting

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views, ... the Court of Appeals should ... enforce[] the Board's order. It [is] error to refuse to do so." *Id.*

In the succeeding decades, the NLRB has consistently "[a]ppl[ied] the common-law agency test as interpreted by the Supreme Court in *NLRB v. United Insurance Co.*" to determine whether a worker is an employee or an independent contractor. *Roadway Package Sys., Inc. (Roadway II)*, 326 N.L.R.B. 842, 843 (1998); *id.* at 849 (declaring that the Supreme Court's "cases teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it").^{FN2} In so doing, the Board has looked to the Restatement (Second) of Agency for the factors relevant to making that determination. *See, e.g.,* cases cited *supra* note 2. Those ten (nonexhaustive) factors are set out in the margin.^{FN3} Following the injunction of the Supreme Court, the Board has continued to reaffirm that " 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.' " *Roadway III*, 326 N.L.R.B. at 850 (quoting *United Ins.*, 390 U.S. at 258, 88 S.Ct. 988); *see, e.g., Ariz. Republic*, 349 N.L.R.B. at 1042-46; *St. Joseph News-Press*, 345 N.L.R.B. at 477-78.

FN2. *Accord Ariz. Republic*, 349 N.L.R.B. 1040, 1042 (2007); *St. Joseph News-Press*, 345 N.L.R.B. 474, 477-78 (2005); *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 & n. 13 (2004).

FN3. The Restatement provides:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the

employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2).

This Circuit has likewise recognized that "Congress intended that traditional agency **298 *507 law principles guide the determination whether workers are employees ... or independent contractors," *N. Am. Van Lines, Inc. v. NLRB (NAVL)*, 869 F.2d 596, 598 (D.C.Cir.1989), and has looked to the Restatement factors for those principles, *id.* at 599-600. *See Local 777, Democratic Union Org. Comm. v. NLRB (Local 777)*, 603 F.2d 862, 872-73 (D.C.Cir.1978); *cf. Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (citing both *United Insurance* and the Restatement's "nonexhaustive list of factors relevant to determining whether a hired party is an employee" in construing the meaning of the term "employee" under the Copyright Act of 1976). "[T]he ultimate determination," we have said, "requires a broad examination of all facets of the relationship between [the] company and" the worker. *NAVL*, 869 F.2d at 604 (citing *United Ins.*, 390 U.S. at 258, 88 S.Ct. 988); *see C.C.*

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Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C.Cir.1995). As we further noted in *NAVL*, “[i]n applying traditional agency law principles, the NLRB and the courts have adopted a right-to-control test.” 869 F.2d at 599. That “test requires an evaluation of all the circumstances,” but it focuses the greatest attention on those factors indicating “ ‘the extent of the actual supervision exercised by a putative employer over the “means and manner” of the workers’ performance.’ ” *Id.* (quoting *Local 777*, 603 F.2d at 873); see *C.C. Eastern*, 60 F.3d at 858 (same).^{FN4}

FN4. See also *Seattle Opera v. NLRB*, 292 F.3d 757, 765 & n. 11 (D.C.Cir.2002) (applying the “common law definition” and concluding that auxiliary choristers are employees because “the Opera possesses the right to control [them] in the material details of their performance”); *Constr., Bldg. Material, Ice & Coal Drivers v. NLRB*, 899 F.2d 1238, 1242 (D.C.Cir.1990) (noting that “[t]he right to control the ‘means and manner’ of job performance ... is the *leitmotiv* recurrent in the cases” that consider whether construction truck drivers are employees or independent contractors).

B

My colleagues contend that “[g]radually,” both this Court and the Board shifted away from “the unwieldy control inquiry in favor of a more accurate proxy: whether the ‘putative independent contractors have significant entrepreneurial opportunity for gain or loss.’ ” Op. at 496-97 (quoting *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C.Cir.2002)). “[W]hile all the considerations at common law remain in play,” my colleagues maintain that now the “emphasis” is on “whether the position presents the opportunities and risks inherent in entrepreneurialism.” *Id.* at 497.

The cases, however, do not evidence this gradual evolution to a test that emphasizes entrepreneurial opportunity. According to my colleagues, the evolutionary process began “implicit[ly]” in our decisions in *NAVL* and *C.C. Eastern*. Op. at 497. It is true that those decisions listed entrepreneurial opportunity as a relevant factor, notwithstanding that it is not expressly mentioned in either *United Insurance* or the Restatement (or in any comment to the Restatement

^{FN5}). But those decisions explicitly stated that entrepreneurial opportunity was only one of multiple factors to consider-and not the most important one.

FN5. Restatement comment (d), to which my colleagues refer, states only that a “full-time cook is regarded as a servant”-and *not* an independent contractor-“although it is understood that the employer will exercise no control over the cooking.” Restatement (Second) of Agency § 220(1) cmt. d. The comment does not mention entrepreneurial opportunity, which plays no role in its analysis of the cook’s status.

*508 **299 In *C.C. Eastern*, for example, we concluded that the entrepreneurial opportunities afforded by a driver’s “right to hire ... his own employees to help him” and to “use his tractor himself to haul for anyone” had “some probative weight,” but that they were “*less important* to our determination of the drivers’ status than [wa]s the absence of evidence that the Company supervises the means and manner of their work.” 60 F.3d at 859, 860 (emphasis added).^{FN6} Similarly, we said in *NAVL* that: “Other factors [than control] weigh in the determination,” including “the extent to which the worker has assumed entrepreneurial risk and stands to gain from risks undertaken.... However, *these factors are of far less importance* than the central inquiry whether the corporation exercises control over the manner and means of the details of the worker’s performance; indeed, these factors are probative only to the extent that they bear upon and further that inquiry.” 869 F.2d at 599-600 (emphasis added). Nothing in these unambiguous declarations suggests any kind of “struggle[] to articulate exactly what we meant” in those cases. Op. at 496. The contention that *C.C. Eastern* and *NAVL* implicitly signaled the advent of an evolutionary process, *id.* at 496-97, is simply incorrect.

FN6. See also *C.C. Eastern*, 60 F.3d at 858 (“Whether a worker is an independent contractor or an employee is a function of the amount of control that the company has over the way in which the worker performs his job.”).

My colleagues cite only one case from this (or any) Circuit, our 2002 opinion in *Corporate Express*, for the proposition that entrepreneurial opportunity has

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“explicit[ly]” become the emphasis of the independent contractor test. Op. at 497. I do not dispute that theirs is one fair reading of that opinion, which contains considerable language regarding entrepreneurial opportunity and the benefits of using such a test. But *Corporate Express* did not purport to overrule Supreme Court, Circuit, and Board precedent. Indeed, in affirming as reasonable the Board’s determination that the owner-operator drivers in that case were *not* independent contractors, the court not only agreed that they lacked entrepreneurial opportunity, but also acknowledged that the Board may have correctly determined that the employer controlled the way in which they performed their jobs. *Corporate Express*, 292 F.3d at 779-80. Hence, *Corporate Express* can also be read as merely holding that the Board was reasonable in determining that entrepreneurial opportunity tipped the balance in *that* case—a logical result given that the court thought the vector of the other common-law factors somewhat unclear, *see id.* at 780 & n. *, while finding that the “owner-operators lacked *all* entrepreneurial opportunity,” *id.* at 780-81 (emphasis added). And when there are two possible readings of an opinion, only one of which is consistent with earlier precedent, the appropriate course is to adopt the consistent reading—on the presumption that the court followed the command of *stare decisis*. Cf. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C.Cir.1999) (“In the event of conflicting panel opinions ... the earlier one controls, as one panel of this court may not overrule another.” (internal quotation marks and citation omitted)).^{FN7}

FN7. I do not suggest that *Corporate Express* should be read as “focus[ing] on the extent of control,” Op. at 503, but rather that it should not be read as giving primacy to entrepreneurial opportunity. Moreover, to the extent that there has been a shift of emphasis in the Board’s own cases, it has been toward regarding *no* single factor as primary—whether it be opportunity or control. *See St. Joseph News-Press*, 345 N.L.R.B. at 478; *Roadway III*, 326 N.L.R.B. at 850.

***509 **300** There was certainly nothing in the NLRB’s opinion in *Corporate Express* to suggest that entrepreneurial opportunity had become the focus of the Board’s own analysis. To the contrary, the Board simply followed its traditional approach of examining

the common-law factors—including, *inter alia*, both entrepreneurial opportunity and employer control. *Corporate Express Delivery Sys.*, 332 N.L.R.B. 1522, 1522 (2000). After doing so, it concluded that, “weighing *all of the incidents of their relationship* with the Respondent, we find that the owner-operators are employees and not independent contractors.” *Id.* (emphasis added).

My colleagues maintain that the evolution toward an emphasis on entrepreneurial opportunity “seems to play a part in the Board’s own cases,” although they “readily concede the Board’s language has not been ... unambiguous.” Op. at 498. The principal NLRB decision upon which they rely is *Arizona Republic*, a decision issued *after* the Regional Director’s decision in this case. *Ariz. Republic*, 349 N.L.R.B. 1040 (May 8, 2007). But *Arizona Republic* does not support my colleagues’ proposition either. Once again, it is true that *one* of the factors weighing in favor of the independent contractor determination in that case was “entrepreneurial potential.” *Id.* at 1042. There simply is no indication, however, that this factor was the “emphasis” of the test *Arizona Republic* applied. To the contrary, the Board announced that, “[i]n determining the status of the [newspaper] carriers in this case, we rely on ... the common-law factors.” *Id.* at 1043. It then proceeded to examine the Restatement factors individually, *id.* at 1043-46, repeating its oft-stated mantra that “this list of factors is not exclusive or exhaustive, and that, in applying the common-law agency test, [we] will consider ‘*all* the incidents of the individual’s relationship to the employing entity,’” *id.* at 1042 (quoting *Roadway III*, 326 N.L.R.B. at 850). The Board ultimately concluded that the majority of the factors “weigh[ed] in favor” of finding that the carriers were independent contractors. *Id.* at 1043-46. One of those factors was entrepreneurial opportunity; another was the employer’s lack of control over the carriers. *Id.* But the Board gave pride of place to neither one, declaring only that the common-law factors, “on balance,” yielded the conclusion that the carriers were independent contractors. *Id.* at 1043. The same traditional common-law analysis was employed in both of the other NLRB decisions that my colleagues cite. Op. at 498.^{FN8}

FN8. *See St. Joseph News-Press*, 345 N.L.R.B. at 478 (noting that “the Board’s analysis ... [has] recognized, as does Supreme Court law, that both the right of con-

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trol and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors”); *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 891 (1998) (declaring that “the list of factors differentiating ‘employee’ from ‘independent contractor’ status under the common-law agency test is nonexhaustive, with no one factor being decisive”).

Finally, I do not dispute my colleagues’ contention that the multi-factor analysis of the common law is “not especially amenable to any sort of bright-line rule.” Op. at 495-96. Although they acknowledge that an emphasis on entrepreneurial opportunity “does not make applying the test purely mechanical,” they maintain that “the line drawing is easier” under that test. *Id.* at 498. There is no question that the common-law agency test makes for difficult line drawing. Indeed, the Supreme Court expressly acknowledged as much when it announced the test. *See United Ins.*, 390 U.S. at 258, 88 S.Ct. 988 (“There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or ****301 *510** an independent contractor....”). It may also be true that line drawing under an entrepreneurial opportunity test would be easier, although that is hardly assured. After all, while my colleagues perceive clear entrepreneurial opportunity in this case, neither the Board nor I see it that way. *See infra* Part II.

But the comparative practical advantage of one or the other of these two tests has no bearing on which one we must apply. Although the NLRB may have authority to alter the test, or at least to alter its focus, *see Chevron*, 467 U.S. at 842-43, 863-64, 104 S.Ct. 2778, this court does not. Until the Supreme Court or the Board tells us differently, we must continue to apply the multi-factor common-law test as set forth by the Supreme Court and applied by the Board.

II

In this case, the NLRB’s Regional Director applied the traditional “common law agency test.” *FedEx Home Delivery and Local 25*, N.L.R.B. Case Nos. 1-RC-22034, 22035, slip op. at 33 (First Region, Sept. 20, 2006) [hereinafter Regional Director’s Decision]. In so doing, she “consider[ed] all the incidents of the

individual’s relationship with the employing entity,” *id.*, including both the extent of FedEx’s control over the drivers and the extent of the drivers’ entrepreneurial opportunities, *id.* at 35-36. Although the Regional Director acknowledged many of the facts cited by my colleagues in support of FedEx’s contention that the contractors are independent contractors, facts that I do not rehearse here, she concluded that they were outweighed by other factors supporting employee status. *Id.* at 39. Part II.A reviews the bulk of the factors that the Director found to support employee status. Part II.B discusses her analysis of the issue of entrepreneurial opportunity.

A

In a lengthy and considered opinion, the Regional Director found the following facts to favor a determination that FedEx Home Delivery’s drivers, whom the company calls “contractors,” were employees:

[A]ll the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home’s normal operations, the delivery of packages.... [A]ll contractors must do business in the name of FedEx Home[,] ... wear [] FedEx Home-approved uniforms and badges, ... [and] operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors.... No prior delivery training or experience is required, and FedEx Home will train those with no experience....

... [C]ontractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor ... and no current contractors at either Wilmington terminal have ever done so....

... FedEx Home exercises substantial control over all the contractors’ performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement.... [It] retains the right to reconfigure the service area unilaterally. All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have discretion not

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to provide delivery service on a given day. While all contractors control their starting times and take breaks when they wish, their control over their work schedule is **302 *511 circumscribed by the requirement that all packages be delivered on the day of assignment....

... FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status.... FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own.... FedEx Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program. FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with \$100 per accounting period to help defray repair costs[, and] requires contractors to permit FedEx Home to pay certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

Regional Director's Decision at 34-37 (internal citations omitted). Many of these are the kind of facts that *United Insurance*, the Restatement, and numerous Circuit and Board decisions confirm are indicative of employee status.^{FN9}

FN9. *See, e.g., United Ins.*, 390 U.S. at 256-58, 88 S.Ct. 988; *NAVL*, 869 F.2d at 600-04; *Local 777*, 603 F.2d at 873-81; *Argix Direct*, 343 N.L.R.B. at 1017-20; *Roadway III*, 326 N.L.R.B. at 843-48, 851-54; RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

My colleagues nonetheless reject the import of many of these facts, arguing that they merely “reflect differences in the type of service the contractors are providing rather than differences in the employment relationship.” Op. at 501. In particular, the court rejects the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the FedEx logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to

two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday. *Id.* The courts and the Board,^{FN10} however, have repeatedly regarded the presence or absence of these very factors as important in determining whether a worker is an employee or independent contractor.^{FN11}

FN10. It is to the precedents of the Board, and not to those of the Internal Revenue Service, that we owe deference, as only the former is charged with enforcing the provisions of the NLRA. *Compare* Op. at 501 (citing an IRS guideline to support the proposition that a uniform requirement does not reflect employer control), *with, e.g., Roadway III*, 326 N.L.R.B. at 851-52 (citing the employer's requirement that its drivers wear an “approved uniform” as evidence that they are employees).

FN11. *See, e.g., United Ins.*, 390 U.S. at 258-59, 88 S.Ct. 988 (listing, among other “decisive factors” of employee status, the fact that the insurance agents “need not have any prior training or experience, but are trained by company supervisory personnel,” and that “they do business in the company's name”); *C.C. Eastern*, 60 F.3d at 858 (finding the following facts, among many others, to be indicative of an independent contractor relationship: the employer does not “exercise any control over the drivers' dress or appearance” or “require the tractors to be of any specific type, size, or color”); *NAVL*, 869 F.2d at 600 (citing, among other “principal reasons” why the drivers are independent contractors, the fact that they “retain nearly absolute control” over “their dress” and “when they work”); *Corporate Express Delivery Sys.*, 332 N.L.R.B. at 1522 (finding that owner-operator drivers are employees because, *inter alia*, “[t]hey are required to display the Respondent's logo on their vehicles and to wear certain color trousers, shirts, and shoes, if they opt not to wear uniforms”); *Roadway III*, 326 N.L.R.B. at 851-52 (citing, among other factors in concluding that drivers are employees, the facts that: “they need not have any prior training or experience, but receive training from the com-

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pany; they do business in the company's name"; they wear an "approved uniform"; and there is a " 'business support package' [that] helps ensure that the drivers' vehicles are properly maintained").

*512 **303 One factor that the Regional Director emphasized was that the drivers "perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages" to homes. Op. at 502. Although my colleagues acknowledge that "the essential nature of a worker's role is a legitimate consideration," they minimize it as "not determinative." *Id.* But that is true of every factor in the common-law test. See *United Ins.*, 390 U.S. at 258, 88 S.Ct. 988 (holding that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"). Moreover, the cases have repeatedly cited this particular factor in concluding that workers are employees.^{FN12} In short, there is no basis for discounting the significance of the traditional factors upon which the Regional Director relied in concluding that the FedEx drivers are employees rather than independent contractors.

FN12. See, e.g., *United Ins.*, 390 U.S. at 258-59, 88 S.Ct. 988 (holding that the fact that the insurance agents "perform functions that are an essential part of the company's normal operations" is a "decisive factor[]"); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C.Cir.1990) (noting that "whether a worker plays an essential role in a company's business" is a factor "presumably because the company more likely than not would want to exercise control over such important personnel"); *Roadway III*, 326 N.L.R.B. at 851 (citing as a factor that the drivers "perform[] essential functions that allow Roadway to compete in the small package delivery market"); see also RESTATEMENT (SECOND) OF AGENCY § 220(2)(h).

B

In accord with court and agency precedent, the Regional Director also considered whether FedEx Home Delivery's drivers have significant entrepreneurial opportunity for gain or loss. For the following rea-

sons, she concluded that the evidence of entrepreneurial opportunity was weak:

The contractors' compensation package also supports employee status. With [one] exception ..., FedEx Home unilaterally establishes the rates of compensation for all contractors.... [T]here is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how many deliveries they will make each day.... A contractor's territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of the contractors' personal initiative. FedEx Home also shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement.

Regional Director's Decision at 37.

Notwithstanding these findings, my colleagues perceive many "characteristics of entrepreneurial potential" in the drivers' relationship to FedEx. Op. at 498. Some of the characteristics they cite, however, appear to have little to do with entrepreneurial opportunity. For example, the court's opinion notes that FedEx's Standard Contractor Operating Agreement "specifies the contractor is not an employee of FedEx for any purpose." *Id.* at 498-99. But the label FedEx puts on its relationship**304 *513 with its workers does not affect whether they have entrepreneurial opportunity for gain or loss.^{FN13}

FN13. See *Corporate Express*, 292 F.3d at 780 n. * (affirming the Board's determination that, although drivers "were described in their contract as 'independent contractors,' " they were actually employees). Nor is there much significance to the fact that FedEx does not "withhold taxes." Op. at 498 n. 4. See *Seattle Opera*, 292 F.3d at 764 n. 8 (noting that " 'if an employer could confer independent contractor [i.e., non-employee] status through the absence of payroll deductions there would be few employees falling under the protection of the Act' " (quoting *J.*

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Huizinga Cartage Co. v. NLRB, 941 F.2d 616, 620 (7th Cir.1991)). Compare also Op. at 498 n. 4 (noting that FedEx “does not provide benefits”), with *Corporate Express*, 292 F.3d at 780 n. * (finding that drivers were not independent contractors notwithstanding that they “received no life or health insurance” benefits from the company).

My colleagues also observe that FedEx “may not prescribe hours of work [or] whether or when the contractors take breaks,” and that the drivers “are not subject to reprimands or other discipline,” Op. at 498—all of which go not to the workers' entrepreneurial opportunity but to the extent of the employer's control, a factor discussed in Part II.A above. In any event, although FedEx does not fix specific hours or break times, it does require its contractors to provide delivery services every day, Tuesday through Saturday, and to finish each day's deliveries by the end of the day. Regional Director's Decision at 17, 36.^{FN14} The insurance agents in *United Insurance* had neither fixed hours nor fixed break times, yet the Supreme Court affirmed the Board's determination that they were employees. See 390 U.S. at 258, 88 S.Ct. 988 (noting that the “agents perform their work primarily away from the company's offices and fix their own hours of work and work days”). And while FedEx does not have a disciplinary system based on “reprimands,” Op. at 498, it does deny drivers bonuses if they fail release audits and uses both counseling and termination as tools to ensure compliance with work rules. Regional Director's Decision at 12, 21. Again, the same was true in *United Insurance*. See 390 U.S. at 258, 88 S.Ct. 988 (noting that if a complaint against an agent is “well founded, the manager talks with the agent to set him straight,” “caution[s]” him, and “[i]f improvement does not follow,” the company may “fire [him] at any time”).

FN14. The Regional Director also noted that a driver cannot take a vacation, or even a day off, when he wants to, without providing a replacement. See Regional Director's Decision at 26; *id.* at 40 (distinguishing other cases in part on the basis that drivers for those companies were “not required to provide delivery services each day” and “were free to elect not to accept routes on specific days”). Even those who participate in FedEx's Time Off Program must schedule

vacations in advance, and weeks are assigned by seniority. *Id.* at 25-26.

In addition, my colleagues state that “[a]t least one contractor has negotiated with FedEx for higher fees.” Op. at 499. Without agreeing that a worker's ability to negotiate his salary takes him out of the category of “employee,” the Regional Director rightly regarded the only evidence on this point as quite weak: One former manager testified that one former driver “once requested some customer service rides to gauge if his core zone payment was set properly, and the payment was raised as a result, although [the manager] was not sure by how much. There is no evidence that any other contractors at the Wilmington facilities have negotiated a change in their core zone payment.” Regional Director's Decision at 20.

Closer to the mark on the issue of entrepreneurial opportunity is the court's observation that drivers “are responsible for all the costs associated with operating and *305 *514 maintaining their vehicles.” Op. at 498.^{FN15} BUT FEDEX DOES MUCH TO liMit the drivers' risk of loss. as the Regional Director found, the company “shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement” and guarantees them a significant amount of income “just for showing up.” Regional Director's Decision at 37. My colleagues maintain that this “contractual willingness to share a small part of the risk ... does not an employee make.” Op. at 502. The NLRB reasonably differs, as to both the magnitude of the shared risk and its import.

FN15. My colleagues also note that “all contractors here own their vehicles.” Op. at 503. The same was true in *Corporate Express*, but we nonetheless found that those drivers had “no real entrepreneurial opportunities.” 292 F.3d at 780 n. *.

My colleagues further note that, under the Operator Agreement, drivers “may use the vehicles for other commercial or personal purposes” when they are not in the service of FedEx, “so long as they remove or mask all FedEx Home logos and markings.” Op. at 498. But do the drivers actually use their trucks for other purposes? Not so much. Indeed, the most that can be said is that “some do use them for personal uses like moving family members,” *id.*, hardly an indicator of a “significant entrepreneurial opportu-

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nity for gain or loss,' ” *id.* at 497 (quoting *Corporate Express*, 292 F.3d at 780). Although the drivers' use of their trucks to conduct business independent of FedEx could well be an indicator of entrepreneurialism, the Regional Director found that “no current contractors at either Wilmington terminal have ever done so.” Regional Director's Decision at 35.^{FN16} Nor would they have much time, even if they wanted to. The Operator Agreement states that the company “seek [s] to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment.” FedEx Home Delivery Standard Contractor Operating Agreement, Private Background Statement (J.A. 720) (emphasis added). The contractor must provide daily service,^{FN17} and “[w]hile the Equipment is in the service of [FedEx], it shall be used by Contractor exclusively for the carriage of the goods of [FedEx], and for no other purpose.” *Id.* § 1.4 (J.A. 722).

FN16. A former manager testified that one former driver, Alan Douglass, used his truck to deliver lawn mowers for a repair company. Regional Director's Decision at 15.

FN17. It is true that a driver could take on extra work on his weekends (although none do). But *C.C. Eastern* did not hold that this would make him an independent contractor, Op. at 499 n. 5—no more than taking on a second, weekend job would turn any full-time employee into an “entrepreneur.”

Based on these facts, the Regional Director found that the

“lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the ... drivers and more a matter of the obstacles created by their relationship with [the Company.]” Thus, the contractors' contractual right to engage in outside business falls within the category of “entrepreneurial opportunities that they cannot realistically take,” because the contractors' work schedules prevent them from taking on additional business during their off-hours during the workweek.

Regional Director's Decision at 35 (quoting *Roadway III*, 326 N.L.R.B. at 851 & n. 36). That is at least a fair conclusion, and consequently one that we may not displace. See *United Ins.*, 390 U.S. at 260, 88

S.Ct. 988.

*515 **306 Another indicator of entrepreneurialism to which my colleagues point is the fact that operators may hire drivers as temporary replacements and occasional helpers. I agree that the “ability to hire ‘others to do the Company's work’ is no small thing in evaluating ‘entrepreneurial opportunity.’ ” Op. at 500 (quoting *Corporate Express*, 292 F.3d at 780-81). But see *Roadway III*, 326 N.L.R.B. at 845 (finding that drivers are employees notwithstanding that, “without prior approval from Roadway, [they] may also use helpers or replacement drivers on their routes”). Once again, however, the record evidence on this issue was weak. The Regional Director found that “many contractors who hire substitute drivers use the FedEx Home ‘temp’ drivers,” Regional Director's Decision at 29, and that the record did not reveal how often contractors hired outside helpers, *id.* at 30. Nor was there any evidence that any operator at the terminals at issue in this case ever hired a substitute on a full-time basis.

My colleagues also note the fact that FedEx drivers “may contract to serve multiple routes,” and that if they do so, they may hire other drivers to handle those routes. Op. at 499. Although this, too, may indicate entrepreneurial opportunity, there were only 3 multiple-route drivers operating out of the Wilmington facilities. Regional Director's Decision at 28. This is as compared to a case like *Arizona Republic*, in which the Board determined that newspaper carriers were independent contractors after finding that 363 of them had multiple routes. *Ariz. Republic*, 349 N.L.R.B. at 1045 n. 6. Moreover, the Regional Director excluded multiple-route drivers from the bargaining unit on the ground that they were not employees but rather statutory supervisors. Regional Director's Decision at 42-43.

My colleagues find particularly significant the fact that drivers have a contractual right to sell their routes, and that this could provide an opportunity for profit. That theoretical possibility, however, is tightly constrained. The drivers may sell only to those buyers whom FedEx accepts as qualified; the company gives out routes without charge,^{FN18} as it did at the two Wilmington terminals; and FedEx can reconfigure a route, “in its sole discretion,” at any time. Regional Director's Decision at 16 (referencing the FedEx Operating Agreement); see *id.* at 38. These

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facts cannot help but limit (or eliminate) any opportunity for profit. *See id.* at 60 n. 73.

FN18. There is nothing confused about saying that FedEx gives out routes without charge when it does not charge anything for routes. *See Op.* at 500. Of course the driver agrees to provide delivery service on the route, and of course FedEx pays compensation for that service. *Id.* But the fact that FedEx will give a new driver a route without charging for it, and can reconfigure any route that a driver purchases from a former driver, plainly constrains the value of the latter.

In light of these constraints, it is not surprising that, although there was evidence that drivers abandoned their routes without selling them, *id.* at 32, there was little evidence that any driver had ever materially profited from a sale: “[T]here is no evidence that any Ballardvale contractor has ever sold a route,” and there is evidence of only one single-route sale at Jewel Drive. *Id.* at 31, 38.^{FN19} The only evidence of profit on that sale was the uncorroborated testimony of the former **307 *516 operator that he sold the route and truck together for at least \$3000 more than the truck’s market value, minus \$1000 he paid to the broker. *Id.* at 31-32. As the Regional Director noted, the fact that the sale was “combined with the sale of a truck ... makes the portion attributable to the route murky.” *Id.* at 38. Based on the operator’s statement alone, he may have netted no more than \$2000—without factoring in his expenses over the two years he had the truck and route. More important, the evidence that there was any gain at all was “murky” indeed. As the Regional Director pointed out, although the operator claimed that he had a bill of sale to support his testimony, and told the hearing officer that he would produce it, he never did. *Id.* at 57 n. 59. Given that the burden is on the proponent of independent contractor status to prove its case,^{FN20} it was not unreasonable for the Director to conclude that FedEx had failed to do so.

FN19. The only other sale was by a multiple-route driver. The driver, Timothy Jung, received about \$36,000 for his truck—for which he had paid about \$35,000—together with one of his routes. Jung abandoned his second route without receiving anything for

it. Regional Director’s Decision at 32, 38. “In these circumstances,” the Regional Director reasonably found “the evidence of only two route sales too insubstantial to support a finding of independent contractor status.” *Id.* at 38-39.

FN20. *See Argix Direct*, 343 N.L.R.B. at 1020; *BKN, Inc.*, 333 N.L.R.B. 143, 144 (2001); *Cent. Transport, Inc.*, 247 N.L.R.B. 1482, 1483 n. 1 (1980); *see also NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710-12, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001) (affirming the Board’s rule that the burden of proof is on the party claiming that a worker is a supervisor rather than an employee).

C

It would be a mistake, however, to read the court’s opinion as reflecting nothing more than a factual disagreement with the NLRB, even on the question of whether the drivers had entrepreneurial opportunity. There is something more important at stake here. In concluding that the indicia of entrepreneurial opportunity were weak, the Regional Director emphasized that few operators seized any of the opportunities that allegedly were available to them. Accordingly, she adhered to the NLRB’s precedent in *Roadway III*, which involved FedEx Home’s predecessor corporation, wherein the “Board found that evidence of a few ... sales ... [was] insufficient to support a finding of independent contractor status, particularly since it was unclear from the record whether any driver had profited materially from a sale.” Regional Director’s Decision at 38 (citing 326 N.L.R.B. at 853).

My colleagues, by contrast, maintain that the failure to actually exercise theoretical opportunities is “beside the point” because “it is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant.” *Op.* at 502 (quoting *C.C. Eastern*, 60 F.3d at 860). But the proper emphasis in that quotation from our *C.C. Eastern* opinion is on the word “regular.” It may not be necessary for workers to *regularly* exercise their right to engage in entrepreneurial activity for that factor to weigh in the balance, but “if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then

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that does not add any weight to the Company's claim that the workers are independent contractors." *C.C. Eastern*, 60 F.3d at 860.

Quoting *C.C. Eastern* and citing *Arizona Republic*, my colleagues suggest that "even 'one instance' of a driver using such an opportunity can be sufficient to 'show[] there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right.'" Op. at 502. But all *C.C. Eastern* held was that under those circumstances, the Board had erred in "discount[ing] to zero" the significance of that single factor in the traditional multi-factor test. *C.C. Eastern*, 60 F.3d at 860. Nor is there anything in *Arizona Republic* to suggest that the Board believes that the exercise of contractual opportunity by one or even a small number of drivers can be sufficient. In that case, **308 *517 "[m]any carriers h[e]ld other jobs," "40 percent of the carriers actually solicited new subscriptions," and 363 carriers-roughly 29 percent of all carriers-had multiple routes. 349 N.L.R.B. at 1045; *id.* at 1045 n. 6. It was in this context, in which "many" carriers held other jobs, solicited business, and had multiple routes-and hence had proven opportunity-that the Board said "the fact that many [other] carriers choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so." *Id.* at 1045; *compare* Op. at 498. In the instant case, by contrast, no FedEx driver has another job or solicits business from his delivery customers,^{FN21} and only three have multiple routes. Regional Director's Decision at 7, 28.

FN21. The closest FedEx comes to contending that any driver has solicited business-and it is not very close-is its contention that one driver "asked the retailer L.L. Bean to ship him some catalogs to distribute to his customers to generate more L.L. Bean deliveries." Regional Director's Decision at 53 n. 33.

The import of my colleagues' suggestion that one or even a few examples of the exercise of contractual rights can be enough to decide the entrepreneurialism factor is magnified by their view that this factor is not just one element in a multi-factor test, but rather the test's "emphasis"-so that an insubstantial exercise may, in effect, tilt the entire outcome.^{FN22} That was certainly not the role that entrepreneurialism played

in *C.C. Eastern*, in which we held that, although indicia of entrepreneurial opportunity did "have some probative weight," they were "less important to our determination of the drivers' status than ... the absence of evidence that the Company supervises the means and manner of their work." 60 F.3d at 859; *see id.* at 860. Nor has it played that role in any other case.

FN22. The significance of designating entrepreneurialism as the emphasis of the test is not diminished by saying that it is a "principle by which to evaluate [the other common-law factors] in cases where some factors cut one way and some the other." Op. at 7. This is particularly true because the opinion elevates no other principle to that role. Cases in which factors cut in different directions are the only cases at issue, as no determinative principle is required when all the factors point in the same direction.

It is not unreasonable for the NLRB to take the position that a material number of workers must actually take advantage of an opportunity before it will conclude that the opportunity is significant and realistic rather than insubstantial and theoretical. *See* Regional Director's Decision at 39. Even if that is not the better rule, "the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order." *United Ins.*, 390 U.S. at 260, 88 S.Ct. 988.

III

But there is a rub. Perhaps recognizing the thinness of the record, FedEx attempted to improve its proof of entrepreneurial opportunity by proffering "system-wide evidence concerning the number of route sales and the amount of profit, if any, on any such sale." Order, *FedEx Home Delivery*, N.L.R.B. Case Nos. 1-RC-22034, 22035 (Nov. 8, 2006) (Battista, Chrmn., dissenting). The Regional Director, however, "refus[ed] to permit the Employer to introduce" this evidence. *Id.* In light of that refusal, the Chairman of the NLRB dissented from the denial of Board review, protesting that this "evidence may be relevant to the issue of whether the drivers have an entrepreneurial interest in their position." *Id.*

563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217
(Cite as: 563 F.3d 492, 385 U.S.App.D.C. 283)

***518 **309** The Chairman was correct. Regardless of whether one regards entrepreneurial opportunity as only one factor or as the decisive factor in determining whether the drivers were independent contractors, FedEx surely had the right to introduce the evidence necessary to make its case. *See* 29 C.F.R. § 102.64(a) (“It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record”); *cf. Drukker Commc’ns, Inc. v. NLRB*, 700 F.2d 727, 733 (D.C.Cir.1983) (“It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence.”).

In support of her ruling, the Regional Director said only that “evidence of route sales and entrepreneurial activity at other terminals had no bearing on the economic value of route sales” at the Wilmington facilities. Regional Director’s Decision at 6. Why that would be so, she did not say. Perhaps there is something special about the Wilmington facilities, especially as compared to others that are far away. But the Director did not identify what the idiosyncrasy might be, or say why at least evidence regarding nearby terminals would not be relevant. *See Burns Elec. Sec. Servs., Inc. v. NLRB*, 624 F.2d 403, 409 (2d Cir.1980) (citing 29 C.F.R. § 102.64 in holding that the hearing officer erred in excluding evidence regarding the functions of certain workers at a nearby facility not within the proposed unit).

The exclusion of FedEx’s evidence appears particularly arbitrary because the Regional Director did consider other evidence regarding some terminals not at issue in this case. *See* Regional Director’s Decision at 4-5. So did the Board in *Roadway III*, where it relied on nationwide data to conclude that drivers were *not* independent contractors. *See* 326 N.L.R.B. at 851 (noting that “only 3 out of Roadway’s 5000 drivers nationwide” had “used their vehicles for other commercial purposes”); *id.* at 853 (“In a system of over 5000 drivers assigned to over 300 terminals, we find that these few forced sales, given their circumstances, are insufficient to support a finding of independent contractor status.”). And so, too, did a different Regional Director in *RPS, Inc.* *See* Decision and Order, N.L.R.B. Case No. 5-RC-14905 (Region 5, Aug. 3, 2000). That Regional Director relied on systemwide data to conclude that an employer’s drivers *were* independent contractors. Although no driver at the only

facility at issue in that case used his vehicle for commercial purposes unrelated to RPS’s business, the Director found persuasive the fact that systemwide “many RPS drivers/contractors, possibly half” did so. *Id.* at 56. That record, the Director said, made it “clear that drivers/contractors can realistically take advantage of a myriad of entrepreneurial activities.” *Id.* at 57.

In sum, the Regional Director’s failure to reasonably explain her refusal to permit FedEx to prove its case requires that we grant the petition for review and remand the case.

IV

My colleagues conclude that, “[b]ecause the indicia favoring a finding [that] the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views.” *Op.* at 504. They reach this conclusion by giving the entrepreneurial opportunity factor a weight, and analyzing it in a way, that the common law of agency-as construed by the courts and the NLRB—does not. Although the indeterminate nature of the common-law test may be problematic, and although the ****310 *519** Board may have some room to modify it, this court cannot. Because the Board’s decision reflects a “choice between two fairly conflicting views,” we cannot displace it. *United Ins.*, 390 U.S. at 260, 88 S.Ct. 988.

We can and should, however, reject the Board’s unexplained refusal to give FedEx a fair opportunity to make its case under the appropriate test. Accordingly, I would remand the case for further proceedings.

C.A.D.C.,2009.
FedEx Home Delivery v. N.L.R.B.
563 F.3d 492, 186 L.R.R.M. (BNA) 2292, 385 U.S.App.D.C. 283, 157 Lab.Cas. P 11,217

END OF DOCUMENT

LEXSEE

STAN FREUND, Plaintiff-Appellant, versus HI-TECH SATELLITE, INC., JOEL EISENBERG, Defendants-Appellees.

No. 05-14091 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**185 Fed. Appx. 782; 2006 U.S. App. LEXIS 13492; 11 Wage & Hour Cas. 2d (BNA)
917**

**May 31, 2006, Decided
May 31, 2006, Filed**

NOTICE: **[**1]** NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Rehearing, en banc, denied by Freund v. Hi-Tech Sarelite, Inc., 186 Fed. Appx. 987, 2006 U.S. App. LEXIS 25224 (11th Cir. Fla., 2006)
Rehearing, en banc, denied by Freund v. Hi-Tech Sarelite, Inc., 2006 U.S. App. LEXIS 32662 (11th Cir., July 26, 2006)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, an installer of home satellite and entertainment systems, appealed a judgment of the United States District Court for the Southern District of Florida, dismissing his Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., action. The district court determined that plaintiff was not entitled to overtime pay from defendants because he was an independent contractor, not an employee under 29 U.S.C.S. § 203(e)(1).

OVERVIEW: The district court concluded that the factors for determining the relationship between the installer and defendants weighed in favor of finding that the installer was an independent contractor. On appeal, the installer argued that the district court erred because it looked not at what the economic reality of the relationship was but, rather, at what the relationship could have been. Although the installer claimed that defendant's allegations that the installer could have hired employees, taken days off, and worked for other companies were made after the fact, defendants pointed to how its other installers had behaved in the same relationship. The court held that such evidence tended to support defendant's

testimony about how it treated its installers and belied the installer's allegations that the testimony was made up after the fact. Just because the installer worked six days a week did not mean that he had to, especially in light of the evidence that other installers did not. In the absence of evidence demonstrating that the relationship with the installer was different, evidence of how defendants treated its other installers was probative of the working relationship.

OUTCOME: The court affirmed the district court's judgment.

CORE TERMS: installers, installation, independent contractor, special skill, skill, working relationship, managerial, satellite, customer, service rendered, integral part, depending, record evidence, common sense, entertainment, appointments, permanence, credited, exerted, belies

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employers
[HN1]The requirements of the Fair Labor Standards Act (FLSA) apply only to employees. The statute defines an "employee" as "any individual employed by an employer." 29 U.S.C.S. § 203(e)(1). In turn, the FLSA defines "to employ" as to suffer or permit to work, § 203(g), and "an employer" as any person acting in the

interest of an employer in relation to an employee, § 203(d).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors

[HN2]In a Fair Labor Standards Act action, courts must determine whether, as a matter of "economic reality," an individual is an employee or an independent contractor in business for himself. Several factors guide this inquiry: (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business. No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor--economic dependence. The determination of employment status is a question of law, which the court of appeals reviews de novo. Subsidiary findings are considered issues of fact.

COUNSEL: For Stan Freund, Appellant: Joseph Bilotta, Vassallo & Bilotta, LAKE WORTH, FL.

For Hi-Tech Satellite, Inc., Joel Eisenberg, Appellees: Alan Dagen, Law Offices of Alan Dagen, P.A., WESTON, FL.

JUDGES: Before ANDERSON, BLACK and BARKETT, Circuit Judges.

OPINION

[*782] PER CURIAM:

Stan Freund appeals the district court's dismissal with prejudice of his Fair Labor Standards Act ("FLSA") suit, brought pursuant to 29 U.S.C. § 201 et seq. The district court determined, after a bench trial, that Freund was not entitled to overtime pay from Hi-Tech Satellite because he was an independent contractor, not an employee.

[HN1]The requirements of the FLSA apply only to employees. The statute defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). In turn, the FLSA defines "to employ" as "to suffer or permit to work," 29 U.S.C. § 203(g), and an

"employer" as "any person acting . . . in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d) [**2] .

The Supreme Court has explained that [HN2]courts must determine whether, as a matter of "economic reality," an individual is an employee or an independent contractor in business for himself. *Rutherford Food* [*783] *Corp. v. McComb*, 331 U.S. 722, 728, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947). Several factors guide this inquiry:

- (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
- (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the working relationship;
- (6) the extent to which the service rendered is an integral part of the alleged employer's business.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987). "No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor [**3] - economic dependence." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976).¹ The determination of employment status is a question of law, which we review de novo. *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996). Subsidiary findings are considered issues of fact. *Patel v. Wargo*, 803 F.2d 632, 634 n.1 (11th Cir. 1986).

1 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

1. Nature and Degree of Control exerted by Hi-Tech over Mr. Freund

The district court determined that Hi-Tech exerted very little control over Mr. Freund. Hi-Tech scheduled the installation appointments but Freund could re-schedule them. The specific details about how Freund carried out his duties were left to him with the exception that 1) he was not allowed to [**4] perform any additional services that were not paid for by the customers without Hi-Tech's approval; 2) he had to wear a Hi-Tech shirt during appointments; 3) he had to follow certain minimum specifications for the installations; and 4) he had to call Hi-Tech to confirm he had completed the installation and report any problems that had arisen. The district court found that Hi-Tech's interest in Freund's work was the end result of customer satisfaction, and not with the day-to-day regulation of his work habits, hours worked or work methods. The district court credited Joel Eisenberg's testimony that Freund was free to perform installations for other companies and could have established his own subcontracting corporation. The court noted that several of Hi-Tech's other installers had created their own corporate entities.

2. Opportunity for Profit or Loss, Depending on his Managerial Skill

Next the district court reasoned that the looseness of the relationship between Hi-Tech and Freund permitted him great ability to profit or lose that was dependant upon his managerial skill. Freund was almost entirely compensated by the job and not the hour; therefore, by accepting more jobs, [**5] performing more efficiently and hiring employees, he could earn greater sums of money. The court also credited Eisenberg's testimony that Freund could have accepted installation jobs from other companies.

3. Investment in Equipment and Materials Required for the Job, and Employment of Other Workers

The court concluded from the testimony and the record evidence that Freund procured [*784] all of the equipment necessary to perform the installations. He drove his own vehicle and provided his own tools and supplies for each installation. Finally, although Freund did not hire any workers, other of Hi-Tech's installers did.

4. Skill Level

From the record evidence and testimony, the district court discerned that Freund had special skills to properly install home satellite and entertainment systems. He was also required to explain the inner workings of the satellite and/or home entertainment systems to customers and troubleshoot any installation difficulties.

5. Degree of Permanence in Freund's Working Relationship with Hi-Tech

The court concluded that Freund's relationship with Hi-Tech was not one with a significant degree of permanence. It based its conclusion on the [**6] fact that Freund was able to take jobs from other installation brokers. Also, the court noted that Freund could take as many or as few jobs as he desired.

6. The Relationship between the Services Freund rendered and Hi-Tech's Business

In the only factor weighing for Freund, the district court found that Freund's services were an integral part of Hi-Tech's business.

On appeal, Freund argues that the district court erred because it looked not at what the economic reality of the relationship was but rather at what the relationship could have been. Although Freund claims that Hi-Tech's allegations that Freund could have hired employees, taken days off, and worked for other companies were made after the fact, Hi-Tech was able to point to how its other installers had behaved in the same relationship. Freund argues that this is irrelevant but we disagree: it is a fact that tends to support Hi-Tech's testimony about how it treated its installers and belies Freund's allegations that the testimony was made up after the fact.

This case is substantially similar to an unpublished Fourth Circuit case that reached the same result. In *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. Appx. 104 (4th Cir. 2001), [**7] the court affirmed the district court's determination that cable installers working for the defendant corporation were independent contractors. The court examined very similar facts and concluded the installers had sufficient control over their jobs and profits, had special skills, and invested in their equipment enough to make them independent contractors. Like Freund, these installers did not set the prices but provided their own equipment and had a special skill set, both of which the court deemed important. Additionally, it recognized that although the installers did not set the prices, the installers were "no less in control of their net profits as a result of these variables than typical independent contractors." *Id.* at **3.

Having read the trial transcript and reviewed the exhibits, we conclude that the district court did not err. It belies common sense to read the facts in the way that Freund argues that they should be. Just because Freund worked six days a week does not mean that he had to, especially in light of the evidence that other installers did not. Under Freund's logic, we would be compelled to determine, in another type of case, that a firm did not give sick [**8] days if the employee never took them. This does not make common sense. In the absence of evidence demonstrating that the relationship with Freund was different, evidence of how Hi-Tech treated its other

[*785] installers is probative of the working relationship.

AFFIRMED.

LEXSEE

Virginia GARCIA, as Personal Representative of the Estate of Richard Garcia, Deceased, Plaintiff-Appellant, v. AMERICAN FURNITURE COMPANY, Defendant-Appellee

No. 7512

COURT OF APPEALS OF NEW MEXICO

101 N.M. 785; 689 P.2d 934; 1984 N.M. App. LEXIS 699; 26 Wage & Hour Cas. (BNA) 1585

August 23, 1984

SUBSEQUENT HISTORY: [***1] Certiorari Denied October 18, 1984.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, REBECCA SITTERLY, District Judge

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, the personal representative of the deceased's estate, filed an action in the District Court of Bernalillo County (New Mexico) against defendant company under New Mexico's Minimum Wage Act (Act), N.M. Stat. Ann. §§ 50-4-20 to 50-4-30 (1984), seeking payment for "work" in connection with company softball team activities. The trial court ruled against the representative at the close of her case and the representative appealed.

OVERVIEW: The deceased had coached and managed the softball team prior to his death. The representative contended that the deceased had worked for the company because the company's name was on the uniform worn by team members and the company financed a portion of the costs of the team, which constituted advertising, helped labor relations and good will, and those items were directly and indirectly beneficial to the company. The representative also asserted that the company employed the deceased because it suffered or permitted the deceased to coach and manage the team and the deceased arranged for a team practice, participated in that practice and distributed new uniforms at the conclusion of the practice, all in the interest of the company. On appeal, the court found that the representative's "benefit" argu-

ment was based on a misreading of N.M. Stat. Ann. § 50-4-21(B). The court held that § 50-4-21(B) did not determine who was an employee. The trial court's finding that the deceased participated on the team on a voluntary basis supported the conclusions that the deceased was not an employee and that the representative was not entitled to recover under the Act.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: team, minimum wages, team members, directed verdict, softball, wage claim, Fair Labor Standards Act, federal statute, indirectly, coach, bias, allowance, coaching, managing, nonjury trial, cause of action, ultimate issue, economic reality', employer-employee, above-quoted, distributed, evidentiary, favorable, pleasure, trainees, spent, evidence supporting, baseball

LexisNexis(R) Headnotes

Civil Procedure > Counsel > General Overview

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

[HN1]In a nonjury trial, a motion for a directed verdict is, in effect, a motion to dismiss under N.M. R. Civ. P. 41(b).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

[HN2]As used in the Minimum Wage Act, N.M. Stat. Ann. §§ 50-4-19 to 50-4-30 (1978) "employ" includes suffer or permit to work; "employer" includes any indi-

vidual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to any employee, but shall not include the United States, the state or any political subdivision thereof; and "employee" includes any individual employed by any employer with certain exclusions.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

[HN3]The phrase "acting directly or indirectly in the interest of an employer" in N.M. Stat. Ann. § 50-4-21(B) is concerned with an entity identifiable as "an employer in relation to any employee." This portion of the Minimum Wage Act, which defines "employer" does not determine who is an employee.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

[HN4]The definitions in N.M. Stat. Ann. § 50-4-21, are similar to definitions in the Fair Labor Standards Act of 1938. The definition of "employ" is almost identical. Accordingly, it is appropriate to look to decisions of federal courts determining the meaning of "employ" in the Fair Labor Standards Act, and to consider those federal decisions as persuasive authority in deciding the meaning of "employ" in the New Mexico Minimum Wage Act.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

[HN5]A purely voluntary service, for which no one intends there shall be pay, is not employment, but a gift. The words "suffer or permit to work" in the Minimum Wage Act must be understood with common sense.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

[HN6]In determining whether a person is an employee under the Minimum Wage Act the ultimate issue is whether as a matter of "economic reality" the particular worker is an employee. This ultimate issue is a question of fact which requires consideration of the total employment situation. Facts such as pay, contract, control and voluntary action are part of the total employment situation which disclose the economic reality.

COUNSEL: Eugene E. Klecan, Klecan & Santillanes, P.A., Albuquerque, for plaintiff-appellant.

Michael L. Danoff, Michael Danoff & Associates, P.C., Albuquerque, for defendant-appellee.

JUDGES: Wood, Judge. Donnelly, C.J., and Hendley, J., concur.

OPINION BY: WOOD

OPINION

[*786] [935] OPINION**

Richard Garcia was coach and manager of a softball team. ¹ On Sunday, April 4, 1982, Richard left home about 12:30 p.m. and returned about 5:30 p.m. During this period he was driven to a practice field; the team practiced about two hours; after practice new uniforms were distributed and some of the team members went to a Pizza Hut; and Richard was returned to his home. There is an inference from the evidence that Richard died during the evening of April 4, 1982. Plaintiff, as personal representative of Richard's estate, sued under New Mexico's Minimum Wage Act, NMSA 1978, §§ 50-4-20 through -30 (Orig.Pamp. and Cum.Supp.1984). The complaint sought payment for six hours of "work" in connection with team activities on April 4, 1982, liquidated damages [***2] and attorney fees. Section 50-4-26. The trial court ruled against plaintiff at the close of plaintiff's case; plaintiff appealed. We discuss: (1) dismissal at the close of plaintiff's case, and (2) the meaning of employment under the Minimum Wage Act.

1 The trial court referred to the team as a baseball team. Counsel refer to both a baseball and a softball team. A team member said it was a softball team. The type of "ball" played makes no difference in this case. We use "softball" on the basis that the team member's knowledge was superior to that of counsel or the court.

Dismissal at Close of Plaintiff's Case

It was a nonjury trial. The trial court dismissed at the close of plaintiff's case-in-chief. The trial court made findings of fact and conclusions of law, and entered judgment dismissing the complaint with prejudice "pursuant to the Court's granting of Defendant's Motion to Dismiss." This procedure was authorized by NMSA 1978, [*787] [**936] Civ.P. Rule 41(b) (Repl.Pamp.1980). [***3] The trial court weighed the evidence, gave the evidence the weight the court believed it deserved, and dismissed. This was a judgment on the merits. Herbert v. Sandia Savings & Loan Association, 82 N.M. 656, 486 P.2d 65 (1971).

Plaintiff contends that defendant did not move for dismissal under Civ.P. Rule 41(b). The words defendant's counsel used were: "[A]t this time I move for a directed verdict * * *." The use of the words "directed verdict" were inappropriate because there was no jury. See NMSA 1978, Civ.P.R. 50(a) (Repl.Pamp.1980). [HN1]This being a nonjury trial, the motion for a directed verdict was, in effect, a motion to dismiss under Civ.P.Rule 41(b). Vallejos v. C.E. Glass Co., 583 F.2d 507 (10th Cir.1978); see Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474 (3d Cir.1979); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* para. 41.13[1] at 41-177 (2d ed. 1982). See also Herbert v. Sandia Savings & Loan Association where there was a motion under Civ.P.Rule 41(b), and the headnote refers to the motion as a motion for a directed verdict.

Plaintiff also contends that the trial court did not dismiss the case under Civ.P.Rule 41(b). [***4] According to plaintiff, the trial court ruled as a matter of law that plaintiff had no cause of action. "Under this approach, all evidence favorable to the plaintiff together with all inferences favorable thereto are accepted. The rules for a Directed Verdict should apply." See Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (1974), for how a trial court must view the evidence in ruling on a motion for a directed verdict. Plaintiff's argument is based on a trial court finding "that no prima facie case has been made" and a conclusion "that there was no judicable cause of action * * *." Plaintiff's argument disregards the context of the finding and conclusion. Considering all of the trial court's findings and conclusions, particularly the evidentiary details revealed therein, it is clear that the trial court did weigh the evidence and did enter a judgment on the merits under Civ.P. Rule 41(b). We refer to several of the evidentiary findings in the next issue.

Employment Under the Minimum Wage Act

Section 50-4-21 states:

[HN2]As used in the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978]:

A. "employ" includes suffer or permit to work;

B. "employer" includes any [***5] individual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to any employee, but shall not include the United States, the state or any political subdivision thereof; and

C. "employee" includes any individual employed by any employer * * * [with exclusions not pertinent in this case].

The Minimum Wage Act was enacted by 1955 N.M.Laws, ch. 200. The above-quoted definitions were included in the original enactment and have not been changed, although Section 50-4-21 has been amended frequently. See the history line to Section 50-4-21. The above-quoted definitions require an employee-employer relationship.

Plaintiff contends that the evidence showed that Richard worked for defendant. He refers us to evidence, essentially uncontradicted, that the name of the team was the name of the defendant; that this name was on the uniform worn by team members; and that defendant financed a portion of the costs of the team. Plaintiff's view is that the use of defendant's name and its financial support of the [***6] team constituted advertising, helped labor relations and good will, and these items were directly and indirectly beneficial to defendant.

Plaintiff's "benefit" argument is based on a misreading of Section 50-4-21(B). [HN3]The phrase "acting directly or indirectly in the interest of an employer" is concerned with an entity identifiable as "an employer in relation to any employee * * *." This portion of the statute, which defines "employer" [*788] [***937] does not determine who is an employee. See Donovan v. Sabine Irrigation Co., 695 F.2d 190 (5th Cir.1983).

Plaintiff asserts that defendant employed Richard because it suffered or permitted Richard to coach and manage the team, and Richard had been the coach since the team was formed in 1979 or 1980. Plaintiff contends that Richard "worked" for defendant on April 4, 1982, because Richard arranged for the team practice on that day, participated in that practice and distributed new uniforms at the conclusion of the practice. According to plaintiff, all of this was in the interest of defendant. The trial court did not agree.

The trial court found that Richard was not employed by defendant. Richard had left his employment [***7] with defendant in 1980 and gone to work for another business. The trial court found that Richard was not paid for coaching and managing the team and "[i]t was never contemplated or agreed that Richard * * * was to be paid for coaching or managing * * *." Richard was not an exception, nobody on the team was paid or expected to be paid. The trial court found that the team was not related to employment by defendant. Some members of the team were employees of defendant, some were not. The trial court found that team membership was voluntary; that Richard's participation was solely on a volun-

tary basis; that team members decided who would be on the team; that defendant had "no control or any input" concerning the team or who would be on the team. The evidence is that defendant made a financial allowance to the team of a fixed amount each year. The team determined how the allowance would be spent -- registration fee for the city league, uniforms, equipment, travel expenses. Any expenses over and above defendant's allowance were the team's responsibility, and such expense was met by team members. The trial court also found that Richard had no employment contract with defendant.

[***8] In the preceding paragraph, we have referred to trial court findings and evidence supporting the findings. The findings are supported by substantial evidence. Plaintiff contends the findings and evidence are largely irrelevant and argues that facts such as pay, contract, control and voluntary action have nothing to do with a minimum wage claim. Specifically, plaintiff asserts that the findings and evidence we have reviewed have nothing to do with whether defendant suffered or permitted Richard to work.

In arguing the meaning of "work," both parties cite extensively to workmen's compensation cases. We do not consider these cases because they deal with statutory definitions which differ from the definitions in the Minimum Wage Act. Compare Section 50-4-21(A) with NMSA 1978, Section 52-1-16 (Cum.Supp.1984), which defines "workman" for compensation purposes. Plaintiff was unsuccessful in the separate worker's compensation suit, see Memorandum Opinion in *Garcia v. American Furniture Co.*, Ct.App. No. 7796 (Filed June 21, 1984). That result does not dispose of the minimum wage claim.

[HN4]The definitions in Section 50-4-21, quoted above, are similar to definitions in the [***9] Fair Labor Standards Act of 1938, a federal statute which dealt with minimum wages for employees engaged in or providing goods for interstate commerce. See 29 U.S.C.A. § 203(d), (e) and (g) (1978). The definition of "employ" is almost identical. Accordingly, it is appropriate to look to decisions of federal courts determining the meaning of "employ" in the federal statute, and to consider those federal decisions as persuasive authority in deciding the meaning of "employ" in the New Mexico statute. Benavidez v. Benavidez, 99 N.M. 535, 660 P.2d 1017 (1983); Featherstone v. Bureau of Revenue, 58 N.M. 557, 273 P.2d 752 (1954); Lopez v. Singh, 53 N.M. 245, 205 P.2d 492 (1949).

Walling v. Portland Terminal Co., 330 U.S. 148, 150-151, 152, 67 S.Ct. 639, 640, 641, 91 L.Ed. 809 (1947), discussed whether trainees were employees under the federal statute, stating:

The Fair Labor Standards Act fixes the minimum wage that employers must [*789] [**938] pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the [***10] Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See N.L.R.B. v. Hearst Publications, 322 U.S. 111, 128-129 [64 S.Ct. 851, 859, 88 L.Ed. 1170 (1944)] This Act contains its own definitions, 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. See United States v. Rosenwasser, 323 U.S. 360, 362-363 [65 S.Ct. 295, 296, 89 L.Ed. 301 (1945)].

* * *

Section 3(g) of the Act defines "employ" as including "to suffer or permit to work" and § 3(e) defines "employee" as "any individual employed by an employer." The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. * * * [S]uch a construction would sweep under the Act each person who, without promise or expectation of compensation, [***11] but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. * * * The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.

Walling v. Jacksonville Terminal Co., 148 F.2d 768, 770 (5th Cir.1945), states: [HN5]"A purely voluntary service, for which no one intends there shall be pay, is not employment, but a gift. * * * The words 'suffer or permit to work' must be understood with common sense."

Bowman v. Pace Co., 119 F.2d 858, 860 (5th Cir.1941), states:

It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances [***12] where an obligation to pay him will be implied, they are not employer and employee under the Act.

[HN6]In determining whether a person is an employee under the Minimum Wage Act "the ultimate issue is whether as a matter of 'economic reality' the particular worker is an employee." Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 1189 (5th Cir.1979). This ultimate issue is a question of fact which requires consid-

eration of the "total employment situation. * * *" Wirtz v. Lone Star Steel Co., 405 F.2d 668, 669 (5th Cir.1968).

Facts such as pay, contract, control and voluntary action are part of the total employment situation which disclose the economic reality. The trial court's findings and the substantial evidence supporting the findings were relevant to plaintiff's minimum wage claim that Richard worked for defendant in coaching and managing the softball team. The trial court's findings support the conclusions that Richard was not an employee and that plaintiff was not entitled to recover under the Minimum Wage Act.

The trial court's findings, which were relevant and supported by substantial evidence, do not, as plaintiff claims, show judicial bias against minimum [***13] wage claimants. As to this claim of bias, see Armijo v. Albuquerque Anesthesia Services, Ltd., [*790] 101 N.M. 129, [***939] 679 P.2d 271 (Ct.App.1984). Plaintiff also asserts that a representative of defendant attempted to create bias because the representative testified that, in denying the wage claim, he did not evaluate the Minimum Wage Act. This assertion overlooks the representative's testimony that hours spent in participation with the softball team were not work for the company.

This case was set on the September docket for oral argument. The setting is vacated; oral argument is unnecessary. Garcia v. Genuine Parts Co., 90 N.M. 124, 560 P.2d 545 (Ct.App.1977).

The judgment of the trial court is affirmed. Plaintiff is to bear the appellate costs.

IT IS SO ORDERED.

161 F.3d 299, 136 Lab.Cas. P 33,769, 5 Wage & Hour Cas.2d (BNA) 7
(Cite as: 161 F.3d 299)

United States Court of Appeals,
Fifth Circuit.
Alexis M. HERMAN, Secretary of Labor, United
States Department of Labor, Plaintiff-Appellant,
v.
EXPRESS SIXTY-MINUTES DELIVERY
SERVICE, INC., Lynn Williams Clayton, Charles
Thomas Clayton and Dee Ann Hopkins, Defendants-
Appellees.
No. 97-10764.

Dec. 4, 1998.

Secretary of Labor brought suit under Fair Labor Standards Act (FLSA) to enjoin courier delivery service from violating FLSA's minimum wage, overtime compensation, and record keeping provisions. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., entered take-nothing judgment against Secretary, and appeal was taken. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) district court did not err in finding that delivery service's drivers were independent contractors, not employees, for FLSA purposes, and (2) Secretary failed to present sufficient credible evidence to support claims for back wages for delivery service's office workers.

Affirmed.

King, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Labor and Employment 231H 2225

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations
231Hk2225 k. Employment Relation-
ship. Most Cited Cases
(Formerly 232Ak1124 Labor Relations)

To determine employee status under Fair Labor Standards Act (FLSA), court focuses on whether alleged employee, as a matter of economic reality, is economically dependent upon the business to which he or she renders his or her services; in other words, court's task is to determine whether the individual is, as a matter of economic reality, in business for himself or herself. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[2] Labor and Employment 231H 2235

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay
231HXIII(B)2 Persons and Employments
Within Regulations
231Hk2234 Independent Contractors
231Hk2235 k. In General. Most
Cited Cases

(Formerly 232Ak1124 Labor Relations)

To aid in determining employee status under Fair Labor Standards Act (FLSA), court considers five factors, including degree of control exercised by alleged employer, extent of the relative investments of the worker and alleged employer, degree to which worker's opportunity for profit and loss is determined by alleged employer, skill and initiative required in performing the job, and the permanency of the relationship; no single factor is determinative. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Federal Courts 170B 865

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts
and Findings
170Bk855 Particular Actions and Pro-
ceedings, Verdicts and Findings
170Bk865 k. Labor and Services.
Most Cited Cases
(Formerly 232Ak1567 Labor Relations)
In Fair Labor Standards Act (FLSA) case, district

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court's findings as to five factors used in determining employee status are reviewed for clear error, but Court of Appeals reviews district court's ultimate determination of employee status de novo. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[4] Labor and Employment 231H ⚡2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular Employments. Most Cited Cases

(Formerly 232Ak1124 Labor Relations)

Courier delivery service exercised minimal control over its drivers, thus supporting finding that drivers were not employees for Fair Labor Standards Act (FLSA) purposes, where, although drivers were required to attend orientation session and required to be on-call, drivers set their own hours and days of work and could reject deliveries without retaliation, they could work for other courier delivery systems, independent contractor agreement did not contain covenant-not-to-compete, and, while it was preferred for drivers to wear uniforms and become notaries, it was not required. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[5] Labor and Employment 231H ⚡2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular Employments. Most Cited Cases

(Formerly 232Ak1125.1 Labor Relations)

Relative investment made by courier delivery service's drivers was not significant as compared to that of the delivery service, and did not support finding that drivers were independent contractors for Fair Labor Standards Act (FLSA) purposes, even though drivers were required to purchase or lease all neces-

sary tools of the trade, including vehicle; vehicles were also used by most drivers for personal purposes, and service's investment included leases on two offices, biweekly payroll, \$25,000 computer system, and other expenses. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[6] Labor and Employment 231H ⚡2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular Employments. Most Cited Cases

(Formerly 232Ak1561 Labor Relations)

District court did not clearly err in finding that opportunity for profit and loss of courier delivery service's drivers was determined by the drivers to a greater degree than by the service, and that factor thus weighed in favor of finding that drivers were independent contractors for Fair Labor Standards Act (FLSA) purposes; drivers had ability to choose how much they wanted to work, and experienced drivers knew which jobs were most profitable. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[7] Labor and Employment 231H ⚡2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)2 Persons and Employments Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular Employments. Most Cited Cases

(Formerly 232Ak1124 Labor Relations)

With respect to skill and initiative required, drivers for courier delivery service were, for Fair Labor Standards Act (FLSA) purposes, more like wage earners than independent entrepreneurs seeking a return on their risky capital investment; initiative, not experience or efficiency, determined independence. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

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[8] Labor and Employment 231H ↪2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular
Employments. Most Cited Cases

(Formerly 232Ak1124 Labor Relations)

Lack of permanency of the relationship weighed in favor of finding that courier delivery service drivers were not employees, but were independent contractors for Fair Labor Standards Act (FLSA) purposes, where majority of drivers worked for delivery service for short period of time, drivers were able to work for other courier delivery companies, and their "independent contractor agreement" did not contain covenant-not-to-compete. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[9] Labor and Employment 231H ↪2236

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)2 Persons and Employments
Within Regulations

231Hk2234 Independent Contractors

231Hk2236 k. Persons in Particular
Employments. Most Cited Cases

(Formerly 232Ak1561 Labor Relations)

District court did not err in finding that courier delivery service drivers were independent contractors, not employees, for Fair Labor Standards Act (FLSA) purposes, where three of the five traditional factors pointed toward independent contractor status, including lack of control exercised by delivery service, degree to which drivers' opportunity for profit and loss was determined by drivers themselves, and lack of permanency in the relationship. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[10] Labor and Employment 231H ↪2347

231H Labor and Employment

231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)5 Administrative Powers and
Proceedings

231Hk2344 Proceedings

231Hk2347 k. Evidence. Most Cited
Cases

(Formerly 232Ak1437 Labor Relations)

Secretary of Labor failed to present sufficient credible evidence to support claims for back wages for courier delivery service's office workers, where testimony of Secretary's witness was rebutted by employer's testimony which indicated that employment dates and hours relied on by Secretary's witness were incorrect, and that office workers were paid time and a half both before and after Secretary's investigation, although employer had changed method of record keeping. Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

[11] Labor and Employment 231H ↪2387(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime
Pay

231HXIII(B)6 Actions

231Hk2383 Evidence

231Hk2387 Weight and Sufficiency

231Hk2387(1) k. In General.

Most Cited Cases

(Formerly 232Ak1521.1 Labor Relations)

In seeking to establish overtime claim under Fair Labor Standards Act (FLSA), Secretary of Labor's burden is met if it is proved that employee has in fact performed work for which he or she was improperly compensated, and if employee produces sufficient evidence to show the amount and extent of that work as matter of just and reasonable inference. Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

*301 William J. Stone, Ellen Randi Edmond, U.S. Dept. of Labor, Washington, DC, for Plaintiff-Appellant.

James K. Peden, III, David Norman Kitner, Earl Jeffery Story, Strasburger & Price, Dallas, TX, William Bryan Peterson, Brown & Thompson, Fort Worth, TX, for Defendants-Appellees.

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(Cite as: 161 F.3d 299)

Appeal from the United States District Court for the Northern District of Texas.

Before KING, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

The Secretary of Labor appeals from a take-nothing judgment entered by the district court in this Fair Labor Standards Act (FLSA) case. 29 U.S.C. §§ 201, *et seq.* We affirm.

Procedural Background

Appellant, the Secretary of Labor, brought this FLSA action seeking to enjoin Appellee Express 60-Minutes Delivery Service, Inc. (“Express”) from violating the minimum wage, overtime compensation, and record keeping provisions of the Act. After a six-day bench trial, the district court concluded that no violation of the FLSA occurred because the courier delivery drivers were independent contractors. The district court further concluded that assuming that the drivers were employees, the Secretary failed to meet her burden of establishing that the requested damages were reasonable. Finally, the district court concluded that the Secretary failed to establish that any office workers were owed back wages.

Factual Background

A. Drivers

Express operates a courier delivery service in Dallas and Tarrant Counties, Texas. Lynn Clayton is the president of Express, Charles Clayton is the vice-president, and Dee Ann Hopkins is the secretary-treasurer. Express contracts with various businesses, including law firms, hospitals, and laboratories, to deliver packages on a 24-hour basis in and around the Dallas-Fort Worth metropolitan area. Over 50% of the packages delivered by Express contain medical blood or tissue samples. Express averages around 525 deliveries each day. To make these deliveries, Express relies on about fifty drivers on its payroll at any given time. The drivers are recruited by Express through newspaper advertisements and word of mouth.

Customers of Express choose among various delivery

options under which Express agrees to complete its deliveries within either one, two, or four hours of when an order is placed. Express uses a computer-dispatch system wherein orders are taken by customer service personnel over the telephone, entered into the computer, and transferred to dispatchers who assign the deliveries. The dispatchers communicate with the drivers by pager, two-way closed-channel radio, and telephone. While different factors guide their decisions, the dispatchers generally offer a delivery to the last on-duty driver to have received an offer who is closest to the pick-up point.

Express bills its customers based upon several factors including the size of the package, the priority of its delivery, and the distance between the pick-up and delivery point. Express negotiates special flat rates for approximately twenty-two regular customers. Express also negotiates with its customers over how much waiting time they will be allotted without additional charge.

Potential drivers are required to attend an orientation session at which they must sign an “Independent Contractor Agreement” *302 providing that they will make deliveries for Express using their own vehicles in exchange for receiving a commission for each delivery equal to a percentage of the customer's cost. Under the agreement, drivers also pay the costs of their gasoline, vehicle maintenance, and insurance. Most drive a vehicle that they also use personally.

The “Independent Contractor Agreement” also provides that drivers will furnish their own uniforms, radios and pagers, as well as the biohazard bags and dry ice required for transporting medical samples. These items are supplied to the drivers by Express, which leases some of the items to the drivers and deducts the cost from their first few paychecks. Drivers supply their own dollies and MAPSCOs, and, if needed, their own tarps and cords for covering and securing items.

The drivers can and do negotiate for increased commissions, but most drivers do not negotiate their commissions. The drivers have no input into how Express's business is conducted, the amount charged its customers, or the allocation or frequency of deliveries.

The drivers may use only those radios supplied by the

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company, because the radios operate on a private channel that Express licenses from the Federal Communication Commission. Most drivers wear a uniform consisting of a blue shirt and khaki pants. One shoulder of the shirt has a patch with an Express logo and the other shoulder sports an "Independent Contractor" patch. Uniforms are not required, but preferred.

In signing the "Independent Contractor Agreement," a driver agrees to apply to become a notary public and to provide notary service to Express and its customers free of charge. Express supplies the drivers with the notary application, and deducts the cost for the notary bond and stamp from each driver's first ten paychecks. Although not required, most drivers become notaries.

Pursuant to their contracts, drivers agree to make themselves available to work on-call for Express's 24-hour delivery service. A majority of the drivers who testified stated either that they were required to work on-call or that they had no input into when their on-call time was scheduled. Express posts the on-call schedules at its offices and informs drivers that if unable to work, they are responsible for finding a replacement.

Drivers work for Express for varying lengths of time, with the majority working for relatively short periods. Several drivers testified that they had worked for other courier companies in the Dallas-Fort Worth area either prior to or after working for Express. Only one driver testified that he worked for another courier company while working for Express. The "Independent Contractor Agreement" does not contain a covenant-not-to-compete.

No prior experience is necessary to become a courier driver, but couriers need to be able to drive, read maps, and be courteous to customers. By using their judgment as to the best routes available and their knowledge about area traffic patterns, drivers may earn more money because they can make their deliveries faster and be available to make more deliveries.

Under the terms of the contract, the drivers have the right to accept or reject individual offers of delivery jobs, and have no obligation to accept any specified number of jobs during any given period. Drivers confirmed that they could decline offers without being

subjected to retaliation.

In addition to the drivers that Express considers independent contractors, the company employs four drivers it considers employees. The employee-drivers run errands for Express and make routine deliveries when the office is busy. They attend the same initial orientation session as the other drivers. Unlike the contract drivers, the employee-drivers (1) report for work at a specified time; (2) are paid by the hour; (3) work a set number of hours that are determined by Express; (4) are required to wear a uniform; (5) are provided with a company vehicle and all of the necessary tools of the trade; (6) are reimbursed for expenses; (7) are not allowed to turn down deliveries; and (8) are under the control and supervision of Express.

*303 B. Office Workers

The Secretary sought to establish an overtime claim on behalf of eleven office workers at Express. During her investigation, the Secretary determined that clerks worked fifty-five hours a week but were not being paid overtime compensation for all hours worked over forty. Lynn Clayton testified that much of the data on which the Secretary's calculations were based was incorrect. Specifically, the employment dates of a number of individuals for whom overtime was claimed was incorrect and in computed damages, a fifty-five hour work week was assumed rather than the hours actually worked. The district court found that the Secretary's calculations on this claim were neither reliable nor accurate, and that the Secretary failed to present sufficient credible evidence to support claims for back wages for the eleven office workers.

Analysis

A. Drivers

[1][2] To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he or she renders his or her services. *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043, 1054 (5th Cir.1987). In other words, our task is to determine whether the individual is, as a matter of economic reality, in business for himself or herself. *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir.1981). To aid us in this task, we

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consider five factors: the degree of control exercised by the alleged employer; the extent of the relative investments of the worker and alleged employer; the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; the skill and initiative required in performing the job; and the permanency of the relationship. *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 327 (5th Cir.1993). No single factor is determinative. *Id.*

[3] We review the district court's findings as to these five factors for clear error, but we review the district court's ultimate determination of employee status de novo. *Id.*

1. Degree of control exercised by the alleged employer

[4] The district court found that Express had minimal control over its drivers. We agree. The drivers set their own hours and days of work and can reject deliveries without retaliation. It is preferred that drivers wear a uniform and become notaries, but it is not required of all contract drivers. The drivers can work for other courier delivery systems, and the "Independent Contractor Agreement" does not contain a covenant-not-to-compete. Although the drivers are required to attend an orientation session and required to be on-call, these facts do not outweigh the other facts indicating a lack of control and independent contractor status. This result is even clearer when one contrasts Express's employee-drivers who, unlike contract drivers, report for work at a specified time; are paid by the hour; work a set number of hours that are determined by Express; are required to wear a uniform; are not allowed to turn down deliveries; and are under the control and supervision of Express.

The degree-of-control factor points toward independent contractor status. Such a finding by the district court is not clearly erroneous.

2. Relative investment of worker and alleged employer

[5] The district court found that the investment on the part of the drivers was significant. The district court first pointed out that Express does not provide drivers with any equipment—drivers were required to purchase or lease all the necessary tools of the trade including a vehicle, automobile insurance, dolly,

MAPSCO, tarp, two-way radio, pager, and a medical delivery bag. The drivers also were responsible for all fuel, maintenance, and depreciation of their vehicles.

The Secretary counters that most drivers use their automobiles for personal and recreational purposes as well as for business, so that the capital risk on the part of the drivers is not substantial. Further, the Secretary argues that the relative investment of *304 Express far exceeds that of the drivers, explaining that Express operates offices in two locations, uses a sophisticated computer system, purchases the equipment that it leases to its drivers, pays to license a closed-channel radio frequency from the Federal Communications Commission, and pays the salaries of twenty-five office employees. While the Secretary did not discuss in her brief the dollar amount of investment of Express, an independent review of the record reveals the following:

- a. monthly lease on Fort Worth office = \$1500-\$1900
- b. monthly lease on Dallas office = several hundred dollars
- c. 60-65 radios at \$600 a piece
- d. air time for radio = \$17 per month for each radio
- e. biweekly payroll = approximately \$19,000
- f. four vehicles = approximately \$14,000 each
- g. fax machine = \$250
- h. computer system = \$25,000

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The relative investment by Express is indeed significant. Although the driver's investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes. In *Carrell v. Sunland Construction, Inc.*, 998 F.2d 330 (5th Cir.1993), the court found that welders were independent contractors partly because the welders invested an average of \$15,000 each for welding equipment. There was no indication in *Carrell* that the welding equipment also was being used for per-

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sonal purposes. Accordingly, the capital risk in *Carrell* was much greater. In *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1051 (5th Cir.1987), the court noted that a fireworks stand operator who used a computer to assist him while working involved no investment because he originally had purchased the home computer for school work. Even considering the additional maintenance on a vehicle which is used for a delivery service, we nonetheless conclude that the district court clearly erred in finding the drivers' relative investment to be significant.

The district court also concluded that, although no direct testimony was presented on this point, the aggregate investment of all the contract drivers is substantially more than that of Express. However, we find no support for the application of an aggregation principle with respect to the relative investment factor. *See, e.g., Carrell v. Sunland Construction, Inc.*, 998 F.2d 330 (5th Cir.1993) (court of appeals did not combine the welder's average individual investment of \$15,000 in trucks, machines, and tools when considering the relative investment factor).

The relative investment factor weighs in favor of the Secretary and toward employee status.

3. Degree to which employee's opportunity for profit and loss is determined by the alleged employer

[6] The district court found that the drivers are compensated on a commission basis. According to the district court a driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business. The district court observed that the drivers who made the most money appeared to be the most experienced and most concerned with efficiency, while the less successful drivers tended to be inexperienced and less concerned with efficiency.

Although the Secretary maintains that Express controls customer volume and the amount charged to customers, we cannot say that the district court clearly erred in finding that the drivers' opportunity for profit and loss was determined by the drivers to a greater degree than Express. This is especially true because the drivers had the ability to choose how much they wanted to work and the experienced drivers knew which jobs were most profitable.

This factor points toward independent contractor status. The district court did not clearly err.

*305 4. Skill and initiative required

[7] The district court found that once a job is offered to the driver, the driver is not told which route to take—the driver must rely on his own judgment, knowledge of traffic patterns and road conditions in the Dallas-Fort Worth metroplex, ability to read a MAPSCO, and ability to anticipate the need for an alternate route. According to the district court, experienced drivers possess specialized skills beyond that of merely driving an automobile, and more experienced drivers tended to make more money than less experienced drivers.

The Secretary argues that the contract drivers are more like wage earners than independent entrepreneurs seeking a return on their risky capital investment. The Secretary is correct. In *Mr. W Fireworks*, 814 F.2d at 1053, we explained that “initiative, not efficiency, determines independence.” In that case, the court found clearly erroneous the district court's finding that fireworks stand operators had the skill and initiative indicative of independent contractors. In doing so, the court referred to *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1314 (5th Cir.1976), where the court reasoned that “routine work which requires industry and efficiency is not indicative of independence and nonemployee status.” The court further explained in *Mr. W Fireworks* that the operators were unable to exert initiative as “all major components open to initiative—advertising, pricing, and most importantly the choice of fireworks' suppliers with which to deal are controlled by Mr. W.” *Mr. W. Fireworks*, 814 F.2d at 1053.

As we found in *Pilgrim Equipment*, the “key missing ingredient in the lower court's determination is initiative.” 527 F.2d at 1314. The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status. The district court clearly erred in finding to the contrary.

5. Permanency of the relationship

[8] The Secretary conceded at oral argument that the district court correctly determined the permanency issue. We agree. The majority of drivers work for

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Express for a short period of time. Drivers are able to work for other courier delivery companies, and the "Independent Contractor Agreement" does not contain a covenant-not-to-compete. The permanency factor points toward independent contractor status.

6. Other factors

[9] Both sides encourage the court to look to other factors in addition to the preceding five factors. The Secretary emphasizes that the work performed by the drivers is an integral and indispensable part of Express' business. Express argues that the contract provided that the drivers were independent contractors and the drivers' uniforms indicate same.

The determination of employee status is very fact intensive, and "as with most employee-status cases, there are facts pointing in both directions." *Carrell v. Sunland Construction, Inc.*, 998 F.2d 330, 334 (5th Cir.1993). In this case, three of the five traditional factors point toward independent contractor status. We conclude that the district court did not err in finding that the drivers were independent contractors.

We are confident in this result not only because the various factors weigh in favor of independent contractor status, but also because of Supreme Court precedent with respect to this issue. In *United States v. Silk and Harrison v. Greyvan Lines, Inc.*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), a consolidated case, the court concluded that the drivers were independent contractors. In *Silk*, Albert Silk, doing business as Albert Silk Coal Co., sold coal at retail. His coalyard consisted of two buildings, one for an office and the other a gathering place for workers. Silk owned no trucks himself but contracted with workers who owned their own trucks to deliver coal at a uniform price per ton. When an order for coal was taken in the office, a bell rang in the building used by the truckers. The truckers voluntarily adopted a call list upon which their names came up in turn, and the top man on the list had the opportunity to deliver coal. The truckers could and often did refuse to make a *306 delivery without penalty. The truckers were not instructed how to do their jobs, but were merely given a ticket telling them where the coal was to be delivered and whether to collect the charge. Any damage caused by the truckers were paid by the company. The truckers could go as they please and could haul for others when they pleased. The

truckers paid all expenses of operating their trucks.

Greyvan Lines involved an interstate trucking business carrying mostly household furniture. Here the truckers were required to haul exclusively for Greyvan; furnish their own trucks and necessary equipment; furnish their own insurance; pay for all loss or damage to shipments; pay all expenses of operation; indemnify the company for any loss caused by the truckers; paint the designation "Greyvan Lines" on their trucks; collect all money due the company from shippers or consignees; personally drive their trucks at all times or be present on the truck when a competent relief driver was driving; and follow all rules, regulations, and instructions of the company. As remuneration, the truckers received from the company a percentage of the tariff charged by the company. The contract was terminable at any time by either party. A contract between the company and Local No. 711 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America was in effect.

In both *Silk* and *Greyvan Lines*, the Court concluded that the truckers were independent contractors. The Court reasoned that these drivers owned their own trucks and were small businessmen. The control exercised, the risk undertaken, and the opportunity for profit from sound management led the Court to conclude that the truck drivers were independent contractors. In *Greyvan Lines*, the drivers were required to haul exclusively for the company and to paint the company logo on their vehicles; nonetheless, the Supreme Court concluded they were independent contractors. Comparatively, it is easier to conclude independent contractor status for the drivers in the case at bar.

Finally, the Secretary maintains that the drivers in this case are analogous to piece-workers who have been held to be employees in numerous instances. *See, e.g., McLaughlin v. Seafood, Inc.*, 867 F.2d 875 (5th Cir.1989) (seafood backers, pickers, and peelers are employees under FLSA); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir.1976) (operators of laundry pickup stations are employees under FLSA); *Dole v. Snell*, 875 F.2d 802 (10th Cir.1989) (cake decorators are employees under FLSA). We disagree. More analogous to the Express contract drivers are the welders in *Carrell* and the truck drivers in *Silk* and *Greyvan Lines*.

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The conclusion of the district court that the drivers were independent contractors is affirmed. Accordingly, we need not address whether the Secretary met her burden of establishing that the requested damages were reasonable.

B. Office Workers

[10][11] Section 207 of the FLSA provides in pertinent part:

... [N]o employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). The Secretary claims that office workers at Express were not paid for their overtime worked. It is well-settled that the Secretary's burden is met if it is proved that the employee has in fact performed work for which he or she was improperly compensated and if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)).

The Secretary's claim for back wages was supported at trial by the testimony of Shirley Kenyon who presented an exhibit purporting to reflect the overtime due these employees. Kenyon's testimony was rebutted by Lynn Clayton's testimony which indicated that the employment dates Kenyon used were incorrect*307 and that Kenyon assumed that each employee worked a 55-hour week, rather than the 45-hour week actually worked. Lynn Clayton further testified that her office employees were being paid time and a half for overtime hours worked prior to the Secretary's investigation. Although Clayton had changed her method of record keeping, she testified that the office employees were being paid the same amount today as they were getting paid before the Secretary's investigation. R. Vol. XI-214-15. The district court concluded that the Secretary failed to present sufficient credible evidence to support claims for back wages for the office workers. We perceive

no error in this conclusion, and the Secretary fails to point to any evidence in the record and fails to cite any binding precedent to support its position that a violation of the Act occurred. The Secretary's citation of *Nunn's Battery & Electric Co. v. Goldberg*, 298 F.2d 516 (5th Cir.1962) offers no assistance to the court because in that case the Secretary introduced evidence into the record indicating that no explicit understanding existed between the parties as to the existence of a regular wage rate that is increased for overtime hours. The court pointed to abundant testimony by numerous employees that they were not told what their hourly rate of pay was. The Secretary points to no such evidence in the record and makes no inference in her brief to that effect. Based upon the limited briefing and record citation on this issue, the court cannot discern how the Secretary proved that a violation of the Act even occurred.

Because we agree with the district court that the Secretary failed to provide sufficient evidence to support her claims, we need not address whether the Secretary produced sufficient and accurate evidence of damages.^{FN1}

FN1. We note that the Secretary's post-trial brief with respect to this issue focused solely on whether it accurately calculated damages for overtime pay. The brief did not address the merits of whether a violation of the Act even occurred. R. Vol. VI-1191-93.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

KING, Circuit Judge, concurring in part and dissenting in part:

I agree with the district court that the evidence proffered by the Secretary of Labor on damages was deficient and I would therefore affirm the district court's take-nothing judgment. I disagree, however, with the district court's decision, affirmed by the majority, that Express's drivers are independent contractors, and I therefore respectfully dissent from the majority's decision to affirm the denial of an injunction ordering prospective compliance with the minimum wage, overtime compensation and recordkeeping requirements of the Fair Labor Standards Act.

I agree with and applaud the majority's conclusion

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that two of the district court's findings of fact are clearly erroneous—the finding regarding the relative investment of the worker and the employer and the finding regarding the skill and initiative required by the worker. But I also would hold clearly erroneous the district court's finding regarding the degree to which the worker's opportunity for profit or loss is determined by the employer. In my opinion, this factor also weighs in favor of employee status. Further, in view of the entirety of the circumstances, I would hold that Express's drivers are employees rather than independent contractors.

Although the district court's findings in connection with each of the *Silk* factors are reviewed for clear error,

we must ensure that the factfinding of the district court is performed with the proper legal standards in mind. Only then can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact. The district court's analysis, of course, is subject to plenary review by this court, to ensure that the district court's understanding of the law is proper.

Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1044-45 (5th Cir.1987). In order to evaluate the district court's finding regarding the ability of Express's drivers to control their opportunity for profit or loss, it is therefore necessary to understand the principles that inform the courts' evaluation of this *308 factor. The ultimate conclusion as to whether the workers are employees or independent contractors is reviewed de novo. See *id.* at 1045. I address each inquiry in turn.

A court's most important task in analyzing the profit or loss factor is to ascertain which party controls the major determinants of the worker's ability to make a profit. See *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 328 (5th Cir.1993); *Mr. W Fireworks*, 814 F.2d at 1050; *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1313 (5th Cir.1976). If the employer largely controls these major determinants, this points toward a finding of employee status. On the other hand, if the workers themselves exert substantial control over their ability to profit or over the likelihood that they will suffer loss, they are more like independent contractors. See *Circle C. Investments*, 998 F.2d at 328; *Mr. W Fireworks*, 814 F.2d at 1051; *Pilgrim Equip.*,

527 F.2d at 1313.

We have defined “profit” as the “gain realized from a business over and above its [capital] expenditures.” *Mr. W Fireworks*, 814 F.2d at 1050-51 (alteration in original) (internal quotation omitted); see *Silent Woman, Ltd. v. Donovan*, 585 F.Supp. 447, 451 (E.D.Wis.1984). Thus, the extent to which the workers have invested capital that is subject to the risk of loss is also relevant. See *Mr. W Fireworks*, 814 F.2d at 1050-51; *Pilgrim Equip.*, 527 F.2d at 1313. If the workers have sizeable capital investments at stake, they are more akin to “independent entrepreneurs seeking a return on their risky capital investments,” than to employees. *Mr. W Fireworks*, 814 F.2d at 1050-51; see *Pilgrim Equip.*, 527 F.2d at 1313 (finding that no opportunity for loss of capital investment indicates dependence, and, thus, employee status).

A line of Fifth Circuit precedent has clarified which determinants of profit are most relevant in determining whether a worker's opportunity for profit or loss is controlled by an employer. Several factors reoccur throughout the case law. In finding that the employer controlled the major determinants of profit in *Usery v. Pilgrim Equipment Co.*, the court emphasized that the employer, an owner of laundry pick-up stations, controlled the prices charged, the location of each store, and the advertising for the business. See 527 F.2d at 1313. The court concluded that these factors outweighed the factors controlled by the operators—the convenience of the hours of operation, extra services provided, and rapport with customers. See *id.* Moreover, the court refused to find that the operators' risk of losing their capital investment was significant where the only risk of loss faced was the risk of bad-check and theft losses and it was the employer who placed this burden upon the operators. See *id.*

Similarly, in *Brock v. Mr. W Fireworks, Inc.*, the court found that the employer, an owner of fireworks stands, controlled the largest determinants of profit—again emphasizing the prices charged, the location of the stands, and the advertising. See 814 F.2d at 1050. The court acknowledged that the factors controlled by the employees—experience and good customer rapport—increased earnings, but did not consider these to be as relevant as the factors controlled by the employer. See *id.* As in *Pilgrim Equipment*, the court further found that the stand operators were subject to a minimal risk of loss because their capital invest-

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ment was limited to the burden of bearing bad-check and theft losses, a burden forced upon them by their employer. *See id.* at 1050-51. The court therefore concluded that the profit and loss factor weighed in favor of employee status. *See id.* at 1051.

Most recently, in *Reich v. Circle C. Investments, Inc.*, the court found that the employer, a nightclub operator, controlled the determinants of profit or loss to a greater extent than the dancers who worked at the nightclubs because the employer was responsible for advertising, location of the clubs, business hours, maintenance and appearance of facilities, and the refreshments served. *See* 998 F.2d at 328. These factors controlled customer volume, which, according to the court, was the largest factor that influenced a dancer's ability to profit. *See id.* Moreover, in the court's view, control over customer volume was more relevant in determining profit than the dancers' initiative, hustle, and costume. *See id.*

***309** In light of these cases, it is clear that the district court did not properly assess the drivers' ability to control their profits or losses. The district court found, in essence, that Express's drivers have control over the hours they work, their efficiency, experience, and skill,^{FN1} and the amount of their commissions.^{FN2} These findings, even if true, are vastly outweighed by Express's ability to affect the drivers' profits by exerting control over the volume of customers, the prices charged to the customers, and the number and profitability of the runs assigned to the drivers.

FN1. The district court's finding that a "driver's profit or loss is determined largely by his or her skill, initiative, ability to cut costs, and understanding of the courier business," is clearly erroneous in light of the legal principles discussed above. While a driver's skill, initiative, ability to cut costs, and understanding of the business may certainly contribute to the amount of money that he or she earns, as discussed further *infra*, by far the larger determinants of the drivers' ability to profit are the number of runs available to each driver, the number of runs actually offered to each driver, and the price charged per run—all factors controlled by Express. It was clearly erroneous for the district court to overlook these larger deter-

minants of profit or loss.

FN2. A review of the record indicates that the district court erred in finding that "Express drivers can and do negotiate for increased commissions." The vast majority of drivers do not negotiate for increased commissions. At the onset of employment, the drivers are given a standard form contract to sign which already contains the commission rates that drivers receive for various runs. Only two of the forty drivers who testified stated that they had negotiated a slightly higher commission than that contained in the standard contract. Moreover, "it is not what the [drivers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive." *Mr. W Fireworks*, 814 F.2d at 1047. As a matter of economic reality, Express exerts substantial, if not exclusive, control over the commissions earned by its drivers. Finally, even were the drivers able to negotiate the amount of their commissions, this ability has a negligible effect on their actual profits in light of the fact that it is Express who controls the number and quality of the runs assigned to each driver. A higher percentage commission is meaningless if the drivers receive a limited number of runs to which this higher commission applies. The district court clearly erred in giving weight to this factor.

For example, Express can increase its customer base through increasing its advertising, or through altering the prices it charges per run; the more runs that are available, the greater a driver's ability to profit. Similarly, the prices that Express charges its customers determine the amount of commission that drivers earn. Finally, Express's dispatchers control the assignment of runs to the drivers. While the dispatchers try to assign runs first to the nearest on-call operator who last received a run, the dispatchers' ability to make assignments is circumscribed by the location of the drivers and the priority of the delivery. In other words, drivers have limited control over the number of runs they receive because a driver's location at the time contributes to whether that driver will be assigned a particular run.

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Thus, Express, and not its drivers, controls the largest determinants of profit-customer volume, advertising, price, and the assignment of runs. In *Pilgrim Equipment*, *Mr. W Fireworks*, and *Circle C. Investments*, the employer's ability to control at least these first three factors outweighed, in the court's view, the workers' ability to control factors such as experience, efficiency, initiative, and hustle. While an increase in a driver's hours or efficiency could certainly have a positive impact on the amount of money he or she earns, even the most industrious and efficient driver will not be able to profit if the prices charged (and thus the commissions available) are not significant, if there are few runs available to assign the driver, or if the driver is not in the right place at the right time in order to be offered runs. Drivers lack control over these vital determinants of profit.

Moreover, although not mentioned by the district court in connection with its analysis of this factor, the drivers' risk of investment loss is small. For the most part, the only investment that the drivers make is in their own labor. See *Mr. W Fireworks*, 814 F.2d at 1050; *Silent Woman*, 585 F.Supp. at 451. As recognized by both the district court and the majority, the record indicates that the vast majority of drivers do not invest in vehicles for purposes of their jobs. Rather, they drive their own personal vehicles. Similarly, while Express requires them to bear the cost of the equipment needed to perform their jobs by deducting from the drivers' *310 paychecks the cost of certain equipment that it supplies to the drivers, such as uniforms, radios and pagers, biohazard bags, and dry ice, the deductions terminate once the drivers leave Express's employment and they return the equipment to Express. Thus, in comparison to true independent contractors, the workers do not make considerable capital investments subject to the risk of loss if the business fails. Instead, the drivers need only earn enough to pay their "rent" on their Express equipment and their automobile expenses. As discussed above, the largest determinants of whether the drivers will make enough to compensate for these expenses are customer volume, advertising (which affects customer volume), the prices charged (which affect both customer volume and the amount of commission received by the drivers), and the assignment of runs to drivers. Express controls all of these factors, and thus controls the drivers' ability to profit and the likelihood that they will suffer loss.

In crediting the district court's findings on this factor, the majority erred. The drivers' control over such factors as the number of hours they work, their experience,^{FN3} and their efficiency is not the type of control over profit that is the true mark of an independent contractor. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *Silent Woman*, 585 F.Supp. at 451. While industry, experience, and efficiency can and do impact profit, the work of Express's drivers more closely resembles "piecework than an enterprise that actually depend[s] for success upon the initiative, judgment or foresight of the typical independent contractor." *Rutherford Food Corp.*, 331 U.S. at 730, 67 S.Ct. 1473; see *Silent Woman*, 585 F.Supp. at 452. I would therefore find clearly erroneous the district court's conclusion that the drivers controlled their opportunity for profit or loss.

FN3. The court in *Mr. W Fireworks* noted that experience is a quality that can enhance the commissions of all commissioned employees and of all employees earning gratuities. See 814 F.2d at 1050. Consequently, the ability to earn more with experience does not distinguish an independent contractor from an employee.

The majority finds relevant the fact that the experienced drivers knew which runs were most profitable. However, this knowledge would be of little use to a driver who was not offered profitable runs. It is undisputed that the drivers had little control over which runs they were offered and could choose only to accept or reject the runs offered. Turning down an unprofitable run would be no guarantee that the driver would be in the right place to receive an offer for a more profitable run, or that the next run offered would be more profitable than the last. In fact, the record reveals that many drivers were reluctant to turn down runs for fear that the dispatchers would retaliate against them by not giving them good runs in the future. Moreover, because the number of runs available was limited, many drivers testified that they rarely turned down runs when offered. Therefore, knowing which runs are profitable has little impact on the

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drivers' ability to realize profit.

With three factors pointing toward a finding of employee status, and considering the totality of the circumstances, I would conclude that these drivers are in fact employees rather than independent contractors. As the courts have consistently held, the central question is whether the workers, as a matter of economic reality, are dependent for their livelihood on their relationship with their employer. *See Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir.1993); *Mr. W Fireworks*, 814 F.2d at 1043; *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir.1983); *Silent Woman*, 585 F.Supp. at 450; *see also Rutherford Food Corp.*, 331 U.S. at 730, 67 S.Ct. 1473 (determining whether a worker is an employee "does not depend on ... isolated factors but rather upon the circumstances of the whole activity"). Express's drivers clearly depend for their livelihood on Express. They are "not specialists called in to solve a special problem, but unskilled laborers who perform[] the essential, everyday chores of [Express's] operation." *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 876-77 (5th Cir.1989). They have invested little more than their labor and, unlike true independent contractors, they lack the ability to grow their business.

United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), and its companion case, *Harrison v. Greyvan Lines, Inc.*, are clearly distinguishable. In concluding that the driver-owners of coal trucks in *Silk* and moving vans in *Greyvan Lines* were independent contractors, the Supreme Court's analysis relied heavily on the drivers' *311 investment in the business and the management skills they exercised. It was the drivers' considerable investment, the risk of loss of that investment, and the drivers' management of others that properly placed the *Silk* and *Greyvan Lines* drivers in the category of independent entrepreneurs seeking a return on their risky investments.

[W]e agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is

the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

Id. at 719, 67 S.Ct. 1463. In comparison, Express's drivers have a much smaller investment at stake (the family Geo is a far cry from the coal-hauling trucks and moving vans at issue in *Silk* and *Greyvan Lines*), and, consequently, are subject to a much smaller risk of loss because they overwhelmingly do not use vehicles purchased for the purpose of becoming a driver. They do not hire their own assistants. They rarely, if ever, work for anyone other than Express. Therefore, they differ considerably from the drivers in *Silk* and *Greyvan Lines*. *Compare Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 549-50 (8th Cir.1952) (distinguishing *Silk*, court found truck drivers who hauled lumber were employees rather than independent contractors where truck drivers did not have substantial investment in trucks, and amount they could earn was largely within control of defendant) with *Goldberg v. Bellotto*, 207 F.Supp. 499, 500 (S.D.Fla.1962) (truckers, who supplied their own tractors and, occasionally, trailers, hired their own assistants, and were authorized to solicit business for defendant, were independent contractors). Express's drivers are more accurately described as employees dependent for their livelihoods on their employer, and I would so hold and order the district court to grant the requested injunctive relief.

C.A.5 (Tex.),1998.

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**ALEXIS HERMAN, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,
Plaintiff, v. MID-ATLANTIC INSTALLATION SERVICES, INC., et al., Defen-
dants**

Civil Action No: S-97-4238

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

164 F. Supp. 2d 667; 2000 U.S. Dist. LEXIS 21678; 145 Lab. Cas. (CCH) P34,433

July 27, 2000, Decided

July 27, 2000, Filed

SUBSEQUENT HISTORY: Affirmed, *Chao v. Mid-Atlantic Installation Servs.*, 2001 U.S. App. LEXIS 14804 (4th Cir. Md. July 2, 2001).

DISPOSITION: **[**1]** Defendants Motions for Summary Judgment GRANTED. Judgment ENTERED in favor of the Defendants and against Plaintiff, with COSTS assessed against Plaintiff.

COUNSEL: For ALEXIS M. HERMAN, plaintiff: Alfred J. Fisher, Jr., Office of the Regional Solicitor Region III, Linda M. Henry, Jacqueline Hershey, Jacqueline A. Hershey, U S Department of Labor, Philadelphia, PA USA.

For MID-ATLANTIC INSTALLATION SERVICES, INC., M/A TELECOMMUNICATIONS, INC., defendants: Douglas M. Topolski, McGuire, Woods, Battle & Boothe, Robert Ross Niccolini, McGuireWoods LLP, Baltimore, MD USA.

For MID-ATLANTIC INSTALLATION SERVICES, INC., COMCAST CABLEVISION OF MARYLAND, L.P., COMCAST CABLEVISION OF HARFORD COUNTY, INC., COMCAST CABLEVISION OF HOWARD COUNTY, INC., defendants: James J. Sullivan, Jr., Pepper Hamilton & Scheetz, Wilmington, DE USA.

For COMCAST CABLEVISION OF MARYLAND, L.P., COMCAST CABLEVISION OF HARFORD COUNTY, INC., COMCAST CABLEVISION OF HOWARD COUNTY, INC., defendants: George A.

Voegele, Jr., Klett, Lieber, et al, Stephen C. Trevisan, Klett Lieber Rooney & Schorling, Philadelphia, PA USA.

JUDGES: Frederic N. Smalkin, United States District Judge.

OPINION BY: Frederic N. Smalkin

OPINION

[*669] **[2]** MEMORANDUM OPINION**

Alexis Herman, the Secretary of Labor, has brought suit against the defendants, cable television providers ("Comcast")¹ and cable installation companies ("MAT")², alleging that the individuals MAT utilizes to install Comcast cable systems in customer homes ("Installers") are employees and not independent contractors, and hence are entitled to overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The defendants have moved for summary judgment, arguing that under the undisputed facts of the case the Installers are independent contractors. The issues have been well briefed by the parties and no oral hearing is necessary. Local Rule 105.6 (D.Md.). For the reasons that follow, the defendants' motions for summary judgment will be GRANTED.

1 The Comcast defendants are Comcast Cablevision of Maryland, L.P., Comcast Cable of Maryland, Inc., Comcast Cablevision of Harford County, Inc., Comcast Cablevision of Howard County, Inc., and Comcast Cable Communications, Inc.

2 The MAT defendants are M/A Telecommunications, Inc. and Mid-Atlantic Installations Services, Inc.

[**3] BACKGROUND

The essential facts of this case are undisputed. Comcast is in the business of providing cable television programming to residences and businesses. When a customer orders a cable system from Comcast, certain equipment must be installed in the customer's home. Comcast has contracted with MAT to provide (in part) this installation service. MAT in turn contracts with individual Installers to do the actual installation work. MAT is known in the industry as a cable installation "broker."

The contract between Comcast and MAT has strict specifications regarding [*670] technical standards and quality control, the fitness of the Installers (i.e. lack of criminal record or drug use), timeliness of delivery of services and so on. If MAT (or an Installer) fails to perform to these specifications, Comcast can either "back-charge" MAT or demand that the problem be corrected without charge to Comcast. Comcast pays MAT on a piece rate basis.

MAT in turn hires Installers via a written contract. The contract the Installers sign unambiguously states that the relationship between MAT and the individual Installers is that of independent contractor/client and not one of employee/employer. The [**4] Installers receive job orders from MAT to install (or repair) the Comcast cable equipment in the homes of Comcast customers. MAT assigns "routes" to the Installers and imposes upon them (via their contracts) the same requirements of timeliness, expertise and compliance with technical specifications as Comcast imposes upon MAT.

The Installers must provide their own trucks or vans and special tools to install and repair cable systems. When on a job, they must wear MAT-approved uniforms, attach signs to their trucks which state "Contracting for Comcast," and wear ID badges identifying themselves as Comcast contractors associated with MAT. There is a relatively strict time element in the contract; service must be provided within a four-hour window provided to the customer. These latter requirements (uniforms, ID badges and scheduling commitments) are in accordance with various county regulations. At a job site, Installers must use their special tools and knowledge to install or repair cable equipment -- work similar to that performed by carpenters and electricians. The Installers are paid on piece rate basis determined by MAT.

Despite the unambiguity of the contract between the Installers [**5] and MAT as to the nature of the relationship, the Secretary of Labor has brought this suit on their behalf alleging that they are actually employees of

both MAT and Comcast under the FLSA and, therefore, the defendants are liable for overtime wages and other employment benefits. Additional facts relevant to the merits of this claim will be discussed below.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably [**6] favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252. In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), but the opponent must bring forth admissible evidence upon which a reasonable fact finder could rely. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, [*671] 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

ANALYSIS

The FLSA provides protection for employees in their working conditions. In doing so, it draws a distinction between employees, whom it covers, and independent contractors, whom it does not. *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 456 (D. Md. 2000). The threshold liability question in this case, therefore, is whether the Installers are "employees" or independent contractors under the FLSA.

The concept of "employment" under the FLSA is extremely broad - broader than [**7] the common law definition of employment and even broader than several other federal employment-related statutes, such as the Internal Revenue Code. *See id.*; *Prince Cable, Inc. v. United States*, 1998 U.S. Dist. LEXIS 5981, 1998 WL 419979, *2 (D.Del. April 9, 1998) (unpublished opinion) (tax code uses common law principles to determine if individual is employee or contractor). Its breadth stems from the definition of the term "employ" in the statute, *see* 29 U.S.C. § 203(g), and courts' recognition of the remedial nature of the statute. *See Heath*, 87 F. Supp. 2d

at 456. Accordingly, the labels which parties attach to their relationship are not controlling; even if a contract clearly defines the relationship as one of client/contractor, it may still constitute that of employer/employee for purposes of the FLSA. *See id.*

Courts determine whether an individual is an employee or independent contractor by looking at the "economic reality" of the relationship between the individuals and their alleged employers. *Id.* at 457 (citations omitted); *see also Dole v. Amerilink Corp.*, 729 F. Supp. 73, 75 (E.D.Mo. 1990). There is a [**8] six-factor test used to determine the economic reality of the relationship:

1. The degree of control which the putative "employer" has over the manner in which the work is performed;
2. The opportunities for profit or loss dependent on the managerial skill of the worker;
3. The worker's investment in equipment or material, or his employment of other workers;
4. The degree of skill required for the work;
5. The permanence of the working relationship; and
6. Whether the service rendered is an integral part of the "employer's" business.

See Heath, 87 F. Supp. 2d at 457; *Dole*, 729 F. Supp. at 76; *DuBois v. Secretary of Defense*, 161 F.3d 2, 1998 WL 610863, *1 (4th Cir. 1998) (unpublished opinion). Rather than looking at one particular factor or applying these factors "mechanically," courts look at the totality of the circumstances in applying them. *See DuBois*, at *1; *Dole*, 729 F. Supp. at 76.

The Case Against MAT

The Court will first apply the six-factor economic reality test to the relationship the Installers have with MAT, as Comcast can only be considered an employer [**9] (or joint-employer) if MAT is also one. On a preliminary note, in applying these factors to the facts of this case (and concluding that the Installers are not "employees" of MAT) the Court notes that it is persuaded by the well-reasoned opinion of Judge Gunn in *Dole v. Amerilink Corp.*, *supra*.³ [**672] In *Dole*, Judge Gunn applied the same six factors to a virtually identical situation and, after a comprehensive application of each factor to the facts, determined that cable installers were con-

tractors and not employees under the FLSA. *See id.* at 76-77. Because the essentially undisputed facts of this case are so similar to those in *Dole* and the reasoning therein so persuasive, this Court concludes that the same outcome is warranted.

3 MAT points out that *Dole* is "unreviewed" because the Secretary, the plaintiff in *Dole*, chose not to appeal an adverse published decision. Hence, the Secretary's critique of reliance on the case because it is "unreviewed" is misleading and a bit disingenuous. *See Sec's Mem.* at 30.

[**10] The Court also finds persuasive, though not, of course, binding, the reasoning and holding in a recent unpublished decision by the Court of Special Appeals of Maryland, adjudicating a contract dispute between one of the Installers involved in this case, Anthony Luna, and MAT. *See Luna v. Mid/Atlantic Telecommunications, Inc.*, No. 0599 (Md. Ct. Spec. App. June 7, 2000) (slip opinion). In that case, Mr. Luna had sued MAT for breach of contract stemming from MAT's requirement that he wear a uniform over his objection. *See id.* at 6. In affirming a grant of summary judgment for MAT, the Court of Special Appeals carefully reviewed the relationship between Luna and MAT and concluded that it was one of client/independent contractor and not one of employer/employee. *See id.* at 11-14. While that conclusion is obviously not binding on this Court for several reasons (most importantly, because it applied Maryland common law principles of employment and not the FLSA's broadly expansive definition), the reasoning and decision therein, based as they are on the same parties and a substantially similar legal question, have a persuasive effect on this Court's resolution of this matter under [**11] the applicable six-factor test in FLSA cases.

With the above case law in mind, the Court turns to an application of the "economic reality factors" to the facts of this case:

1. Control

The Secretary argues that several aspects of the parties' working relationship indicate that MAT exercises *de facto* control over the Installers: the latter must install the cable systems in accordance with MAT's and Comcast's strict specifications; MAT "back-charges" Installers for failure to meet installation specifications and other MAT policies; Installers are required to wear uniforms and ID badges associating themselves with MAT and Comcast; they must get pre-approval before they perform "field assists" (special work assignments requested by the customer); MAT performs background checks and drug tests on Installer applicants; they receive their routes from MAT and have little opportunity to alter them; and they must check in regularly with MAT's dispatcher.

On their face, these facts appear to demonstrate substantial control by MAT. Upon careful review, however, it is apparent that MAT does not exercise the type of control necessary to label the Installers "employees." *See Dole*, 729 F. Supp. at 76 [**12] (discussing the "control" the putative employer had over the installers and concluding that it was insufficient to make them employees). First, and most importantly, requiring the Installers to meet MAT's and Comcast's installation specifications is entirely consistent with the standard role of a contractor who is hired to perform highly technical duties. It is in the nature of a contract that the contractor promises to deliver the performance bargained for by the client. For example, a builder will build a building according to the specifications of an architect. That does not make the builder an employee. A painter will [*673] paint a house the colors dictated by the homeowner. That does not make the painter an employee. In short, requiring a contractor to meet the client's technical specifications is not the type of "control" which bestows "employee" status on the contractor. *See id.* ("This [quality control] constraint inheres in any subcontractor relationship and the Court does not find this isolated instance of control dispositive.").

Similarly, "back-charging" - that is, deducting money from payments for failure to meet specifications - does not indicate "control" in the sense [**13] of an employer's control over an employee. It is common in contractual relationships for the client to withhold money if work is not done correctly. For example, in most construction contracts a certain percentage is generally withheld from each payment pending complete performance of the contract and satisfactory completion of the "punch list" items. If complete and acceptable performance is not made, the full contract amount is not paid. Similarly, in this case MAT has the right to charge its contractors if they fail to meet the contract specifications. Such a right does not implicate "control" or "employee" status. In fact, the Secretary has been unable to point to a case in which *employees* are generally docked pay as a result of their mistakes. Based on this record, the Court is satisfied that this arrangement is consistent with a contractor/client relationship.

Requiring Installers to wear uniforms and ID badges identifying themselves with MAT and Comcast does not make them employees. First, all parties agree that local county regulations require the ID badges and uniform identifications. As such, it is impossible to conclude that MAT is controlling the Installers. Because [**14] the law requires it, Installers would have to wear the same identifying information regardless of whether they are employees or independent contractors under FLSA's criteria. Moreover, even if the county regulations did not mandate it, the Court would conclude that MAT's identi-

fication requirement would not transform the Installers into employees, because the requirement does not affect the economic reality of the relationship. It does not affect the Installers' economic dependence on or independence from MAT in any way, but merely allows consumers to be assured of their *bona fides*.

MAT's requirement that the Installers get prior approval before they perform additional work for a customer connotes a typical contractor/client relationship and not one of employee/employer. Because the Installers are paid by the task, it is natural that MAT would want to pre-approve additional work orders before committing themselves financially.

MAT's drug test and background-check policy (which is mandated by its contract with Comcast) is neutral. It denotes neither an employee/employer nor a contractor/client relationship; instead, it is perfectly consistent with both. The Installers enter customers' [**15] homes. It is only good business sense for Comcast and MAT to attempt to insure that they are fit to do so. Accordingly, MAT is entitled to contract only with people who pass these fitness clearances. Similarly, the requirement that any helpers or sub-contractors hired by the Installers meet the same fitness requirements does not make the Installers employees.

The final alleged indicator of "control" is the fact that MAT assigns the routes that Installers work.⁴ MAT also requires the [*674] Installers to regularly report in to the dispatcher. The Court agrees with the Secretary that this close monitoring of progress and location indicates a certain degree of control over the Installers by MAT. It is insufficient in and of itself, however, to transform the relationship between the parties into that of employer/employee. Given the nature of the job and the requirement that customers be serviced inside a four-hour window -- a requirement mandated by the contract with Comcast and, more importantly, county regulations -- it is natural that MAT would establish procedures to insure that this timeliness requirement is met by its contractors. These procedures stem from the nature of the business [**16] and the need to provide reliable service and convenience to the consumers, not the nature of the relationship between MAT and Installers. Accordingly, this factor is not so compelling as to dictate a conclusion that the Installers are MAT's employees.

4 While it is true that ultimately MAT determines the Installers' routes, it is uncontroverted that MAT attempts to meet the Installers' requests for specific routes. Moreover, one of the Installers testified that it was common for them to swap routes among themselves at breakfast and thereafter inform MAT who would be servicing which customer, presenting MAT with a *fait accompli*

as to the actual routes. *See, e.g.*, Dreer Depo. at 164. Employees do not commonly enjoy such a degree of freedom.

Other aspects of the relationship between the Installers and MAT, not emphasized by the Secretary, indicate a lack of control by MAT over the Installers. As the Court of Special Appeals recognized in *Luna*, the Installers must assume responsibility for obtaining the [**17] proper qualifications, assure compliance with safety standards, perform their jobs free from all defects, pay all required taxes, and train and supervise their own helpers. *See Luna, supra*, at 11. The court called these aspects of the relationship "classic factors that establish the absence of control by [MAT]." *Id.* Moreover, the Installers can hire whomever they want as helpers or sub-contractors, subject only to the fitness standards discussed above.⁵

5 The fact that many Installers choose not to hire helpers does not mean that they are controlled by MAT. It is their *right* to do so which is relevant. The Installers' independent decision whether to hire helpers or not indicates their financial autonomy and the necessity for a certain amount of management skill - one of the factors indicative of independent contractor status.

Taking all of these factors into consideration, this Court concludes, as the *Dole* court and the Court of Special Appeals did, that MAT does not exercise the type or [**18] level of control necessary to characterize the relationship between the Installers and MAT as one of employee/employer under any conceivably relevant test.

2. Opportunity for Profit or Loss Dependent on Managerial Skill

This factor indicates contractor status, but it does not overwhelmingly tip the scales in that direction. On the one hand, it is well-established that Installers can control their own profits and losses by agreeing to work more or fewer hours and, more importantly, by improving their technique so that they can service more customers faster. One Installer testified that there were certain installers who "did good work,...large amounts of work" who "could make a very large sum of money." Dreer Depo. at 60.⁶ The ability to generate more money based on skill and hard work denotes independent contractor status. *See Dole*, 729 F. Supp. at 76-77.

6 According to Installer Dreer, these "favorite" installers generally have their choice of routes. *See Dreer Depo.* at 60.

[**19] On the other hand, MAT essentially controls the routes and sets the per-job pay rate. The Installers cannot unilaterally [*675] control how many

customers they will service on a given day or how much they will be paid for each job. Accordingly, it is impossible to say that the Installers are *solely* in control of their profits or losses. But, they are no more in control than are any other entities, including "typical" contractors, whose income derives from how much work someone else wants to give them, and at what rate they will be paid. Because the Installer's opportunity for profit or loss is curtailed to only that limited extent by dependence on MAT, this factor does not strongly tip the scales one way or the other. *See Dole*, 729 F. Supp. at 76 (finding that because the installers had a self-determined opportunity for profit or loss, this factor indicates "contractor" status).

3. Investment in Equipment and Employment of Others

This factor weighs strongly in favor of the Installers being considered contractors. The Installers are responsible for providing their own truck or van and specialty tools (which they may acquire from MAT). They also pay their own [**20] insurance premiums and taxes as self-employed contractors. Because these costs are considerable, especially considering the expense of a truck or van, and are of a type not normally borne by employees, this factor indicates that the Installers are contractors.⁷ *See id.* at 76-77 (finding that costs of tools, vehicle, and insurance constitute a significant investment and contrast sharply with the experience of a typical clerical employee, who finds all of his office supplies waiting for him at his work-station, freely provided by the employer).

7 The Secretary attempts to show a minimal investment by focusing only on the costs of the specialty tools which the Installers must possess. Her argument is without merit, because it blatantly ignores the substantial costs of a vehicle (even if the Installer leases one), taxes, and insurance.

As discussed above, the right of the Installers to hire helpers or sub-contractors is also indicative of their status as independent contractors.⁸

8 *See Note 5, supra.*

[**21] 4. The Degree of Skill Required

While the Secretary has attempted to downplay the skill level required to install and service cable systems, there is no question that it is a skilled trade. The skills involved in cable installation and service are akin to carpentry and electrical work. Traditionally, carpenters, construction workers, electricians and similarly skilled tradesmen are considered independent contractors. *See "Labor and Labor Relations,"* 48A Am.Jur.2d, § 3836

(1994). Because of the similarity between cable installation and these trades, this factor indicates a finding that the Installers are independent contractors. *See Dole*, 729 F. Supp. at 77 (installers possess special skills of carpenters and electricians, which is indicative of contractor status).⁹

9 The skills involved in cable installation stand in stark contrast to chicken catching, the focus of Judge Nickerson's opinion in *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452 (D.Md. 2000), the principal case upon which the Secretary relies. Without going into the truly gory details involved, suffice it to say that chicken catching is unskilled labor; hence *Heath's* outcome has about as much to do with this case as chicken feathers have to do with chicken salad.

[**22] 5. *The Permanence of the Working Relationship*

While several Installers have been with MAT for over a year, several have not. Some Installers work only part time, to supplement their principal incomes, while others make this their career. While it is [*676] certainly possible for Installers to establish a long-term relationship with MAT, implying employment, it is not necessarily the norm, nor is it required. Accordingly, this factor is neutral.

The parties devote a substantial portion of their briefs to arguing over whether the Installers can work for more than one cable installation broker. (This is the only issue on which there is any significant dispute of fact.) The language in the contract between MAT and the Installers is clear that the Installers can work for others. Despite that, the Secretary submits that MAT does not allow the Installers to work for competitors and disciplines them if they do.

The Secretary's flat statement that it was "*prohibited* by MAT and Comcast," Sec's Mem. at 26 (emphasis added), for the Installers to work elsewhere is not supported by admissible evidence sufficient to generate a triable dispute.¹⁰ What is clear, however, taking the evidence [**23] in the light most favorable to the Secretary, is that working for competitors was discouraged. What is equally clear from the deposition testimony is that there was no real incentive or time to work for competitors. Because MAT generally had full assignments for the Installers, there was no reason to switch from one broker to another or to work for more than one at any given time. Accordingly, although MAT's discouragement of working for competitors contributed to a more permanent working relationship between MAT and the Installers, and otherwise generally strengthened the economic dependence of the Installers [*677] on MAT, it

is not enough, by itself or in combination with other factors, to cause the Installers to be classified as MAT's "employees."

10 The Secretary cites several witnesses' depositions to support this statement. *See* Sec's Mem. at 26. Not all of the cited testimony stands for this proposition, however. In fact, some of the witnesses cited by the Secretary testified exactly contrary to her factual averment. Messrs. Holcomb, Anders, and Schreyer stated flatly that Installers *could* work for others. The other deponents essentially stated that while it was discouraged, they knew they had the right to work for others. There is also evidence that Comcast disliked Installers working for more than one broker handling Comcast accounts in the same region - in other words, Comcast wanted to limit overlap among the Installers.

There are only two pieces of evidence regarding actions taken by MAT against an Installer for working for a competitor, and neither is sufficient to create a triable issue of fact because neither is admissible. *See* Fed. R. Civ. P. 56(e); *Wilson v. Clancy*, 747 F. Supp. 1154, 1158 (D.Md. 1990) (opponent of motion must present admissible evidence to defeat summary judgment), *aff'd* 940 F.2d 654 (4th Cir. 1991). Installer Dreer testified about an individual named "Tim" who, according to the "rumor mill," may have been fired by MAT because he was also working for Jones Cable. *See* Dreer Depo. at 176-77, 256. The Court will not credit such speculative hearsay as competent evidence. The other evidence is in the form of a handwritten message dated November 23, 1993, from Joe Walker of MAT to Mark Markiewicz of Comcast stating that Gordon Gierczak was fired for "violating the no competition clause [sic] of the the [sic] contract." Sec's Ex. 60. The Secretary has produced no other evidence and devotes no time in her brief explaining the circumstances surrounding the firing, the subsequent note, who Mr. Walker or Mr. Gierczak are, what Gierczak's contract with MAT provided, or even whether he was an Installer. Therefore, the Secretary has failed to establish a proper foundation to admit the note as a statement by a party-opponent pursuant to Fed. R. Evid. 801(d)(2) or as a business record pursuant to Fed. R. Evid. 803(6). Because the note is inadmissible, it cannot be considered as competent evidence sufficient to defeat a motion for summary judgment. *See Wilson, supra.*

Even if such evidence were admissible, it would not change this Court's conclusion as to whether the Installers are contractors or employees. It is not uncommon to have non-compete clauses in contracts, and while a restraint on free competition is somewhat indicative of economic dependence on MAT, it does not outweigh the other substantial factors showing the Installers' economic independence. Because of that independence, the Installers must be considered contractors.

[24]** 6. *Cable Installation as an Integral Part of MAT's Business*

MAT was in the business of brokering cable installation to cable providers. The Installers were therefore integral to MAT's business. However, one factor standing alone does not tip the balance towards a finding of "employment." See *Dole*, 729 F. Supp. at 77.

Conclusion

In conclusion, taking all of these factors together, the Court concludes that the Installers are independent contractors. Other than assigning routes, MAT does not exert significant control over them; instead, the Installers are personally responsible for providing their trucks and tools, for the quality of their work, and for adherence to contract specifications. Through skill and hard work, they can substantially increase their earnings. Their labor is skilled and is of the type usually performed by contractors. And, as noted, they must make a significant capital investment in their business, including the purchase or lease of a vehicle and special tools. As the courts in both *Dole* and *Luna* found, these are the hallmarks of an independent contractor, whether adjudged under common law or FLSA criteria of what an **[**25]** "employee" is.

The Case Against Comcast

Because MAT cannot be considered the Installers' employer, neither can Comcast, whose only relationship with them is via its contract with MAT. Moreover, even if this Court were to conclude that the Installers were employees of MAT, it would not so find vis-a-vis Com-

cast. The Secretary's arguments imputing employer liability to Comcast are devoid of merit. She argues that because Comcast set technical specifications which had to be met, insisted that Installers be fit to enter customers homes, and mandated that the Installers show up within a four-hour window, Comcast "controlled" the Installers. The Court notes that taking this argument to its logical conclusion, a case could be made that the *customer* is an employer of the Installers. After all, the customer also expects the Installer to show up within the four hour window, to be fit to enter the house, and to install the cable service in a quality manner. In short, neither the customer nor Comcast can possibly be considered the Installers' employer.

CONCLUSION

For the aforesaid reasons, an Order will separately issued GRANTING the defendants' motions for summary judgment.

[26]** Date: July 27, 2000

Frederic N. Smalkin

United States District Judge

ORDER AND JUDGMENT

For the reasons stated in the Memorandum Opinion issued this day, it is this 27th day of July, 2000, hereby ORDERED and ADJUDGED:

- 1) That the Defendants Motions for Summary Judgment BE, and they hereby ARE, GRANTED;
- 2) That judgment BE, and it hereby IS, ENTERED in favor of the Defendants and against the Plaintiff, with COSTS assessed against the Plaintiff;
- 3) That the Clerk of the Court send copies of this Order and the Memorandum Opinion to counsel for the parties; and
- 4) That this case is HEREBY CLOSED.

Frederic N. Smalkin

United States District Judge

LEXSEE

Joe S. HICKMAN, Plaintiff, v. The UNITED STATES, Defendant

No. 46-85C

UNITED STATES CLAIMS COURT

8 Cl. Ct. 748; 104 Lab. Cas. (CCH) P34,793; 1985 U.S. Cl. Ct. LEXIS 923; 27 Wage & Hour Cas. (BNA) 581

September 13, 1985

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff federal employee filed a motion to compel production of documents by defendant government, in a case where the employee sought recovery of overtime compensation under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.S. § 216(b), which assessed liquidated damages for willful violations of the minimum and overtime pay mandates of 29 U.S.C.S. §§ 206 and 207, and challenged his classification as exempt under 29 U.S.C.S. § 213(a)(1).

OVERVIEW: The federal employee worked for the United States Navy. He served on the government his first request for production of documents, seeking records depicting hours worked, compensation received, and position descriptions, to which the government resisted contending that the information was irrelevant and unduly burdensome. The employee contended that he had performed substantially the same duties and worked the same hours, but that his job description was changed incident to the government's classification of him as non-exempt. The threshold relevancy of the compensation information sought could not be questioned, although the government could be protected from the same discovery in a case in which the burden was greater because of the number of record searches involved. The relevance of the position descriptions appeared tangential, as he sought the information as to other exempt employees presumably to show the type of "pattern or practice" which was the grist of Civil Rights Act cases. However, the FLSA, unlike the Civil Rights Act, did not attach liability to the existence of a "pattern or practice."

OUTCOME: The employee's motion to compel the government to produce documents in his action under the FLSA was granted in part and denied in part.

CORE TERMS: discovery, exempt, overtime, Civil Rights Act, job description, burdensome, production of documents, ship, Portal-to-Portal Act, willful violations, statute of limitations, classification, personnel, remarked, Fair Labor Standards Act, overtime compensation, work performed, payroll records, cover sheets, limitations period, inter alia, undue burden, representative actions, class actions, declaration, duplication, undertaken, deliberate, relevancy, relevance

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Discovery > Relevance

[HN1]The broad swath given to discovery requests pursuant to Fed. R. Civ. P. 26(b)(1), which is identical to U.S. Ct. Cl. R. 26(b)(1), allowing discovery of all information that may lead to the discovery of admissible evidence, limits inquiry only to the subject matter of the action and applies to claims brought under the Fair Labor Standards Act (FLSA).

Civil Procedure > Discovery > Relevance

[HN2]It is proper to deny discovery of events that occurred before an applicable limitations period unless the information is otherwise relevant to the issues in the case.

Civil Procedure > Discovery > Undue Burdens

[HN3]In general, discovery can be had as to acts occurring prior to an alleged injury where otherwise relevant and not unduly burdensome.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN4]Section 216(b) of the Fair Labor Standards Act provides that an action to recover liability may be maintained against any employer, including a public agency, in any Federal or state court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

COUNSEL: [**1] Charles M. Rand, Orlando, Florida, for Plaintiff.

Elaine J. Guth, Washington, District of Columbia, with whom was Acting Assistant Attorney General Richard K. Willard, for Defendant; Naomi Miske, Department of the Navy, of counsel.

JUDGES: Christine Cook Nettlesheim, Judge.

OPINION BY: NETTESHEIM

OPINION

[*748] ORDER

NETTESHEIM, Judge.

Plaintiff has moved pursuant to RUSCC 37(a)(2) for an order compelling production of documents, which defendant opposes.

FACTS

This case arises under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1982) (the "FLSA"), and is brought by Joe S. Hickman ("plaintiff"), a federal employee to whom coverage of the FLSA was extended by the Act of April 8, 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 216(b) (1982)). Plaintiff seeks recovery of overtime compensation under section 216(b) of the FLSA, which assesses liquidated damages for willful violations of the minimum and overtime pay mandates of sections 206 and 207, and challenges his classification as exempt under section 213(a)(1) from payment for overtime.

Plaintiff's complaint filed on January 24, 1985, reveals that he is employed by the David W. Taylor [**2] Naval Ship Research and Development Center (the "TR&DC"), which is within the Department of the United States Navy. Plaintiff is an Senior Electronics Technician, engaged in the performance of acoustical trials on Naval ships at the GS-12 level of the Acoustical Technician Detachment of the TR&DC, located [*749] at

Cape Canaveral, Florida. According to the complaint, plaintiff's job responsibilities and duties include the maintenance and operation of electronic equipment aboard the research ship MONOB. Plaintiff complains that he has been denied overtime compensation from June 1976 to the present, further averring that he has worked an average of 1700 to 1800 overtime hours per year. In his discovery motion, plaintiff also asserts that, although he was classified as non-exempt from 1974-76, his status under the FLSA and job description were changed in 1976 without any real change in his duties or work hours to justify the FLSA exemption.

On May 29, 1985, plaintiff served on defendant its first request for production of documents seeking, principally from 1974 to present: his personnel files; documents submitted by defendant to the Office of Personnel Management (the "OPM") [**3] regarding plaintiff's status of employment under the FLSA (defendant states that on July 20, 1984, the OPM determined plaintiff's position to be exempt under the FLSA and that his position had been reaudited in 1981 and 1984 with the same result); all classification evaluation statements for plaintiff's job position descriptions that were sent by defendant to the OPM; all documents supporting defendant's position that plaintiff is properly characterized as exempt from the FLSA; and written instructions by the OPM on which defendant relies to support its position.

Defendant resisted the following production request on the ground of irrelevancy: ¹

3. Any and all records depicting the hours worked and the compensation received by Plaintiff while employed by defendant from January 1, 1984 to date, including, but not limited to, time sheets, records and cards, payroll records, W-2 forms, etc.

1 In its opposition defendant also argued that the request was burdensome.

The following request was objected [**4] to as both irrelevant and burdensome:

5. All cover sheets and job or employee position descriptions, including any amendments or updates thereto, from June 1, 1974 to the present for Plaintiff and all employees of David W. Taylor Naval Ship Research and Development Center classified as exempt under the Fair Labor Standards Act as set forth in the attached

letter of F. D. Harmon, Jr., dated May 28, 1976 [listing the names and pay grades of 39 other employees].

DISCUSSION

[HN1]The broad swath given to discovery requests pursuant to Fed. R. Civ. P. 26(b)(1) (identical to RUSCC 26(b)(1)), allowing discovery of all information that may lead to the discovery of admissible evidence, limits inquiry only to the subject matter of the action and applies to claims brought under the FLSA. See Donovan v. Prestamos Presto Puerto Rico, 91 F.R.D. 222, 223-24 (D.P.R. 1981). The broad discretionary power to control discovery endowed by Fed. R. Civ. P. 26 is mirrored in RUSCC 26 with respect to disputes under the FLSA. See Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977).

Discovery Beyond the Three-year Statute of Limitations

Defendant contends that the three-year statute [**5] of limitations applicable to willful violation of the FLSA as charged by plaintiff, 29 U.S.C. § 255(a); Bebee v. United States, 226 Ct. Cl. 308, 323-24, 640 F.2d 1283, 1293 (1981), bars plaintiff from discovery of documents emanating from a period longer than that which measures his potential monetary recovery, so that the discovery is irrelevant. Defendant also asserts that this discovery is burdensome and submits the Declaration of Don A. Mauzy, Aug. 22, 1985, the cognizant payroll supervisor, who describes the "extensive search" that has been undertaken to locate the requested payroll records. Mauzy Declr. para. 3. Mr. Mauzy avers that time cards are available from April 1980; overtime requests and authorizations and time and attendance sheets or statements of work performed, from 1981 to present; and records of actual pay, for various periods from October 1975 [*750] to present. Defendant asks that if the discovery is allowed, plaintiff be required to bear the cost of duplication -- a position not objectionable to plaintiff.

The Supreme Court in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978), remarked: [HN2]"It is proper [**6] to deny discovery of . . . events that occurred before an applicable limitations period unless the information is otherwise relevant to the issues in the case . . ." Plaintiff contends that since 1974 he has performed substantially the same duties and worked the same hours, but that his job description was changed incident to defendant's classification of plaintiff as nonexempt in 1976. The threshold relevancy of the information sought cannot be questioned.

Adelman v. Nordberg Manufacturing Co., 6 F.R.D. 383 (D. Wisc. 1947), the only case cited by defendant for the proposition that discovery in FLSA cases should be restricted to the applicable limitations period, confined discovery in that multiple-plaintiff action consistent with the six-year statute of limitations. Prior to the Portal-to-Portal Act of 1947, Pub. L. No. 49, 61 Stat. 87 (1947) (codified at 29 U.S.C. §§ 251-262 (1982)), which, *inter alia*, limited jurisdiction of the courts under the FLSA, H.R. Rep. No. 71, 80th Cong., 1st Sess. 1 (1947), reprinted in 1947 U.S. Code Cong. & Ad. News 1029, there was no uniform federal statute of limitations for the FLSA. The one-year period established in 1947 was [**7] enlarged to three years in 1966, Act of Sept. 23, 1966, Pub. L. No. 89-601, § 601(b), 80 Stat. 844 (1966) (codified at 29 U.S.C. § 255(a)), for willful violations of the FLSA. Adelman is an old case decided under another law and is not binding. See Greenberg v. United States, 1 Cl. Ct. 406, 407 (1983). Given plaintiff's strong showing of relevance, rooted in what plaintiff will seek to show was an invalid change in his job description in 1976, the statute of limitations will not define the parameters of discovery of plaintiff's own records in this case.²

2 Defendant has pleaded laches as an affirmative defense. This defense has not been considered in deciding this motion.

Plaintiff points out that FTC v. Lukens Steel Co., 444 F. Supp. 803, 806 (D.D.C. 1977), disfavors selective withholding of documents. Defendant made many of plaintiff's personnel records available antedating 1982, three years before plaintiff sued, but resisted production of overtime and pay records before 1982. Although defendant did not do so here, it could have preserved its objection by submitting documents and noting that it reserved objection. Nonetheless, the court finds no waiver of defendant's objection in the circumstances presented.

[**8] Mr. Mauzy's declaration demonstrates that the search undertaken by defendant to locate available and missing records was extensive and time-consuming. The burden of this discovery has already been assumed and the sources for retrieving existing hard copies of documents identified. Under the circumstances the requested discovery should be allowed, provided that plaintiff pays for the cost of duplication.

This ruling is grafted firmly to the posture of this case. It is at present a single-plaintiff action. An undue burden readily can be envisaged if multiple plaintiffs were to seek production of documents for a 15-year period (assuming a compelling showing of relevancy). See 4 J. Moore, *Moore's Federal Practice*, para. 26.56[1], at

26-104 (2d ed. 1984) [HN3] ("In general, discovery can be had as to acts occurring prior to an alleged injury where otherwise relevant and not unduly burdensome."). Thus, defendant may be protected from the same discovery in a case in which the burden is greater because of the number of record searches involved.

Discovery of Non-plaintiff Employees

Plaintiff's request for the cover sheets and job descriptions from 1974 for the 39 other exempt [**9] employees of David W. Taylor is more problematic because of the peculiar status of collective and representative lawsuits under the FLSA. [HN4]Section 216(b) of the FLSA provides in pertinent part:

An action to recover . . . liability . . . may be maintained against any employer (including a public agency) in any Federal [*751] or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought . . .

A thorough discussion of this provision appears in *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984). The Tenth Circuit tracked the statutory history of the FLSA in commenting on the deliberate congressional effort to limit the nature of a class action suit based upon an alleged FLSA violation in section 5 of the Portal-to-Portal Act, 61 Stat. 87, adding the portions of section 216(b) quoted above. The Tenth Circuit remarked:

While still providing for collective and [**10] representative actions, . . . [Congress] intended to severely limit the burden on the defendant and the participation of the court. Indeed, within the policy statements of the Portal-to-Portal Act of 1947, the following statement is included:

Section 1(b)(3)--"[A policy of this Act is] to define and limit the jurisdiction of the courts."

725 F.2d at 1267. It is also true that the House Report was attentive to the financial burden on the employer of discovery addressed to all affected employees in suits

maintained as class actions under the FLSA. See H.R. Rep. 71, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S. Code Cong. & Ad. News 1029, 1032.

This amendment to section 216(b) produced disparate decisions on the question of whether, and to what extent, a court would serve notice on prospective plaintiffs. See *Dolan*, 725 F.2d at 1266 (citing, *inter alia*, *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977); *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1978); and *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982)). Of pertinence to this case is that the courts debating this issue have [**11] ruled on whether to allow discovery of names and addresses of all employees or categories thereof. The Tenth Circuit in *Dolan* remarked:

Discovery into the patterns and practices of the employer may uncover violations of the statute affecting other employees. We do not intend to limit discovery that would be normally available in cases of this sort, even though it might reveal identities of other potential plaintiffs.

725 F.2d at 1267 n.4. *Dolan* cited as authority the Ninth Circuit in *Kinney Shoe Corp.*, wherein the court opined that although the employee list could not be produced for the purpose of requiring the court to give notice,

we cannot say that the district court would be entirely without a sustainable basis for its order. Cf., e.g., *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306 (5th Cir. 1973) (in Civil Rights Act suit statistics showing a past history of bi-racial employment discoverable as relevant despite absence of both "pattern or practice" claim and class allegation.) . . .

564 F.2d at 864.

Here plaintiff seeks more information than an employee list. The only FLSA case to which he cites ordering discovery beyond [**12] names and addresses of other employees, *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979), permitted discovery of any and all records for work performed by field workers for a 45-day period. Noting that "the requests should not create an undue burden upon Defendants . . .", the district court pointed out that requests "span a period of less than one month . . ." 82 F.R.D. at 620. Assuming, *arguendo*, that the protective policies, as embodied in statutes and regulations, for migrant farm workers apply with equal force

to employees of the federal government, the disparity between 45 days and 15 years for discovery requests in the *Riojas* and this case is obvious.

Moreover, the relevance of the documentation sought here appears tangential. Plaintiff seeks information as to other exempt employees (who are GS-11 or 12). [*752] Presumably the information sought is to show the type of "pattern or practice" which is the grist of Civil Rights Act cases. However, the FLSA, unlike the Civil Rights Act, does not attach liability to the existence of a "pattern or practice."

The dictum in *Kinney Shoe*, cited with approval by the Tenth Circuit in *Dolan*, is [**13] not persuasive. The analogy to Civil Rights Act cases is flawed. Although the willfulness of defendant's refusal to comply with the FLSA is actionable, the case turns on the facts with respect to the affected plaintiff. See *Martin v. Penn Line Service, Inc.*, 416 F. Supp. 1387, 1389-90 (W.D. Pa. 1976); *Reeves v. International Telephone & Telegraph Corp.*, 357 F. Supp. 295, 302 (W.D. La. 1973), *aff'd*, 616 F.2d 1342, 1351 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S. Ct. 857, 66 L. Ed. 2d 800. At this point

plaintiff sues by himself. The deliberate congressional policy to limit the onus of FLSA actions to the type of representative action provided for in the Portal-to-Portal Act counsels against expanding discovery to encompass the type of class action that Congress sought to avoid.

CONCLUSION

Based on the foregoing, plaintiff's motion to compel production of documents is granted in part and denied in part.

IT IS ORDERED, as follows:

1. Defendant shall produce, and plaintiff shall bear the cost of producing, the documents called for in plaintiff's request no. 3, except to the extent they have been provided already.

2. Plaintiff's motion is otherwise denied.

[**14] 3. Since the opposition to plaintiff's motion was substantially justified, each party shall bear its own costs.

Christine Cook Nettesheim, Judge

LEXSEE

**HI-TECH VIDEO PRODUCTIONS, INC., Plaintiff-Appellee, v. CAPITAL
CITIES/ABC, INC., Defendant-Appellant.**

No. 93-1090

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**58 F.3d 1093; 1995 U.S. App. LEXIS 16760; 1995 FED App. 0204P (6th Cir.); 35
U.S.P.Q.2D (BNA) 1419; Copy. L. Rep. (CCH) P27,413; 23 Media L. Rep. 2171**

**May 3, 1994, Argued
July 11, 1995, Decided
July 11, 1995, Filed**

SUBSEQUENT HISTORY: **[**1]** Rehearing Denied August 3, 1995, Reported at: 1995 U.S. App. LEXIS 21039.

PRIOR HISTORY: ON APPEAL from the United States District Court for the Western District of Michigan. District No. 90-01015. Robert Holmes Bell, District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment of the United States District Court for the Western District of Michigan entered in favor of plaintiff in copyright infringement case.

OVERVIEW: Plaintiff registered a copyright in a travel video as a work made for hire. Defendant used portions of the video on its television program without plaintiff's permission. Plaintiff filed suit against defendant alleging copyright infringement. The trial court entered judgment in favor of plaintiff. On appeal, the court held that because the video was produced in part by independent contractors, it was not a work made for hire and, therefore, the copyright in the video as a work made for hire was invalid. The court reversed and remanded the case with instructions to enter judgment in favor of defendant.

OUTCOME: The court reversed and remanded the case with instructions to enter judgment in favor of defendant, holding that because the video was produced in part by independent contractors, it was not a work made for hire and, therefore, the copyright in the video as a work made for hire was invalid.

CORE TERMS: video, hire, hiring, hired, independent contractors, regular, independent contractors, island, right to control, paying, skill, weigh, common law, employment status, employer-employee, scene, shot, freelance, employee status, instrumentalities, accomplish, assign, film, photography, creative, aerial, employee benefits, tax treatment, remaining factors, infringement

LexisNexis(R) Headnotes

Copyright Law > Civil Infringement Actions > Burdens of Proof

Copyright Law > Civil Infringement Actions > Elements > Ownership

Copyright Law > Formalities > General Overview

[HN1]To sustain a case of copyright infringement, the plaintiff must prove (1) ownership of a valid copyright, and (2) copying by the defendants of constituent elements of the work that are original. A certificate of copyright creates a presumption of the copyright's validity. 17 U.S.C.S. § 410(c). Although the presumption may be rebutted, it is the burden of the party challenging the copyright to do so.

Copyright Law > Conveyances > Divisibility of Rights

Copyright Law > Formalities > General Overview

Copyright Law > Ownership Interests > Works Made for Hire

[HN2]In the case of a work made for hire, the Copyright Act of 1976 considers the employer or person for whom the work was prepared to be the author for purposes of copyright registration and ownership. 17 U.S.C.S. § 201(b).

Copyright Law > Ownership Interests > Works Made for Hire

[HN3]See 17 U.S.C.S. § 101.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Copyright Law > Ownership Interests > Works Made for Hire

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

[HN4]The court conducts a de novo review of the district court's application of 17 U.S.C.S. § 101(1) to the facts of the case.

Copyright Law > Ownership Interests > Works Made for Hire

[HN5]The term "employee" in 17 U.S.C.S. § 101 must be understood through application of the general common law of agency. The following is a nonexclusive list of factors relevant to the determination of "employee" status: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.

Copyright Law > Ownership Interests > Works Made for Hire

[HN6]It does not necessarily follow that because no one factor to determine employee status is dispositive all factors are equally important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case.

Copyright Law > Ownership Interests > Works Made for Hire

[HN7]The choice to treat a skilled worker as an independent contractor for compensation and tax purposes is entirely inconsistent with an employer-employee relationship.

Copyright Law > Ownership Interests > Works Made for Hire

[HN8]The parties' perceptions or understanding are relevant to a worker's employment status.

Copyright Law > Ownership Interests > Works Made for Hire

[HN9]Similarity between the hiring party's regular business and the hired party's work does not necessarily weigh significantly in favor of finding an employer-employee relationship.

Copyright Law > Ownership Interests > Works Made for Hire

[HN10]The exercise of authority to hire assistants tends to show independent contractor status.

Copyright Law > Ownership Interests > Works Made for Hire

Labor & Employment Law > Employment Relationships > Independent Contractors

[HN11]Neither the right to control nor actual control alone can turn an otherwise independent contractor into an employee.

COUNSEL: For HI-TECH VIDEO PRODUCTIONS, INCORPORATED, a Michigan corporation, Plaintiff - Appellee: James M. Hunt, ARGUED, BRIEFED, Graff & Hunt, Traverse City, MI.

For CAPITAL CITIES/ABC, INCORPORATED, a New York corporation, Defendant - Appellant: Herschel P. Fink, ARGUED, BRIEFED, Michael A. Gruskin, Honigman, Miller, Schwartz & Cohn, Detroit, MI.

JUDGES: Before: JONES and BATCHELDER, Circuit Judges; GILMORE, District Judge. * BATCHELDER, J., delivered the opinion of the court, in which GILMORE, D.J., joined. JONES, J. (pp. 14-16), delivered a separate dissenting opinion.

* The Honorable Horace W. Gilmore, District Judge for the Eastern District of Michigan, sitting by designation.

OPINION BY: ALICE M. BATCHELDER

OPINION

[**2] [*1094] ALICE M. BATCHELDER, Circuit Judge. Hi-Tech Video Productions, Inc. ("Hi-Tech"), filed suit against Capital Cities/ABC, Inc. (ABC), alleg-

ing a single count of copyright infringement. At the close of a two-day bench trial, the district court denied from the bench ABC's motion to dismiss the complaint due to the invalidity of Hi-Tech's copyright. The district court subsequently entered judgment in favor of Hi-Tech. Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc., 804 F. Supp. 950 (W.D. Mich. 1992). In so doing, the district court rejected ABC's affirmative defense of fair use, trebled the award of damages in light of ABC's "willful" infringement of copyright, and awarded Hi-Tech attorney's fees and costs. The [**2] district court later denied ABC's motion for a new trial or for reconsideration of the bench ruling on copyright validity and of the judgment for Hi-Tech.

ABC filed this appeal contesting the district court's rulings on copyright validity, fair use, treble damages, and attorney's fees and costs. Because we find Hi-Tech's copyright invalid, we reverse the judgment below without reaching ABC's other assignments of error.

I.

Hi-Tech is a production company in Traverse City, Michigan. In addition to contractual work, such as the creation of commercials and other promotional tapes for companies, Hi-Tech independently produces and distributes "video postcards" of northern Michigan vacation spots.

In May 1990, Hi-Tech released a travel video entitled "Mackinac Island: The Mackinac video." Stan Akey, sole owner of Hi-Tech, produced and directed the video. He enlisted the help of freelance subcontractors: Ted Cline as aerial videographer, Steve Cook as scriptwriter/narrator, and Michael Mueller as principal videographer. As one of Hi-Tech's independent productions, the Mackinac video received its funding from Hi-Tech itself, not from a commercial client. Effective August 3, 1990, [**3] Hi-Tech registered a copyright in the Mackinac video as a "work made for hire."

[***3] Also in early 1990, the producers of "Good Morning America" (GMA), a news and information program on ABC, decided to feature Mackinac Island's annual Lilac Festival in GMA's June 8, 1990, broadcast. Donna Vislocky, then an associate producer of GMA, was charged with preparing a one-minute videotape on Mackinac Island and its history. Twice, Vislocky obtained footage of the island from an ABC affiliate in Traverse City. Two days before the air date, Vislocky determined the scenes to be insufficient.

[*1095] Vislocky telephoned Sarah Bolger, Executive Director of the Mackinac Island Chamber of Commerce. Bolger sent Vislocky two videos, including the Mackinac video, via overnight mail. Upon receiving the videos, Vislocky identified scenes from Hi-Tech's video

that were appropriate for use in GMA's background piece on Mackinac Island. Vislocky rearranged those scenes for use in the background piece but did not use Hi-Tech's narration or music. ¹

1 Vislocky later contended that she received permission for such use from the Chamber of Commerce, which she believed owned the video. The district court resolved this factual issue against ABC. In light of our conclusion on the copyright's validity, we do not express an opinion on the district court's factual findings with respect to the circumstances of ABC's use.

[**4] The next morning, Spencer Christian of GMA reported the weather from Mackinac Island and conducted an interview of Bolger regarding the annual Lilac Festival. Introducing Christian's segment was the background piece that Vislocky had edited to include scenes from the visual portion of Hi-Tech's video.

II.

[HN1]To sustain a case of copyright infringement, the plaintiff must prove "(1) ownership of a valid copyright, and (2) copying [by the defendants] of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 [***4] (1991); Wickham v. Knoxville Int'l Energy Exposition, Inc., 739 F.2d 1094, 1097 (6th Cir. 1984). Hi-Tech's certificate of copyright creates a presumption of the copyright's validity. 17 U.S.C.A. § 410(c) (1977). Although the presumption may be rebutted, it is the burden of the party challenging the copyright to do so. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 831 (10th Cir. 1993).

Hi-Tech's certificate of copyright registration labels the Mackinac video a "work made for hire." [HN2]In the case of a "work made for hire," the Copyright Act of 1976 ("the Act") considers the employer [**5] or person for whom the work was prepared to be the "author" for purposes of copyright registration and ownership. 17 U.S.C.A. § 201(b) (1977). Section 101 of the Act defines a "work made for hire" in two ways:

[HN3](1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test,

as answer material for a test, or as an atlas, *if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.* . . .

(4) the location of the work;

17 U.S.C.A. § 101 (1977) (emphasis added).

Hi-Tech does not claim that the parties signed a written agreement to consider the video a "work made for hire." Thus, we are not asked to find Hi-Tech's copyright valid under § 101(2) of the Act. With respect to § 101(1), ABC does not argue that, if indeed prepared by employees as opposed to independent contractors, the work was not prepared in the scope of the employees' employment. Therefore, [**6] Hi-Tech's copyright is a valid "work made for hire" if we conclude it was prepared by employees, not independent contractors.

[**7]

(5) the duration of the relationship between the parties;

[***5] The district court found Akey's assistants in the production of the video to be employees within the meaning of § 101(1). [HN4] This Court conducts a *de novo* review of the district court's application of § 101(1) to the facts of the case. See *Marco v. Accent Publishing Co.*, 969 F.2d 1547, 1548 (3d Cir. 1992); *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

(6) whether the hiring party has the right to assign additional projects to the hired party;

III.

The United States Supreme Court construed the "work made for hire" provision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (hereinafter *CCNV*), and concluded that the term "employee" in § 101 must be understood through application of the general common law of agency. *Id.* at 740-41. The Court [*1096] then set forth [HN5] a nonexclusive list of factors relevant to the determination of "employee" status:

(7) the extent of the hired party's discretion over when and how long to work;

(1) the hiring party's right to control the manner and means by which the product is accomplished;

(8) the method of payment;

(9) the hired party's role in hiring and paying assistants;

(2) the skill required;

[***6]

(10) whether the work is part of the regular business of the hiring party;

(3) the source of the instrumentalities and tools;

(11) whether the hiring party is in business;

(12) the provision of employee benefits; and

(13) the tax treatment of the hired party.

See id. at 751-52 (footnotes omitted). No single factor is determinative. *Id.*

In finding "employee" status in this case, the district court relied on six of the above factors: Hi-Tech's right to control and actual control, the source of the instrumentalities, Hi-Tech's right to assign additional projects, the assistants' role in hiring and paying their own assistants, the scope of Hi-Tech's regular business, and Hi-Tech's status as a business. The court mentioned several factors that weigh in favor of independent contractor status, [**8] but summarily found them insufficient to affect its conclusion that an employer-employee relationship existed between Akey and his assistants. ²

2 We cannot agree with the dissent's characterization of Akey as an employee of Hi-Tech. Hi-Tech is a business venture owned and operated solely by Akey. Thus, Akey is not an employee of Hi-Tech; Akey is Hi-Tech.

The district court clearly erred in two of its factual findings. First, the district court found that Akey supplied the production equipment to his assistants. To the contrary, the record shows that Cline, the aerial videographer, supplied his own plane, which was specially equipped to accommodate aerial photography. Also, Akey provided the camera for principal photographer Mueller, but not the computer with which Mueller developed the video's graphics.

Second, the district court found that Akey retained the right to assign additional projects to his assistants. The [***7] record does not support this finding. While Akey may have previously engaged [**9] one or more of his Mackinac video assistants for other projects, there is no suggestion that Cline, Cook, and Mueller were bound to accept assignments unrelated to the Mackinac video. Rather, the record indicates that Akey hired Cline,

Cook, and Mueller to make specific contributions to the Mackinac video only. For example, Akey testified that when a "particular job . . . comes out," he hires "freelance people" to assist with "that project." Akey also testified that Mueller's primary occupation is in the computer field, but that Mueller takes on "contractual jobs" in the photography field as well. Indeed, Akey testified that Cline, too, has his own business of flying his Cessna for aerial photography.

More importantly, the district court erred as a matter of law in its application of the common law of agency to the facts of this case. The district court misapprehended the Supreme Court's statement that no single factor is conclusive in the agency analysis and improperly used this principle to dismiss the relative importance of several factors. As one court has said of *CCNV*,

[HN6]It does not necessarily follow that because no one factor is dispositive all factors are equally [**10] important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case.

Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992); *see CCNV*, 490 U.S. at 742-43, 752. We agree [*1097] with the Second Circuit's approach to applying the factors in the agency analysis. The factors that warrant significant weight in this case are discussed below.

A. The Right to Control, Actual Control, and Skill Required

In *CCNV*, the Supreme Court adopted the agency principles test and rejected the tests that made the right to exercise control over production, or the actual exercise of [***8] control, dispositive in the "work made for hire" analysis. 490 U.S. at 742-43, 748. Nevertheless, the Supreme Court retained the "control" factor as simply one of the many relevant factors. *Id.* at 751.

In this case, Hi-Tech, through its sole proprietor Stan Akey, had the right to control the manner and means by which the video was completed. Akey exercised this right through his involvement in almost every step of the creative and administrative processes required to produce "Mackinac Island: [**11] The Video."

Nevertheless, while Akey may have had control of the artistic objectives of the project, it is also true that Akey relied on the skill of the artists he solicited to accomplish those objectives. In Akey's own words, he "coordinated the entire project from its inception to completion, the creative input into the tape, and coordinated the

efforts of all the freelance people who worked with [him]." Akey further testified that he considered himself the producer and director of the Mackinac video and that he depended on each assistant's "creative, artistic ability" in his particular field.

Akey's control of the video production thus weighs in favor of finding an employer-employee relationship, but not significantly, in light of the skill required of the assistants, as well as the assistants' artistic contributions to the product. See Marco, 969 F.2d at 1552.

B. Method of Payment, Employee Benefits, and Tax Treatment

In virtually every case, a strong indication of a worker's employment status can be garnered through examining how the employer compensates the worker (including benefits provided) and how the employer treats the worker for tax purposes. For [**12] example, in Aymes, 980 F.2d 857, the hiring party provided a computer programmer no benefits and withheld neither social security nor federal or state income taxes. The Second Circuit reasoned that [HN7]the choice to treat a skilled worker as an independent contractor for [***9] compensation and tax purposes was entirely inconsistent with an employer-employee relationship. *Id.* at 862-63.

The record reveals that Akey paid Mueller on a per diem basis. Regular wages, as opposed to payment by the job, suggest employee status, but the fact that Mueller worked on the Mackinac video for only five days suggests otherwise. The record does not specify the method of payment for Cline and Cook. Overall, the evidence on the method of payment is indeterminate.

However, the same cannot be said of the other relevant economic factors. Akey neither withheld payroll taxes from his assistants' compensation nor provided the assistants employment benefits such as medical or life insurance. Contrary to the district court's analysis, these factors weigh very heavily in favor of finding independent contractor status.

C. Perceptions of the Parties

In applying the common law of agency to copyright [**13] cases, the Supreme Court typically refers to the Restatement of Agency for guidance. CCNV, 490 U.S. at 752 n.31; see also Marco, 969 F.2d at 1550 (drawing on CCNV and the Restatement). In addition to the factors listed above, the Restatement cites [HN8]the parties' perceptions or understanding as relevant to a worker's employment status. Restatement (Second) of Agency § 220(i) (1957).

Akey is the only full-time employee of Hi-Tech. He testified that when the need arises for a production team, he hires "freelance people," including photographers,

scriptwriters, musicians, and narrators. In his testimony, Akey referred to his assistants on the Mackinac video as "freelancers," "independent contractors," "subcontractors," or the like no fewer than eight times. Akey also [*1098] specifically stated that the assistants were not his employees.

The district court did not accord any weight to Akey's understanding of his employment relationship with the [***10] assistants. This Court considers Akey's perceptions highly indicative of his assistants' independent contractor status. See Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enter., 815 F.2d 323, 336 [**14] (5th Cir. 1987), ³ cert. denied, 485 U.S. 981, 99 L. Ed. 2d 491, 108 S. Ct. 1280 (1988).

3 This case preceded CCNV but adopted and applied the agency principles test that the Supreme Court later approved in CCNV. Compare Easter Seal, 815 F.2d at 335 with CCNV, 490 U.S. at 741-43.

D. The Scope of the Business

If the work at issue is not a part of the hiring party's regular business, the hiring party is more likely to enlist the services of an independent contractor on a periodic basis (that is, when and if the need arises), rather than hire a full-time employee. In CCNV, for instance, the hiring party was a charity, and the hired party was an artist. 490 U.S. at 753. The Supreme Court found this suggestive of independent contractor status. *Id.*; see also M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1492 (11th Cir. 1990) (home builder using outside contractor for drafting work); Respect Inc. v. Committee on the Status of Women, 815 F. Supp. 1112, 1118 (N.D. Ill. 1993) (organization established [**15] to fund author's texts). Although the district court does not emphasize this factor, Hi-Tech relies heavily on it in its appellate brief.

Hi-Tech is in the business of producing videos. Accordingly, it would be perfectly understandable for Hi-Tech to maintain employees skilled in the various aspects of video production. Nevertheless, [HN9]similarity between the hiring party's regular business and the hired party's work does not necessarily weigh significantly in favor of finding an employer-employee relationship. In Marco v. Accent Publishing Co., 969 F.2d 1547 (3d Cir. 1992), Accent, a publisher of a trade journal, regularly published photographs of its own conception. The Third Circuit noted, however, that a hiring party in Accent's situation [***11] "might easily accomplish its regular business by using independent contractors rather than employees" to produce the required photographs. *Id.* at 1551. Accordingly, the regular business factor did not undermine the court's conclusion that the plaintiff pho-

tographer was an independent contractor. *See also MGB Homes*, 903 F.2d at 1492; *Johannsen v. Brown*, 797 F. Supp. 835, 840-41 (D. Or. 1992) (finding artist who produced [**16] cover artwork for magazine to be independent contractor).

By Akey's own admission, Hi-Tech uses independent contractors to accomplish its regular business. Akey testified that he is the only full-time employee and then explained, "And when we have a particular job that comes out, then, yes, we do hire freelance people to get involved in that project." As in *Marco*, the fact that the assistants' work was part of Hi-Tech's regular business is not particularly probative evidence of employment status.

E. The Remaining Factors

Of the remaining factors, several find little foundation in the record at all. The live photography was obviously completed on site at Mackinac Island. It is, however, unclear whether Mueller and Cook completed their work (such as developing the graphics and writing the script, respectively) in their own studios or at Hi-Tech. Similarly, the record does not indicate the extent of Hi-Tech's discretion over when and how long to work.

Akey testified that Mueller worked on the Mackinac video for five days. The duration of Cline's and Cook's assistance on the Mackinac video is unknown. Furthermore, any assistance Cline, Mueller, and Cook rendered on earlier [**17] projects would be relevant to, though not dispositive of, employment status. This information is also unknown.

The district court found, however, that two of the remaining factors weigh in favor of finding an employer-employee relationship: (1) the fact that Akey's assistants did not have a role in hiring and paying additional [***12] assistants and (2) the fact that Hi-Tech is in [*1099] business. Neither of these considerations is significant in the context of this case. The fact that Akey's assistants did not hire their own assistants is not surprising. In light of the scope of the project and the nature of the work, it is appropriate that Akey's assistants would work without assistants of their own. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) ("The factors relating to the authority to hire assistants will not normally be relevant if the very nature of the work requires the hired party to work alone."). Indeed, it would seem that a hired party's failure to hire her own assistants is rarely, if ever, significant in determining whether a party is an independent contractor. On the other hand, however, [HN10]the exercise of authority to hire assistants tends to show independent [**18] contractor status. *Id.* (commenting on significance of authority to hire assistants). Thus, we accord no weight to this factor.

As discussed above, the fact that Hi-Tech is in business does not make it more likely that it would hire employees, because Hi-Tech could effectively accomplish its regular work through independent contractors instead of employees. *See Marco*, 969 F.2d at 1551. Contrary to the district court, then, this factor does not approach proof of the actual employment status of Mueller, Cline, and Cook. Therefore, we decline to give weight to this factor either.

IV.

In sum, Akey's right to control and actual control of the video's production suggests, at first blush, that his assistants were employees. However, [HN11]neither the right to control nor actual control alone can turn an otherwise independent contractor into an employee. *Easter Seal*, 815 F.2d at 336. The economic treatment of the assistants, the skill required of the assistants, and Akey's own perceptions of the assistants' status compel the conclusion that Cline, Mueller, and Cook were independent contractors. *See Banctraining Video Sys. v. First Am. Corp.*, No. 91-5340, 1992 U.S. App. LEXIS 3677, 1992 WL 42345 (6th [**19] Cir. Mar. 3, 1992).

[***13] Because the video was produced in part by independent contractors, Hi-Tech's Mackinac video is not a "work made for hire," and the copyright in the video as a "work made for hire" is invalid. Therefore, we REVERSE and REMAND the case with instruction to enter judgment in ABC's favor.

DISSENT BY: NATHANIEL R. JONES

DISSENT

[***14] NATHANIEL R. JONES, Circuit Judge, dissenting. I disagree with the majority's conclusion that Akey's production assistants were not "employees." Contrary to the majority, I believe the factors set forth in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (hereinafter *CCNV*), for determining employee status weigh in favor of finding that the production assistants were indeed employees.

The issue turns on 17 U.S.C. § 101, which was authoritatively interpreted in *CCNV*, where the Supreme Court unanimously held that an association could not copyright a work created by a particular sculptor because the sculptor was an independent contractor, rather than an employee, of the association. *CCNV*, 490 U.S. at 2179-80. Section 101 provides that a work is made "for hire," and accordingly copyrightable [**20] by the employer, under two sets of circumstances:

(1) a work [is] prepared by an employee within the scope of his or her employment; or

(2) a work [is] specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1988).

Thus, under subsection (1) Hi-Tech may copyright the works of its *employees* without any restrictions, but under subsection (2) it may only copyright the works of *independent contractors* if it obtained written permission. Because no such agreement was signed here, the question turns on whether "employees" [*1100] made the video. *CCNV* provides the following guidance in this regard: [***15]

To determine whether a work is for hire under the Act, a court first should ascertain, using general principles of general common law of agency, whether the work was prepared [**21] by an employee or an independent contractor.

. . . In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants;

whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. No one of these factors is determinative.

490 U.S. at 750-51 (footnotes and citations omitted).

It is undisputed that Akey was clearly an employee of Hi-Tech. ' He hired others to do some of the camera work. He, himself, however, shot the scene of the island from an aircraft, which was used on "Good [**22] Morning America", and he, himself, edited and composed the film from the footage that others shot. He also designed the packaging of the work. Thus, he was an employee who "prepared" the work under § 101(1). I believe that this is, in itself, enough to establish that Hi-Tech could copyright the work as the "work for hire" of an employee.

1 Akey was the only "employee," in the usual sense; other people were hired to do specific things.

[***16] Akey did delegate some of the creative work to others. Mike Mueller, whom Akey referred to as a non-employee, shot most of the film. J.A. at 113-14. Akey, however, maintained control over the work. Akey was obviously skilled and experienced at video production work. *See, e.g.*, J.A. at 96 (Akey discussing technicalities of splicing film shots to make a "fade out" transition in film). This seems quite different from the situation in *CCNV*, where non-artists in an anti-homelessness agency hired a sculptor to create a sculpture. The *CCNV* factors that support [**23] a work for hire in the instant case include: (1) the hiring party's right to control the manner and means by which the product is accomplished (Akey maintained full control over the final product--what shots would be included, what order, the transitions, etc.); (2) the source of the instrumentalities (Akey supplied the cameras and other equipment); (3) the hired party's role in hiring and paying assistants (Akey completely controlled all aspects of hiring and paying assistants); (4) whether the work is part of the regular business of the hiring party (making videos was Akey's business, unlike the association in *CCNV*); and (5) whether the hiring party is in business (same).

Finally, I note that the district court found that "the vast majority of the creativity that was encompassed in this work was the work that Mr. Akey did by putting it all together, sequencing it, and packaging it as it was done." J.A. at 179. This is a finding of fact that should not be disturbed, and lends support to the conclusion that the video was a product of Akey, as a Hi-Tech employee.

Moreover, the cases from other circuits applying *CCNV* are not especially relevant here, as each includes different [**24] circumstances than those now at issue. There-

fore, I would affirm the district court's determination that this was a work for hire.

I respectfully dissent.

LEXSEE

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. UNITED STATES ET AL.

No. 75-636

SUPREME COURT OF THE UNITED STATES

431 U.S. 324; 97 S. Ct. 1843; 52 L. Ed. 2d 396; 1977 U.S. LEXIS 2; 14 Fair Empl. Prac. Cas. (BNA) 1514; 14 Empl. Prac. Dec. (CCH) P7579

**Argued January 10, 1977
May 31, 1977; as amended ***

* Together with No. 75-672, T.I.M.E.-D.C., Inc. v. United States et al., also on certiorari to the same court.

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DISPOSITION: The Court vacated the judgment and remanded to the district court for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant union sought review of a judgment for appellee The United States from the United States Court of Appeals for the Fifth Circuit, holding that the union violated Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000 et seq., by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination.

OVERVIEW: On appeal, the union contended that the seniority system contained in the collective-bargaining agreements did not violate Title VII. The Court held that, because the seniority system was protected by § 703(h) (42 U.S.C.S. § 2000e-2(h)) of Title VII, the union's conduct in agreeing to and maintaining the system did not violate Title VII. The unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history showed, the result was intended even where the employer's pre-Title VII discrimination resulted in whites having greater existing seniority rights than minorities. Although a seniority system inevitably tended to perpetuate the effects of pre-Title VII discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of

existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of Title VII. The single fact that the system extended no retroactive seniority to pre-Title VII discriminatees did not make it unlawful.

OUTCOME: The Court vacated the judgment and remanded to the district court for further proceedings.

CORE TERMS: seniority, driver, line-driver, discriminatory, hired, vacancy, nonapplicant, terminal, pre-act, discriminatee, negroes, hiring, perpetuate, layoff, retroactive, legislative history, employment discrimination, incumbent, employment opportunities, class member, discriminatory practices, bona fide, qualification, unlawful discrimination, employment practice, national origin, decree, facie, Civil Rights Act, minority groups

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN1]See 42 U.S.C.S. § 2000e-2(a).

Labor & Employment Law > Discrimination > Racial Discrimination > Employment Practices > Pattern or Practice

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN2]When maintaining an action pursuant to § 707(a) (42 U.S.C.S. § 2000e-6(a)), of Title VII of the Civil

Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., as the plaintiff, the government bears the initial burden of making out a prima facie case of discrimination. And, where it alleges a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the government ultimately has to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It has to establish by a preponderance of the evidence that racial discrimination was a company's standard operating procedure, the regular rather than the unusual practice.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employees

[HN3]Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., provides for equal opportunity to compete for any job, whether it is thought better or worse than another.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Tests

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > General Overview

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN4]Statistics are competent in proving employment discrimination. Statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN5]See 42 U.S.C.S. § 2000e-2(i).

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN6]Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population may be significant even though § 703(j) (42 U.S.C.S. § 2000e-2(j)) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000 et seq., makes clear that Title VII imposes no requirement that a work force mirror the general population. Considerations such as small sample size may, of course, detract from the value of such evidence, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants is also relevant.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN7]Affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN8]In a suit brought by the government under § 707(a) (42 U.S.C.S. § 2000e-6(a)) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., a district court's initial concern is in deciding whether the government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct.

Labor & Employment Law > Discrimination > Disparate Treatment > Defenses & Exceptions > General Overview

[HN9]See 42 U.S.C.S. § 2000e-2(h).

Governments > Legislation > Effect & Operation > Retrospective Operation

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Benefits

[HN10]Where a company discriminates both before and after the enactment of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., the seniority system is said to have operated to perpetuate the effects of both pre- and post-Title VII discrimination. Post-Title VII discriminatees, however, may obtain full "make whole" relief, including retroactive seniority without attacking the legality of the seniority system as applied to them. Retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN11]A prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN12]Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., practices, procedures, or

tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964

Governments > Legislation > Interpretation

[HN13]The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) of Title VII, 42 U.S.C.S. § 2000e-2(j) of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., in 1964 that controls.

SUMMARY:

The government instituted federal court actions--consolidated for trial in the United States District Court for the Northern District of Texas--under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) against a nationwide common carrier of motor freight and a union representing many of its employees. The government alleged that the employer had engaged in a pattern of discrimination against Negroes and Spanish-surnamed persons with regard to hiring for and transfers or promotions to certain preferred truck driving positions, and that the seniority system in the bargaining agreement between the defendants perpetuated the effects of the past discrimination, because under such system, an employee who transferred to the preferred truck driving position forfeited all competitive seniority accumulated in his previous bargaining unit, thus "locking" discriminatees into inferior jobs and discouraging transfers to the preferred jobs. After trial, the District Court found that the employer had engaged in unlawful discrimination and that the seniority system violated Title VII, both the employer and the union being enjoined from committing further Title VII violations. With respect to individual relief, the District Court concluded that (1) the affected class included all Negroes and Spanish-surnamed incumbent employees hired in other departments, (2) such employees, whether hired before or after the effective date of Title VII (July 2, 1965), were entitled to preference over all other applicants for future vacancies in the preferred driving positions, and (3) the affected class should be divided into subclasses having different retroactive seniority rights, depending on the extent to which the evidence showed actual harm to the discriminatee. The United States Court of Appeals for the Fifth Circuit agreed with the District Court's basic conclusions as to employer discrimination and the invalidity of the seniority system, but held that the District Court's relief order was inadequate--the Court of Appeals

concluding, in general, that all incumbent discriminatees could bid for future preferred driving positions on the basis of their company seniority, and that once assigned to such jobs, they could use their full company seniority (even if it predated Title VII's effective date) for all purposes (517 F2d 299).

On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case to the District Court for further proceedings. In an opinion by Stewart, J., joined by Burger, Ch. J., and White, Blackmun, Powell, Rehnquist, and Stevens, JJ., it was held that (1) the government had sustained its burden of proving that the employer had engaged in a pattern or practice of discrimination continuing after the effective date of Title VII, since statistical evidence showing post-Act racial and ethnic imbalance of the employer's work force with regard to the preferred truck driving positions was bolstered with the testimony of individuals who recounted over 40 specific instances of discrimination, and since such evidence was not adequately rebutted by the employer; (2) post-Act discriminatees were entitled to full "make whole" relief, including retroactive seniority, without attacking the legality, as applied to them, of the seniority system, since even though 703(h) of Title VII (42 USCS 2000e-2(h))--which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system, if such differences are not the result of an intention to discriminate--did not distinguish between the perpetuation of pre-Act and post-Act discrimination and thus immunized all bona fide seniority systems against attacks as being unlawful under Title VII for perpetuating discrimination, nevertheless, where a pattern of post-Act discrimination in hiring or promotion policies was proved, post-Act discriminatees could receive all appropriate relief, including retroactive seniority; (3) the seniority system was "bona fide" and thus protected by 703(h), since the system applied equally to all races and ethnic groups, was in accord with industry practice and National Labor Relations Board precedents, and did not have its genesis in racial discrimination; (4) employees who suffered only pre-Act discrimination were not entitled to relief, and no person suffering post-Act discrimination could be given retroactive seniority to a date earlier than the effective date of the Act; (5) an incumbent minority-group employee's failure to apply for a preferred job was not an inexorable bar to an award of retroactive seniority, the employee having the burden of proving that he would have applied for a preferred job but for the employer's discriminatory practices; and (6) at remedial hearings, the District Court must decide which of the minority-group employees were actual victims of discrimination and must then, as nearly as possible, recreate the conditions and relationships that would have been

had there been no unlawful discrimination, balancing the equities of each minority-group employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members, and adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing.

Marshall, J., joined by Brennan, J., concurring in part and dissenting in part, agreed that the government had proved an unlawful pattern of discrimination by the employer, and that incumbent minority-group employees who showed that they had applied for a preferred driving position or that they would have applied but for the unlawful discrimination were presumptively entitled to full relief, but expressed the view that 703(h) should not be construed as protecting seniority systems that perpetuated the effects of either pre-Act or post-Act discrimination.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RIGHTS §7.5

EVIDENCE §383

equal employment opportunities -- discriminatory motive -- inference --

Headnote:[1A][1B]

In an action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) based on an employer's alleged "disparate treatment" of individuals on the basis of race, color, religion, sex, or national origin in violation of 703(a) of Title VII (42 USCS 2000e-2(a)), proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

[***LEdHN2]

EVIDENCE §383

burden of proof -- discriminatory employment practices --

Headnote:[2]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against a nationwide common carrier of motor freight and a union representing many of its employees, based on the employer's alleged practice or pattern of discrimination against Negroes and Spanish-surnamed persons with regard to hiring for and transfers or promotions to certain preferred truck driving positions, the government, as the plaintiff, bears the initial burden of

making out a prima facie case of discrimination, and because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the government ultimately has to prove more than the mere occurrence of isolated, "accidental," or sporadic discriminatory acts; it has to establish by a preponderance of the evidence that racial discrimination was the employer's standard operating procedure--the regular rather than the unusual practice.

[***LEdHN3]

STATUTES §166

interpretation -- usual meaning -- Civil Rights Act --

Headnote:[3A][3B]

Under 707(a) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-6(a)), relating to the government's institution of a civil action upon reasonable cause to believe that any person or group of persons is engaged in a "pattern or practice" of resistance to the full enjoyment of any of the equal employment opportunity rights secured by Title VII, the words "pattern or practice" reflect only their usual meaning, and are not intended as a term of art.

[***LEdHN4]

EVIDENCE §904.3

sufficiency -- civil rights action -- employment discrimination --

Headnote:[4A][4B]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against a nationwide common carrier of motor freight and a union representing many of its employees, based on the employer's alleged practice or pattern of discrimination against Negroes and Spanish-surnamed persons with regard to hiring for and transfers or promotions to certain preferred truck driving positions, the government sustains its burden of proving that the employer had engaged in a pattern or practice of discrimination continuing after the effective date of Title VII (July 2, 1965), where statistical evidence showing post-Act racial and ethnic imbalance of the employer's work force with regard to the preferred truck driving positions was bolstered with the testimony of individuals who recounted over 40 specific instances of discrimination, and where such evidence was not adequately rebutted by the employer, whose contention that low personnel turnover, rather than post-Act discrimination, accounted for these statistical disparities was not supported by the record, which showed that many drivers continued to be hired

for the preferred positions and that almost all of them were white.

[***LEdHN5]

RIGHTS §7.5

equal employment opportunity -- nature of job --

Headnote:[5A][5B]

Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), requiring equal employment opportunities, provides for equal opportunity to compete for any job, whether it is thought better or worse than another.

[***LEdHN6]

EVIDENCE §852

statistics -- employment discrimination -- competency and weight --

Headnote:[6]

Statistical analyses, which serve an important role in cases in which the existence of discrimination is a disputed issue, are competent in proving employment discrimination; however, statistics are not irrefutable and may be rebutted--their usefulness depending on all of the surrounding facts and circumstances.

[***LEdHN7]

RIGHTS §7.5

EVIDENCE §852

employment discrimination -- statistical evidence -- admissibility and weight --

Headnote:[7A][7B]

In an action alleging racial and ethnic discrimination by an employer in violation of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), 703(j) of Title VII (42 USCS 2000e-2(j))--which provides that nothing in Title VII shall be interpreted as requiring an employer to grant preferential treatment to any individual or group because of race or national origin on account of any imbalance which may exist with respect to the total number or percentage of persons of any race or national origin employed by the employer in comparison with the total number or percentage of persons of such race or national origin in the community or area or in the available work force in the community or area--does not preclude the use of statistical evidence comparing the racial composition of the employer's work force to the composition of the population at large, where such evidence is offered to show racial or ethnic imbalance as probative of purposeful discrimination, not to support an erroneous

theory that Title VII requires an employer's work force to be racially balanced; considerations such as small sample size may detract from the value of such statistical evidence, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants is also relevant.

[***LEdHN8]

RIGHTS §7.5

employment discrimination --

Headnote:[8A][8B]

Section 703(j) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(j))--which provides that nothing in Title VII shall be interpreted as requiring an employer to grant preferential treatment to any individual or group because of race or national origin on account of any imbalance which may exist with respect to the total number or percentage of persons of any race or national origin employed by the employer in comparison with the total number or percentage of persons of such race or national origin in the community or area or in the available work force in the community or area--makes clear that Title VII imposes no requirement that a work force mirror the general population.

[***LEdHN9]

EVIDENCE §904.3

sufficiency -- civil rights -- employment discrimination --

Headnote:[9A][9B]

In an action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) based on an employer's alleged racial and ethnic discrimination in filling certain jobs, the employer's affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.

[***LEdHN10]

EVIDENCE §904.3

weight -- civil rights -- employment discrimination -

Headnote:[10A][10B]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against an employer, based on the employer's alleged racial and ethnic discrimination in filling certain jobs, the trial judge is not bound to accept testimony of the employer attempting to show that all of the government's witnesses who testified to specific instances of

discrimination either were not discriminated against or suffered no injury, but instead may properly rely on other evidence offered by the government showing discrimination.

[***LEdHN11]

RIGHTS §12.5

remedies -- employment discrimination --

Headnote:[11A][11B]

In an action brought under 707(a) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(a)) by the government against an employer, based on the employer's alleged racial and ethnic discrimination in filling certain jobs, the District Court's initial concern is in deciding whether the government has proved that the employer has engaged in a pattern or practice of discriminatory conduct, and thus individual proof concerning each class member's specific injury is appropriately left to later proceedings to determine individual relief.

[***LEdHN12]

RIGHTS §12.5

discriminatory employment practices -- remedies -- retroactive seniority --

Headnote:[12]

In a Federal District Court action against an employer and a union under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), where the employer's pattern of racial and ethnic discrimination against Negroes and Spanish-surnamed persons in filling certain jobs is proved, post-Act discriminatees may obtain full "make whole" relief, including retroactive seniority, without attacking the legality, as applied to them, of the employer's seniority system under which an employee who transferred to the preferred jobs forfeited all the competitive seniority accumulated in his previous bargaining unit, thus "locking" discriminatees into inferior jobs and discouraging transfers to the preferred jobs; retroactive seniority may be awarded as relief from an employer's post-Act discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief.

[***LEdHN13]

RIGHTS §7.5

discriminatory employment practices -- seniority system -- relief --

Headnote:[13A][13B]

Section 703(h) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(h))--which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system, if such differences are not the result of an intention to discriminate--does not distinguish between the perpetuation of pre-Act and post-Act discrimination, and thus immunizes all bona fide seniority systems against attacks as being unlawful under Title VII for perpetuating discrimination; however, where a pattern of post-Act discrimination in hiring or promotion policies is proved, post-Act discriminatees may receive all appropriate relief, including retroactive seniority. (Marshall and Brennan, JJ., dissented in part from this holding.)

[***LEdHN14]

RIGHTS §7.5

discriminatory employment practices -- seniority system --

Headnote:[14A][14B]

Section 703(h) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(h))--which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system, if such differences are not the result of an intention to discriminate--validates otherwise bona fide systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII (July 2, 1965) thus, an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination, Congress not having intended to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

[***LEdHN15]

RIGHTS §7.5

equal employment opportunities -- purpose of statute --

Headnote:[15]

The primary purpose of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), which requires equal employment opportunities, is to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens; to achieve such purpose, Congress proscribed not only overt discrimination but also prac-

tices that are fair in form, but discriminatory in operation.

[***LEdHN16]

RIGHTS §7.5

equal employment opportunities -- preserving effects of discrimination --

Headnote:[16]

Under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.)--which requires equal employment opportunities--practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory practices.

[***LEdHN17]

RIGHTS §7.5

discriminatory employment practices -- seniority system --

Headnote:[17A][17B]

Under 703(h) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(h))--which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a "bona fide" seniority system, if such differences are not the result of "an intention to discriminate"--a seniority system does not become illegal (not "bona fide") simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted; the proviso in 703(h), which bars differences in treatment resulting from "an intention to discriminate," does not apply merely because application of a seniority system may perpetuate past discrimination.

[***LEdHN18]

STATUTES §91

interpretation -- Civil Rights Act --

Headnote:[18A][18B]

In a case involving the interpretation of 703(h) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(h)), the views of members of a later Congress concerning different sections of Title VII, enacted after the subject litigation was commenced, are entitled to little if any weight; it is the intent of the Congress that enacted 703(h) in 1964 that controls. (Marshall and Brennan, JJ., dissented from this holding.)

[***LEdHN19]

RIGHTS §7.5

discriminatory employment practices -- seniority system --

Headnote:[19]

The rule that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) simply because it may perpetuate pre-Act discrimination is applicable even where the pre-Act discriminatees are incumbent employees, denied transfers to preferred jobs, who accumulated competitive seniority in other bargaining units which would be forfeited upon being transferred to the preferred jobs in another bargaining unit; no distinction can be made between claims of such incumbent employees and claims of persons initially denied any job but hired later with less seniority than they might have had in the absence of pre-Act discrimination. (Marshall and Brennan, JJ., dissented from this holding.)

[***LEdHN20]

RIGHTS §7.5

discriminatory employment practices -- seniority system --

Headnote:[20]

Although extending no retroactive seniority to persons discriminated against before the effective date of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), a seniority system in a bargaining agreement between a nationwide common carrier of motor freight and a union representing many of its employees--under which seniority system an employee who transferred to a preferred line-driver job forfeited all the competitive seniority accumulated in his previous bargaining unit, thus allegedly "locking" discriminatees into inferior jobs and discouraging transfers to line-driver jobs--is bona fide and thus is protected by 703(h) of Title VII (42 USCS 2000e-2(h)), which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a "bona fide" seniority system, where (1) the seniority system applied equally to all races and ethnic groups, (2) the placing of line drivers in a separate bargaining unit from other employees was rational, in accord with industry practice, and consistent with National Labor Relations Board precedents, and (3) the seniority system did not have its genesis in racial discrimination, but was negotiated and maintained free from any illegal purpose; because the seniority system is protected by 703(h), the union's conduct in agreeing to and maintaining the system does not violate Title VII.

[***LEdHN21]

RIGHTS §12.5

employment discrimination -- remedies -- retroactive seniority --

Headnote:[21]

In a Federal District Court action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against an employer and a union representing many of its employees--wherein it was proved that the employer had engaged in a pattern of discrimination against Negroes and Spanish-surnamed persons with regard to hiring for and transfers or promotions to certain preferred jobs--those employees who suffered only pre-Act discrimination are not entitled to relief, and no person suffering post-Act discrimination may be given retroactive seniority, under a bona fide seniority system that does not violate Title VII, to a date earlier than the effective date of the Act (July 2, 1965). (Marshall and Brennan, JJ., dissented from this holding.)

[***LEdHN22]

RIGHTS §7.5

EVIDENCE §383

burden and sufficiency of proof -- inferences -- employment discrimination --

Headnote:[22A][22B]

Any plaintiff in an action for a violation of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), which requires equal employment opportunities, must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act; an employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based, and although direct proof of discrimination is not required, the alleged discriminatee must demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer may rely to reject a job applicant: (1) an absolute or relative lack of qualifications, or (2) the absence of a vacancy in the job sought--elimination of such reasons for the refusal to hire being sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

[***LEdHN23]

EVIDENCE §383

burden of proof -- inferences -- employment discrimination --

Headnote:[23]

In a class action for a violation of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), which requires equal employment opportunities, upon proof of the plaintiffs' allegation of a discriminatory hiring pattern or practice, there are reasonable grounds to infer that individual hiring decisions are made in pursuit of the discriminatory policy, and to require the employer to come forth with evidence dispelling that inference.

[***LEdHN24]

EVIDENCE §90

presumptions -- burden of proof --

Headnote:[24A][24B]

Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof.

[***LEdHN25]

EVIDENCE §383

burden and sufficiency of proof -- employment discrimination --

Headnote:[25]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against an employer, based on an alleged pattern or practice of unlawful discrimination by the employer, the government has the initial burden of demonstrating that unlawful discrimination has been a regular procedure or policy followed by the employer, and at the initial "liability" stage of a pattern or practice suit, the government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy; if the government sustains its initial burden, the burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by providing a nondiscriminatory explanation or by demonstrating that the government's proof is either inadequate or insignificant, such as by showing that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period the employer is alleged to have pursued a discriminatory policy, it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

[***LEdHN26]

RIGHTS §12.5

employment discrimination -- remedies --

Headnote:[26]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the government against an employer, based on an alleged pattern or practice of unlawful discrimination by the employer, if the employer fails to rebut the inference of a pattern or practice of unlawful discrimination arising from the government's prima facie case, the trial court may then conclude that a violation has occurred and determine the appropriate remedy; without any further evidence from the government, the court's finding of a pattern or practice justifies an award of prospective relief which may take the form of (1) an injunctive order against continuation of the discriminatory practice, (2) an order that the employer keep records of its future employment decisions and file periodic reports with the court, or (3) any other order necessary to ensure the full enjoyment of the rights protected by Title VII.

[***LEdHN27]

RIGHTS §12.5

EVIDENCE §383

employment discrimination -- remedies -- burden of proof and inferences --

Headnote:[27]

After the government has established a pattern or practice of unlawful discrimination by an employer in the liability phase of a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), the Federal District Court must usually conduct additional proceedings to determine the scope of individual relief when the government seeks such relief for the victims of the discriminatory practice; the government's proof of the pattern or practice of discrimination supports an inference at the remedial stage of trial that any particular employment decision, during the period in which the discriminatory policy was enforced, was made in pursuit of that policy, and the government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proven discrimination, not that each individual was discriminatorily denied an employment opportunity; the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

[***LEdHN28]

RIGHTS §12.5

employment discrimination -- remedies --

Headnote:[28A][28B]

In a civil action brought under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) by the gov-

ernment against a nationwide common carrier or motor freight and a union representing many of its employees, based on the employer's alleged practice or pattern of discrimination against Negroes and Spanish-surnamed persons with regard to hiring for and transfers or promotions to certain preferred truck driving positions, after the government has proved, at the liability phase of the trial, a systemwide pattern and practice of racial and ethnic discrimination continuing after the effective date of Title VII, every post-Act minority group applicant for a preferred truck driving position is presumptively entitled to relief, subject to a showing by the employer that its earlier refusal to place the applicant in the preferred job was not based on its policy of discrimination; any nondiscrimination justification offered by the company is subject to further evidence by the government that the purported reason for an applicant's rejection was in fact a pretext for unlawful discrimination.

[***LEdHN29]

RIGHTS §12.5

EVIDENCE §383

employment discrimination -- remedies -- burden of proof --

Headnote:[29]

In a civil action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) brought by the government against an employer and a union representing many of its employees, based on an alleged pattern of discrimination by the employer against Negroes and Spanish-surnamed employees with regard to transfers or promotions to preferred jobs in a bargaining unit which was a separate unit for purposes of determining competitive seniority rights, an incumbent minority-group employee's failure to apply for a preferred job is not an inexorable bar to an award of retroactive seniority relief after the government has proved, at the liability phase of the trial, a pattern of unlawful discrimination by the employer; individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly.

[***LEdHN30]

RIGHTS §12.5

employment discrimination -- remedies --

Headnote:[30]

The scope of a Federal District Court's remedial powers under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), which requires equal employ-

ment opportunities, is determined by the purposes of the Act.

[***LEdHN31]

RIGHTS §7.5

employment discrimination -- remedies --

Headnote:[31]

An important purpose of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), requiring equal employment opportunities, is to make persons whole for injuries suffered on account of unlawful employment discrimination; in determining the specific remedies to be afforded, a Federal District Court must fashion such relief as the particular circumstances of a case may require to effect restitution.

[***LEdHN32]

RIGHTS §12.5

employment discrimination -- remedies --

Headnote:[32A][32B]

In an action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) where employer discrimination in hiring practices is established, an award of seniority relief to an individual is not barred solely because he had not actually applied for a job; when a person's desire for a job is not translated into a formal application only because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application, and a per se prohibition of Title VII relief on the ground that the claimant had not formally applied for the job would be manifestly inconsistent with the historic purpose of equity to secure complete justice and with the duty of courts in Title VII cases to render a decree which will so far as possible eliminate the discriminatory effects of the past.

[***LEdHN33]

RIGHTS §12.5

EVIDENCE §383

employment discrimination -- remedies -- burden of proof --

Headnote:[33]

Although a person's failure to have applied for a job does not necessarily foreclose his entitlement to retroactive seniority relief in an action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) wherein a pattern of unlawful hiring discrimination by an

employer is established, nevertheless a nonapplicant must show that he was a potential victim of unlawful discrimination; because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, a nonapplicant has the burden of proving that he would have applied for the job had it not been for those practices.

[***LEdHN34]

RIGHTS §12.5

EVIDENCE §383

employment discrimination -- remedies -- burden of proof --

Headnote:[34A][34B]

In a civil action by the government against an employer and a union under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.)--wherein the government, at the liability phase of the trial, established a pattern of discrimination by the employer against Negroes and Spanish-surnamed employees with regard to transfers and promotions to preferred jobs in a bargaining unit which was a separate unit for purposes of determining competitive seniority rights--an award of seniority relief may be made to an incumbent, minority-group employee who had not applied for a preferred job if it is determined that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied; the nonapplicant must bear the burden of coming forward with the basic information about his qualifications that he would have presented in a job application, whereupon the burden is on the employer to show that the nonapplicant was nevertheless not a victim of discrimination, such as by showing that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient; all minority-group nonapplicants are not entitled to seniority relief merely because they were aware of the futility of seeking the preferred jobs, and at the remedial hearings in the District Court, the government must carry the burden of proving which nonapplicant employees desired and would have applied for preferred jobs but for their knowledge of the employer's policy of discrimination, the question being a factual one for determination by the trial judge, who may find evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire credible and convincing.

[***LEdHN35]

RIGHTS §12.5

employment discrimination -- remedies -- rights of innocent employees --

Headnote:[35]

In a Federal District Court action by the government against an employer and a union under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.)--wherein the government, at the liability phase of the trial, established a pattern of discrimination by the employer against Negroes and Spanish-surnamed persons with regard to hiring for and transfers and promotions to preferred jobs in a bargaining unit which was a separate unit for purposes of determining competitive seniority rights--the District Court, at the remedial hearings, must decide which of the minority-group employees were actual victims of the employer's discriminatory practices and must then, as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination, which process necessarily involves a degree of imprecision; because the class of victims may include some who did not apply for preferred jobs as well as those who did, and because more than one minority-group employee may have been denied a preferred-job vacancy, the court must balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members, and the court must adjust the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing.

[***LEdHN36]

#) ERROR §1087.5(1)

certiorari -- questions presented --

Headnote:[36A][36B]

Under Rule 23 of the Rules of the United States Supreme Court, a question not presented in the petition for certiorari is not properly before the court for review.

[***LEdHN37]

RIGHTS §12.5

employment discrimination -- remedies -- innocent employees --

Headnote:[37]

Although not directly controlled by Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.), the extent to which the legitimate expectations of nonvictim employees should determine when victims of employment discrimination are restored to their rightful place regarding seniority is limited by basic principles of equity; in devising and implementing remedies under Title VII, a court must draw on the qualities of mercy and practicality that have made equity the instrument for nice adjustment and reconciliation between the public interest

and private needs as well as between competing private claims.

[***LEdHN38]

RIGHTS §12.5

employment discrimination -- remedies -- seniority -

Headnote:[38A][38B]

Section 703(j) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(j)), which provides that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's workforce and the make-up of the population at large, does not prevent a court, in ordering relief for unlawful employment discrimination, from permitting a victim of discrimination to use his rightful place seniority to bid on a job before the recall of all nonvictim employees on layoff, since to allow identifiable victims of unlawful discrimination to participate in a layoff recall is not the kind of "preference" prohibited by the statute; if a discriminatee is ultimately allowed to secure a position before a laid-off employee, he will do so because of the bidding power inherent in his rightful place seniority, and not because of a preference based on race.

[***LEdHN39]

EQUITY §87

remedies --

Headnote:[39]

Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must look to the practical realities and necessities inescapably involved in reconciling competing interests, in order to determine the special blend of what is necessary, what is fair, and what is workable.

[***LEdHN40]

RIGHTS §12.5

employment discrimination -- remedies --

Headnote:[40]

When a Federal District Court--in awarding relief under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.) for unlawful employment discrimination--exercises its discretion in dealing with the problem of the rights of innocent, laid-off employees as opposed to the rightful place seniority of discriminatees, it

should clearly state its reasons so that meaningful review may be had on appeal.

SYLLABUS

The United States instituted this litigation under Title VII of the Civil Rights Act of 1964 against petitioners, a nationwide common carrier of motor freight, and a union representing a large group of the company's employees. The Government alleged that the company had engaged in a pattern or practice of discriminating against Negroes and Spanish-surnamed persons (hereinafter sometimes collectively "minority members") who were hired as servicemen or local city drivers, which were lower paying, less desirable jobs than the positions of line drivers (over-the-road, long-distance drivers), which went to whites, and that the seniority system in the collective-bargaining agreements between petitioners perpetuated ("locked in") the effects of past racial and ethnic discrimination because under that system a city driver or serviceman who transferred to a line-driver job had to forfeit all the competitive seniority he had accumulated in his previous bargaining unit and start at the bottom of the line drivers' "board." The Government sought a general injunctive remedy and specific "make whole" relief for individual discriminatees, which would allow them an opportunity to transfer to line-driver jobs with full company seniority. Section 703(a) of Title VII makes it an unlawful employment practice, inter alia, for an employer to fail or refuse to hire any individual or otherwise discriminate against him with regard to his employment because of his race or national origin. Section 703(h) provides in part that notwithstanding other provisions, it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority... system,... provided that such differences are not the result of an intention to discriminate...." The District Court after trial, with respect to both the employment discrimination and the seniority system in the collective-bargaining agreements, held that petitioners had violated Title VII and enjoined both the company and the union from committing further violations thereof. With respect to individual relief, the court determined that the "affected class" of discriminatees included all minority members who had been hired as city drivers or servicemen at every company terminal with a line-driver operation, whether they were hired before or after Title VII's effective date. The discriminatees thereby became entitled to preference over all other line-driver applicants in the future. Finding that members of the affected class had been injured in varying degrees, the court created three subclasses, and applied to each a different formula for filling line-driver jobs and for establishment of seniority, giving retroactive seniority to the effective date of the Act to those who suffered "severe injury." The right of any class member to a line-

driver vacancy was made subject to the prior recall rights under the collective-bargaining agreement of line drivers who had been on layoff for not more than three years. Although agreeing with the District Court's basic conclusions, the Court of Appeals rejected the affected-class trisection, holding that the minority members could bid for future line-driver jobs on the basis of their company seniority and that once a class member became a line driver he could use his full company seniority even if it antedated Title VII's effective date, limited only by a "qualification date" formula, under which seniority could not be awarded for periods prior to the date when (1) a line-driver job was vacant, and (2) the class member met (or, given the opportunity, would have met) the line-driver qualifications. Holding that the three-year priority in favor of laid-off workers "would unduly impede the eradication of past discrimination," the Court of Appeals directed that when a not purely temporary line-driver vacancy arose a class member might compete against any line driver on layoff on the basis of the member's retroactive seniority. Held:

1. The Government sustained its burden of proving that the company engaged in a systemwide pattern or practice of employment discrimination against minority members in violation of Title VII by regularly and purposefully treating such members less favorably than white persons. The evidence, showing pervasive statistical disparities in line-driver positions between employment of the minority members and whites, and bolstered by considerable testimony of specific instances of discrimination, was not adequately rebutted by the company and supported the findings of the courts below. Pp. 334-343.

2. Since the Government proved that the company engaged in a post-Act pattern of discriminatory employment policies, retroactive seniority may be awarded as relief for post-Act discriminatees even if the seniority system agreement makes no provision for such relief. Franks v. Bowman Transportation Co., 424 U.S. 747, 778-779. Pp. 347-348.

3. The seniority system was protected by § 703(h) and therefore the union's conduct in agreeing to and maintaining the system did not violate Title VII. Employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the Act's effective date. The District Court's injunction against the union must consequently be vacated. Pp. 348-356.

(a) By virtue of § 703(h) a bona fide seniority system does not become unlawful simply because it may perpetuate pre-Title VII discrimination, for Congress (as is manifest from the language and legislative history of the Act) did not intend to make it illegal for employees

with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees. Thus here because of the company's intentional pre-Act discrimination the disproportionate advantage given by the seniority system to the white line drivers with the longest tenure over the minority member employees who might by now have enjoyed those advantages were it not for the pre-Act discrimination is sanctioned by § 703(h). Pp. 348-355.

(b) The seniority system at issue here is entirely bona fide, applying to all races and ethnic groups, and was negotiated and is maintained free from any discriminatory purpose. Pp. 355-356.

4. Every post-Act minority member applicant for a line-driver position is presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination. Cf. Franks, supra, at 773 n. 32. Pp. 357-362.

5. An incumbent employee's failure to apply for a job does not inexorably bar an award of retroactive seniority, and individual nonapplicants must be afforded an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. Pp. 362-371.

(a) Congress' purpose in vesting broad equitable powers in Title VII courts was "to make possible the '[fashioning] [of] the most complete relief possible,'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 421. Measured against the broad prophylactic purposes of Title VII, the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail, for a consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. Pp. 364-367.

(b) However, a nonapplicant must still show that he was a potential victim of unlawful discrimination and that he would have applied for a line-driver job but for the company's discriminatory practices. The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them but does not show which of the nonapplicants actually wanted such jobs or were qualified. Consequently, the Government has the burden of proving at a remedial hearing to be conducted by the District Court which specific nonapplicants would have applied for line-driver jobs but for their knowledge of the company's discriminatory policies. Pp. 367-371.

6. At such hearing on remand the District Court will have to identify which of the minority members were actual victims of discrimination and, by application of the basic principles of equity, to balance their interest against the legitimate expectations of other employees innocent of wrongdoing. Pp. 371-376.

517 F. 2d 299, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, post, p. 377.

COUNSEL: L. N. D. Wells, Jr., argued the cause for petitioner in No. 75-636. With him on the briefs were David Previant and G. William Baab. Robert D. Shuler argued the cause for petitioner in No. 75-672. With him on the brief was John W. Ester.

Deputy Solicitor General Wallace argued the cause for the United States et al. in both cases. With him on the brief were Solicitor General Bork, Assistant Attorney General Pottinger, Thomas S. Martin, Brian K. Landsberg, David L. Rose, William B. Fenton, Jessica Dunsay Silver, and Abner W. Sibal. +

+ Jack Greenberg, O. Peter Sherwood, Barry L. Goldstein, and Eric Schnapper filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as amicus curiae urging affirmance.

Briefs of amici curiae were filed by Michael A. Warner, Robert E. Williams, and Douglas S. McDowell for the Equal Employment Advisory Council; and by W. Walton Garrett for the Over the Road Drivers Assn., Inc.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens.

OPINION BY: STEWART

OPINION

[*328] [***410] [**1851] MR. JUSTICE STEWART delivered the opinion of the Court.

This litigation brings here several important questions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. [***411] § 2000e et seq. (1970 ed. and Supp. V). The issues grow out of alleged unlawful employment practices engaged in by an employer and a union. The employer is a common carrier of motor freight with nationwide operations, and the union represents a large group of its employees. The

District Court and the Court of Appeals held that the employer had violated Title VII by engaging in a pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans, and that the union had violated the Act by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination. In addition to the basic questions presented by these two rulings, other subsidiary issues must be resolved if violations of Title VII occurred - issues concerning the nature of the relief to which aggrieved individuals may be entitled.

I

The United States brought an action in a Tennessee federal court against the petitioner T.I.M.E.-D.C., Inc. (company), pursuant to § 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a).¹ The complaint charged that the [*329] company had followed discriminatory hiring, assignment, and promotion policies against Negroes at its terminal in Nashville, Tenn.² The Government brought a second action against the company almost three years later in a Federal District Court in Texas, charging a pattern and practice of employment discrimination against Negroes and Spanish-surnamed persons throughout the company's transportation system. The petitioner International Brotherhood of Teamsters (union) was joined as a defendant in that suit. The two actions were consolidated for trial in the Northern District of Texas.

1 At the time of suit the statute provided as follows:

"(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

Section 707 was amended by § 5 of the Equal Employment Opportunity Act of 1972, 86

Stat. 107, 42 U.S.C. § 2000e-6(c) (1970 ed., Supp. V), to give the Equal Employment Opportunity Commission, rather than the Attorney General, the authority to bring "pattern or practice" suits under that section against private-sector employers. In 1974, an order was entered in this action substituting the EEOC for the United States but retaining the United States as a party for purposes of jurisdiction, appealability, and related matters. See 42 U.S.C. § 2000e-6(d) (1970 ed., Supp. V).

2 The named defendant in this suit was T.I.M.E. Freight, Inc., a predecessor of T.I.M.E.-D.C., Inc. T.I.M.E.-D.C., Inc., is a nationwide system produced by 10 mergers over a 17-year period. See United States v. T.I.M.E.-D.C., Inc., 517 F. 2d 299, 304, and n. 6 (CA5). It currently has 51 terminals and operates in 26 States and three Canadian Provinces.

The central claim in both lawsuits was that the company had engaged in a pattern or practice of discriminating [***412] against minorities in hiring so-called line drivers. Those Negroes and Spanish-surnamed persons who had been hired, the Government alleged, were given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against [**1852] with respect to promotions and transfers.³ In [*330] this connection the complaint also challenged the seniority system established by the collective-bargaining agreements between the employer and the union. The Government sought a general injunctive remedy and specific "make whole" relief for all individual discriminatees, which would allow them an opportunity to transfer to line-driver jobs with full company seniority for all purposes.

3 Line drivers, also known as over-the-road drivers, engage in long-distance hauling between company terminals. They compose a separate bargaining unit at the company. Other distinct bargaining units include servicemen, who service trucks, unhook tractors and trailers, and perform similar tasks; and city operations, composed of dockmen, hostlers, and city drivers who pick up and deliver freight within the immediate area of a particular terminal. All of these employees were represented by the petitioner union.

The cases went to trial⁴ and the District Court found that [*331] the Government had shown "by a preponderance of the evidence that T.I.M.E.-D.C. and its predecessor companies were engaged in a plan and practice of discrimination in violation of Title VII..."⁵ The court further found that the seniority system contained in the collective-bargaining contracts between the company

and the union violated Title VII because it "[operated] to impede the free transfer of minority groups into and within the company." Both the company and the union were [***413] enjoined from committing further violations of Title VII.

4 Following the receipt of evidence, but before decision, the Government and the company consented to the entry of a Decree in Partial Resolution of Suit. The consent decree did not constitute an adjudication on the merits. The company agreed, however, to undertake a minority recruiting program; to accept applications from all Negroes and Spanish-surnamed Americans who inquired about employment, whether or not vacancies existed, and to keep such applications on file and notify applicants of job openings; to keep specific employment and recruiting records open to inspection by the Government and to submit quarterly reports to the District Court; and to adhere to certain uniform employment qualifications respecting hiring and promotion to line driver and other jobs.

The decree further provided that future job vacancies at any company terminal would be filled first "[by] those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964." Any remaining vacancies could be filled by "any other persons," but the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal. Finally, the company agreed to pay \$ 89,500 in full settlement of any backpay obligations. Of this sum, individual payments not exceeding \$ 1,500 were to be paid to "alleged individual and class discriminatees" identified by the Government.

The Decree in Partial Resolution of Suit narrowed the scope of the litigation, but the District Court still had to determine whether unlawful discrimination had occurred. If so, the court had to identify the actual discriminatees entitled to fill future job vacancies under the decree. The validity of the collective-bargaining contract's seniority system also remained for decision, as did the question whether any discriminatees should be awarded additional equitable relief such as retroactive seniority.

5 The District Court's memorandum decision is reported at 6 FEP Cases 690 (1974) and 6 EPD [*] 8979 (1973-1974).

With respect to individual relief the court accepted the Government's basic contention that the "affected class" of discriminatees included all Negro and Spanish-surnamed incumbent employees who had been hired to fill city operations or serviceman jobs at every terminal that had a line-driver operation. ⁶ All of these employees, whether hired before or after the effective date of Title VII, thereby became entitled to preference over all other applicants with respect to consideration for future vacancies in line-driver jobs. ⁷ Finding that members of the affected class had been injured in different [**1853] degrees, the court created three subclasses. Thirty persons who had produced "the most convincing evidence of discrimination and harm" were found to have suffered "severe injury." The court ordered that they be offered the opportunity to fill line-driver jobs with competitive seniority dating back to July 2, [*332] 1965, the effective date of Title VII. ⁸ A second subclass included four persons who were "very possibly the objects of discrimination" and who "were likely harmed," but as to whom there had been no specific evidence of discrimination and injury. The court decreed that these persons were entitled to fill vacancies in line-driving jobs with competitive seniority as of January 14, 1971, the date on which the Government had filed its systemwide lawsuit. Finally, there were over 300 remaining members of the affected class as to whom there was "no evidence to show that these individuals were either harmed or not harmed individually." The court ordered that they be considered for line-driver jobs ⁹ ahead of any applicants from the general public but behind the two other subclasses. Those in the third subclass received no retroactive seniority; their competitive seniority as line drivers would begin with the date they were hired as line drivers. The court further decreed that the right of any class member to fill a line-driver vacancy was subject to the prior recall rights of laid-off line drivers, which under the collective-bargaining agreements then in effect extended for three years. ¹⁰

6 The Government did not seek relief for Negroes and Spanish-surnamed Americans hired at a particular terminal after the date on which that terminal first employed a minority group member as a line driver.

7 See n. 4, supra.

8 If an employee in this class had joined the company after July 2, 1965, then the date of his initial employment rather than the effective date of Title VII was to determine his competitive seniority.

9 As with the other subclasses, there were a few individuals in the third group who were found to have been discriminated against with respect to jobs other than line driver. There is no need to discuss them separately in this opinion.

10 This provision of the decree was qualified in one significant respect. Under the Southern Conference Area Over-the-Road Supplemental Agreement between the employer and the union, line drivers employed at terminals in certain Southern States work under a "modified" seniority system. Under the modified system an employee's seniority is not confined strictly to his home terminal. If he is laid off at his home terminal he can move to another terminal covered by the Agreement and retain his seniority, either by filling a vacancy at the other terminal or by "bumping" a junior line driver out of his job if there is no vacancy. The modified system also requires that any new vacancy at a covered terminal be offered to laid-off line drivers at all other covered terminals before it is filled by any other person. The District Court's final decree, as amended slightly by the Court of Appeals, 517 F. 2d 299, 323, altered this system by requiring that any vacancy be offered to all members of all three subclasses before it may be filled by laid-off line drivers from other terminals.

[*333] The [***414] Court of Appeals for the Fifth Circuit agreed with the basic conclusions of the District Court: that the company had engaged in a pattern or practice of employment discrimination and that the seniority system in the collective-bargaining agreements violated Title VII as applied to victims of prior discrimination. 517 F. 2d 299. The appellate court held, however, that the relief ordered by the District Court was inadequate. Rejecting the District Court's attempt to trisect the affected class, the Court of Appeals held that all Negro and Spanish-surnamed incumbent employees were entitled to bid for future line-driver jobs on the basis of their company seniority, and that once a class member had filled a job, he could use his full company seniority - even if it predated the effective date of Title VII - for all purposes, including bidding and layoff. This award of retroactive seniority was to be limited only by a "qualification date" formula, under which seniority could not be awarded for periods prior to the date when (1) a line-driving position was vacant,¹¹ and (2) the class member met [**1854] (or would have met, given the opportunity) the qualifications for employment as a line driver.¹² Finally, [*334] the Court of Appeals modified that part of the District Court's decree that had subjected the rights of class members to fill future vacancies to the recall rights of laid-off employees. Holding that the three-year priority in favor of laid-off workers "would

unduly impede the eradication of past discrimination," id., at 322, the Court of Appeals ordered that class members be allowed to compete for vacancies with laid-off employees on the basis of the class members' retroactive seniority. Laid-off line drivers would retain their prior recall rights with respect only to "purely temporary" vacancies. Ibid.¹³

11 Although the opinion of the Court of Appeals in this case did not specifically mention the requirement that a vacancy exist, it is clear from earlier and later opinions of that court that this requirement is a part of the Fifth Circuit's "qualification date" formula. See, e.g., Rodriguez v. East Texas Motor Freight, 505 F. 2d 40, 63 n. 29, rev'd on other grounds, post, p. 395, cited in 517 F. 2d, at 318 n. 35; Sagers v. Yellow Freight System, Inc., 529 F. 2d 721, 731-734.

12 For example, if a class member began his tenure with the company on January 1, 1966, at which time he was qualified as a line driver and a line-driving vacancy existed, his competitive seniority upon becoming a line driver would date back to January 1, 1966. If he became qualified or if a vacancy opened up only at a later date, then that later date would be used.

13 The Court of Appeals also approved (with slight modification) the part of the District Court's order that allowed class members to fill vacancies at a particular terminal ahead of line drivers laid off at other terminals. See n. 10, supra.

The Court of Appeals remanded the case to the District Court to hold the evidentiary hearings necessary to apply these remedial principles. We granted both the company's and the union's petitions for certiorari to consider the significant questions presented under the Civil Rights Act of 1964, 425 U.S. 990.

[***415] II

In this Court the company and the union contend that their conduct did not violate Title VII in any respect, asserting first that the evidence introduced at trial was insufficient to show that the company engaged in a "pattern or practice" of employment discrimination. The union further contends that the seniority system contained in the collective-bargaining agreements in no way violated Title VII. If these contentions are correct, it is unnecessary, of course, to reach any of the issues concerning remedies that so occupied the attention of the Court of Appeals.

A

[***LEdHR1A] [1A]Consideration of the question whether the company engaged in a pattern or practice of

discriminatory hiring [*335] practices involves controlling legal principles that are relatively clear. The Government's theory of discrimination was simply that the company, in violation of § 703(a) of Title VII, ¹⁴ regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons. The disparity in treatment allegedly involved the refusal to recruit, hire, transfer, or promote minority group members on an equal basis with white people, particularly with respect to line-driving positions. The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n. 18. ¹⁵

[***LEdHR1B] [1B]

14 [HN1]Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1970 ed. and Supp. V), provides:

"(a) It shall be an unlawful employment practice for an employer -

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

¹⁵ "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does... is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jew-

ish citizens, not as colored citizens, but as citizens of the United States").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See *infra*, at 349. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-432, with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 1-12 (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59 (1972). Either theory may, of course, be applied to a particular set of facts.

[*336] [***LEdHR2] [2] [***LEdHR3A] [3A][HN2]As [***416] the plaintiff, the Government bore the initial burden of making out a [**1855] prima facie case of discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425; McDonnell Douglas Corp. v. Green, *supra*, at 802. And, because it alleged a system-wide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice. ¹⁶

[***LEdHR3B] [3B]

16 The "pattern or practice" language in § 707(a) of Title VII, *supra*, at 328 n. 1, was not intended as a term of art, and the words reflect only their usual meaning. Senator Humphrey explained:

"[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and

regularly engaged in acts prohibited by the statute.

...

"The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice...." 110 Cong. Rec. 14270 (1964).

This interpretation of "pattern or practice" appears throughout the legislative history of § 707(a), and is consistent with the understanding of the identical words as used in similar federal legislation. See 110 Cong. Rec. (1964) (remarks of Sen. Magnuson) (referring to § 206(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-5); 110 Cong. Rec. 13081 (1964) (remarks of Sen. Case); *id.*, at 14239 (remarks of Sen. Humphrey); *id.*, at 15895 (remarks of Rep. Celler). See also United States v. Jacksonville Terminal Co., 451 F. 2d 418, 438, 441 (CA5); United States v. Ironworkers Local 86, 443 F. 2d 544, 552 (CA9); United States v. West Peachtree Tenth Corp., 437 F. 2d 221, 227 (CA5); United States v. Mayton, 335 F. 2d 153, 158-159 (CA5).

[*337] [***LEdHR4A] [4A] [***LEdHR5A] [5A] We agree with the District Court and the Court of Appeals that the Government carried its burden of proof. As of March 31, 1971, shortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation had commenced. With one exception - a man who worked as a line driver at the Chicago terminal from 1950 to 1959 - the company and its predecessors did not employ a Negro on a regular basis as a line driver until 1969. And, as the Government showed, even in 1971 there were terminals in areas of substantial Negro population where all of the company's line drivers were white.¹⁷ A great majority of the Negroes (83%) [***417] and Spanish-surnamed Americans [*338] (78%) who did work for the company held [**1856] the lower paying city operations and serviceman jobs,¹⁸ whereas only 39% of the nonminority employees held jobs in those categories.

[***LEdHR5B] [5B]

¹⁷ In Atlanta, for instance, Negroes composed 22.35% of the population in the surrounding metropolitan area and 51.31% of the population in the city proper. The company's Atlanta terminal employed 57 line drivers. All were white. In Los

Angeles, 10.84% of the greater metropolitan population and 17.88% of the city population were Negro. But at the company's two Los Angeles terminals there was not a single Negro among the 374 line drivers. The proof showed similar disparities in San Francisco, Denver, Nashville, Chicago, Dallas, and at several other terminals.

¹⁸ Although line-driver jobs pay more than other jobs, and the District Court found them to be "considered the most desirable of the driving jobs," it is by no means clear that all employees, even driver employees, would prefer to be line drivers. See *infra*, at 369-370, and n. 55. Of course, [HN3] Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another. See, e.g., United States v. Hayes Int'l Corp., 456 F. 2d 112, 118 (CA5); United States v. National Lead Co., 438 F. 2d 935, 939 (CA8).

The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that "[numerous] qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." Minority employees who wanted to transfer to line-driver jobs met with similar difficulties.¹⁹

19 Two examples are illustrative:

George Taylor, a Negro, worked for the company as a city driver in Los Angeles, beginning late in 1966. In 1968, after hearing that a white city driver had transferred to a line-driver job, he told the terminal manager that he also would like to consider line driving. The manager replied that there would be "a lot of problems on the road... with different people, Caucasian, et cetera," and stated: "I don't feel that the company is ready for this right now.... Give us a little time. It will come around, you know." Mr. Taylor made similar requests some months later and got similar responses. He was never offered a line-driving job or an application.

Feliberto Trujillo worked as a dockman at the company's Denver terminal. When he applied for a line-driver job in 1967, he was told by a personnel officer that he had one strike against him. He asked what that was and was told:

"You're a Chicano, and as far as we know, there isn't a Chicano driver in the system."

[*339] The company's principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on "statistics alone." The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.

[**LEdHR6] [6] [**LEdHR7A] [7A] [**LEdHR8A] [8A] In any event, our cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620. See also McDonnell Douglas Corp. v. Green, 411 U.S., at 805. Cf. Washington v. Davis, 426 U.S. 229, 241-242. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases, see, e.g., Turner v. Fouche, 396 U.S. 346; [**418] Hernandez v. Texas, 347 U.S. 475; Norris v. Alabama, 294 U.S. 587. [HN4] Statistics are equally competent in proving employment discrimination.²⁰ [*340] We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness [**1857] depends on all of the surrounding facts and circumstances. See, e.g., Hester v. Southern R. Co., 497 F. 2d 1374, 1379-1381 (CA5).

[**LEdHR7B] [7B] [**LEdHR8B] [8B]

20 Petitioners argue that statistics, at least those comparing the racial composition of an employer's work force to the composition of the population at large, should never be given decisive weight in a Title VII case because to do so would conflict with [HN5] § 703(j) of the Act, 42 U.S.C. § 2000e-2(j). That section provides:

"Nothing contained in this subchapter shall be interpreted to require any employer... to grant preferential treatment to any individual or to any group because of the race... or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race... or national origin employed by any employer... in comparison with the total number or percentage

of persons of such race... or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. [HN6] Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. See, e.g., United States v. Sheet Metal Workers Local 36, 416 F. 2d 123, 127 n. 7 (CA8). Considerations such as small sample size may, of course, detract from the value of such evidence, see, e.g., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-621, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant. *Ibid.* See generally Schlei & Grossman, *supra*, n. 15, at 1161-1193.

"Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation.... In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." United States v. Ironworkers Local 86, 443 F. 2d, at 551. See also, e.g., Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211, 225 n. 34 (CA5); Brown v. Gaston County Dyeing Mach. Co., 457 F. 2d 1377, 1382 (CA4); United States v. Jacksonville Terminal Co., 451 F. 2d, at 442; Parham v. Southwestern Bell Tel. Co., 433 F. 2d 421, 426 (CA8); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245, 247 (CA10).

In addition to its general protest against the use of statistics in Title VII cases, the company claims that in this case the statistics revealing racial imbalance are misleading because they fail to take into account the company's particular [*341] business situation as of the effective date of Title VII. The company concedes that its

line drivers were virtually all white in July 1965, but it claims that thereafter business conditions were such that its work force dropped. Its argument is that low personnel turnover, rather than post-Act discrimination, accounts for more recent statistical disparities. It points to substantial minority hiring in later years, especially after 1971, as showing that any pre-Act patterns of discrimination were broken.

The argument would be a forceful [***419] one if this were an employer who, at the time of suit, had done virtually no new hiring since the effective date of Title VII. But it is not. Although the company's total number of employees apparently dropped somewhat during the late 1960's, the record shows that many line drivers continued to be hired throughout this period, and that almost all of them were white. ²¹ To be sure, there were improvements in the company's hiring practices. The Court of Appeals commented that "T. I. M. E.-D. C.'s recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." ²² 517 F. 2d, at 316. But the District Court and the Court of Appeals found upon substantial evidence that the company had engaged in [**1858] a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and [*342] promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it. Cf. Albemarle Paper Co. v. Moody, 422 U.S., at 413-423. ²³

21 Between July 2, 1965, and January 1, 1969, hundreds of line drivers were hired systemwide, either from the outside or from the ranks of employees filling other jobs within the company. None was a Negro. Government Exhibit 204.

22 For example, in 1971 the company hired 116 new line drivers, of whom 16 were Negro or Spanish-surnamed Americans. Minority employees composed 7.1% of the company's systemwide work force in 1967 and 10.5% in 1972. Minority hiring increased greatly in 1972 and 1973, presumably due at least in part to the existence of the consent decree. See 517 F. 2d, at 316 n. 31.

23 The company's narrower attacks upon the statistical evidence - that there was no precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority populations were located close to terminals or that transportation was available, that the statistics failed to show what

portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs, etc. - are equally lacking in force. At best, these attacks go only to the accuracy of the comparison between the composition of the company's work force at various terminals and the general population of the surrounding communities. They detract little from the Government's further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs. Such employees were willing to work, had access to the terminal, were healthy and of working age, and often were at least sufficiently qualified to hold city-driver jobs. Yet they became line drivers with far less frequency than whites. See, e.g., Pretrial Stipulation 14, summarized in 517 F. 2d, at 312 n. 24 (of 2,919 whites who held driving jobs in 1971, 1,802 (62%) were line drivers and 1,117 (38%) were city drivers; of 180 Negroes and Spanish-surnamed Americans who held driving jobs, 13 (7%) were line drivers and 167 (93%) were city drivers).

In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from "the inexorable zero." Id., at 315.

[***LEdHR4B] [4B] [***LEdHR9A] [9A]
[***LEdHR10A] [10A] [***LEdHR11A] [11A]The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful employment discrimination, continuing well beyond the effective date of Title VII. The company's attempts to rebut that conclusion were held to be inadequate. ²⁴ [***420] For the reasons we have summarized, [*343] there is no warrant for this Court to disturb the findings of the District Court and the Court of Appeals on this basic issue. See Blau v. Lehman, 368 U.S. 403, 408-409; Faulkner v. Gibbs, 338 U.S. 267, 268; United States v. Dickinson, 331 U.S. 745, 751; United States v. Commercial Credit Co., 286 U.S. 63, 67; United States v. Chemical Foundation, Inc., 272 U.S. 1, 14; Baker v. Schofield, 243 U.S. 114, 118; Towson v. Moore, 173 U.S. 17, 24.

[***LEdHR9B] [9B] [***LEdHR10B] [10B]
[***LEdHR11B] [11B]

24 The company's evidence, apart from the showing of recent changes in hiring and promotion policies, consisted mainly of general statements that it hired only the best qualified applicants. But "[HN7]affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." Alexander v. Louisiana, 405 U.S. 625, 632. The company also attempted to show that all of the witnesses who testified to specific instances of discrimination either were not discriminated against or suffered no injury. The Court of Appeals correctly ruled that the trial judge was not bound to accept this testimony and that it committed no error by relying instead on the other overpowering evidence in the case. 517 F. 2d, at 315. The Court of Appeals was also correct in the view that individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief. [HN8]In a suit brought by the Government under § 707 (a) of the Act the District Court's initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct. See *infra*, at 360-362.

B

The District Court and the Court of Appeals also found that the seniority system [**1859] contained in the collective-bargaining agreements between the company and the union operated to violate Title VII of the Act.

For purposes of calculating benefits, such as vacations, pensions, and other fringe benefits, an employee's seniority under this system runs from the date he joins the company, and takes into account his total service in all jobs and bargaining units. For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining unit seniority that controls. Thus, a line driver's seniority, [*344] for purposes of bidding for particular runs²⁵ and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal.²⁶ The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line drivers' "board."

25 Certain long-distance runs, for a variety of reasons, are more desirable than others. The best runs are chosen by the line drivers at the top of

the "board" - a list of drivers arranged in order of their bargaining-unit seniority.

26 Both bargaining-unit seniority and company seniority rights are generally limited to service at one particular terminal, except as modified by the Southern Conference Area Over-the-Road Supplemental Agreement. See n. 10, *supra*.

The vice of this arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the disincentive applied to all workers, [***421] including whites, it was Negroes and Spanish-surnamed persons who, those courts found, suffered the most because many of them had been denied the equal opportunity to become line drivers when they were initially hired, whereas whites either had not sought or were refused line-driver positions for reasons unrelated to their race or national origin.

The linchpin of the theory embraced by the District Court and the Court of Appeals was that a discriminatee who must forfeit his competitive seniority in order finally to obtain a line-driver job will never be able to "catch up" to the seniority level of his contemporary who was not subject to discrimination.²⁷ Accordingly, this continued, built-in disadvantage to [*345] the prior discriminatee who transfers to a line-driver job was held to constitute a continuing violation of Title VII, for which both the employer and the union who jointly created and maintain the seniority system were liable.

27 An example would be a Negro who was qualified to be a line driver in 1958 but who, because of his race, was assigned instead a job as a city driver, and is allowed to become a line driver only in 1971. Because he loses his competitive seniority when he transfers jobs, he is forever junior to white line drivers hired between 1958 and 1970. The whites, rather than the Negro, will henceforth enjoy the preferable runs and the greater protection against layoff. Although the original discrimination occurred in 1958 - before the effective date of Title VII - the seniority system operates to carry the effects of the earlier discrimination into the present.

The union, while acknowledging that the seniority system may in some sense perpetuate the effects of prior discrimination, asserts that the system is immunized from a finding of illegality by reason of [HN9]§ 703 (h) of Title VII, 42 U.S.C. § 2000e-2 (h), which provides in part: S

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice

for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority... system,... provided that such differences are not the result of an intention to discriminate because of race... or national origin...."I

It argues that the seniority system in this case is "bona fide" within the meaning of § 703 (h) when judged in light of its history, [**1860] intent, application, and all of the circumstances under which it was created and is maintained. More specifically, the union claims that the central purpose of § 703 (h) is to ensure that mere perpetuation of pre-Act discrimination is not unlawful under Title VII. And, whether or not § 703 (h) immunizes the perpetuation of post-Act discrimination, the union claims that the seniority system in this litigation has no such effect. Its position in this Court, as has been its position throughout this litigation, is that the seniority system presents no hurdle to post-Act discriminatees [*346] who seek retroactive seniority to the date they would have become line drivers but for the company's discrimination. Indeed, the union asserts that under its collective-bargaining agreements the union will itself take up the cause of the post-Act victim and attempt, through grievance procedures, to gain for him full "make whole" relief, including appropriate seniority.

[***422] The Government responds that a seniority system that perpetuates the effects of prior discrimination - pre-Act or post-Act - can never be "bona fide" under § 703 (h); at a minimum Title VII prohibits those applications of a seniority system that perpetuate the effects on incumbent employees of prior discriminatory job assignments.

The issues thus joined are open ones in this Court. ²⁸ We considered § 703 (h) in Franks v. Bowman Transportation Co., 424 U.S. 747, but there decided only that § 703 (h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination. We stated that "the thrust of [§ 703 (h)] is directed toward [*347] defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U.S., at 761. Beyond noting the general purpose of the statute, however, we did not undertake the task of statutory construction required in this litigation.

²⁸ Concededly, the view that § 703 (h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. It was apparently first adopted in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (ED Va.). The court there held that "a departmental senior-

ity system that has its genesis in racial discrimination is not a bona fide seniority system." Id., at 517 (first emphasis added). The Quarles view has since enjoyed wholesale adoption in the Courts of Appeals. See, e.g., Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980, 987-988 (CA5); United States v. Sheet Metal Workers Local 36, 416 F. 2d, at 133-134, n. 20; United States v. Bethlehem Steel Corp., 446 F. 2d 652, 658-659 (CA2); United States v. Chesapeake & Ohio R. Co., 471 F. 2d 582, 587-588 (CA4). Insofar as the result in Quarles and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," 279 F. Supp., at 517, the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

(1)

[**LEdHR12] [12] [**LEdHR13A] [13A][HN10]Because the company discriminated both before and after the enactment of Title VII, the seniority system is said to have operated to perpetuate the effects of both pre- and post-Act discrimination. Post-Act discriminatees, however, may obtain full "make whole" relief, including retroactive seniority under Franks v. Bowman,^{supra}, without attacking the legality of the seniority system as applied to them. Franks made clear and the union acknowledges that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief. ²⁹ [**1861] 424 U.S., at 778-779. [***423] Here the Government has proved that the company engaged in a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion policies. Any Negro or Spanish-surnamed American injured by those policies [*348] may receive all appropriate relief as a direct remedy for this discrimination. ³⁰

[**LEdHR13B] [13B]

²⁹ Article 38 of the National Master Freight Agreement between the company and the union in effect as of the date of the systemwide lawsuit provided:

"The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will

they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin."

Any discrimination by the company would apparently be a "grievable" breach of this provision of the contract.

30 The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case, in light of the injunction entered against the union. See supra, at 331. Our decision today in United Air Lines, Inc. v. Evans, post, p. 553, is largely dispositive of this issue. Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time barred. But this is simply an additional reason not to hold the seniority system unlawful, since such a holding would in no way enlarge the relief to be awarded. See Franks v. Bowman Transportation Co., 424 U.S. 747, 778-779. Section 703 (h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination.

(2)

[**LEdHR14A] [14A]What remains for review is the judgment that the seniority system unlawfully perpetuated the effects of pre-Act discrimination. We must decide, in short, whether § 703 (h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII, and it is to that issue that we now turn.

[**LEdHR15] [15]The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S., at 800.³¹ See also Albemarle Paper Co. v. Moody, 422 U.S., at [*349] 417-418; Alexander v. Gardner-Denver Co., 415 U.S. 36, 44; Griggs v. Duke Power Co., 401 U.S., at 429-431. To achieve this purpose, Congress "[proscribed] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id., at 431. Thus, the Court has repeatedly held that [HN11]a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but

that nonetheless discriminate in effect against a particular group. General Electric Co. v. Gilbert, 429 U.S. 125, 137; Washington v. Davis, 426 U.S., at 246-247; Albemarle Paper Co. v. Moody, supra, at 422, 425; McDonnell Douglas Corp. v. Green, supra, at 802 n. 14; Griggs v. Duke Power Co., supra.

31 We also noted in McDonnell Douglas:

"There are societal as well as personal interests on both sides of this [employer-employee] equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U.S., at 801.

[**LEdHR16] [16]One [**424] kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination.³² As the Court held in Griggs: "[HN12]Under [**1862] the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S., at 430.

32 Asbestos Workers Local 53 v. Vogler, 407 F. 2d 1047 (CA5), provides an apt illustration. There a union had a policy of excluding persons not related to present members by blood or marriage. When in 1966 suit was brought to challenge this policy, all of the union's members were white, largely as a result of pre-Act, intentional racial discrimination. The court observed: "While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership." Id., at 1054.

Were it not for § 703(h), the seniority system in this case would seem to fall under the Griggs rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, [*350] the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advan-

tages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

Throughout the initial consideration of H.R. 7152, later enacted as the Civil Rights Act of 1964, critics of the bill charged that it would destroy existing seniority rights.³³ The consistent response of Title VII's congressional proponents and of the Justice Department was that seniority rights would not be affected, even where the employer had discriminated prior to the Act.³⁴ An interpretative memorandum placed in the Congressional Record by Senators Clark and Case stated: S

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged - or indeed, [*351] permitted - to fire whites in order to hire Negroes, [***425] or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964) (emphasis added).³⁵

A Justice Department statement concerning Title VII, placed in the Congressional Record by Senator Clark, voiced the same conclusion: S

"Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior [**1863] to the effective date of the title, white workers had more seniority than Negroes." *Id.*, at 7207 (emphasis added).³⁶

33 E.g., H. R. Rep. No. 914, 88th Cong., 1st Sess., 65-66, 71 (1963) (minority report); 110 Cong. Rec. 486-488 (1964) (remarks of Sen. Hill); *id.*, at 2726 (remarks of Rep. Dowdy); *id.*, at 7091 (remarks of Sen. Stennis).

34 In addition to the material cited in Franks v. Bowman Transportation Co., 424 U.S., at 759-762, see 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler); *id.*, at 6549 (remarks of Sen. Humphrey); *id.*, at 6564 (remarks of Sen. Kuchel).

35 Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. Bipartisan captains were selected for each title of the Civil Rights Act by the leading proponents of the Act in both parties. They were responsible for explaining their title in detail, defending it, and leading discussion on it. See *id.*, at 6528 (remarks of Sen. Humphrey); Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 444-445 (1966).

36 The full text of the statement is set out in Franks v. Bowman Transportation Co., *supra*, at 760 n. 16. Senator Clark also introduced a set of answers to questions propounded by Senator Dirksen, which included the following exchange:

"Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

"Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." 110 Cong. Rec. 7217 (1964). See Franks, *supra*, at 760 n. 16.

[*352] While these statements were made before § 703(h) was added to Title VII, they are authoritative indicators of that section's purpose. Section 703(h) was enacted as part of the Mansfield-Dirksen compromise substitute bill that cleared the way for the passage of Title VII.³⁷ The drafters of the compromise bill stated that one of its principal goals was to resolve the ambiguities in the House-passed version of H.R. 7152. See, e.g., 110 Cong. Rec. 11935-11937 (1964) (remarks of Sen. Dirksen); *id.*, at 12707 (remarks of Sen. Humphrey). As the debates indicate, one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights. It is apparent that § 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. It is inconceivable that § 703(h), as part of a compromise bill, was intended to vitiate the earlier representations of the [***426] Act's supporters by increasing Title VII's im-

pact on seniority systems. The statement of Senator Humphrey, noted in Franks, 424 U.S., at 761, confirms that the addition of § 703(h) "merely clarifies [Title VII's] present intent and effect." 110 Cong. Rec. 12723 (1964).

37 See Franks v. Bowman Transportation Co., supra, at 761; Vaas, supra, n. 35, at 435.

In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of [*353] pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

[***LEdHR14B] [14B] [***LEdHR17A] [17A] [***LEdHR18A] [18A] To be sure, § 703(h) does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any differences in treatment not be "the result of an intention to discriminate because of race... or national origin..." But our reading of the legislative history compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide." To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted. It would place an affirmative obligation on the parties to the seniority agreement to [**1864] subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose. We cannot accept the invitation to disembowel § 703(h) by reading the words "bona fide" as the Government would have us do. ³⁸ Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate [*354] pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees. ³⁹

[***LEdHR17B] [17B] [***LEdHR18B] [18B]

38 For the same reason, we reject the contention that the proviso in § 703(h), which bars differences in treatment resulting from "an intention to

discriminate," applies to any application of a seniority system that may perpetuate past discrimination. In this regard the language of the Justice Department memorandum introduced at the legislative hearings, see supra, at 351, is especially pertinent: "It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.... Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7207 (1964).

39 The legislative history of the 1972 amendments to Title VII, summarized and discussed in Franks, 424 U.S., at 764-765, n. 21; id., at 796-797, n. 18 (POWELL, J., concurring in part and dissenting in part) in no way points to a different result. As the discussion in Franks indicates, that history is itself susceptible of different readings. The few broad references to perpetuation of pre-Act discrimination or "de facto segregated job ladders," see, e.g., S. Rep. No. 92-415, pp. 5, 9 (1971); H.R. Rep. No. 92-238, pp. 8, 17 (1971), did not address the specific issue presented by this case. And the assumption of the authors of the Conference Report that "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII," see Franks, supra, at 765 n. 21, of course does not foreclose our consideration of that issue. More importantly, the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. [HN13] The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.

[***LEdHR19] [19] That [***427] conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other bargaining units. Although there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs, there can be no rational basis for distinguishing their claims from those of persons initially denied any job but hired later with less seniority than they might have had in the absence of pre-Act discrimination. ⁴⁰ We rejected any such [*355] distinction in Franks, finding that it had "no support anywhere in Title VII or its legislative history," 424 U.S., at 768. As discussed above, Congress in 1964 made clear that a senior-

ity system is not unlawful because it honors employees' existing rights, even where the employer has engaged in pre-Act discriminatory hiring or promotion practices. It would be as contrary to that mandate to forbid the exercise of seniority rights with respect to discriminatees who held inferior jobs as with respect to later hired minority employees who previously were denied any [**1865] job. If anything, the latter group is the more disadvantaged. As in *Franks*, "it would indeed be surprising if Congress gave a remedy for the one [group] which it denied for the other." *Ibid.*, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187.⁴¹

40 That Title VII did not proscribe the denial of fictional seniority to pre-Act discriminatees who got no job was recognized even in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (ED Va.), and its progeny. *Quarles* stressed the fact that the references in the legislative history were to employment seniority rather than departmental seniority. *Id.*, at 516. In *Paperworkers v. United States*, 416 F. 2d 980 (CA5), another leading case in this area, the court observed: "No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination." *Id.*, at 994.

41 In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1602 (1969). The legislative history contains no suggestion that any one system was preferred.

(3)

[**LEdHR20] [20]The seniority system in this [***428] litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it [*356]

does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents.⁴² It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

42 See *Georgia Highway Express*, 150 N.L.R.B. 1649, 1651: "The Board has long held that local drivers and over-the-road drivers constitute separate appropriate units where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes.... In view of the different duties and functions, separate supervision, and different bases of payment, it is clear that the over-the-road drivers have divergent interests from those of the employees in the [city operations] unit... and should not be included in that unit."

Because the seniority system was protected by § 703(h), the union's conduct in agreeing to and maintaining the system did not violate Title VII. On remand, the District Court's injunction against the union must be vacated.⁴³

43 The union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination. *Fed. Rule Civ. Proc. 19(a)*. See *EEOC v. Mac-Millan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6).

III

[**LEdHR21] [21]Our conclusion that the seniority system does not violate Title VII will necessarily affect the remedy granted to individual employees on remand of this litigation to the District Court. Those employees who suffered only pre-Act discrimination are not entitled to relief, and no person may [*357] be given retroactive seniority to a date earlier than the effective date of the Act. Several other questions relating to the appropriate measure of individual relief remain, however, for our consideration.

The petitioners argue generally that the trial court did not err in tailoring the remedy to the "degree of injury" suffered by each individual employee, and that the

Court of Appeal' "qualification date" formula sweeps with too broad a brush by granting a remedy to employees who were not shown to be actual victims of unlawful discrimination. Specifically, the petitioners assert that no employee should be entitled to relief until the Government demonstrates that he was an actual victim of the company's discriminatory practices; that no employee who did not apply for a line-driver job should be granted retroactive competitive seniority; and that no employee should be elevated to a line-driver job ahead of any [**1866] current line driver on layoff status. We consider each of these contentions separately.

A

The petitioners' first contention is [***429] in substance that the Government's burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas v. Green*. Since the Government introduced specific evidence of company discrimination against only some 40 employees, they argue that the District Court properly refused to award retroactive seniority to the remainder of the class of minority incumbent employees.

In *McDonnell Douglas* the Court considered "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S., at 800. We held that an individual Title VII complaint must carry the initial burden of proof by establishing a prima facie case of racial discrimination. On the specific facts there involved, we concluded that this burden was met by showing that a [*358] qualified applicant, who was a member of a racial minority group, had unsuccessfully sought a job for which there was a vacancy and for which the employer continued thereafter to seek applicants with similar qualifications. This initial showing justified the inference that the minority applicant was denied an employment opportunity for reasons prohibited by Title VII, and therefore shifted the burden to the employer to rebut that inference by offering some legitimate, nondiscriminatory reason for the rejection. *Id.*, at 802.

[***LEdHR22A] [22A]The company and union seize upon the *McDonnell Douglas* pattern as the only means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that "[the] facts necessarily will vary in Title VII cases, and the specification... of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.*, at 802 n. 13. The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden

of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act. ⁴⁴

[***LEdHR22B] [22B]

44 The *McDonnell Douglas* case involved an individual complainant seeking to prove one instance of unlawful discrimination. An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

[***LEdHR23] [23] [***LEdHR24A] [24A]In *Franks v. Bowman Transportation Co.*, the Court applied [*359] this principle in the context of a class action. The *Franks* plaintiffs proved, to the satisfaction of a District Court, that *Bowman Transportation Co.* "had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees." 424 U.S., at 751. [***430] Despite this showing, the trial court denied seniority relief to certain members of the class of discriminatees because not every individual had shown that he was qualified for the job he sought and that a vacancy had been available. We held that the trial court had erred in placing this burden on the individual plaintiffs. By "demonstrating the existence of a discriminatory hiring pattern and practice" the plaintiffs had made out a prima facie case of discrimination against the individual class members; the burden therefore shifted to the employer "to prove that individuals who reapply were not in fact victims of [**1867] previous hiring discrimination." *Id.*, at 772. The *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met. The class there alleged a broad-based policy of employment discrimination; upon proof of that allegation there were reasonable grounds to infer that individual hiring decisions were made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference. ⁴⁵

[***LEdHR24B] [24B]

45 The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. See C. McCormick, *Law of Evidence* §§ 337, 343 (2d ed. 1972); James, *Burdens of Proof*, 47 Va. L. Rev. 51, 61 (1961). See also *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209. These factors were present in *Franks*. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process.

[*360] [***LEdHR25] [25]Although not all class actions will necessarily follow the *Franks* model, the nature of a pattern-or-practice suit brings it squarely within our holding in *Franks*. The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. See *supra*, at 336, and n. 16. At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too [***431] few employment decisions to justify the inference that it had engaged in a regular practice of discrimination. ⁴⁶

46 The employer's defense must, of course, be designed to meet the prima facie case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use. The point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy. In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. See n. 20, *supra*, and cases cited therein.

[*361] [***LEdHR26] [26]If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order "necessary to ensure [**1868] the full enjoyment of the rights" protected by Title VII. ⁴⁷

47 The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) eliminate their discriminatory practices and the effects therefrom. See, e.g., cases cited in n. 51, *infra*. In this case prospective relief was incorporated in the parties' consent decree. See n. 4, *supra*.

[***LEdHR27] [27]When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case. As was true of the particular facts in *Franks*, and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment

policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage [*362] of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job ⁴⁸ and therefore was a potential victim of the proved discrimination. As in *Franks*, the burden then rests on the [***432] employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. See 424 U.S., at 773 n. 32.

48 Nonapplicants are discussed in Part III-B, *infra*.

[***LEdHR28A] [28A] In Part II-A, *supra*, we have held that the District Court and Court of Appeals were not in error in finding that the Government had proved a systemwide pattern and practice of racial and ethnic discrimination on the part of the company. On remand, therefore, every post-Act minority group applicant ⁴⁹ for a line-driver position will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination. ⁵⁰

[***LEdHR28B] [28B]

49 Employees who initially applied for line-driver jobs and were hired in other jobs before the effective date of the Act, and who did not later apply for transfer to line-driver jobs, are part of the group of nonapplicants discussed *infra*.

50 Any nondiscriminatory justification offered by the company will be subject to further evidence by the Government that the purported reason for an applicant's rejection was in fact a pretext for unlawful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S., at 804-806.

B

The Court of Appeals' "qualification date" formula for relief did not distinguish between incumbent employees who [*363] had applied for line-driver jobs and those who had not. The appellate court held that where there has been a showing of classwide discriminatory

practices coupled with a seniority system that perpetuates the effects of that discrimination, an individual member of the class need not show that he unsuccessfully applied for the position from which the class had been excluded. In support of its award of relief to all non-applicants, the Court suggested that "as a practical matter... a member of the affected class may well have concluded that an application for transfer to an all White position such as [line driver] was not worth the candle." 517 F. 2d, at 320.

[**1869] The company contends that a grant of retroactive seniority to these nonapplicants is inconsistent with the make-whole purpose of a Title VII remedy and impermissibly will require the company to give preferential treatment to employees solely because of their race. The thrust of the company's contention is that unless a minority-group employee actually applied for a line-driver job, either for initial hire or for transfer, he has suffered no injury from whatever discrimination might have been involved in the refusal of such jobs to those who actually applied for them.

The Government argues in response that there should be no "immutable rule" that nonapplicants are nonvictims, and contends that a determination whether nonapplicants have suffered from unlawful discrimination will necessarily vary depending on the circumstances of each particular case. The Government further asserts that under the specific facts of this case, the Court of Appeals correctly determined that all qualified nonapplicants were likely victims and were therefore presumptively entitled to relief.

[***LEdHR29] [29] The question whether seniority relief may be awarded to nonapplicants was left open by our decision [***433] in *Franks*, since the class at issue in that case was limited to "identifiable applicants who were denied employment... after the effective date... of Title VII." 424 U.S., at 750. We now [*364] decide that an incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly.

(1)

[***LEdHR30] [30] [***LEdHR31] [31] Analysis of this problem must begin with the premise that the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act. *Albemarle Paper Co. v. Moody*, 422 U.S., at 417. In *Griggs v. Duke Power Co.*, and again in *Albemarle*, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees

over other employees. 401 U.S., at 429-430; 422 U.S., at 417. The prospect of retroactive relief for victims of discrimination serves this purpose by providing the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of their discriminatory practices. *Id.*, at 417-418. An equally important purpose of the Act is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. In determining the specific remedies to be afforded, a district court is "to fashion such relief as the particular circumstances of a case may require to effect restitution." *Franks*, 424 U.S., at 764.

Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion[ing] [of] the most complete relief possible,'" and that the district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle*, [*365] *supra*, at 421, 418. More specifically, in *Franks* we decided that a court must ordinarily award a seniority remedy unless there exist reasons for denying relief "which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination... and making persons whole for injuries suffered." 424 U.S., at 771, quoting *Albemarle*, *supra*, at 421.

[***LEdHR32A] [32A] Measured against these standards, the company's assertion that a person who [**1870] has not actually applied for a job can never be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications [***434] from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices - by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.⁵¹ When a per-

son's [*366] desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

51 The far-ranging effects of subtle discriminatory practices have not escaped the scrutiny of the federal courts, which have provided relief from practices designed to discourage job applications from minority-group members. See, e.g., *Franks v. Bowman Transportation* 495 F. 2d 398, 418-419 (CA5) (public recruitment and advertising), *rev'd on other grounds*, 424 U.S. 747; *Carter v. Gallagher*, 452 F. 2d 315, 319 (CA8) (recruitment); *United States v. Jacksonville Terminal Co.*, 451 F. 2d, at 458 (posting of job vacancies and job qualification requirements); *United States v. Local No. 86, Ironworkers*, 315 F. Supp. 1202, 1238, 1245-1246 (WD Wash.) (dissemination of information), *aff'd*, 443 F. 2d 544 (CA9). While these measures may be effective in preventing the deterrence of future applicants, they afford no relief to those persons who in the past desired jobs but were intimidated and discouraged by employment discrimination.

In cases decided under the National Labor Relations Act, the model for Title VII's remedial provisions, *Albemarle*, *supra*, at 419; *Franks*, *supra*, at 769, the National Labor Relations Board, and the courts in enforcing its orders, have recognized that the failure to submit a futile application does not bar an award of relief to a person claiming that he was denied employment because of union affiliation or activity. In *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, this Court enforced an order of the Board directing an employer to hire, with retroactive benefits, former employees who had not applied for newly available jobs because of the employer's well-known policy of refusing to hire union members. See *In re Nevada Consolidated Copper Corp.*, 26 N.L.R.B. 1182, 1208, 1231. Similarly, when an application would have been no more than a vain gesture in light of employer discrimination, the Courts of Appeals have enforced Board orders reinstating striking workers despite the failure of individual strikers to apply for reinstatement when the strike ended. E.g., *NLRB v. Park Edge Sheridan Meats, Inc.*, 323 F. 2d 956 (CA2); *NLRB v. Valley Die Cast Corp.*, 303 F. 2d 64 (CA6); *Eagle-Picher Mining & Smelting Co. v. NLRB*, 119 F. 2d 903 (CA8). See also *Piasecki Aircraft Corp. v. NLRB*, 280 F. 2d 575 (CA3); *NLRB v. Anchor Rome Mills*, [*367] 228 F. 2d 775 (CA5); *NLRB v. Lummus Co.*, 210 F. 2d 377 (CA5). Consistent with the NLRA model, several [***435] Courts of Appeals have held in Title VII cases that a nonapplicant can be a victim of unlawful discrimi-

nation entitled to make-whole relief when an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him. Achav. Beame, 531 F. 2d 648, 656 (CA2); Hairston v. McLean Trucking Co., 520 F. 2d 226, 231-233 (CA4); Bing v. Roadway Express, Inc., 485 F. 2d 441, 451 [**1871] (CA5); United States v. N.L. Industries, Inc., 479 F. 2d 354, 369 (CA8).

[***LEdHR32B] [32B]The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A per se prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination - those that extend to the very hope of self-realization. Such a per se limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the "historic purpose of equity to '[secure] complete justice'" and with the duty of courts in Title VII cases "'to render a decree which will so far as possible eliminate the discriminatory effects of the past.'" Albemarle Paper Co. v. Moody, 422 U.S., at 418.

(2)

[***LEdHR33] [33]To conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief. A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily [*368] claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. Cf. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274. When this burden is met, the nonapplicant is in a position analogous to that of an applicant and is entitled to the presumption discussed in Part III-A, supra.

[***LEdHR34A] [34A]The Government contends that the evidence it presented in this case at the liability stage of the trial identified all nonapplicants as victims of unlawful discrimination "with a fair degree of specificity," and that the Court of Appeals' determination that qualified nonapplicants are presumptively entitled to an award of seniority should accordingly be affirmed. In support of this contention the Government cites its proof of an extended pattern and practice of discrimination as evidence that an application from a minority employee

for a line-driver job would have been a vain and useless act. It further argues that since the class of nonapplicant discriminatees is limited to incumbent employees, it is likely that every class member was aware of the futility of seeking a line driver job and was therefore deterred from filing [***436] both an initial and a follow-up application.⁵²

52 The limitation to incumbent employees is also said to serve the same function that actual job applications served in Franks: providing a means of distinguishing members of the excluded minority group from minority members of the public at large. While it is true that incumbency in this case and actual applications in Franks both serve to narrow what might otherwise be an impossible task, the statuses of nonincumbent applicant and nonapplicant incumbent differ substantially. The refused applicants in Franks had been denied an opportunity they clearly sought, and the only issue to be resolved was whether the denial was pursuant to a proved discriminatory practice. Resolution of the nonapplicant's claim, however, requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied. The mere fact of incumbency does not resolve the first issue, although it may tend to support a nonapplicant's claim to the extent that it shows he was willing and competent to work as a driver, that he was familiar with the tasks of line drivers, etc. An incumbent's claim that he would have applied for a line-driver job would certainly be more superficially plausible than a similar claim by a member of the general public who may never have worked in the trucking industry or heard of the company prior to suit.

[*369] We cannot agree. While the scope and duration of the company's discriminatory policy can leave little doubt that the [**1872] futility of seeking line-driver jobs was communicated to the company's minority employees, that in itself is insufficient. The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs, or which possessed the requisite qualifications.⁵³ There are differences between city- and line-driving jobs.⁵⁴ for example, but the desirability of the latter is not so self-evident as to warrant a conclusion that all employees would prefer to be line drivers if given a free choice.⁵⁵ Indeed, a substantial number of white [*370] city drivers who were not subjected to the company's discriminatory practices were apparently [***437] content to retain their city jobs.⁵⁶

53 Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that his status is similar to that of the applicant, he must bear the burden of coming forward with the basic information about his qualifications that he would have presented in an application. As in *Franks*, and in accord with Part III-A, *supra*, the burden then will be on the employer to show that the nonapplicant was nevertheless not a victim of discrimination. For example, the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient. See *Franks*, 424 U.S., at 773 n. 32.

54 Of the employees for whom the Government sought transfer to line-driving jobs, nearly one-third held city-driver positions.

55 The company's line drivers generally earned more annually than its city drivers, but the difference varied from under \$ 1,000 to more than \$ 5,000 depending on the terminal and the year. In 1971 city drivers at two California terminals, "LOS" and San Francisco, earned substantially more than the line drivers at those terminals. In addition to earnings, line drivers have the advantage of not being required to load and unload their trucks. City drivers, however, have regular working hours, are not required to spend extended periods away from home and family, and do not face the hazards of long-distance driving at high speeds. As the Government acknowledged at argument, the jobs are in some sense "parallel" - some may prefer one job and some may prefer another.

The District Court found generally that line-driver jobs "are considered the most desirable of the driving jobs." That finding is not challenged here, and we see no reason to disturb it. We observe only that the differences between city and line driving were not such that it can be said with confidence that all minority employees free from the threat of discriminatory treatment would have chosen to give up city for line driving.

56 In addition to the futility of application, the Court of Appeals seems to have relied on the minority employees' accumulated seniority in non-line-driver positions in concluding that nonapplicants had been unlawfully deterred from applying. See 517 F.2d, at 318, 320. The Government adopts that theory here, arguing that a nonapplicant who has accrued time at the company would be unlikely to have applied for transfer because he would have had to forfeit all of his competitive

seniority and the job security that went with it. In view of our conclusion in Part II-B, *supra*, this argument detracts from rather than supports a nonapplicant's entitlement to relief. To the extent that an incumbent was deterred from applying by his desire to retain his competitive seniority, he simply did not want a line-driver job requiring him to start at the bottom of the "board." Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired seniority suffered only from a lawful deterrent imposed on all employees regardless of race or ethnicity. The nonapplicant's remedy in such cases is limited solely to the relief, if any, to which he may be entitled because of the discrimination he encountered at a time when he wanted to take a starting line-driver job.

In order to fill this evidentiary gap, the Government argues that a nonapplicant's current willingness to transfer into a line-driver position confirms his past desire for the job. An employee's response to the court-ordered notice of his entitlement to relief⁵⁷ demonstrates, according to this argument, that [*371] the employee would have sought a line-driver job when he first became qualified to fill one, but for his knowledge of the company's discriminatory policy.

57 The District Court's final order required that the company notify each minority employee of the relief he was entitled to claim. The employee was then required to indicate, within 60 days, his willingness to accept the relief. Under the decision of the Court of Appeals, the relief would be qualification-date seniority.

[**1873] [***LEdHR34B] [34B] This assumption falls short of satisfying the appropriate burden of proof. An employee who transfers into a line driver unit is normally placed at the bottom of the seniority "board." He is thus in jeopardy of being laid off and must, at best, suffer through an initial period of bidding on only the least desirable runs. See *supra*, at 343-344, and n. 25. Nonapplicants who chose to accept the appellate court's post hoc invitation, however, would enter the line-driving unit with retroactive seniority dating from the time they were first qualified. A willingness to accept the job security and bidding power afforded by retroactive seniority says little about what choice an employee would have made had he previously been given the opportunity freely to choose a starting tenderer job. While it may be true that many of the nonapplicant employees desired and would have applied for line-driver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each

specific individual, at the remedial hearings to be conducted by the District Court on remand. ⁵⁸

58 While the most convincing proof would be some overt act such as a pre-Act application for a line-driver job, the District Court may find evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire credible and convincing. The question is a factual one for determination by the trial judge.

C

[**LEdHR35] [35]The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number [**438] of individual determinations in deciding which of the minority employees were actual victims [*372] of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "recreate the conditions and relationships that would have been had there been no" unlawful discrimination. Franks, 424 U.S., at 769. This process of recreating the past will necessarily involve a degree of approximation and imprecision. Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.

Moreover, after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrong doing. In the prejudgment consent decree, see n. 4, supra, the company and the Government agreed that minority employees would assume line-driver positions that had been discriminatorily denied to them by exercising a first-priority right to job vacancies at the company's terminals. The decree did not determine what constituted a vacancy, but in its final order the trial court defined "vacancy" to exclude any position that became available while there were laid-off employees awaiting an opportunity to return to work. Employees on layoff were given a preference to fill whatever openings might occur at their terminals during a three-year period after they were laid off. ⁵⁹ [*373] [**1874] The [**439] Court of Appeals rejected the preference and held that all but "purely temporary" vacancies were to be filled according to an employee's seniority, whether as a member of the class [*374] discriminated against or as an incumbent line driver on layoff. 517 F.2d, at 322-323.

59 Paragraph 9(a) of the trial court's final order provided:

"A 'vacancy' as used in this Order, shall include any opening which is caused by the transfer or promotion to a position outside the bargaining unit, death, resignation or final discharge of an incumbent, or by an increase in operations or business where, ordinarily, additional employees would be put to work. A vacancy shall not exist where there are laid off employees on the seniority roster where the opening occurs. Such laid off employees shall have a preference to fill such laid off positions when these again become open without competition from the individuals granted relief in this case. However, if such layoff continues for three consecutive years the position will be deemed as 'vacant' with the right of all concerned to compete for the position, using their respective seniority dates, including those provided for in this Order."

The trial court's use of a three-year recall right is apparently derived from provisions in the collective-bargaining agreements. Article 5 of the National Master Freight Agreement (NMFA) establishes the seniority rights of employees covered by the Agreement. Under Art. 5, "[seniority] rights for employees shall prevail?. Seniority shall only be broken by discharge, voluntary quit, [or] more than a three (3) year layoff." § 1. As is evident, the three-year layoff provision in the NMFA determines only when an employee shall lose all of his accumulated seniority; it does not determine either the order of layoff or the order of recall. Subject to other terms of the NMFA, Art. 2, § 2, "[t]he extent to which seniority shall be applied as well as the methods and procedures of such application" are left to the Supplemental Agreements. Art. 5, § 1. The Southern Conference Area Over-the-Road Supplemental Agreement, covering line drivers in the Southern Conference, also provides for a complete loss of seniority rights after a three-year layoff, Art. 42, § 1, and further provides that in the event of a reduction in force "the last employee hired shall be laid off first and when the force is again increased, the employees are to be returned to work in the reverse order in which they were laid off," Art. 42, § 3.

This order of layoff and recall, however, is limited by the NMFA in at least two situations involving an influx of employees from outside a terminal. Art. 5, § 3(a)(1) (merger with a solvent company), § 5(b)(2) (branch closing with transfer

of operations to another branch). In these cases the NMFA provides for "dovetailing" the seniority rights of active and laid-off employees at the two facilities involved. *Ibid.*; see also NMFA, Art. 15 (honoring Military Selective Service Act of 1967). The NMFA also recognizes that "questions of accrual, interpretation or application of seniority rights may arise which are not covered by the general rules set forth," and provides a procedure for resolution of unforeseen seniority problems. Art. 5, § 7. Presumably § 7 applies to persons claiming discriminatory denial of jobs and seniority in violation of Art. 38, which prohibits discrimination in hiring as well as classification of employees so as to deprive them of employment opportunities on account of race or national origin. See n. 29, *supra*. The District Court apparently did not consider these provisions when it determined the recall rights of employees on layoff.

[***LEdHR36A] [36A]As their final contention concerning the remedy, the company and the union argue that the trial court correctly made the adjustment between the competing interests of discriminatees and other employees by granting a preference to laid-off employees, and that the Court of Appeals erred in disturbing it. The petitioners therefore urge the reinstatement of that part of the trial court's final order pertaining to the rate at which victims will assume their rightful places in the line driver hierarchy. ⁶⁰

[***LEdHR36B] [36B]

60 In their briefs the petitioners also challenge the trial court's modification of the interterminal transfer rights of line drivers in the Southern Conference. See n. 10, *supra*. This question was not presented in either petition for certiorari and therefore is not properly before us. This Court's Rule 23(1)(c). Our disposition of the claim that is presented, however, will permit the trial court to reconsider any part of the balance it struck in dealing with this issue.

[***LEdHR37] [37] [***LEdHR38A] [38A] [***LEdHR39] [39]Although not directly controlled by the Act, ⁶¹ the extent to [*375] which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a [*1875] court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice [*440] adjust-

ment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-330. Cf. Phelps Dodge Corp. v. NLRB, 313 U.S., at 195-196, modifying 113 F. 2d 202 (CA2); 19 N.L.R.B. 547, 600; Franks, 424 U.S., at 798-799 (POWELL, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." Lemon v. Kurtzman, 411 U.S. 192, 200-201 (opinion of BURGER, C.J.).

[***LEdHR38B] [38B]

61 The petitioners argue that to permit a victim of discrimination to use his rightful-place seniority to bid on a line-driver job before the recall of all employees on layoff would amount to a racial or ethnic preference in violation of § 703(j) of the Act. Section 703(j) provides no support for this argument. It provides only that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's work force and the makeup of the population at large. See n. 20, *supra*. To allow identifiable victims of unlawful discrimination to participate in a layoff recall is not the kind of "preference" prohibited by § 703(j). If a discriminatee is ultimately allowed to secure a position before a laid-off line driver, a question we do not now decide, he will do so because of the bidding power inherent in his rightful-place seniority, and not because of a preference based on race. See Franks, 424 U.S., at 792 (POWELL, J., concurring in part and dissenting in part).

Because of the limited facts now in the record, we decline to strike the balance in this Court. The District Court did not explain why it subordinated the interests of class members to the contractual recall expectations of other employees on layoff. When it made that determination, however, it was considering a class of more than 400 minority employees, all of whom had been granted some preference in filling line-driver vacancies. The overwhelming majority of these were in the District Court's subclass three, composed of those employees with respect to whom neither the Government nor the company had presented any specific evidence on the question of unlawful discrimination. Thus, when the court considered the problem of what constituted a line-driver "vacancy" [*376] to be offered to class members,

it may have been influenced by the relatively small number of proved victims and the large number of minority employees about whom it had no information. On the other hand, the Court of Appeals redefined "vacancy" in the context of what it believed to be a class of more than 400 employees who had actually suffered from discrimination at the behest of both the company and the union, and its determination may well have been influenced by that understanding. For the reasons discussed in this opinion, neither court's concept was completely valid.

[**LEdHR40] [40]After the evidentiary hearings to be conducted on remand, both the size and the composition of the class of minority employees entitled to relief may be altered substantially. Until those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees. That determination is best left, in the first instance, to the sound equitable discretion of the trial court. ⁶² See Franks v. Bowman Transportation Co., *supra*, at 779; Albemarle Paper Co. v. Moody, 422 U.S., at 416. [***441] We observe only that when the court exercises its discretion in dealing with the problem of laid-off employees in light of the facts developed at the hearings on remand, it should clearly state its reasons so that meaningful review may be had on appeal. See Franks, *supra*, at 774; Albemarle Paper Co. v. Moody, *supra*, at 421 n. 14.

62 Other factors, such as the number of victims, the number of nonvictim employees affected and the alternatives available to them, and the economic circumstances of the industry may also be relevant in the exercise of the District Court's discretion. See Franks, *supra*, at 796 n. 17 (POWELL, J., concurring in part and dissenting in part).

For all the reasons we have discussed, the judgment of the Court of Appeals is vacated, and the cases are remanded to the [*377] District Court for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: MARSHALL (In Part)

DISSENT BY: MARSHALL (In Part)

DISSENT

[**1876] MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I agree with the Court that the United States proved that petitioner T.I.M.E.-D.C. was guilty of a pattern or practice of discriminating against blacks and Spanish-surnamed Americans in hiring line drivers. I also agree that incumbent minority-group employees who show that they applied for a line-driving job or that they would have applied but for the company's unlawful acts are presumptively entitled to the full measure of relief set forth in our decision last Term in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). ¹ But I do not agree that Title VII permits petitioners to treat Negro and Spanish-surnamed line drivers differently from other drivers who were hired by the company at the same time simply because the former drivers were prevented by the company from acquiring seniority over the road. I therefore dissent [*378] from that aspect of the Court's holding, and from the limitations on the scope of the remedy that follow from it.

1 In stating that the task nonapplicants face in proving that they should be treated like applicants is "difficult," ante, at 364, I understand the Court simply to be addressing the facts of this case. There may well be cases in which the jobs that the nonapplicants seek are so clearly more desirable than their present jobs that proving that but for the employer's discrimination the nonapplicants previously would have applied will be anything but difficult.

Even in the present case, however, I believe the Court unnecessarily adds to the nonapplicants' burden. While I agree that proof of a nonapplicant's current willingness to accept a line-driver job is not dispositive of the question of whether the company's discrimination deterred the nonapplicant from applying in the past, I do not agree that current willingness "says little," see ante, at 371, about past willingness. In my view, we would do well to leave questions of this sort concerning the weight to be given particular pieces of evidence to the district courts, rather than attempting to resolve them through overly broad and ultimately meaningless generalizations.

As the Court quite properly acknowledges, ante, at 349-350, the seniority provision at issue here clearly would violate Title VII absent § 703(h), 42 U.S.C. § 2000e-2(h), which exempts at least some seniority systems from the reach of the Act. Title VII prohibits an employer from "[classifying] his employees... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an [***442] employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(2) (1970 ed., Supp. V). "Under

the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (emphasis added). Petitioners' seniority system does precisely that: It awards the choicest jobs and other benefits to those possessing a credential - seniority - which, due to past discrimination, blacks and Spanish-surnamed employees were prevented from acquiring. Consequently, "every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (CA5 1969) (Wisdom, J.), cert. denied, 397 U.S. 919 (1970).

As the Court also concedes, with a touch of understatement, "the view that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support." Ante, at 346 n. 28. Without a single dissent, six Courts of Appeals have so held in over 30 cases,² and [**1877] two [*379] other Courts of Appeals have indicated their agreement, also without dissent.³ [***443] In an unbroken line of cases, the Equal Employment Opportunity Commission has reached the same [*380] conclusion.⁴ And the overwhelming weight of scholarly opinion is in accord.⁵ Yet for the second time this Term, see General Electric Co. v. Gilbert, 429 U.S. 125 (1976), a majority of this Court overturns [**1878] the unanimous conclusion of the Courts of Appeals and the EEOC concerning the scope of Title VII. Once again, I respectfully disagree.

2 Acha v. Beame, 531 F. 2d 648 (CA2 1976); United States v. Bethlehem Steel Corp., 446 F. 2d 652 (CA2 1971); Nance v. Union Carbide Corp., 540 F. 2d 718 (CA4 1976), cert. pending, Nos. 76-824, 76-838; Patterson v. American Tobacco Co., 535 F. 2d 257 (CA4), cert. denied, 429 U.S. 920 (1976); Russell v. American Tobacco Co., 528 F. 2d 357 (CA4 1975), cert. denied, 425 U.S. 935 (1976); Hairston v. McLean Trucking Co., 520 F. 2d 226 (CA4 1975); United States v. Chesapeake & Ohio R. Co., 471 F. 2d 582 (CA4 1972), cert. denied sub nom. Railroad Trainmen v. United States, 411 U.S. 939 (1973); Robinson v. Lorillard Corp., 444 F. 2d 791 (CA4), cert. dismissed, 404 U.S. 1006 (1971); Griggs v. Duke Power Co., 420 F. 2d 1225 (CA4 1970), rev'd on other grounds, 401 U.S. 424 (1971); Swint v. Pullman-Standard, 539 F. 2d 77 (CA5 1976); Sagers v. Yellow Freight System, 529 F. 2d 721 (CA5 1976); Sabala v. Western Gillette, Inc., 516 F. 2d 1251 (CA5 1975), cert. pending, Nos. 75-

788, 76-1060; Gamble v. Birmingham Southern R. Co., 514 F. 2d 678 (CA5 1975); Resendis v. Lee Way Motor Freight, Inc., 505 F. 2d 69 (CA5 1974); Herrera v. Yellow Freight System, Inc., 505 F. 2d 66 (CA5 1974); Carey v. Greyhound Bus Co., 500 F. 2d 1372 (CA5 1974); Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211 (CA5 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d 1364 (CA5 1974); Bing v. Roadway Express, Inc., 485 F. 2d 441 (CA5 1973); United States v. Georgia Power Co., 474 F. 2d 906 (CA5 1973); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (CA5 1971), cert. denied, 406 U.S. 906 (1972); Long v. Georgia Kraft Co., 450 F. 2d 557 (CA5 1971); Taylor v. Armco Steel Corp., 429 F. 2d 498 (CA5 1970); Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980 (CA5 1969), cert. denied, 397 U.S. 919 (1970); EEOC v. Detroit Edison Co., 515 F. 2d 301 (CA6 1975), cert. pending, Nos. 75-220, 75-221, 75-239, 75-393; Palmer v. General Mills, Inc., 513 F. 2d 1040 (CA6 1975); Head v. Timken Roller Bearing Co., 486 F. 2d 870 (CA6 1973); Bailey v. American Tobacco Co., 462 F. 2d 160 (CA6 1972); Rogers v. International Paper Co., 510 F. 2d 1340 (CA8), summarily vacated and remanded, 423 U.S. 809 (1975); United States v. N.L. Industries, Inc., 479 F. 2d 354 (CA8 1973); Gibson v. Longshoremen, 543 F. 2d 1259 (CA9 1976); United States v. Navajo Freight Lines, Inc., 525 F. 2d 1318 (CA9 1975).

The leading case in this line is a District Court decision, Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (ED Va. 1968).

3 Bowe v. Colgate, Palmolive Co., 489 F. 2d 896 (CA7 1973); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (CA10 1970), cert. denied, 401 U.S. 954 (1971).

I agree with the Court, ante, at 346 n. 28, that the results in a large number of the Quarles line of cases can survive today's decision. That the instant seniority system "is rational, in accord with the industry practice,... consistent with NLRB [precedents],... did not have its genesis in racial discrimination, and... was negotiated and has been maintained free from any illegal purpose," ante, at 356, distinguishes the facts of this case from those in many of the prior decisions.

4 CCH Empl. Prac. Guide (1976) [*] [*] 6481, 6448, 6441, 6400, 6399, 6395, 6382; CCH EEOC Decisions (1973) [**] 6373, 6370, 6366, 6365, 6355, 6334, 6313, 6272, 6223, 6217, 6214, 6211, 6197, 6195, 6188, 6176, 6169, 6044.

5 Blumrosen, *Seniority & Equal Employment Opportunity: A Glimmer of Hope*, 23 Rutgers L. Rev. 268 (1969); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969); Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. Colo. L. Rev. 73 (1975); Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications*, 47 Texas L. Rev. 1039 (1969); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLAL. Rev. 177 (1975); S. Ross, *Reconciling Plant Seniority with Affirmative Action and Anti-Discrimination*, in New York University, *Twenty-Eighth Annual Conference on Labor* 231 (1976); *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1157-1164 (1971); Comment, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 Colum. J. Law & Soc. Prob. 343 (1975); Note, *The Problem of Last Hired, First Fired: Retroactive Seniority as a Remedy Under Title VII*, 9 Ga. L. Rev. 611 (1975); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544 (1975); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260 (1967); Comment, *Title VII and Seniority Systems: Back to the Foot of the Line?* 64 Ky. L. Rev. 114 (1975); Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 Wis. L. Rev. 791; 1969 Duke L.J. 1091; 46 N.C.L. Rev. 891 (1968).

[*381] I

Initially, it is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly: "to fail... to hire or to discharge... or otherwise to discriminate... with respect to... compensation, terms, conditions, or privileges of employment," and "to limit, segregate, or classify... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status." 42 U.S.C. § 2000e-2(a) (1970 ed., Supp. V) [***444] (emphasis added). Section 703(h) carves out an exemption from these broad prohibitions. Accordingly, under long-standing principles of statutory construction, the Act should "be given a liberal interpretation... [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont & Northern R. Co. v. ICC, 286 U.S. 299, 311-312 (1932); see also Spokane & Inland R. Co. v. United

States, 241 U.S. 344, 350 (1916); United States v. Dickson, 15 Pet. 141, 165 (1841) (Story, J.). Unless a seniority system that perpetuates discrimination falls "plainly and unmistakably within [the] terms and spirit" of § 703(h), A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945), the system should be deemed unprotected. I submit that whatever else may be true of the section, its applicability to systems that perpetuate past discrimination is not "plainly and unmistakably" clear.

The language of § 703(h) provides anything but clear support for the Court's holding. That section provides, in pertinent part: S

"[It] shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority... system... provided that such differences are not the result of an intention to [*382] discriminate because of race, color, religion, sex, or national origin...." (Emphasis added.)I

In this case, however, the different "privileges of employment" for Negroes and Spanish-surnamed Americans, on the one hand, and for all others, on the other hand, produced by petitioners' seniority system are precisely the result of prior, intentional discrimination in assigning jobs; but for that discrimination, Negroes and Spanish-surnamed Americans would not be disadvantaged by the system. Thus, if the proviso is read literally, the instant case falls squarely within it, thereby rendering § 703(h) inapplicable. To avoid this result the Court is compelled to reconstruct the proviso to read: provided that such a seniority system "did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." Ante, at 356.

There are no explicit statements in the legislative history of Title VII that warrant this radical reconstruction of the proviso. The three documents placed in the Congressional Record by Senator Clark concerning seniority all were written many weeks before the Mansfield-Dirksen amendment containing § 703(h) was introduced. Accordingly, they do not specifically discuss the meaning of the proviso. ⁶ More importantly, [*383] [**1879] none [***445] of the documents addresses the general problem of seniority systems that perpetuate discrimination. Not surprisingly, Congress simply did not think of such subtleties in enacting a comprehensive, path breaking Civil Rights Act. ⁷ To my mind, this is dispositive. Absent unambiguous statutory language or an authoritative statement in the legislative history legalizing seniority systems that continue past wrongs, I do not see how it can be said that the § 703(h) exemption "plainly and unmistakably" applies.

6 The three documents, quoted in full in Franks v. Bowman Transportation Co., 424 U.S. 747, 759-761, nn. 15-16 (1976), and in substantial part in today's decision, ante, at 350-351, and n. 36, are (1) the Clark-Case Interpretive Memorandum, 110 Cong. Rec. 7212-7215 (1964); (2) the Justice Department Reply to Arguments Made by Senator Hill, id., at 7207; and (3) Senator Clark's Response to the Dirksen Memorandum, id., at 7216-7218. They were all placed in the Congressional Record of April 8, 1964, but were not read aloud during the debates. The Mansfield-Dirksen amendment was presented by Senator Dirksen on May 26, 1964. Id., at 11926.

A few general statements also were made during the course of the debates concerning Title VII's impact on seniority, but these statements add nothing to the analysis contained in the documents. See id., at 1518 (Rep. Cellar); id., at 6549, 11848 (Sen. Humphrey); id., at 6563-6564 (Sen. Kuchel); id., at 9113 (Sen. Keating); id., at 15893 (Rep. McCulloch).

7 In amending Title VII in 1972, Congress acknowledged its own prior naivete:

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization.... Experience has shown this view to be false."

S. Rep. No. 92-415, p. 5 (1971). See H.R. Rep. No. 92-238, p. 8 (1971).

II

Even if I were to agree that this case properly can be decided on the basis of inferences as to Congress' intent, I still could not accept the Court's holding. In my view, the legislative history of the 1964 Civil Rights Act does not support the conclusion that Congress intended to legalize seniority systems that perpetuate discrimination, and administrative and legislative developments since 1964 positively refute that conclusion.

A

The Court's decision to uphold seniority systems that perpetuate post-Act discrimination - that is, seniority systems that treat Negroes and Spanish-surnamed Americans who become line drivers as new employees even though, after the effective date of Title VII, these persons were discriminatorily assigned to city-driver jobs where they accumulated seniority - is explained in a single footnote. Ante, at 348 n. 30. That footnote relies almost entirely on United Air Lines, Inc. v. Evans, post, p. 553. But like the instant decision, Evans is

devoid of any analysis of the legislative history of § 703(h); it simply asserts its conclusion in a single paragraph. For the Court to base its decision here on the strength of Evans is sheer bootstrapping.

Had the Court objectively examined the legislative history, it would have been compelled to reach the opposite conclusion. As we stated just last Term, "it is apparent that the thrust of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." ⁸ Franks v. Bowman Transportation Co., 424 U.S., at 761 (emphasis added). Congress was concerned with seniority expectations that had developed prior to the enactment of Title VII, not with expectations arising [***446] thereafter to the extent that those expectations were dependent on whites benefiting from unlawful discrimination. Thus, the paragraph of the Clark-Case Interpretive Memorandum dealing with seniority systems begins: S

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964) (emphasis added).I

Similarly, the Justice Department memorandum that Senator Clark introduced explains:S

[**1880] "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected... by title VII. This [*385] would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.... Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." Id., at 7207 (emphasis added).I

Finally, Senator Clark's prepared answers to questions propounded by Senator Dirksen stated: S

"Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

"Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists." Id., at 7217 (emphasis added).I

For the Court to ignore this history while reaching a conclusion contrary to it is little short of remarkable.

8 This understanding of § 703(h) underlies Franks' holding that constructive seniority is the

presumptively correct remedy for discriminatory refusals to hire, even though awarding such seniority necessarily disrupts the expectations of other employees.

B

The legislative history of § 703(h) admittedly affords somewhat stronger support for the Court's conclusion with respect to seniority systems that perpetuate pre-Act discrimination - that is, seniority systems that treat Negroes and Spanish-surnamed Americans who become line drivers as new employees even though these persons were discriminatorily assigned to city-driver jobs where they accumulated seniority before the effective date of Title VII. In enacting § 703(h), Congress intended to extend at least some protection to seniority expectations that had developed prior to the effective date of the Act. But the legislative history is very clear that the only threat to these expectations that Congress was seeking to avert was nonremedial, fictional seniority. Congress did not want minority group members who were hired after the effective date of the Act to be given superseniority simply because they were members of minority groups, nor did it want the use of seniority to be invalidated whenever it had a disparate [*386] impact on newly hired minority employees. These are the evils - and the only evils - that the opponents of Title VII raised⁹ [***447] and that the Clark-Case Interpretive Memorandum addressed.¹⁰ As the Court acknowledges, "there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs." Ante, at 354.

⁹ The most detailed attack on Title VII's effect on seniority rights was voiced in the minority report to the House Judiciary Committee Report, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963):

"The provisions of this act grant the power to destroy union seniority.... [T]he extent of actions which would be taken to destroy the seniority system is unknown and unknowable.

"... Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race." *Id.*, at 71 (emphasis in original).

The Senate opponents of the bill who discussed its effects on workers generally followed this line, although the principal argument advanced in the Senate was that Title VII would require preferential hiring of minorities. See 110

Cong. Rec. 487 (1964) (Sen. Hill); *id.*, at 7091 (Sen. Stennis); *id.*, at 7878 (Sen. Russell).

¹⁰ The Clark-Case Memorandum states:

"Title VII would have no effect on established seniority rights.... Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged - or indeed, permitted - to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers." *Id.*, at 7213.

The remaining documents, see n. 6, *supra*, while phrased more generally, are entirely consistent with the focus of Senators Clark and Case.

[**1881] Our task, then, assuming still that the case properly can be decided on the basis of imputed legislative intent, is "to put to ourselves the question, which choice is it the more likely that Congress would have made," *Burnet v. Guggenheim*, 288 [*387] U.S. 280, 285 (1933) (Cardozo, J.), had it focused on the problem: would it have validated or invalidated seniority systems that perpetuate pre-Act discrimination? To answer that question, the devastating impact of today's holding validating such systems must be fully understood. Prior to 1965 blacks and Spanish-surnamed Americans who were able to find employment were assigned the lowest paid, most menial jobs in many industries throughout the Nation but especially in the South. In many factories, blacks were hired as laborers while whites were trained and given skilled positions;¹¹ in the transportation industry blacks could only become porters;¹² and in steel plants blacks were assigned to the coke ovens and blasting furnaces, "the hotter and dirtier" places of employment.¹³ The Court holds, in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions.¹⁴ Even those willing to pay the [***448] price will [*388] have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.

¹¹ E.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (CA5 1974); *United States v. N.L. Industries, Inc.*, 479 F. 2d 354 (CA8 1973);

Griggs v. Duke Power Co., 420 F. 2d 1225 (CA4 1970).

12 E.g., Carey v. Greyhound Bus Co., 500 F. 2d 1372 (CA5 1974); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (CA5 1971).

13 United States v. Bethlehem Steel Corp., 446 F. 2d, at 655.

14 This "lock-in" effect explains why, contrary to the Court's assertion, ante, at 354, there is a "rational basis for distinguishing... claims [of persons already employed in less desirable jobs] from those of persons initially denied any job." Although denying constructive seniority to the latter group will prevent them from assuming the position they would have occupied but for the pre-Act discrimination, it will not deter them from moving into higher paying jobs.

In comparing incumbent employees with pre-Act discriminatees who were refused jobs, however, the Court assumes that § 703(h) must mean that the latter group need not be given constructive seniority if they are later hired. The only clear effect of § 703(h), however, is to prevent persons who were not discriminated against from obtaining special seniority rights because they are members of minority groups. See supra, at 385-386, and n. 10. Although it is true, as the Court notes, ante, at 354-355, n. 40, that in Quarles and United Papermakers the courts concluded that persons refused jobs prior to the Act need not be given fictional seniority, the EEOC, CCH EEOC Decisions (1973) [*] 6217, and several commentators, e.g., Cooper & Sobol, supra, n. 5; Note, supra, n. 5, 88 Harv. L. Rev., at 1544, have rejected this conclusion, and more recent decisions have questioned it, e.g., Watkins v. Steel Workers, 516 F. 2d 41 (CA5 1975).

I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority-group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality. The backers of that Title viewed economic equality as both a practical necessity and a moral imperative.¹⁵ They were well aware of the corrosive impact employment discrimination has on its victims, and on society generally.¹⁶ They sought, therefore, "to eliminate those discriminatory practices and devices which have fostered racially stratified [**1882] job environments to the disadvantage of minority citizens"; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); see also Griggs v. Duke Power Co., 401 U.S., at 429-431; Alexander v. Gardner-

Denver Co., 415 U.S. 36, 44 (1974); and "to make persons whole for injuries suffered on account of unlawful employment discrimination," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). In [*389] short, Congress wanted to enable black workers to assume their rightful place in society.

15 See, e.g., 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey); id., at 6562 (remarks of Sen. Kuchel); id., at 7203-7204 (remarks of Sen. Clark); H.R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., 26-29 (1963).

16 See sources cited in n. 15, supra.

It is, of course, true that Congress was not willing to invalidate seniority systems on a wholesale basis in pursuit of that goal.¹⁷ But the United States, as the plaintiff suing on behalf of the incumbent minority group employees here, does not seek to overturn petitioners' seniority system. It seeks only to have the "time actually worked in [minority group] jobs [recognized] as the equal of [the majority group's] time," Local 189, United Papermakers & [***449] Paperworkers v. United States, 416 F. 2d, at 995, within the existing seniority system. Admittedly, such recognition would impinge on the seniority expectations white employees had developed prior to the effective date of the Act. But in enacting Title VII, Congress manifested a willingness to do precisely that. For example, the Clark-Case Interpretive Memorandum, see n. 6, supra, makes clear that Title VII prohibits unions and employers from using discriminatory waiting lists, developed prior to the effective date of the Title, in making selections for jobs or training programs after that date. 110 Cong. Rec. 7213 (1964). Such a prohibition necessarily would disrupt the expectations of those on the lists. More generally, the very fact that Congress made Title VII effective shortly after its enactment demonstrates that expectations developed prior to passage of the Act were not considered sacrosanct, since Title VII's general ban on employment discrimination inevitably interfered with the pre-existing expectations of whites who anticipated benefiting from continued discrimination. Thus I am in complete agreement with Judge Butzner's conclusion [*390] in his seminal decision in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (ED Va. 1968): "It is... apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."¹⁸

17 As one commentator has stated:

"[The] statute conflicts with itself. While on the one hand Congress did wish to protect established seniority rights, on the other it intended to expedite black integration into the economic

mainstream and to end, once and for all, the de facto discrimination which replaced slavery at the end of the Civil War." Poplin, *supra*, n. 5, at 191.
18 See also Gould, *supra*, n. 5, at 1042:

"If Congress intended to bring into being an integrated work force,... and not merely to create a paper plan meaningless to Negro workers, the only acceptable legislative intent on past discrimination is one that requires unions and employers to root out the past discrimination embodied in presently nondiscriminatory seniority arrangements so that black and white workers have equal job advancement rights."

C

If the legislative history of § 703(h) leaves any doubt concerning the section's applicability to seniority systems that perpetuate either pre- or post-Act discrimination, that doubt is entirely dispelled by two subsequent developments. The Court all but ignores both developments; I submit they are critical.

First, in more than a score of decisions beginning at least as early as 1969, the Equal Employment Opportunity Commission has consistently held that seniority systems that perpetuate prior discrimination are unlawful.¹⁹ While the Court may have [**1883] retreated, see General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976), from its prior view that the interpretations of the EEOC are "entitled to great deference," Albemarle Paper Co. v. Moody, *supra*, at 431, quoting Griggs [*391] v. Duke Power Co., *supra*, at 434, I have not. Before I would sweep aside the EEOC's consistent interpretation of the statute it administers, I would require "compelling [***450] indications that it is wrong." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). I find no such indications in the Court's opinion.

19 See cases cited in n. 4, *supra*.

The National Labor Relations Board has reached a similar conclusion in interpreting the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In Local 269, Electrical Workers, 149 N.L.R.B. 769 (1964), enforced, 357 F. 2d 51 (CA3 1966), the Board held that a union hiring hall commits present acts of discrimination when it makes referrals based on experience if, in the past, the union has denied nonunion members the opportunity to develop experience. See also Houston Maritime Assn., 168 N.L.R.B. 615 (1967), enforcement denied, 426 F.2d 584 (CA5 1970).

Second, in 1972 Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, amending Title VII. In so doing, Congress made very clear that it approved of the lower court decisions invalidating seniority systems that perpetuate discrimination. That Congress was aware of such cases is evident from the Senate and House Committee Reports which cite the two leading decisions, as well as several prominent law review articles. S.Rep. No. 92-415, p. 5 n. 1 (1971); H.R. Rep. No. 92-238, p. 8 n. 2 (1971). Although Congress took action with respect to other lower court opinions with which it was dissatisfied,²⁰ it made no attempt to overrule the seniority cases. To the contrary, both the Senate and House Reports expressed approval of the "perpetuation principle" as applied to seniority systems²¹ and [*392] invoked the principle to justify the Committees' recommendations to extend Title VII's coverage to state and local government employees,²² and to expand the powers [***451] of the [**1884] EEOC.²³ Moreover, the Section-by-Section Analysis of the [*393] Conference Committee bill, which was prepared and placed in the Congressional Record by the floor managers of the bill, stated in "language that could hardly be more explicit," Franks v. Bowman Transportation Co., 424 U.S., at 765 n. 21, that, "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law... would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166, 7564 (1972) and perhaps most important, in explaining the section of the 1972 Act that empowers the EEOC "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3," 42 U.S.C. § 2000e-5(a) (1970 ed., Supp. V), the Section-by-Section Analysis declared:

"The unlawful employment practices encompassed by sections 703 and 704 which were enumerated in 1964 by the original Act, and as defined and expanded by the courts, remain in effect." 118 Cong. Rec. 7167, 7564 (1972) (emphasis added).²⁴

20 For example, the 1972 Act added to the definitional section of Title VII, 42 U.S.C. § 2000e (1970 ed., Supp. V), a new subsection (j) defining "religion" to include "religious observance and practice, as well as belief." This subsection was added "to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v.

Reynolds Metal Company, 429 F. 2d [324] (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971)." 118 Cong. Rec. 7167 (1972) (Section-by-Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, prepared by Sens. Williams and Javits). Dewey had questioned the authority of the EEOC to define "religion" to encompass religious practices. Dewey v. Reynolds Metals Co., 429 F. 2d 324, 331 n. 1, 334-335 (CA6 1970).

21 After acknowledging the naive assumptions of the 1964 Civil Rights Act, see n. 7, *supra*, both Committee Reports went on to state:

"Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, [and] perpetuation of the present effect of pre-act discriminatory practices through various institutional devices.... In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful." S. Rep. No. 92-415, p. 5 (1971).

See H.R. Rep. No. 92-238, p. 8 (1971).

In addition, in discussing "pattern or practice" suits and the recommendation to transfer the power to bring them to the EEOC, the House Report singled out several seniority cases, including United Papermakers, as examples of suits that "have contributed significantly to the Federal effort to combat employment discrimination." H.R. Rep. No. 92-238, *supra*, at 13, and n. 4.

It is difficult to imagine how Congress could have better "[addressed] the specific issue presented by this case," ante, at 354 n. 39, than by referring to "the mechanics of seniority... [and] perpetuation of the present effect of pre-act discriminatory practices" and by citing Quarles and United Papermakers.

22 Both Reports stated that state and local governments had discriminated in the past and that "the existence of discrimination is perpetuated by both institutional and overt discriminatory practices... [such as] de facto segregated job ladders." S. Rep. No. 92-415, *supra*, at 10; H.R. Rep. No. 92-238, *supra*, at 17. The same points were made in the debate in the House and Senate. 118 Cong.

Rec. 1815 (1972) (remarks of Sen. Williams); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins).

23 The Senate Report stated:

"It is expected that through the administrative process, the Commission will continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment... (including seniority systems)." S. Rep. No. 92-415, *supra*, at 19.

The House Report argued:

"Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.... Issues that have perplexed courts include plant-wide restructuring of pay-scales and progression lines, seniority rosters and testing." H.R. Rep. No. 92-238, *supra*, at 10.

24 By enacting a new section defining the EEOC's powers with reference to §§ 703 and 704 of the 1964 Act, Congress in 1972 effectively re-enacted those sections, and the judicial gloss that had been placed upon them. See 2A C. Sands, Sutherland's Statutes and Statutory Construction § 49.10 (1973) and cases cited; cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975) (finding that re-enactment in 1972 of backpay provision of 1964 Act "ratified" Courts of Appeals decisions awarding backpay to unnamed class members who had not filed charges with the EEOC).

We have repeatedly held: "When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." Tiger v. Western Investment Co., 221 U.S. 286, 309 (1911); see NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (subsequent [*394] legislation entitled to "significant weight"); Red Lion Broadcasting Co. v. FCC, 395 U.S., at 380; United States v. Stafoff, 260 U.S. 477, 480 (1923) (Holmes, J.); New York & Norfolk R. Co. v. Peninsula Produce Exchange, 240 U.S. 34, 39 (1916) (Hughes, J.); United States v. Weeks, 5 Cranch 1, 8 (1809). Earlier this Term, we implicitly followed this canon in using a statute passed in 1976 to conclude that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, enacted in 1946, was not intended as an independent grant of jurisdiction to the federal courts. Califano v. Sanders, 430 U.S. 99 (1977). The canon is particularly applicable here for two reasons. First, because there is no explicit legislative history discussing seniority systems that perpetuate discrimination, we are required to [***452] "[seize] every thing from which aid can be

derived...," Brown v. GSA, 425 U.S. 820, 825 (1976), quoting, United States v. Fisher, 2 Cranch 358, 386 (1805), if we are to reconstruct congressional intent. Second, because petitioners' seniority system was re-adopted in collective-bargaining agreements signed after the 1972 Act took effect, any retroactivity problems that ordinarily inhere in using a later Act to interpret an earlier one are not present here. Cf. Stockdale v. Insurance Cos., 20 Wall. 323, 331-332 (1874). Thus, the Court's bald assertion that the intent of the Congress that enacted the 1972 Act is "entitled to little if any weight," ante, at 354 n. 39, in construing § 703(h) is contrary to both principle and precedent.

Only last Term, we concluded that the legislative materials reviewed above "completely [answer] the argument that Congress somehow intended seniority relief to be less available" than backpay as a remedy for discrimination. Franks v. Bowman Transportation Co., supra, at 765 n. 21. If anything, the materials provide an even more complete answer to the argument that Congress somehow intended to immunize seniority systems that perpetuate past discrimination. To the extent that today's decision grants immunity to such systems, I respectfully dissent.

REFERENCES

15 Am Jur 2d, Civil Rights 135, 138, 139, 141-143, 422-426

5 Am Jur Pl & Pr Forms (Rev Ed), Civil Rights, Forms 61-65; 16 Am Jur Pl & Pr Forms (Rev Ed), Labor and Labor Relations, Forms 321 et seq.

10 Am Jur Legal Forms 2d, Labor and Labor Relations 159:321-159:323, 159:761-159:872

2 Am Jur Proof of Facts 2d 187, Racial Discrimination in Employment (In General; Use of Statistics); 3 Am Jur Proof of Facts 2d 221, Racial Discrimination in Employment--Recruiting and Hiring; 4 Am Jur Proof of Facts 2d 477, Racial Discrimination in Employment--Post-Hiring Practices

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts

42 USCS 2000e et seq.

FRES, Job Discrimination 2:17 et seq.

US L Ed Digest ,Civil Rights 7.5, 12.5

ALR Digests, Civil Rights 1.3, 20

L Ed Index to Annos, Civil Rights; Labor and Employment

ALR Quick Index, Discrimination; Seniority

Federal Quick Index, Fair Employment Practices; Seniority

Annotation References:

Construction and application of Rule 23 of Rules of Supreme Court prescribing requirements of petition for certiorari. 32 L Ed 2d 830.

Racial discrimination in labor and employment. 28 L Ed 2d 928.

Sex discrimination. 27 L Ed 2d 935.

Use of employment seniority to determine order of layoff and recall of employees as unlawful employment practice under Title VII of Civil Rights Act of 1964 (42 USCS 2000e et seq.). 34 ALR Fed 18.

What constitutes reverse or majority discrimination on basis of sex or race violative of Federal Constitution or statutes. 26 ALR Fed 13.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (42 USCS 2000e et seq.) making sex discrimination in employment unlawful. 12 ALR Fed 15.

Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment. 44 ALR2d 1138.

Private rights and remedies to enforce right based on civil rights statute. 171 ALR 920.

LEXSEE

LONG JOHN SILVER'S RESTAURANTS, INCORPORATED; LONG JOHN SILVER'S, INCORPORATED, Plaintiffs-Appellants, v. ERIN COLE; NICK KAUFMAN; VICTORIA MCWHORTER, Defendants-Appellees. SECRETARY OF LABOR, Amicus Supporting Appellants.

No. 06-1259

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

514 F.3d 345; 2008 U.S. App. LEXIS 1798; 155 Lab. Cas. (CCH) P35,393; 13 Wage & Hour Cas. 2d (BNA) 364

**December 6, 2007, Argued
January 28, 2008, Decided**

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Long John Silver'S v. Cole, 2008 U.S. LEXIS 6685 (U.S., Oct. 6, 2008)

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry F. Floyd, District Judge. (6:05-cv-03039-HFF).
Cole v. Long John Silver's Rests., Inc., 388 F. Supp. 2d 644, 2005 U.S. Dist. LEXIS 29227 (D.S.C., 2005)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employer sought appellate relief from a ruling of the United States District Court for the District of South Carolina, at Greenville, declining to vacate an arbitration award. In the underlying arbitration proceedings, three former managerial employees contended that the employer violated the Fair Labor Standards Act (FLSA) by failing to pay them and other employees the overtime compensation required by law.

OVERVIEW: The arbitrator ruled, in his class determination partial final award (class award), that the opt-in class certification provision of the FLSA did not apply in the arbitration proceedings. The arbitrator also ruled that, pursuant to the controlling arbitration agreement, the arbitration proceedings were governed by the opt-out class certification provision of the Supplementary Rules for Class Arbitrations of the American Arbitration Association. The employer argued that the district court erred when it declined to vacate the class award in failing to

recognize that the arbitrator had manifestly disregarded controlling legal principles and in failing to recognize that the arbitrator had exceeded the scope of his authority. As there was a debatable contention that the certification provision did not explicitly overrule the opt-out feature of the arbitration agreement, the arbitrator did not ignore the FLSA or any other applicable legal principles when he certified an opt-out class in the class award. The district court correctly ruled that it lacked the authority to vacate the class award, which was at the very most only an arguable contravention of the arbitrator's powers.

OUTCOME: The opinion of the district court was affirmed.

CORE TERMS: arbitrator's, arbitration, opt-in, arbitration agreement, opt-out, AAA Class Rules, arbitration proceedings, claimant, vacate, legal principles, arbitration award, nonwaivable, class certification, substantive right, disregarded, waived, manifestly, initiated, arbitrate, exceeded, manifest, substantive law, managerial employees, collective actions, legislative history, certification, restaurant, certifying, correctly, waivable

LexisNexis(R) Headnotes

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN1]Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 216(b), is an "opt-in" class provision, providing that no employee shall be a party plaintiff to any action under the FLSA unless he gives his consent

in writing to become such a party and such consent is filed in the court in which such action is brought.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

[HN2]In conducting an appellate review of a district court's refusal to vacate an arbitration award, an appellate court is obliged to accept findings of fact that are not clearly erroneous and to assess conclusions of law de novo. Importantly, any judicial review of an arbitration award is extremely limited, and is, in fact, among the narrowest known to the law. A reviewing court is entitled to determine only whether the arbitrator did his job--not whether he did it well, correctly, or reasonably, but simply whether he did it. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN3]An arbitration award may be vacated if it fails to draw its essence from the controlling agreement. And such an award may be overturned if it flowed from an arbitrator's manifest disregard of the applicable law. In order to secure judicial relief on such grounds, it must be shown that the arbitrator, in making his ruling, was aware of the law, understood it correctly, found it applicable to the case before him, and yet chose to ignore it in propounding his decision. An arbitrator does not act in manifest disregard of the law unless: (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***

[HN4]Parties who agree to arbitrate a statutory claim do not forgo the substantive rights afforded by the statute, but rather submit to their resolution in an arbitral, rather than a judicial, forum. It is well-settled that a contract to arbitrate a Fair Labor Standards Act claim will not be enforceable if Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN5]Any judicial review of an arbitration award must be an extremely narrow exercise. In order to overturn an arbitration award on the basis of the arbitrator's manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly ignored applicable law when rendering his decision.

COUNSEL: ARGUED: Kenneth Steven Geller, MAYER BROWN, L.L.P., Washington, D.C., for Appellants.

Edward D. Sieger, Senior Appellate Attorney, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Supporting Appellants.

Morris Reid Estes, Jr., STEWART, ESTES & DONNELL, Nashville, Tennessee, for Appellees.

ON BRIEF: Robert P. Davis, David M. Gossett, Tamara S. Killion, MAYER, BROWN, ROWE & MAW, L.L.P., Washington, D.C.; John F. Dienelt, Scott McIntosh, DLA PIPER RUDNICK GRAY CARY, L.L.P., Washington, D.C.; Henry L. Parr, Jr., J. Theodore Gentry, Hannah Rogers Metcalfe, WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellants.

Thomas J. Ervin, KATHRYN WILLIAMS, P.A., Greenville, South Carolina; Darrell L. West, STEWART, ESTES & DONNELL, Nashville, Tennessee; Brian P. Murphy, Greenville, South Carolina, for Appellees.

Howard M. Radzely, Solicitor of Labor, Gregory F. Jacob, Deputy Solicitor, Nathaniel I. Spiller, Assistant Deputy Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Supporting [**2] Appellants.

JUDGES: Before MICHAEL and KING, Circuit Judges, and Catherine C. BLAKE, United States District Judge for the District of Maryland, sitting by designation. Judge King wrote the opinion, in which Judge Michael and Judge Blake joined.

OPINION BY: KING

OPINION

[*346] KING, Circuit Judge:

Long John Silver's Restaurants, Incorporated, and Long John Silver's, Incorporated (collectively, "LJS"), seek appellate relief from a January 20, 2006 ruling of

the district court declining to vacate an arbitration award. *Long John Silver's Rests., Inc. v. Cole*, No. 6:05-cv-03039-HFF (D.S.C. Jan. 20, 2006) (the "Opinion").¹ In the underlying arbitration proceedings, three former LJS managerial employees, Erin Cole, Nick Kaufman, and Victoria McWhorter (the [*347] "Claimants"), contended that LJS violated the Fair Labor Standards Act (the "FLSA") by failing to pay them and other LJS employees the overtime compensation required by law. In September 2005, the arbitrator ruled, in his Class Determination Partial Final Award (the "Class Award"),² that the "opt-in" class certification provision of the FLSA (codified at 29 U.S.C. § 216(b)) did not apply in the arbitration proceedings. The arbitrator also ruled that, pursuant to the controlling [**3] arbitration agreement, the arbitration proceedings were governed by the "opt-out" class certification provision of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "AAA Class Rules").

1 The Opinion can be found at J.A. 281-91. (Citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this appeal.)

2 The Class Award can be found at J.A. 47-71.

In this appeal, LJS contends that the district court erred in two respects when it declined to vacate the Class Award: first, in failing to recognize that the arbitrator, in making the Award, had manifestly disregarded controlling legal principles; and, second, in failing to recognize that the arbitrator had exceeded the scope of his authority. As explained below, we reject these contentions and affirm.

I.

A.

As background in this matter, the Claimants are former managers and managerial assistants of various LJS restaurants. They maintain that LJS has been engaged in unlawful employment practices, subjecting them and others to payroll deductions and salary give-backs to cover losses in LJS's restaurant operations. These unlawful practices, according to the Claimants, violated [**4] the FLSA and its regulations on overtime pay, and resulted in insufficient compensation being paid to them and others.

In 1995, LJS initiated a mandatory arbitration procedure and commenced the use of a uniform arbitration agreement for disputes with its employees. The arbitration agreement prepared for this purpose was executed by each of the Claimants. The agreement provides, in pertinent part, that

[a]ny arbitration will be administered by the American Arbitration Association under its commercial arbitration rules (except as modified herein) The arbitrator shall apply the substantive law (and the laws and remedies, if applicable), in the state in which the claim arose, or federal law, or both, depending upon the claims asserted.

J.A. 84.

The AAA Class Rules empower an arbitrator to make certain determinations about whether an arbitration agreement permits an arbitration proceeding to be conducted as a class arbitration. In the event that the agreement so permits, the arbitrator must decide whether the arbitration should proceed as a class arbitration by considering the criteria enumerated in the AAA Class Rules, as well as "any law or agreement of the parties the arbitrator [**5] determines applies to the arbitration." *See* AAA Class Rule 4(a). When the arbitrator has decided that the arbitration should proceed as a class arbitration, he must set forth the basis for that decision in a Class Determination Award, which defines the class, the notice to be given, and the grounds for exclusion of class members. *See* AAA Class Rule 5. AAA Class Rule 7 provides that a final award on the merits of a class arbitration must define the class "with specificity," including "those who have elected to opt out of the class."

[*348] Like the AAA Class Rules, § 16(b) of the FLSA contains a provision governing class action proceedings. Unlike the "opt-out" provision of the AAA Class Rules, however, [HN1] § 16(b) of the FLSA is an "opt-in" class provision, providing that

[n]o employee shall be a party plaintiff to any . . . action [under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (the "FLSA § 16(b) provision" or the "§ 16(b) provision").

B.

On January 21, 2004, Claimants Cole and Kaufman initiated an arbitration proceeding before the AAA, on behalf of themselves and others similarly [**6] situated. They alleged that LJS, in failing to properly compensate them, had violated the FLSA.³ On March 4, 2005, the Claimants filed an amended arbitration complaint with the AAA, adding McWhorter as a representative claim-

ant and seeking class certification pursuant to the AAA Class Rules. LJS then secured rulings from the arbitrator on certain class certification issues, ultimately leading to this appeal.

3 A related civil action involving similar compensation issues had been previously initiated by a former LJS managerial employee in a Tennessee federal court. That case was dismissed in 2004 because the claims were deemed subject to arbitration. See *Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005). After the Tennessee lawsuit was filed, Johnson sought certification of an "opt-in" class pursuant to the FLSA § 16(b) provision. LJS opposed any such class certification, however, and moved to compel arbitration.

First, on June 15, 2004, the arbitrator made a clause construction award, ruling that the arbitration agreement did not preclude a class arbitration proceeding. Although the award did not decide whether a class [**7] would ultimately be certified in the arbitration proceeding, LJS promptly initiated suit in the district court, seeking to vacate the award. LJS made two assertions in its lawsuit: (1) that the FLSA § 16(b) provision permitting employees to pursue collective actions is a procedural right, and thus had been waived by the arbitration agreements; and (2) that conducting a class arbitration proceeding is inconsistent with the FLSA. On September 15, 2005, the district court dismissed that suit for lack of subject matter jurisdiction. See *Cole v. Long John Silver's Rests., Inc.*, 388 F. Supp. 2d 644 (D.S.C. 2005).⁴

4 LJS initially pursued an appeal in this Court of the district court's dismissal of its challenge to the clause construction award. On January 10, 2007, the appeal was dismissed at LJS's request.

Next, on September 19, 2005, the arbitrator issued its Class Award, which LJS challenges in this appeal. In the Class Award, the arbitrator ruled that the Claimants could serve as representative plaintiffs in an "opt-out" class arbitration proceeding -- the class being composed of current and former LJS managerial employees having potential FLSA claims. In rendering the Class Award, the [**8] arbitrator was called upon to address the apparent conflict between the "opt-in" aspect of the FLSA § 16(b) provision, on the one hand, and the "opt-out" aspect of the AAA Class Rules, on the other. In the Class Award, the arbitrator decided that, because "there is no evidence of any congressional intent" to make the right to the "opt-in" requirement of the § 16(b) provision non-waivable, the FLSA did not preclude enforcement of the parties' agreement to arbitrate pursuant to the AAA Class

Rules. Class Award [*349] 7. Accordingly, the arbitrator applied the "opt-out" provisions of AAA Class Rule 7.

C.

On October 25, 2005, LJS filed suit in the District of South Carolina, seeking to vacate the Class Award, and challenging the arbitrator's ruling that the FLSA § 16(b) provision was not controlling.⁵ On January 20, 2006, the district court filed its Opinion denying LJS's request for relief. By the Opinion, the court rejected LJS's contention that the FLSA dispositively provides employees a nonwaivable substantive right to "opt-in" proceedings under the § 16(b) provision. Having determined that no "clear principle of law bound the arbitrator in this case," the court further ruled that the arbitrator [**9] had satisfied his obligation to render a reasoned award, that he had not manifestly disregarded the applicable legal principles, and that he had instead "thoroughly analyzed the relationship of [the § 16(b) provision] and the arbitration agreement." Opinion 7. Indeed, as the court recognized, because the arbitration agreement "undoubtedly gave the arbitrator authority to invoke equity, it provided him with the power to render any relief which a court could award." *Id.* at 9. LJS has appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

5 The Secretary of Labor made an *amicus curiae* submission to the district court supporting LJS's motion to vacate. More particularly, she asserted that the FLSA § 16(b) provision constituted substantive law and was nonwaivable.

II.

[HN2]In conducting an appellate review of a district court's refusal to vacate an arbitration award, we are obliged to accept findings of fact that are not clearly erroneous and to assess conclusions of law de novo. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). Importantly, any judicial review of an arbitration award is "extremely limited," and is, in fact, "among the narrowest known to the [**10] law." *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). As we have consistently recognized, a reviewing court is entitled to "determine only whether the arbitrator did his job -- not whether he did it well, correctly, or reasonably, but simply whether he did it." *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to

overturn his decision." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

[HN3]An arbitration award may be vacated if it fails to draw its essence from the controlling agreement. United Paperworkers Int'l Union, 484 U.S. at 36. And such an award may be overturned if it flowed from an arbitrator's manifest disregard of the applicable law. Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998). In order to secure judicial relief on such grounds, it must be shown that the arbitrator, in making his ruling, was [**11] "aware of the law, understood it correctly, found it applicable to the case before [him], and yet chose to ignore it in propounding [his] decision." Remmey v. PaineWebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994). As one of our sister circuits has explained, an arbitrator does not act in manifest disregard of the law unless: "(1) the applicable legal principle is clearly defined and not subject [*350] to reasonable debate; and (2) the arbitrator[] refused to heed that legal principle." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995).

III.

LJS makes two contentions in support of its position on appeal. First, it maintains that the arbitrator's certification of an "opt-out" class resulted from a manifest disregard of the applicable legal principles, and that, in particular, the arbitrator disregarded the FLSA § 16(b) provision. Second, LJS asserts that the arbitrator exceeded the scope of his authority in certifying an "opt-out" arbitration class, rather than applying the "opt-in" aspect of the § 16(b) provision.

A.

In pursuing these contentions, LJS asserts, as a threshold matter, that an employee cannot be made a party to an FLSA-related civil proceeding without [**12] his consent, and that this statutory right, being both fundamental and substantive, is not waivable. ⁶ The apparent conflict between the AAA Class Rules and the FLSA § 16(b) provision would necessarily be resolved in favor of an "opt-in" procedure if the consent requirement of § 16(b) is a substantive right, not waivable by an arbitration agreement. As the Supreme Court noted in Gilmer v. Interstate/Johnson Lane Corp., [HN4]parties who agree to arbitrate a statutory claim "do[] not forgo the substantive rights afforded by the statute," but rather "submit[] to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (internal quotation marks omitted). It is well-settled that a contract to arbitrate an FLSA claim will not be enforceable if "Congress has evinced an intention to preclude a waiver of judicial remedies for the

statutory rights at issue." Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000). Therefore, in order to prove that the "opt-in" requirement of the FLSA could not be waived by the parties' agreement to arbitrate under the AAA Class Rules, LJS must demonstrate that Congress expressly intended to preclude a waiver of the "opt-in" procedure [**13] for class arbitration of FLSA claims, by reference to "the text of the FLSA, its legislative history, or an 'inherent conflict'" between the AAA Class Rules and the FLSA's "underlying purposes." Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002); see also Gilmer, 500 U.S. at 26.

6 In an *amicus curiae* submission in this appeal, the Secretary of Labor supports LJS's position, asserting, as she did in the district court, that the "written consent" provision of the FLSA § 16(b) provision is a substantive and unwaivable right.

LJS has failed to make any such demonstration here. For example, LJS posits that, in the FLSA § 16(b) provision's mandate that "consent [must be] filed in the court in which such action is brought," the word "court" must be accorded its general meaning, which, LJS asserts, would include an arbitration forum. LJS also references a portion of the legislative history of the § 16(b) provision -- particularly, the remarks of Senator Donnell during a 1947 Senate debate on FLSA amendments that included the § 16(b) provision -- suggesting that it would be "unwholesome" to allow suits under the FLSA which are "not brought with the actual consent or agency of the [**14] individuals for whom an ostensible plaintiff filed the suit." Br. of Appellants 27-28 (citing Arrington v. Nat'l Broad. Co., 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 [*351] Cong. Rec. 2182 (1947))); ⁷ see also Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (observing that Congress enacted the § 16(b) provision "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions"). Although LJS's references to the text and legislative history of the FLSA reassure us of Congress's intention that the "opt-in" procedure should apply in arbitration as in court proceedings, they fail to also convince us that Congress expressly intended that the "opt-in" procedure could not be waived by the parties' agreement to an alternate procedure.

7 Senator Donnell's remarks during the proposed 1947 debate on the FLSA amendments included the following:

"Obviously, . . . this is a whole-some provision, for it is certainly

unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later [**15] on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit."

Arrington, 531 F. Supp. at 502 (quoting 93 Cong. Rec. 2182 (1947)).

We also are not persuaded by LJS's reliance on a prior decision of this Court. LJS highlights a footnote in *Adkins v. Labor Ready, Inc.*, in which we observed that the fee provision in § 16(b) (a provision LJS contends is analogous to the "opt-in" aspect of the § 16(b) provision) is a substantive right retained by parties in arbitration. See 303 F.3d at 502 n.1. LJS acknowledges, however, that no court has explicitly ruled that the "opt-in" provision of the § 16(b) provision creates a substantive, non-waivable right.⁸ Put simply, it is far from clear that the "opt-in" aspect of the § 16(b) provision is such a non-waivable substantive right. Having so concluded, we turn to LJS's contentions that the arbitrator manifestly disregarded the applicable legal principles and exceeded the scope of his authority in rendering the Class Award.

8 By contrast, the Claimants point out that the Supreme Court [**16] has recognized that employees are entitled to waive their right to collective action by agreeing to mandatory arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (upholding compulsory arbitration agreement under the Age Discrimination in Employment Act of 1967). If the right to initiate a collective action can be waived, as the Claimants assert, it may be inferred that an "opt-in" procedure relating to any such right (here, the FLSA § 16(b) provision) can also be waived.

B.

1.

In its first contention, LJS asserts that the district court erred in refusing to vacate the Class Award on the basis that the arbitrator had manifestly disregarded applicable federal law -- namely, the FLSA § 16(b) provision's "opt-in" requirement. As discussed above,

[HN5]any judicial review of an arbitration award must be an extremely narrow exercise. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987); *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996). In order to overturn an arbitration award on the basis of the arbitrator's [**17] manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly [*352] ignored applicable law when rendering his decision. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).

In making the Class Award, the arbitrator specifically assessed the possibility that "Congress [had] evinced an intention to preclude a waiver of judicial remedies" for the consent mandate of the FLSA § 16(b) provision. Class Award 7 (citing *Gilmer*, 500 U.S. at 26). He concluded, however, that "there is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated," and thus that such a procedure remained waivable. *Id.* After careful analysis, the arbitrator then ruled in the Class Award that the use of an "opt-out" class in the class arbitration proceeding was proper. According to the arbitrator, LJS's pretrial maneuvering in the *Johnson* case, see *supra* note 3, had occasioned a substantial delay in the processing of potential claims, and had threatened the resolution of legitimate claims, such that the adoption of the "opt-in" procedure of the § 16(b) provision "would [**18] now create a fundamental unfairness" by "significantly reduc[ing] the class population in derogation of fundamental FLSA objectives." Class Award 10. On this point, the arbitrator emphasized that equity would be better served by safeguarding the rights of potential claimants "'sidelined' during the progress of this case." *Id.* at 11. And the arbitrator reasoned that the "opt-out" procedure best achieved FLSA's objective of permitting states (and by analogy, private parties) to "adopt higher standards than those established in the [FLSA]," as well as the Federal Arbitration Act's preference for "the procedural rules defined by private contract." *Id.* at 8.

In rejecting LJS's challenge to the Class Award, the district court acknowledged the uncertainty as to whether Congress intended to apply the FLSA § 16(b) provision's "consent in writing" requirement in arbitration proceedings, and concluded that the arbitrator was not, therefore, bound by any "clear principle of law" in rendering the Award. Opinion 5. The court further observed that the parties had been accorded "a full and fair opportunity to present their competing views of the relevance of FLSA § 16(b) to [**19] the arbitration proceedings," and that the Class Award was based on a reasonable interpreta-

tion of the FLSA and the Federal Arbitration Act. *Id.* at 7.

On this record, we are similarly convinced that the arbitrator "did his job." See *Mountaineer Gas*, 76 F.3d at 608. Because there is a debatable contention that the FLSA § 16(b) provision did not explicitly overrule the "opt-out" feature of the arbitration agreement, the arbitrator did not ignore the FLSA or any other applicable legal principles when he certified an "opt-out" class in the Class Award, and LJS has thus not sustained its heavy burden to demonstrate otherwise. See *Remmey*, 32 F.3d at 149. The district court accordingly did not err in declining to vacate the Class Award on this basis.

2.

LJS's second appellate contention is that the district court erred in failing to vacate the Class Award on the ground that the arbitrator exceeded the scope of his authority under the arbitration agreement by certifying an "opt-out" arbitration class. On this point, LJS argues that the plain terms of the arbitration agreement required the arbitrator to "apply the 'federal law' regarding the claim at issue, provide 'the same protections as a court [*20] of law,' and award only that relief available in a 'court of law.'" Br. of Appellants 47. More specifically, LJS relies on specific [*353] language drawn from the arbitration agreement. See J.A. 81 ("If you win, the arbitrator can award you anything you might seek through a court of law."); *id.* at 84 ("The arbitrator shall apply the substantive law (and the laws of remedies, if applicable) in the state in which the claims arose, or federal law, or both . . ."). LJS asserts that, by approving an "opt-out" class, the arbitrator ignored the terms of the agreement requiring him -- in exercising the authority he derived therefrom -- to apply the "opt-in" requirement of the FLSA § 16(b) provision.

The district court deemed LJS's argument on this point unpersuasive, observing that the arbitrator's decision in the Class Award to certify an "opt-out" class was simply a matter of contract interpretation, and thus well within his authority. The central question, as framed by the arbitrator and the court, was whether the arbitration agreement that incorporated the AAA Class Rules authorized the use of an "opt-out" procedure. With regard to the proposition that the arbitration agreement unambiguously [*21] required the arbitrator to adhere to the FLSA § 16(b) provision, the court disagreed, observing that the arbitrator was forced to interpret the agreement precisely "because of its ambiguity as to whether § 16(b) or the AAA rules would apply to class certification." Opinion 9 (emphasis in original).

Indeed, the first provision of the arbitration agreement upon which LJS relies -- that an employee is entitled in arbitration to anything he might seek in a court of law -- appears only in a portion of the agreement generally describing the benefits of arbitration. And the second provision quoted by LJS -- requiring the arbitrator to apply substantive law -- could not have limited the arbitrator's authority in the manner LJS proposes, when, as we have already explained, it is far from clear that the "opt-in" procedure of the FLSA § 16(b) provision creates a substantive, nonwaivable right.⁹

9 LJS also asserts that the arbitrator, in making the Class Award, relied on his personal notions of right and wrong, thus exceeding the scope of his authority under the arbitration agreement. In support of this proposition, LJS relies on the arbitrator's statement in the Class Award that, in light of LJS's [**22] "endless procedural machination . . . in *Johnson* and . . . in this arbitration," "[e]quity is better served by preserving the rights of potential claimants who have been 'sidelined' during the progress of this case." Class Award 10-11. In this regard, we agree with the district court that LJS's assertion is contradicted by the fact that the arbitrator relied on settled principles in support of his reliance on equity, and by the provision of the arbitration agreement empowering the arbitrator to "award any relief which a court could award." Opinion 9.

In making our extremely limited review of the Class Award, we must, in these circumstances, agree with the district court that the arbitrator did not exceed the scope of his authority by certifying an "opt-out" class. See *Am. Postal Workers Union*, 204 F.3d at 527. As the district court recognized, the arbitrator "did what he was supposed to do: he analyzed two conflicting interpretations of the arbitration agreement and made a reasoned decision as to why an opt-out class should be certified." Opinion 9. The court thus correctly ruled that it lacked the authority to vacate the Class Award, which was "at the very most" only an arguable contravention [**23] of the arbitrator's powers. *Id.* at 10. In these circumstances, we are obliged to affirm the district court.

IV.

Pursuant to the foregoing, we reject the appellate contentions of LJS with respect [*354] to the Class Award and affirm the Opinion of the district court.

AFFIRMED

LEXSEE

**JEAN MATHIS, Plaintiff, v. HOUSING AUTHORITY OF UMATILLA COUNTY,
a non-profit business entity, Defendants.**

CV-01-1470-ST

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

242 F. Supp. 2d 777; 2002 U.S. Dist. LEXIS 25544

September 19, 2002, Decided

DISPOSITION: Plaintiff's Motion for Partial Summary Judgment was granted in part and denied in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee filed suit alleging that defendant, her former employer, owed her wages for overtime hours. Her claims included failure to pay final wages when due in violation of Or. Rev. Stat. § 652.140 and failure to pay overtime wages in violation of 29 U.S.C.S. § 207 of the Fair Labor Standards Act (FLSA) and Or. Rev. Stat. § 653.010 et seq. The employee moved for summary judgment.

OVERVIEW: The degree of control, the fact that the employee had no opportunity for profit or loss, the fact that the employee made no investment in either equipment or materials required for her work, the fact that the employee did not use her skills in any independent way, the fact that the position was for an indefinite duration and either party could terminate the relationship at any time, and the services that the employee rendered pointed towards those of an employee. The issue of the employee's desire to be an independent contractor did not alter the economic reality that she was an employee. Because she was an employee, the employee automatically became a member of the union on her 31st day of employment and was covered by the collective bargaining agreement (CBA). The employee's motion for summary judgment that the employer acted willfully under Oregon law was denied because if the employer accommodated her desire to be an independent contractor (to which there was an issue of fact), then the employer's conduct was not willful.

OUTCOME: The motion was granted to the extent that: (1) the employee was an employee; (2) she was entitled to overtime pay as provided in the CBA; and (3) she

could recover one penalty under state law and liquidated damages under the FLSA, but prejudgment interest must be offset from the liquidated damages and, if the violation was willful, recovery was limited to the greater of the penalty under state law or the FLSA. Otherwise, the motion was denied.

CORE TERMS: housing authorities, liquidated damages, failure to pay, independent contractor, independent contractor, overtime, summary judgment, termination, housing, prejudgment interest, minimum wage, willful, skill, citation omitted, hired, overtime wages, economic realities, genuine, pay wages, moving party, liquidated, unpaid, double, executive director, employer misconduct, overtime pay, employment relationship, bargaining agreement, willful violation, issue of material fact

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN1]See Or. Rev. Stat. § 652.140.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN2]See 29 U.S.C.S. § 207.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN3]See Or. Rev. Stat. § 653.055(1).

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

[HN4]Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > Materiality

[HN5]On a motion for summary judgment, the moving party must show an absence of an issue of material fact. Once the moving party does so, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial.

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN6]On a motion for summary judgment, the court must not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial. A "scintilla of evidence," or evidence that is "merely colorable" or "not significantly probative," does not present a genuine issue of material fact.

Civil Procedure > Summary Judgment > Standards > General Overview

[HN7]On a motion for summary judgment, the substantive law governing a claim or defense determines whether a fact is material. The court must view the inferences drawn from the facts in the light most favorable to the nonmoving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN8]The Fair Labor Standards Act was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive a fair day's pay for a fair day's work and should be protected from the evil of overwork as well as underpay.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN9]The Fair Labor Standards Act defines an "employee" as any individual employed by an employer. 29 U.S.C.S. § 203(e)(1). This is the broadest definition that has ever been included in any one act. Meanwhile, "employer" is defined to include any person acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C.S. § 203(d).

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Plan Termination > General Overview

[HN10]The Fair Labor Standards Act defines the verb "employ" expansively to mean suffer or permit to work. 29 U.S.C.S. §§ 203(e), 203(g). The words "suffer" and "permit" as used in the statute mean with the knowledge of the employer. The United States Supreme Court has emphasized that the striking breadth of this latter definition stretches the meaning of employee to cover some parties who might not qualify as such under a strict application of traditional agency law principles.

Labor & Employment Law > Employment Relationships > Independent Contractors

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN11]The Fair Labor Standards Act (FLSA) is to be construed expansively in favor of coverage, recognizing that broad coverage is essential to accomplish the goals of this remedial legislation. Importantly, neither the common law concepts of employee and independent contractor nor contractual provisions purporting to describe the relationship are determinative of employment status. Accordingly, to determine employment status for the remedial purposes of the FLSA, the economic realities test is the applicable standard.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors

[HN12]Consisting of a nonexhaustive list, courts have identified a number of factors which may be useful in distinguishing employees from independent contractors

for purposes of social legislation such as the Fair Labor Standards Act. Some of those factors are: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. The presence of any individual factor is not dispositive of whether an employee/employer relationship exists. Such a determination depends upon the circumstances of the whole activity.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors

[HN13]The United States District Court for the District of Oregon has applied a four factor test in distinguishing employees from independent contractors for purposes of the Fair Labor Standards Act, which includes 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.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN14]The United States District Court for the District of Oregon applies the same Fair Labor Standards Act analysis under state law claims when determining whether an employment or independent contractor relationship exists.

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN15]In distinguishing employees from independent contractors for purposes of the Fair Labor Standards Act (FLSA), the "right to control" does not require continuous monitoring of employees. Instead, control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence. Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN16]In distinguishing employees from independent contractors for purposes of the Fair Labor Standards Act, purely technical skills are not viewed in isolation. Instead, courts look to see how an employee's skills are utilized.

Labor & Employment Law > Employment Relationships > Independent Contractors

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN17]The fact that workers are skilled is not itself indicative of independent contractor status for Fair Labor Standards Act (FLSA) purposes. A variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN18]Agents who do the same work as those explicitly hired employees are an essential part of the business' operation.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN19]In the Fair Labor Standards Act (FLSA) context, it is well-settled that subjective intent cannot override the economic realities. Contractual intention is not a dispositive consideration in an FLSA analysis.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN20]Pursuant to Or. Rev. Stat. § 653.055, failure to pay overtime mandates payment of a penalty as provided in Or. Rev. Stat. § 652.150.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN21]To act willfully under Or. Rev. Stat. § 652.150, the employer had to know what it was doing, intending to do it while acting as a free agent.

Civil Procedure > Remedies > Damages > General Overview

[HN22]Oregon law provides that where there are two separate statutory schemes and two separate remedies,

each with its own purpose, an employer who violated both laws is liable for the penalties provided in each.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN23]A failure to pay wages owed at termination violates Or. Rev. Stat. § 652.140. If the employer willfully fails to pay wages as provided in Or. Rev. Stat. § 652.140, then it is liable for the penalty as provided in Or. Rev. Stat. § 652.150. Similarly, a failure to pay overtime violates Or. Rev. Stat. § 653.261 for which Or. Rev. Stat. § 653.055(1)(b) mandates payment of a penalty as provided in Or. Rev. Stat. § 652.150. The Oregon Court of Appeals has rejected the argument that the payment of inadequate overtime and nonpayment of termination offenses are bundled into a single penalty provision.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN24]When an employee's regular wage rate complies with the statutory minimum requirement, the minimum wage component is automatically subsumed within the wage rate on which the penalty under Or. Rev. Stat. § 652.150 is computed for the violation of Or. Rev. Stat. § 652.140 itself. To impose a separate penalty under Or. Rev. Stat. § 652.150, under these circumstances, would constitute a second penalty based on an amount that has already been included in the penalty that the employee has recovered for the untimeliness of the final payment under Or. Rev. Stat. § 652.140.

Labor & Employment Law > Wage & Hour Laws > Remedies > Backpay

Labor & Employment Law > Wage & Hour Laws > Remedies > Liquidated Damages

[HN25]An employer who violates the Fair Labor Standards Act (FLSA) is ordinarily liable both for unpaid wages and an additional equal amount as liquidated damages. 29 U.S.C.S. § 216(b). However, the court has the discretion to award no liquidated damages or reduced liquidated damages if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA. 29 U.S.C.S. § 260.

Banking Law > National Banks > Insolvencies, Liquidations & Rehabilitations > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Labor & Employment Law > Wage & Hour Laws > Remedies > Judgment Interest

[HN26]The United States Supreme Court has stated that the liquidated damages provision in the Fair Labor Standards Act (FLSA) is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. In addition, liquidated damages under the FLSA provide compensation for delay in payment of sums due under the FLSA. Therefore, if liquidated damages are awarded under the FLSA, then prejudgment interest must be offset from the liquidated damages to avoid a double recovery.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN27]To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. Allowance of interest on minimum wages and liquidated damages recoverable under the Fair Labor Standards Act (FLSA) tends to produce the undesirable result of allowing interest on interest. Congress by enumerating the sums recoverable in an action under the FLSA meant to preclude recovery of interest on minimum wages and liquidated damages.

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

[HN28]If a plaintiff is entitled to the full award of liquidated damages, the plaintiff cannot also recover prejudgment interest.

Civil Procedure > Remedies > Damages > General Overview

Governments > Legislation > Statutes of Limitations > Extension & Revival

Governments > Legislation > Statutes of Limitations > Time Limitations

[HN29]Although liquidated damages are not punitive in nature, the Fair Labor Standards Act imposes a separate penalty for a willful violation in the form of an extension of the statute of limitations from two to three years. 29 U.S.C.S. § 255.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN30]The penalty set forth in Or. Rev. Stat. § 652.150 is penal in character.

Civil Procedure > Remedies > Judgment Interest > Pre-judgment Interest

Governments > Legislation > Statutes of Limitations > Extension & Revival

Labor & Employment Law > Wage & Hour Laws > Remedies > Judgment Interest

[HN31]An award of the penalty under Or. Rev. Stat. § 652.150 and an award of liquidated damages under the Fair Labor Standards Act (FLSA) do not constitute a double recovery. Liquidated damages under the FLSA are the equivalent of prejudgment interest under Oregon law, not the equivalent of the penalty under Or. Rev. Stat. § 652.150. Just as a plaintiff may not recover overtime pay under both Oregon law and the FLSA, a plaintiff may not recover both liquidated damages under the FLSA, which are duplicative of prejudgment interest, and prejudgment interest under Oregon law. With respect to the penalty under Or. Rev. Stat. § 652.150 for a willful violation, the equivalent damages under the FLSA are additional wages due to the extended statute of limitations.

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN32]See Or. Rev. Stat. § 82.010.

COUNSEL: [**1] For Jean Mathis, PLAINTIFF: Paul L Breed, Paul L Breed, PC, Portland, OR USA.

For Housing Authority of Umatilla County, DEFENDANT: Karen M Vickers, Bullivant Houser Bailey, Portland, OR USA.

JUDGES: Janice M. Stewart, United States Magistrate Judge.

OPINION BY: Janice M. Stewart

OPINION

OPINION AND ORDER

STEWART, Magistrate Judge:

INTRODUCTION

[*779] Plaintiff, Jean Mathis ("Mathis"), filed this action on October 3, 2001, alleging that her former employer, the Housing Authority of Umatilla County ("the Housing Authority") owes her wages for overtime hours.

Her claims include failure to pay final wages when due in violation of ORS 652.140¹ (First Claim) and failure to pay overtime wages in violation of 29 USC § 207 ("FLSA")² and ORS 653.010, et seq.³ (Second and Third Claims).

1 ORS 652.140 provides in relevant part that: [HN1]"(1) Whenever . . . employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge . . . shall become due and payable not later than the end of the first business day after the . . . termination. . . . (5) This section does not apply to employment for which a collective bargaining agreement otherwise provides for the payment of wages upon termination of employment."

[**2]

2 The FLSA provides that: [HN2]"(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

3 ORS 653.055(1) provides that: [HN3]"Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and (b) For civil penalties provided in ORS 652.150."

This court has original jurisdiction over the federal statutory claim under 28 USC § 1331 and supplemental jurisdiction over the state law claims under 28 USC § 1367. All parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c).

[**3] Plaintiff's Motion for Summary Judgment or Partial Summary Judgment (docket # 9) is now before the court. For the reasons that follow, the motion is granted to the extent that: (1) Mathis was an employee within the meaning of the FLSA and ORS Chapter 653; (2) she is entitled to overtime pay as provided in the collective bargaining agreement; and (3) she may recover one penalty under ORS 652.150 and liquidated damages under the FLSA, but prejudgment interest must be offset from the liquidated damages and, if the violation is willful, recovery is limited to the greater of the penalty under ORS 652.150 or 29 USC § 260. Otherwise, the motion is denied.

LEGAL STANDARDS

FRCP 56(c) [HN4] authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. [HN5] The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party does so, the non-moving party [*780] must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id.* at 324. [**4] [HN6] The court must "not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." Balint v. Carson City, 180 F3d 1047, 1054 (9th Cir 1999) (citation omitted). A "'scintilla of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,'" does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 865 F2d 1539, 1542 (9th Cir), cert denied, 493 U.S. 809, 107 L. Ed. 2d 20, 110 S. Ct. 51 (1989) (emphasis in original) (citation omitted).

[HN7] The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F2d 626, 631-32 (9th Cir 1987). The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *Id.* at 631 (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id.* at 630-31.

FACTS

Because Mathis is the moving party, this court will view the evidence [**5] in the light most favorable to the Housing Authority. A review of the parties' facts, as well as other materials submitted by the parties, including affidavits, declarations, and deposition excerpts, reveal the following facts.

4 Citations to affidavits, declarations, and depositions are identified by the last name of the affiant, declarant, or deponent, and citations are to the paragraph(s) of the affidavit, declaration or page(s) of the deposition transcript. All other citations are to the exhibit number of the parties' submissions.

I. The Housing Authority

During 2000 and 2001, the Housing Authority administered a Section 8 Housing Program ("Section 8"), Public Housing Program, and Rural Development Housing Program. Deposition of Stanley E. Stradley ("Stradley Depo"), pp. 11-12. Section 8 is a program of the

United States Department of Housing and Urban Development ("HUD"). *Id.* at 10-11, 28.

II. Section 8 Coordinator

On January 15, 2001, the Housing Authority posted a [**6] job opening announcement for a Section 8 Coordinator. *Id.* at Ex 1. This announcement, drafted by the Housing Authority's Executive Director, Stanley Stradley ("Stradley"), describes the position as follows:

SECTION 8 COORDINATOR. Housing authority seeks individual to perform complex professional work administering the Housing Assistance Payment Program (Section 8) under the general direction of the executive director. Responsibilities include limited supervision of a small staff. Requirements: thorough knowledge of HUD policy concerning Section 8 of the U.S. Housing Act of 1937, as amended; thorough knowledge of new "choice" voucher policies; Welfare-to-Work voucher policies; the management policies and procedures of the authority concerning Section 8; and the ability to establish and maintain effective working relationships with subordinates, other officials, clients, and the general public. Any combination of education and experience equivalent to graduation from a college or university of recognized standing, supplemented by considerable experience in the work of a housing or redevelopment authority in a position involving eligibility or program development, or considerable [**7] experience in the real estate field; some experience counseling and/or working with low- and [*781] moderate-income families. The ability to communicate both orally and in writing in Spanish is a plus. Mail resumes before 3:00 p.m. on February 20, 2001, to: Stan Stradley, Executive Director, The Housing Authority of the County of Umatilla, P.O. Box 107, Hermiston, Oregon 97838-0107. Women and Minorities encouraged to apply. Equal Opportunity Employer.

Id.

The prior Section 8 Coordinator was an employee, not an independent contractor. *Id.* at 19-20, 26. When Mathis applied for this position, Stradley offered to hire her as an employee, but she chose to be an independent

contractor at \$ 14.50 per hour. ⁵ *Id* at 18, 20-21; Mathis Aff, P5. Mathis had previously worked as an independent contractor for the Housing Authority and other housing authorities. Mathis Depo, p. 25; Stadley Depo, p. 29.

5 As discussed below, the parties disagree as to whether Mathis chose to be an independent contractor.

[**8] III. Mathis as Section 8 Coordinator

Mathis' overall objective as the Section 8 Coordinator was to oversee the transition of the program from another agency, "set up the procedures, train staff, and get it fully operational." Stadley Depo, p. 21. There was no understanding regarding how long she would serve in the position. *Id*. Both assumed that either party could terminate the relationship at any time. *Id* at 22; Mathis Aff, P6.

Of the four Housing Authority staff in the Section 8 program working with Mathis, three were employees and one was an independent contractor. Stadley Depo, pp. 23-24. Stadley never discussed with Mathis the degree of supervision he had over her as Section 8 Coordinator. *Id* at 27. Mathis was not expected to adhere to any particular schedule, and Stadley did not provide her with any direction or interfere with her work. *Id* at 30; Stadley Aff, P4. However, Stadley did expect Mathis to administer the program in a way that complied with the federal guidelines on Section 8 policies. Stadley Depo, pp. 28-29. Mathis could have hired her own employees and was aware that there was no withholding from her paycheck. *Id* at 29-30; Mathis [**9] Depo, p. 36.

The Housing Authority provided Mathis with an office and purchased her supplies and equipment with which she worked. Stadley Depo, p. 30. Mathis was authorized to send letters relating to the operation of the Section 8 program on Housing Authority letterhead. *Id*. It made no difference to Stadley whether Mathis identified herself as an employee or independent contractor in her correspondence. *Id* at 31.

From February 23 through August 15, 2001, Mathis submitted "billing statements" almost weekly, showing her daily number of hours, which the Housing Authority promptly paid. Stadley Aff, Ex A. The billing statements use an address different from that of the Housing Authority. *Id*. Most work-weeks exceeded 49 hours and included some holidays. *Id*. On June 22, 2001, Mathis advised Stadley that she was "terminating [her] services . . . effective July 25, 2001." *Id* at 46. The individual who replaced Mathis as the Section 8 Coordinator was hired as an employee. Stadley Depo, p. 27.

IV. Collective Bargaining Agreement

From July 1, 1998, through July 1, 2001, the Housing Authority was a signatory to a collective bargaining agreement ("CBA") [**10] with Teamsters Union Local No. 670. Mathis Aff, Ex 3. The CBA's Union Recognition clause, Article 2, establishes the union as the "exclusive bargaining representative [*782] for the office and maintenance employees of [the Housing Authority]." *Id* at 4. Also, Article 5, Section 2, of the CBA provides that, "all work performed on or after the forty-ninth (49th) compensated hour in the work week, or on a Sunday, shall be paid at the rate of two times (2x) the employee's basic hourly rate of pay." *Id* at 6.

DISCUSSION

I. Employee or Independent Contractor

Mathis first moves for summary judgment on all of her claims or, alternatively, for partial summary judgment on the issue of liability because Mathis is an employee. The Housing Authority responds that it cannot be held liable because Mathis was an independent contractor.

A. Legal Standards

Congress enacted the FLSA to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers . . ." 29 USC § 202(a). The Supreme Court has observed that [HN8]"the FLSA was designed to give specific [**11] minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive [a] fair day's pay for a fair day's work and should be protected from the evil of overwork as well as underpay." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981) (internal quotations and citation omitted) (emphasis in original).

[HN9]The FLSA defines an "employee" as "any individual employed by an employer." 29 USC § 203(e)(1). This is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363, n3, 89 L. Ed. 301, 65 S. Ct. 295 (1945), (internal quotations and citation omitted). Meanwhile, "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." 29 USC § 203(d). [HN10]The FLSA "defines the verb 'employ' expansively to mean 'suffer or permit to work.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992), quoting 29 USC §§ 203(e) [**12] , (g). "The words 'suffer' and 'permit' as used in the statute mean with the knowledge of the employer." *Forrester v. Roth's IGA Foodliner, Inc.*, 646 F2d 413, 414 (9th Cir 1981) (internal quotations and citation

omitted). The Supreme Court has emphasized that the "striking breadth" of this latter definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. Co., 503 U.S. at 326.

[HN11]The FLSA is to be construed expansively in favor of coverage, recognizing that broad coverage is essential to accomplish the goals of this remedial legislation. Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 296-97, 85 L. Ed. 2d 278, 105 S. Ct. 1953 (1985); Hale v. State of Arizona, 967 F2d 1356, 1362 (9th Cir 1992). Importantly, "neither the common law concepts of 'employee' and 'independent contractor' nor contractual provisions purporting to describe the relationship are determinative of employment status." Nash v. Resources, Inc., 982 F Supp 1427, 1433 (D Or 1997), citing Real v. Driscoll, 603 F2d 748, 754-55 (9th Cir 1979). [**13] Accordingly, to determine employment status for the remedial purposes of the FLSA, the "economic realities test" is the applicable standard. Real, 603 F2d at 754. [HN12]Consisting of a nonexhaustive list, ⁶

[*783] courts have identified a number of factors which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA. Some of those factors are:

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship; and
- 6) whether the service rendered is an integral part of the alleged employer's business.

The presence of any individual factor is not dispositive of whether an employee/employer relationship exists. Such

a determination depends "upon the circumstances of the whole activity."

Id at 754-55 (footnote omitted), [**14] quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947).

6 [HN13]This district has applied a four factor test, which includes "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." Nash, 982 F Supp at 1433, citing Hale, 967 F2d at 1364. At oral argument, both parties agreed that this court should blend the four and six part tests and consider every relevant factor.

[HN14]This district applies the same FLSA analysis under state law claims when determining whether an employment or independent contractor relationship exists. Nash, 982 F Supp at 1437.

B. Analysis

1. Control

[HN15]The "right to control" does not require continuous monitoring of employees. Instead, control may be restricted, or exercised only occasionally, [**15] without removing the employment relationship from the protections of the FLSA, since such limitations on control "do[] not diminish the significance of its existence." Donovan v. Janitorial Servs., Inc., 672 F2d 528, 531 (5th Cir 1982). "Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity." Usery v. Pilgrim Equip. Co., Inc., 527 F2d 1308, 1312-13 (5th Cir), *cert denied*, 429 U.S. 826, 50 L. Ed. 2d 89, 97 S. Ct. 82 (1976).

As evidence of the Housing Authority's right to control her work, Mathis points to the facts that she had a key to and worked at the Housing Authority's office, used its letterhead, and understood the relationship to be terminable at-will. Moreover, the job announcement specifies that the Coordinator works "under the general direction of the executive director." Stradley Depo, Ex 1. The job description that Stradley provided to Mathis also states that "the Authority reserves the right to change, reassign, or combine job duties at any time and to assign the [Section 8 Coordinator] position additional tasks [**16] from time to time." Mathis Aff, P7.

The Housing Authority argues that other factors, such as her power to hire and fire, supervise and control

employee work schedules or conditions, her rate and method of payment, and the employment records all point to an independent contractor relationship. Mathis, indeed, did not keep time cards and was not expected to adhere to any particular schedule or [*784] work a certain set number of hours. The Housing Authority did not track her hours, but accepted her periodic billing statements. Moreover, the degree of control the Housing Authority had over her work was dictated primarily by the federal government's Section 8 regulations.

However, these factors are not sufficient to show that the Housing Authority exerted such little control that Mathis stood as a separate economic entity. Although Mathis may have believed she was an independent contractor and billed the Housing Authority accordingly, she was dependent on the Housing Authority for her sole source of income, worked at the Housing Authority's office, and was subject to the Executive Director's direction. Thus, the degree of control tips toward an employee relationship.

2. Opportunity for [**17] Profit or Loss

Because she was paid at a fixed hourly rate, Mathis had no opportunity for profit or loss other than by charging the Housing Authority for the number of hours she worked. She made no capital investment in her business and did not control the volume of the business, set prices, advertise, or engage in other activities generally associated with an independent business. *See, e.g., Baker v. Flint Eng'g & Constr. Co.*, 137 F3d 1436, 1441 (10th Cir 1998) (holding that workers paid at fixed hourly rate had no opportunity for profit or exposure to loss). Accordingly, this factor weighs in favor of finding an employee relationship.

3. Investment

Mathis made no investment in either equipment or materials required for her work. Mathis Aff, PP9, 11. This factor likewise favors an employee relationship.

4. Special Skill

[HN16]Purely technical skills are not viewed in isolation. Instead, courts look to see how an employee's skills are utilized:

[HN17]The fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant initiative in locating work opportunities [**18] have been held to be employees under the FLSA. *See, e.g., Robicheaux v. Radcliff Material, Inc.*, 697 F2d 662, 666-67 (5th Cir 1983) (welders); *Walling v. Twyeffort, Inc.*, 158 F2d 944 (2nd Cir), *cert denied*,

331 U.S. 851, 91 L. Ed. 1859, 67 S. Ct. 1727 (1947) (tailors); *Dunlop v. Imperial Tool and Manufacturing, Inc.*, 1975 U.S. Dist. LEXIS 15846, 77 Lab Cas P33,304 (ND Tex1975) [available on WESTLAW, 1975 WL 1173] (tool and die maker); *cf. Donovan v. DialAmerica Marketing, Inc.*, 757 F2d 1376, 1387 (where distributors in home research business exercised "business-like initiative," in recruiting new home researchers, skill factor weighed in favor of independent contractor status). The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way. Rather, they depended entirely on referrals to find job assignments, and Superior Care in turn controlled the terms and conditions of the employment relationship. As a matter of economic reality, the nurses' training does not weigh significantly in favor of independent [**19] contractor status.

Brock v. Superior Care, Inc., 840 F2d 1054, 1060 (2nd Cir 1988).

Mathis did not use her skills in any independent way. Instead, her work and client contacts took place at the Housing Authority during its normal business hours. Thus, this factor weighs towards a finding of an employee relationship.

[*785] 5. Permanence

The Section 8 Coordinator position was for an indefinite duration and either party could terminate the relationship at any time. These facts favor an employee relationship.

6. Service Rendered

[HN18]"Agents [who] do the same work as those explicitly hired employees . . . are an essential part of the [business'] operation." *Donovan v. Sureway Cleaners*, 656 F2d 1368, 1372 (9th Cir 1981) (citation omitted). Mathis administered one of three programs at the Housing Authority and was an integral part of the Housing Authority's business. Her daily activities required her to work with housing inspectors and other Housing Authority employees. The Housing Authority had one other independent contractor, but that position was part-time and for a limited purpose. The others were recognized as employees, including [**20] Mathis' predecessor and successor. Thus, the services that Mathis rendered point towards those of an employee.

7. Mathis' Intent

The Housing Authority and Mathis dispute whether Mathis requested to be hired as an independent contractor instead of an employee. According to Stradley, due to "some personal problems," it was Mathis' choice "to stay as an independent contractor" until "a later period in time . . . if she so desired to take that position." Stradley Depo, pp. 20-21. Meanwhile, Mathis counters that "there was no discussion regarding how long [she] would be employed." Mathis Aff, P5. Instead, she sent billing statements to the Housing Authority for her hours "because [she] was told that that's what they were going to do." Mathis Depo, p. 36. Mathis does, however, admit that she "worked for the Housing Authority in the capacity of an independent contractor" and "was aware of the union contract and the double-time pay provision at the time [she] worked for the Housing Authority." Mathis Aff, PP5, 16.

When viewing the facts in favor of the Housing Authority, as this court must do at this juncture, Mathis explicitly communicated her objective desire to work as [**21] an independent contractor. Although Stradley anticipated hiring Mathis as an employee, he accommodated her request to be hired as an independent contractor. This court finds it troubling that despite her own request to work as an independent contractor, Mathis now seeks to pursue a claim under the FLSA.⁷

7 In response to this court's request for additional briefing on this issue, the Housing Authority was unable to locate any case discussing whether a plaintiff can successfully sue under the FLSA when her stated desire was to be hired as an independent contractor.

However, [HN19]it is well-settled that subjective intent "cannot override the economic realities . . ." *Real*, 603 F2d at 755, citing *Usery*, 527 at 1315 (holding that "broader economic realities are determinative"); *Brennan v. Partida*, 492 F2d 707, 709 (5th Cir 1974) (holding that it does not "matter that the parties had no intention of creating an employment relationship, for application of the FLSA does not turn [**22] on subjective intent"). In addition, case law from this and other jurisdictions agree that contractual intention is not a dispositive consideration in an FLSA analysis. See, e.g., *Baker*, 137 F3d at 1440 (finding that rig welders were employees of general contractor even though parties signed an agreement stating an intent to maintain an independent relationship); *Imars v. Contractors Mfg. Servs., Inc.*, 165 F.3d 27, 1998 WL 598778, *5 (6th Cir 1998) (reasoning that the FLSA does not consider contractual intention in a situation where plaintiff chose to be an independent contractor); *Real*, 603 F2d at 755 (noting that "economic [**786] realities, not contractual labels, determine employment

status for the remedial purposes of the FLSA"); *Brennan*, 492 F2d at 709 (holding that attendants at self-service laundromat were employees under the FLSA, notwithstanding facts that agreement of parties was not made to evade the FLSA and that the parties never intended to enter into an employer-employee relationship). Accordingly, the issue of Mathis' desire to be an independent contractor does not alter the economic reality that she was an employee of [**23] the Housing Authority.

II. Unpaid Overtime

Based on her status as an employee, Mathis next moves for summary judgment on her claim for double-time for hours worked in excess of 49 per week, as provided by the CBA, Article 5, Section 2. The Housing Authority argues that Mathis is not entitled to double-time because: (1) she was not a party to the CBA; (2) she does not bring a breach of contract claim; (3) she did not follow the grievance procedure; and (4) her position is not listed as one to which the CBA applies. For the reasons that follow, this court disagrees.

Article 2 of the CBA "recognizes the Union as [] the exclusive bargaining representative for the office and maintenance employees of . . . [the] Housing Authority, for the purpose of the negotiation of wages, fringe benefits, hours of work, working conditions and job descriptions." Mathis Aff, Ex 3, p. 4. Moreover, Article 3, Section 1, mandates as "a condition of employment that *all* members of the bargaining unit hired on or after . . . [July 1, 1998] shall on the 31st day following the beginning of such employment become and remain members in good standing in the bargaining representative . . . [**24] . . ." *Id* (emphasis added). Thus, if Mathis was an employee, she automatically became a member of the union on her 31st day of employment and is covered by the CBA. Nothing in the record indicates that Mathis, as an employee, should be exempt from membership.

The Housing Authority's arguments that Mathis' position is not listed within the CBA and she never followed its detailed grievance procedure fail. The CBA covers both "office" and "maintenance" employees and specifically includes "Occupancy Coordinator." While Mathis' position is not expressly listed in the CBA, the record does indicate that the position of Section 8 Housing Coordinator is equivalent to an Occupancy Coordinator. Although Mathis did not follow any procedure, including the grievance procedure contained within the CBA, she could not do so because the Housing Authority erroneously classified her as an independent contractor. Had she been properly classified as an employee when hired, she could have complied with the CBA. The Housing Authority cannot hide behind Mathis' failure to comply with the CBA when it deprived her of that opportunity. Accordingly, Mathis is entitled to the benefit of the

CBA, including double-time [**25] for all hours worked in excess of 49 per week.

III. Willful Conduct

Mathis next requests that this court find that the Housing Authority's failure to pay her overtime was willful within the meaning of ORS 653.055 such that it must pay a penalty. [HN20] Pursuant to ORS 653.055, failure to pay overtime mandates payment of a penalty as provided in ORS 652.150. She also requests a finding that the Housing Authority's failure to pay her at the time of her termination was willful within the meaning of ORS 652.150, also entitling her to a penalty.⁸

8 Mathis does not seek summary judgment that the Housing Authority's failure to pay her overtime was a willful violation under the FLSA.

[HN21] [*787] To act willfully under ORS 652.150, the employer had to know what it was doing, intending to do it while acting as a free agent. Kling v. Exxon, 74 Ore. App. 399, 403, 703 P.2d 1021, 1023 (1985). As discussed above, a genuine issue of material fact exists on whether Mathis requested to be an independent contractor. [**26] If the Housing Authority accommodated her desire to be an independent contractor, then the Housing Authority's conduct was not willful. Accordingly, Mathis' motion for summary judgment that the Housing Authority acted willfully under Oregon law is denied.

IV. Liquidated Damages and Penalties

Lastly, based on her status as an employee of the Housing Authority, Mathis seeks summary judgment that she is entitled to recover two penalties plus liquidated damages. In particular, she seeks a penalty under ORS 652.150 for late payment of wages, a penalty under ORS 653.055 for failure to pay overtime wages, and liquidated damages for failure to pay overtime wages under the FLSA. The Housing Authority contends that to avoid a triple recovery, Mathis should recover only liquidated damages under the FLSA because all three penalties arise from one act, namely the failure to pay overtime wages.

This dispute involves two separate issues: (1) whether Mathis may recover two penalties for violating two state statutes; and (2) regardless of how many penalties she may recover under Oregon law, whether she also may recover liquidated damages under the FLSA.

With respect to the first issue, [**27] [HN22] Oregon law provides that "where there are two separate statutory schemes and two separate remedies, each with its own purpose, an employer who violated both laws is liable for the penalties provided in each."

Hurger v. Hyatt Lake Resort, Inc., 170 Ore. App. 320, 323, 13 P.3d 123, 124 (2000), *rev denied*, 331 Ore. 583, 19 P.3d 355 (2001). However, the Housing Authority's failure to pay Mathis overtime wages does not necessarily expose it to liability for failing to pay that overtime to Mathis after her termination.

The two state statutes involved address two separate failures: (1) failing to pay wages owed at termination; and (2) failing to pay overtime. [HN23] A failure to pay wages owed at termination violates ORS 652.140. If the employer willfully fails to pay wages as provided in ORS 652.140, then it is liable for the penalty as provided in ORS 652.150. Similarly, a failure to pay overtime violates ORS 653.261 for which ORS 653.055(1)(b) mandates payment of a penalty as provided in ORS 652.150. The Oregon Court of Appeals has rejected the argument that the payment of inadequate overtime and nonpayment of termination offenses are bundled into a single penalty [**28] provision:

The statutes refer to separate varieties of employer misconduct, each of which is based on a different set of facts. One kind of misconduct -- failure to pay "time and a half" for overtime -- is a violation of Oregon's minimum employment conditions law and can occur during employment. Had plaintiff never terminated her employment with defendant, she still would have a valid claim under ORS 653.261. The second kind of employer misconduct -- failure to pay wages due and owing upon termination -- addresses a different social evil, regulated by a different ORS chapter, which occurs after the employment relationship has ended. Thus, the two penalty provisions at issue remedy two distinct statutory violations that arise out of different factual contexts and accrue at different times.

Cornier v. Tulacz, 176 Ore. App. 245, 249, 30 P.3d 1210, 1212 (2001).

[*788] In Cornier, the court allowed the employee to recover a penalty both for unpaid overtime under ORS 653.055 and for failure to pay vacation wages after the employee's termination under ORS 652.140. However, Cornier acknowledged that if an employee presents "two claims for two penalties based [**29] on the same employer misconduct, one of those claims would probably fail under Hurger" *Id.*, 176 Ore. App. at 250, 30 P.3d at 1212.

In *Hurger*, former employees alleged that their employer did not pay wages until two weeks after the time allowed by ORS 652.140. When the wages were paid, however, they complied with the minimum wage requirements. The court disallowed recovery of both a penalty for violation of the minimum wage statute, ORS 653.055, and a penalty for late payment of wages after termination as required by ORS 652.140, explaining:

[HN24]When, as here, the employee's regular wage rate complies with the statutory minimum requirement, the minimum wage component is automatically subsumed within the wage rate on which the penalty under ORS 652.150 is computed for the violation of ORS 652.140 itself. To impose a separate penalty under ORS 652.150, under these circumstances, would constitute a second penalty based on an amount that has already been included in the penalty that the employee has recovered for the untimeliness of the final payment under ORS 652.140.

Hurger, 170 Ore. App. at 326, 13 P.3d at 126.

Although neither [**30] *Cornier* nor *Hurger* involve the precise situation involved in this case, their analysis limits Mathis to recovery of only one penalty under Oregon law for the same employer misconduct. The Housing Authority committed only one wrongful act, namely not paying Mathis overtime wages. A violation of the overtime statute does not automatically create a second violation of the statute requiring prompt payment of all wages due and owing at termination when an employee quits or is terminated.

Since Mathis may only recover one penalty under Oregon law, the next issue is whether she also can recover liquidated damages under the FLSA. The Housing Authority argues that recovery of both a penalty under Oregon law for failure to pay overtime wages and liquidated damages under the FLSA must be disallowed as a double recovery:

Recovery of penalties under both Oregon law and the FLSA for failure to pay a minimum wage is cumulative. In *Allen v. WTD Indus.*, 2000 U.S. Dist. LEXIS 22382, Case No. 99-249-RE (D Or Oct. 11, 2000), Judge Redden found that the plaintiffs could assert both a FLSA and state claim for overtime violations, but limited recovery to "whatever amount is greater under one statute or the other.

[**31] " 2000 U.S. Dist. LEXIS 22382, *14. Judge Redden reasoned that "this prevents the imposition of multiple penalties on an employer for a single course of conduct." *Id.* The same reasoning should apply here. While Pascoe may allege both an FLSA and a state claim for failure to pay a minimum wage, he may not recover penalties under both. Accordingly, Pascoe should be granted summary judgment against Mentor Graphics for penalties *both* for violating ORS 652.140 and for violating *either* the FLSA minimum wage provision *or* ORS 653.055, with the second penalty limited to whatever amount is greater under the FLSA or ORS 652.150 (the penalty provision for violating ORS 653.055).

Pascoe v. Mentor Graphics Corp., 199 F Supp 2d 1034, 1063 (D Or 2001) (emphasis in original).

Mathis responds that *Allen* and *Pascoe* misconstrue the remedial provisions of the FLSA as established by Ninth Circuit and [*789] Supreme Court precedent. Mathis argues that when properly construed, penalties under Oregon law do not duplicate liquidated damages under the FLSA because they serve different purposes.

[HN25]An employer who violates the FLSA is ordinarily liable both for unpaid wages and an [**32] additional equal amount as liquidated damages. 29 USC § 216(b). However, the court has the discretion to award no liquidated damages or reduced liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 USC § 260.

Before the enactment of 29 USC § 260, [HN26]the Supreme Court stated that the liquidated damages provision in the FLSA "is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 89 L. Ed. 1296, 65 S. Ct. 895 (1945), citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L. Ed. 1682, 62 S. Ct. 1216 (1942). In addition, liquidated damages under the FLSA provide "compensation for delay in payment of sums due under the Act." *Brooklyn*, 324 U.S. at 715. Therefore, if [**33] liquidated damages are awarded under the FLSA, then prejudgment interest must be offset from the liquidated damages to avoid a double recovery.

[HN27]To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. . . . Allowance of interest on minimum wages and liquidated damages recoverable under [the FLSA] tends to produce the undesirable result of allowing interest on interest. . . . Congress by enumerating the sums recoverable in an action under [the FLSA] meant to preclude recovery of interest on minimum wages and liquidated damages.

Id at 715-16 (citations omitted); see also *Holtville Alfalfa Mills, Inc. v. Wyatt*, 230 F2d 398, 401, n2 (9th Cir 1955).

The Tenth Circuit concluded that *Brooklyn Sav. Bank* nonetheless remains binding after the enactment of 29 USC § 260 "at least when the court has no discretion to reduce or eliminate the liquidated damages award." *Doty v. Elias*, 733 F2d 720, 726 (10th Cir 1984). Hence, [HN28]if [**34] a plaintiff is entitled to the full award of liquidated damages, the plaintiff cannot also recover prejudgment interest. See *Ford v. Alfaro*, 785 F2d 835, 842 (9th Cir 1986) (holding that "in the absence of a liquidated damage award, pre-judgment interest is necessary to fully compensate employees for the losses they have suffered").

[HN29]Although liquidated damages are not punitive in nature, the FLSA imposes a separate penalty for a willful violation in the form of an extension of the statute of limitations from two to three years. 29 USC § 255; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988).

In contrast, [HN30]the penalty set forth in ORS 652.150 is "penal in character." In *Nordling v. Johnston*, 205 Ore. 315, 326, 283 P.2d 994, 999 (1955), the Oregon Court of Appeals, in drawing a distinction between liquidated damages and penalties, rejected the argument that ORS 652.150 was a provision for liquidated damages. Instead, it found that the purpose of ORS 652.150 is "to spur an employer to the payment of wages when they are due. Compensation to the employee is merely incidental. [**35] " *Id.*

[*790] Because penalties under Oregon law are not equivalent to prejudgment interest, as are liquidated damages under the FLSA, Mathis argues that she can recover both the penalty under ORS 652.150 and liqui-

dated damages under the FLSA. Since they do not serve the same purpose, Mathis contends that one is not duplicative of the other.

After carefully reviewing the cases relied upon by Mathis, this court agrees that [HN31]an award of the penalty under ORS 652.150 and an award of liquidated damages under the FLSA do not constitute a double recovery. Liquidated damages under the FLSA are the equivalent of prejudgment interest under Oregon law, ' not the equivalent of the penalty under ORS 652.150. Just as a plaintiff may not recover overtime pay under both Oregon law and the FLSA, a plaintiff may not recover both liquidated damages under the FLSA, which are duplicative of prejudgment interest, and prejudgment interest under Oregon law. With respect to the penalty under ORS 652.150 for a willful violation, the equivalent damages under the FLSA are additional wages due to the extended statute of limitations. Awarding Mathis the penalty under Oregon law and liquidated damages under the FLSA [**36] is no more a double recovery than awarding prejudgment interest and punitive damages.

9 ORS 82.010 provides as follows:

[HN32](1) The rate of interest for the following transactions, if the parties have not otherwise agreed to a rate of interest, is nine percent per annum and is payable on:

(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

(b) Money received to the use of another and retained beyond a reasonable time without the owner's express or implied consent.

(c) Money due or to become due where there is a contract to pay interest and no rate specified.

(2) Except as provided in this subsection, the rate of interest on judgments for the payment of money is nine percent per annum.

This court acknowledges that this conclusion may be at odds with both *Pascoe* and *Allen*. However, in both *Pascoe* and *Allen*, the plaintiffs failed to draw the court's attention to differing purposes of the various forms of damages available under [**37] both Oregon law and the FLSA. Given those differing purposes, the penalty under ORS 652.150 does not duplicate liquidated damages under the FLSA, but does duplicate the penalty under the FLSA for a willful violation.

Accordingly, Mathis' request for summary judgment on the issue of entitlement to both liquidated damages under the FLSA and penalties under Oregon law is granted in part. Although the Housing Authority committed only a single act by not paying Mathis overtime pay, it may be liable for the following damages:

1. Unpaid overtime pay;
2. Unless the Housing Authority shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of the FLSA, liquidated damages under the FLSA;
3. Prejudgment interest under either the FLSA or Oregon law, whichever is greater, less the amount of any liquidated damages awarded under the FLSA;
4. If the Housing Authority's violation was willful, the penalty set forth in ORS 652.150 or 29 USC § 260, whichever is greater.

[*791] CONCLUSION

In short, this court [**38] finds that Mathis was an employee within the context of the FLSA and ORS Chapter 653 and, as an employee, is entitled to the benefit of the CBA. However, genuine issues of material fact exist on whether the Housing Authority's conduct was willful. Lastly, Mathis may recover one penalty under ORS 652.150 and liquidated damages under the FLSA, but prejudgment interest must be offset from the liquidated damages and, if the violation is willful, recovery is limited to the greater of the penalty under ORS 652.150 or 29 USC § 260.

ORDER

For the reasons stated above, Mathis' Motion for Partial Summary Judgment (docket # 9) is GRANTED as follows:

1. Mathis was an employee, not an independent contractor, within the meaning of the FLSA and ORS 653;
2. Mathis is entitled to payment of overtime at the rate of two times her regular rate of pay for all hours worked in excess of 49 during a working week pursuant to the terms of the CBA in effect at the time of her employment; and
3. Mathis may recover one penalty under ORS 652.150 and liquidated damages under the FLSA, but prejudgment interest must be offset from the liquidated damages and, if [**39] the violation is willful, recovery is limited to the greater of the penalty under ORS 652.150 or 29 USC § 260.

Otherwise, the motion is DENIED.

DATED this 19th day of September, 2002.

Janice M. Stewart

United States Magistrate Judge

LEXSEE

NATIONAL LABOR RELATIONS BOARD v. HEARST PUBLICATIONS, INC.

No. 336

SUPREME COURT OF THE UNITED STATES

322 U.S. 111; 64 S. Ct. 851; 88 L. Ed. 1170; 1944 U.S. LEXIS 1201; 8 Lab. Cas. (CCH) P51,179; 14 L.R.R.M. 614

**February 8, 9, 1944, Argued
April 24, 1944, Decided**

PRIOR HISTORY: CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. *

* Together with No. 337, National Labor Relations Board v. Stockholders Publishing Co., Inc., No. 338, National Labor Relations Board v. Hearst Publications, Inc., and No. 339, National Labor Relations Board v. Times-Mirror Co., also on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

CERTIORARI, 320 U.S. 728, to review decrees denying enforcement of orders of the National Labor Relations Board (39 N. L. R. B. 1245, 1256) and setting aside the orders.

DISPOSITION: 136 F.2d 608, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner National Labor Relations Board (NLRB) sought review of a decision of the United States Circuit Court of Appeals for the Ninth Circuit, which denied enforcement of the NLRB's orders that found respondent publishers had violated the National Labor Relations Act, 29 U.S.C.S. § 158(1) and (5). The publishers were ordered to cease and desist from such violations and to bargain collectively with the union upon request.

OVERVIEW: Four petitions were filed with the NLRB for investigation and certification by a local union. The NLRB made findings of fact that the regular, full-time newsboys selling each paper were employees within the National Labor Relations Act, 29 U.S.C.S. § 152, and that questions affecting commerce concerning the effective representation of employees had arisen. The NLRB had designated appropriate units and ordered elections

and, after the union was selected, the publishers refused to bargain with it. After finding the publishers to have violated 29 U.S.C.S. § 158(1) and (5), the NLRB ordered them to cease and desist from such violations and to collectively bargain with the union upon request. The appellate court refused to enforce the NLRB's orders when it decided that the newsboys were not employees within the meaning of the Act. Certiorari was granted, and the United States Supreme Court reversed the appellate court's decision, holding that the NLRB's findings were not erroneous. The Court found that the newsboys were the publishers' employees within the meaning of the Act, and the publishers were required to collectively bargain with them.

OUTCOME: The United States Supreme Court reversed the decision refusing to enforce the NLRB's orders that the publishers cease and desist from engaging in unfair labor practices.

CORE TERMS: newsboy, publisher's, manager, spot, collective bargaining, selling, times, common-law, checkmen, edition, independent contractor, full-time, industrial, circulation, variations, self-organization, labor dispute, appropriate units, bargain, per week, regularly, suburban, vendors, temporary, designated, street, bargaining units, advertising, part-time, corners

LexisNexis(R) Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement
[HN1]See 29 U.S.C.S. § 152.

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement

***Torts > Vicarious Liability > Independent Contractors
> General Overview***

[HN2]It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist.

***Governments > Legislation > Interpretation
Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement
Labor & Employment Law > Employment Relations
> At-Will Employment > Employees***

[HN3]The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. It is an Act, therefore, in reference to which it is not only proper but necessary for the Supreme Court to assume, in the absence of a plain indication to the contrary, that Congress is not making the application of the federal act dependent on state law. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, the federal law must prevail no matter what name is given to the interest or right by state law.

Governments > Legislation > Interpretation

[HN4]The word employee is not treated by Congress as a word of art having a definite meaning. Rather it takes color from its surroundings in the statute where it appears and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained.

***Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement
Labor & Employment Law > Collective Bargaining &
Labor Relations > Strikes & Work Stoppages
Labor & Employment Law > Employment Relations
> Independent Contractors***

[HN5]Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically "independent contractors" and their employers as from disputes between persons who, for those purposes, are "employees" and their employers. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as helpless in dealing with an employer, as dependent on his daily wage and as unable to leave the employ and to resist arbitrary and unfair treatment as the latter. For each, union may be essential to give opportunity to deal on equality with their employer. And for each, collective bargaining may be appropriate and effective for the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.

***Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement
Labor & Employment Law > Collective Bargaining &
Labor Relations > Strikes & Work Stoppages***

[HN6]When the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

***Governments > Legislation > Interpretation
Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement***

[HN7]The broad language of the National Labor Relations Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

***Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement***

[HN8]Control of physical conduct in the performance of the service is the traditional test of the "employee relationship" at common law.

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement

[HN9]Technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants have been rejected in various applications of the National Labor Relations Act both in the Supreme Court and in other federal courts.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Judicial Review of Awards > General Overview

[HN10]Determination of where all the conditions of the relation require protection involves inquiries for the National Labor Relations Board charged with this duty. Everyday experience in the administration of the National Labor Relations Act gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, belongs to the usual administrative routine of the Board.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Judicial Review of Awards > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

[HN11]In reviewing the National Labor Relations Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement

[HN12]The National Labor Relations Board's choice of a unit is limited specifically only by the requirement that it be an employer unit, craft unit, plant unit, or subdivision thereof and that the selection be made so as to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the National Labor Relations Act. The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of factors in case-to-case determination of the appropriate unit.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

NATIONAL LABOR RELATIONS ACT, §1

who are "employees" -- test. --

Headnote:[1]

The term "employees" as used in the National Labor Relations Act providing for collective bargaining between employers and employees without explicitly defining the term, is not to be determined by common-law standards, but in the light of the objective of the act to promote industrial peace.

[***LEdHN2]

NATIONAL LABOR RELATIONS ACT, §1

applicability as independent of state law. --

Headnote:[2]

The applicability of the National Labor Relations Act is not dependent on state law as to the existence of the relation of employer and employee.

[***LEdHN3]

NATIONAL LABOR RELATIONS BOARD, §1

determination as to who are employees -- conclusiveness. --

Headnote:[3]

The question whether a relation of employer and employee exists so as to render the National Labor Relations Act applicable is primarily for the National Labor Relations Board, whose determination is to be accepted if it has warrant in the record and a reasonable basis in law.

[***LEdHN4]

ADMINISTRATIVE LAW, §213

NATIONAL LABOR RELATIONS BOARD, §1

findings -- conclusiveness. --

Headnote:[4]

In reviewing the ultimate conclusions of the National Labor Relations Board, it is not the court's function to substitute its own inferences of fact for those of the Board when the latter have support in the record.

[***LEdHN5]

ADMINISTRATIVE LAW, §210

judicial review -- interpretation of statute. --

Headnote:[5]

Questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute; but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited, and the administrative interpretation is to be accepted if it has warrant in the record and a reasonable basis in law.

[***LEdHN6]

NATIONAL LABOR RELATIONS ACT, §1

who are employees within -- newspaper venders. --

Headnote:[6]

Newspaper venders who sell papers full time at fixed spots assigned to them by newspaper publishers during hours to which they are expected to adhere, may permissibly be found by the National Labor Relations Board to be employees of the publishers within the meaning of the term as used in the National Labor Relations Act, where they work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total earnings influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets, and control their supply of papers, and their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents, and much of their sales equipment and advertising material is furnished by the publishers.

[***LEdHN7]

NATIONAL LABOR RELATIONS BOARD, §1

bargaining unit -- appropriateness. --

Headnote:[7]

The designations by the National Labor Relations Board as an appropriate unit for collective bargaining with the publishers of certain newspapers, of all full-time news venders engaged to sell papers on the street to the exclusion of those selling to the general public at places other than established corners and of temporary, casual, and part-time newsboys, and as an appropriate unit for collective bargaining with other newspaper publishers, of newsboys selling at established spots in a city four or more hours per day, five or more days per week, except temporary newsboys, although the designations made may on the one hand fail to embrace all workers who in fact come within the responsible or full-time category, generically stated, and on the other hand may fail to exclude all who in fact come within the schoolboy or more volatile part-time category, where it embraces a large portion of those who would make up a stable bargaining group based on responsible tenure and full-time work, and although suburban newsboys are excluded on the ground that they are not organized, where there is no suggestion that the union deliberately excluded suburban newsboys, or that suburban newsboys had displayed any interest in collective bargaining or self-organization.

SYLLABUS

1. The meaning of the term "employee" in the National Labor Relations Act is to be determined not exclusively by reference to common-law standards, local law, or legal classifications made for other purposes, but with regard also to the history, context and purposes of the Act and to the economic facts of the particular relationship. Pp. 120, 129.

2. The determination of the National Labor Relations Board that, in the circumstances of the case, a person is an "employee" under the National Labor Relations Act, may not be set aside on review if it has warrant in the record and a reasonable basis in law. P. 130.

3. The conclusion of the National Labor Relations Board that "newsboys" distributing respondents' papers on the streets of the city were employees under the National Labor Relations Act is supported by the findings and the evidence and has ample basis in the law. P. 131.

The Board found that the "newsboys" work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers (respondents) who dictate their buying and selling prices, fix their markets and control their supply of papers; that their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or

the publishers' agents; and that a substantial part of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publishers' benefit.

4. The Board's designation of the collective bargaining units in this case -- (1) full-time newsboys and "checkmen," engaged to sell papers within the city, and excluding bootjackers, temporary, casual, and part-time newsboys; and (2) newsboys selling at established spots in the city, four or more hours per day, five or more days per week, except temporary newsboys -- was within its discretion and is sustained. P. 132.

(a) That the Board's selection of the collective bargaining units emphasizes difference in tenure rather than in function was, on the record in this case, not an abuse of discretion. P. 133.

(b) The Board's exclusion of suburban newsboys from the collective bargaining units, on the ground that they were not organized by the union, was, on the record in this case, not an abuse of discretion. P. 133.

COUNSEL: Mr. Alvin J. Rockwell, with whom Solicitor General Fahy, Messrs. Robert L. Stern and Frank Donner, and Miss Ruth Weyand were on the brief, for petitioner.

Mr. John M. Hall, with whom Mr. Oscar Lawler was on the brief; Mr. Lewis B. Binford, with whom Mr. Thomas S. Tobin was on the brief; Mr. Edward L. Compton, with whom Mr. H. S. Mac Kay, Jr., was on the brief; and Mr. T. B. Cosgrove, with whom Mr. John N. Cramer was on the brief, -- for respondents in Nos. 336, 337, 338, and 339, respectively.

Mr. Arthur W. A. Cowan filed a brief on behalf of the International Printing Pressmen & Assistants' Union, as amicus curiae, in support of petitioner.

JUDGES: Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge

OPINION BY: RUTLEDGE

OPINION

[*113] [**852] [***1175] MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

These cases arise from the refusal of respondents, publishers of four Los Angeles daily newspapers, to bargain collectively with a union representing newsboys who distribute their papers on the streets of that city. Respondents' contention that they were not required to bargain because the newsboys are not their "employees" within the meaning of that term in the National Labor

Relations Act, 49 Stat. 450, 29 U. S. C. § 152,¹ presents the important question which we granted certiorari² to resolve.

1 Section 2 (3) of the Act provides that [HN1]"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

2 320 U.S. 728.

[*114] The proceedings before the National Labor Relations Board were begun with the filing of four petitions for investigation and certification³ by Los Angeles Newsboys Local Industrial Union No. 75. Hearings were held in a consolidated proceeding⁴ after which the Board made findings of fact and concluded that the regular full-time newsboys selling each paper were employees within the Act and that questions affecting commerce concerning the representation of employees had arisen. It designated appropriate units and ordered elections. 28 N. L. R. B. 1006.⁵ At these the union was selected [***1176] as their representative by majorities of the eligible newsboys. After the union was appropriately certified, 33 N. L. R. B. 941, 36 N. L. R. B. 285, the respondents refused to bargain with it. Thereupon proceedings under § 10, 49 Stat. 453-455, 29 U. S. C. § 160, were instituted, a hearing⁶ was held and respondents were found to have violated §§ 8 (1) and 8 (5) of the Act, [**853] 49 Stat. 452-453, 29 U. S. C. § 158 (1), (5). They were ordered to cease and desist from such violations and to bargain collectively with the union upon request. 39 N. L. R. B. 1245, 1256.

3 Pursuant to § 9 (b) and (c) of the Act; 49 Stat. 453, 29 U. S. C. § 159 (b) and (c).

4 Although it treated the four representation petitions in one consolidated proceeding and disposed of them in one opinion, the Board did not consider evidence with respect to one publisher as applicable to any of the others.

5 Subsequently those orders were amended in various details. 29 N. L. R. B. 94, 95; 30 N. L. R. B. 696, 697; 31 N. L. R. B. 697.

6 The record in the representation proceeding was in effect incorporated in the complaint proceeding.

Upon respondents' petitions for review and the Board's petitions for enforcement, the Circuit Court of Appeals, one judge dissenting, set aside the Board's orders. Rejecting [*115] the Board's analysis, the court independently examined the question whether the newsboys are employees within the Act, decided that the statute imports common-law standards to determine that question, and held the newsboys are not employees. 136 F.2d 608.

The findings of the Board disclose that the Los Angeles Times and the Los Angeles Examiner, published daily and Sunday,⁷ are morning papers. Each publishes several editions which are distributed on the streets during the evening before their dateline, between about 6:00 or 6:30 p. m. and 1:00 a. m., and other editions distributed during the following morning until about 10:00 o'clock. The Los Angeles Evening Herald and Express, published every day but Sunday, is an evening paper, which has six editions on the presses between 9:00 a. m. and 5:30 p. m.⁸ The News, also published every day but Sunday, is a twenty-four hour paper with ten editions.⁹

7 The Times' daily circulation is about 220,000 and its Sunday circulation is about 368,000. The Examiner's daily circulation is about 214,000 and its Sunday circulation is about 566,000.

8 The Herald has a circulation of about 243,000. Both it and the Examiner are owned by Hearst Publications, Inc.

9 The News has a circulation of about 195,000. Its first three and seventh editions are consigned for the most part to route delivery or suburban dealers. Its fourth edition, which goes to press at 2:45 a. m., is sold in the city during the mornings. The remaining editions, which go to press at regular intervals between 9:50 a. m. and 5:00 p. m., are sold in the city during the afternoons.

The papers are distributed to the ultimate consumer through a variety of channels, including independent dealers and newsstands often attached to drug, grocery or confectionery stores, carriers who make home deliveries, and newsboys who sell on the streets of the city and its suburbs. Only the last of these are involved in this case.

The newsboys work under varying terms and conditions. They may be "bootjackers," selling to the general public at places other than established corners, or they may sell [*116] at fixed "spots." They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily. The units which the Board determined to be appropriate are composed of those who sell full-time at established spots. Those vendors, misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families.

Working thus as news vendors on a regular basis, often for a number of years, they form a stable group with relatively little turnover, in contrast to schoolboys and others who sell as bootjackers, temporary and casual distributors.

Over-all circulation and distribution of the papers are under the general supervision of circulation managers. But for purposes of street [***1177] distribution each paper has divided metropolitan Los Angeles into geographic districts. Each district is under the direct and close supervision of a district manager. His function in the mechanics of distribution is to supply the newsboys in his district with papers which he obtains from the publisher and to turn over to the publisher the receipts which he collects from their sales, either directly or with the assistance of "checkmen" or "main spot" boys.¹⁰ The latter, stationed at the important corners or "spots" in the district, are newsboys who, among other things, receive delivery of the papers, redistribute them to other newsboys stationed at less important corners, and collect receipts from their sales.¹¹ For that service, which occupies a minor portion [*117] of their working day, the [**854] checkmen receive a small salary from the publisher.¹² The bulk of their day, however, they spend in hawking papers at their "spots" like other full-time newsboys. A large part of the appropriate units selected by the Board for the News and the Herald are checkmen who, in that capacity, clearly are employees of those papers.

10 The Examiner, the Herald, and the News all employ "main spot" boys or checkmen; the Times does not.

11 The Times district managers deliver the papers directly to the newsboys and collect directly from them. On the other papers district managers may deliver bundles of papers to the checkmen or directly to the newsboys themselves. The Times customarily transports its newsboys to their "spots" from the Times building, where they first report and pick up their papers. The other respondents offer similar transportation to those of their newsboys who desire it.

12 In the case of the Examiner these "main spot" boys, although performing services similar to those of checkmen, are less closely knit to the publisher and sometimes receive no compensation for their services.

The newsboys' compensation consists in the difference between the prices at which they sell the papers and the prices they pay for them. The former are fixed by the publishers and the latter are fixed either by the publishers or, in the case of the News, by the district manager.¹³ In practice the newsboys receive their papers on credit.

They pay for those sold either sometime during or after the close of their selling day, returning for credit all unsold papers. ¹⁴ Lost or otherwise unreturned papers, however, must be paid for as though sold. Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.

13 See *infra*, note 15.

14 Newsboys selling the Herald in one residential area do not receive credit for *all* unsold papers.

In addition to effectively fixing the compensation, respondents in a variety of ways prescribe, if not the [*118] minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the supervisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys. ¹⁵ The district [***1178] managers assign "spots" or corners to which the newsboys are expected to confine their selling activities. ¹⁶ Transfers from one "spot" to another may be ordered by the district manager for reasons of discipline or efficiency or other cause. Transportation to the spots from the newspaper building is offered by each of respondents. Hours of work on the spots are determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers. Adherence to the prescribed hours is observed closely by the district managers or other supervisory agents of the publishers. Sanctions, varying in severity [*119] from reprimand to dismissal, [**855] are visited on the tardy and the delinquent. By similar supervisory controls minimum standards of diligence and good conduct while at work are sought to be enforced. However wide may be the latitude for individual initiative beyond those standards, district managers' instructions in what the publishers apparently regard as helpful sales technique are expected to be followed. Such varied items as the manner of displaying the paper, of emphasizing current features and headlines, and of placing advertising placards, or the advantages of soliciting customers at specific stores or in the traffic lanes are among the subjects of this instruction. Moreover, newsboys are furnished with sales equipment, such as racks, boxes and change aprons, and advertising placards by the publishers. In this pattern

of employment the Board found that the newsboys are an integral part of the publishers' distribution system and circulation organization. And the record discloses that the newsboys and checkmen feel they are employees of the papers; and respondents' supervisory employees, if not respondents themselves, regard them as such.

15 Admittedly the Times, Examiner, and Herald district managers are employees of their respective papers. While the News urged earnestly that its managers are not its employees, the Board found otherwise. They do not operate on a formal salary basis but they receive guaranteed minimum payments which the Board found are "no more than a fixed salary bearing another label." And while they, rather than the publisher, fix the price of the paper to the newsboy, the Board found, on substantial evidence, that they function for the News in specified districts, distribute racks, aprons, advertising placards from the News to the newsboys, give instructions as to their use, supervise the redistributing activities of the checkmen (themselves clearly employees of the News), and hand out News checks to the checkmen for their services. On this and other evidence suggesting that however different may be their formal arrangements, News district managers bear substantially the same relation to the publisher on one hand and the newsboys on the other as do the other district managers, the Board concluded that they were employees of the paper.

16 Although from time to time these "spots" are bought and sold among the vendors themselves, without objection by district managers and publishers, this in no way negates the need for the district managers' implicit approval of a spot-holder or their authority to remove vendors from their "spots" for reasons of discipline or efficiency.

In addition to questioning the sufficiency of the evidence to sustain these findings, respondents point to a number of other attributes characterizing their relationship with the newsboys ¹⁷ and urge that on the entire [*120] record the latter cannot be considered their employees. They base this conclusion on the argument that by common-law standards the extent of their control and direction of the newsboys' working activities creates no more than an "independent contractor" relationship and that common-law standards determine the "employee" relationship under the [***1179] Act. They further urge that the Board's selection of a collective bargaining unit is neither appropriate nor supported by substantial evidence. ¹⁸

17 E. g., that there is either no evidence in the record to show, or the record explicitly negatives, that respondents carry the newsboys on their payrolls, pay "salaries" to them, keep records of their sales or locations, or register them as "employees" with the Social Security Board, or that the newsboys are covered by workmen's compensation insurance or the California Compensation Act. Furthermore, it is urged the record shows that the newsboys all sell newspapers, periodicals and other items not furnished to them by their respective publishers, assume the risk for papers lost, stolen or destroyed, purchase and sell their "spots," hire assistants and relief men and make arrangements among themselves for the sale of competing or leftover papers.

18 They have abandoned here the contention, made in the circuit court, that the Act does not reach their controversies with the newsboys because they do not affect commerce.

I.

[**LEdHR1] [1]The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing.¹⁹ But this formula has been by no means [*121] exclusively controlling in the solution of other problems. And its simplicity has been illusory [**856] because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.²⁰ This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

19 The so-called "control test" with which common-law judges have wrestled to secure precise and ready applications did not escape the difficulties encountered in borderland cases by its reformulation in the Restatement of the Law of Agency § 220. That even at the common law the control test and the complex of incidents evolved in applying it to distinguish an "employee" from an "independent contractor," for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts, compare *Lumley v. Gye* [1853] El. & Bl. 216, and see also the cases collected in 21 A. L. R. 1229 *et seq.*; 23 A. L. R. 984 *et seq.*

20 See, e. g., Stevens, *The Test of the Employment Relation* (1939) 38 Mich. L. Rev. 188; Steffen, *Independent Contractor and the Good Life* (1935) 2 U. of Chi. L. Rev. 501; Leidy, *Salesmen as Independent Contractors* (1938) 28 Mich. L. Rev. 365; N. Y. Law Revision Commission Report, 1939 (1939) Legislative Document No. 65 (K).

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment,²¹ more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes.²² [*122] [HN2]It is enough to point out that, with reference to an identical [***1180] problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made;²³ and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, e. g., *Globe Grain & Milling Co. v. Industrial Comm'n*, 98 Utah 36, 91 P. 2d 512. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist.

21 See note 20 *supra*.

22 Compare, e. g., *McKinley v. Payne Lumber Co.*, 200 Ark. 1114, 143 S. W. 2d 38; *Industrial Comm'n v. Northwestern Ins. Co.*, 103 Colo. 550, 88 P. 2d 560; *Schomp v. Fuller Brush Co.*, 124 N. J. L. 487, 12 A. 2d 702; 126 N. J. L. 368, 19 A. 2d 780; *Unemployment Compensation Comm'n v. Jefferson Ins. Co.*, 215 N. C. 479, 2 S. E. 2d 584; *Singer Sewing Machine Co. v. Unemployment Compensation Comm'n*, 167 Ore. 142, 103 P. 2d 708, with *McCain v. Crossett Lumber Co.*, 174 S.

W. 2d 114 (Ark.); Hill Hotel Co. v. Kinney, 138 Neb. 760, 295 N. W. 397; Washington Recorder Co. v. Ernst, 199 Wash. 176, 91 P. 2d 718; Wisconsin Bridge Co. v. Industrial Comm'n, 233 Wis. 467, 290 N. W. 199. See generally Wolfe, Determination of Employer-Employee Relationships in Social Legislation (1941) 41 Col. L. Rev. 1015. And see note 23 *infra*.

23 Compare Stockwell v. Morris, 46 Wyo. 1, with Auer v. Sinclair Refining Co., 103 N. J. L. 372; Schomp v. Fuller Brush Co., 124 N. J. L. 487, 126 N. J. L. 368, with Fuller Brush Co. v. Industrial Comm'n, 99 Utah 97; Stover Bedding Co. v. Industrial Comm'n, 99 Utah 423, with Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000.

Mere reference to these possible variations as characterizing the application of the Wagner Act in the treatment of persons identically situated in the facts surrounding their employment and in the influences tending to disrupt it, would be enough to require pause before accepting a thesis which would introduce them into its administration. This would be true, even if the statute itself had indicated less clearly than it does the intent they should not apply.

Two possible consequences could follow. One would be to refer the decision of who are employees to local state law. The alternative would be to make it turn on a sort of pervading general essence distilled from state law. Congress obviously did not intend the former result. It [*123] would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. Persons who might be "employees" in one state would be "independent contractors" in another. They would be [**857] within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

[**LEdHR2] [2]Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. [HN3]The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, there-

fore, in reference to which it is not only proper but necessary for us to assume, "in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law." Jerome v. United States, 318 U.S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to [***1181] be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, "the federal law must prevail no matter what name is given to the interest or [*124] right by state law." Morgan v. Commissioner, 309 U.S. 78, 81; cf. Labor Board v. Blount, 131 F.2d 585 (C. C. A.).

II.

Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. [HN4]The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," United States v. American Trucking Assns., 310 U.S. 534, 545, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259; cf. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552; Drivers' Union v. Lake Valley Co., 311 U.S. 91.

Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute.²⁴ It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate [*125] region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

24 Cf. notes 28-30 *infra* and text.

It will not do, for deciding this question as one of uniform national application, to import wholesale the

traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be [**858] consistent with the statute's broad terms and purposes.

Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective. It rather sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established. Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are "employees" within the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered [***1182] by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives. Congress no more intended to [*126] import this mass of technicality as a controlling "standard" for uniform national application than to refer decision of the question outright to the local law.

The Act, as its first section states, was designed to avert the "substantial obstructions to the free flow of commerce" which result from "strikes and other forms of industrial strife or unrest" by eliminating the causes of that unrest. It is premised on explicit findings that strikes and industrial strife themselves result in large measure from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their "wages, hours or other working conditions" with employers who are "organized in the corporate or other forms of ownership association." Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 49 Stat. 449, 450.

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "em-

ployees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way [*127] or the other, depending upon the weight of this balance and its relation to the special purpose at hand.

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. [HN5] Interruption of commerce through strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically "independent contractors" and their employers as from disputes between persons who, for those purposes, are "employees" and their employers. Cf. *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91. Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent . . . on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the latter. For each, "union . . . [**859] [may be] essential to give . . . opportunity to deal [***1183] on equality with their employer." ²⁵ And for each, collective bargaining may be appropriate and effective for the "friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." ²⁶ 49 Stat. 449. In [*128] short, [HN6] when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

²⁵ *American Steel Foundries Co. v. Tri-City Council*, 257 U.S. 184, 209, cited in H. R. Rep. No. 1147, 74th Cong., 1st Sess. 10; cf. *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769.

26 The practice of self-organization and collective bargaining to resolve labor disputes has for some time been common among such varied types of "independent contractors" as musicians (How Collective Bargaining Works (20th Century Fund, 1942) 848-866; Proceedings of the 47th Annual Convention of the American Federation of Musicians (1942)), actors (see, e. g., Collective Bargaining by Actors (1926) Bureau of Labor Statistics, Bulletin No. 402; Harding, The Revolt of the Actors (1929); Ross, Stars and Strikes (1941)), and writers (see, e. g., Rosten, Hollywood (1941); Ross, Stars and Strikes (1941) 48-63), and such atypical "employees" as insurance agents, artists, architects and engineers (see, e. g., Proceedings of the 2d Convention of the UOPWA, C. I. O. (1938); Proceedings of the 3d Convention of the UOPWA, C. I. O. (1940); Handbook of American Trade Unions (1936), Bureau of Labor Statistics, Bull. No. 618, 291-293; Constitution and By-Laws of the IFTEAD of the A. F. L., 1942).

To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service."²⁷ On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces,"²⁸ and that the very disputes sought to be avoided might involve [*129] "employees [who] are at times brought into an economic relationship with employers who are not their employers."²⁹ In this light, [HN7] the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute,"³⁰ leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. Cf. Labor Board v. Blount, supra.

27 [HN8] Control of "physical conduct in the performance of the service" is the traditional test of the "employee relationship" at common law. Cf., e. g., Restatement of the Law of Agency § 220 (1).

28 Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

29 Sen. Rep. No. 573, 74th Cong., 1st Sess. 6.

30 Cf. Phelps-Dodge Corp. v. Labor Board, 313 U.S. 177; and compare Drivers' Union v. Lake Valley Co., 311 U.S. 91, with Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

Hence [HN9] "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" have been rejected [***1184] in various applications of this Act both here (International Association of Machinists v. Labor Board, 311 U.S. 72, 80-81; H. J. Heinz Co. v. Labor Board, 311 U.S. 514, 520-521)³¹ [**860] and in other federal courts (Labor Board v. Condenser Corp., 128 F.2d 67 (C. C. A.); North Whittier Heights Citrus Assn. v. Labor Board, 109 F.2d 76, 82 (C. C. A.); Labor Board v. Blount, supra). There is no good reason for invoking them to restrict the scope of the term "employee" sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.³² "Where all the conditions of the relation require protection, protection ought to be given."³³

31 Compare Labor Board v. Waterman S. S. Corp., 309 U.S. 206; Phelps-Dodge Corp. v. Labor Board, 313 U.S. 177.

32 Cf. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251; Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (C. C. A.).

33 Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (C. C. A.).

[*130] [***LEdHR3] [3] It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. [HN10] Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.³⁴ Gray v. Powell, 314 U.S. 402, 411. Cf. Labor Board v. Standard Oil Co., 138 F.2d 885, 887-888.

34 E. g., Matter of Metro-Goldwyn-Mayer Studios, 7 N. L. R. B. 662, 686-690; Matter of KMOX Broadcasting Station, 10 N. L. R. B. 479; Matter of Interstate Granite Corp., 11 N. L. R. B. 1046; Matter of Sun Life Ins. Co., 15 N. L. R. B. 817; Matter of Kelly Co., 34 N. L. R. B. 325; Matter of John Yasek, 37 N. L. R. B. 156.

[***LEdHR4] [4] [***LEdHR5] [5] In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence [HN11] in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. Labor Board v. Nevada Copper Corp., 316 U.S. 105; cf. Walker v. Altmeyer, 137 F.2d 531 (C. C. A.). Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for [*131] the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294; United States v. American Trucking Assns., 310 U.S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the [***1185] statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, ³⁵ that a man is not a "member of a crew" (South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251) or that he was injured "in the course of employment" (Parker v. Motor Boat Sales, 314 U.S. 244) and the Federal Communications Commission's determination ³⁶ that one company is under the [*861] "control" of another (Rochester Telephone Corp. v. United States, 307 U.S. 125), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

35 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

36 Under § 2 (b) of the Communications Act of 1934, 48 Stat. 1064, 1065, 47 U. S. C. § 152 (b).

[***LEdHR6] [6] In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent pre-

scribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that "the primary consideration in the determination of the applicability of the statutory definition is whether [*132] effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act," the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion.

III.

[***LEdHR7] [7] The Board's selection of the collective bargaining units also must be upheld. The units chosen for the News and the Herald consist of all full-time ³⁷ newsboys and checkmen engaged to sell the papers in Los Angeles. Bootjackers, temporary, casual and part-time ³⁸ newsboys are excluded. The units designated for the Times and the Examiner consist of newsboys selling at established spots ³⁹ in Los Angeles ⁴⁰ four or more hours per day five or more days per week, except temporary newsboys. ⁴¹

37 Full-time newsboys for the Herald includes those who regularly sell to the public five or more editions five or more days per week. Full-time newsboys for the News includes those who regularly sell to the general public the fifth, sixth, eighth, ninth and tenth, or the sixth, eighth, ninth and tenth editions five or more days per week, or the fourth and earlier editions for at least four hours daily between 4:00 a. m. and 10:00 a. m. five days per week.

38 Part-time newsboys for the Herald means those selling less than five editions daily or for less than five days per week.

39 Established spots are corners at which newsboys sold those papers for at least five or more days per week during at least six consecutive months.

40 Glendale is included in the Times unit.

41 Temporary newsboys are those selling for less than thirty-one consecutive days.

The Board predicated its designations in part upon the finding that the units included, in general, men who were responsible workers, continuously and regularly employed as vendors and dependent upon their sales for their livelihood, [*133] while schoolboys and transient or casual workers were excluded. The discretion which Congress vested in the Board to determine an appropriate unit is hardly overstepped by the [***1186] choice of a unit based on a distinction so clearly consistent with the

need for responsible bargaining. That the Board's selection emphasizes difference in tenure rather than function is, on this record certainly, no abuse of discretion.

Nor is there substance in the objection that the Board's designations on the one hand fail to embrace *all* workers who in fact come within the responsible or stable full-time category generically stated, and on the other hand fail to exclude all who in fact come within the schoolboy or more volatile part-time category. The record does not suggest that the units designated, at least so far as Los Angeles newsboys are concerned, do not substantially effectuate the Board's theory or embrace a large portion of those who would make up a stable bargaining group based on responsible tenure and full-time work. In these matters the Board cannot be held to mathematical precision. If it chooses to couch its orders in terms which for good reasons it regards effective to accomplish its stated ends, peripheral or hypothetical deviations will not defeat an otherwise appropriate order.

Another objection urged by the Times, [**862] the Herald and the Examiner is to the Board's exclusion of suburban newsboys⁴² from the units on the ground they were not organized by the union. The Board found that although all vendors in metropolitan Los Angeles were eligible for membership, the union had not been extended to the suburban groups generally and that no other labor organization was seeking to represent respondents' employees. There is no suggestion either that the union deliberately [*134] excluded suburban newsboys who sought admission or that suburban newsboys have displayed any interest in collective bargaining or self-organization.

42 Except newsboys selling the Times in Glendale.

Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case⁴³ and accordingly gave the Board wide discretion in the matter. [HN12]Its choice of a unit is limited specifically only by the requirement that it be an "employer unit, craft unit, plant unit, or subdivision thereof" and that the selection be made so as "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of the Act." *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146. The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of factors in case-to-case determination of the appropriate unit. ⁴⁴ Among the considerations to which it has given weight is the extent of organization of

the union requesting certification or collective bargaining. This is done on the expressed theory that it is desirable in the determination of an appropriate unit to render collective bargaining of the company's employees an immediate possibility. ⁴⁵ No [*135] plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining. In [***1187] the circumstances disclosed by this record we cannot say the Board's conclusions are lacking in a "rational basis."

43 Hearings before Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 83.

44 E. g., see First Annual Report of the National Labor Relations Board 112-120; Second Annual Report of the National Labor Relations Board 122-140; Third Annual Report of the National Labor Relations Board 156-197; Fourth Annual Report of the National Labor Relations Board 82-97; Fifth Annual Report of the National Labor Relations Board 63-72; Sixth Annual Report of the National Labor Relations Board 63-71.

45 *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133.

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE REED concurs in the result. He is of the opinion that the test of coverage for employees is that announced by the Board in the matter of Stockholders Publishing Company, Inc., and Los Angeles Newsboys Local Industrial Union No. 75, C. I. O., and other similar cases, decided January 9, 1941, 28 N. L. R. B. 1006, 1022-23.

DISSENT BY: ROBERTS

DISSENT

MR. JUSTICE ROBERTS:

I think the judgment of the Circuit Court of Appeals should be affirmed. The opinion of that court reported in 136 F.2d 608, seems to me adequately to state the controlling facts and correctly to deal with the question of law presented for decision. I should not add anything were it not for certain arguments presented here and apparently accepted by the court.

I think it plain that newsboys are not "employees" of the respondents within the meaning and intent of the National Labor Relations Act. When Congress, in § 2 (3), said "The term 'employee' shall include any employee, . . ." it stated as clearly as language could do it

that the provisions of the Act were to extend [**863] to those who, as a result of decades of tradition which had become part of the common understanding of our people, bear the named relationship. Clearly also Congress did not delegate [*136] to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute. The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.

I do not think that the court below suggested that the federal courts sitting in the various states must determine whether a given person is an employee by application of either the local statutes or local state decisions. Quite the contrary. As a result of common law development, many prescriptions of federal statutes take on meaning which is uniformly ascribed to them by the federal courts, irrespective of local variance. *Funk v. United States*, 290 U.S. 371. This court has repeatedly resorted to just such considerations in defining the very term "employee" as used in other federal statutes, as the opinion of the court below shows. There is a general and prevailing rule throughout the Union as to the indicia of employment and the criteria of one's status as employee. Unquestionably it was to this common, general, and prevailing

understanding that Congress referred in the statute and, according to that understanding, the facts stated in the opinion below, and in that of this court, in my judgment, demonstrate that the newsboys were not employees of the newspapers.

It is urged that the Act uses the term in some loose and unusual sense such as justifies the Board's decision because Congress added to the definition of employee above quoted these further words: "and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . ." The suggestion seems to be that Congress intended that the term employee should mean those who were not in fact employees, but it [*137] is perfectly evident, not only from the provisions of the Act as a whole but from the Senate Committee's Report, that this phrase was added to prevent any misconception of the provisions whereby employees were to be allowed freely to combine and to be represented in collective bargaining [***1188] by the representatives of their union. Congress intended to make it clear that employee organizations did not have to be organizations of the employees of any single employer. But that qualifying phrase means no more than this and was never intended to permit the Board to designate as employees those who, in traditional understanding, have no such status.

LEXSEE

**NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL., PETITIONERS v.
ROBERT T. DARDEN**

No. 90-1802

SUPREME COURT OF THE UNITED STATES

**503 U.S. 318; 112 S. Ct. 1344; 117 L. Ed. 2d 581; 1992 U.S. LEXIS 1949; 60 U.S.L.W.
4242; 14 Employee Benefits Cas. (BNA) 2625; 92 Cal. Daily Op. Service 2467; 92
Daily Journal DAR 4075; 6 Fla. L. Weekly Fed. S 86**

**January 21, 1992, Argued
March 24, 1992, Decided**

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 922 F.2d 203, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: By writ of certiorari, petitioner insurance companies sought review of a decision from the United States Court of Appeals for the Fourth Circuit that vacated the district court's grant of summary judgment to petitioners on respondent agent's claim for benefits under the Employee Retirement Income Security Act of 1974 (ERISA) brought pursuant to 29 U.S.C.S. § 1132(a).

OVERVIEW: A decision that vacated a grant of summary judgment to an insurance company in its agent's ERISA action was reversed because the appellate court failed to apply the common-law definition of an employee. Respondent's contract provided that he would be entitled to receive retirement benefits if he refrained from selling insurance for competing companies after termination. When respondent became an independent insurance agent, he brought suit under the Employee Retirement Income Security Act of 1974 (ERISA) pursuant to 29 U.S.C.S. § 1132(a), claiming that the benefits were vested. The district court granted summary judgment to petitioners. The appellate court vacated because respondent had a reasonable expectation of receiving retirement benefits. On appeal, the Court reversed because the proper test of employee status under 29 U.S.C.S. § 1002(6) was the master-servant relationship as defined by common-law agency doctrine. Because

Congress had not specified any other test, it should have been presumed that the traditional definition was intended. The Court remanded for a determination of whether respondent could be considered an employee under agency law.

OUTCOME: The Court reversed because the traditional master-servant relationship as understood by common-law agency doctrine was the test that should have been applied. The Court remanded for a determination of whether respondent qualified as an employee under the common law definition.

CORE TERMS: common-law, retirement, qualify, independent contractor, claimant's, hiring, hired, common law, master-servant, competitors, construing, construe, termination, Copyright Act, Social Security Act, benefit plan, reasonable expectation, disqualified, entitlement, forfeiture, helpfully, pension, amicus, Employee Retirement Income Security Act, insurance policies, insurance agent, business activities, employee benefit plan, summary judgment, power to contract

LexisNexis(R) Headnotes

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > General Overview

[HN1]29 U.S.C.S. § 1132(a) enables a benefit plan "participant" to enforce the substantive provisions of the Employee Retirement Income Security Act of 1974 (ERISA). A "participant" is defined as any employee or former employee of an employer who is or may become eligible to receive a benefit of any type from an employee benefit plan. 29 U.S.C.S. § 1002(7).

Business & Corporate Law > Agency Relationships > Agents Distinguished > Independent Contractors, Masters & Servants > Masters & Servants Governments > Legislation > Interpretation

[HN2]Where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. When Congress uses the term "employee" without defining it, courts have concluded that Congress intends to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Business & Corporate Law > Agency Relationships > Agents Distinguished > General Overview Labor & Employment Law > Employment Relationships > At-Will Employment > Employees Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > General Overview

[HN3]The United States Supreme Court adopts a common-law test for determining who qualifies as an "employee" as defined under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1002(6). In determining whether a hired party is an employee under the general common law of agency, the Court considers the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

DECISION:

ERISA provision (29 USCS 1002(6)) defining "employee" as "any individual employed by an employer," held to incorporate traditional agency-law criteria for identifying master-servant relationships.

SUMMARY:

Under 29 USCS 1132(a), a participant in an employee benefit plan is allowed to bring an action to enforce the substantive provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS

1001 et seq.). A "participant" is defined in 29 USCS 1002(7) as any employee or former employee who is or may become eligible to receive a benefit from an employee benefit plan," and an "employee" is defined in 3(6) of ERISA (29 USCS 1002(6)) as "any individual employed by an employer." Contracts between an insurer and an insurance agent provided that (1) the agent, who operated an insurance agency, would sell only the insurer's policies, (2) the insurer would enroll the agent in the insurer's retirement plan for agents, and (3) the agent would forfeit his entitlement to plan benefits if, within a year of termination of the parties' contractual relationship, and within 25 miles of the agent's prior business location, he sold insurance for the insurer's competitors. One month after the contractual relationship was terminated, the agent began to sell insurance for the insurer's competitors. After the insurer contended that the agent's new business activities disqualified him from receiving plan benefits, the agent sued for the benefits under 1132(a) and claimed that the benefits were nonforfeitable because they had already vested under the terms of ERISA. Applying common-law agency principles, the United States District Court for the Eastern District of North Carolina granted summary judgment to the insurer on the ground that the agent had been an independent contractor rather than an employee of the insurer. Reversing and remanding, the United States Court of Appeals for the Fourth Circuit held that common-law agency principles were inapplicable and that an ERISA plaintiff could qualify as an employee by showing that he or she (1) had a reasonable expectation of receiving pension benefits, (2) relied on this expectation, and (3) lacked the economic power to contract out of benefit plan forfeiture provisions (796 F2d 701). On remand, the District Court applied the Court of Appeals' standard and held that the agent had been an employee of the insurer (717 F Supp 388). The Court of Appeals affirmed (922 F2d 203).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Souter, J., expressing the unanimous view of the court, it was held that the term "employee" in 1002(6) incorporates traditional agency-law criteria for identifying master-servant relationships, because (1) the nominal definition in 1002(6) is completely circular and explains nothing, (2) no other ERISA provision gives specific guidance on the term's meaning or suggests that construing it to incorporate traditional agency-law principles would thwart the congressional design or lead to absurd results, (3) application of traditional agency-law criteria generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the "employee" status of ERISA claimants with similar job descriptions, and (4) agency-law principles comport with recent Supreme Court precedents and with the common

understanding, reflected in those precedents, of the difference between an employee and an independent contractor.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

PENSIONS AND RETIREMENT FUNDS §1

ERISA -- definition of "employee" -- traditional agency law --

Headnote:[1A][1B][1C]

The term "employee" as it appears in 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS 1002(6)) incorporates traditional agency-law criteria for identifying master-servant relationships, because (1) the nominal definition in 1002(6) of an "employee" as "any individual employed by an employer" is completely circular and explains nothing, (2) no other provision of ERISA (29 USCS 1001 et seq.) gives specific guidance on the term's meaning or suggests that construing it to incorporate traditional agency-law principles would thwart the congressional design or lead to absurd results, (3) application of traditional agency-law criteria generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the "employee" status of ERISA claimants with similar job descriptions, and (4) agency-law principles comport with recent United States Supreme Court precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.

[***LEdHN2]

PENSIONS AND RETIREMENT FUNDS §1

ERISA -- action for benefits --

Headnote:[2]

An action brought by an insurance agent under 29 USCS 1132(a) for benefits under an insurer's retirement plan for agents, in which plan the agent was enrolled while contractually bound to sell only the insurer's insurance policies, can succeed only if the agent, whose contractual relationship with the insurer has ended, was the insurer's employee under the Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS 1001 et seq.)--where 3(6) of ERISA (29 USCS 1002(6)) defines an "employee" as "any individual employed by an employer"--because (1) 1132(a) enables a participant in an employee benefit plan to bring an action to enforce the substantive provisions of ERISA, and (2) 29 USCS 1002(7) defines a "participant" as any employee or for-

mer employee who is or may become eligible to receive a benefit from an employee benefit plan.

[***LEdHN3]

MASTER AND SERVANT §8

status -- employee or independent contractor --

Headnote:[3]

A court, in determining whether a hired party is an employee or an independent contractor under the general common law of agency, must consider the hiring party's right to control the manner and means by which the product is accomplished; among the other factors relevant to this inquiry are (1) the skill required, (2) the source of the instrumentalities and tools, (3) the location of the work, (4) the duration of the relationship between the parties, (5) whether the hiring party has the right to assign additional projects to the hired party, (6) the extent of the hired party's discretion over when and how long to work, (7) the method of payment, (8) the hired party's role in hiring and paying assistants, (9) whether the work is part of the regular business of the hired party, (10) whether the hiring party is in business, (11) the provision of employee benefits, and (12) the tax treatment of the hired party; since the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, all of the incidents of the relationship must be assessed and weighed with no one factor's being decisive.

[***LEdHN4]

COURTS §908.5

PENSIONS AND RETIREMENT FUNDS §1

ERISA -- definition of "employee" -- general common law of agency --

Headnote:[4A][4B]

In adopting a common-law test that applies traditional agency-law principles to determine who qualifies under the Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS 1001 et seq.) as an "employee," which term is defined in 3(6) of ERISA (29 USCS 1002(6)) as "any individual employed by an employer," the United States Supreme Court will construe the term "employee" to incorporate the general common law of agency, rather than the law of any particular state.

[***LEdHN5]

CONSTITUTIONAL LAW §48

power to construe law --

Headnote:[5]

The Federal Constitution invests the judiciary, not the legislature, with the final power to construe the law.

[***LEdHN6]

LABOR §151

Fair Labor Standards Act -- employee --

Headnote:[6]

Under the Fair Labor Standards Act (29 USCS 201 et seq.), which, at 29 USCS 203(e) defines an "employee" to include "any individual employed by an employer," the expansive definition, at 29 USCS 203(g), of the verb "employ" as meaning "suffer or permit to work," stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency-law principles.

[***LEdHN7]

APPEAL §1692.2

remand -- issue not decided below --

Headnote:[7]

On certiorari to review a Federal Court of Appeals' judgment affirming a Federal District Court judgment holding that an insurance agent who sued for benefits under an insurer's retirement plan for agents, in which plan the agent was enrolled while contractually bound to sell only the insurer's insurance policies, was, during the completed contractual period, an "employee" under the definition of that term contained in 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS 1002(6)), so as to be able to maintain the suit for benefits, the United States Supreme Court, upon reversing the Court of Appeals' judgment, will remand the case to the Court of Appeals for proceedings consistent with the Supreme Court's opinion, where (1) the Supreme Court has held that the 1002(6) definition incorporates traditional agency-law principles, and (2) the Court of Appeals, which rejected traditional agency-law principles and applied a different standard, merely recognized that the agent "most probably would not qualify as an employee" under traditional agency-law principles, but did not actually decide whether the agent would qualify as an employee under traditional agency-law principles.

SYLLABUS

Contracts between petitioners Nationwide Mutual Insurance Co. et al. and respondent Darden provided, among other things, that Darden would sell only Nationwide policies, that Nationwide would enroll him in a company retirement plan for agents, and that he would forfeit his entitlement to plan benefits if, within a year of his termination and 25 miles of his prior business loca-

tion, he sold insurance for Nationwide's competitors. After his termination, Darden began selling insurance for those competitors. Nationwide charged that Darden's new business activities disqualified him from receiving his retirement plan benefits, for which he then sued under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment to Nationwide on the ground that Darden was not a proper ERISA plaintiff because, under common-law agency principles, he was an independent contractor rather than, as ERISA requires, an "employee," a term the Act defines as "any individual employed by an employer." Although agreeing that he "most probably would not qualify as an employee" under traditional agency law principles, the Court of Appeals reversed, finding the traditional definition inconsistent with ERISA's policy and purposes, and holding that an ERISA plaintiff can qualify as an "employee" simply by showing (1) that he had a reasonable expectation that he would receive benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of benefit plan forfeiture provisions. Applying this standard, the District Court found on remand that Darden had been Nationwide's "employee," and the Court of Appeals affirmed.

Held:

1. The term "employee" as used in ERISA incorporates traditional agency law criteria for identifying master-servant relationships. Where a statute containing that term does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise. See, e. g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-740, 104 L. Ed. 2d 811, 109 S. Ct. 2166. ERISA's nominal definition of "employee" is completely circular and explains nothing, and the Act contains no other provision that either gives specific guidance on the term's meaning or suggests that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Since the multifactor common-law test here adopted, see, e. g., id., at 751-752, contains no shorthand formula for determining who is an "employee," all of the incidents of the employment relationship must be assessed and weighed with no one factor being decisive. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 88 L. Ed. 1170, 64 S. Ct. 851; United States v. Silk, 331 U.S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463; Rutherford Food Corp. v. McComb, 331 U.S. 722, 91 L. Ed. 1772, 67 S. Ct. 1473, distinguished. Pp. 322-327.

2. The case is remanded for a determination whether Darden qualifies as an "employee" under traditional agency law principles. P. 328.

COUNSEL: George Robinson Ragsdale argued the cause for petitioners. With him on the briefs were Gordon E. McCutchan, Robert M. Parsons, Craig G. Dalton, Jr., Francis M. Gregory, Jr., and Margaret M. Richardson.

Christopher J. Wright argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Deputy Solicitor General Mahoney, Allen H. Feldman, and Elizabeth Hopkins.

Marion G. Follin III argued the cause and filed a brief for respondent.

* Edward N. Delaney and Russell A. Hollrah filed a brief for the National Association of Independent Insurers as amicus curiae urging reversal.

JUDGES: SOUTER, J., delivered the opinion for a unanimous Court.

OPINION BY: SOUTER

OPINION

[*319] [***587] [**1346] JUSTICE SOUTER delivered the opinion of the Court.

[**LEdHR1A] [1A]In this case we construe the term "employee" as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 834, 29 U. S. C. § 1002(6), and read it to incorporate traditional agency law criteria for identifying master-servant relationships.

I

From 1962 through 1980, respondent Robert Darden operated an insurance agency according to the terms of several [*320] contracts he signed with petitioners Nationwide Mutual Insurance Co. et al. Darden promised to sell only Nationwide insurance policies, and, in exchange, Nationwide agreed to pay him commissions on his sales and enroll him in a company retirement scheme called the "Agent's Security Compensation Plan" (Plan). The Plan consisted of two different programs: the "Deferred Compensation Incentive Credit Plan," under which Nationwide annually credited an agent's retirement account with a sum based on his business performance, and the "Extended Earnings Plan," under which Nationwide paid an agent, upon retirement or termination, a sum equal to the total of his policy renewal fees for the previous 12 months.

Such were the contractual terms, however, that Darden would forfeit his entitlement to the Plan's benefits if, within a year of his termination and 25 miles of his prior

business location, he sold insurance for Nationwide's competitors. The contracts also disqualified him from receiving those benefits if, after he stopped representing Nationwide, he ever induced [**1347] a Nationwide policyholder to cancel one of its policies.

In November 1980, Nationwide exercised its contractual right to end its relationship with Darden. A month later, Darden became an independent insurance agent and, doing business from his old office, sold insurance policies for several of Nationwide's competitors. The company reacted with the charge that his new business activities disqualified him from receiving the Plan benefits to which he would have been entitled otherwise. Darden then sued for the benefits, which he claimed were nonforfeitable because already vested under the terms of ERISA. 29 U. S. C. § 1053(a).

[**LEdHR2] [2]Darden brought his action under 29 U.S.C. § 1132(a), which [HN1]enables a benefit plan "participant" to enforce the substantive provisions of ERISA. The Act elsewhere defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit [*321] of any type from an employee benefit plan . . ." § 1002(7). [***588] Thus, Darden's ERISA claim can succeed only if he was Nationwide's "employee," a term the Act defines as "any individual employed by an employer." § 1002(6).

It was on this point that the District Court granted summary judgment to Nationwide. After applying common-law agency principles and, to an extent unspecified, our decision in *United States v. Silk*, 331 U.S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947), the court found that "the total factual context" of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee." App. to Pet. for Cert. 47a, 50a, quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 19 L. Ed. 2d 1083, 88 S. Ct. 988 (1968).

The United States Court of Appeals for the Fourth Circuit vacated. *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (1986). After observing that "Darden most probably would not qualify as an employee" under traditional principles of agency law, *id.*, at 705, it found the traditional definition inconsistent with the "'declared policy and purposes'" of ERISA, *id.*, at 706, quoting *Silk*, *supra*, at 713, and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131-132, 88 L. Ed. 1170, 64 S. Ct. 851 (1944), and specifically with the congressional statement of purpose found in § 2 of the Act, 29 U. S. C. § 1001. ¹ It therefore held that an ERISA plaintiff can qualify as an "employee" simply by showing "(1) that he had a reasonable expectation that he would receive [pension] benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of

[benefit plan] forfeiture provisions." [*322] 922 F.2d 203, 205 (CA4 1991) (summarizing 796 F.2d 701 (CA4 1986)). The court remanded the case to the District Court, which then found that Darden had been Nationwide's "employee" under the standard set by the Court of Appeals. 717 F. Supp. 388 (EDNC 1989). The Court of Appeals affirmed. 922 F.2d 203 (1991).²

1 The Court of Appeals cited Congress's declaration that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that ERISA was necessary to "assure the equitable character of such plans and their financial soundness." 796 F.2d at 706, quoting 29 U. S. C. § 1001. None of these passages deals specifically with the scope of ERISA's class of beneficiaries.

2 The Court of Appeals also held that the Deferred Compensation Plan was a pension plan subject to regulation under ERISA, but that the Extended Earnings Plan was not. 922 F.2d at 208. We denied Darden's cross-petition for certiorari, which sought review of that conclusion. 502 U.S. 906 (1991).

In due course, Nationwide filed a petition for certiorari, which we granted on October [**1348] 15, 1991. 502 U.S. 905. We now reverse.

II

We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it. Most recently we confronted this [***589] problem in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989), a case in which a sculptor and a non-profit group each claimed copyright ownership in a statue the group had commissioned from the artist. The dispute ultimately turned on whether, by the terms of § 101 of the Copyright Act of 1976, 17 U. S. C. § 101, the statue had been "prepared by an employee within the scope of his or her employment." Because the Copyright Act nowhere defined the term "employee," we unanimously applied the "well established" principle that

[HN2]"where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms In the past, when Congress has used the term 'employee' without defining it, we have

concluded that Congress intended to describe the conventional [*323] master-servant relationship as understood by common-law agency doctrine. See, e. g., Kelley v. Southern Pacific Co., 419 U.S. 318, 322-323, 42 L. Ed. 2d 498, 95 S. Ct. 472 (1974); Baker v. Texas & Pacific R. Co., 359 U.S. 227, 228, 3 L. Ed. 2d 756, 79 S. Ct. 664 (1959) (*per curiam*); Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, 59 L. Ed. 849, 35 S. Ct. 491 (1915)." 490 U.S. at 739-740 (internal quotation marks omitted).

While we supported this reading of the Copyright Act with other observations, the general rule stood as independent authority for the decision.

[***LEdHR1B] [1B] [***LEdHR3] [3] [***LEdHR4A] [4A]So too should it stand here. ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U. S. C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, [HN3]we adopt a common-law test for determining who qualifies as an "employee" under ERISA,³ a test we most recently summarized in *Reid*:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired [*324] party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring [***590] party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 U.S. at 751-752 (footnotes omitted).

Cf. Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationship); Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-299 (setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law [**1349] contexts). Since the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." NLRB v. United Ins. Co. of America, 390 U.S. at 258.

[***LEdHR4B] [4B]

3 As in *Reid*, we construe the term to incorporate "the general common law of agency, rather than . . . the law of any particular State." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989).

In taking its different tack, the Court of Appeals cited NLRB v. Hearst Publications, Inc., 322 U.S. at 120-129, and United States v. Silk, 331 U.S. at 713, for the proposition that "the content of the term 'employee' in the context of a particular federal statute is 'to be construed 'in the light of the mischief to be corrected and the end to be attained. ''"Darden, 796 F.2d at 706, quoting Silk, supra, at 713, in turn quoting Hearst, supra, at 124. But *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, ⁴ to imply something broader than the common-law definition; after each opinion, Congress [*325] amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. See United Ins. Co., supra, at 256 ("Congressional reaction to [*Hearst*] was adverse and Congress passed an amendment . . . the obvious purpose of [which] was to have the . . . courts apply general agency principles in distinguishing between employees and independent contractors under the Act"); Social Security Act of 1948, ch. 468, § 1(a), 62 Stat. 438 (1948) (amending statute to provide that term "employee" "does not include . . . any individual who, under the *usual common-law rules* applicable in determining the employer-employee relationship, has the status of an independent contractor") (emphasis added); see also United States v. W. M. Webb, Inc., 397 U.S. 179, 183-188, 25 L. Ed. 2d 207, 90 S. Ct. 850 (1970) (discussing congressional reaction to *Silk*).

4 The National Labor Relations Act simply defined "employee" to mean (in relevant part) "any employee." 49 Stat. 450 (1935). The Social Security Act defined the term to "include," among other, unspecified occupations, "an officer of a corporation." 49 Stat. 647.

[***LEdHR5] [5]To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid's* presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk's* emphasis [***591] on construing that term "'in the light of the mischief to be corrected and the end to be attained.'" Silk, supra, at 713, quoting Hearst, supra, at 124.

[***LEdHR6] [6]At oral argument, Darden tried to subordinate *Reid* to Rutherford Food Corp. v. McComb, 331 U.S. 722, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947), which adopted a broad reading of "employee" under the Fair Labor Standards Act (FLSA). And *amicus* United States, while rejecting Darden's position, also relied on *Rutherford Food* for the proposition that, when enacting ERISA, Congress must have intended a modified common-law definition of "employee" that would advance, in a way not defined, the Act's "remedial purposes." Brief for United States as *Amicus* [*326] *Curiae* 15-21. ⁵ But *Rutherford Food* supports neither position. The definition of "employee" in the FLSA evidently derives [**1350] from the child labor statutes, see Rutherford Food, supra, at 728, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U. S. C. §§ 203(e), (g). This latter definition, whose striking breadth we have previously noted, Rutherford Food, supra, at 728, stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of "employee."

5 While both Darden and the United States cite a Department of Labor "Opinion Letter" as support for their separate positions, see Brief for Respondent 34-35, Brief for United States as *Amicus Curiae* 16-18, neither suggests that we owe that letter's legal conclusions any deference

under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Quite apart from its inconsistency with our precedents, the Fourth Circuit's analysis reveals an approach infected with circularity and unable to furnish predictable results. Applying the first element of its test, which ostensibly enquires into an employee's "expectations," the Court of Appeals concluded that Nationwide had "created a reasonable expectation on the 'employees' part that benefits would be paid to them in the future," *Darden*, 796 F.2d at 706, by establishing "a comprehensive retirement benefits program for its insurance agents," *id.*, at 707. The court thought it was simply irrelevant that the forfeiture clause in Darden's contract "limited" his expectation of receiving pension benefits, since "it is precisely that sort of employer-imposed condition on the *employee's* anticipations that Congress intended to out-law [*327] with the enactment of ERISA." *Id.*, at 707, n. 7 (emphasis added). Thus, the Fourth Circuit's test would turn not on a claimant's actual "expectations," which the court effectively deemed inconsequential, *ibid.*, but on his statutory entitlement to relief, which itself depends on his very status as an "employee." This begs the question.

This circularity infects the test's [***592] second prong as well, which considers the extent to which a claimant has relied on his "expectation" of benefits by "remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for [his] retirement." *Id.*, at 706. While this enquiry is ostensibly factual, we have seen already that one of its objects may not be: to the extent that actual "expectations" are (as in Darden's case) unnecessary to relief, the nature of a claimant's required "reliance" is left unclear. Moreover, any enquiry into "reliance," whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans. Because, for example, Darden failed to make much independent provision for his retirement, he satisfied the "reliance" prong of the Fourth Circuit's test, see 922 F.2d at 206, whereas a more provident colleague who signed exactly the same contracts, but saved for a rainy day, might not.

[***LEdHR1C] [1C] Any such approach would severely compromise the capacity of companies like Nationwide to figure out who their "employees" are and what, by extension, their pension-fund obligations will be. To be sure, the traditional agency law criteria offer no paradigm of determinacy. But their application generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the "employee" status of claimants with similar job descriptions. Agency law principles comport, moreover,

with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.

[*328] III

[***LEdHR7] [7]While the Court of Appeals noted that "Darden most probably would not qualify as an employee" under traditional agency law [***1351] principles, *Darden, supra*, at 705, it did not actually decide that issue. We therefore reverse the judgment and remand the case to that court for proceedings consistent with this opinion.

So ordered.

REFERENCES

60A Am Jur 2d, Pensions and Retirement Funds 95

27 Federal Procedure, L Ed, Pensions and Retirement Systems 61:146-61:153

13A Federal Procedural Forms, L Ed, Pensions and Retirement Systems 53:45

14A Am Jur Legal Forms 2d, Pension, Profit-Sharing, and Deferred Compensation Plans 200:11-200:15

1 Am Jur Proof of Facts 345, Agency; 1 Am Jur Proof of Facts 2d 711, Independent Contractor Status

29 USCS 1002(6)

Employment Coordinator B-20,416

Pension Coordinator 48,307

L Ed Digest, Pensions and Retirement Funds 1

L Ed Index, Independent Contractors; Insurance Agents and Brokers; Labor and Employment; Pensions and Retirement

Index to Annotations, Employee Retirement Income Security Act; Independent Contractors ;Insurance Agents and Brokers ;Labor and Employment

Annotation References:

The Supreme Court and the post-Erie Federal common law. 31 L Ed 2d 1006.

Determination of "independent contractor" and "employee" status for purposes of 3(e)(1) of the Fair Labor Standards Act (29 USCS 203(e)(1)). 51 ALR Fed 702.

When is individual in training an "employee" for purposes of 3(e)(1) of the Fair Labor Standards Act (29 USCS 203(e)(1)). 50 ALR Fed 632.

Validity, construction, and effect of provision forfeiting or suspending benefits in event of competitive employment as part of retirement or pension plan. 18 ALR3d 1246.

LEXSEE

STATE OF NEW HAMPSHIRE v. STATE OF MAINE

No. 130, Orig.

SUPREME COURT OF THE UNITED STATES

532 U.S. 742; 121 S. Ct. 1808; 149 L. Ed. 2d 968; 2001 U.S. LEXIS 3981; 69 U.S.L.W. 4393; 2001 Cal. Daily Op. Service 4303; 2001 Daily Journal DAR 4303; 14 Fla. L. Weekly Fed. S 283

April 16, 2001, Argued

May 29, 2001, Decided

PRIOR HISTORY: ON MOTION TO DISMISS COMPLAINT.

Hampshire the prerogative to construe "Middle of the River" differently than it did 25 years ago.

DISPOSITION: Motion to dismiss complaint granted.

OUTCOME: The court granted Maine's motion to dismiss the complaint.

CASE SUMMARY:

PROCEDURAL POSTURE: New Hampshire brought an original action against Maine, claiming that the Piscataqua River boundary ran along the Maine shore, the entire river, and all of Portsmouth Harbor belonged to New Hampshire. Maine moved to dismiss, asserting that two prior proceedings, a 1740 boundary determination and a 1977 consent judgment entered by the United States Supreme Court, fixed the boundary at the middle of the river's main channel of navigation.

CORE TERMS: river, decree, consent decree, judicial estoppel, shore, harbor, marine, lateral, estoppel, consent judgment, geographic, navigation, main channel, judicial process, border, inland, navigable channel, public policy, prior judgment, asserting, northern, unfair, convenience, estopped, shipyard, region, inform, earlier proceedings, issue preclusion, legal proceeding

LexisNexis(R) Headnotes

OVERVIEW: The court held judicial estoppel barred New Hampshire from asserting, contrary to its prior position, that the inland river boundary ran along the Maine shore. It was clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation. In the 1977 consent decree, New Hampshire agreed that "Middle of the River" meant middle of the main navigable channel. The states had represented that the proposed judgment was in each state's best interest and the court had accepted the proposed boundary. The court's acceptance of the consent decree was a judicial function. The consent decree reasonably invested precise terms with definitions that give effect to the 1740 decree. Pleadings in the prior case showed New Hampshire had done a searching historical inquiry and understood the importance of the boundary. The new position was advanced not to enforce its own laws within its borders, but to adjust the border itself. Given Maine's countervailing interest in the location of the boundary, there was no broad interest of public policy giving New

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata

[HN1] Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN2]Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN3]Because the rule of judicial estoppel is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN4]Several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case. First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Additional considerations may inform the doctrine's application in specific factual contexts.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel

[HN5]It may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake.

DECISION:

Doctrine of judicial estoppel held to bar New Hampshire from asserting claim that--inland of boundary consented to in prior litigation--Piscataqua River boundary between New Hampshire and Maine ran along Maine shore.

SUMMARY:

The Piscataqua River flows between the states of New Hampshire and Maine, until the river reaches the sea at Portsmouth Harbor, also known as Piscataqua Harbor. During the colonial period, a 1740 decree by King George II of England included a provision that "the Dividing Line" between New Hampshire and Maine (the latter then a part of Massachusetts) would "pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River." Subsequently, in original litigation in the 1970's between the states of New Hampshire and Maine, the United States Supreme Court eventually approved a consent judgment or decree, which (1) fixed the precise location of the "lateral marine boundary" of the two states in the waters off the coast, from the closing line of Portsmouth Harbor 5 miles seaward to a harbor in some offshore islands; and (2) provided, among other matters, that the words "Middle of the River," as used in the 1740 decree, meant the middle of the main channel of navigation of the Piscataqua River (decision approving entry of decree at 426 US 363, 48 L Ed 2d 701, 96 S Ct 2113; decree entered at 434 US 1, 54 L Ed 2d 1, 98 S Ct 42). In 2000, the Supreme Court granted New Hampshire leave to file an original complaint against Maine (530 US 1272, 147 L Ed 2d 1003, 120 S Ct 2764). This complaint claimed, with respect to the states' boundary inland of the partial one consented to in the 1970's litigation, that (1) the Piscataqua River boundary ran along the Maine shore, and (2) the entire river and all of Portsmouth Harbor belonged to New Hampshire. Maine then filed a motion to dismiss the complaint.

The Supreme Court granted Maine's motion. In an opinion by Ginsburg, J., expressing the unanimous view of the eight participating members of the court, it was held that the doctrine of judicial estoppel equitably barred New Hampshire from asserting its claim that, inland, the Piscataqua River boundary ran along the Maine shore, for (1) New Hampshire, in the consent decree approved in the 1970's, agreed without reservation that the words "Middle of the River," as used in the 1740 decree, meant the middle of the Piscataqua River's main channel of navigation; (2) the pertinent factors firmly tipped the balance of equities in favor of barring New Hampshire's complaint; and (3) there was no broad interest of public policy that gave New Hampshire the prerogative, notwithstanding this balance of equities, to construe the words "Middle of the River" differently than the state had in the 1970's.

Souter, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ESTOPPEL WAIVER §9

-- state -- boundary -- inconsistent position in prior litigation

Headnote:[1A][1B][1C][1D][1E][1F][1G]

In 2001, the doctrine of judicial estoppel equitably bars the state of New Hampshire from asserting a claim, in an original United States Supreme Court complaint against the state of Maine, that--with respect to the two states' boundary inland of a partial one consented to in some 1970's Supreme Court litigation between the two states--the Piscataqua River boundary between the two states allegedly runs along the Maine shore, because New Hampshire, in a consent decree approved in the 1970's litigation, agreed without reservation that the words "Middle of the River," as used in a 1740 colonial-period decree in which King George II of England announced the "Dividing Line" between New Hampshire and Maine, meant the middle of the Piscataqua River's main channel of navigation; the pertinent factors firmly tip the balance of equities in favor of barring New Hampshire's complaint, as (1) New Hampshire's present claim is clearly inconsistent with the state's interpretation of the words "Middle of the River" during the 1970's litigation, (2) an interpretation of these words was necessary to fix the northern endpoint of the boundary then at issue, which was the "lateral marine boundary" between the two states in the waters off the coast, from the closing line of Portsmouth Harbor 5 miles seaward to a harbor in some offshore islands, (3) the record of the 1970's litigation makes it clear that (a) the Supreme Court accepted New Hampshire's agreement with Maine that the "Middle of the River" meant the middle of the main navigable channel, and (b) New Hampshire benefited from this interpretation, (4) it is incorrect to imply that the parties settled the 1970's dispute without judicial endorsement of this interpretation, (5) the prior consent decree was not entered without a searching historical inquiry by New Hampshire into what the words in question meant, (6) New Hampshire, in the 1970's, lacked neither the opportunity nor the incentive to locate the river boundary at Maine's shore, and (7) the Supreme Court cannot interpret the words "Middle of the River" to mean two different things along the same boundary line without undermining the integrity of the judicial process; moreover, there is no broad interest of public policy that gives New Hampshire the prerogative, notwithstanding this balance of equities, to construe the words "Middle of the River" differently than the state did in the 1970's, for (1) the present proceeding is not a case where (a) estoppel would compromise a governmental interest in enforcing the law, or (b) the shift in the government's position is the result of a change in public policy, (2) instead, the proceeding is a case between two states, where each owes the other a full measure of respect, (3) what has changed is New Hampshire's interpretation of the histori-

cal evidence concerning the 1740 decree, (4) New Hampshire advances its new interpretation not to enforce the state's own laws within its borders, but to adjust the border itself, and (5) Maine has a countervailing interest in the location of the boundary.

[***LEdHN2]

SUPREME COURT OF THE UNITED STATES
§67

-- boundary between states -- estoppel -- prior litigation

Headnote:[2A][2B][2C]

In 2001, with respect to an original complaint by the state of New Hampshire against the state of Maine, the United States Supreme Court will grant a motion by Maine to dismiss the complaint, where (1) the Piscataqua River flows between the two states, until the river reaches the sea at Portsmouth Harbor, also known as Piscataqua Harbor, (2) New Hampshire's complaint claims--with respect to the two states' boundary inland of a partial one fixed in some 1970's original litigation between the two states, which litigation ended in a consent decree--that (a) the Piscataqua River boundary runs along the Maine shore, and (b) the entire river and all of Portsmouth Harbor belong to New Hampshire, (3) the Supreme Court decides that under the unusual circumstances presented, the discrete doctrine of judicial estoppel best fits the controversy, and (4) the Supreme Court holds that the doctrine of judicial estoppel equitably bars New Hampshire from asserting this Piscataqua River boundary claim, which is contrary to the state's position in the 1970's litigation; in such circumstances, the Supreme Court will pretermitt the two states' (1) competing historical contentions, and (2) arguments on the application of the res judicata doctrines commonly called claim and issue preclusion.

[***LEdHN3]

JUDGMENT §76

-- claim preclusion

Headnote:[3]

The res judicata doctrine commonly called claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, regardless of whether relitigation of the claim raises the same issues as the earlier suit.

[***LEdHN4]

JUDGMENT §76

-- issue preclusion

Headnote:[4]

The res judicata doctrine commonly called issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, regardless of whether the issue arises on the same or a different claim.

[***LEdHN5]

ESTOPPEL WAIVER §78

-- inconsistent position -- prior legal proceeding

Headnote:[5]

Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, the party may not thereafter, simply because the party's interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by the first party; this rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase; because this rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.

[***LEdHN6]

ESTOPPEL WAIVER §78

-- inconsistent position -- prior judicial proceeding

Headnote:[6A][6B]

Several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case; the first such factor is that a party's later position must be clearly inconsistent with the party's earlier position; with respect to a second such factor, courts regularly inquire whether a party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; this inquiry is made because in the absence of success in a prior proceeding, a party's later inconsistent position (1) introduces no risk of inconsistent court determinations, and (2) thus, poses little threat to judicial integrity; a third such factor or consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped; in enumerating these factors, the United States Supreme Court will not establish inflexible prerequisites or an exhaustive formula for determining the applicabil-

ity of judicial estoppel, as additional considerations may inform the doctrine's application in specific factual contexts.

[***LEdHN7]

ESTOPPEL WAIVER §78

-- judicial -- prior position

Headnote:[7]

It may be appropriate to resist the application of judicial estoppel when a party's prior inconsistent position was based on inadvertence or mistake.

SYLLABUS

New Hampshire and Maine share a border that runs from northwest to southeast. At the border's southeastern end, New Hampshire's easternmost point meets Maine's southernmost point. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. In 1977, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment setting the precise location of the States' "lateral marine boundary," *i.e.*, the boundary in the marine waters off the coast, from the closing line of Portsmouth Harbor five miles seaward. *New Hampshire v. Maine*, 426 U.S. 363, 48 L. Ed. 2d 701, 96 S. Ct. 2113; *New Hampshire v. Maine*, 434 U.S. 1, 2, 54 L. Ed. 2d 1, 98 S. Ct. 42. The Piscataqua River boundary was fixed by a 1740 decree of King George II at the "Middle of the River." See 426 U.S. at 366-367. In the course of litigation, the two States proposed a consent decree in which they agreed, *inter alia*, that the descriptive words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main navigable channel. Rejecting the Special Master's view that the quoted words mean the geographic middle of the river, this Court accepted the States' interpretation and directed entry of the consent decree. *Id.* at 369-370. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." 434 U.S. at 2. The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. In 2000, New Hampshire brought this original action against Maine, claiming on the basis of historical records that the inland river boundary runs along the Maine shore and that the entire Piscataqua River and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss, urging that the earlier proceedings bar New Hampshire's complaint.

Held: Judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Pp. 5-13.

(a) Judicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion. Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Davis v. Wakelee, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, this Court does not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. Pp. 5-8.

(b) Considerations of equity persuade the Court that application of judicial estoppel is appropriate in this case. New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation to mean either the middle of the main navigable channel or the geographic middle of the river. Either construction located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River. Moreover, the record of the 1970's dispute makes clear that this Court accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Were the Court to accept New Hampshire's latest view, the risk of inconsistent court determinations would become a reality. The Court cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process. Pp. 8-9.

(c) The Court rejects various arguments made by New Hampshire. The State urged at oral argument that the 1977 consent decree simply fixed the "Middle of the River" at an arbitrary location based on the parties' administrative convenience. But that view is foreclosed by the Court's determination that the consent decree proposed a wholly permissible final resolution of the controversy both as to facts and law, 426 U.S. at 368-369. The Court rejected the dissenters' view that the decree interpreted the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles," id. at 369. New Hampshire's contention that the 1977 consent decree was entered without a searching historical inquiry into what "Middle of the River" meant is refuted by the pleadings in the lateral marine boundary case and by this Court's independent determination that nothing suggests the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence, ibid. Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials that were no less available in the 1970's than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have resulted in a substantial amount of additional territory for New Hampshire. Pp. 9-11.

(d) Also unavailing is New Hampshire's reliance on this Court's recognition that the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is ordinarily not applied to States, Illinois ex rel. Gordon v. Campbell, 329 U.S. 362, 369, 91 L. Ed. 348, 67 S. Ct. 340. This is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. Heckler v. Community Health Services of Crawford Cty., Inc., 467 U.S. 51, 60, 81 L. Ed. 2d 42, 104 S. Ct. 2218. Nor is this a case where the shift in the government's position results from a change in public policy, cf. Commissioner v. Sunnen, 333 U.S. 591, 601, 92 L. Ed. 898, 68 S. Ct. 715, or a change in facts essential to the prior judgment, cf. Montana v. United States, 440 U.S. 147, 159, 59 L. Ed. 2d 210, 99 S. Ct. 970. Instead, it is a case between two States, in which each owes the other a full measure of respect. The Court is unable to discern any substantial public policy interest allowing New Hampshire to construe "Middle of the River" differently today than it did 25 years ago. Pp. 11-13.

Motion to dismiss complaint granted.

COUNSEL: Paul Stern argued the cause for defendant.

Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.

Leslie J. Ludtke argued the cause for plaintiff.

JUDGES: GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except SOUTER, J., who took no part in the consideration or decision of the case.

OPINION BY: GINSBURG

OPINION

[**1812] [***974] [*745] JUSTICE GINSBURG delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]The Piscataqua River lies at the southeastern end of New Hampshire's boundary with Maine. The river begins at the headwaters of Salmon Falls and runs seaward into Portsmouth Harbor (also known as Piscataqua Harbor). On March 6, 2000, New Hampshire brought this original action against Maine, claiming that the Piscataqua River boundary runs along the Maine shore and that the entire river and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss on the ground that two prior proceedings -- a 1740 boundary determination by King George II and a 1977 consent judgment entered by this Court -- definitively fixed the Piscataqua River boundary at the middle of the river's main channel of navigation.

[***975] The 1740 decree located the Piscataqua River boundary at the "Middle of the River." Because New Hampshire, in the 1977 proceeding, agreed without reservation that the words "Middle of the River" mean the middle of the Piscataqua River's main channel of navigation, we conclude that New Hampshire is estopped from asserting now that the boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

I

New Hampshire and Maine share a border that runs from northwest to southeast. At the southeastern end of the [*746] border, the easternmost point of New Hampshire meets the southernmost point of Maine. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. Twenty-five years ago, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment fixing the precise location of the "lateral marine boundary," *i.e.*, the boundary in the marine waters off the coast of New Hampshire and Maine, from the closing line of Portsmouth Harbor five miles seaward to Gosport Harbor in the Isles of Shoals. New Hampshire v. Maine, 426 U.S. 363, 48 L. Ed. 2d 701, 96 S. Ct. 2113 (1976);

New Hampshire v. Maine, 434 U.S. 1, 2, 54 L. Ed. 2d 1, 98 S. Ct. 42 (1977). This case concerns the location of the Maine-New Hampshire boundary along the inland stretch of the Piscataqua River, from the mouth of Portsmouth Harbor westward to the river's headwaters at Salmon Falls. (A map of the region appears as an appendix to this opinion.)

[**1813] In the 1970's contest over the lateral marine boundary, we summarized the history of the interstate boundary in the Piscataqua River region. See New Hampshire v. Maine, 426 U.S. at 366-367. The boundary, we said, "was in fact fixed in 1740 by decree of King George II of England" as follows:

"That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side" Id. at 366 (quoting the 1740 decree).

In 1976, New Hampshire and Maine "expressly agreed . . . that the decree of 1740 fixed the boundary in the Piscataqua Harbor area." Id. at 367 (internal quotation marks omitted). "Their quarrel was over the location . . . of the 'Mouth of Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the decree." [*747] *Ibid.* The meaning of those terms was essential to delineating the lateral marine boundary. See Report of Special Master, O. T. 1975, No. 64 Orig., pp. 32-49 (hereinafter Report). In particular, the northern end of the lateral marine boundary required a determination of the point where the line marking the "Middle of the [Piscataqua] River" crosses the closing line of Piscataqua Harbor. Id. at 43.

In the course of litigation, New Hampshire and Maine proposed a [***976] consent decree in which they agreed, *inter alia*, that the words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main channel of navigation. Motion for Entry of Judgment By Consent of Plaintiff and Defendant in New Hampshire v. Maine, O. T. 1973, No. 64 Orig., p. 2 (hereinafter Motion for Consent Judgment). The Special Master, upon reviewing pertinent history, rejected the States' interpretation and concluded that "the geographic middle of the river and not its main or navigable channel was intended by the 1740 decree." Report 41. This Court determined, however, that the States' interpretation "reasonably invested imprecise terms" with a definition not "wholly contrary to relevant evidence." New Hampshire v. Maine, 426 U.S. at 369. On that basis, the Court declined to adopt the Special Master's construction of "Middle of the River" and directed entry of the consent decree. Id. at 369-370. The final decree, entered in 1977, defined "Middle of the River" as "the mid-

dle of the main channel of navigation of the Piscataqua River." New Hampshire v. Maine, 434 U.S. at 2.

The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. See Report 42-43 ("For the purposes of the present dispute, . . . it is unnecessary to lay out fully the course of the boundary as it proceeds upriver . . ."). In the instant action, New Hampshire contends that the inland river boundary "runs along the low water mark on the Maine shore," Complaint 49, and asserts sovereignty over the entire river [*748] and all of Portsmouth Harbor, including the Portsmouth Naval Shipyard on Seavey Island located within the harbor just south of Kittery, Maine, *id.* at 34. Relying on various historical records, New Hampshire urges that "Middle of the River," as those words were used in 1740, denotes the main branch of the river, not a mid-channel boundary, Brief in Opposition to Motion to Dismiss 12-16, and that New Hampshire, not Maine, exercised sole jurisdiction over shipping and military activities in Portsmouth [**1814] Harbor during the decades before and after the 1740 decree, *id.* at 17-19, and nn. 35-38.

* According to New Hampshire, the Federal Government in recent years has taken steps to close portions of the shipyard and to lease its land and facilities to private developers. Complaint 34. New Hampshire and Maine assert competing claims of sovereignty over private development on shipyard lands. *Ibid.*

While disagreeing with New Hampshire's understanding of history, see Motion to Dismiss 9-14, 18-19 (compiling evidence that Maine continually exercised jurisdiction over the harbor and shipyard from the 1700's to the present day), Maine primarily contends that the 1740 decree and the 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation -- a division that places Seavey Island within Maine's jurisdiction. Those earlier proceedings, according to Maine, bar New Hampshire's complaint under principles of claim and issue preclusion as well as judicial estoppel.

[**LEdHR1B] [1B] [**LEdHR2B] [2B] [**LEdHR3] [3] [**LEdHR4] [4] We pretermitt the States' competing historical claims along with their arguments on the application *vel non* of the *res judicata* doctrines commonly called claim and issue preclusion. [HN1] Claim preclusion generally refers to the effect of a [**977] prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually [*749] litigated and resolved in a

valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. See Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); D. Shapiro, *Civil Procedure: Preclusion in Civil Actions* 32, 46 (2001). In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting -- contrary to its position in the 1970's litigation -- that the inland Piscataqua River boundary runs along the Maine shore.

II

[**LEdHR5] [5][HN2]"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v. Herdrich, 530 U.S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (hereinafter Wright).

Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (CA6 [*750] 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," United States v. McCaskey, 9 F.3d 368, 378 (CA5 1993). See In re Cassidy, 892 F.2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); Scarano v. Central R. Co., 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents [**1815] parties from "playing 'fast and loose with the courts'" (quoting Stretch v. Watson, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). [HN3] Because the rule is intended to prevent "improper use of judicial

machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," [***978] *Russell v. Rolfs*, 893 F.2d 1033, 1037 (CA9 1990) (citation omitted).

[***LEdHR6A] [6A] Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F.2d at 1166; accord *Lowery v. Stovall*, 92 F.3d 219, 223 (CA4 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (CA1 1987). Nevertheless, [HN4] several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success [*751] in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See *Hook*, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *Davis*, 156 U.S. at 689; *Philadelphia, W. & B. R. Co. v. Howard*, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782.

[***LEdHR1C] [1C] [***LEdHR6B] [6B] In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

[***LEdHR1D] [1D] New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation.

As mentioned above, *supra*, at 3-4, interpretation of those words was "necessary" to fixing the northern endpoint of the lateral marine boundary, Report 43. New Hampshire offered two interpretations in the earlier proceeding -- first agreeing with Maine in the proposed consent decree that "Middle of the River" means the middle of the main channel of navigation, and later agreeing with the Special Master that the words mean the geographic middle of the river. Both constructions located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River.

[*752] Moreover, the record of the 1970's dispute makes clear that this Court [***979] accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. New Hampshire, it is true, preferred the interpretation of "Middle of the River" in the Special Master's report. See Exceptions and Brief for Plaintiff in *New Hampshire v. Maine*, O. T. 1975, No. [**1816] 64 Orig., p. 3 (hereinafter Plaintiff's Exceptions) ("the boundary now proposed by the Special Master is more favorable to [New Hampshire] than that recommended in the proposed consent decree"). But the consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the River" in the 1970's litigation, Brief in Opposition to Motion to Dismiss 24, that "compromise" enabled New Hampshire to settle the case, see *id.* at 24-25, on terms beneficial to both States. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Motion for Consent Judgment 1. Relying on that representation, the Court accepted the boundary proposed by the two States. *New Hampshire v. Maine*, 434 U.S. 1, 54 L. Ed. 2d 1, 98 S. Ct. 42 (1977).

At oral argument, New Hampshire urged that the consent decree simply fixed the "Middle of the River" at "an arbitrary location based on the administrative convenience of the parties." Tr. of Oral Arg. 37. To the extent New Hampshire implies that the parties settled the lateral marine boundary dispute without judicial endorsement of their interpretation of "Middle of the River," that view is foreclosed by the Court's determination that "the consent decree . . . proposes a wholly permissible final resolution of the controversy both as to facts and law," *New Hampshire v. Maine*, 426 U.S. at 368-369. Three dissenting Justices agreed with New Hampshire that the consent decree interpreted [*753] the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles." *Id.* at 371 (White, J., dissenting, joined by Blackmun and

STEVENS, JJ.). But the Court concluded otherwise, noting that its acceptance of the consent decree involved "nothing remotely resembling 'arbitral' rather than 'judicial' functions," *id.* at 369. The consent decree "reasonably invested imprecise terms with definitions that give effect to [the 1740] decree," *ibid.*, and "[did] not fall into the category of agreements that we reject because acceptance would not be consistent with our Art. III function and duty," *ibid.*

[**LEdHR1E] [1E] [**LEdHR7] [7]New Hampshire also contends that the 1977 consent decree was entered without "a searching historical inquiry into what that language ['Middle of the River'] meant." Tr. of Oral Arg. 39. According to New Hampshire, had it known then what it knows now about the relevant history, it would not have entered into the decree. *Ibid.* We do not question that [HN5]it may be appropriate to resist application of judicial estoppel "when a party's prior position was based on inadvertence or mistake." *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 [**980] (CA4 1995); see *In re Corey*, 892 F.2d 829, 836 (CA9 1989); *Konstantinidis*, 626 F.2d at 939. We are unpersuaded, however, that New Hampshire's position in 1977 fairly may be regarded as a product of inadvertence or mistake.

[**LEdHR1F] [1F]The pleadings in the lateral marine boundary case show that New Hampshire did engage in "a searching historical inquiry" into the meaning of "Middle of the River." See Reply Brief for Plaintiff in *New Hampshire v. Maine*, O. T. 1975, No. 64 Orig., pp. 3-9 (examining history of river boundaries under international law, proceedings leading up to the 1740 order of the King in Council, and relevant precedents of this Court). None of the historical evidence cited by New Hampshire remotely suggested that the Piscataqua River boundary runs along the Maine shore. In fact, in attempting to place the boundary at the geographic middle of the [*754] river, New Hampshire acknowledged that its agents in 1740 understood the King's order to "adjudge *half of the river* to" the portion of Massachusetts that is now Maine. *Id.* at 6 (emphasis in original) (quoting *N. H. State Papers*, XIX, pp. [**1817] 591, 596-597); see *id.* at 4 ("The intention of those participating in the proceedings leading to the [1740 decree] was to use 'geographic middle' as the Piscataqua boundary." (emphasis in original)). In addition, this Court independently determined that "there is nothing to suggest that the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence." *New Hampshire v. Maine*, 426 U.S. at 369.

Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire

relies on historical materials -- primarily official documents and events from the colonial and postcolonial periods, see Brief in Opposition to Motion to Dismiss 12-19 -- that were no less available 25 years ago than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have placed the northern terminus of the lateral marine boundary much closer to Maine, "resulting in hundreds if not thousands of additional acres of territory being in New Hampshire rather than Maine," Tr. of Oral Arg. 48 (rebuttal argument of Maine). Tellingly, New Hampshire at the time understood the importance of placing the northern terminus as close to Maine as possible. While agreeing with the Special Master that "Middle of the River" means geographic middle, New Hampshire insisted that the geographic middle should be determined by using the banks of the river, not low tide elevations (as the Special Master had proposed), as the key reference points -- a methodology that would have placed the northern terminus 350 yards closer to the Maine shore. Plaintiff's Exceptions 3.

[*755] In short, considerations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations," *C. I. T. Construction*, [**981] 944 F.2d at 259, would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

Finally, notwithstanding the balance of equities, New Hampshire points to this Court's recognition that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states," *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369, 91 L. Ed. 348, 67 S. Ct. 340 (1946). Of course, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." 18 Wright § 4477, p. 784. But this is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. *Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 60, 81 L. Ed. 2d 42, 104 S. Ct. 2218 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."). Nor is this a case

where the shift in the government's position is "the result of a change in public policy," *United States v. Owens*, 54 F.3d 271, 275 (CA6 1995); cf. *Commissioner v. Sunnen*, 333 U.S. 591, 601, 92 L. Ed. 898, 68 S. Ct. 715 (1948) (collateral estoppel does not apply to Commissioner where pertinent statutory provisions or Treasury [*756] regulations have changed between the first and second proceeding), or the result of a change in facts essential to the prior [**1818] judgment, cf. *Montana v. United States*, 440 U.S. 147, 159, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) ("changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues"). Instead, it is a case between two States, in which each owes the other a full measure of respect.

What has changed between 1976 and today is New Hampshire's interpretation of the historical evidence concerning the King's 1740 decree. New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself. Given Maine's countervailing interest in the location of the boundary, we are unable to discern any "broad interest of public policy," 18 Wright § 4477, p. 784, that gives New Hampshire the prerogative to construe "Middle of the River" differently today than it did 25 years ago.

* * *

[***LEdHR1G] [1G] [***LEdHR2C] [2C]For the reasons stated, we conclude that judicial estoppel bars

New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

[**1819] [***982] APPENDIX TO OPINION OF THE COURT

[Graphic Omitted; see Printed Opinion].

REFERENCES

28 Am Jur 2d, Estoppel and Waiver 74, 75, 138-143, 146; 32 Am Jur 2d, Federal Courts 578, 599-601

L Ed Digest, Estoppel and Waiver 9; Supreme Court of the United States 67

L Ed Index, Boundaries; Consent Judgment or Decree

Annotation References:

Original jurisdiction of United States Supreme Court in suits between states. 68 L Ed 2d 969.

State or federal law as governing applicability of doctrine of res judicata or collateral estoppel in federal court action. 19 ALR Fed 709.

LEXSEE

WILLIAM M. NICASTRO, et al., Plaintiffs, v. WILLIAM J. CLINTON, et al., Defendants.

Civil Action No. 94-0590 PLF

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

882 F. Supp. 1128; 1995 U.S. Dist. LEXIS 5845

April 28, 1995, Decided

April 28, 1995, FILED

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff inmates brought suit under the Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., (FLSA) against defendant executive directors of federal prison industries, seeking back pay, liquidated and punitive damages, and declaratory and injunctive relief. Defendants filed a motion to dismiss the amended complaint under Fed. R. Civ. P. 12(b) or, in the alternative, for summary judgment under Rule 56.

OVERVIEW: The inmates brought the action pro se, alleging that federal prisoners who worked for federal prison industries (FPI) were employees under the FLSA, and (2) were entitled to a minimum wage because FPI was a self-sustaining private corporation independent of the government. The court was unable to accept the inmates' assertion that the labor they performed for FPI was voluntary and dismissed their action. A prerequisite to finding that the inmates had "employee" status under the FLSA was that the prisoners had freely contracted with a non-prison employer to sell their labor. If their labor was compelled, or if their compensation was set and paid by a custodian, the inmates would be barred from asserting a claim under the FLSA. The inmates were legally required to participate in a prison work program. One of the assignments was to FPI, which was organized specifically as a work program to aid the disciplinary and rehabilitative goals of the prison system and to utilize prison labor. Therefore, the inmates' labor for FPI was not voluntary for purposes of the FLSA.

OUTCOME: The court granted defendants' motion to dismiss for failure to state a claim on which relief could be granted in the inmate's action seeking back pay, liquidated and punitive damages, and declaratory and injunctive relief.

CORE TERMS: prison, inmate, prisoner, minimum wage, work programs, economic reality, compelled, Fair Labor Standards Act, work release program, work assignment, pro se, employee status, failure to state a claim, correctional, procurement, contracted, coverage, freely

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

[HN1]Federal Prison Industries (FPI) was created to provide work to inmates confined in federal institutions. 28 C.F.R. § 345.10 (1994). Its statutory mandate limits FPI to providing products to federal penal and correctional institutions and to other federal departments and agencies, but not for sale to the public. 18 U.S.C.S. § 4122(a). It requires FPI to concentrate on using the greatest number of inmates as is reasonably possible without unduly interfering with private industry and the marketplace. 18 U.S.C.S. §§ 4122(a), (b). All monies and profits received by FPI must be deposited into the Treasury of the United States to be used to pay for the administration of FPI programs, maintenance of FPI buildings and equipment, and vocational training and compensation of inmates. 18 U.S.C.S. § 4126.

Civil Procedure > Parties > Self-Representation > Pleading Standards

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

[HN2]In considering a motion to dismiss, courts must assume the truth of the factual allegations of the complaint and liberally construe them in favor of plaintiff. It may dismiss the complaint for failure to state a claim only if it appears that plaintiff can prove no set of facts in support of his or her claim that would entitle plaintiff to relief. Although pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers, and plaintiff is entitled to all favorable inferences that may be drawn from his or her allegations, a pro se complaint, like any other, must present a claim upon which relief can be granted by the court.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Governmental Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN3]The primary purpose of the Fair Labor Standards Act, (FLSA) is to provide workers with the minimum standard of living necessary for health, efficiency and general well-being. 29 U.S.C.S. § 202(a). The FLSA seeks to accomplish this goal by requiring employers to pay their employees minimum wages and overtime compensation for their work. 29 U.S.C.S. §§ 206(a)(1), 207(a)(1). The FLSA is also intended to prevent unfair competition through the use of unpaid labor. 29 U.S.C.S. § 202(a)(3).

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview

[HN4]The Fair Labor Standards Act, (FLSA) defines an "employee" as any individual employed by an employer, 29 U.S.C.S. § 203(e)(1), and an "employer" as any person acting in the interest of an employer in relation to an employee. 29 U.S.C.S. § 203(d). The broad definition of "employee" is narrowed by the FLSA's exemption from coverage of an extensive list of workers, from executives to babysitters. 29 U.S.C.S. § 213(a). Prisoners are not on the list of workers who are specifically exempted by the FLSA. Under the traditional four-factor economic reality test most often used in determining if a worker is an employee covered by the FLSA, the relevant inquiries are whether the alleged employer (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. When the economic

reality test has been applied to prison labor, inmates generally have been found to fall outside the coverage of the FLSA.

Evidence > Inferences & Presumptions > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview

[HN5]A prerequisite to finding that an inmate has "employee" status under the Fair Labor Standards Act, (FLSA) FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor. Under this analysis, where an inmate participates in a non-obligatory work release program in which he is paid by an outside employer, he may be able to state a claim under the FLSA for compensation at the minimum wage. However, where the inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodian, the prisoner is barred from asserting a claim under the FLSA, since he is definitively not an "employee." In the District of Columbia Circuit a federal prisoner seeking to state a claim under the FLSA must at a minimum allege (1) that his or her work was performed without legal compulsion, and (2) that his or her compensation was set and paid by a source other than the Bureau of Prisons.

COUNSEL: [**1] For Plaintiffs: Pro Se.

For Defendants: Kimberly N. Tarver, Assistant U.S. Attorney, Washington, D.C.

JUDGES: PAUL L. FRIEDMAN, United States District Judge

OPINION BY: PAUL L. FRIEDMAN

OPINION

[*1128] MEMORANDUM OPINION

William M. Nicastro and Roy D. Little are federal prison inmates housed at the United States Penitentiary in White Deer, Pennsylvania, who have brought a claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., ("FLSA") against the Executive Directors of Federal Prison Industries ("FPI"), among others. ¹

¹ The defendants named in the complaint are: William Jefferson Clinton, President of the United States; Janet Reno, United States Attorney General; Kathleen Hawk, Director of the Bureau of Prisons; Les Aspin, former Secretary of De-

fense; and two unnamed Executive Directors of FPI.

[*1129] [HN1]FPI was created to provide work to inmates confined in federal institutions. 28 C.F.R. § 345.10 (1994). Its statutory mandate limits FPI to providing products to federal penal and correctional institutions and to other federal departments and agencies, but not for sale to the public. 18 U.S.C. § 4122(a). It requires [**2] FPI to concentrate on using the greatest number of inmates as is reasonably possible without unduly interfering with private industry and the marketplace. 18 U.S.C. §§ 4122(a) and (b). All monies and profits received by FPI must be deposited into the Treasury of the United States to be used to pay for the administration of FPI programs, maintenance of FPI buildings and equipment, and vocational training and compensation of inmates. 18 U.S.C. § 4126.

Plaintiffs bring this action *pro se*, alleging that federal prisoners who work for FPI (1) are "employees" under the Fair Labor Standards Act, and (2) are entitled to a minimum wage because (3) FPI is a self-sustaining private corporation independent of the government. Plaintiffs also claim that FPI is required by statute to abide by federal procurement standards applicable to public contracts, particularly those standards pertaining to minimum wage. ² Plaintiffs seek back pay, liquidated and punitive damages, and declaratory and injunctive relief. Defendants have moved to dismiss the amended complaint under Rule 12(b), Fed. P. Civ. P., or, in the alternative, for summary judgment under Rule 56, Fed. R. Civ. P. The Court has concluded [**3] that plaintiffs' complaint should be dismissed for failure to state a claim on which relief can be granted under Rule 12(b)(6).

² Plaintiffs cite the Service Labor Act, 41 U.S.C. § 351 et seq., the Davis-Bacon Act, 40 U.S.C. § 276a, and the Walsh-Healey Act, 41 U.S.C. § 35 et seq., as applicable to FPI laborers. Compl. at 16-30; Opp. Mem. at 32-37. These statutes apply to government contracts, however, not "intragovernmental transfers." 18 U.S.C. § 4124(c) ("sales by [FPI] are considered intergovernmental transfers . . . reporting sales by [FPI] to the [Federal Procurement Data System] is to provide a complete overview of acquisitions by the Federal Government . . .")

I. MOTION TO DISMISS

[HN2]In considering a motion to dismiss, the Court must assume the truth of the factual allegations of the complaint and liberally construe them in favor of the plaintiff. It may dismiss the complaint for failure to state a claim only if it appears that the plaintiff can prove no set of facts in support of [**4] his or her claim that

would entitle the plaintiff to relief. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 1845, 114 L. Ed. 2d 366 (1991); Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994); Kenneda v. United States, 880 F.2d 1439, 1442 (D.C. Cir. 1989). Although *pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers," Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), and a plaintiff is entitled to all favorable inferences that may be drawn from his or her allegations, Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), "a *pro se* complaint, like any other, must present a claim upon which relief can be granted by the court." Henthorn v. Department of Navy, 308 U.S. App. D.C. 36, 29 F.3d 682, 684 (D.C. Cir. 1994) (citation omitted).

II. ANALYSIS

[HN3]The primary purpose of the FLSA is to provide workers with the minimum standard of living necessary for health, efficiency and general well-being. 29 U.S.C. § 202(a); see Mitchell v. Robert DeMario Jewelry Inc., 361 U.S. 288, 292, 4 L. Ed. 2d 323, 80 S. [**5] Ct. 332 (1960). The Act seeks to accomplish this goal by requiring employers to pay their employees minimum wages and overtime compensation for their work. 29 U.S.C. §§ 206(a)(1), 207(a)(1). The FLSA is also intended to prevent unfair competition through the use of unpaid labor. 29 U.S.C. § 202(a)(3). Plaintiffs argue that federal prisoners employed by FPI are "employees" covered by the minimum wage provisions of the FLSA.

[*1130] [HN4]The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and an "employer" as "any person acting . . . in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The broad definition of "employee" is narrowed by the Act's exemption from coverage of an extensive list of workers, from executives to babysitters. 29 U.S.C. § 213(a). Plaintiffs correctly point out that prisoners are not on the list of workers who are specifically exempted by the FLSA. Many courts have questioned whether inmates are "employees" within the meaning of the FLSA, however. Concluding that the FLSA's definitions are vague, ambiguous and, as our court of appeals has said, "generally unhelpful," those courts have developed several [**6] tests to determine exactly which workers the FLSA covers. Henthorn v. Department of Navy, 29 F.3d at 684. See, e.g., Hale v. Arizona, 993 F.2d 1387, 1394-95 (9th Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 335, 114 S. Ct. 386 (1993); Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992), cert. denied, 122 L. Ed. 2d 692, 113 S. Ct. 1303 (1993).

Under the traditional four-factor economic reality test most often used in determining if a worker is an employee covered by the FLSA, the relevant inquiries are whether the alleged employer (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. Henthorn v. Department of Navy, 29 F.3d at 684 (citing Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)). When the economic reality test has been applied to prison labor, inmates generally have been found to fall outside the coverage of the FLSA. See, e.g., Emory v. United States, 2 Cl. Ct. 579, 580 (Cl. Ct. 1983), aff'd, 727 F.2d 1119 (Fed. Cir. 1983); Vanskike [**7] v. Peters, 974 F.2d at 810.³

3 Examples of situations where prisoners have been held to be covered by the FLSA are found in two cases presenting very different facts from those in this case. See Watson v. Graves, 909 F.2d 1549, 1553-54 (5th Cir. 1990) (inmates working outside the prison on work release program were found to be "employees" of the outside company and protected by the FLSA); Carter v. Dutchess Community College, 735 F.2d 8, 13-14 (2nd Cir. 1984) (inmate working as a tutor at community college which paid him directly could be "employee" under the FLSA).

The District of Columbia Circuit has recognized that the traditional economic reality test fails "to capture the true nature of [most prison employment] relationship[s] for essentially [it] presuppose[s] a free labor situation." Henthorn v. Department of Navy, 29 F.3d at 686 (quoting Vanskike v. Peters, 974 F.2d at 809). The court in Henthorn, distinguishing those rare cases in which a prisoner is voluntarily [**8] selling his or her labor, explained that

in cases . . . in which the prisoner is legally compelled to part with his labor as part of a penological work assignment and is paid by the prison authorities themselves, the prisoner may not state a claim under the FLSA, for he is truly an involuntary servant to whom no compensation is actually owed.

Id. The Court therefore held that

[HN5]a prerequisite to finding that an inmate has "employee" status under the FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor. Under this analysis, where an

inmate participates in a non-obligatory work release program in which he is paid by an outside employer, he may be able to state a claim under the FLSA for compensation at the minimum wage. However, where the inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodian, the prisoner is barred from asserting a claim under the FLSA, since he is definitively not an "employee."

Id. 29 F.3d 682 at 686-87. In our Circuit, therefore, a federal prisoner seeking to state a claim under the FLSA must at a minimum allege (1) that his or her work was performed [**9] without legal compulsion, and (2) that his or her compensation was set and paid by a source other than the Bureau of Prisons. Henthorn v. Department of Navy, 29 F.3d at 687.

Plaintiffs do claim that they were not compelled to work for FPI and that they contracted [*1131] freely with FPI for their positions. Opp. Mem. at 41. This allegation is wholly unsupported both by the law and by the facts. The Bureau of Prisons runs inmate work programs to reduce inmate idleness and develop useful job skills and work habits to assist in post-release employment. 28 C.F.R. § 545.20. Physically and mentally able federal prisoners such as plaintiffs are legally required to participate in prison work programs. *Id.* Plaintiffs have not alleged that they are entitled to be excused from this mandatory correctional requirement. One of the possible Bureau of Prison work assignments is to Federal Prison Industries. See 28 C.F.R. § 545.20 *et seq.* FPI was organized specifically as a work program to aid the disciplinary and rehabilitative goals of the prison system and to utilize prison labor. See Sprouse v. Federal Prison Industries, Inc., 480 F.2d 1 (5th Cir.), *cert. denied*, 414 U.S. 1095, [**10] 38 L. Ed. 2d 553, 94 S. Ct. 728 (1973); see 28 C.F.R. § 545.50.

The Court is unable to accept plaintiffs' assertion that the labor they perform for FPI is voluntary. Plaintiffs' failure to legitimately allege "employee" status under the FLSA renders them outside the ambit of the statute. Henthorn v. Department of Navy, 29 F.3d at 687. For these reasons, the Court concludes that Mr. Nicastro and Mr. Little's complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6), Fed. R. Civ. P. Accordingly, the Court grants the defendants' motion to dismiss and dismisses all claims against them. An Order consistent with this Memorandum Opinion is entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Court
DATE: 4/28/95

ORDER

For the reasons stated in the Memorandum Opinion filed on this day, it is this *28th* day of April, 1995, hereby

ORDERED that defendants' Motion To Dismiss is GRANTED; it is

FURTHER ORDERED that this case is DISMISSED with prejudice; and it is

FURTHER ORDERED that this case shall be removed from the docket of this Court.

SO ORDERED.

PAUL L. FRIEDMAN
United [**11] States District Judge

LEXSEE

**VICKY RAVIJOJLA POWELL, Petitioner, v. LAURA H. TANNER; HARCOURT
BRACE & COMPANY; and THE HERTZ CORPORATION, Respondents.**

Supreme Court Nos. S-10254/10264, No. 5644

SUPREME COURT OF ALASKA

59 P.3d 246; 2002 Alas. LEXIS 160

November 22, 2002, Decided

PRIOR HISTORY: [**1] Petition for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Rene J. Gonzalez, Judge. Superior Court No. 3AN-99-8250 CI.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant injury victim filed suit against appellee driver, employer, and rental car company for injuries sustained in an automobile accident under theories of respondeat superior, agency, joint enterprise, negligence, negligent entrustment, and supervision. The Superior Court, Third Judicial District, Anchorage (Alaska), granted summary judgment to the employer and rental company, dismissing all claims against them. The victim appealed.

OVERVIEW: The trial court held the driver was an independent contractor and granted summary judgment dismissing the victim's claims against the employer. On appeal, the victim argued that there was a factual dispute regarding whether the driver was an independent contractor. The appellate court found that there was a genuine issue of material fact regarding whether the driver was an employee, making the employer potentially vicariously liable for the driver's actions. Thus, summary judgment was improperly granted for the employer. The court examined the factors of Restatement (Second) of Agency § 220(2). The court found that the factors did not permit the trial court to resolve on summary judgment whether there was a master and servant relation. The employer offered prima facie evidence that it exercised insufficient control over the driver to create an employer employee relationship; however, other Restatement factors indicated that the driver was an independent contractor. The court also reversed the order striking 37 of the

victim's witnesses, because the victim's failure to identify the additional witnesses would not prejudice the employer in light of the remand of the case for trial.

OUTCOME: The judgment was reversed.

CORE TERMS: independent contractor, summary judgment, servant, witness list, presentation, discovery, per diem, educational, teacher, in-service, disclosure, demonstration, factual dispute, contractor, scheduling, hiring, hired, vicariously liable, respondeat superior, right to control, relation of master, citation omitted, non-compliance, publisher, deadline, partial, depose, rental, vicarious liability, order striking

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1]An appellate court reviews a grant of summary judgment de novo and adopts the rule of law that is most persuasive in light of precedent, reason, and policy.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN2]To obtain summary judgment, the moving party must prove the absence of a genuine factual dispute and its entitlement to judgment as a matter of law. All reasonable inferences of fact are drawn in favor of the non-moving party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Torts > Vicarious Liability > Independent Contractors

[HN3]Because characterization of the relationship between an employer and alleged employee is ordinarily an issue for the trier of fact, the burden is initially on the employer to affirmatively demonstrate that the alleged employee was an independent contractor rather than an employee. If the employer makes this prima facie showing, a plaintiff must then establish facts from which it reasonably may be inferred that the alleged employee was an employee. In other words, a plaintiff must prove that a genuine issue of fact exists by showing that she can produce admissible evidence reasonably tending to dispute the employer's evidence.

Labor & Employment Law > Employer Liability > Contract Liability > Third Party Liability

Torts > Vicarious Liability > Employers > Scope of Employment > General Overview

[HN4]Under the doctrine of respondeat superior, an employer is liable for the negligent acts or omissions of his employee committed within the scope of his employment.

Torts > Vicarious Liability > Independent Contractors

[HN5]Under the independent contractor rule the doctrine of respondeat superior does not apply to acts of independent contractors: Because such an employer normally does not control the work of the independent contractor, he is not held liable for the torts of the contractor and its employees.

Torts > Vicarious Liability > Independent Contractors

[HN6]An independent contractor is any person who does work for another under conditions which are not sufficient to make him a servant of the other.

Torts > Vicarious Liability > Independent Contractors

[HN7]Alaska courts have employed the Restatement (Second) of Agency § 220(2) (1958) factors defining a servant to determine the nature of the relationship between a worker and an employer.

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > Vicarious Liability > Independent Contractors

[HN8]An independent contractor, as distinguished from a mere employee, is one who, carrying on an independent business, contracts to do a piece of work according to

his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.

Torts > Vicarious Liability > Independent Contractors

[HN9]In determining whether a hired party is an employee under the general common law of agency, appellate courts consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Torts > Vicarious Liability > Employers > General Overview

Torts > Vicarious Liability > Independent Contractors

[HN10]Alaska courts have used the language of comment c to the Restatement (Second) of Agency § 220 to describe the degree of control required under Restatement (Second) of Agency § 220(2)(a) to impose vicarious liability: It is not enough that the employer has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Business & Corporate Law > Agency Relationships > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

Business & Corporate Law > Agency Relationships > Agents Distinguished > Independent Contractors, Masters & Servants > Masters & Servants

Torts > Vicarious Liability > Independent Contractors

[HN11]If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant.

Torts > Vicarious Liability > Independent Contractors

[HN12]While the existence or nonexistence of a master-servant relationship is ordinarily a jury question, if the inference is clear that there is, or is not, a master and servant relation, it is made by the court.

Torts > Vicarious Liability > Independent Contractors

[HN13]The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master.

Torts > Vicarious Liability > Independent Contractors

[HN14]A work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > Vicarious Liability > Independent Contractors

[HN15]The mere fact that the question as to whether a particular relationship is that of master-servant or employer-independent contractor is ordinarily a factual one does not mean that it cannot be decided by the court on a motion for summary judgment, where the moving party meets its burden and the nonmoving party does not adequately respond.

Civil Procedure > Discovery > Misconduct

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN16]The choice of a particular sanction for a discovery violation generally is a matter committed to the broad discretion of the trial court, subject only to review for abuse of discretion.

Civil Procedure > Discovery > Misconduct

[HN17]The trial court's discretion is limited when the effect of the discovery sanction it selects is to impose liability on the offending party, establish the outcome of or preclude evidence on a central issue, or end the litigation entirely. Before extreme sanctions of this kind may properly be imposed, there must be willful noncompliance with court orders, or extreme circumstances, or gross violations of the discovery rules. The record must also clearly indicate a reasonable exploration of possible and meaningful alternatives to dismissal. If meaningful alternative sanctions are available, the trial court must ordinarily impose these lesser sanctions.

Civil Procedure > Discovery > Disclosures > Mandatory Disclosures

[HN18]Alaska R. Civ. P. 26(a)(3)(A) requires parties to identify each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises.

Civil Procedure > Discovery > Disclosures > Mandatory Disclosures

[HN19]Alaska R. Civ. P. 26(e)(1) provides that after making initial disclosures under Rule 26(a) a party is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Civil Procedure > Discovery > Misconduct

[HN20]Sanctions for noncompliance with discovery provisions of Alaska R. Civ. P. 26 are governed by Alaska R. Civ. P. 37(c)(1).

Civil Procedure > Discovery > Misconduct

[HN21]See Alaska R. Civ. P. 37(c)(1).

Evidence > Relevance > Confusion, Prejudice & Waste of Time

[HN22]See Alaska R. Evid. 403.

COUNSEL: John R. White, The Law Offices of Jody Brion, Anchorage, for Petitioner.

Donald C. Thomas, Delaney, Wiles, Hayes, Gerety, Ellis & Young, Inc., Anchorage, for Respondents.

JUDGES: Before: Fabe, Chief Justice, Matthews, and Bryner, Justices. [Eastaugh and Carpeneti, Justices, not participating.]

OPINION BY: FABE

OPINION

[*247] FABE, Chief Justice.

I. INTRODUCTION

These consolidated petitions for review arise out of an automobile accident which occurred when Laura H. Tanner changed lanes and her automobile collided with Vicky Ravijojla Powell's automobile. Tanner was driving a Hertz rental car and was working for Harcourt Brace & Co. at the time of the accident. The trial court granted summary judgment dismissing Powell's vicarious liability claims against Harcourt. The trial court also struck thirty-seven witnesses from Powell's final witness [**2] list who had not been named as witnesses until after the close of discovery. Because there is a genuine issue of material fact regarding whether Tanner is a Harcourt employee, making Harcourt potentially vicariously liable for Tanner's actions, summary judgment was improperly granted in favor of Harcourt. In addition, because any immediacy which required striking thirty-seven of Powell's witnesses no longer exists, we need not address whether the order striking Powell's witnesses was an abuse of discretion.

II. FACTUAL HISTORY

Tanner began working for Harcourt, a publishing company that publishes and sells educational materials, after responding to an advertisement placed by Harcourt stating "educational publisher needs teacher." Tanner worked for Harcourt from the summer of 1996 to the summer of 1998. On March 1, 1997, Tanner signed Harcourt's "Per Diem Agreement for Independent Contractors" which specified that Tanner had been "engaged, on a per diem basis [at \$ 125 per day], for no more than 16 days . . . [to] sell[] all Harcourt Brace School Publishers programs in the state of Hawaii." ¹

¹ Tanner also had an hourly contract with Harcourt, entered into on May 1, 1997, under which she performed administrative work for Harcourt, such as contacting schools to see if they were interested in receiving samples of Harcourt's materials and setting up a database.

[**3] In August 1997 Tanner came to Anchorage to conduct demonstrations of educational materials for Harcourt at an Anchorage School District in-service for teachers. Tanner arrived in Anchorage on August 20,

1997, the [*248] day of the accident, and checked into her hotel. Tanner picked up a rental car from Hertz and drove to a storage facility to retrieve the Harcourt materials she needed for her presentation the following day. While driving back to the hotel, Tanner attempted to change lanes and Powell and Tanner's vehicles collided, allegedly causing injuries to Powell's person and automobile.

III. DISCUSSION

A. The Superior Court Erred in Granting Partial Summary Judgment to Harcourt.

1. Procedural history relating to summary judgment

Powell brought suit against Tanner, Harcourt, and Hertz, alleging that Harcourt and Hertz "are vicariously responsible for defendant Tanner's acts and omissions under the theories of respondeat superior, agency, joint enterprise, negligence, negligent entrustment, and negligent supervision." Powell further alleged in the complaint that the accident caused severe injuries to her neck, head, back, arms, knees, bladder, abdomen, ribs, [**4] and face, as well as damage to her vehicle. In the answer, Harcourt admitted that "Tanner was in the course and scope of her contract with Harcourt at the time of the accident, and that Harcourt paid for the rental of the vehicle Tanner was driving."

Harcourt and Hertz moved for partial summary judgment, seeking to dismiss all claims against them. Harcourt argued that Tanner was an independent contractor at the time of the accident and so Harcourt could not be vicariously liable for Tanner's actions under the "independent contractor rule."

After considering the motion for summary judgment and Powell's opposition, the superior court summarily granted the motion for summary judgment in favor of Harcourt and Hertz, dismissing all claims against them. The superior court subsequently denied Powell's motion to reconsider. Powell petitioned this court to review the summary judgment order. She did not seek review of the court's order dismissing all of Powell's claims against Hertz. We granted Powell's petition.

2. Standard of review relating to motion for summary judgment [HN1] We review a grant of summary judgment de novo and adopt the rule of law that is most persuasive in light of precedent, [**5] reason, and policy. ² [HN2] To obtain summary judgment, the moving party must prove the absence of a genuine factual dispute and its entitlement to judgment as a matter of law. ³ All reasonable inferences of fact are drawn in favor of the nonmoving party. ⁴

2 State v. Alaska Civil Liberties Union, 978 P.2d 597, 603 (Alaska 1999); Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248, 1254 (Alaska 1993).

3 Alaska Civil Liberties Union, 978 P.2d at 603.

4 McGlothlin v. Municipality of Anchorage, 991 P.2d 1273, 1277 (Alaska 1999).

[HN3]Because characterization of the relationship between Harcourt and Tanner is ordinarily an issue for the trier of fact, the burden is initially on Harcourt to affirmatively demonstrate that Tanner was an independent contractor rather than an employee. ⁵ If Harcourt makes this prima facie showing, Powell must then establish facts from which it reasonably may be inferred that Tanner was an employee. ⁶ [**6] In other words, Powell must prove that a genuine issue of fact exists by showing that she can produce admissible evidence reasonably tending to dispute Harcourt's evidence. ⁷

5 See Sterud v. Chugach Elec. Ass'n, 640 P.2d 823, 827 n.8 (Alaska 1982).

6 See *id.*

7 See Lincoln v. Interior Reg'l Hous. Auth., 30 P.3d 582, 586 (Alaska 2001).

3. There is a factual dispute regarding whether Tanner was Harcourt's servant or its independent contractor.

[HN4]"Under the doctrine of respondeat superior, an employer is liable for the negligent acts or omissions of his employee committed within the scope of his employment." ⁸ [*249] Harcourt has admitted that "Tanner was in the course and scope of her contract with Harcourt at the time of the accident, and that Harcourt paid for the rental of the vehicle Tanner was driving." However, the parties dispute whether Tanner was an independent contractor or an employee. [HN5]Under the "independent contractor rule" the doctrine [**7] of respondeat superior does not apply to acts of independent contractors: "Because such an employer normally does not control the work of the independent contractor, he is not held liable for the torts of the contractor and its employees." ⁹

8 Luth v. Rogers & Babler Constr. Co., 507 P.2d 761, 762 (Alaska 1973); see also PROSSER AND KEETON ON TORTS § 70, at 501-03 (5th ed. 1984).

9 Parker Drilling Co. v. O' Neill, 674 P.2d 770, 775 (Alaska 1983). For purposes of determining whether Harcourt is vicariously liable under a theory of respondeat superior, we assume that Tanner was negligent. See Sterud, 640 P.2d at 825 ("For purposes of this [vicarious liability/

ity/respondent superior] theory, the negligence of Hansen or Smith is assumed.").

[HN6]An independent contractor is "any person who does work for another under conditions which are not sufficient to make him a servant of the other." ¹⁰ [HN7]We have employed the Restatement (Second) of Agency § 220(2) [**8] (1958) factors defining a servant to determine the nature of the relationship between a worker and an employer: ¹¹

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part [**9] of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business. ¹²

¹⁰ RESTATEMENT (SECOND) OF TORTS § 409 cmt. a; see also Soderback v. Townsend, 57 Ore. App. 366, 644 P.2d 640, 641 (Or. App. 1982) [HN8] ("An independent contractor, as distinguished from a mere employee, is one who, carrying on an independent business, contracts to do a piece of work according to his own methods,

and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work." (citation omitted).

11 *Sterud*, 640 P.2d at 826.

12 See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) [HN9] ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." (citations omitted).

[**10] [HN10] We have used the language of comment c to the Restatement (Second) of Agency § 220 to describe the degree of control required under Restatement (Second) of Agency § 220(2)(a) to impose vicarious liability:

It is not enough that [the employer] has merely a general right to order the work stopped or resumed, to inspect its progress [*250] or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.¹³

Harcourt exercised control over some aspects of Tanner's work. But because the evidence leads to no clear conclusion whether Tanner is, or is not, an employee of Harcourt, it is for the jury to decide the nature of their employment relationship.¹⁴

13 *Hammond v. Bechtel, Inc.*, 606 P.2d 1269, 1275 (Alaska 1980); see also RESTATEMENT (SECOND) OF TORTS § 414 cmt. a (1965) ("[HN11] If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liabil-

ity for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant.").

[**11]

14 See *Sterud*, 640 P.2d at 826 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. c (1958)) (providing that [HN12] while the existence or nonexistence of a master-servant relationship is ordinarily a jury question, "if the inference is clear that there is, or is not, a master and servant relation, it is made by the court").

On one hand, Harcourt controlled where Tanner held her in-service demonstrations and the type of administrative work that she performed. Harcourt paid for Tanner to attend a training session on its materials and suggested that she dress professionally for the job. Harcourt provided Tanner with the names of the schools where she was to make in-service presentations, and provided her with specific material for use at her presentations, including training outlines. Sasha Hedona, a Harcourt sales representative, scheduled some of the in-services where Tanner made presentations, while other times Tanner would call and schedule in-services for times which were convenient for her. Hedona attended some, but not all, of the in-service demonstrations that Tanner performed [**12] in Anchorage, but Tanner often did not know which demonstrations Hedona would be attending. Harcourt also directed Tanner to reserve her flight to Alaska through Harcourt's travel agent and Harcourt directly paid for Tanner's flight and car rental.

On the other hand, in her affidavit, Tanner indicated that for her work in Anchorage, she "re-worked an outline and determined how to present the Harcourt Brace training material to the teachers [she] instructed." In making presentations, Tanner used her own overheads or used ones she received from other people and there were no scripts which she was required to follow. She testified that "how I presented [Harcourt's] materials was up to me." She could refuse assignments she felt were outside of her expertise, and she could reschedule presentations. Tanner stated in her deposition that Hedona "wasn't a supervisor in the traditional sense . . . She wasn't always aware of exactly what I was doing. She didn't totally keep tabs on every detail . . ." In sum, there is a factual dispute as to whether Harcourt exercised sufficient control over Tanner's work to make Tanner a servant.

There is also a factual dispute as to whether the other [**13] Restatement § 220(2) factors indicate that Tanner is an employee or an independent contractor. For example, a jury could reasonably conclude that Tanner generally works as a teacher, which is distinct from Harcourt's educational publishing business.¹⁵ Tanner re-

sponded to an advertisement in the education section of the newspaper that said "educational publisher needs teacher," and Powell acknowledges that Tanner is a teacher by profession. However, a jury also could reasonably conclude that Tanner's work in demonstrating Harcourt's educational materials to teachers is not sufficiently distinct from Harcourt's principal business of selling educational materials, since Tanner's demonstrations could be considered essential to achieving sales. Indeed, the per diem contract between the parties indicates that Tanner was hired to "sell[] all [*251] Harcourt Brace School Publishers programs"

15 See RESTATEMENT (SECOND) OF AGENCY § 220(2)(b) (1958).

A jury also could reasonably conclude that, although Tanner [**14] reworked some of her outlines, Harcourt "supplies the instrumentalities [and] tools" for Tanner by providing her with its sample educational materials, which she was required to show to the teachers at her presentations, and with outlines which she could use for her presentations.¹⁶ In addition, Tanner's per diem contract indicates that "Harcourt Brace will own any materials or other contributions prepared by you, including copyright throughout the world, as work-made-for-hire."¹⁷ In addition, Harcourt arguably provided Tanner with "the place of work"¹⁸ by telling her which schools needed in-service presentations.

16 RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1958).

17 The fact that Harcourt owns the materials that Tanner creates would seem to indicate that she is Harcourt's servant. See RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. k (1958) [HN13] ("The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master."). However, the United States Supreme Court has made clear that [HN14] "a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors." Community for Creative Non-Violence, 490 U.S. at 743.

[**15]

18 RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1958).

There is also a factual dispute as to whether Tanner was paid "by the time" rather than "by the job."¹⁹ She earned \$ 125 per day for her work in Anchorage. But

Harcourt argues that "the facts clearly suggest that a demonstration would not take more than a day. In effect, Tanner was paid per demonstration." Whether the facts do, in fact, indicate that Harcourt effectively paid Tanner by the job is an issue for the jury. The jury may also consider the evidence that Tanner did not receive a W-2 form from Harcourt. Rather, she received an IRS 1099 form and paid self-employment tax on the \$ 9,000 to \$ 10,000 she earned from her work for Harcourt in 1997. How much weight to give the method-of-payment factor against other factors also is an issue for the factfinder.²⁰

19 RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (1958).

20 At least one court has held that a worker is an independent contractor in spite of evidence that the worker is paid on a per diem basis. See Soderback v. Townsend, 57 Ore. App. 366, 644 P.2d 640, 642 (Or. App. 1982) (holding that broker was an independent contractor, despite undisputed evidence that he was paid a per diem of \$ 175 plus expenses).

[**16] The record indicates that there is a factual dispute over whether Tanner and Harcourt "believed they [were] creating the relation of master and servant."²¹ The only employment contract in the record is the independent contractor contract, and Tanner has repeatedly asserted that she considered herself to be an independent contractor when she did work for Harcourt. She also states that although she was representing Harcourt when making presentations, she "didn't have authority to speak for the company." But Powell argues that Harcourt's and Tanner's statements that she "was doing work for Harcourt Brace" and that she was acting within "the scope of her employment" at the time of the accident indicate that she believed she was an employee of Harcourt. However, the fact that Tanner admitted to working for Harcourt says nothing about the nature of their working relationship.²²

21 RESTATEMENT (SECOND) OF AGENCY § 220(2)(i) (1958).

22 See Soderback, 644 P.2d at 643 ("That Townsend may have represented himself as 'working for' Quasar did not present any evidence to dispute Quasar's evidence on its lack of any right to control the means whereby Townsend accomplished his mission for Quasar.").

[**17] More relevant is Powell's argument that the independent contractor per diem contract does not apply to Tanner's work in Alaska. Tanner's March 1, 1997 "Per Diem Agreement for Independent Contractors" provided that Tanner had been "engaged, on a per diem basis [at \$ 125 per hour], for no more than 16 days . . . [to] sell[] all

Harcourt [*252] Brace School Publishers programs in the state of Hawaii." The plain language of this contract covers only sales of Harcourt programs in Hawaii. Thus, a jury reasonably could infer that the contract does not cover the in-service presentations that Tanner conducted in Alaska.²³

23 Furthermore, the record suggests that Tanner may have already exceeded the sixteen days of work authorized under the contract. Tanner explained that between March 1, 1997 and August 20, 1997, the day of the accident, she had worked less than twenty days under that contract. However, in her deposition, Tanner stated that she had done approximately ten presentations for Harcourt before the day of the accident.

[**18] In sum, the application of Restatement § 220(2) factors (a), (b), (e), (g), and (i) to the facts of this case does not permit the court to resolve on summary judgment whether there is, or is not, a master and servant relation.²⁴ Harcourt offered prima facie evidence that it exercised insufficient control over Tanner to create an employer employee relationship and that the other Restatement factors indicate that Tanner was an independent contractor. Powell also satisfied her burden that there is a genuine issue of material fact by providing evidence from which a jury reasonably could infer that Tanner was an employee.²⁵ Therefore, we reverse the trial court's partial summary judgment in favor of Harcourt.²⁶ On remand, the jury must consider the evidence relating to each of the factors and decide how to weigh the factors in determining the nature of the working relationship between [*253] Harcourt and Tanner.²⁷

24 See RESTATEMENT (SECOND) OF AGENCY § 220(1), cmt. c (providing that although the existence or nonexistence of a master-servant relationship is ordinarily a jury question, "if the inference is clear that there is, or is not, a master and servant relation, it is made by the court."); see also Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752-53, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (holding that sculptor was an independent contractor because "Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid \$ 15,000, a sum depend-

ent on 'completion of a specific job, a method by which independent contractors are often compensated.' Reid had total discretion in hiring and paying assistants. 'Creating sculptures was hardly 'regular business' for CCNV.' Indeed, CCNV is not a business at all. Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.") (citations omitted).

[**19]

25 See Sterud v. Chugach Elec. Ass'n, 640 P.2d 823, 826-27 n.8 (Alaska 1982) (affirming judgment in favor of the employer as a matter of law based on affidavits submitted by the employer that indicated that it had no control over the manner and means by which construction by the contractor/labor broker was performed, and the injured party offered no evidence to indicate that the employer retained control over details of the labor involved in the construction: [HN15]"The mere fact that the question as to whether a particular relationship is that of master-servant or employer-independent contractor is ordinarily a factual one does not mean that it cannot be decided by the court on a motion for summary judgment, where the moving party meets its burden and the nonmoving party does not adequately respond.").

26 Powell appears to argue that even if Tanner could be considered an independent contractor, Harcourt is vicariously liable for the accident because Tanner is an agent of Harcourt. However, the critical inquiry in determining vicarious liability is whether a master-servant relationship exists; evidence of agency, alone, is insufficient to impose vicarious liability. See Norris v. Sackett, 63 Ore. App. 762, 665 P.2d 1262, 1262-63 (Or. App. 1983) (holding that a corporation's liability could not be established merely by showing that the motor vehicle operator was an agent of the corporation; the corporation must have been the worker's master and must have had a right to control its servant while carrying out a task for the corporation's benefit); RESTATEMENT (SECOND) OF AGENCY § 250, cmt. a ("It is only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.").

Powell also asserts that the case law cited by the respondents "does not deal with a company

being responsible for acts of an agent against third[]parties." However, neither the Restatement nor any decision by this court indicates that an employer may be vicariously liable when an independent contractor injures a third party. Thus, the fact that a third party was injured in this case is irrelevant.

[**20]

27 RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. c ("The relation of master and servant is one not capable of exact definition. . . . The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.") (citation omitted).

B. The Striking of Thirty-Seven of Powell's Witnesses 1. Procedural history relating to motion to strike witnesses

On March 8, 2000, the parties held a planning meeting and agreed on a scheduling order setting trial for June 4, 2001. They agreed to provide each other with preliminary witness lists by June 8, 2000, to complete discovery by February 28, 2001, and to exchange final witness lists by April 4, 2001.

In Powell's initial disclosures dated November 25, 1999, she provided the factual basis for her claims against Tanner, and identified twenty-three witnesses, including eighteen witnesses who would "testify as to the nature of the injury, its relation to the accident, that it may cause permanent problems, [**21] and that it will limit Ms. Powell's activities, work, and his [or her] treatment of the same." In her response to interrogatories on March 31, 2000, Powell listed medical bills from more than twenty medical centers and doctors, and stated that future medical bills would be incurred for problems relating to her knee and bladder.

On June 7, 2000, Powell timely filed her preliminary witness list, naming twenty-five witnesses. On March 14, 2001, Powell supplemented her preliminary witness list with one additional witness. In her final witness list, timely filed on April 4, 2001, Powell listed sixty-eight witnesses, including thirty-eight witnesses who had not been named in her preliminary witness list or initial disclosures.

On April 9, 2001, Harcourt moved to strike the new witnesses, arguing that Powell could have identified them at the moment the lawsuit was filed, and that Harcourt would be prejudiced by the addition of these new witnesses because it did not have time to interview them in the two months before trial.²⁸ Powell responded that the new witnesses were necessary to rebut allegations that Powell was not injured in the accident and that her

hotel project, for which she [**22] claims financial loss, was not fully in effect at the time of the accident. She further argued that the names of all of the new witnesses were revealed to Harcourt through discovery. On May 31, 2001, the trial court summarily granted Harcourt's motion and struck thirty-eight of Powell's new witnesses.

28 On May 2, 2001, the superior court granted Powell's attorney's motions to withdraw from the case and to continue the June 4, 2001 trial. However, the trial court did not reopen discovery.

Powell filed a motion for reconsideration, describing the nature of the testimony to be given by each witness and how their identities were disclosed to Harcourt in discovery. The trial court denied reconsideration in part, ruling that Powell may only "supplement her witness [list] with Dr. Leon Chandler, whom she has identified as her current treating physician."

Powell petitioned for review of the trial court's orders striking certain of her witnesses and entering partial summary judgment against her. We granted this [**23] petition as well as the petition challenging summary judgment and consolidated them.

2. Standard of review relating to order striking witnesses Powell argues that the trial court erred in striking her witnesses because there is no evidence of "willful noncompliance" with court orders, or 'extreme circumstances,' or 'gross violations.'" [HN16]The choice of a particular sanction for a discovery violation generally is a matter committed to the broad discretion of the trial court, subject only to review for abuse of discretion.²⁹ Because the court's striking of thirty-seven of Powell's witnesses does not establish the outcome of this case or end the litigation, we need not determine whether the order was justified [*254] because of "willful noncompliance" with court orders, "extreme circumstances," or "gross violations" of the Rules, nor must we determine whether the trial court explored alternatives to the sanction.³⁰

²⁹ *Sykes v. Melba Creek Mining, Inc.*, 952 P.2d 1164, 1169 (Alaska 1998).

³⁰ See *id.* at 1169-70 [HN17] ("The trial court's discretion is limited when the effect of the sanction it selects is to impose liability on the offending party, establish the outcome of or preclude evidence on a central issue, or end the litigation entirely. Before extreme sanctions of this kind may properly be imposed, there must be 'willful noncompliance' with court orders, or 'extreme circumstances,' or 'gross violations' of the Rules. The record must also 'clearly indicate a reasonable exploration of possible and meaningful alternatives to dismissal.' . . . If meaningful alterna-

tive sanctions are available, the trial court must ordinarily impose these lesser sanctions.") (citations omitted).

[24] 3. We need not decide whether the trial court abused its discretion by striking witnesses because Powell's failure to supplement her disclosure no longer prejudices Harcourt and Tanner.**

Powell argues that because there was no "evidence of prejudice, noncompliance with a court order, or bad faith, it was error for the trial court to strike 37 witnesses from Powell's final witness list."³¹ Harcourt argues that Powell violated the court's pre-trial order for the parties to file preliminary witness lists and to supplement their initial disclosures every thirty days until discovery closed.

³¹ The trial court initially struck thirty-eight of Powell's new witnesses, but upon reconsideration, it allowed one of the thirty-eight witnesses to be added to Powell's final witness list. Thus, only thirty-seven witnesses were struck.

[HN18]Alaska Rule of Civil Procedure 26(a)(3)(A) requires parties to identify "each witness, separately identifying those whom the party expects to present and those whom the party may [**25] call if the need arises." [HN19]Alaska Rule of Civil Procedure 26(e)(1) provides that after making initial disclosures under Rule 26(a)

[a] party . . . is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

[HN20]Sanctions for noncompliance with these provisions are governed by Alaska Rule of Civil Procedure 37(c)(1):

[HN21]A party that without substantial justification fails to disclose information required by Rule 26(a), 26(e)(1), or 26.1(b) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

Powell complied with Rule 26(a) by providing initial disclosures and she complied with the scheduling order's deadlines for filing preliminary and final witness lists. Complicating this case is an anomalous provision in the scheduling order requiring [**26] the parties to file their final witness lists after discovery closed. The scheduling order's sequencing of deadlines created a po-

tential conflict over an opposing party's inability to depose witnesses identified for the first time in the final witness list without violating the close of discovery deadline. Nothing in the scheduling order limited the number of witnesses the parties could call or otherwise addressed how to resolve this foreseeable dispute.

On the other hand, Powell's failure to identify the thirty-seven additional witnesses before the close of discovery may have been prejudicial at the time, given the looming June 2001 trial date.³² However, because we reverse the trial court's order granting summary judgment, a new trial date must be set and discovery will likely be reopened. We therefore need not address whether the trial court abused its discretion because any time pressures that existed in spring 2001 no longer exist and Harcourt will now have time to depose Powell's additional witnesses. Powell's [**255] failure to supplement her disclosures will no longer prejudice Harcourt and Tanner.³³

³² *But see Sigala v. Spikouris*, 2002 U.S. Dist. LEXIS 10743, 2002 WL 721078, 3 (E.D.N.Y. 2002) (rejecting the defendant's argument that it should be permitted to depose all witnesses listed on plaintiff's witness list because the argument finds "no support in the Federal Rules of Civil Procedure").

[**27]

³³ Note that our decision does not preclude Harcourt from seeking an order compelling Powell to furnish a list of witnesses she actually intends to call at trial. *Cf. Matter of Long*, 34 B.R. 85, 87 (Bankr. M.D. Fla. 1983) ("It is quite obvious that it is absurd to bombard a litigant with a list of an army of prospective witnesses without specifying which of them will actually testify. In such a situation, the litigant is faced with two choices, both of them unfair. He either takes the chance and guesses which of them will actually testify and depose them or not to take this chance and depose all of them."). Neither does our decision preclude Harcourt from moving to exclude the testimony of any of Powell's witnesses under Alaska Rule of Evidence 403. *See* Alaska R. Evid. 403 [HN22] ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

IV. CONCLUSION

Reasonable [**28] minds could differ as to whether the Restatement (Second) of Agency § 220(2) factors

indicate that Tanner was an employee or an independent contractor. Accordingly, we REVERSE the order granting Harcourt partial summary judgment. We also REVERSE the order striking thirty-seven of Powell's

witnesses because Powell complied with the scheduling order deadline, and her failure to identify the additional witnesses will not prejudice Harcourt and Tanner in light of our decision to remand the case for trial.

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United States District Court,
 N.D. Texas,
 Amarillo Division.
 Lisa PROCTOR and Duncan Proctor, Plaintiffs,
 v.
 ALLSUPS CONVENIENCE STORES, INC., a New
 Mexico Corporation, Lonnie D. Allsup, an individual
 and Barbara J. Allsup, an individual, Defendants.
 No. 2:06-CV-255-J.

April 24, 2008.

Background: Employees brought collective action against employer under Fair Labor Standards Act (FLSA), alleging failure to pay overtime wages. The District Court conditionally certified class and authorized sending of notice to potential plaintiffs. Following discovery, employer moved for decertification.

Holding: The District Court, Mary Lou Robinson, J., held that decertification was warranted based on evidence that putative class members were not similarly situated to named employees.

Motion granted.

West Headnotes

[1] Labor and Employment 231H  2377

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)6 Actions
 231Hk2373 Actions on Behalf of Others
 in General

231Hk2377 k. Class Actions. Most Cited Cases
 At decertification stage of FLSA collective action, burden is on plaintiff to prove that the individual class members are similarly situated to named plaintiffs. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

[2] Labor and Employment 231H  2375

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)6 Actions
 231Hk2373 Actions on Behalf of Others
 in General

231Hk2375 k. Employees Similarly Situated. Most Cited Cases
 Factors in deciding whether class members in FLSA collective action are similarly situated to named plaintiffs, as required to defeat motion for decertification, include: (1) disparate factual and employment settings of individual plaintiffs; (2) various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

[3] Labor and Employment 231H  2375

231H Labor and Employment
 231HXIII Wages and Hours
 231HXIII(B) Minimum Wages and Overtime
 Pay
 231HXIII(B)6 Actions
 231Hk2373 Actions on Behalf of Others
 in General

231Hk2375 k. Employees Similarly Situated. Most Cited Cases
 Class decertification was warranted, on “similarly situated” grounds, in employees’ FLSA collective action against employer alleging failure to pay overtime wages; there was no evidence of single decision, policy or plan causing employees to work off the clock, and conversely there was evidence indicating employer’s official policy to prohibit working off the clock, and furthermore there was variation, from store to store, manager to manager, and day to day, among putative class members as to whether and how much they had worked off the clock. Fair Labor Standards Act of 1938, §§ 7(a), 16(b), 29 U.S.C.A. §§ 207(a), 216(b).
 *279 Philip R. Russ, Law Office of Philip R. Russ, Amarillo, TX, Mark Wilson Laney, Laney & Stokes, Plainview, TX, for Plaintiffs.

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Michael W. Fox, Robert Chance, Ogletree Deakins
 Nash Smoak & Stewart, Austin, TX, for Defendants.

MEMORANDUM OPINION

MARY LOU ROBINSON, District Judge.

On March 7, 2008, the Defendants filed a *Motion for Decertification and Brief in Support*. The Plaintiffs filed their response on April 7, 2008, and Defendants filed a reply on April 16, 2008. Defendants' motion is GRANTED.

BACKGROUND

Plaintiffs filed this case on September 22, 2006, alleging violations of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 207(a). The named Plaintiffs filed on behalf of themselves and as representatives of other similarly situated workers. Allsup's Convenience Stores is a New Mexico Corporation that operates 301 company stores in New Mexico and Texas. Plaintiffs allege that Allsup's conspired and acted concertedly to avoid paying overtime to its hourly employees. Plaintiffs allege that Allsup's required their employees to clock out after completing forty hours of work per week and to continue working off the clock for 1 to 3 hours each week. Plaintiffs allege that they were not able to finish their duties during their shifts, and had to stay late in order to clean bathrooms, transition to the next shift, balance the cash register, and complete paperwork.

Each Allsup's store is allocated a certain number of working hours per week by corporate headquarters. This number of hours is used to set shifts for the hourly workers. The number of hours is set based partly on sales and traffic in each store. Stacey Owens, the director of human resources for Allsup's, admits that the company tries to keep the amount of overtime worked to a minimum to control costs. Store managers can also lose a part of their bonus if they go over their store's allotted overtime hours.

On April 18, 2007, the Court granted Plaintiffs' motion for class certification and entered an order authorizing notice pursuant to 29 U.S.C. § 216(b). Notice was sent to all hourly employees of Allsup's Convenience Stores in Texas and New Mexico who

were employed from April 18, 2004 to the date of the order. In addition to the two named plaintiffs, 1,072 additional consent forms were filed by the court-designated deadline. The parties have conducted significant discovery, including taking the depositions of 34 plaintiffs, Lonnie and Barbara Allsup, and director of human resources Stacey Owens. The Defendants now ask that the Court decertify the class and allege that the plaintiffs are not "similarly situated" to one another.

STANDARD FOR DECERTIFICATION

The FLSA requires employers to compensate their non-exempt hourly employees at overtime rates for time worked over the statutorily-defined*280 maximum of 40 hours per week. 29 U.S.C. § 207(a). If an employer does not provide that pay, the statute authorizes an employee to bring suit against his or her employer not only on behalf of him or herself, but also on behalf of other "similarly situated" employees. 29 U.S.C. § 216(b). The purpose of allowing this type of action is "to serve the interest of judicial economy and to aid in the vindication of plaintiffs' rights." *Basco v. Wal-Mart Stores, Inc.*, 2004 WL 1497709, *3, 2004 U.S. Dist. LEXIS 12441, *7 (E.D.La.), citing *Freeman v. Wal-Mart Stores, Inc.*, 256 F.Supp.2d 941, 943 (W.D.Ark.2003), citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). In order to bring a representative action, however, the plaintiffs must be "similarly situated" to one another. *Id.*

The similarly situated analysis follows a two step process typified by *Lusardi v. Xerox Corp.* 118 F.R.D. 351 (D.N.J.1987), *mandamus granted in part, appeal dismissed, Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir.1988), *vacated in part, modified in part, and remanded, Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J.1988), *aff'd in part, appeal dismissed, Lusardi v. Xerox Corp.*, 975 F.2d 964 (3rd Cir.1992). In this process, the Court considers if potential opt-in plaintiffs are "similarly situated" at two different stages in the litigation. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213 (5th Cir.1995). At the first stage, the Court determines if notice should be sent to potential class member plaintiffs. *Id.* At this stage, the Court usually has a minimal amount of evidence before it and uses a "fairly lenient" standard. *Id.* at 1214. This usually results in a conditional certification of a class, potential members of which are then given notice and

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may opt-in to the lawsuit. *Id.* In the present case, the Court has already conducted this analysis and authorized the sending of notice to potential plaintiffs.

Following discovery, the Court enters the second phase of the analysis. This is often done at the initiation of a motion for decertification. *Id.* With the aid of information gained in discovery, the Court considers if the opt-in plaintiffs are “similarly situated” to the named plaintiffs. *Id.* If they are, the representative action may proceed. *Id.* If they are not, the class is decertified, the opt-in plaintiffs are dismissed, and the original named plaintiffs may proceed with their own claims only. *Id.*

[1][2] At this second stage, the burden is on the Plaintiff to prove that the individual class members are similarly situated. *Bayles v. Am. Med. Response of Col., Inc.*, 950 F.Supp. 1053, 1062-63 (D.Colo.1996), *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D.Ill.2003), *Basco*, 2004 WL 1497709 at *4-5, 2004 U.S. Dist. LEXIS 12441 at *14. Because the parties have been able to conduct discovery, the similarly situated inquiry at the second stage is much more stringent. *Harris v. Fee Transp. Servs., Inc.*, 2006 WL 1994586, *2-3, 2006 U.S. Dist. LEXIS 51437, *7-8 (N.D.Tex.). The Court considers several factors at this stage in the analysis, including:

- (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [the defendant] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations ...

Basco, 2004 WL 1497709 at *4, 2004 U.S. Dist. LEXIS 12441 at *10, *citing Mooney*, 54 F.3d at 1213 n. 7, *citing Lusardi*, 118 F.R.D. at 359. While the plaintiffs must show that they are “similarly situated,” this does not mean they must establish they are “identically situated.” *Id.* at *5, 2004 U.S. Dist. LEXIS 12441 at *15, *citing Crain v. Helmerich and Payne Intern'l Drilling Co.*, 1992 WL 91946, *1, 1992 U.S. Dist. LEXIS 5367, *2 (E.D.La.1992). Instead, the question is if there is “a demonstrated similarity among the individual situations ... some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice.]” *Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y.1988), *see also Helmerich*, 1992 WL

91946 at *1, 1992 U.S. Dist. LEXIS 5367 at *2. Decertification is proper if “the action relates to specific circumstances personal to the plaintiff rather than any generally applicable policy or practice.” *Burt v. Manville Sales Corp.*, 116 *281 F.R.D. 276, 277 (D.Colo.1987), *see also Helmerich*, 1992 WL 91946 at *1, 1992 U.S. Dist. LEXIS 5367 at *2. In fact, “the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action.” *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir.2007).

In looking at the factual disparities among Plaintiffs, the Court must consider if it can “coherently manage the class in a manner that will not prejudice any party.” *Johnson*, 2005 WL 1994286 at *7, 2005 U.S. Dist. LEXIS 44259 at *32, *citing Lusardi*, 118 F.R.D. at 360. If there is “no single decision, policy, or plan” that affects the Plaintiffs, the case will have “enormous manageability problems ...” *Id.* at *7, 2005 U.S. Dist. LEXIS 44259 at *34, *citing Mielke v. Laidlaw Transit, Inc.*, 313 F.Supp.2d 759, 764 (N.D.Ill.2004).

District courts have granted motions to decertify where there was great variety in the factual allegations among the individual Plaintiffs. In *Johnson v. TGF Precision Haircutters, Inc.*, the Court granted a motion for decertification at the second stage of the “similarly situated” analysis. 2005 WL 1994286, 2005 U.S. Dist. LEXIS 44259 (S.D. Tex.). The Plaintiffs alleged that hourly employees were not being paid overtime and were working off the clock. *Id.* at *1, 2005 U.S. Dist. LEXIS 44259 at *6. At the first stage, the Court authorized sending notice to nearly 4000 potential plaintiffs, and 264 employees from over 90 locations filed opt-in consents. *Id.* at *1, 2005 U.S. Dist. LEXIS 44259 at *7. The Defendant then moved to decertify the class. *Id.* The Court found that the evidence showed “a substantial variance of experiences by different Plaintiffs under different managers and at different shops around Texas.” *Id.* at *3, 2005 U.S. Dist. LEXIS 44259 at *12. For example, Plaintiffs at some stores stated that they were not allowed to clock in when they worked for 15 minutes before the store opened. *Id.* At other stores, employees did clock in for that time. *Id.* Additionally, the Plaintiffs varied on whether or not they were required to clock-out when waiting for customers and even if they were allowed to leave the store when clocked-out and waiting. *Id.*

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The Court noted that the “large number of widespread shops, each with its own manager, understandably appears to have contributed materially to the dissimilarities in the Plaintiffs’ experiences.” *Id.* at *2, 2005 U.S. Dist. LEXIS 44259 at *12-13. While the Plaintiffs alleged an overarching policy to deny them overtime, the company’s actual policy in the manual instructed employees to make sure their time-sheets accurately reflected the hours worked. *Id.* at *3, 2005 U.S. Dist. LEXIS 44259 at *14. The Court concluded that although the evidence established that “some Plaintiffs may have prima facie claims for FLSA violations at different times, in different places, in different ways, and to differing degrees”; the overall “evidence of varied particular violations” was not enough to prove a “uniform, systematically applied policy of wrongfully denying overtime pay to Plaintiffs.” *Id.* at *4, 2005 U.S. Dist. LEXIS 44259 at *22. The “highly variable” nature of the alleged violations that differed by manager meant that the class should be decertified. *Id.*

Even at the first, more lenient stage of initial certification, courts consider the factual disparities among the Plaintiffs and sometimes refuse to certify a class and send notice. In *Basco v. Wal-Mart Stores, Inc.*, Plaintiffs sought class certification and notice to all similarly situated employees which the Court denied. 2004 WL 1497709, 2004 U.S. Dist. LEXIS 12441 (E.D.La.). As in the present case, the Plaintiffs in *Basco* alleged that as hourly workers, they were required to work beyond their scheduled hours after clocking out, that they were not paid for this time spent working off the clock, and that managers at Wal-Mart stores had “manipulated time and wage records to reduce amounts paid to Wal-Mart employees, including overtime pay.” *Id.* at *2, 2004 U.S. Dist. LEXIS 12441 at *6. Plaintiffs sought to certify a class that included all Louisiana Wal-Mart employees who were not paid overtime. *Id.* at *6, 2004 U.S. Dist. LEXIS 12441 at *17. In their motion for class certification, Plaintiffs alleged that they were all similarly situated because Wal-Mart had a ***282** “mentality” of “no overtime and strict budgeting of time and employee costs.” *Id.* The Plaintiffs also presented evidence of bonus incentives given to store managers who kept salary costs down. *Id.* at *6, 2004 U.S. Dist. LEXIS 12441 at *19. In contrast, Wal-Mart presented evidence that managers are instructed to never allow employees to work off the clock. *Id.* at *7, 2004 U.S. Dist. LEXIS 12441 at *21.

The Court denied the motion to certify the class because the effects on the workers were “neither homogenous nor lend[ed] themselves to collective inquiry.” *Id.* at *7, 2004 U.S. Dist. LEXIS 12441 at *22. In fact, the effects were “anecdotal” and “particularized,” as shown by the Plaintiffs’ own witnesses testifying that any policy was not “uniformly or systematically implemented at any given store.” *Id.* Analyzing the motion under the more demanding second stage inquiry, the Court went on to note that the plaintiffs “performed different jobs at different geographic locations and were subject to different managerial requirements which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis.” *Id.* at *8, 2004 U.S. Dist. LEXIS 12441 at *26. The Court denied the motion for class certification.

Similarly, in *Simmons v. T-Mobile USA, Inc.*, the Court refused to certify a class and send notice to “all current and former senior sales representatives employed” by the defendant in Texas for the past three years. 2007 WL 210008, 2007 U.S. Dist. LEXIS 5002 (S.D.Tex.). The Court found that the case involved “claims of ‘off the clock’ unpaid overtime, where allegedly dozens (if not hundreds) of different low-level supervisors with wide management discretion in practice violate Defendant’s clear, lawful written policies at some or many of Defendant’s more than one hundred different retail locations.” *Id.* at *6, 2007 U.S. Dist. LEXIS 5002 at *25.

DECERTIFICATION IN THE PRESENT CASE

[3] In the present case, there is no evidence of a single decision, policy, or plan that is causing the Plaintiffs to work off the clock. In fact, the evidence indicates that Allsup’s official policy was to prohibit working off the clock. The testimony of the opt-in Plaintiffs confirms that there is no official policy at Allsup’s of having or allowing employees to work off the clock. Many of the opt-in Plaintiffs testified that they knew about Allsup’s policy prohibiting employees from working off the clock. Juan Cherry, Maria Zamora, Andrea Exparaza, James Lasseter, and Sara Heater are only some of the Plaintiffs who said in their depositions or in their responses to interrogatories that they knew Allsup’s policy was that employees were not allowed to work off the clock. Some

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Plaintiffs testified that they were explicitly told that they were *not* allowed to work off the clock. For example, Dalynn Green and Carrie Bennett were told about the policy by their store managers; Carolyn Shaw and Robyn Skiles were told at training; David Price was told by the area manager; Paige Guinn was told by her store and her district manager; and Patricia Saenz was told by her district manager.^{FN1}

FN1. Plaintiffs allege that it is sufficient proof of a single policy that there are no records kept of the time employees worked off the clock. However, if this was all that was needed to prove a single policy, any case alleging work done off the clock would be certifiable as a class. While failure to keep records of the time that Plaintiffs worked may in some cases be an independent violation of the FLSA, it is not enough to constitute a policy that makes this class appropriate for a single lawsuit.

In addition to lacking evidence of any policy that employees may work off the clock, the Plaintiffs also present claims that are factually disparate. Some Plaintiffs say that they never worked off the clock. Plaintiffs Brenda Bridges and Juan Jaramillo both wrote in their responses to interrogatory questions, "I never worked off the clock." Plaintiffs' expert, Bradley T. Ewing, acknowledged in his report that 10% of the Plaintiffs who were deposed in this case said they did not work off the clock.

Other Plaintiffs allege that while they remained clocked in the entire time they were working, their paychecks were not correct. Plaintiff Kimberly Dawn Pilgreen testified *283 she never worked off the clock, but was paid straight time instead of the overtime she was entitled to. Plaintiff Arilee Marsh testified that she never worked off the clock, but that her paycheck did not accurately reflect all the hours she worked. Plaintiff Valerie Smith testified that she always worked on the clock, but that she was not paid for the overtime she worked.

The quantity of time and the pattern of incidents Plaintiffs allege they have spent working off the clock also vary. Some Plaintiffs allege that they spent a large portion of their work time off the clock. Plaintiff Patience Gunn wrote in her interrogatory responses that she worked off the clock for 6 hours at a

time over five months of working for Allsup's. Plaintiff Angel Aragon testified that he worked 8 to 10 hours of unpaid overtime every week. Plaintiff Lilly Tamayo testified that some weeks, she worked 80 or 90 hours and was only paid for 50. Other Plaintiffs allege a minimal amount of time worked off the clock. Plaintiff Teena Thompson, for example, testified she worked 20 minutes off the clock four or five times during her employment with Allsup's. Plaintiff Dynasty Richardson wrote in her interrogatory responses that she forgot to clock in on one occasion and was not paid for three hours. Plaintiff Deborah Knotts wrote in her interrogatory responses that she possibly worked off the clock on her last day of employment only. Similarly, Plaintiff Julie Smith wrote in her interrogatory responses that she worked one hour off the clock on a single occasion.

The Plaintiffs' claims vary from store to store and manager to manager. Plaintiff Kenrick Harmon testified that he worked at a store in Texas where he was asked to bag ice or unload trucks off the clock. However, when he worked at a different Texas store under a different manager, he was never allowed to do work off the clock. Plaintiffs Martin Salazar and Juan Montano testified that whether or not they worked off the clock depended on which store they were working at. Plaintiffs Sara Heater and Bridget Garcia testified that they only worked off the clock for one manager and not for their other managers.

The evidence shows a large factual variety among the individual Plaintiffs' claims and the times they allege they worked off the clock. These differences in the Plaintiffs' claims mean that the Defendant's defenses would also vary. Defenses to claims that individuals did not work off the clock but were not paid correctly will be distinct from the Plaintiffs alleging they were asked to work off the clock by management. As for off the clock claims, the *Basco* court noted that the variety of defenses could include

(1) that the particular class member did not in fact work off-the-clock, (2) any instructions received to work off-the-clock without compensation were outside the scope of authority and directly contrary to the well established policy and practice, (3) even if a particular class member did work off-the-clock, that employee unreasonably failed to avail themselves of curative steps provided by defendant to be compensated for that work ... (5) a class mem-

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ber had an actual and/or constructive knowledge of [Defendant's] policies banning off the clock work and voluntarily chose to engage in such work in deviance of that policy ...

2004 WL 1497709 at *8, 2004 U.S. Dist. LEXIS 12441 at *25-26. Other defenses will involve alleging that some of the claims are *de minimis*.

Management of this case and procedural concerns also support decertification. The Plaintiffs have not suggested any alternative ways to try the case or any ways to address the disparate factual allegations of the more than 1,000 Plaintiffs. Plaintiffs do suggest that the 3% of the class who was deposed could serve as a representative group. It is true that representative testimony can sometimes suffice so that not every plaintiff must testify. *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir.1973). A representative sample of employees can provide the proof of a prima facie case of a FLSA violation. *Reich v. S. New England Telecommc'ns Corp.*, 121 F.3d 58, 67 (2nd Cir.1997), citing *Reich v. S. Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir.1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d *284 Cir.1994). Although the 2nd Circuit has affirmed representative testimony of only 2.7% of a class, that case involved "actual consistency" among the testimony "both within each category [of employee] and overall"; there was "no contradictory testimony"; the abuse arose from a policy that was consistently applied; and the uncompensated "periods at issue were the employees' lunch hours, which are predictable, daily-recurring periods of uniform and predetermined duration." *Id.* at 68. In this case, there is no consistency among the testimony, there is no consistently applied policy resulting in working off the clock, and the time spent working off the clock is not alleged to be uniform or of a predetermined duration.

The cases that the Plaintiffs cite for recent examples of denials of decertification are distinguishable from the present case. The *Behr* case is an example of the analysis conducted at the first and more lenient stage in determining if notice should be sent to a class. *Behr v. Drake Hotel*, 586 F.Supp. 427 (N.D.Ill.1984). In other cases the Plaintiff cites, the issue is whether or not employees' job duties are similar enough for making a single the determination if the class was properly classified as exempt. See *Bradford v. Bed*

Bath & Beyond, 184 F.Supp.2d 1342 (N.D.Ga.2002). *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 265 (D.Conn.2002).

In the case before this Court, all three considerations lead to the conclusion that decertification is appropriate. The Plaintiffs have worked in settings that vary from store to store, manager to manager, and day to day. The defenses that the Defendant will offer vary with these factual disparities. Finally, it would be fairer and procedurally more expedient to decertify the class.

CONCLUSION

The Defendants' Motion to Decertify the Class is GRANTED, and all opt-in Plaintiffs are DISMISSED from this action without prejudice to each such opt-in Plaintiff filing a suit in his or her own behalf. To avoid prejudice to individual opt-in Plaintiffs who may choose to file their own cases, the Court invokes its equity powers to toll the applicable statute of limitations for 30 days after entry of this Order. The claims of Plaintiffs Lesa Proctor and Duncan Proctor remain pending herein for trial.

IT IS SO ORDERED.

N.D.Tex.,2008.
 Proctor v. Allsup's Convenience Stores, Inc.
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LEXSEE

**ROBERT R. REICH, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee, v. SOUTHERN NEW ENGLAND TELECOMMUNICATIONS
CORPORATION, and SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
INC., Defendants-Appellants.**

Docket Nos. 95-6207(L), 95-6239(CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**121 F.3d 58; 1997 U.S. App. LEXIS 19872; 134 Lab. Cas. (CCH) P33,569; 4 Wage &
Hour Cas. 2d (BNA) 33**

**November 1, 1996, Argued
July 31, 1997, Decided**

SUBSEQUENT HISTORY: [**1] As Corrected. As Amended September 10, 1997.

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the District of Connecticut (Daly, J.) finding that defendants, Southern New England Telecommunications Corp. and Southern New England Telephone Company, Inc., violated the overtime and record-keeping provisions of the Fair Labor Standards Act by requiring outside craft workers to remain at open work sites during their lunch break to ensure the safety and security of the site, enjoining future violations, and awarding actual and liquidated damages.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant telephone companies sought review of the judgment of the United States District Court for the District of Connecticut that held that appellants had violated the overtime and record-keeping provisions of the Fair Labor Standards Act, 29 U.S.C.S. §§ 207, 211(c), 215(a)(2), 215(a)(5).

OVERVIEW: Appellant telephone companies required that outside craft workers remain at the work site during their lunch periods to secure the area and its equipment and to prevent possible harm to the public. The court held that the workers were performing a valuable service for appellant and that if the worker did not remain at the site, appellant would have had to pay someone else to secure the site. Because the worker was performing a service for the employer, appellee Secretary of Labor determined that lunch hours during which workers per-

formed such a service were compensable work periods. The district court found that appellants had violated the overtime and record-keeping provisions of the Fair Labor Standards Act, 29 U.S.C.S. §§ 207, 211(c), 215(a)(2), 215(a)(5). The court rejected appellant's argument that the sample presented to the district court of workers was too small to be a representative sample. The court held that the sample was representative because it included every relevant combination of worker and work site. The court affirmed the district court and held that appellants failed to prove that they had acted in good faith in compensating employees.

OUTCOME: The court affirmed the decision of the trial court that held that appellant telephone companies had violated the overtime and record-keeping provisions of the Fair Labor Standards Act and that assessed damages against appellants. By mandatorily staying on the work site, during lunch, to secure the area, the worker was performing a valuable service for the employer.

CORE TERMS: craft, meal, liquidated damages, lunch breaks, site, compensable, lunch, cable, good faith, technician, work sites, representational, repair, work performed, sufficient evidence, classification, predominantly, installation, telephone, reasonableness, mealtime, on-site, network, reasonable inference, calculation, overtime, delivery, eating, interruptions, predominant

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Regular Rate

[HN1]The Fair Labor Standards Act requires compensation at one and a half times the regular rate when employers cause their employees to work more than forty hours a week. 29 U.S.C.S. § 207(a)(1).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN2]29 C.F.R. § 785.19(a) states that bona fide meal periods are not worktime. The employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. An office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN3]"Work" under the Fair Labor Standards Act means physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business. The determination of what constitutes work is necessarily fact-bound.

Evidence > Procedural Considerations > General Overview

[HN4]The weight to be accorded evidence is a function not of quantity but of quality. The adequacy of the representative testimony is determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony. Depending on the nature of the facts to be proved, a very small sample of representational evidence can suffice.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

Labor & Employment Law > Wage & Hour Laws > Recordkeeping Requirements

[HN5]When an employer fails to keep adequate records of its employees' compensable work periods, as required under the Fair Labor Standards Act, employees seeking recovery for overdue wages will not be penalized due to their employer's record-keeping default. Employees need only prove that they performed work for which they were not properly compensated and produce sufficient evi-

dence to show the amount and extent of that work as a matter of just and reasonable inference. Upon meeting this evidentiary threshold, the fact of damage is established, and the only potential uncertainty is in the amount. The burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Should the employer fail to produce such evidence, the court may award damages, even though the result is only approximate.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN6]Under 29 U.S.C.S. § 216(c) of the Fair Labor Standards Act (FLSA), an employer who violates the minimum compensation provisions of the FLSA is liable for both past due wages and an equal amount of liquidated damages.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN7]Pursuant to 29 U.S.C.S. § 260 of the Portal-to-Portal Act (Act), liquidated damages may be remitted if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the Act. Under 29 U.S.C.S § 260, the employer bears the burden of establishing, by "plain and substantial" evidence, subjective good faith and objective reasonableness. The burden is a difficult one to meet.

Banking Law > National Banks > Insolvencies, Liquidations & Rehabilitations > General Overview

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN8]Liquidated damages under the Fair Labor Standards Act are considered compensatory rather than punitive in nature. They constitute compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

COUNSEL: BURTON KAINEN, Kainen, Starr, Garfield, Wright & Escalera, Hartford, Connecticut, (Miguel A. Escalera, Vaughan Finn, Kainen, Starr, Garfield, Wright & Escalera, Hartford, Connecticut; Madelyn DeMatteo, Vice President and General Counsel, John K. Costello, Carole F. Wilder, the Southern New England Telecommunications Corp. and the Southern New Eng-

land Telephone Corp., New Haven, Connecticut, of counsel), for appellant.

PAUL L. FRIEDEN, United States Department of Labor, Washington, D.C., (J. David McAteer, Acting Solicitor of Labor, Steven J. Mandel, William J. Stone, United States Department of Labor, Washington, D.C., of counsel), for [**2] appellee. (Stephen S. Ostrach, Cynthia L. Amara, New England Legal Foundation, Boston, Massachusetts) for Connecticut Business & Industry Association and the United States Telephone Association, amici curiae.

JUDGES: Before: FEINBERG, WALKER, and JACOBS, Circuit Judges.

OPINION BY: WALKER

OPINION

[*61] WALKER, *Circuit Judge*:

On June 2, 1993, the Secretary of the United States Department of Labor ("Secretary") brought suit against defendants, the Southern New England Telecommunications Corp. and the Southern New England Telephone Company (collectively, "SNET" or "the company") on behalf of some 1500 outside craft workers employed by SNET, seeking to enjoin violations of the overtime and recordkeeping provisions of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. §§ 207, 211(c), 215(a)(2), and 215(a)(5). The complaint alleged that SNET failed to compensate the company's outside craft workers for 30-minute lunch breaks which SNET required them to spend at outside work sites to provide security and ensure safety at the sites. The Secretary sought back overtime pay and liquidated damages as well as injunctive relief.

After a nine-day bench trial, the United States District Court for [**3] the District of Connecticut [*62] (T.F. Gilroy Daly, *Judge*) issued a memorandum decision on June 14, 1995, finding that because SNET's outside craft workers "performed substantial duties during their lunch periods that [were] predominantly for the benefit of SNET," *Reich v. Southern New England Telecomm. Corp.*, 892 F. Supp. 389, 402 (D. Conn. 1995), SNET violated the FLSA by not compensating them. ¹ The district court enjoined SNET from committing future violations of the FLSA and found SNET liable for actual and liquidated damages. In a subsequent judgment, entered August 28, 1995, the district court awarded the workers actual damages, in the form of back pay, of \$ 4,823,884.60 and an equal amount of liquidated damages for a total of \$ 9,647,769.20. On January 29, 1996, the district court entered an amended judgment directing SNET to pay an additional \$ 88,893.33 in overdue wages. This appeal followed. We affirm.

1 In July 1996, Judge Daly passed away after serving on the federal bench with distinction for nearly two decades.

[**4] I. BACKGROUND

We assume familiarity with Judge Daly's opinion, see *Reich v. SNET*, 892 F. Supp. 389 (D. Conn. 1995), and restate only those facts necessary for the disposition of this appeal. SNET, based in New Haven, Connecticut, provides telephone and other services to consumers throughout the state. The company employs workers who spend a significant portion of their time on-site, out-of-doors ("outside craft employees"). From sometime in 1990 until February 1994, SNET categorized these workers into three groups: outside plant technicians ("OPTs"), who install and replace telephone poles and cables, generally in crews from two to six; assistant supervisors of construction ("ASCs"), who supervise the work of OPTs; and communication facilities technicians ("CFTs"), who work both indoors and outdoors in cable splicing and repair and in telephone installation and maintenance. In approximately February 1994, SNET eliminated the CFT category and redesignated those workers into three separate categories: network deployment technicians (formerly cable splicers), network delivery technicians (formerly cable repair workers), and service delivery technicians (formerly installation [**5] and maintenance workers).

Outside craft employees, with the exception of those performing installation and maintenance tasks indoors, routinely work on the lines strung between telephone poles, in trenches (usually located in new housing developments), and in manholes. However, some of the work of outside craft employees is performed inside, in controlled environmental vaults at central office locations. Installation and maintenance workers, who install and repair telephone equipment in homes and businesses, do some work at outside locations, such as connecting links from buildings to nearby terminal poles; however, the Secretary conceded that the lunch periods of these workers would not be compensable given the general flexibility of their work schedules.

The specific work assignments of outside craft employees vary in duration from as brief as 45 minutes to a day or more. Outside craft employees use valuable company equipment including trucks (with extendable ladders or buckets for aerial work), fresh air ventilation systems, water pumps, gas testing and fiber optic devices, cable and wire, as well as numerous hand held tools. It is also their responsibility throughout their shift [**6] to maintain and protect this equipment from theft and, at times, the elements.

SNET's outside craft employees are so-called "lunch carrying employees." Although these workers are not paid by SNET for the time they spend on lunch break and SNET does not record this time as part of their compensable employment hours, their employer requires them to bring their lunch to work and, generally, to stay at the work site during lunch. The workers are allotted thirty minutes for lunch. The company instructs them to take their lunch break between 12:00 and 12:30 p.m., if possible; however, there is sufficient unpredictability in the work that a noon break is not always possible, and frequently [*63] the workers are unable to plan the precise time and place of the break. Whenever the lunch break occurs at an open outdoor site, SNET requires the craft workers to stay at the site to secure the area and its equipment and to prevent possible harm to the public. Leaving an open work site during the shift without specific permission is sanctionable conduct. As a consequence, outside craft employees at open sites take their lunch break at or near the work site, often in the cab of a truck or near a manhole, [**7] trench, or telephone pole.

The district court concluded that SNET's restrictions on outside craft employees resulted in their performance of substantial duties predominantly for the benefit of the SNET. The district court found (1) that the company violated the record keeping provisions of the FLSA in failing to account for the duties that outside workers performed during their lunch break and (2) that, when such duties cause outside craft employees to work more than forty hours per week, SNET violated the overtime compensation provision of the Act. The district court entered judgment in favor of the Secretary, awarding back overtime pay as well as liquidated damages and enjoining further violations of the FLSA.

II. DISCUSSION

SNET argues that the district court erred in finding liability for unpaid wages for the on-site lunch break taken by SNET's outside craft employees. The company contends that the district court misapplied the appropriate standard (the "predominant benefit" standard) for determining whether company-imposed restrictions on employees' mealtime require compensation under the FLSA. SNET also challenges several further conclusions of the district court. [**8] First, even assuming that some lunch breaks were compensable within the meaning of the FLSA, SNET maintains that the district court committed factual error in finding too many to be compensable. Second, SNET argues that the district court reached an inaccurate damage award. Finally, the company contends that the district court lacked jurisdiction to enter an award of liquidated damages, and, in any event, abused its discretion in making the award.

A. Liability for Unpaid Wages.

[HN1]The FLSA requires compensation at one and a half times the regular rate when employers cause their employees to work more than forty hours a week. *See* 29 U.S.C. § 207(a)(1). The Secretary contends that SNET systematically undercompensated its outside craft employees by failing to pay them overtime wages for activities performed during their lunch break. Such work, according to the Secretary, caused the outside craft workers to be employed for more than forty hours per week. Thus, the crux of this dispute is whether the restrictions imposed by SNET on its outside craft workers transform an otherwise uncompensable meal break into one that is compensable under the FLSA. This is an issue of first [**9] impression in the Second Circuit.

In aid of its enforcement authority under the FLSA, the Department of Labor ("DoL") has issued interpretive regulations, in effect at all times relevant to this appeal, that specifically address compensability of employees' mealtimes.

[HN2](a) Bona fide meal periods. Bona fide meal periods are not worktime. . . . The employee must be *completely relieved from duty* for the purposes of eating regular meals. . . . *The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.* For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

29 C.F.R. § 785.19 (citations omitted) (emphasis added). SNET's liability would not be in doubt if we were to apply this regulation as written. It is not open to reasonable question that SNET did not completely relieve its outside craft employees from duty during their lunch break. [**10] However, the Secretary concedes that the test is not so rigid. [*64] Rather, the Secretary contends that § 785.19 should be construed in a "practical manner" and points us to certain agency constructions of the regulation.

In a Wage-Hour Opinion Letter, dated August 25, 1980, the DoL's then-Deputy Administrator found that postal employees responsible for the safekeeping of their mail during lunch break generally were not entitled to

compensation under the FLSA. In so construing § 785.19, the DoL's representative commented that a

broad reading of the phrase "relieved of all duty" . . . would extend the requirement of compensation to 24 hours of the day in the case of outside workers who are required to take their employer's tools or materials home with them or who drive home in the company's vehicles, so as to have them available for going directly to the work site the following morning.

Secretary of Labor's Supplemental Appendix at 6 (Letter of Henry T. White, Jr., Deputy Administrator, U.S. Dep't of Labor (Aug. 25, 1980)). The Wage-Hour letter continues: "compensation would be required for a letter carrier only if the postal material in his possession were of such quantity [**11] or of such nature that the carrier's meal-time was substantially impeded in the free disposition of the time for his own beneficial use." *Id.*

In a DoL letter of July 29, 1985, construing § 785.19 in the context of law enforcement employees' meal break, the DoL's representative commented:

we would not consider the fact that [law enforcement employees] remain in uniform [during meals] as meaning that they are on duty while eating a meal. Moreover, we would not consider infrequent interruptions of short duration which may occur when a citizen compliments, or asks the law enforcement employee a simple question, as nullifying the exclusion of an otherwise bona fide meal period from compensable hours of work.

Id. at 9 (Letter of Susan R. Meisinger, Deputy Under Secretary, U.S. Dep't of Labor (July 29, 1985)). Although this letter also states that a meal break must be an "uninterrupted period during which the employee has no duties whatsoever to perform," *id.*, and thus suggests a broader view of compensability of meal periods under the FLSA, the Secretary in its brief cites both letters as examples of the DoL's "practical," and thus implicitly flexible, approach [**12] to construing § 785.19. See Brief of Secretary of Labor at 19-21. This flexible approach to determining compensability of meal break activity is consistent with the reasoning of various courts.

The central issue in mealtime cases is whether employees are required to "work" as that term is understood under the FLSA. See *Henson v. Pulaski County Sheriff*

Dep't., 6 F.3d 531, 533-34 (8th Cir. 1993). Although the FLSA itself does not define "work," the Supreme Court has attempted to do so. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 88 L. Ed. 949, 64 S. Ct. 698 (1944), the Court held that "[HN3]"work" under the FLSA means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." At about the same time, the Court counseled that the determination of what constitutes work is necessarily fact-bound. See, e.g., *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 89 L. Ed. 118, 65 S. Ct. 165 (1944) ("Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."); *Skidmore v. Swift & Co.*, 323 [**13] U.S. 134, 136-37, 89 L. Ed. 124, 65 S. Ct. 161 (1944) (similar). For example, time spent waiting for an event to occur, such as a fire, may constitute work if an employer hired an employee for that function. See *Armour*, 323 U.S. at 133-34; *Skidmore*, 323 U.S. at 136-37.

To be consistent with the FLSA's use of the term "work" as construed in *Armour* and *Skidmore*, we believe § 785.19 must be interpreted to require compensation for a meal break during which a worker performs activities predominantly for the benefit of the employer. See *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1155 (10th Cir. 1992) (compensation required during meal periods except "when the employee's time is not spent predominantly for the benefit of the [*65] employer"); *Henson*, 6 F.3d at 534 (same); *Myracle v. General Elec. Co.*, 1994 U.S. App. LEXIS 23307, 1994 WL 456769 at *4 (6th Cir. Aug. 23, 1994) (per curiam) (same); *Alexander v. City of Chicago*, 994 F.2d 333, 337 (7th Cir. 1993) (same); see also *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984) (meal periods not compensable unless activities "could be characterized as substantial"). But see *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473, 1477 (11th Cir. 1990) ("essential [**14] consideration . . . is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal"); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir. 1985) (adopting, without comment, § 785.19's completely-removed-from-duty standard). In our view, this "predominant benefit" standard "sensibly integrates developing case law with the regulations' language and purpose." *Alexander*, 994 F.2d at 337, and more importantly, with the language of the FLSA itself.

To the extent that the Secretary advocates a literal reading of § 785.19, similar to that adopted by the Fourth Circuit in *Bel-Loc Diner*, 780 F.2d at 1115 n.1, we decline to follow this construction. Section 785.19, as with

other interpretive regulations issued by the Secretary under the FLSA, does not have the force of law. See, e.g., *Skidmore*, 323 U.S. at 139; *Freeman v. National Broad. Co.*, 80 F.3d 78, 83-84 (2d Cir. 1996). Although not controlling on courts, such regulations do "constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance," *Skidmore*, 323 U.S. at 140, and should be viewed as [**15] persuasive authority. See *Reich v. State of New York*, 3 F.3d 581, 588 (2d Cir. 1993). However, "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. See also *Reich*, 3 F.3d at 588. Here, § 785.19, as literally construed, fails to persuade us primarily because the completely-removed-from-duty standard is inconsistent with controlling Supreme Court precedent defining "work." See *Henson*, 6 F.3d at 535. Thus, we believe that the district court was correct in holding that meal periods are compensable under the FLSA when employees during a meal break perform duties predominantly for the benefit of the employer.

SNET does not dispute the applicability of the predominant benefit standard but argues that the district court ignored this standard and effectively applied the completely-removed-from-duty standard. We disagree.

SNET argues that the lunch breaks predominantly benefit the workers, and not the employer, because [**16] during their lunch break the workers' safety and security roles are wholly passive, leaving them free to eat their meal. This argument, whatever its superficial appeal, misses the point. During their lunch break, the workers are restricted to the site for the purpose of performing valuable security service for the company. The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers' lunch break. To be sure, the workers perform different services during meal breaks than throughout the rest of the day, but the workers' on-site presence is solely for the benefit of the employer and, in their absence, the company would have to pay others to perform those same services. By not compensating these workers, SNET is effectively receiving free labor.

SNET's second argument invokes policy and economic concerns. The company contends that a finding of liability would

require payment for meals in any industry in which the nature of the work compels employees to remain at or near an outdoor work site, not because they are

required to work during their meal periods, but solely because a complex set-up or a [**17] particular location makes it impractical to shut down and leave the job site.

Brief on Behalf of Defendants-Appellants at 23. This argument, however, fails to acknowledge that the workers are not compelled by "the nature of their work" to remain at the job site but are required to do so by their employer, on pain of discipline, for [**66] the purpose of providing important (albeit non-taxing) security, maintenance and safety services. See *SNET*, 892 F. Supp. at 393-95. Thus, SNET's argument begs the question at issue in this case: whether outside craft workers were "working" within the meaning of the FLSA during their constrained mealtimes.

Third, SNET argues that the district court's decision conflicts with decisions in several other circuits that have applied the predominant benefit standard. The cases relied upon by SNET, however, are distinguishable. In *Avery v. City of Talladega*, 24 F.3d 1337, 1347 (11th Cir. 1994), *Henson*, 6 F.3d at 536, and *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992), the lunch break of law enforcement officers was held not to be compensable. In these cases the officers were permitted during their break to leave their [**18] work stations to tend to personal matters. *Avery*, 24 F.3d at 1347; *Henson*, 6 F.3d at 536; *Armitage*, 982 F.2d at 431. The only restrictions were requirements that officers remain in uniform, *Avery*, 24 F.3d at 1347, and respond to calls for assistance and inquiries from the public, *Avery*, 24 F.3d at 1347; *Henson*, 6 F.3d at 536; *Armitage*, 982 F.2d at 431. These cases differ from the case at bar in the same way that being on call differs from being on duty.

Similarly, in *Myracle*, plant employees were generally permitted to choose the time and location of their meals and were even permitted to leave the plant during their break. 1994 WL 456769, at *2. The only arguable limitation was that employees often chose (but were not required) to eat lunch in a room adjacent to their work area so that they could monitor their machines, to forestall potential malfunctions. *Id.* In this case, SNET requires outside craft employees at open sites to remain on-site to maintain public safety and provide security to the area.

Finally, in *Hill*, 751 F.2d at 811, 814, letter carriers were given a choice of locations at which to eat lunch and, except for maintaining [**19] in their possession mail and other postal items, were not expected to perform any tasks. In *Hill*, as in the other cases on which SNET relies, there was considerable flexibility as to when and where the lunch break might occur.

B. *The Secretary's Evidence, its Representational*

Capacity and the Conclusions of the District Court.

SNET also contests the district court's liability finding because (1) the sample of employees who testified was too small and (2) there were too few findings concerning outside craft workers' interruptions during lunch periods. We address each in turn.

1. Representational Evidence

SNET contends that, while it is permissible to award back wages to an entire group of employees based on the testimony of a representative sample, the sample of 2.5 percent used by the district court was inadequate. We disagree.

When a defendant in a suit for lost wages under the FLSA fails to maintain employment records as required by the Act, an employee (or the Secretary on behalf of a group of employees) may "submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred." *Martin v. Selker Bros.*, [****20**] *Inc.*, 949 F.2d 1286, 1296-97 (3d Cir. 1991). In doing so, an employee (or in this case the Secretary) is simply following the instructions of the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946):

where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . the solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he [***67**] was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with [****21**] evidence to nega-

tive the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

In meeting the burden under *Mt. Clemens*, the Secretary need not present testimony from each underpaid employee; rather, it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. See *Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d Cir. 1994).

The Secretary's burden in such cases, while not overly onerous, is to establish a prima facie case. See *Gateway Press*, 13 F.3d at 701; *Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (noting that "the Secretary's initial burden in these cases is minimal"). He is not required to do so in complete detail as to the wages lost by each employee. However, he must produce sufficient evidence to establish that the employees have in fact performed work for which they were improperly [****22**] compensated and produce sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687; cf. *Gateway Press*, 13 F.3d at 701. Upon meeting this burden, the burden shifts to the employer, and if the employer fails to produce evidence of the "precise amount of work performed" or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence," the court may then "award damages to the employees, even though the result be only approximate." *Mt. Clemens*, 328 U.S. at 687-88.

The Secretary presented the testimony of thirty-nine employees, accounting for each of the five job categories in question. See *DeSisto*, 929 F.2d at 793 ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award."). These witnesses served directly in four of the job categories (OPTs, network deployment technicians/cable splicers, network delivery technicians/cable repair workers, and service delivery technicians/installation [****23**] and maintenance workers), and some of the witnesses (particularly the OPTs) had first-hand knowledge of the fifth (ASCs). See *SNET*, 892 F. Supp. at 391-96, 402. Although the district court did not make express findings that the sample covered the three types of sites at which SNET's work is performed, it is clear from the findings and the record that witnesses had

worked in all three areas and testified broadly about their experiences. *See id.* at 392.

Although SNET is correct that most cases resting on representational evidence "involve a fairly small employee population, a limited number of employee positions, and uniform work tasks," *Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995); *see, e.g., Bel-Loc Diner*, 780 F.2d at 1115 (testimony of 22 employees for DoL supporting award of backpay to group of 98 employees); *Donovan v. Williams Oil Co.*, 717 F.2d 503, 505 (10th Cir. 1983) (testimony of 19 supported award to group of 34); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982) (testimony of six employees from six restaurants, with stipulations from 20 others, found to support backpay award to 246 employees at 44 [**24] restaurants); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 826, 829 (5th Cir. 1973) (testimony of 16, award to 26), there is no bright line formulation that mandates reversal when the sample is below a percentage threshold. It is axiomatic that [HN4]the weight to be accorded evidence is a function not of quantity but of quality, *DeSisto*, 929 F.2d at 793 ("the adequacy of the representative testimony necessarily will be determined in light of the nature of the work involved, the working [*68] conditions and relationships, and the detail and credibility of the testimony") (quoting, with approval, brief of Secretary of Labor), and that, depending on the nature of the facts to be proved, a very small sample of representational evidence can suffice. *Cf. Mt. Clemens*, 328 U.S. at 690-91, 692-93 (testimony of 8 of approximately 300 employees, or 2.7% of group, sufficient to establish entitlement to recovery under the FLSA). Our focus is not on the numbers in isolation but on whether the district court could reasonably conclude that there was "sufficient evidence to show the amount and extent of . . . [uncompensated] work as a matter of just and reasonable inference." *Id.* [**25] at 687. In the case at bar, we cannot say that the district court's conclusion is in error.

Ultimately, we are untroubled by the quantum of representational evidence in this case because the testimony covered each clearly defined category of worker; there was actual consistency among those workers' testimony, both within each category and overall; SNET offered no contradictory testimony; the abuse arose from an admitted policy of the employer that was consistently applied; and the periods at issue were the employees' lunch hours, which are predictable, daily-recurring periods of uniform and predetermined duration. *Compare Southern Maryland Hosp.*, 43 F.3d at 952 (finding that district court abused its discretion in relying on a representational sample consisting of 1.6% of employees covering "a variety of departments, positions, time periods, shifts, and staffing needs" when the sample failed to in-

clude employees from several departments). In other words, the focus of attention was not the *level of activity* of outside craft employees at open sites during their lunch break but whether and for what reasons the employees were required to remain on-site. The evidence, wholly apart [**26] from its representational nature, supported the district court's finding that the workers had the significant responsibility during their lunch break of ensuring the security of the site and the equipment and the safety of any passers-by. The district court heard testimony covering every relevant combination of workers and work site. Accordingly, we are unable to find error in Judge Daly's conclusion that the Secretary produced sufficient evidence on which to base a just and reasonable inference that SNET failed to compensate its employees in a manner consistent with the FLSA.

2. The District Court's Finding of Fact

SNET also challenges the district court's failure to make detailed findings concerning the nature and extent of lunch period interruptions and particular safety and security concerns typically experienced by the various classifications of outside craft workers at SNET's various open work sites. This deficiency, according to SNET, led to a generalized, overly-inclusive, and ultimately inaccurate finding about the extent of compensable work performed by outside craft employees during their lunch break.

Although the district court acknowledged the differences [**27] among both the various sites at which SNET outside craft workers perform their jobs, *see SNET*, 892 F. Supp. at 392, 394, and the job categories of outside craft employees, *see id.* at 391, SNET is correct that the district court's opinion did not consider these matters in detail.² However, as suggested already, such job- and site-specific findings were not required to support the district court's award. Because SNET required all workers to remain on-site to provide security and ensure safety -- regardless of location, type of work site, or job classification -- the frequency and nature of interruptions is beside the point. Just as security guards are compensated for work at museums, as well as at rock concerts and football games, so also are SNET's outside craft workers entitled to compensation for security in pastoral, as well as urban, settings. *See Armour*, 323 U.S. at 133 ("Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.").

² The one exception being work at manhole sites, which the court addressed in some detail. *See SNET*, 892 F. Supp. at 401-02.

[**28] [*69] In sum, we uphold the district court's findings that those in the OPT category carried out com-

pensable responsibilities at open job sites for at least 80% of their lunch periods and that those in the ASC, network delivery technician, and network deployment technician categories, as well as those in the now-defunct CFT category, carried out compensable responsibilities at open sites for at least 60% of their lunch periods. *See SNET*, 892 F. Supp. at 396. These calculations are supported by the record. *See Fed. R. Civ. P. 52(a)*.

C. District Court's Damage Award.

SNET next challenges the district court's calculation of damages as excessive because it encompassed substantial amounts of time during which outside craft workers were engaged in installation and maintenance ("I&M") work -- work which the parties agreed by stipulation would be excluded from the award. *See Joint Appendix, Vol. I, at 270*. SNET attributes this overassessment to the court's erroneous exclusion of evidence the company proffered which, the company contends, would have enabled the court to exclude from the damage calculation certain I&M work performed by outside craft workers during the relevant [**29] time period of October 1991 until April 1994. We need not consider SNET's contention that the district court committed reversible evidentiary error in failing to admit their evidence because in our view it makes no difference. Regardless of the district court's decision on this matter, its calculation of damages was proper.

It is well-settled that [HN5]when an employer fails to keep adequate records of its employees' compensable work periods, as required under the FLSA, employees seeking recovery for overdue wages will not be penalized due to their employer's record-keeping default. *See Mt. Clemens*, 328 U.S. at 687. *See also Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 828 (11th Cir. 1988). A rule preventing employees from recovering for uncompensated work because they are unable to determine precisely the amount due would result in rewarding employers for violating federal law. *Mt. Clemens*, 328 U.S. at 687. Rather, in such cases, employees need only prove that they performed work for which they were not properly compensated and produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* Upon meeting [**30] this evidentiary threshold, the fact of damage is established, and the only potential uncertainty is in the amount. *See Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986). At this point, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-88. Should the employer fail to produce such evidence, the court may award damages, even though the result is only approximate. *Id.* at 688.

Through the use of representational evidence, the Secretary met his burden of establishing that outside craft workers, including the majority of those in the CFT job classification, were entitled to back pay. However, both parties stipulated that certain aspects of I&M work, encompassed in the CFT classification (that is, I&M work performed in residential homes or businesses), were not compensable. *See Joint Appendix, Vol. I, at 270*. The Secretary adduced evidence, for the purpose of calculating damages, which treated the CFT classification as a whole, thereby including I&M work in the class of compensable [**31] employment. A week into trial, SNET countered by proffering evidence in the form of a lengthy table that purported to break down the CFT job classification into the three job functions (cable splicing, cable repair, and installation and maintenance) to which those individuals in CFT classification were primarily assigned during a given week. The district court excluded this summary, which SNET contends would have led the district court to remove I&M workers from the damage calculation.

However, SNET conceded in its post-trial motions and its briefs before this court, *see Memorandum in Support of Defendant's Motion to Amend Judgment at 13 n.5, Brief on Behalf of Defendants-Appellants at 37 n.25, [**70]* that all those employees in the now defunct CFT job category (cable splicers, cable repair workers, and I&M workers), were trained to perform, and from time to time did perform, each of the three tasks encompassed in that job category. Since workers who were designated to perform I&M work were also called upon at times to perform cable splicing and cable repair tasks, both of which were compensable, the evidence offered by SNET was under-inclusive. In leaving out I&M workers, it failed [**32] to account for all workers performing cable splicing and cable repair. On the other hand, the evidence of damages offered by the Secretary was, to some extent, over-inclusive, because it included I&M work performed inside residential houses and businesses by those in the CFT category. Thus, the district court was forced to choose between the two. In opting for that proffered by the Secretary, the district court -- consistent with the lesson of *Mt. Clemens* -- placed the burden of inadequate record keeping on the employer. The district court did not err in this regard.³

³ SNET also argues that its evidence was sufficient under the *Mt. Clemens* framework to "negative the reasonableness of the employee's evidence." 328 U.S. at 687-88. Although SNET's evidence indicates that the award might have been somewhat generous, the evidence does not affect the reasonableness of the award. It simply points out the difficulty of precisely determining

damages when the employer has failed to keep adequate records.

D. [**33] *Liquidated Damages*.

[HN6] Under § 16(c) of the FLSA, 29 U.S.C. § 216(c), an employer who violates the minimum compensation provisions of the FLSA is liable for both past due wages and, in addition, an equal amount of liquidated damages. SNET challenges the district court's award of liquidated damages on the grounds that (1) the court lacked jurisdiction to enter such an award and, (2) assuming jurisdiction, it erred in entering the award in this case. We reject both arguments.

We need not pause long over SNET's contention that the district court lacked jurisdiction to enter an award of liquidated damages. In brief, SNET argues that the complaint sought only equitable relief pursuant to § 17 of the FLSA, 29 U.S.C. § 217, not unpaid wages and liquidated damages pursuant to § 16(c) of the Act, 29 U.S.C. § 216(c). This, however, is a mischaracterization of the Secretary's complaint. The Secretary clearly sought relief under both § 17 and § 16(c) and, indeed, in response to SNET's motion to strike the claim for liquidated damages, the Secretary invited SNET to request a trial by jury. See Secretary of Labor's Supplemental Appendix at 1. SNET simply declined to do so. Because [**34] "nothing in the FLSA, relevant case law, or the Federal Rules of Civil Procedure precludes the Secretary from seeking both legal relief under § 216(c) and equitable relief under § 217," *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1033 n.11 (5th Cir. 1993), SNET -- having received notice of the Secretary's causes of action -- cannot now complain that the district court was without jurisdiction to award liquidated damages.

SNET's principal contention in this regard is that the award of liquidated damages should be set aside because the district court erred in finding that SNET did not satisfy the good faith and reasonable basis elements necessary to permit a reduction in such an award. We disagree.

Under § 16(c) of the FLSA, 29 U.S.C. § 216(c), an employer who violates the compensation provisions of the Act is liable for unpaid wages "and an additional equal amount as liquidated damages." ⁴ However, pursuant to § 11 of the Portal-to-Portal Act, [HN7] 29 U.S.C. § 260, liquidated damages may be remitted "if the employer shows to the satisfaction of the court that the act or [*71] omission giving rise to such action was in good faith and that he had reasonable grounds for believing [**35] that his act or omission was not in violation of the [Act]." Under 29 U.S.C. § 260, the employer bears the burden of establishing, by "plain and substantial" evidence, subjective good faith and objective reasonableness. *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991); see *Brock v. Wilamowsky*, 833

F.2d 11, 19 (2d Cir. 1987). The burden, under 29 U.S.C. § 260, "is a difficult one to meet, however, and 'double damages are the norm, single damages the exception . . .'" *Wilamowsky*, 833 F.2d at 19, quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.). ⁵

4 "As used in the FLSA 'liquidated damages' is something of a misnomer. It is not a sum certain, determined in advance as a means of liquidating damages that may be incurred in the future. It is an award of special or exemplary damages added to the normal damages." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1063 n.3 (2d Cir. 1988). Congress provided for liquidated damages as a means of compensating employees "for losses they might suffer by reason of not receiving their lawful wage at the time it was due." *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991).

[**36]

5 However, even assuming that the employer meets its burden in this regard, the district court nonetheless may, in the exercise of its discretion, award liquidated damages under the express language of the statute. See 29 U.S.C. § 260. See also *Thompson v. Sawyer*, 219 U.S. App. D.C. 393, 678 F.2d 257, 282 (D.C. Cir. 1982).

[HN8] Liquidated damages under the FLSA are considered compensatory rather than punitive in nature. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 89 L. Ed. 1296, 65 S. Ct. 895 (1945); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991). They "constitute[] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank*, 324 U.S. at 707; see also *United Consumer Club*, 786 F.2d at 310 ("Doubling [damages under the FLSA] is not some disfavored 'penalty.' [The Portal-to-Portal Act] made doubling discretionary rather than mandatory, but it left a strong presumption in favor of doubling, a presumption overcome only by the employer's 'good faith . . . and reasonable grounds [**37] for believing that [the] act or omission was not a violation.'").

To establish "good faith," a defendant must produce "plain and substantial evidence of at least an honest intention to ascertain what the Act requires and to comply with it." *Wilamowsky*, 833 F.2d at 19. SNET contends that the district court erred in finding an absence of good faith in light of the evidence (1) that company officials did not intentionally violate the dictates of the FLSA, (2) that company officials complied with all pay obligations imposed under the collective bargaining agreement, (3)

that the lunch period practices had never been the subject of a grievance by an outside craft employee, (4) that the lunch period practices were consistent with those in the industry as a whole, and (5) that company officials were unaware of any judicial or regulatory decision that required the utility to compensate outside craft workers for "providing passive security during a meal period." Brief on Behalf of Defendants-Appellants at 47-48. Although the district court ruled tersely on this matter, *see SNET*, 892 F. Supp. at 405, we find no error in its conclusion.

"Good faith" in this context requires more than [**38] ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them. *See Cooper Elec.*, 940 F.2d at 908. *See also Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984). That SNET did not purposefully violate the provisions of the FLSA is not sufficient to establish that it acted in good faith. *Cooper Elec.*, 940 F.2d at 909. Nor is good faith demonstrated by the absence of complaints on the part of employees, *see Tri-County Growers*, 747 F.2d at 129, or simple conformity with industry-wide practice, *see Cooper Elec.*, 940 F.2d at 910; *Wilamowsky*, 833 F.2d at 19-20. Thus, although the evidence cited by SNET establishes that company officials are not scofflaws, it does not establish that SNET officials acted in good faith as understood in this context. Were SNET's argument to carry the day, anytime an employer unintentionally violates an unsettled wage or hour provision of the FLSA, the employer would be acting in good faith so long as it acted in accord with prevailing industry practice and no employee had complained. Such [**39] a view is incompatible with the compensatory nature of liquidated damages under the FLSA.

[*72] The only probative evidence of SNET's good faith is reflected in the opinion letter issued by the DoL

on the propriety of the company's meal period policy. *See* Joint Appendix, Vol. II, at 686 (Letter of John T. McMahon, District Director, U.S. Dept of Labor, Wage and Hour Division (Feb. 18, 1991)). It suggests that SNET took some efforts to ascertain the legality of its mealtime practices. Significantly, however, SNET failed to ask the appropriate question in its inquiry. Instead of seeking advice on whether compensation is required when outside craft employees are required to remain at open sites to ensure the security and safety of the site, they asked simply whether compensation was required by the fact that outside craft workers were required to remain on site. *See* Reply Brief on Behalf of Defendants-Appellants at 20-21. No agency opinion was necessary to answer this question, as the relevant regulations explicitly addresses the matter. *See* 29 C.F.R. § 785.19(b) (noting that "it is not necessary that an employee be permitted to leave the premises if he is otherwise completely [**40] freed from duties during the meal"). Predictably, the opinion letter does little more than repeat this regulatory provision. Moreover, nowhere in their briefs does SNET contend that it was relying on the advice of informed counsel. Thus, SNET's inquiry was insufficient, in itself, to compel a finding of good faith and, indeed, supported a finding to the contrary.

Because we find that the district court did not err in concluding that SNET failed to act in good faith as that term is understood under the FLSA, we need not address the company's contention that its actions were objectively reasonable. Thus, we affirm the district court's award of liquidated damages.

III. CONCLUSION

We have considered the remaining contentions of SNET and find them to be without merit. Accordingly, for the reasons set forth above we affirm the decision of the district court in its entirety.

LEXSEE

**LISA PROCTOR and DUNCAN PROCTOR, Plaintiffs, v. ALLSUPS
CONVENIENCE STORES, INC., a New Mexico Corporation, LONNIE D.
ALLSUP, an individual and BARBARA J. ALLSUP, an individual, Defendants.**

NO. 2:06-CV-255-J

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
TEXAS, AMARILLO DIVISION**

250 F.R.D. 278; 2008 U.S. Dist. LEXIS 33707

April 24, 2008, Decided

April 24, 2008, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Two plaintiff convenience store workers filed an action alleging violations of the Fair Labor Standards Act, 29 U.S.C.S. § 207(a), in relation to denial of overtime, against defendant employer. After a conditional class certification and discovery, the employer filed a motion to decertify the class, alleging the workers were not "similarly situated" to one another as required by 29 U.S.C.S. § 216(b).

OVERVIEW: There was no evidence of a single decision, policy, or plan that was causing the workers to work off the clock. Some of the workers said they were explicitly told they were not allowed to work off the clock and some said they never worked off the clock. Their expert acknowledged that 10 percent of the workers who were deposed said they did not work off the clock. Others alleged that while they remained clocked the entire time they were working, their paychecks were not correct. The quantity of time and the pattern of incidents the workers alleged they had spent working off the clock also varied. The claims varied from store to store and manager to manager. Those differences in the claims meant that the defenses would also vary. Management of the case and procedural concerns also supported decertification. There was no consistency among the testimony, no consistently applied policy resulting in working off the clock, and the time spent working off the clock was not alleged to be uniform or of a predetermined duration. Thus, a representative sample of employees could not provide a prima facie case.

OUTCOME: The employer's motion was granted. All opt-in workers were dismissed without prejudice and

could file suit in his or her own behalf. Equitable powers were invoked to toll the applicable statute of limitations for 30 days. The claims of the original two workers remained pending.

CORE TERMS: clock, manager, similarly situated, overtime, notice, opt-in, decertification, class member, decertify, hourly, class certification, present case, discovery, certify, times, interrogatory responses, store managers, off-the-clock, disparate, disparities, lenient, representative action, overtime pay, hours per week, human resources, time spent, appeal dismissed, factual allegations, presented evidence, systematically

LexisNexis(R) Headnotes

*Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions*

[HN1]The Fair Labor Standards Act requires employers to compensate their non-exempt hourly employees at overtime rates for time worked over the statutorily-defined maximum of 40 hours per week. 29 U.S.C.S. § 207(a). If an employer does not provide that pay, the statute authorizes an employee to bring suit against his or her employer not only on behalf of him or herself, but also on behalf of other "similarly situated" employees. 29 U.S.C.S. § 216(b). The purpose of allowing this type of action is to serve the interest of judicial economy and to aid in the vindication of plaintiffs' rights. In order to bring a representative action, however, the plaintiffs must be "similarly situated" to one another.

***Civil Procedure > Class Actions > Decertification
Labor & Employment Law > Wage & Hour Laws >
Remedies > Class Actions***

[HN2]In the two step similarly situated process under 29 U.S.C.S. § 216(b), a court considers if potential opt-in plaintiffs are "similarly situated" at two different stages in the litigation. At the first stage, the court determines if notice should be sent to potential class member plaintiffs. At this stage, the court usually has a minimal amount of evidence before it and uses a "fairly lenient" standard. This usually results in a conditional certification of a class, potential members of which are then given notice and may opt-in to the lawsuit. Following discovery, the court enters the second phase of the analysis. This is often done at the initiation of a motion for decertification. With the aid of information gained in discovery, the court considers if the opt-in plaintiffs are "similarly situated" to the named plaintiffs. If they are, the representative action may proceed. If they are not, the class is decertified, the opt-in plaintiffs are dismissed, and the original named plaintiffs may proceed with their own claims only.

***Civil Procedure > Class Actions > Decertification
Labor & Employment Law > Wage & Hour Laws >
Remedies > Class Actions***

[HN3]At the second stage in the two step similarly situated process under 29 U.S.C.S. § 216(b), the burden is on a plaintiff to prove that the individual class members are similarly situated. Where the parties have been able to conduct discovery, the similarly situated inquiry at the second stage is much more stringent. A court considers several factors at this stage in the analysis, including: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to a defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.

***Civil Procedure > Class Actions > Decertification
Labor & Employment Law > Wage & Hour Laws >
Remedies > Class Actions***

[HN4]While plaintiffs in a Fair Labor Standards Act class action must show that they are "similarly situated" under 29 U.S.C.S. § 216(b), this does not mean they must establish they are "identically situated." Instead, the question is if there is a demonstrated similarity among the individual situations, some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice. Decertification is proper if the action relates to specific circumstances personal to the plaintiff rather than any generally applicable policy or practice. In fact, the

more material distinctions revealed by the evidence, the more likely a district court is to decertify the collective action. In looking at the factual disparities among the plaintiffs, the court must consider if it can coherently manage the class in a manner that will not prejudice any party. If there is no single decision, policy, or plan that affects the plaintiffs, the case will have enormous manageability problems.

***Labor & Employment Law > Wage & Hour Laws >
Recordkeeping Requirements
Labor & Employment Law > Wage & Hour Laws >
Remedies > Class Actions***

[HN5]While a failure to keep records of the time that employees worked may in some cases be an independent violation of the Fair Labor Standards Act, it is not enough to constitute a policy that makes a class action appropriate for a single lawsuit.

***Labor & Employment Law > Wage & Hour Laws >
Remedies > Class Actions***

[HN6]A representative sample of employees can provide the proof of a prima facie case of a Fair Labor Standards Act violation.

COUNSEL: [**1] For Lesa Proctor, Duncan Proctor, Plaintiffs: Philip R Russ, LEAD ATTORNEY, Law Office of Philip R Russ, Amarillo, TX; Mark Wilson Laney, Laney & Stokes, Plainview, TX.

For Allsup's Convenience Stores Inc, a New Mexico Corporation, Lonnie D Allsup, an individual, Barbara J Allsup, an individual, Defendants: Michael W Fox, LEAD ATTORNEY, Robert Chance, Ogletree Deakins Nash Smoak & Stewart, Austin, TX.

JUDGES: Mary Lou Robinson, UNITED STATES DISTRICT JUDGE.

OPINION BY: Mary Lou Robinson

OPINION

[*279] MEMORANDUM OPINION

On March 7, 2008, the Defendants filed a *Motion for Decertification and Brief in Support*. The Plaintiffs filed their response on April 7, 2008, and Defendants filed a reply on April 16, 2008. Defendants' motion is GRANTED.

BACKGROUND

Plaintiffs filed this case on September 22, 2006, alleging violations of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. §207(a). The named Plaintiffs filed on behalf of themselves and as representatives of other similarly situated workers. Allsup's Convenience Stores is a New Mexico Corporation that operates 301 company stores in New Mexico and Texas. Plaintiffs allege that Allsup's conspired and acted concertedly to avoid paying overtime to its hourly employees. Plaintiffs allege [**2] that Allsup's required their employees to clock out after completing forty hours of work per week and to continue working off the clock for 1 to 3 hours each week. Plaintiffs allege that they were not able to finish their duties during their shifts, and had to stay late in order to clean bathrooms, transition to the next shift, balance the cash register, and complete paperwork.

Each Allsup's store is allocated a certain number of working hours per week by corporate headquarters. This number of hours is used to set shifts for the hourly workers. The number of hours is set based partly on sales and traffic in each store. Stacey Owens, the director of human resources for Allsup's, admits that the company tries to keep the amount of overtime worked to a minimum to control costs. Store managers can also lose a part of their bonus if they go over their store's allotted overtime hours.

On April 18, 2007, the Court granted Plaintiffs' motion for class certification and entered an order authorizing notice pursuant to 29 U.S.C. §216(b). Notice was sent to all hourly employees of Allsup's Convenience Stores in Texas and New Mexico who were employed from April 18, 2004 to the date of the order. [**3] In addition to the two named plaintiffs, 1,072 additional consent forms were filed by the court-designated deadline. The parties have conducted significant discovery, including taking the depositions of 34 plaintiffs, Lonnie and Barbara Allsup, and director of human resources Stacey Owens. The Defendants now ask that the Court decertify the class and allege that the plaintiffs are not "similarly situated" to one another.

STANDARD FOR DECERTIFICATION

[HN1]The FLSA requires employers to compensate their non-exempt hourly employees at overtime rates for time worked over the statutorily-defined [*280] maximum of 40 hours per week. 29 U.S.C. §207(a). If an employer does not provide that pay, the statute authorizes an employee to bring suit against his or her employer not only on behalf of him or herself, but also on behalf of other "similarly situated" employees. 29 U.S.C. §216(b). The purpose of allowing this type of action is "to serve the interest of judicial economy and to aid in the vindication of plaintiffs' rights." *Basco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 12441, *7 (E.D. La.), citing

Freeman v. Wal-Mart Stores, Inc., 256 F. Supp.2d 941, 943 (W.D. Ark. 2003), citing *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). [**4] In order to bring a representative action, however, the plaintiffs must be "similarly situated" to one another. *Id.*

The similarly situated analysis follows a two step process typified by *Lusardi v. Xerox Corp.* 118 F.R.D. 351 (D.N.J. 1987), *mandamus granted in part, appeal dismissed*, *Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir. 1988), *vacated in part, modified in part, and remanded*, *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J. 1988), *aff'd in part, appeal dismissed*, *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3rd Cir. 1992). [HN2]In this process, the Court considers if potential opt-in plaintiffs are "similarly situated" at two different stages in the litigation. *Mooney v. Aramco Services, Inc.*, 54 F.3d 1207, 1213 (5th Cir. 1995). At the first stage, the Court determines if notice should be sent to potential class member plaintiffs. *Id.* At this stage, the Court usually has a minimal amount of evidence before it and uses a "fairly lenient" standard. *Id.* at 1214. This usually results in a conditional certification of a class, potential members of which are then given notice and may opt-in to the lawsuit. *Id.* In the present case, the Court has already conducted this analysis and authorized the sending [**5] of notice to potential plaintiffs.

Following discovery, the Court enters the second phase of the analysis. This is often done at the initiation of a motion for decertification. *Id.* With the aid of information gained in discovery, the Court considers if the opt-in plaintiffs are "similarly situated" to the named plaintiffs. *Id.* If they are, the representative action may proceed. *Id.* If they are not, the class is decertified, the opt-in plaintiffs are dismissed, and the original named plaintiffs may proceed with their own claims only. *Id.*

[HN3]At this second stage, the burden is on the Plaintiff to prove that the individual class members are similarly situated. *Bayles v. Am. Med. Response of Col., Inc.*, 950 F. Supp. 1053, 1062-63 (D. Colo. 1996), *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003), *Basco*, 2004 U.S. Dist. LEXIS 12441 at *14. Because the parties have been able to conduct discovery, the similarly situated inquiry at the second stage is much more stringent. *Harris v. FFE Transp. Servs., Inc.*, 2006 U.S. Dist. LEXIS 51437, *7-8 (N.D. Tex.). The Court considers several factors at this stage in the analysis, including:

- (1) the disparate factual and employment settings [**6] of the individual plaintiffs;
- (2) the various defenses available to [the defendant] which appear to be

individual to each plaintiff; [and] (3) fairness and procedural considerations...

Basco, 2004 U.S. Dist. LEXIS 12441 at *10, citing Mooney, 54 F.3d at 1213 n.7, citing Lusardi, 118 F.R.D. at 359. [HN4] While the plaintiffs must show that they are "similarly situated," this does not mean they must establish they are "identically situated." Id. at *15, citing Helmerich and Payne Intern'l Drilling Co., 1992 U.S. Dist. LEXIS 5367, *2 (E.D. La. 1992). Instead, the question is if there is "a demonstrated similarity among the individual situations...some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice.]" Heagney v. European Am. Bank, 122 F.R.D. 125, 127 (E.D.N.Y. 1998), see also Helmerich, 1992 U.S. Dist. LEXIS 5367 at *2. Decertification is proper if "the action relates to specific circumstances personal to the plaintiff rather than any generally applicable policy or practice." Burt v. Manville Sales Corp., 116 F.R.D. 276, 277 [*281] (D. Colo. 1987), see also Helmerich, 1992 U.S. Dist. LEXIS 5367 at *2. In fact, [**7] "the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action." Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007).

In looking at the factual disparities among Plaintiffs, the Court must consider if it can "coherently manage the class in a manner that will not prejudice any party." Johnson v. TGF Precision Haircutters, Inc., 2005 U.S. Dist. LEXIS 44259 at *32, citing Lusardi, 118 F.R.D. at 360. If there is "no single decision, policy, or plan" that affects the Plaintiffs, the case will have "enormous manageability problems..." Id. at *34, citing Mielke v. Laidlaw Transit, Inc., 313 F. Supp. 2d 759, 764 (N.D. Ill. 2004).

District courts have granted motions to decertify where there was great variety in the factual allegations among the individual Plaintiffs. In Johnson v. TGF Precision Haircutters, Inc., the Court granted a motion for decertification at the second stage of the "similarly situated" analysis. 2005 U.S. Dist. LEXIS 44259 (S.D. Tex.). The Plaintiffs alleged that hourly employees were not being paid overtime and were working off the clock. Id. at *6. At the first stage, the Court authorized sending notice to nearly 4000 potential [**8] plaintiffs, and 264 employees from over 90 locations filed opt-in consents. Id. at *7. The Defendant then moved to decertify the class. Id. The Court found that the evidence showed "a substantial variance of experiences by different Plaintiffs under different managers and at different shops around Texas." Id. at *12. For example, Plaintiffs at some stores stated that they were not allowed to clock in when they

worked for 15 minutes before the store opened. Id. At other stores, employees did clock in for that time. Id. Additionally, the Plaintiffs varied on whether or not they were required to clock-out when waiting for customers and even if they were allowed to leave the store when clocked-out and waiting. Id.

The Court noted that the "large number of widespread shops, each with its own manager, understandably appears to have contributed materially to the dissimilarities in the Plaintiffs' experiences." Id. at *12-13. While the Plaintiffs alleged an overarching policy to deny them overtime, the company's actual policy in the manual instructed employees to make sure their timesheets accurately reflected the hours worked. Id. at *14. The Court concluded that although the evidence established [**9] that "some Plaintiffs may have prima facie claims for FLSA violations at different times, in different places, in different ways, and to differing degrees"; the overall "evidence of varied particular violations" was not enough to prove a "uniform, systematically applied policy of wrongfully denying overtime pay to Plaintiffs." Id. at *22. The "highly variable" nature of the alleged violations that differed by manager meant that the class should be decertified. Id.

Even at the first, more lenient stage of initial certification, courts consider the factual disparities among the Plaintiffs and sometimes refuse to certify a class and send notice. In Basco v. Wal-Mart Stores, Inc., Plaintiffs sought class certification and notice to all similarly situated employees which the Court denied. 2004 U.S. Dist. LEXIS 12441 (E.D. La.). As in the present case, the Plaintiffs in Basco alleged that as hourly workers, they were required to work beyond their scheduled hours after clocking out, that they were not paid for this time spent working off the clock, and that managers at Wal-Mart stores had "manipulated time and wage records to reduce amounts paid to Wal-Mart employees, including overtime pay." [**10] Id. at *6. Plaintiffs sought to certify a class that included all Louisiana Wal-Mart employees who were not paid overtime. Id. at *17. In their motion for class certification, Plaintiffs alleged that they were all similarly situated because Wal-Mart had a [*282] "mentality" of "no overtime and strict budgeting of time and employee costs." Id. The Plaintiffs also presented evidence of bonus incentives given to store managers who kept salary costs down. Id. at 19. In contrast, Wal-Mart presented evidence that managers are instructed to never allow employees to work off the clock. Id. at 21.

The Court denied the motion to certify the class because the effects on the workers were "neither homogeneous nor lend[ed] themselves to collective inquiry." Id. at 22. In fact, the effects were "anecdotal" and "particularized," as shown by the Plaintiffs' own witnesses testifying that any policy was not "uniformly or systematically

implemented at any given store." *Id.* Analyzing the motion under the more demanding second stage inquiry, the Court went on to note that the plaintiffs "performed different jobs at different geographic locations and were subject to different managerial requirements which occurred [**11] at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis." *Id.* at 26. The Court denied the motion for class certification.

Similarly, in *Simmons v. T-Mobile USA, Inc.*, the Court refused to certify a class and send notice to "all current and former senior sales representatives employed" by the defendant in Texas for the past three years. 2007 U.S. Dist. LEXIS 5002 (S.D. Tex.). The Court found that the case involved "claims of 'off the clock' unpaid overtime, where allegedly dozens (if not hundreds) of different low-level supervisors with wide management discretion in practice violate Defendant's clear, lawful written policies at some or many of Defendant's more than one hundred different retail locations." *Id.* at *25.

DECERTIFICATION IN THE PRESENT CASE

In the present case, there is no evidence of a single decision, policy, or plan that is causing the Plaintiffs to work off the clock. In fact, the evidence indicates that Allsup's official policy was to prohibit working off the clock. The testimony of the opt-in Plaintiffs confirms that there is no official policy at Allsup's of having or allowing employees to work off [**12] the clock. Many of the opt-in Plaintiffs testified that they knew about Allsup's policy prohibiting employees from working off the clock. Juan Cherry, Maria Zamora, Andrea Exparaza, James Lasseter, and Sara Heater are only some of the Plaintiffs who said in their depositions or in their responses to interrogatories that they knew Allsup's policy was that employees were not allowed to work off the clock. Some Plaintiffs testified that they were explicitly told that they were *not* allowed to work off the clock. For example, Dalynn Green and Carrie Bennett were told about the policy by their store managers; Carolyn Shaw and Robyn Skiles were told at training; David Price was told by the area manager; Paige Guinn was told by her store and her district manager; and Patricia Saenz was told by her district manager.¹

¹ Plaintiffs allege that it is sufficient proof of a single policy that there are no records kept of the time employees worked off the clock. However, if this was all that was needed to prove a single policy, any case alleging work done off the clock would be certifiable as a class. [HNS]While failure to keep records of the time that Plaintiffs worked may in some cases be an independent

[**13] violation of the FLSA, it is not enough to constitute a policy that makes this class appropriate for a single lawsuit.

In addition to lacking evidence of any policy that employees may work off the clock, the Plaintiffs also present claims that are factually disparate. Some Plaintiffs say that they never worked off the clock. Plaintiffs Brenda Bridges and Juan Jaramillo both wrote in their responses to interrogatory questions, "I never worked off the clock." Plaintiffs' expert, Bradley T. Ewing, acknowledged in his report that 10% of the Plaintiffs who were deposed in this case said they did not work off the clock.

Other Plaintiffs allege that while they remained clocked in the entire time they were working, their paychecks were not correct. Plaintiff Kimberly Dawn Pilegreen testified [*283] she never worked off the clock, but was paid straight time instead of the overtime she was entitled to. Plaintiff Arilee Marsh testified that she never worked off the clock, but that her paycheck did not accurately reflect all the hours she worked. Plaintiff Valerie Smith testified that she always worked on the clock, but that she was not paid for the overtime she worked.

The quantity of time and the pattern [**14] of incidents Plaintiffs allege they have spent working off the clock also vary. Some Plaintiffs allege that they spent a large portion of their work time off the clock. Plaintiff Patience Gunn wrote in her interrogatory responses that she worked off the clock for 6 hours at a time over five months of working for Allsup's. Plaintiff Angel Aragon testified that he worked 8 to 10 hours of unpaid overtime every week. Plaintiff Lilly Tamayo testified that some weeks, she worked 80 or 90 hours and was only paid for 50. Other Plaintiffs allege a minimal amount of time worked off the clock. Plaintiff Teena Thompson, for example, testified she worked 20 minutes off the clock four or five times during her employment with Allsup's. Plaintiff Dynasty Richardson wrote in her interrogatory responses that she forgot to clock in on one occasion and was not paid for three hours. Plaintiff Deborah Knotts wrote in her interrogatory responses that she possibly worked off the clock on her last day of employment only. Similarly, Plaintiff Julie Smith wrote in her interrogatory responses that she worked one hour off the clock on a single occasion.

The Plaintiffs' claims vary from store to store and manager [**15] to manager. Plaintiff Kenrick Harmon testified that he worked at a store in Texas where he was asked to bag ice or unload trucks off the clock. However, when he worked at a different Texas store under a different manager, he was never allowed to do work off the clock. Plaintiffs Martin Salazar and Juan Montano testified that whether or not they worked off the clock de-

pendent on which store they were working at. Plaintiffs Sara Heater and Bridget Garcia testified that they only worked off the clock for one manager and not for their other managers.

The evidence shows a large factual variety among the individual Plaintiffs' claims and the times they allege they worked off the clock. These differences in the Plaintiffs' claims mean that the Defendant's defenses would also vary. Defenses to claims that individuals did not work off the clock but were not paid correctly will be distinct from the Plaintiffs alleging they were asked to work off the clock by management. As for off the clock claims, the *Basco* court noted that the variety of defenses could include

(1) that the particular class member did not in fact work off-the-clock, (2) any instructions received to work off-the-clock without compensation [**16] were outside the scope of authority and directly contrary to the well established policy and practice, (3) even if a particular class member did work off-the-clock, that employee unreasonably failed to avail themselves of curative steps provided by defendant to be compensated for that work...(5) a class member had an actual and/or constructive knowledge of [Defendant's] policies banning off the clock work and voluntarily chose to engage in such work in deviance of that policy...

2004 U.S. Dist. LEXIS 12441 at *25-26. Other defenses will involve alleging that some of the claims are *de minimis*.

Management of this case and procedural concerns also support decertification. The Plaintiffs have not suggested any alternative ways to try the case or any ways to address the disparate factual allegations of the more than 1,000 Plaintiffs. Plaintiffs do suggest that the 3% of the class who was deposed could serve as a representative group. It is true that representative testimony can sometimes suffice so that not every plaintiff must testify. *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). [HN6]A representative sample of employees can provide the proof of a prima facie case of [**17] a FLSA violation. *Reich v. S. New England Commc'ns Corp.*, 121 F.3d 58, 67 (2nd Cir. 1997), citing *Reich v. Southern Md. Hosp.*, 43 F.3d 949, 951 (4th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d [**284] Cir. 1994). Although the 2nd Circuit has affirmed representative testimony of only 2.7% of a class,

that case involved "actual consistency" among the testimony "both within each category [of employee] and overall"; there was "no contradictory testimony"; the abuse arose from a policy that was consistently applied; and the uncompensated "periods at issue were the employees' lunch hours, which are predictable, daily-recurring periods of uniform and predetermined duration." *Id.* at 68. In this case, there is no consistency among the testimony, there is no consistently applied policy resulting in working off the clock, and the time spent working off the clock is not alleged to be uniform or of a predetermined duration.

The cases that the Plaintiffs cite for recent examples of denials of decertification are distinguishable from the present case. The *Behr* case is an example of the analysis conducted at the first and more lenient stage in determining if notice should be sent [**18] to a class. *Behr v. Drake Hotel*, 586 F. Supp. 427 (N.D. Ill. 1944). In other cases the Plaintiff cites, the issue is whether or not employees' job duties are similar enough for making a single the determination if the class was properly classified as exempt. See *Bradford v. Bed Bath & Beyond*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002). *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 265 (D. Conn. 2002).

In the case before this Court, all three considerations lead to the conclusion that decertification is appropriate. The Plaintiffs have worked in settings that vary from store to store, manager to manager, and day to day. The defenses that the Defendant will offer vary with these factual disparities. Finally, it would be fairer and procedurally more expedient to decertify the class.

CONCLUSION

The Defendants' Motion to Decertify the Class is GRANTED, and all opt-in Plaintiffs are DISMISSED from this action without prejudice to each such opt-in Plaintiff filing a suit in his or her own behalf. To avoid prejudice to individual opt-in Plaintiffs who may choose to file their own cases, the Court invokes its equity powers to toll the applicable statute of limitations for 30 days after entry of this [**19] Order. The claims of Plaintiffs Lesa Proctor and Duncan Proctor remain pending herein for trial.

IT IS SO ORDERED.

Signed this 24<th> day of April 2008.

/s/ Mary Lou Robinson

MARY LOU ROBINSON

UNITED STATES DISTRICT JUDGE

LEXSEE

**Billy ROBICHEAUX, et al., Plaintiffs-Appellees, v. RADCLIFF MATERIAL, INC.,
a subsidiary of Southern Industries Corporation, Defendant-Appellant**

No. 81-3578

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**697 F.2d 662; 1983 U.S. App. LEXIS 30719; 96 Lab. Cas. (CCH) P34,329; 25 Wage
& Hour Cas. (BNA) 1210**

February 7, 1983

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Louisiana.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer challenged a judgment of the United States District Court for the Western District of Louisiana, which held that plaintiff welders were "employees" rather than "independent contractors" for the purpose of recovering overtime wages under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq. Plaintiffs requested reversal of the denial of their claim for liquidated damages.

OVERVIEW: Plaintiff welders brought a suit against defendant employer to recover unpaid overtime wages and liquidated damages under the Fair Labor Standards Act of 1938 (Act), 29 U.S.C.S. § 201 et seq. Defendant contended that plaintiffs were "independent contractors" rather than "employees" covered by the Act. The district court found that plaintiffs were entitled to overtime compensation because they were "employees" under the Act. However, the district court rejected plaintiffs' claim for statutory liquidated damages. The court affirmed the judgment. The court held that plaintiffs were "employees" covered by the Act because defendant exercised substantial if not complete control over the hours worked and the jobs done by plaintiffs. The court also found that plaintiffs were economically dependent on defendant. The court refused to review plaintiffs' claim regarding their entitlement to liquidated damages because they failed to file a cross-appeal. The court found that plaintiffs did not show any exceptional circumstances to in-

duce it to consider the liquidated damages issue. The court awarded attorney fees to plaintiffs on appeal.

OUTCOME: The court affirmed the judgment in favor of plaintiff welders in their action to recover overtime wages. The court held that plaintiffs were covered employees rather than independent contractors. The court also supplemented the district court's judgment by awarding attorney fees to plaintiffs on appeal. The court found that plaintiffs' claim for liquidated damages was not properly before it because they did not file a cross-appeal.

CORE TERMS: welder, liquidated damages, independent contractors, attorney's fees, cross-appeal, welding, unpaid, overtime wages, employee status, economic reality, Fair Labor Standards Act, overtime compensation, good faith, hours worked, action accrued, period of time, own business, cause of action, letterheads, livelihood, personnel, skill, work done, failing to pay, denied sub nom, exceptional circumstances, self-employed, insignificant, economically, dependence

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN1]See 29 U.S.C.S. § 207.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN2]See 29 U.S.C.S. § 216(b).

***Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Remedies > Liquidated Damages***

[HN3]Section 260 of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 260, grants discretion to the district court in awarding liquidated damages if the judge determines that the employer has been in good faith in failing to pay overtime wages.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN4]See 29 U.S.C.S. § 260.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ***

[HN5]The Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., defines an "employee" simply as any individual employed by an employer, 29 U.S.C.S. § 203(e)(1); and to "employ" as including to suffer or permit to work, 29 U.S.C.S. § 203(g). The term "employee" is thus used in the broadest sense ever included in any act. Various jurisprudential tests have evolved, the focus of which is whether the employees, as a matter of economic reality, are dependent upon the business to which they render service. When there are indicia of the employee's economic independence of the employer, the determination of employee status is not always an easy one to make and will rest on an analysis of the evidence as a whole as to whether the claimant as a matter of economic reality is dependent for his livelihood upon his relationship with his alleged employer.

***Labor & Employment Law > Employment Relationships > Independent Contractors
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***

[HN6]Common law concepts of "employee" and "independent contractor" have been specifically rejected by the courts, and five considerations are generally used in gauging the degree of economic dependence of an alleged employee: the skill required; the permanency of the relationship; the employee's investment in facilities; the employer's degree of control; and the degree to which the opportunity for profit or loss is determined by the employer. No one of these tests is controlling, but the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the Fair Labor

Standards Act of 1938, 29 U.S.C.S. § 201 et seq., or are sufficiently independent to lie outside its ambit. Stated another way, the focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic reality, in business for himself.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN7]As to a trial court's underlying factual findings and factual inferences deduced therefrom, the appellate court is bound by the clearly erroneous standard of Fed. R. Civ. P. 52(a). However, as to a legal conclusion reached by the district court based upon this factual data, the appellate court may review this as an issue of law.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN8]An employee is not permitted to waive employee status under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

***Labor & Employment Law > Employment Relationships > Independent Contractors
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***

[HN9]A person's subjective opinion that he is a businessman rather than an employee does not change his status under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

Civil Procedure > Appeals > Reviewability > Notice of Appeal

[HN10]Without the filing of a cross-appeal, an appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

COUNSEL: Kullman, Lang, Inman & Bee, James D. Carriere, New Orleans, Louisiana, for Appellant.

Conery & Breaux, John E. Conery, Franklin, Louisiana, for Appellee.

JUDGES: Wisdom, Randall and Tate, Circuit Judges.

OPINION BY: TATE

OPINION

[*664] TATE, Circuit Judge:

The plaintiffs, five Louisiana welders, bring suit in federal court, 29 U.S.C. § 216(b), to recover unpaid overtime wages and liquidated damages under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. Made defendant is their alleged employer ("Radcliff"), who principally contends that the welders are independent contractors, rather than "employees" covered by the Act. The district court found the plaintiff welders to have been employees within the meaning of the Act and thus entitled to overtime compensation for work performed for Radcliff in excess of forty hours in any week, section 207 of the Act, 29 U.S.C. § 207.¹ The court rejected, however, their claim for statutory liquidated damages in an additional amount equal to the unpaid overtime wages, section 216(b), 29 U.S.C. § 216(b),² in purported [****2**] exercise of its discretion not to do so when the employer is found to be in good faith, section 260, 29 U.S.C. § 260.³ The court also awarded the plaintiffs' attorney's fees.

1 [HN1]Section 207 of the Act states, in part, that, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2 [HN2]Section 216(b) provides, in part, that,

any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

3 [HN3]Section 260 of the Act grants discretion to the district court in awarding liquidated damages if the judge determines that the employer has been in good faith in failing to pay overtime wages. This section provides:

[HN4]In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

[**3] [*665] Radcliff appeals, contesting only the finding of employee status. The welders also request appellate relief. Without having filed a cross-appeal, the plaintiff welders argue in brief and orally for reversal of the denial of liquidated damages. Finding no error in the district court's determination that the welders were employees rather than independent contractors, because of Radcliff's economic control over their work functions and their resultant economic dependence upon Radcliff under the circumstances here shown, and finding that the issue of liquidated damages is not properly before us, we affirm, supplementing the award by allowing attorney's fees and costs on appeal.

Facts

The facts relevant to a disposition of this case are essentially undisputed. For a period of time ranging from ten months to three years, each of the plaintiff welders in this case worked for Radcliff. They each signed contract with the company describing themselves to be independent contractors, furnished their own welding equipment (in which they had invested from five to seven thousand dollars), and provided their own insurance and workmen's compensation coverage. In addition, [****4**] they invoiced Radcliff (for hours worked) on their own business letterheads, filed federal income tax returns on IRS forms as self-employed individuals, and received a higher hourly wage than did other welders employed by Radcliff who did not furnish their own equipment and who were considered by the company to be employees.

Prior to working exclusively for Radcliff, the welders had held themselves out to be independent contractors, some with their own business cards, advertising, company names, and letterheads.

Despite these factors, however, indicating some degree of independence and control, the welders were expected by Radcliff to arrive at work each morning at 7:00 a.m. and work at least until 5:00 p.m. They were given daily work assignments by Radcliff personnel, were told what to work on, where, and how long an assignment should take. They were supervised by Radcliff personnel periodically during the course of the day. Of the work done, the district court found that only 50% was welding work, with the remainder being clean-up work and other semi-skilled mechanical work. One plaintiff testified that, of the welding work, only 30% was performed with the welders' own machines, [**5] the remainder being performed with Radcliff equipment. The welders were on 24-hour call, and generally worked 50 to 80 hours per week. Except for insignificant occasions, all work during the ten month to three year period was done for Radcliff. One welder testified, for example, that if he did not appear at the prescribed time in the morning, he knew he would lose his job.

In 1980, Radcliff asked the welders to procure additional insurance. Upon their refusal, the work relationship was terminated. Radcliff now appeals the district court's determination that the welders were employees within the meaning of the Act, and the court's consequent award of accrued overtime wages, attorney's fees and costs.

"Employee" Status and Standard of Review

[HN5]The Act defines an "employee" simply as "any individual employed by an employer", section 203(e) (1), 33 U.S.C. § 203(e) (1); and to "employ" as including "to suffer or permit to work", section 203(g), 33 U.S.C. § 203(g). The term "employee" is thus used "in the broadest sense 'ever . . . included in any act.'" Donovan v. American Airlines, Inc., 686 F.2d 267, 271 (5th Cir. 1982). Various jurisprudential tests have evolved, the [**6] focus of which is whether the employees, "as a matter of economic reality, are dependent upon the business to which they render service." Mednick v. Albert [*666] Enterprises, Inc., 508 F.2d 297, 299 (5th Cir.1975), quoting Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 1550, 91 L. Ed. 1947 (1947).

When there are indicia of the employee's economic independence of the employer, the determination of employee status is not always an easy one to make and will rest on an analysis of the evidence as a whole as to whether the claimant as a matter of economic reality is dependent for his livelihood upon his relationship with

his alleged employer. Hickey v. Arkla Industries, Inc., 688 F.2d 1009, 1012-13 (5th Cir. 1982). In this regard, [HN6]common law concepts of "employee" and "independent contractor" have been specifically rejected by the courts, ⁴ and five considerations are generally used in gauging the degree of economic dependence of an alleged employee: the skill required; the permanency of the relationship; the employee's investment in facilities; the employer's degree of control; and the degree to which the opportunity for profit or loss is determined by [**7] the employer. Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1311 (5th Cir.) cert. denied, sub nom. Pilgrim Equipment Company, Inc. v. Usery, 429 U.S. 826, 97 S. Ct. 82, 50 L. Ed. 2d 89 (1976). No one of these tests is controlling, but

the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit.

Usery, supra, 527 F.2d at 1311-12. Stated another way, "the focal inquiry in the characterization process is thus whether the individual is or is not, as a matter of economic reality, in business for himself." Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir.1981).

4 Persons are often found to be "employees" although they possess attributes common to independent contractors. *See, e.g., Donovan v. Tehco, Inc., 642 F.2d 141 (5th Cir.1981); Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185 (5th Cir.1979); Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308 (5th Cir.) cert. denied, sub nom. Pilgrim Equipment Company, Inc. v. Usery, 429 U.S. 826, 97 S. Ct. 82, 50 L. Ed. 2d 89 (1976); Mednick v. Albert Enterprises Inc., 508 F.2d 297 (5th Cir.1975).*

[**8] We review the district court's determination as being one of mixed law and fact. Donovan, supra, 686 F.2d at 270 note 4. [HN7]As to the trial court's underlying factual findings and factual inferences deduced therefrom, we are bound by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* However, as to the legal conclusion reached by the district court based upon this factual data, *i.e.*, here that these welders are employees rather than independent contractors, we may review this as an issue of law. *Id.*

Employee Status Was Correctly Determined

We conclude, on the basis of the non-clearly erroneous factual findings of the district court, that these welders were correctly determined to be employees within the meaning of the Act. Looking at the "economic realities" of the relationship in light of the factors listed above, it is apparent that the welders were economically dependent on Radcliff.

Radcliff exercised substantial if not complete control over the hours worked and the jobs done by the welders. The duration of the relationship was from ten months to three years for each of them -- a substantial period of time [**9] -- and except for insignificant work elsewhere, was exclusively with Radcliff. The skill required for welding was determined by the district court to be "moderate," and much of the work done was less-skilled non-welding-related work. Although each of the welders had invested his own money in purchasing a welding machine, the district court concluded that a relatively minor portion of the compensation was paid to the employees based upon their furnishing their equipment and that the major part of the compensation was paid for the services of these reliable, always on call, experienced employees. The [*667] district court also found that any opportunity for profit was determined solely by Radcliff's need for their work (rather than, for instance, on the initiative and planning of the individual welders.) Cf. Hickey v. Arkla Industries, Inc., supra, 688 F.2d 1009 (manufacturer's sales representative whose income was in the form of commissions rather than wages, and whose opportunity for profit depended on initiative and planning, is not an "employee"); see also Usery v. Pilgrim Equipment Co., Inc., supra, 527 F.2d at 1314.

The plaintiff welders in this case did receive [**10] higher hourly wages than did the Radcliff welders who did not furnish their welding equipment and who were considered by Radcliff to be employees. However, a fair inference from the record is that, as some of even Radcliff's witnesses testified, the higher pay to these "contract" welders resulted from their higher degree of skill, the greater number of hours worked per week, and their more onerous 24-hour on-call duty.

[HN8]An employee is not permitted to waive employee status. Donovan v. American Airlines, Inc., supra, 686 F.2d at 269 note 3. Thus, the fact that the plaintiff welders in this case signed contracts stating that they were independent contractors, while relevant, is not dispositive. Id. Usery v. Pilgrim Equipment Co., Inc., supra, 527 F.2d at 1315. Likewise, the fact that they provided their own insurance coverage, listed themselves as self-employed on their tax returns, and had their own business cards and letterheads, does not tip the balance in favor of independent contractor status where, as here, the

economic realities of the situation indicate that the employee depended upon the employer for his livelihood, as tested by the cited criteria. [HN9]A person's [**11] subjective opinion that he is a businessman rather than an employee does not change his status. Usery, supra, 527 F.2d at 1315. While some of the welders may have been independent contractors for other companies before commencing work with Radcliff, this fact does not preclude a finding that they exchanged this status for the security of the present employee relationship. They thereby obtained the benefit of steady reliable work over a substantial period of time and became economically dependent on a single source of income.

Under the facts found by the district court, we conclude that it did not err in determining that for purposes of the Act the present welders, rather than being "independent contractors" in business for themselves, were "employees", dependent for their livelihood upon the work they performed for Radcliff on a permanent and full-time basis.⁵

5 Radcliff also contends that these plaintiffs, earning an annual income in excess of \$30,000, are not the kind of persons meant to be covered by the Act. There is no support for this contention in either the legislative history of the Act or in the jurisprudence.

[**12] *The Liquidated Damages Issue Is Not Before Us*

The plaintiff welders, without having filed a cross-appeal, contest the district court's finding that Radcliff was in good faith in failing to pay overtime wages. They request that this finding be reversed and that they be awarded liquidated damages in addition to the amount already awarded.⁶

6 The district judge found that a three year rather than a two year statute of limitations applied upon his determination that Radcliff had "willfully" violated the Act. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.1971), cert. denied, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed. 2d 219 (1972). See 29 U.S.C. § 255 which provides, in relevant part:

Any action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, . . .

(a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

The plaintiff welders contend that, in view of this willfulness determination, Radcliff must, as a matter of law, be determined not to have been in good faith. *See* note 3 *supra*. They therefore conclude that liquidated damages should have been awarded. In view of our determination that the issue is not properly before us, we decline to answer this contention.

[**13] [*668] The rule is well established, however, that [HN10]without the filing of a cross-appeal, an appellee "may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Morley Construction Company v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 328, 81 L. Ed. 593 (1937). *See also* *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1272 (5th Cir.1982); *Dupuy v. Dupuy*, 551 F.2d 1005, 1026 note 34 (5th Cir.), *cert. denied*, 434 U.S. 911, 98 S. Ct. 312, 54

L. Ed. 2d 197 (1977); *Lettsome v. United States*, 434 F.2d 907, 909-10 (5th Cir.1970); 9 Moore's Federal Practice and Procedure, para. 204.11[3] (2d ed.1974); 16 Wright, Miller, Cooper, and Gressman, Federal Practice § 3950 at 367-68 (1977); 15 Wright, Miller, and Cooper, Federal Practice and Procedure § 3904 (1976). The plaintiff welders argue that this rule is not jurisdictionally mandated and may be judicially waived under exceptional circumstances. *Langnes v. Green*, 282 U.S. 531, 538, 51 S. Ct. 243, 246, 75 [**14] L. Ed. 520 (1931); 9 Moore's, *supra*, at para. 204.11[5]; 15 Wright, Miller, and Cooper, *supra*, § 3904 at 417-418. No such exceptional circumstances producing great inequity are here shown of the extra-ordinary nature that on rare occasions has induced a reviewing court to afford relief to appellees who did not file a cross-appeal. The present appellees simply did not preserve by cross-appeal their claim for liquidated damages, and no more reason is shown for our exercising any power we might have under Fed.R.App.P. 2 to suspend the requirement for a timely cross-appeal, Fed.R.App.P. 4(a) (3), than in any other such instance. The liquidated damages issue is therefore not properly before us.

Attorney's Fees and Costs on Appeal

Pursuant to stipulation of the parties, the attorney's fees and costs on this appeal are fixed at \$2,000.00. We are able to award this amount to appellee's counsel on this appeal. *See* *Marston v. Red River Levee & Drainage District*, 632 F.2d 466, 468 (5th Cir.1980).

Accordingly, the judgment of the district court, as supplemented here, is AFFIRMED.

AFFIRMED.

LEXSEE

**ROCKWELL INTERNATIONAL CORPORATION, ROCKWELL HANFORD
OPERATIONS, a Delaware Corporation, Plaintiff-Appellee, v. HANFORD
ATOMIC METAL TRADES COUNCIL, etc., Defendant-Appellant**

No. 87-3746

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**851 F.2d 1208; 1988 U.S. App. LEXIS 9306; 128 L.R.R.M. 3058; 109 Lab. Cas.
(CCH) P10,600**

June 8, 1988, Argued and Submitted

* This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

July 12, 1988, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Washington, Robert J. McNichols, District Judge, Presiding.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant union sought review of the judgment of the United States District Court for the Eastern District of Washington, which granted appellee employer's motion for summary judgment in appellee's action to enjoin grievance arbitration requested by appellant.

OVERVIEW: When appellant union requested that appellee employer arbitrate grievances over work assignments, appellee refused and brought suit to enjoin arbitration. Both parties filed motions for summary judgment, appellee requested an order enjoining arbitration, and appellant counterclaimed for an order to compel arbitration. The district court invoked the doctrine of judicial estoppel to bar appellant's claim and granted appellee's motion. Appellant sought review. The court reversed and remanded because judicial estoppel should not have been invoked and the district court should have looked only to the parties' collective bargaining agreement's arbitration clause. The court found that the district court erred in considering appellee's compliance with its obligations under the agreement.

OUTCOME: The judgment of the district court that granted appellee employer's motion for summary judgment in appellee's action to enjoin arbitration requested by appellant union was reversed and remanded, as judicial estoppel should not have been invoked to bar appellant's counterclaim and the district court should have looked only to the parties' collective bargaining agreement's arbitration clause.

CORE TERMS: judicial estoppel, grievance, arbitration, summary judgment, arbitration clause, bargaining agreement, compel arbitration, arbitrability, asserting, classification, judicial inquiry, sua sponte, de novo, equitable estoppel, authorization, counterclaim, adjudicated, collateral, arbitrator, enjoining, arbitrate, estoppel, estopped, judicata, invoked, unfair, res, bargaining agent, job classification, decommissioning

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1]The appellate court reviews de novo a district court's grant of summary judgment.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata

[HN2]Unlike collateral estoppel, res judicata, and equitable estoppel, judicial estoppel focuses exclusively on preventing the use of inconsistent assertions that would result in an "affront to judicial dignity" and "a means of obtaining unfair advantage."

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview
Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement
Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Limits

[HN3]In deciding whether the parties have agreed to submit a particular grievance to arbitration, a district court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, a union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability
Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement

[HN4]In reaching a decision on arbitrability, a district court must examine the collective bargaining agreement (CBA), most specifically, the arbitration clause, in order to determine the intent of the contracting parties. The judicial inquiry must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. Moreover, there exists a strong presumption of arbitrability for disputes arising under CBAs with arbitration clauses unless it may be said with positive assurance that the arbitration clause was not intended to cover the asserted dispute.

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Authority

[HN5]Questions of actual compliance with a collective bargaining agreement are for the arbitrator, not the courts.

COUNSEL: David E. Williams, Critchlow & Williams, Richland, Washington, for the Defendant-Appellant.

Robert S. Gruhn, Richland, Washington, and Burton J. Fishman, Gibson, Dunn & Crutcher, Washington, District of Columbia, for the Plaintiff-Appellee.

JUDGES: Wright, Ferguson and Brunetti, Circuit Judges.

OPINION BY: FERGUSON

OPINION

[*1209] FERGUSON, Circuit Judge:

Hanford Atomic Metal Trades Council ("HAMTC") appeals the district court's grant of summary judgment to Rockwell International Corporation ("Rockwell"). HAMTC argues that the district court erroneously raised the doctrine of judicial estoppel, sua sponte, to bar HAMTC's counterclaim for an order to compel arbitration of a grievance filed pursuant to a collective bargaining agreement. We reverse and remand to the district court for consideration of whether the grievance is arbitrable.

I.

HAMTC is a labor organization composed of approximately fifteen different unions. Each of these individual union affiliates represents a distinct group of craft employees at Rockwell Hanford Operations. HAMTC is the exclusive bargaining agent for all union represented employees working at the Hanford [**2] site.

Since 1977, HAMTC and Rockwell have been parties to a collective bargaining agreement. In 1982, Rockwell and HAMTC officials began negotiating for the creation of a new classification of workers to undertake the decontamination and decommissioning ("D & D") of certain installations. The impetus for the new work category came from a Department of Energy request for D & D at a cost lower than that for maintaining installations. The D & D job classification and definition was adopted by HAMTC and Rockwell and became part of the existing collective bargaining agreement ("CBA") on December 14, 1982. Under the agreement, D & D work was allocated to Local I-369 of the Oil, Chemical and Atomic Workers Union ("OCAW"). A new CBA, negotiated in 1983, incorporated the D & D classification. Apparently, the new classification overlapped with the job classifications of several other HAMTC member unions.

In August 1983, United Brotherhood of Carpenters and Joiners Local 2403 ("Carpenters") filed a grievance against Rockwell alleging that the assignment of D & D

work to OCAW violated the CBA. After Rockwell denied the grievance, Carpenters filed suit in state court -- purportedly in the name of HAMTC -- to compel [**3] arbitration. Rockwell thereafter removed the action to district court.

Rockwell argued in court that, since HAMTC is the sole bargaining agent for its affiliate unions under the CBA, it would be an unfair labor practice for it to proceed to arbitration with the Carpenters rather than HAMTC. In support of Rockwell's position, Pete J. Todish, President of HAMTC, submitted an affidavit dated April 16, 1984. Todish stated in paragraph 3 of the affidavit that "HAMTC is not a party to this litigation and has never authorized Local 2403 to file, participate in, or otherwise initiate litigation against Rockwell in HAMTC's name. Local 2403 and its attorney Daryl Jonson usurped HAMTC's name in these proceedings without proper authority." Todish also stated in paragraph 5 that "with respect to the allocation of decontaminating and decommissioning work to the Oil, Chemical, and Atomic Workers International Union, Local I 369, Rockwell has observed and is continuing to observe its contractual obligations under the Collective Bargaining Agreement signed by it and HAMTC."

The district court held that, in construing the arbitration clause, it could look to the rest of the CBA to establish the clause's [**4] meaning. Hanford Atomic Metal Trades Council v. Rockwell Int'l Corp., 607 F. Supp. 19, 21 (E.D. Wash. 1984) ("HAMTC I"). Without referring to paragraph 5 of Todish's affidavit, the court found that the CBA "clearly contemplates the necessity of [HAMTC] authorization and involvement" to proceed with a grievance. *Id.* Because the affidavit asserted that HAMTC had not given authorization, the court granted Rockwell's motion for summary judgment [*1210] "for lack of a necessary party in these proceedings." *Id.* at 22.

A separate grievance was filed on May 25, 1984, by an employee of another union, i.e. Local Union 598, Plumbers and Pipefitters ("Plumbers"). The employee grieved the "misassignment of work being performed on the Rockwell Hanford Project, by the D & D workers" including "removal of pipe, pipe hangers and valves." After the Plumbers proceeded through proper channels as specified in the CBA -- and after an impasse was reached -- HAMTC itself requested arbitration on July 31, 1985. Rockwell refused and brought this action for declaratory and injunctive relief to prevent arbitration. Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council, No. C-85-710-RJM (E.D. Wash. [**5] March 9, 1987) ("HAMTC II"). HAMTC II was argued before the same district court judge who heard HAMTC I.

Both Rockwell and HAMTC filed motions for summary judgment. Rockwell requested an order enjoin-

ing arbitration and HAMTC counterclaimed for an order directing Rockwell to proceed to arbitration. HAMTC President Todish submitted two affidavits in support of HAMTC's motion.

The district court, sua sponte, invoked the doctrine of judicial estoppel. The court found that, because the statement in paragraph 5 of Todish's first affidavit in HAMTC I regarding Rockwell's compliance with the CBA was "inconsistent" with Todish's later affidavits and HAMTC's position in HAMTC II, HAMTC was estopped from asserting its contradictory position in the later action. HAMTC's proffered explanation made in both a telephonic conference and briefing did not persuade the court otherwise. The court thus granted Rockwell's motion for summary judgment. HAMTC timely appealed. This court has jurisdiction under 28 U.S.C. § 1291.

II.

[HN1]This court reviews de novo a district court's grant of summary judgment. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). See also, Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984), cert. denied, 469 U.S. 1197, 83 L. Ed. 2d 982, 105 S. Ct. 980 (1985) (de novo standard applied to summary judgment based in part on judicial estoppel).

III.

[HN2]Unlike collateral estoppel,¹ res judicata,² and equitable estoppel,³ judicial estoppel focuses exclusively on preventing the use of inconsistent assertions that would result in an "affront to judicial dignity" and "a means of obtaining unfair advantage." Shamrock Foods, 729 F.2d at 1215 (quoting Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3rd Cir. 1953)). The doctrine is intended to protect against a litigant playing "fast and loose with the courts" by asserting inconsistent positions. See e.g., *id.*; Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982); Sperling v. United States, 692 F.2d 223, 227 (2d Cir. 1982) (Van Graafeiland, J., concurring), cert. denied, 462 U.S. 1131, 77 L. Ed. 2d 1366, 103 S. Ct. 3111 (1983); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).

1 Collateral estoppel prevents a party from relitigating an issue based on specific factual matters that have been previously adjudicated by a court. Thus this doctrine prevents repetitive litigation. See, e.g., Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

[**7]

2 Res judicata bars future claims arising from facts that have already been the subject of litigation.

tion. Its purpose is to ensure that all possible claims will be brought and adjudicated in the same action.

3 Although equitable estoppel is closer to judicial estoppel than are the other doctrines, it is broader and focuses principally on the relationship among the parties. As such, a party will be equitably estopped from asserting an inconsistent position whenever the adverse party has detrimentally relied on it. *See e.g., Edwards*, 690 F.2d at 598-99.

The judicial estoppel doctrine, however, is applied differently among the circuits. *See generally*, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U.L. Rev. 1244 (1986). Although the Ninth Circuit has considered judicial estoppel claims twice before and impliedly approved the use of the doctrine in limited circumstances,⁴ we have not had the occasion to consider the various approaches and limitations on the doctrine. We need not explore them here either because we hold the application^[**8] of judicial estoppel in the context of HAMTC's arbitration request to be inappropriate for other reasons.

⁴ *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), cert. denied, 469 U.S. 1197, 83 L. Ed. 2d 982, 105 S. Ct. 980 (1985); *Garcia v. Andrus*, 692 F.2d 89 (9th Cir. 1982).

The role of the courts in resolving labor disputes is extremely narrow: judicial inquiry must go only to the arbitrability of disputes, and not to the merits of the underlying dispute. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960). The Supreme Court in *AT & T Tech., Inc. v. Communications Workers*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), recently reaffirmed this principle:

[HN3]in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining

agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

Id. at 649-50. [HN4]In reaching a decision on arbitrability, a court must examine the^[**9] CBA -- most specifically, the arbitration clause -- in order to determine the intent of the contracting parties. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). The judicial inquiry "must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. . . ." *Id.* Moreover, there exists a strong presumption of arbitrability for disputes arising under CBAs with arbitration clauses "unless it may be said with positive assurance that the arbitration clause" was not intended to cover the asserted dispute. *AT & T Tech.*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83).

Thus, when the district court was presented in *HAMTC II* with Rockwell's request for an order enjoining arbitration and HAMTC's counterclaim for an order to compel arbitration, it should have looked only to the CBA and the arbitration clause to determine whether Rockwell and HAMTC intended to arbitrate grievances over work assignments. Instead, it considered Todish's statement in paragraph 5 which broadly asserted Rockwell's compliance with the CBA. Paragraph 5, however, concerns the underlying merits of the dispute and^[**10] as such is beyond the scope of the district court's scrutiny. Moreover, the district court's speculation of whether paragraph 5 was inconsistent with HAMTC's position in *HAMTC II*, and its efforts to extract an explanation from HAMTC regarding the apparent inconsistency, necessarily led the court into an inquiry regarding Rockwell's compliance with its obligations under the CBA. This was error, since the Supreme Court has expressly stated that [HN5]questions of actual compliance are for the arbitrator, not the courts. *See e.g., AT & T Tech.*, 475 U.S. at 650.

Because judicial estoppel should not have been invoked to bar HAMTC's claim, we reverse and remand to the district court for consideration of whether the grievance is arbitrable.

REVERSED AND REMANDED.

LEXSEE

S. G. BORELLO & SONS, INC., Plaintiff and Appellant, v. DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Respondent

No. S003956

SUPREME COURT OF CALIFORNIA

48 Cal. 3d 341; 769 P.2d 399; 256 Cal. Rptr. 543; 1989 Cal. LEXIS 975; 54 Cal. Comp. Cas 80

March 23, 1989

PRIOR HISTORY: Superior Court of Santa Clara County, No. 587811, Jack Komar, Judge.

DISPOSITION: We therefore hold as a matter of law that Borello has failed to demonstrate the cucumber sharefarmers are independent contractors excluded from coverage under the Act. Accordingly, the judgment of the Court of Appeal, directing the superior court to grant Borello's petition for writ of mandate, is reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: On its own motion, the court reviewed the judgment of the Court of Appeal (California) that laborers engaged to harvest cucumbers under a written "sharefarmer" agreement were "independent contractors" exempt from workers' compensation coverage and not "employees."

OVERVIEW: Defendant, the California Division of Labor Standards Enforcement of the Department of Industrial Relations rejected plaintiff employer's contentions that agricultural laborers engaged to harvest cucumbers under a written "sharefarmer" agreement were "independent contractors" exempt from workers' compensation coverage. Plaintiff appealed. The superior court found that the agency's decision was supported by the evidence. Plaintiff appealed to the court of appeal, which reversed the superior court decision. On its own motion, the court reviewed and reversed the judgment of the court of appeal because plaintiff had failed to meet his burden of proof under the statutory "control-of-work" test. The court held that the laborers were "employees" because plaintiff retained control over their work.

OUTCOME: The court reversed the judgment of the court of appeal that laborers engaged to harvest cucum-

bers under a written "sharefarmer" agreement were "independent contractors" exempt from workers' compensation coverage and not "employees" because plaintiff employer controlled their work.

CORE TERMS: sharefarmer, cucumber, crop, harvest, workers' compensation, independent contractors, grower's, harvester, farmer, plant, independent contractors, coverage, skill, contractor, employer-employee, hourly, common law, agricultural, industrial, furnish, pick, employment relationship, occupation, vine, buyer, farm, sharecropper, right to control, unemployment, indicia

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors

[HN1]The Workers' Compensation Act extends only to injuries suffered by an "employee," which arise out of and in the course of his "employment." Cal. Lab. Code §§ 3600, 3700; Cal. Const. art. XIV, § 4 (original version at Cal. Const. art. XX, § 21). "Employees" include most persons in the service of an employer under any contract of hire, Cal. Lab. Code § 3351, but do not include independent contractors. The Workers' Compensation Act defines an "independent contractor" as any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished. § 3353.

Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Burdens of Proof Workers' Compensation & SSDI > Coverage > General Overview

Workers' Compensation & SSDI > Defenses > General Overview

[HN2]The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences, and the Division of Labor Standards Enforcement of the Department of Industrial Relations' decision must be upheld if substantially supported. If the evidence is undisputed, the question becomes one of law, but deference to the agency's view is appropriate. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. The Workers' Compensation Act must be liberally construed to extend benefits to persons injured in their employment. Cal. Lab. Code § 3202. One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. Cal. Lab. Code §§ 3357, 5705(a).

Workers' Compensation & SSDI > Coverage > General Overview

[HN3]The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.

Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Burdens of Proof Business & Corporate Law > Agency Relationships > Establishment > Proof of Agency > General Overview Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment

[HN4]Strong evidence in support of an employment relationship is the right to discharge at will, without cause. Additional factors include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied cucumber growers' petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) overturning the affirmance by the Division of Labor Standards Enforcement of the Department of Industrial Relations of a deputy labor commissioner's stop order/penalty assessment against the growers for failure to secure workers' compensation coverage for 50 migrant harvesters of its cucumber crop (Lab. Code, §§ 3700, 3710.1, 3722). The growers admitted failure to secure coverage and contended only that the workers were independent contractors excluded from the law. The workers harvested cucumbers under a "sharefarming" agreement with the growers (in a form provided by the sole local buyer of cucumbers) expressly stipulating independent contractorship. The harvest was on land owned and cultivated by the growers for their own account, the growers chose and planted the crop and obtained a sale price formula from the buyer, did most of the cultivation, supplied bins and boxes, removed the harvested fruit, transported it to the buyer, sold it, maintained documentation on the proceeds, and handed out the checks to the sharefarmers. The court found the evidence supported the division's finding the sharefarmers were employees. (Superior Court of Santa Clara County, No. 587811, Jack Komar, Judge.) The Court of Appeal Sixth Dist., No. H001732, reversed, holding the sharefarmers were independent contractors, and directed the trial court to grant the growers' petition for writ of mandate.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the growers had failed to demonstrate the cucumber sharefarmers were independent contractors excluded from coverage under the Workers' Compensation Act (Lab. Code, § 3200 et seq.). The harvesting was simple manual labor, the growers exercised persuasive control over the whole operation, and it appeared the sharefarming agreement resulted from no real bargaining. (Opinion by Eagleston, J., with Lucas, C.J., Mosk, and Broussard, JJ., and Arguelles, J., concurring. Separate dissenting opinion by Kaufman, J., with Panelli, J., concurring.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Workers' Compensation § 26 -- Persons Entitled to Compensation -- Employees -- Employer-employee Relationship -- Determination of Status -- Questions of Law and Fact. --The determination of employee or independent-contractor status is one of fact if dependent on the resolution of disputed evidence or inferences, and the decision of the Division of Labor Standards Enforcement must be upheld if substantially supported. If the evidence is undisputed, the question becomes one of law, but deference to the agency's view is appropriate. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.

(2a) (2b) (2c) (2d) (2e) Workers' Compensation § 29 -- Persons Entitled to Compensation -- Employees -- Employer-employee Relationship -- Employment Contract -- Sharefarmers. --Seasonal "sharefarmers" who harvested cucumbers under an agreement with the growers (in a form provided by the sole local buyer of cucumbers) expressly stipulating independent contractorship were nonetheless employees within the intended protection of the Workers' Compensation Act (Lab. Code, § 3200 et seq.), where other indicia of employment were compelling and the growers failed to demonstrate the workers' exclusion from coverage. The growers exercised pervasive control over the whole operation, on land they owned and cultivated for their own account; the harvesting was simple manual labor, learned quickly and involving no particular skill; and the workers had a seasonal but permanent relationship with the growers and did not invest anything or hold themselves out in business. Further, it appeared the agreement resulted from no real bargaining.

(3a) (3b) Workers' Compensation § 26 -- Persons Entitled to Compensation -- Employees -- Employer-employee Relationship -- Determination of Status -- Indicia. -- Although the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, strong evidence in support of an employment relationship for workers' compensation purposes is the right to discharge at will, without cause. Additional factors include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal of the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which

the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

(4a) (4b) Workers' Compensation § 26 -- Persons Entitled to Compensation -- Employees -- Employer-employee Relationship -- Determination of Status -- Weight of Factors. --In determining whether an employment relation exists, rather than an independent contractorship, each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case. The individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. Moreover, the Workers' Compensation Act's definition (Lab. Code, § 3351) of the employment relationship must be construed with particular reference to the history and fundamental purposes of the statute.

(5) Workers' Compensation § 3 -- Nature and Purposes of Workers' Compensation. --The purposes of the Workers' Compensation Act (Lab. Code, § 3200 et seq.) are several. It seeks (1) to insure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injury, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. The act intends comprehensive coverage of injuries in employment.

(6) Workers' Compensation § 30 -- Persons Entitled to Compensation -- Independent Contractors -- Exclusion From Coverage -- Purpose. --The express exclusion of "independent contractors" from coverage under the Workers' Compensation Act (Lab. Code, § 3200 et seq.) is purposeful and has a limited but important function. It recognizes those situations where the act's goals are best served by imposing the risk of "no fault" work injuries directly on the provider, rather than the recipient, of a compensated service.

(7) Landlord and Tenant § 2 -- Definitions and Distinctions -- Sharecropper. --A "sharecropper" is one who occupies the land, invests in equipment and seeds, plants the crop, takes responsibility for its cultivation and harvest, and splits the sale proceeds as a form of rent.

(8) Workers' Compensation § 27 -- Persons Entitled to Compensation -- Employer-employee Relationship -- Right of Control -- Subterfuge. --A business entity may not avoid its statutory obligations to provide work-

ers' compensation insurance to its employees by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers.

(9) Workers' Compensation § 30 -- Persons Entitled to Compensation -- Employees -- Independent Contractors -- Exclusion From Coverage -- Agreement by Worker. --A worker's express or implied agreement to forego workers' compensation coverage as an independent contractor is significant. However, where compelling indicia of employment are otherwise present, the court may not lightly assume an individual waiver of the protections derived from that status.

COUNSEL: Marcus Max Gunkel, Karen K. Carey and Sims & Gunkel for Plaintiff and Appellant.

Dressler & Quesenbery, Antone S. Bulich, Jr., Nancy N. McDonough and Carl G. Borden as Amici Curiae on behalf of Plaintiff and Appellant.

H. Thomas Cadell, Jr., and Frank C. S. Pederson for Defendant and Respondent.

T. Kirk McBride, Sue E. Manahl, Rucka, O'Boyle, Lombardo & McKenna, Joan M. Graff, Robert Barnes, William C. McNeill III, William G. Hoerger, Joel Diringer and Michael Blank as Amici Curiae on behalf of Defendant and Respondent.

JUDGES: Opinion by Eagleson, J., with Lucas, C. J., Mosk, and Broussard, JJ., and Arguelles, J., * concurring. Separate dissenting opinion by Kaufman, J., with Panelli, J., concurring.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

OPINION BY: EAGLESON

OPINION

[*345] [**400] [***544] We ordered review to decide whether agricultural laborers engaged to harvest cucumbers under a written "sharefarmer" agreement are "independent contractors" exempt from workers' compensation coverage. ¹ Our answer has implications for the employer-employee relationship upon which other state social legislation depends. ²

¹ There was no petition for review of the Court of Appeal's decision in this case. Because we considered the issue presented to be of substantial

importance, we ordered review on our own motion. (Cal. Rules of Court, rule 28(a)(1).)

² The interest generated by the case is demonstrated by the number of amicus curiae briefs on file. Briefs have been received from the California Applicants' Attorneys Association, California Farm Bureau Federation, and Western Growers Association. The Employment Law Center and California Rural Legal Assistance have filed a joint brief on behalf of farmworker Cirilo Lopez.

The grower claims the "sharefarmer" harvesters are independent contractors under the statutory "control-of-work" test, because they manage their own labor, share the profit or loss from the crop, and agree in writing that they are not employees. After taking evidence on the nature of the work relationship, the Division of Labor Standards Enforcement (Division) of the Department of Industrial Relations rejected these contentions. The superior court found that the Division's decision was supported by the evidence. However, these rulings were reversed by the Court of Appeal.

Like the Division and the superior court, we find the grower's arguments unpersuasive. [***545] The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker [**401] incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way.

Moreover, so far as the record discloses, the harvesters' work, though seasonal by nature, follows the usual line of an employee. In no practical sense are the "sharefarmers" entrepreneurs operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply.

[*346] We therefore conclude as a matter of law on the undisputed facts that the "sharefarmers" are "employees" entitled to compensation coverage. Accordingly, we reverse the judgment of the Court of Appeal.

Facts

On August 14, 1985, a deputy labor commissioner issued a stop order/penalty assessment against S. G. Borello & Sons, Inc. (Borello), a Gilroy grower, for failure to secure workers' compensation coverage for the 50 migrant harvesters of its cucumber crop. (Lab. Code, §§ 3700, 3710.1, 3722.) ³ Borello appealed the citation to the Division. At the administrative hearing, Borello admitted the failure to secure coverage. It contended only that the workers were independent contractors excluded from the workers' compensation law. (§§ 3351, 3353.)

3 All statutory references are to the Labor Code unless otherwise indicated.

A preprinted agreement signed by the heads of harvester families was introduced in evidence. The agreement, printed in English and Spanish, designates the signatory worker as a "Share Farmer" and states that his function is to "prepare for and harvest the cucumbers." Borello agrees to "furnish and prepare the land; plant the crop; cultivate, spray, and fertilize the crop; and pay all the costs incurred with respect thereto." The grower also agrees to furnish the boxes and bins into which cucumbers will be loaded, and to transport the harvest to the buyer.

The "Share Farmer" agrees "to furnish himself and the members of his family, *but only the members of his own family*, to harvest the crop. . . ." (Italics in original.) "Harvest is agreed to mean the placing of the crop, clean and free from rubbish and debris [*sic*], in the boxes or bins supplied by [Borello]." The method and manner of accomplishing this task are left "solely" to the "Share Farmer," who nonetheless "agrees to utilize accepted agricultural practices in order to provide for the maximum harvest . . . and . . . to devote the necessary time to accomplish the harvest." The "Share Farmer" must supply his own tools and his own transportation to and from the field.

The agreement further provides that the crop harvested by the "Share Farmer" will be sold to a buyer "acceptable to both parties." Borello will retain title to the crop until it is sold, but the "Share Farmer" and Borello will split the gross proceeds equally. The contract specifies that the amount of the proceeds will depend exclusively upon price, weight, and grading data developed by the buyer. Copies of this data will be furnished to both [*347] parties. Borello undertakes to keep all necessary weight, grade, and price records, which shall be open to the "Share Farmer's" inspection.

Finally, the agreement recites that the parties deem themselves principal and independent contractor rather than employer and employee; that the "Share Farmer" is self-employed; that he will follow all child labor laws; that Borello will not withhold taxes; that the "Share Farmer" must file separate tax returns; and that Borello will not provide workers' compensation or disability insurance coverage. The contract is deemed personal and nonassignable except with the other party's consent.

Richard and Johnny Borello, principals of the company, testified as follows: Borello grows a number of crops, including cucumbers. [***546] All the other crops are harvested by employees on a wage basis. In recent years, the only local market for cucumbers is the Vlastic pickle company. Vlastic unilaterally determines

the cucumber varieties it will accept and sets the prices it will pay. [**402] "The smaller the cucumber, the higher the price" per ton.

The growing cycle for cucumbers is 60 days. Borello plants and cultivates the crop at its own expense, using its own pipe irrigation system and applying pesticides under Vlastic's direction.

The harvest workers -- 14 migrant families during the 1985 season -- arrive around "2-3 weeks" before the harvest begins. They "[want] to go on a sharefarming basis" because "they make a lot more money." Some families have returned to work under the system for several years running, and it is commonly employed for cucumber harvest in the Gilroy area. Vlastic supplies the preprinted "Share Farmer" contract form, which Borello has a family head sign. The contract is read and explained to the workers, in Spanish if necessary.

The sharefarmers may contract for the amount of land they wish to harvest on a first-come, first-served basis. One or two acres or twenty to forty rows is common. The workers are "totally responsible" for the care of the plants in their assigned plots during the harvest period. Besides hoeing and weeding, the harvesters must prevent the vines from growing into the furrows between the rows where they might be stepped on and damaged. The latter task is accomplished simply by laying any errant vine into the proper position. The sharefarmers also collectively decide when to irrigate during this period, but Borello controls the water supply.

Borello maintains no field supervisor and does not direct the harvesters' work. They may set their own hours. The workers decide when to pick each [*348] cucumber at the correct size to maximize the profit. Profit incentive is the only guaranty of performance and quality control. Borello's only field employee is a tractor driver. He supplies empty boxes or bins, coded for each sharefarmer, and removes them to a loading area when full. The workers "could" transport their own harvest to Vlastic, but Borello handles the transportation because that is what Vlastic prefers.

Based on the code system, Vlastic keeps records of each sharefarmer's harvest. At Borello's request, the weekly check for the sharefarmer's share of proceeds is issued directly by Vlastic, though Richard Borello "physically" hands over the check and a copy of Vlastic's documentation. The sharefarmer then splits his share as he chooses with other family members working under him.

Borello's witnesses insisted that they have no right to discharge a sharefarmer or his workers during the harvest, and no recourse if the harvesters abandon the field. Despite contract terms which prohibit assignment of the

sharefarmer agreement or employment of workers outside the sharefarmer's family, several sharefarmers have unilaterally assigned or sublet their plots when family emergencies arose. The workers leave once the cucumber harvest is over and do not harvest any other crops for Borello. Richard Borello conceded the grower provides no food or sanitary facilities for its cucumber harvesters.

On this evidence, the Division concluded that because of Borello's predominant control over the cultivation, harvest, and sale of its cucumbers, and the workers' lack of investment in the crop, they cannot be deemed "sharecroppers in the true sense." Hence, it ruled, they are employees rather than independent contractors. The penalty assessment/stop order was affirmed.⁴

4 At the time the deputy labor commissioner issued the penalty assessment/stop order for failure to secure compensation coverage, he also cited Borello for failure to obtain a work permit for a minor seen participating in the cucumber harvest. (§§ 1287, 1288, subd. (b), 1299.) Hearing on the child-labor citation was consolidated with the compensation matter. The defense and evidence presented as to each was identical, and the Division affirmed both citations. However, the child-labor citation was voluntarily vacated by the Division on November 26, 1985, and is not at issue here. (But see discussion, *post*, at p. 359.)

[***547] Borello sought mandamus to review the Division's order. (Code Civ. Proc., § 1094.5.) After a hearing, the trial court [**403] found the Division's finding supported by the evidence and denied the writ.

The Court of Appeal reversed. It concluded that Borello's relinquishment of control over the harvesters' work, its lack of authority to discharge them [*349] at will, their responsibility for furnishing necessary tools, the "result" method of compensation, the temporary nature of the work, and the mutual understanding embodied in the written contract all combine to render the sharefarmers independent contractors as a matter of law.

Discussion

[HN1]The Workers' Compensation Act (Act) extends only to injuries suffered by an "employee," which arise out of and in the course of his "employment." (§§ 3600, 3700; see Cal. Const., art. XIV, § 4 (former art. XX, § 21).) "[Employees]" include most persons "in the service of an employer under any . . . contract of hire" (§ 3351), but do not include independent contractors. The Act defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (§ 3353.)

(1) [HN2]The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences, and the Division's decision must be upheld if substantially supported. (*Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783 [176 Cal.Rptr. 868].) If the evidence is undisputed, the question becomes one of law (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 951 [88 Cal.Rptr. 175, 471 P.2d 975]), but deference to the agency's view is appropriate. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671, 588 P.2d 811]; *Tieberg, supra*, 2 Cal.3d at p. 952; *Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 614 [235 Cal.Rptr. 754]; *Martin v. Phillips Petroleum Co.* (1974) 42 Cal.App.3d 916, 922-923 [117 Cal.Rptr. 269]; see *Bemis v. People* (1952) 109 Cal.App.2d 253, 267 [240 P.2d 638].) The Act must be liberally construed to extend benefits to persons injured in their employment. (§ 3202.) One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. (§§ 3357, 5705, subd. (a).)

(2a) Borello and its amici (collectively the growers) urge that the Court of Appeal properly found independent contractorship as a matter of law. By agreement and in actual practice, the growers urge, Borello retains the cucumber sharefarmers for a "specified result" -- a completed harvest -- relinquishing all "control" over the "means" by which the task is accomplished. Moreover, the growers note, the sharefarmers are paid a "specified recompense" based entirely on results. The growers stress that the harvesters [*350] furnish their own tools, exercise specialized skill, cannot be discharged, and have expressly accepted their independent status with its attendant risks and benefits. We disagree both with the growers' premises and with their conclusions.

The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him. The principal's supervisory power was crucial in that context because ". . . [the] extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them. . . ." (1C Larson, The Law of Workmen's Compensation (1986) § 43.42, p. 8-20; see also 2 Hanna, [***548] Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1988) § 3.01[2], p. 3-4.) Thus, the "control of details" test became the principal measure of the servant's status for common law purposes.

Much 20th-century legislation for the protection of "employees" has adopted the "independent contractor"

distinction as an express or implied limitation on coverage. [**404] The Act plainly states the exclusion of "independent contractors" and inserts the common law "control-of-work" test in the statutory definition. The cases extend these principles to other "employee" legislation as well. (3a) Following common law tradition, California decisions applying such statutes uniformly declare that [HN3]"[the] principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . ." (*Tieberg, supra*, 2 Cal.3d at p. 946 [unemployment insurance]; see also, e.g., *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 39 [180 P.2d 11] [same; drawing direct analogy to workers' compensation law]; *Perguica v. Ind. Acc. Com.* (1947) 29 Cal.2d 857, 859-861 [179 P.2d 812] [workers' compensation]; *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44 [168 P.2d 686] [unemployment insurance].)

However, the courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.

Thus, we have noted that [HN4]"[strong] evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.]" [*351] (*Tieberg, supra*, 2 Cal.3d at p. 949, quoting *Empire Star Mines, supra*, 28 Cal.2d at p. 43.) Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (*Tieberg, supra*, at p. 949; *Empire Star Mines, supra*, 28 Cal.2d at pp. 43-44; see Rest.2d Agency, § 220.) (4a) "Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Germann, supra*, 123 Cal.App.3d at p. 783.)⁵

5 The Legislature itself has indicated recognition that "control of work details" is not necessarily the decisive test for independent contractorship. Section 2750.5, adopted in 1978, provides extensive guidelines for determining whether one who operates under a required contractor's license is an independent contractor or an employee. Under the statute, "[proof] of [the licensee's] independent contractor status" for any purpose requires a showing *not only* that the parties have contracted for the "result" of the work rather than the "means by which it is accomplished" (the traditional "control" test) (subd. (a)), *but also* that "the [licensee] is customarily engaged in an independently established business" (subd. (b)) and that "[his] independent contractor status is bona fide and not a subterfuge to avoid employee status" (subd. (c)). Besides the "control" and "independent business" factors, the test of "bona fide" independent contractorship includes such "cumulative" indicia as "[the licensee's] substantial investment other than personal services in [his] business, holding out to be in business for [himself], bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract." (*Ibid.*) For work requiring a contractor's license, the worker "shall hold a valid . . . license as a condition of having independent contractor status." (*Ibid.*)

[**405] [***549] Moreover, the concept of "employment" embodied in the Act is not inherently limited by common law principles. We have acknowledged that the Act's definition of the employment relationship must be construed with particular reference to the "history and fundamental purposes" of the statute. (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778 [100 Cal.Rptr. 377, 494 P.2d 1].)

[*352] The common law and statutory purposes of the distinction between "employees" and "independent contractors" are substantially different. While the common law tests were developed to define an employer's

liability for injuries caused by his employee, "the basic inquiry in compensation law involves which injuries to the employee should be insured against by the employer. [Citations.] . . ." (*id.*, at pp. 777-778, fn. 7 [italics in original]; 1 Larson, *supra*, § 43.42, pp. 8-20, 8-21; 2 Hanna, *supra*, § 3.01[2], p. 3-4, & fn. 14.)

Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees." Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional "control" test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover. (E.g., *Bartels v. Birmingham* (1947) 332 U.S. 126, 130-132 [91 L.Ed. 1947, 1953-1954, 67 S.Ct. 1547, 172 A.L.R. 317]; *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 727-730 [91 L.Ed. 1772, 1776-1778, 67 S.Ct.1473]; *United States v. Silk* (1947) 331 U.S. 704, 713-718 [91 L.Ed. 1757, 1767-1770, 67 S.Ct. 1463]; *Board v. Hearst Publications* (1944) 322 U.S. 111, 124-132 [88 L.Ed. 1170, 1181-1185, 64 S.Ct. 851]; but see *United States v. Webb, Inc.* (1970) 397 U.S. 179, 183-190 [25 L.Ed.2d 207, 211-215, 90 S.Ct. 850] [1948 amendments to Federal Insurance Contributions Act and Federal Unemployment Tax Act providing that employment relationship must be determined by "usual common-law rules" ⁶].)

6 We find no similar express confinement to common law principles in our workers' compensation scheme. Though early cases suggested that the California Constitution (art. XIV, § 4, former art. XX, § 21) precluded any expansion or contraction under the Act of the common law definitions of "employee," "employer," "employment," "independent contractor," and "control" (see, e.g., *Fidelity & C. Co. v. Industrial Acc. Com.* (1923) 191 Cal. 404, 406 [216 P. 578, 43 A.L.R. 1304]; *Flickenger v. Industrial Acc. Com.* (1919) 181 Cal. 425, 432 [184 P. 851, 19 A.L.R. 1150]), more recent developments belie that notion. In contrast with the federal situation, there has been no statutory or constitutional response to the holding of *Laeng, supra*, 6 Cal.3d 771, that common law principles are *not* dispositive of the employment relationship contemplated by the Act. Moreover, the Legislature has extended compensation coverage to "employees" who might not have been considered as such under the common law. (See, e.g., §§ 3360 [workmen in partnership formed to perform "labor on a particular piece of work" are employees of person for whom such work is performed], 2750.5 [es-

tablishing detailed standards for determining whether person licensed under Business and Professions Code is employee or independent contractor; providing that unlicensed person can never be independent contractor]; see also *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5 [219 Cal.Rptr. 13, 706 P.2d 1146] [construing § 2750.5; no unconstitutionality suggested].)

A number of state courts have agreed that in worker's compensation cases, the employee-independent contractor issue cannot be decided absent [*353] consideration of the remedial statutory purpose. Several state cases have so concluded despite statutes, like California's, which emphasize "control" of the work as the governing distinction between employees and independent contractors. (See, e.g., *Anton v. Industrial Commission of Arizona* (Ariz.App. 1984) 141 Ariz. 566 [688 P.2d 192, 197-200] [***550] [statute defines excluded "independent contractor" as one "not subject to the rule or control of the person for whom the work is done, but . . . engaged only in the performance of a definite job or piece of work [and] subordinate to the employer only in effecting a result in accordance with the employer's design"]; *Woody v. Waibel* (1976) 276 Ore. 189 [**406] [554 P.2d 492, 495-497] [statute covers "workmen," defined as persons who furnish services for remuneration "subject to the direction and control of an employer"]; see also *Matter of Kokesch* (Minn.App. 1987) 411 N.W.2d 559, 562; *Grothe v. Olafson* (Alaska 1983) 659 P.2d 602, 605 ["control of details" definition repealed in 1959]; *Ceradsky v. Mid-America Dairymen, Inc.* (Mo.App. 1979) 583 S.W.2d 193, 196-197; *Burton v. Crawford and Company* (1976) 89 N.M. 436 [553 P.2d 716, 719-720]; *Evans v. Naihaus* (La.App. 1976) 326 So.2d 601, 603; *Sandy v. Salter* (1976) 260 Ark. 486 [541 S.W.2d 929, 931-932]; *Caicco v. Toto Brothers, Inc.* (1973) 62 N.J. 305 [301 A.2d 143, 145-146]; *Tata v. Benjamin Muskovitz Plumbing & Heating* (1959) 354 Mich. 695 [94 N.W.2d 71, 74]; *Seals v. Zollo* (1959) 205 Tenn. 465 [327 S.W.2d 41, 44-45]; *Paly v. Lane Brush Co.* (1958) 6 A.D.2d 50 [174 N.Y.S.2d 205, 209-210]; but see *Kirkwood v. Industrial Commission* (1981) 4 Ill.2d 14 [416 N.E.2d 1078, 1082] [approving remedial construction in principle, but citing business reliance on traditional "control" rule].)

Our decision in *Laeng, supra*, 6 Cal.3d 771, did not directly involve the statutory distinction between employees and "independent contractors." However, since *Laeng*, several of our own Courts of Appeal have suggested that traditional California tests for independent contractor status must be supplemented in compensation cases by consideration of the remedial purpose of the statute, the class of persons intended to be protected, and

the relative bargaining positions of the parties. (E.g., Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal.App.3d 608, 617 [235 Cal.Rptr. 754]; Germann, supra, 123 Cal.App.3d at p. 784; Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal.App.3d 318, 322-323 [115 Cal.Rptr. 871].)

We agree that under the Act, the "control-of-work-details" test for determining whether a person rendering service to another is an "employee" or an excluded "independent contractor" must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine [*354] whether they come within the "history and fundamental purposes" of the statute. (Laeng, supra, 6 Cal.3d at p. 777.)

(5) The purposes of the Act are several. It seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. (See Laeng, supra, 6 Cal.3d at p. 782; Van Horn v. Industrial Acc. Com. (1963) 219 Cal.App.2d 457, 467 [33 Cal.Rptr. 169]; 2 Hanna, supra, § 1.05[1], [2], pp. 1-25 to 1-27.)

The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining "employment" broadly in terms of "service to an employer" and by including a general presumption that any person "in service to another" is a covered "employee." (§§ 3351, 5705, subd. (a); see Laeng, supra, 6 Cal.3d at pp. 776-778.)

(6) The express exclusion of "independent contractors" is purposeful, of course, and has a limited but important function. It recognizes those situations where the Act's goals are best served by imposing the risk of "no-fault" work injuries directly on the provider, rather than the recipient, of a compensated service. This is obviously the case, for example, when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his [***551] own business, and has independently chosen the burdens and benefits of self-employment.

This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the Act. We adopt no detailed new standards for examination of the issue. To that end, the Restatement guidelines heretofore [**407] approved in our state remain a useful reference. The standards set forth for contractor's licensees in section 2750.5 (see fns. 5, 6, ante, at pp. 351-352) are also a helpful means of identifying the employee/contractor distinction. The

relevant considerations may often overlap those pertinent under the common law. (See Laeng, supra, 6 Cal.3d at pp. 777-778, fn. 7.) (4b) Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.

We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the "right to control the work," the factors include [*355] (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. (Real v. Driscoll Strawberry Associates, Inc. (9th Cir. 1979) 603 F.2d 748, 754 [Fair Labor Standards Act].)

(3b) As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. (See discussion, ante, at pp. 350-351.) We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.

(2b) By any applicable test, we must dismiss the growers' claims here. Despite Borello's elaborate effort to deal with the cucumber harvesters as independent contractors, the indicia of their employment are compelling.

The issue has arisen on several occasions elsewhere. There, as here, growers claimed that migrant harvesters of their cucumber crops were self-employed "sharefarmers," who contracted for a finished job, applied skill and judgment, controlled their own work, and were compensated only for results. Hence, the growers urged, the harvesters were not "employees" for purposes of protective legislation, but excluded "independent contractors."

With one exception, the cases have rejected such contentions. The decisions emphasize that the growers, though purporting to relinquish supervision of the harvest work itself, retained absolute overall control of the production and sale of the crop. Moreover, the cases note, the workers made no capital investment beyond simple hand tools; they performed manual labor requiring no special skill; their remuneration did not depend on their initiative, judgment, or managerial abilities; their service, though seasonal, was rendered regularly and as an integrated part of the grower's business; and they were dependent for subsistence on whatever farm work they could obtain. Under these circumstances, the authorities reason, the harvesters were within the intended reach of the protective legislation. (Sec'y of Labor, U.S. Dept. of

Labor v. Lauritzen (7th Cir. 1987) 835 F.2d 1529, 1536-1538, cert. denied (1988) ___ U.S. ___ [102 L.Ed.2d 232, 109 S.Ct. 243]; Beliz v. W.H. McLeod & Sons Packing Co. (5th Cir. 1985) 765 F.2d 1317, 1329-1330; Donovan v. Gillmor (N.D. Ohio 1982) 535 F.Supp. 154, 159-163; Kokesch, supra, 411 N.W.2d at pp. 562-563; contra, Donovan v. [**356] Brandel (6th Cir. 1984) 736 F.2d 1114, 1116-1120.) Similar considerations are dispositive here.

The growers emphasize that, with respect to the cucumber harvest, Borello contracts only to obtain a "specified result" for a "specified recompense," retaining no [***552] interest in the details of the work. They stress that the sharefarmers work free of Borello's interference, have all legal and actual power over the means of accomplishing their work, and are paid for their production rather than their labor. The job involves considerable skill and judgment, the growers urge, because the crops require [**408] final hoeing, weeding, and irrigation; the vines must be "trained" out of the furrows; and care is necessary to pick each maturing cucumber at the most marketable size. Hence, the growers assert, the factor of "control" weighs against a finding of employment.

We are not persuaded. In the first place, Borello, whose business is the production and sale of agricultural crops, exercises "pervasive control over the operation as a whole." (Lauritzen, supra, 835 F.2d at p. 1536.) Borello owns and cultivates the land for its own account. Without any participation by the sharefarmers, Borello decides to grow cucumbers, obtains a sale price formula from the only available buyer,⁷ plants the crop, and cultivates it throughout most of its growing cycle. The harvest takes place on Borello's premises, at a time determined by the crop's maturity. During the harvest itself, Borello supplies the sorting bins and boxes, removes the harvest from the field, transports it to market, sells it, maintains documentation on the workers' proceeds, and hands out their checks. Thus, "[all] meaningful aspects of this business relationship: price, crop cultivation, fertilization and insect prevention, payment, [and] right to deal with buyers . . . are controlled by [Borello]." (7) (Gillmor, supra, 535 F.Supp. at p. 161.)⁸

7 Thus, little credence can be placed in the sharefarmer contract's recitation that "[the] crop shall be sold to a buyer acceptable to both parties."

8 Thus, the cucumber sharefarmers are not true "sharecroppers," who themselves occupy the land, invest in equipment and seeds, plant the crop, take responsibility for its cultivation and harvest, and split the sale proceeds as a form of rent.

(2c) Moreover, contrary to the growers' assertions, the cucumber harvest involves simple manual labor which can be performed in only one correct way. Harvest and plant-care methods can be learned quickly. While the work requires stamina and patience, it involves no peculiar skill beyond that expected of any employee. (Lauritzen, supra, at p. 1537; Gillmor, supra, at p. 162; Kokesch, supra, 411 N.W.2d at p. 563.) It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision [**357] and discipline unnecessary. Diligence and quality control are achieved by the payment system, essentially a variation of the piecework formula familiar to agricultural employment.

Under these circumstances, Borello retains all *necessary* control over the harvest portion of its operations. (8) A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers. (Silk, supra, 331 U.S. at pp. 706, 718 [91 L.Ed. at pp. 1764, 1770]; see Powell v. Appeal Board of Michigan Empl. Sec. Com'n (1956) 345 Mich. 455 [75 N.W.2d 874, 883] [dis. opn. of Smith, J.]⁹

9 In fact, Borello does retain important rights which would normally inure to a self-employed contractor. Under the written agreement, sharefarmers may hire only members of their own families to help work their rows. Richard Borello testified he did not know why Vlastic had included this restriction in the printed form, and he claimed it is not enforced. However, it is the right to control, not the exercise of the right, which bears on the status of the work arrangement. (E.g., Perguica, supra, 29 Cal.2d at pp. 859-860.)

(2d) Other factors also show convincingly that the workers' compensation statute places the risk and cost of work-related injuries upon Borello, rather than the farm workers themselves. The harvesters form a regular and integrated portion of Borello's business operation. Their work, though seasonal by nature, is "permanent" in the agricultural process. Indeed, Richard Borello testified that he has a permanent relationship with the individual harvesters, in that many of the migrant families return year after year. This permanent [***553] integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer under the Act. (See, e.g., Lauritzen, supra, 835 F.2d at pp. 1535-1538; Kokesch, supra, 411 N.W.2d at pp. 562-563; 1C Larson, supra, § 45.00, p. 8-174 ["The modern tendency is to find employment when the [**409] work being done is an integral part of the regular business of the employer, and when the worker, relative to the em-

ployer, does not furnish an independent business or professional service."].)

By the same token, the sharefarmers and their families exhibit no characteristics which might place them outside the Act's intended coverage of employees. They engage in no distinct trade or calling. They do not hold themselves out in business. They perform typical farm labor for hire wherever jobs are available. They invest nothing but personal service and hand tools.¹⁰ They incur no opportunity for "profit" or "loss"; like employees [*358] hired on a piecework basis, they are simply paid by the size and grade of cucumbers they pick.¹¹ They rely solely on work in the fields for their subsistence and livelihood. Despite the contract's admonitions, they have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries.¹² If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur.¹³ Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.¹⁴

10 Indeed, by deeming the sharefarmers independent contractors, Borello has avoided its obligation under California law to provide its agricultural employees all necessary tools and equipment unless the employee's wages equal two times the minimum wage. (Cal. Code Regs., tit. 8, § 11140, subd. 9(B).)

11 That the amount per cucumber earned by the sharefarmers is set by the crop's sale price, rather than directly by Borello, does not mean the sharefarmers are earning a "profit" as a reward for their entrepreneurial risk. Before the harvesters arrive, the buyer of the crop, and the sale price based on grade and size, have already been set. By the same token, the sharefarmers incur no entrepreneurial risk of "loss." The growers stress that the sharefarmers assume the "risk" the crop will be unharvestable. So, of course, would any employee engaged for the harvest. This "risk" is not "entrepreneurial" as the growers suggest, but is the chance faced by any at-will wage earner that his services will not be needed after all. The record does not clearly indicate that the sharefarmers would go unpaid -- and so understood -- in the unlikely event the cucumber crop became unsaleable *after* the harvest.

12 If deemed an independent contractor, the sharefarmer himself is presumably not eligible for self-procured personal workers' compensation coverage. (See §§ 3501, 3503, 3600, 3700.) He must therefore rely on personal accident, disability, or income-protection insurance he is unlikely to procure. Nor is it reasonable to assume the

sharefarmer/contractor, often a migrant who works with his family in many states each year, can or will obtain compensation insurance for the other family members who become *his* "employees" under the contract with Borello.

13 The growers have suggested that Borello is not the "employer" of the cucumber harvesters in any event, since it is *Vlasic*, not Borello, that dictates the "sharefarmer" arrangement. The contention is specious. Whatever Borello's reasons for using the *Vlasic* contract form, the relationship between Borello and the harvesters is not thereby obviated. Under the contract and in reality, the harvesters are recruited by Borello to work on Borello's land harvesting crops owned by Borello until sold after harvest to *Vlasic*.

14 The Legislature has made clear its intent to cover agricultural workers under the Act. Their exclusion from coverage was repealed in 1959. (Stats. 1959, ch. 505, § 1, p. 2466; see Lab. Code, § 3352, former subd. (c).)

The growers suggest that by signing the printed agreement after full explanations, the sharefarmers expressly agree they are not employees and consciously accept the attendant risks and benefits. However, the protections conferred by the Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury. (See discussion, *ante.*) (9) Of course, a worker's express or implied agreement to forego coverage as an independent contractor is "significant." (See *Tieberg, supra*, 2 Cal.3d at p. 952.) [***554] However, where compelling indicia of employment are otherwise present, we may not lightly assume an individual waiver of the protections derived from that status.

[*359] (2e) Moreover, there is no indication that Borello offers its cucumber harvesters any real choice of terms. Richard Borello testified [**410] only that the family heads sign the preprinted contract. He conceded that recent seasons have brought a surplus of workers to the local cucumber harvest, suggesting further that no real bargaining takes place. Nor is there evidence that nonsignatory members of the sharefarmer's family have accepted Borello's disclaimer of employment responsibilities. The record fails to demonstrate that the harvesters voluntarily undertake an "independent" and unprotected status.¹⁵

15 Richard Borello testified that the harvesters seek and "prefer" the sharefarmer arrangement because they make more money. However, aside from the absence of evidence that a choice was

available, the facts belie any claim of true economic advantage in the sharefarmer arrangement. In the first place, any increase in immediate cash income is offset by the loss of statutory financial protections due employees. In the second place, even the cash advantage appears illusory. Richard Borello testified that the typical hourly wage rate for harvest work in the Gilroy area during the 1985 season was \$ 4 per hour, but that a sharefarmer makes "at least \$ 7-\$ 8 an hour if you were to break it down." Vlastic's individual harvest summaries for the week ending July 4, 1985, indicate that sharefarmer earnings that week ranged from a high of \$ 634.34 to a low of \$ 136.04. Richard Borello acknowledged that these amounts must be *split* among all the members of the sharefarmer's family who are working in his plot, sometimes as many as eight or nine people - "[however] large the family is." This may produce an effective hourly rate far below that which each worker would presumably have received as an employee.

A conclusion that the sharefarmers are "independent contractors" under the Act would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of "employees," including laws enacted specifically for the protection of agricultural labor. These include the Agricultural Labor Relations Act (§ 1141 et seq.), statutes requiring the licensure and bonding of farm labor contractors (§ 1682 et seq.), laws governing minimum wages, maximum hours, and (as illustrated in this case) employment of minors (§ 1171 et seq., § 1285 et seq.), the antidiscrimination provisions of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.), and provisions governing employee health and safety (see, e.g., Lab. Code, § 6300 et seq. [Occupational Health and Safety Act]; Health & Saf. Code, § 5474.20 et seq. [imposing duty, not followed here, to provide toilet and washing facilities for each 40 or fewer field "employees"].)¹⁶

16 The California Unemployment Insurance Law specifically requires that, in most cases, the status of a covered "employee" must be determined by "usual common law rules." (Unemp. Ins. Code, § 621, subd. (b).) Moreover, absent election by the employer, one may not be deemed an "employee" for unemployment insurance purposes if he has "a substantial investment in [non-transportation] facilities" used to perform the service, "or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed." (*Id.*, subd. (c)(2).) We need

not decide whether these provisions would require a different determination of the sharefarmers' relationship to Borello for purposes of unemployment insurance coverage. At least one precedent tax decision of the Unemployment Insurance Appeals Board has found cucumber harvesters to be independent contractors under similar facts. (Dino J. Orsetti (Apr. 11, 1985) No. T-85-53.)

[*360] We therefore hold as a matter of law that Borello has failed to demonstrate the cucumber sharefarmers are independent contractors excluded from coverage under the Act. Accordingly, the judgment of the Court of Appeal, directing the superior court to grant Borello's petition for writ of mandate, is reversed.

DISSENT BY: KAUFMAN

DISSENT

KAUFMAN, J. I dissent.

[***555] This court's sua sponte grant of review¹ and the resulting majority opinion, substantially departing from long and well established statutory and case law, constitute one of the sadder episodes in the history of this court -- a wholly unnecessary and inappropriate [**411] intermeddling in the affairs of and curtailment of the liberties of California's residents. It requires little foresight to predict that this unfortunate decision declaring illegal a practice followed almost universally in the area for many years, insisted on by the only cucumber purchaser in the area and satisfactory to all concerned, will end up harming the very persons it is paternalistically intended to help. Will Rogers is reported to have articulated the folk wisdom: "If it ain't broke, don't fix it." That is sound advice for any branch of government; it should be adhered to religiously by the judiciary.

1 No party nor any other person assertedly aggrieved by the Court of Appeal decision sought review. Review was granted on this court's own motion.

At the time we granted review in this case, there was considerable curiosity why no petition for review had been filed by any party. At oral argument the parties told us why; they rather frankly indicated their mutual recognition that the record in this case was entirely insufficient to furnish the basis for a decision of major significance. The entire hearing transcript including exhibits consists of only 60 pages; the department presented no witnesses; not a single sharefarmer testified; the only witnesses were 2 members of the Borello family active in the business. Having ascertained this it would have been quite appropriate for this court to vacate the order granting review as improvidently granted (see Cal. Rules of

Court, rule 29.4(c)), but apparently too embarrassed to dismiss following its sua sponte grant of review, the majority now proceed to render a decision distorting independent contractor law and, in the process, rely on a number of facts and assumptions wholly unsupported by the record.

There are really two cases being decided today, the one decided by the majority and the one presented by the record before the court. The picture [*361] painted by the majority is one of a nefarious subterfuge invented by S.G. Borello & Sons, Inc. (Borello) to evade its responsibilities under the workers' compensation laws and to exploit vulnerable and disadvantaged immigrant farm workers.² The uncontroverted evidence in the record establishes an altogether different picture. Neither the Division of Labor Standards (the Division) nor the superior court found a subterfuge,³ and there is no evidence whatever that Borello originated this arrangement, much less that it concocted it to evade its obligations under the workers' compensation laws. Indeed, unless the sharefarmers are employees under the Workers' Compensation Act (Act), Borello has no obligations thereunder. The reasoning of the majority in this regard is a classic example of begging the question. The same is true of the majority's appeal to "liberal construction" as provided for in Labor Code section 3202.⁴ Liberal construction is for the benefit only of persons covered by the Act, employees. Moreover, as section 3202.5 reminds, liberal construction [***556] is no substitute for substantial evidence.⁵

2 The majority makes the gratuitous assumptions that the sharefarmers do not obtain insurance coverage for themselves and would not be able to afford it in any event. The truth is that there is not one iota of evidence in the record supporting these assumptions. For all the record shows, the sharefarmers may be fully covered by health and/or accident insurance. Indeed, it is noteworthy that this is not a workers' compensation proceeding instituted by an injured sharefarmer, nor is there any evidence that any sharefarmer has ever been injured or disabled. It was specifically observed at the hearing that there was no known workers' compensation case arising out of this relationship.

3 As the majority states, ". . . the Division concluded that because of Borello's predominant control over the cultivation, harvest, and sale of its cucumbers, and the workers' lack of investment in the crop, they [the sharefarmers] cannot be deemed 'sharecroppers in the true sense.' Hence, it ruled, they are employees rather than independent contractors. . . . [The] trial court found the Division's finding supported by the

evidence and denied the writ." (Maj. opn., *ante*, p. 348, fn. omitted.)

4 All statutory references are to the Labor Code unless otherwise indicated.

5 Section 3202.5 reads: "Nothing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of the evidence. 'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[**412] The record establishes that Borello has a sizable farming operation employing numerous farm laborers who work with numerous other types of crops. Borello covers all such employees by workers' compensation insurance and they are paid on an hourly or other basis regardless of the success or failure of the crop or the marketing of the crop, consistent with their status as employees. Only the pickle cucumber crop is produced and marketed by the use of the sharefarmer arrangement which involves 14 families. This arrangement and its details are dictated by the sole pickle cucumber purchaser in the area, Vlastic Pickle Company. Vlastic drafted and supplies [*362] the sharefarmer contract form and insists on its use by every farmer who furnishes cucumbers to it. Vlastic unilaterally sets the price it will pay for cucumbers each year before the sharefarmer agreements are signed.

The sharefarmer arrangement has been in virtually universal use in the Gilroy area for at least the 10 years Borello has been growing pickle cucumbers. According to the uncontradicted testimony of both witnesses at the hearing, this arrangement is preferred by the sharefarmer families because it affords them an opportunity to make much more money than they would as hourly workers. (See discussion, *infra*.) During the ten years Borello has been growing pickle cucumbers, many of the sharefarmer families have returned several years, and at least one family has returned each year for nine years. Experienced sharefarmer families often bring with them and recommend to Borello new families who want to work on and harvest the cucumbers under the sharefarmer arrangement.

The majority states (maj. opn., *ante*, p. 345) that caring for and harvesting cucumbers are nothing more than manual labor and that Borello "retains all necessary control over a job which can be done only one way." All the evidence in the record is to the contrary. Richard Borello testified without contradiction that experienced sharefarmers will make more than inexperienced ones and that considerable skill was required in caring for and harvest-

ing the cucumbers during the time the sharefarmers are responsible for the crop. Specifically he testified: "He [the sharefarmer] comes in, he pulls the weeds, and he does, he does put the, at that time the vines are just starting to fall into the furrow, and he does take those vines and he slips them under the plant so that way they grow along the row line. That way they're not in furrow, so people don't step on them and you could do a lot of damage by letting the vines grow into the furrows and then as they walk through they step on them. That is you could lose 20% of your cucumbers that way. And it's their responsibility to take care of that plant and put the vines under the plants and pull the weeds." He further testified that from the time they execute their contracts, the sharefarmers "are totally responsible for the harvest and the care of the plants. If that involves weeding or hoeing, then they're responsible for that. They take care of that." "[There] is irrigation and the sharefarmer takes care of his rows and the irrigation [*sic*]. The only thing I do is I provide the water. Which means I press the button and start the pump." Asked who would decide when to irrigate, Richard Borello testified: "The sharecroppers work together. They understand that the field cannot be watered so many rows at a time, so they work together as sharefarmers. They all come to an agreement when they're going to pick [*sic*: irrigate?]. I don't have nothing [*sic*] to do with it." Asked what he would do if he thought a sharefarmer was damaging the crop [*363] through improper irrigation, [***557] he responded: "I lose, then I lose. There's nothing I can do about it. But it doesn't work that way though because they lose also. They would lose also. Why would they want to damage their crop?"

As an indication of the individual skill needed to train the vines and care for the cucumber crop, Richard Borello testified that "If they [the sharefarmers] abandon the field then I lose. . . . [Then] it's hard to or for another sharecropper to come in a [*sic*] take those rows 'cause they may not like the way the person handled the plants, [**413] and if he didn't have the plants right, then the crop is lost." It is also difficult to take over the crop because "It's very important to keep the vine clean of large cucumbers because it stresses the plant. . . ."

As to the time at which the sharefarmers were to do their work Richard Borello testified: "They're experienced cucumber pickers. And they realize that starting too early in the morning is not good for the plants. And they want to keep them [*sic*] plants as healthy and produce as much as possible. It's in their best interest. So they start later on in the day and, many times, some sharecroppers won't show up. Some will start, say at 8:00 and others will come in at 10:00 depending on [*sic*] some people don't care quite as much about the plants. Some people say, 'well I want to get it over with.' And

they go in in the morning and they pick it even when the plant is wet which hurts the plant. But I have no say over that. Others come in at 10:00 when the plant is dry which is better for the plant, and others will come in at 6:00 at night and pick only in the evening. So I have no say over the times or the hours." As to which persons were to do the work he testified: "No, I have no control at all. It, the sharefarmer furnishes, the sharefarmer, it says in the contract here, that they only use family members. It's even underlined in the contract. And being a sharefarmer or a contractor I have no control over who they put in the field other than they should agree with this document that they have only their family members."⁶

6 The majority find significant that the contract allows for work only by family members, but the reason for that requirement is quite apparent. Otherwise, the head of the family might be illegally acting as a labor contractor. (See § 1140.4, § 1682 et seq.)

Asked whether there was "any type of quality control involved by either Vlastic or Borello," Richard Borello testified: "There is no quality control other than, ya [*sic*] know, self motivation of making the most, by picking the smallest cucumber and taking care of the plants, that is the motivation. That is the quality control. . . . That's right. If they pick big cucumbers, they make less, and I make less. If they pick small cucumbers, then they make good, and I make good."

[*364] Again, the majority's assertion that "in no practical sense are the 'sharefarmers' entrepreneurs" is an unsupported conclusion. Two essential facts established by the uncontradicted evidence demonstrate that these sharefarmers are entrepreneurs: One, they cannot be terminated or discharged without cause during the term of the contract or even, according to the testimony, for inadequate performance; second, if the crop fails, is destroyed or for any reason cannot be marketed, the sharefarmers will not be compensated for their labors, no matter how many hours they have worked.

These facts also demonstrate the majority's error in stating that the sharefarmers make no investment in the enterprise. They invest the value of their labor. That may be insignificant to the majority but it is no doubt significant to the sharefarmers, as it is to me. The value of one's labor is ultimately the source of all capital. Many generations of American immigrants have become successful entrepreneurs doing just that -- investing the only asset at their command, the value of their labor.

Borello too incurs real and substantial risks and obtains real benefits from the sharefarmer arrangement. Borello saves the cost of hiring supervisors to control the

manner and quality of the work. On the other hand, it gives up its right to control the manner in which and the time at which the work is performed. As Richard Borello [***558] explained, Borello retains no control over the work and if the sharefarmers lose because of improper care or harvesting of the crop, Borello also loses.

The majority's conclusion that the "record fails to demonstrate that the harvesters voluntarily undertake an 'independent' and unprotected status" (maj. opn., ante, p. 359) is not based on any finding of the Division or the superior court (see fn. 3, ante) and again is simply contrary to the uncontradicted evidence of record. The [**414] written agreement expressly provides that the sharefarmer is an independent contractor and discloses that Borello will not withhold taxes or carry workers' compensation insurance covering the sharefarmers or their families. It is written in plain language, both in Spanish and English, and was explained to the sharefarmers in Spanish where appropriate before it was signed. Contrary to the implication in the majority opinion, there is no law establishing that a person's decision to enter into a transaction is involuntary unless he or she has been offered alternative arrangements. And the uncontradicted testimony of both Richard and Johnny Borello, the only witnesses, was that the sharefarmers like the sharefarmer arrangement because, for one reason, they can make much more under this arrangement than as hourly laborers.⁷ (See further discussion, [*365] *infra*.) The Borellos' testimony was verified by the fact that families often return year after year and even recommend the arrangement to other families who they bring with them to join in.

⁷ Though there was no testimony on the point, it is also apparent from the evidence that, except perhaps for the time when picking is at its peak, the full time of all family members would not be required by the sharefarming arrangement, and, conceivably, some members of the family could be simultaneously employed elsewhere on a part-time basis.

The statement by the majority that there is no evidence "that nonsignatory members of the sharefarmer's family have accepted Borello's disclaimer of employment responsibilities" (maj. opn., ante, p. 359) is amazing. The head of the family obviously enters into the sharefarmer agreement for himself and the rest of the family as their authorized agent. There is simply no evidence to the contrary nor is there any other reasonable inference. Significantly, not a single sharefarmer nor any other witness was called by the department to contradict the testimony of the Borellos.

Even more astonishing is the majority's attempt to discredit the uncontradicted evidence that the harvesters are able to earn considerably more as sharefarmers than they could as hourly employees. (Maj. opn., ante, p. 359, fn. 15.) Richard Borello was asked: "Why is that they like to typically go on a sharefarmer basis, then [*sic*] let's say, paying them an hourly wage?" He responded: "Well they make a lot more money on the sharefarmer basis." Later he was asked: "Now, if they were working on an hourly basis, what would be their typical hourly rate?" He responded: "Probably they'd be \$ 4.00 an hour, that's the going rate in Gilroy right now." He was next asked: "Is it fair to say then, that the amount of money they make under this arrangement is typically substantially greater than" He answered: "Oh yes, it's at least \$ 7-8 an hour if you were to break it down."

Johnny Borello's testimony was to the same effect. His testimony germane to the question is as follows: "Q: Now, are you aware of any farmers in the Gilroy area that are not using the sharefarmer arrangement?

"A: There's a few.

"Q: Do you have any reason, do you know why, that, why they may not be using that particular sharefarmer arrangement?

"A: Well, [if] they use this system, the workers make more. . . .

"Q: Based on your experience in having been on the farm there for a while, does it appear that the sharefarmers that come in are happy with that arrangement and that they want to share the sharecropping arrangement?

[*366] " [***559] A: They want to do it. They're happier, that way.

"Q: In your opinion would they make more money that way?

"A: Way more."

It is true that Richard Borello testified that whatever proceeds of sale were paid each week would be divided among the family members, but no inference can be drawn from that obvious fact that the amount earned would be less than that earned by an hourly employee. The [**415] amount of the proceeds of sale would naturally depend on the number and kind of cucumbers harvested and sold during a particular week, and the weekly amounts referred to by the majority do not indicate either the number of hours worked nor the number of persons who picked the cucumbers sold that week. It is thus impossible to draw from the weekly amounts any rational inference as to what average hourly wage would have been equivalent. What is left is the uncontradicted and uncontroverted testimony of Richard and Johnny Borello.

And so I come at last to the law. The controlling law is clear and simple though not always so easy to apply as it is here. On the evidence in the record before us, the unanimous Court of Appeal decision correctly determined that the Division's finding these sharefarmers were employees was incorrect as a matter of law.

As the majority correctly observes: "The Workers' Compensation Act (Act) extends only to injuries suffered by an 'employee,' which arise out of and in the course of his 'employment.' (§§ 3600, 3700; see Cal. Const., art. XIV, § 4 (former art. XX, § 21).) '[Employees]' include most persons 'in the service of an employer under any . . . contract of hire' (§ 3351), but do not include independent contractors." (Maj. opn. ante, p. 349.) (§§ 3353, 3357.)

The meaning and content of the statutory control test has been clear since at least 1947 when this court explained: "An independent contractor is one 'who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.' (Lab. Code, § 3353.) The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. (*S. A. Gerrard* [*367] *Co. v. Industrial Acc. Com.*, supra, 17 Cal.2d 411, 413-414 [110 P.2d 377]; *Riskin v. Industrial Acc. Com.*, supra, 23 Cal.2d 248, 253 [144 P.2d 16]; *Industrial Indemnity Exchange v. Industrial Acc. Com.*, 26 Cal.2d 130, 135 [156 P.2d 926].) Strong evidentiary support of the employment relationship is 'the right of the employer to end the service whenever he sees fit to do so.' (*Press Publishing Co. v. Industrial Acc. Com.*, 190 Cal. 114, 120 [210 P. 820]; see, also, *Hillen v. Industrial Acc. Com.*, 199 Cal. 577, 582 [250 P. 570]; *Riskin v. Industrial Acc. Com.*, supra, 23 Cal.2d 248, 253; *California Employment Com. v. Los Angeles etc. News Corp.*, 24 Cal.2d 421, 425 [150 P.2d 186]; *Yucaipa Farmers etc. Assn. v. Industrial Acc. Com.*, supra, 55 Cal.App.2d 234, 237.) 'An employee may quit, but an independent contractor is legally obligated to complete his contract.' (*Baugh v. Rogers*, supra, 24 Cal.2d 200, 206-207 [148 P.2d 633, 152 A.L.R. 1043]; *Los Flores School Dist. v. Industrial Acc. Com.*, 13 Cal.App.2d 180, 183 [56 P.2d 581].) There are 'other factors to be taken into consideration,' as stated in *Empire Star Mines Co. v. California Employment Commission* [1946] 28 Cal.2d 33, at page 43 [168 P.2d 686]: '(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of

occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman [***560] supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220 [Rest.2d Agency, §§ 2, 220]; Cal. Ann., § 220.)" (*Perguica v. Ind. Acc. Com.* (1947) 29 Cal.2d 857, 859-860 [179 P.2d 812]; [**416] accord, *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949-953 [88 Cal.Rptr. 175, 471 P.2d 975]; *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44 [168 P.2d 686].)

"Generally speaking, it is a question of fact to be determined by the commission, from the evidence adduced, whether the essential employer-employee relationship exists (*Riskin v. Industrial Acc. Com.*, 23 Cal.2d 248, 255 [144 P.2d 16]), and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence. (*S. A. Gerrard Co. v. Industrial Acc. Com.*, 17 Cal.2d 411, 414 [110 P.2d 377].) But 'if from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law.' (*Baugh v. Rogers*, 24 Cal.2d 200, 206 [148 P.2d 633, 152 A.L.R. 1043]; *Yucaipa Farmers etc. Assn. v. Industrial Acc. Com.*, 55 Cal.App.2d 234, 238 [*368] [130 P.2d 146]; see, also, *Burlingham v. Gray*, 22 Cal.2d 87, 100 [137 P.2d 91].)" (*Perguica v. Ind. Acc. Com.*, supra, 29 Cal.2d at p. 859.)

The law as set down in the statute and explicated by this court has been uniformly followed both by this court and the Courts of Appeal throughout the years, and the Court of Appeal in this case correctly applied that law to the facts established by the record. In its opinion authored by Justice Capaccioli, it reasoned: "Here, the work to be performed was the care and harvest of the cucumber plants. Borello & Sons did not retain or exercise control over the manner in which those responsibilities were discharged by the share farmers once they were contractually undertaken except to require the share farmers to use their own families to perform the work. The share farmers were free to utilize their own methods and set their own hours. Although the Vlasic's pricing schedule was an economic incentive to pick the cucumbers while they were small, the share farmers were free to pick them at any stage of maturity. The share farmers determined when the cucumber crops would be irrigated.

"The following factors are also indicative of an independent contractor relationship. First, there was no evidence that Borello had the authority to terminate the share farmers at will. Second, the share farmers were required to furnish their own tools and equipment necessary to care for and harvest the cucumber plants. Third, the share farmers worked for a limited time period. Fourth, the share farmers were paid based on the result produced rather than upon the time devoted. Fifth, the parties evidently believed they were creating an independent contractor relationship. . . .

"We do not find the fact that Borello & Sons retained responsibility for the application of pesticides and fertilizer significant since those activities involve different skills and knowledge and were separable from the manual labor which the share farmers had contracted to perform. '[In] weighing the control exercised we must carefully distinguish between authoritative control and . . . necessary co-operation where the work furnished is part of a larger undertaking. [Citation.]' (*Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 813 [159 P. 721].)"

Departing from the statutorily provided and long established standard, the majority opinion makes a strenuous effort to justify its result. First, it discusses at some length the history of the development of the control test in an attempt to demonstrate that it is not as meaningful today as once it was. The answer is that it is statutorily prescribed (§§ 3353 and 3357) and that until today it was as meaningful as ever.

[*369] Next, the majority finds comfort in a number of federal decisions in other contexts [***561] and

not involving our statutory standard and a number of out-of-state decisions of little consequence to us in view of the rather clear law of this state on the subject. Next reliance is placed on section 2750.5 relating to unlicensed contractors. The meaning of this statutory provision has itself been the subject of considerable dispute. (See *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* [**417] (1985) 40 Cal.3d 5 [219 Cal.Rptr. 13, 706 P.2d 1146].) ⁸ But the simple answer here is that no claim has been made that the sharefarmers are required to be licensed, so section 2750.5 has nothing to do with this case.

8 That decision had the unique effect of rewarding misdemeanor contracting without a license by extending to the unlicensed contractor workers' compensation benefits that would not have been available to him if he had obtained the proper license.

I conclude that the majority opinion is incorrect on the facts and the law. If there is some problem with the sharefarmer arrangement that threatens the social policies of the state, which is not established by the record in this case, the Legislature is undoubtedly competent to remedy it. There is no need for this court to render a decision distorting the law and which, to boot, ignores the facts established by the record.

I would either dismiss the review as improvidently granted or affirm the judgment of the Court of Appeal.

LEXSEE

Secretary of Labor, United States Department of Labor, Plaintiff-Appellee, v. Michael Lauritzen and Marilyn Lauritzen, individually and doing business as Lauritzen Farms, Defendants-Appellants

No. 86-2770

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

835 F.2d 1529; 1987 U.S. App. LEXIS 16875; 107 Lab. Cas. (CCH) P35,003; 28 Wage & Hour Cas. (BNA) 654

**May 27, 1987, Argued
December 15, 1987, Decided**

SUBSEQUENT HISTORY: [**1] Petition for Rehearing and Petition for Rehearing En Banc Denied February 8, 1988.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Wisconsin, No. 84 C 980 - Terence T. Evans, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant farm employers challenged the judgment of the United States District Court for the Eastern District of Wisconsin, which enjoined defendants from further violations of the record-keeping and child labor laws of the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq.

OVERVIEW: Plaintiff Secretary of Labor filed an action against defendant farm employers, alleging that their migrant harvesters were employees and not independent contractors. She requested an injunction to keep defendants from violating minimum wage requirements and to enforce the record-keeping and child labor provisions of the Fair Labor Standards Act of 1938 (Act), 29 U.S.C.S. § 201 et seq. The district court granted the injunction and defendants appealed, alleging that the migrant workers were independent contractors and therefore were not entitled to the protections of the Act. The judgment of the district court was affirmed. The court held that defendants did not effectively relinquish control of the harvesting to the migrants and the migrant workers had invested nothing except the cost of their gloves and therefore had no investment to lose. Therefore, the migrant workers were employees as defined by the Act and were entitled to its protections.

OUTCOME: The judgment of the district court enjoining defendant farm employers from further violations of record-keeping and child labor laws was affirmed. The court held that the migrant workers were employees entitled to the full protection of the Fair Labor Standards Act of 1938.

CORE TERMS: migrant, pickle, migrant workers, independent contractors, harvest, crop, skill, cucumber, farm, economic reality, harvesting, pick, independent contractors, colleagues, contractual, summary judgment, dependence, picker, common law, minimum wage, right to control, integral part, dispositive, depositions, overtime, season, picked, gloves, child labor, capital investment

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Independent Contractors Workers' Compensation & SSDI > Coverage > Employment Relationships > Farm Laborers
[HN1]The Wisconsin Migrant Law, Wis. Stat. Ann. § 103.90-.97, invalidates agreements that endeavor to convert migrant workers from employees to independent contractors.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality

[HN2]A minor factual dispute does not preclude summary judgment. The disputed facts must be outcome determinative under the governing law. The court should neither look the other way to ignore genuine issues of material fact, nor strain to find material fact issues where there are none.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN3]Under the Fair Labor Standards Act of 1938 (Act), 29 U.S.C.S. § 201 et seq., the statutory definitions regarding employment are broad and comprehensive in order to accomplish the remedial purposes of the Act. Courts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage. Courts are seeking, instead, to determine "economic reality." For purposes of social welfare legislation, such as the Act, employees are those who as a matter of economic reality are dependent upon the business to which they render service.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees

Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ

[HN4]The Fair Labor Standards Act of 1938 (the Act), 29 U.S.C.S. § 201 et seq., defines an employee as any individual employed by an employer. 29 U.S.C.S. § 203(e)(1). An employer is defined to include any person acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C.S. § 203(d). To employ includes to suffer or permit to work. 29 U.S.C.S. § 203(g).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN5]In seeking to determine the economic reality of the nature of a working relationship, courts do not look to a particular isolated factor but to all the circumstances of the work activity. Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling. Among the criteria courts consider are the following six: 1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;

4) whether the service rendered requires a special skill; 5) the degree of permanency and duration of the working relationship; 6) the extent to which the service rendered is an integral part of the alleged employer's business.

COUNSEL: Paula Wright Coleman, for Plaintiff.

Richard M. Van Orden, for Defendant.

JUDGES: Wood, Jr., Flaum, and Easterbrook, Circuit Judges. Easterbrook, Circuit Judge, concurring.

OPINION BY: WOOD, JR.

OPINION

[*1531] WOOD, JR., Circuit Judge.

This, as unlikely as it may at first seem, is a federal pickle case. The issue is whether the migrant workers who harvest the pickle crop of defendant Lauritzen Farms, in effect defendant Michael Lauritzen, are employees for purposes of the Fair Labor Standards Act of 1938 ("FLSA"),¹ or are instead independent contractors not subject to the requirements of the Act.² The Secretary, alleging that the migrant harvesters are employees, not independent contractors, brought this action seeking to enjoin the defendants from violating the minimum wage requirements and to enforce [*1532] the record-keeping and child labor provisions of the Act.

1 29 U.S.C. § 201 et seq.

[**2]

2 All the parties refer to the crop to be harvested as the "pickle crop," and so shall we. Perhaps the defendants have developed a remarkable new "pickle" seed. But whether they grow pickles or only potential pickles in the form of cucumbers, the law is the same.

After discovery, which entailed principally collecting depositions of migrant workers who had worked for the defendants, the Secretary moved for partial summary judgment. The defendants countered with affidavits of some of the previously deposed migrant workers which contradicted their earlier depositions. The contradictions were charged to language interpretation difficulties and to the absence of defendants' counsel when the depositions were taken.³ The district court granted the Secretary partial summary judgment, determining the migrants to be employees, not independent contractors. *Brock v. Lauritzen*, 624 F. Supp. 966, 970 (E.D. Wis. 1985) (*Lauritzen I*). Trial was then set to determine the remaining issues of possible minimum wage violations, child labor violations, and the sufficiency of the defendants' [**3] statutorily required record keeping. By an amended complaint, however, the minimum wage viola-

tion allegations were eliminated. The Secretary then sought summary judgment on the remainder of the case. Some migrant workers sought unsuccessfully to intervene to protect their claimed contractual status. The defendants protested that they had raised material factual issues, but the district court disagreed. The district court found that the controlling material facts were largely undisputed and entered final judgment on the issues of record-keeping and child labor violations, enjoining the defendants from further violations of the Act, and dismissing the action. Brock v. Lauritzen, 649 F. Supp. 16, 18-19 (E.D. Wis. 1986) (*Lauritzen II*). Both summary judgment orders are appealed as well as the district court's denial of the defendants' motion under Federal Rule of Civil Procedure 60(b)(6), seeking relief from the first entry of partial summary judgment.

3 The absence of defendants' counsel at the depositions was the fault of the defendants or of their counsel, who was later replaced. The government, however, gave the usual notice to take the depositions in Texas where the migrant workers were then located.

[**4] I. FACTUAL BACKGROUND

We must examine the factual background of the case to determine whether the employment status of the migrant workers could be concluded as a matter of law.

On a yearly basis the defendants plant between 100 to 330 acres of pickles on land they either own or lease. The harvested crop is sold to various processors in the area. The pickles are handpicked, usually from July through September, by migrant families from out of state. Sometimes the children, some under twelve years of age, work in some capacity in the fields alongside their parents. Many of the migrant families return each harvest season by arrangement with the defendants, but, each year, other migrant families often come for the first time from Florida, Texas and elsewhere looking for work. The defendants would inform the families, either orally or sometimes in writing, of the amount of compensation they were to receive. Compensation is set by the defendants at one-half of the proceeds the defendants realize on the sale of the pickles that the migrants harvest on a family basis. Toward the end of the harvest season, when the crop is less abundant and, therefore, less profitable, the defendants [**5] offer the migrants a bonus to encourage them to stay to complete the harvest, but some leave anyway.

Wisconsin law requires a form "Migrant Work Agreement" to be signed, and it was used in this case. It provides for the same pay scale as is paid by the defendants except the minimum wage is guaranteed. [HN1]The Wisconsin Migrant Law invalidates agree-

ments that endeavor to convert migrant workers from employees to independent contractors. Wis. Stat. Ann. § 103.90-97 (West 1987); 71 Op. Att'y Gen. Wis. 92 (1982). Accompanying the work agreement is a pickle price list purporting to set forth what the processors will pay the defendants for pickles of various grades. This price list is the basis of the migrant workers' compensation. The workers are not parties to the determination of prices agreed upon between the defendants and the processors.

[*1533] All matters relating to planting, fertilizing, insecticide spraying, and irrigation of the crop are within the defendants' direction, and performed by workers other than the migrant workers here involved. Occasionally a migrant who has worked for the defendant previously and knows the harvesting will suggest the need for [**6] irrigation. In order to conduct their pickle-raising business, the defendants have made a considerable investment in land, buildings, equipment, and supplies. The defendants provide the migrants free housing which the defendants assign, but with regard for any preference the migrant families may have. The defendants also supply migrants with the equipment they need for their work. The migrants need supply only work gloves for themselves.

The harvest area is subdivided into migrant family plots. The defendants make the allocation after the migrant families inform them how much acreage the family can harvest. Much depends on which areas are ready to harvest, and when a particular migrant family may arrive ready to work. The family, not the defendants, determines which family members will pick the pickles. If a family arrives before the harvest begins, the defendants may, nevertheless, provide them with housing. A few may be given some interim duties or be permitted to work temporarily for other farmers. When the pickles are ready to pick, however, the migrant family's attention must be devoted only to their particular pickle plot.

The pickles that are ready to harvest must be picked [**7] regularly and completely before they grow too large and lose value when classified. The defendants give the workers pails in which to put the picked pickles. When the pails are filled by the pickers the pails are dumped into the defendants' sacks. At the end of the harvest day a family member will use one of the defendants' trucks to haul the day's pick to one of defendants' grading stations or sorting sheds. After the pickles are graded the defendants give the migrant family member a receipt showing pickle grade and weight. The income of the individual families is not always equal. That is due, to some extent, to the ability of the migrant family to judge the pickles' size, color, and freshness so as to achieve pickles of better grade and higher value.

The workers describe their work generally as just "pulling the pickles off." It is not always physically easy, however, because the work involves stooping and kneeling and constant use of the hands, often under a hot sun. Picking pickles requires little or no prior training or experience; a short demonstration will suffice. One migrant worker recalled that when he was ten years old it had taken him about five minutes to learn pickle [**8] picking. Pickles continue to grow and develop until picked, but not uniformly, so harvesting is a continuing process. The migrant workers' income depends on the results of the particular family's efforts. The defendants explain that the migrants exercise care for both the plants and the pickles, which results in maximum yields, a benefit to the family as well as to the defendants. Machine harvesting, although advantageous for other crops, is not suitable for pickle harvesting. The defendants leave the when and how to pick to the families under this incentive arrangement. The defendants occasionally visit the fields to check on the families, the crop, and to supervise irrigation. The defendant, Michael Lauritzen, who actually operates the business, is sometimes referred to as the "boss." Some workers expressed the belief that he had the right to fire them.

The district court considered the factual background generally set forth above to be largely undisputed. Lauritzen I, 624 F. Supp. at 966. The defendants deny that some of the facts are undisputed because some of the migrants subsequently changed their testimony. They argue that some migrants had language problems [**9] which caused them to respond incorrectly during their depositions. To support this argument, the defendants presented counteraffidavits from four migrants which allege in conclusory language that their relationship with the defendants had been at all times "that of an independent businessman or contractor and not one of an employee." [*1534] They "contracted," they say, with the defendants. In other respects these later counteraffidavits did not dispute the basic factual background that we have recounted, except that these four migrants claimed that their pickle-picking expertise required at least a complete harvest to develop. The conclusions set forth in the affidavit, obviously in the language of a lawyer, not that of the migrants themselves, create no material factual issues.

The affidavits of defendant Michael Lauritzen, for the most part, track the facts found to be undisputed by the trial judge, adding only more detail. Lauritzen claims that the Wisconsin pickle industry as a whole considers the relationship with migrant workers to be contractual. He explains that hourly compensation does not maximize revenues, and that the more proficient migrants would not work except [**10] through a contractual relationship. He denies that the workers receive any compensa-

tion if there are no pickle harvest sale proceeds. Other aspects of the pickle business, Lauritzen points out, such as crop dusting, also are done by contract. Nothing in the Lauritzen affidavit differs in any substantial way from the trial court's view of the facts, except that stress is placed on certain details in an effort to make an employment arrangement appear to be more than it is.

II. STANDARDS OF REVIEW

We need not generally review again the requirements of disposition by summary judgment, ⁴ except to note that [HN2] a minor factual dispute does not preclude summary judgment. The disputed facts must be "outcome determinative under the governing law." Hossmann v. Spradlin, 812 F.2d 1019, 1020-21 (7th Cir. 1987) (per curiam); Egger v. Phillips, 710 F.2d 292, 296 (7th Cir.) (en banc), cert. denied, 464 U.S. 918, 78 L. Ed. 2d 262, 104 S. Ct. 284 (1983). The court should neither "look the other way" to ignore genuine issues of material fact, nor "strain to find" material fact issues where there are none, and we shall not. Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); [**11] Mintz v. Mathers Fund, Inc., 463 F.2d 495, 498 (7th Cir. 1972).

⁴ Fed. R. Civ. P. 56(c).

[HN3]

It is well recognized that under the FLSA the statutory definitions regarding employment ⁵ are broad and comprehensive in order to accomplish the remedial purposes of the Act. See, e.g., United States v. Rosenwasser, 323 U.S. 360, 362-63, 89 L. Ed. 301, 65 S. Ct. 295 (1945); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979). Courts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage. We are seeking, instead, to determine "economic reality." Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987); Karr v. Strong Detective Agency, Inc., 787 F.2d 1205, 1207 (7th Cir. 1986). For purposes of social welfare legislation, such as the FLSA, "employees are those who as a matter of economic reality are dependent [**12] upon the business to which they render service." Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975) (quoting Bartels v. Birmingham, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947)).

⁵ [HN4] The Act defines an employee simply as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). An "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). To "employ in-

cludes to suffer or permit to work." 29 U.S.C. § 203(g).

[HN5]

In seeking to determine the economic reality of the nature of the working relationship, courts do not look to a particular isolated factor but to all the circumstances of the work activity. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947). Certain criteria have been developed to assist in determining the true [**13] nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.

Among the criteria courts have considered are the following six:

[*1535] 1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;

2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;

4) whether the service rendered requires a special skill;

5) the degree of permanency and duration of the working relationship;

6) the extent to which the service rendered is an integral part of the alleged employer's business.

See Bartels v. Birmingham, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947); *Rutherford Food Corp.*, 331 U.S. at 730; *United States v. Silk*, 331 U.S. 704, 716, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947); *see also Donovan v. Dial-America Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir.), *cert. denied*, 474 U.S. 919, 88 L. Ed. 2d 255, 106 S. Ct. 246 (1985); [**14] *Donovan v. Brandel*, 736 F.2d 1114, 1119-20 (6th Cir. 1984). This court previously has held that the determination of workers' status is a legal rather than a factual one, and therefore not subject to the clearly erroneous standard of review. *Karr*, 787 F.2d at 1206. The underlying facts, however, are necessarily subject to that standard. *Id.*

The Fifth Circuit recently discussed the types of findings involved in determining whether workers are employees within the meaning of the FLSA. *Mr. W Fireworks*, 814 F.2d at 1044-45. According to the Fifth Circuit, a district court makes three kinds of findings under the Act. The first are the historical findings of fact that underlie the findings regarding the six factors mentioned above. An example of such a finding in this case is the court's finding that the migrant workers supplied their own gloves. As the Fifth Circuit found, "it is beyond cavil . . . that these findings of historical fact are subject to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a)." *Id.* at 1044.

The findings as to the six factors themselves constitute the second tier of [**15] findings under the Act. The Fifth Circuit explained that these findings are "plainly and simply based on inferences from facts and thus are questions of fact that we may set aside only if clearly erroneous." *Id.* The court went on to say that

two caveats are necessary, however. Although we may only set aside factual findings of the district court if we have a firm and definite conviction that a mistake has been made, this must not serve as an excuse to avoid comprehensively canvassing the record with great care. For us to do otherwise, would abrogate our role and duty as a reviewing court. Congress surely did not intend Rule 52(a) to constrict as a Victorian corset, binding the courts of appeals to the findings of the district court absent a careful and fitting examination. Second, we must ensure that the factfinding of the district court is performed with the proper legal standards in mind. Only then can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact. The district court's analysis, of course, is subject to plenary review by this court, to ensure that the district court's understanding of the law is [**16] proper.

Id. at 1044-45 (citations omitted).

The third level of findings is the district court's ultimate conclusion as to whether the workers are employees or independent contractors. The Fifth Circuit found, as we have, that the legal effect of the fact findings is a question of law. *Id.* at 1045; *Karr*, 787 F.2d at 1206.

III. ANALYSIS

In a number of agricultural cases, albeit nonpickle cases, courts have applied the six criteria to find an employment, rather than a contractual, relationship. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); *Driscoll Strawberry Associates*, 603 F.2d 748; *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973). In some other cases involving migrant workers in similar circumstances, an employment [*1536] relationship was either admitted or assumed, and was therefore not an issue. *See, e.g., Washington v. Miller* 721 F.2d 797 (11th Cir. 1983); *Bueno v. Mattner*, 633 F. Supp. 1446 (W.D. Mich. 1986); *Alzalde v. Ocanas*, 580 F. Supp. 1394 (D. Colo. 1984). [*17]

In one case, however, *Donovan v. Brandel*, the Sixth Circuit affirmed the district court in classifying migrant workers harvesting pickles, under circumstances similar to those here, as independent contractors, not employees. 736 F.2d 1114 (6th Cir. 1984). Even in its own circuit, however, that case has been narrowed and distinguished. Although *Donovan v. Gillmor*, 535 F. Supp. 154 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982), was decided before *Brandel*, the pre-*Brandel* holding in *Gillmor* was thereafter reexamined by the same district court in 1986. After the *Brandel* decision was announced in that circuit, the district court reaffirmed its original, inconsistent, holding in an unpublished order. *Brandel* itself took note of the prior contrary holding in *Gillmor* and distinguished *Gillmor* on a factual basis without revealing which factual distinctions the court considered to be critical. 736 F.2d at 1120, n.11. Although some factual differences are evident between this case and *Gillmor*, the situations are basically similar.⁶ *Brandel* is also similar to this case, but we [*18] view the factual similarities differently than did the *Brandel* court.

⁶ In *Gillmor* the migrants did harvest crops other than pickles, for which they were paid additional sums. They always worked exclusively for the one employer.

A. Control

The *Brandel* court found that the landowner, under a sharecropping arrangement, had effectively relinquished control of harvesting to the migrants. The court considered this to be a factor in its finding that the migrant workers were independent contractors. In view of the pervasive overall control retained by the defendants here, we do not reach the same finding. We view the wage arrangement as no more than a way to effectively motivate employees, and to provide a means of determining their wages.

Brandel, according to the Sixth Circuit, did not retain "the right to dictate the manner in which the details of the harvesting function are executed." *Brandel*, 736 F.2d at 1119. For example, he did not appear in the fields to supervise [*19] the workers, or set hours for them to work. In this case, the defendants did occasionally visit the families in the fields. The workers sometimes referred to Michael Lauritzen as the "boss," and some of them expressed a belief that he had the right to fire them. Moreover, unlike the Sixth Circuit, we believe that the defendants' right to control applies to the entire pickle-farming operation, not just the details of harvesting. The defendants exercise pervasive control over the operation as a whole. We therefore agree with the district court that the defendants did not effectively relinquish control of the harvesting to the migrants. *Lauritzen I*, 624 F. Supp. at 968.

B. Profit and Loss

The Sixth Circuit found that the migrant workers had the opportunity to increase their profits through the management of their pickle fields. *Id.* Although the court found little or no evidence in the record supporting a finding that the workers were exposed to any risk of loss, it found the fact that their remuneration would increase through their management efforts to be dispositive of the profit and loss analysis. We do not agree. Although the profit opportunity may [*20] depend in part on how good a pickle picker is, there is no corresponding possibility for migrant worker loss. As the *Gillmor* court held, a reduction in money earned by the migrants is not a loss sufficient to satisfy the criteria for independent contractor status. 535 F. Supp. at 162. The migrants have invested nothing except for the cost of their work gloves, and therefore have no investment to lose. Any reduction in earnings due to a poor pickle crop is a loss of wages, and not of an investment. *Lauritzen I*, 624 F. Supp. at 969.

[*1537] C. Capital Investment

The capital investment factor is interrelated to the profit and loss consideration. The *Gillmor* court characterized the investment in this context to be "large expenditures, such as risk capital, capital investments, and not negligible items or labor itself." 535 F. Supp. at 161. The workers here are responsible only for providing their own gloves. Gloves do not constitute a capital investment. As in *Gillmor*, "everything else, from farm equipment, land, seed, fertilizer, [and] insecticide to the living quarters of the migrants is supplied by the defendants. [*21] " *Id.* at 162. *See Lauritzen I*, 624 F. Supp. at 969. Although in *Brandel* the migrant furnished the pails, the *Brandel* court minimized this factor by saying that in pickle harvesting by hand there is no need for heavy capital investment by the worker, and the overall size of

the investment by the employer relative to that by the worker is irrelevant. 736 F.2d at 1118-19. To the contrary, we believe that the migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants.

D. Degree of Skill Required

Although a worker must develop some specialized skill in order to recognize which pickles to pick when, this development of occupational skills is no different from what any good employee in any line of work must do. Skills are not the monopoly of independent contractors. See *Lauritzen I*, 624 F. Supp. at 969. The *Brandel* court found that a high degree of skill is involved in caring for the pickle plants and picking the pickles. 736 F.2d at 1117-18. We agree that some skill is required, but we do not find [**22] that this level of skill sets the pickle harvester apart from the harvester of other crops. The migrants' talent and their physical endurance in the hot sun do not change the nature of their employment relationship with the defendants.

E. Permanency

Another factor in the employment analysis is permanency and duration of the relationship. The Sixth Circuit in *Brandel* found that the vast majority of harvesters have only a temporary relationship with the employee which suggested to the court an independent contractual arrangement. *Id.* Many seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors. Many migrant families return year after year. In *Brandel* the returning migrant families comprised as high a proportion as forty percent to fifty percent of the work force. *Id.* at 1117. In this case the district court found that the migrant workers did not have the sort of permanent relationship associated with employment. *Lauritzen I*, 624 F. Supp. at 969. Nevertheless, when the district court considered its finding in light of the economic [**23] reality of the parties' entire work relationship, the court did not consider this one criterion to be dispositive. Although we have serious doubts about this particular district court determination in view of cases such as *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985), we need not disturb that finding for the purposes of this case. We agree with the *Gillmor* court that however temporary the relationship may be it is permanent and exclusive for the duration of that harvest season. 535 F. Supp. at 162-63. One indication of permanency in this case is the fact that it is not uncommon for the migrant families to return year after year.

F. Harvesting as an Integral Part of Defendants' Business

Another factor we consider briefly is the extent to which the service of migrants may be considered an integral part of the pickle-picking business. The district court held that the migrants' work was an integral part of the business, as even the court in *Brandel* conceded. *Lauritzen I*, 624 F. Supp. at 969; *Brandel*, 736 F.2d at 1120. The defendant here takes a contrary view on appeal [**24] claiming that the record is insufficient to sustain the district court finding. It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle [*1538] business unless the employer's investment, planting, and cultivating activities are only to serve the purpose of raising ornamental pickle vines. That result would likely disappoint all good pickle lovers.

G. Dependence of Migrant Workers

Our final task is to consider the degree to which the migrant families depend on the defendants. Economic dependence is more than just another factor. It is instead the focus of all the other considerations.

The [other] tests are aids -- tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is *dependence* that indicates employee status. Each test must be applied with that ultimate notion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently [**25] independent to lie outside its ambit.

Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1311-12 (5th Cir.) (emphasis in original), cert. denied, 429 U.S. 826, 50 L. Ed. 2d 89, 97 S. Ct. 82 (1976). The district court held that the migrants were economically dependent on the defendants during the harvest season. *Lauritzen I*, 624 F. Supp. at 969. If the migrant families are pickle pickers, then they need pickles to pick in order to survive economically. The migrants clearly are dependent on the pickle business, and the defendants, for their continued employment and livelihood. *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385 (3d Cir.), cert. denied, 474 U.S. 919, 106 S. Ct. 246, 88 L. Ed. 2d 255 (1985). That is why many of them return year after year. The defendants contend that skilled migrant families are in demand in the area and do not need the

defendants. Were it not for the defendants the migrant families would have to find some other pickle grower who would hire them. Until they found another grower, they would be unemployed. It is not necessary to show that workers are [**26] unable to find work with any other employer to find that the workers are employees rather than contractors.

We cannot say that the migrants are not employees, but, instead, are in business for themselves and sufficiently independent to lie beyond the broad reach of the FLSA. They depend on the defendants' land, crops, agricultural expertise, equipment, and marketing skills. They are the defendants' employees.

IV. CONCLUSION

No trial is needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers are employees, entitled to the protection of the FLSA. The purpose of the Act is to protect employees from low wages and long hours, and "to free commerce from the interferences arising from the production of goods under conditions that were detrimental to the health and well-being of workers." Rutherford Food Corp. v. McComb, 331 U.S. 722, 727, 91 L. Ed. 1772, 67 S. Ct. 1473 (1971). In this case, for example, some children under twelve years of age are in the fields. Although there is no suggestion in the record that the defendants are abusing the children in any way, the child labor provisions of [**27] the Act are intended for their benefit. It may be that the defendants' pickle operation is exemplary and conducted pursuant to standards even higher than those of the FLSA, but that does not allow the defendants to circumvent the Act. Neither does the defendants' gloomy prediction that application of the Act will have a devastating economic impact on the pickle business relieve them from complying with the Act's provisions. In any event, that argument is one for the Congress, not the courts. The basic arrangement between the defendants and the pickle pickers which, according to the defendants, produces the highest economic return for both grower and picker, need not be altered. All that need change is the label which the defendants apply to the arrangement. The defendants need only think of the proceeds [*1539] paid to the pickle pickers as wages, keep the necessary records, and make sure they abide by the protections that the Act accords to working children.⁷

⁷ We acknowledge the brief of *amicus curiae* filed by Legal Action of Wisconsin, Inc., supporting the view that the migrant harvesters are employees, not independent contractors.

[**28] AFFIRMED.

CONCUR BY: EASTERBROOK

CONCUR

EASTERBROOK, Circuit Judge, concurring.

Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984), says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors" -- each important, none dispositive. As the majority puts it: "Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling." At 1534. Courts must examine "all the circumstances" in search of "economic reality." *Ibid*.

It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision. The price of avoidance [**29] should be committing the decisions to the finders of fact, as our inability to fulfill Justice Holmes's belief that all tort law could be reduced to formulas after some years of experience¹ has meant that juries today decide the most complex products liability cases without substantial guidance from legal principles. Surely Holmes was right in believing that legal propositions ought to be in the form of rules to the extent possible. E.g., Aguilera v. Cook County Police and Corrections Merit Board, 760 F.2d 844, 847-48 (7th Cir. 1985). Why keep cucumber farmers in the dark about the legal consequences of their deeds?

¹ Oliver Wendell Holmes, Jr., *The Common Law* 111-13, 123-26 (1881).

People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to [**30] eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns. Courts have had plenty of experience with the application of the FLSA to migrant farm workers. Fifty years after the Act's passage is too late to say that we still do not have a legal rule to govern these

cases. My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of "economic reality" matter, and why.

I

Consider the problems with the balancing test. These are not the factors the *Restatement (Second) of Agency* § 2(3) (1958) suggests for identifying "independent contractors." The *Restatement* takes the view that the right to control the physical performance of the job is the central element of status as an independent contractor. My colleagues, joining many other courts, say that this approach is inapplicable because we should "accomplish the remedial [**31] purposes of the Act" (at 1534):

Courts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage. We are [*1540] seeking, instead, to determine "economic reality."

This implies that the definition of "independent contractor" used in tort cases is inconsistent with "economic reality" but that the seven factors applied in FLSA cases capture that "reality." In which way did "economic reality" elude the American Law Institute and the courts of 50 states? What kind of differences between FLSA and tort cases are justified? A definition under which "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service" (*Bartels v. Birmingham*, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947)) does not help to isolate the elements of "reality" that matter.

Consider, too, the seven factors my colleagues distill from the cases. The first is the extent to which the supposed employer possesses a right to control the workers' performance. This is the core of the common law definition. [**32] The parties agree that Lauritzen did not prescribe or monitor the migrant workers' methods of work but instead measured output, the weight and kind of cucumbers picked. Lauritzen did not say who could work but instead negotiated only with the head of each migrant family. Lauritzen did not control how long each member of the family worked. This absence of control over who shall work, when, and how, strongly suggests an independent contractor relation at common law. Cf. *United States v. Orleans*, 425 U.S. 807, 813-16, 48 L.

Ed. 2d 390, 96 S. Ct. 1971 (1976) (lack of control over "detailed physical performance" establishes independent contractor status as a matter of law for purposes of the Federal Tort Claims Act). Perhaps Lauritzen could have dictated the workers' identities and methods, but inferences run in favor of the person opposing the motion for summary judgment.

My colleagues admit that the migrant workers controlled their own working hours and picking methods, but discount these facts on the grounds that what counts is Lauritzen's "right to control . . . the entire pickle-farming operation" (at 1536.) If this is so, Pittsburgh Plate Glass must be an "employee" [**33] of General Motors because GM controls "the entire automobile manufacturing process" in which windshields from PPG are used. This method of analysis makes everyone an employee.

The second factor is whether the worker has an opportunity to profit (or is exposed to a risk of loss) through the application of managerial skills. My colleagues say that this indicates "employment" here because each worker has "invested nothing except for the cost of . . . work gloves, and therefore [has] no investment to lose" (at 1536). But the opportunity to obtain profit from efficient management is not the same as exposing a stock of capital to a risk of loss. (*That* subject is the third factor, discussed below.) A consultant analyzing the operation of an assembly line also may furnish few tools except for a stopwatch, pencil, and clipboard, but such a person unquestionably is an independent contractor. The "managerial" skill may lie in deploying a work force efficiently. The head of each migrant family decides which family members works, for how long, on what plot of land. That is the same sort of managerial decision customarily made by supervisors in a hierarchical organization.

Third in my [**34] colleagues' list is the worker's investment in equipment or materials, that is, physical capital. The record is clear that the migrant workers possess little or no physical capital. ² This is true of many workers we would call independent contractors. Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are "employees" of their clients under [*1541] the FLSA. ³

² Physical capital is not, however, the same thing as a "disproportionately small stake in the pickle-farming operation" (slip op. 13). The laborers' share of the farm's gross income exceeds 50%, giving the migrant workers a very large stake indeed in the successful harvest and marketing of the crop. (The migrants receive 50% of

Lauritzen's gross, plus housing and end-of-season bonuses.)

3 A story current among electrical engineers has it that after analyzing a destructive harmonic vi-

bration in one of Edison's new generators, Prof. Steinmetz submitted an invoice for \$ 5,000. An irate Edison demanded itemization. Steinmetz's new bill said:

1. Telling you to remove the third coil from the top	\$ 10.00
2. Knowing which coil to remove	\$ 4,990.00

Steinmetz, selling only expertise, was the paradigm of an independent contractor.

[**35] The fourth factor, whether the worker possesses a "special skill," would exclude lawyers and others rich in human capital. The migrant workers, by contrast, are poor in human capital, so this factor augurs for a conclusion of employment.

Fifth in the list is "the degree of permanency and duration of the working relationship." This can be measured, but it is hard to see why it is significant. Lawyers may work for years for a single client but be independent contractors; hamburger-turners at fast-food restaurants may drift from one job to the next yet be employees throughout. The migrant workers who picked Lauritzen's cucumbers labor on many different farms over the course of a year, but work full-time at the pickle operation for more than a month. Surely an engineering consultant who worked full-time on a given job, and frequently worked with a single manufacturer, but did five to ten jobs a year, would be an independent contractor. What matters for the migrant workers: that they have many jobs and float among employers, or that they work full-time for the duration of the harvest? Without a legal theory we cannot tell.

Factor number six, the "extent to which the service rendered [**36] is an integral part of the employer's business," is one of those bits of "reality" that has neither significance nor meaning. *Everything* the employer does is "integral" to its business -- why else do it? An omission to pick the cucumbers would be fatal to Lauritzen, but then so would an omission to plant the vines or water them. An omission to design a building would be fatal to an effort to build it, but this does not imply that architects are the "employees" of firms that want to erect new buildings. Acquiring tires is integral to the business of Chrysler, but the tires come from independent contractors. Perhaps "integral" in this formulation could mean "part of integrated operation", which would distinguish tires but leave unanswered the question why the difference should have a legal consequence.

Seventh and finally we have "dependence." "Economic dependence is more than just another factor. It is instead the focus of all the other considerations." At 1538. The majority proceeds (*id.* at 1538, citations omitted):

The district court held that the migrants were economically dependent on the defendants during the harvest season. If the migrant families are pickle [**37] pickers, then they need pickles to pick in order to survive economically. The migrants clearly are dependent on the pickle business, and the defendants, for their continued employment and livelihood. That is why many of them return year after year. The defendant contend that skilled migrant families are in demand in the area and do not need the defendants. Were it not for the defendants the migrant families would have to find some other pickle grower who would hire them. Until they found another grower, they would be unemployed. It is not necessary to show that workers are unable to find work with any other employer to find that the workers are employees rather than contractors.

This is the nub of both the district court's opinion and my colleagues' approach. Part of it is factually unsupported. There is *no* evidence that the migrant families pick only pickles or are "dependent on the pickle business." For all we can tell, these families pick oranges in California, come to Wisconsin to pick cucumbers, and move on to New York to harvest apples. We know they work year-round, and cucumbers are not harvested year-round in the United States. The point of my colleagues' discussion [**38] of factors 2-4 is that these migrant workers are not specialized to pickles.

[*1542] Now the families may be dependent on the pickle business once they arrive at Lauritzen's farm and settle down to work. If a flood carried away the cucumbers, the migrants would be hard pressed to find other work immediately. This, however, is true of anyone, be he employee or independent contractor. A lawyer engaged full-time on a complex case may take a while to find new business if the case unexpectedly settles. Migrant workers are no more dependent on Lauritzen than are sellers of fertilizer, who rely on the trade of the locality and are in the grip of economic forces beyond their control, and the person who fixes Lauritzen's irrigation equipment, a classic independent contractor. The conclusion of dependence in this case is an artifact of looking at the subject *ex post* -- that is, after the workers are in the cucumber fields. To determine whether they are dependent on Lauritzen, we have to look at the arrangement *ex ante*.

The usual argument that workers are "dependent" on employers -- frequently a euphemism for a concern about monopsony -- is that they are immobile. The coal miner [**39] in a company town, the weaver who lives next door to one textile mill and 50 miles from the next, may be offered a wage less than the one that would be necessary to induce a new worker to come to town. The employer takes advantage of the family ties and other things that may fracture some labor markets into small regions, each of which may be less than fully competitive. Migrant workers, by definition, have broken the ties that bind them to one locale. They sell their skills in a national market. It is unlikely that they receive less than the competitive wage. That wage may be low -- it will be if the skills they possess are common -- and the FLSA may have something to say about that wage. It is not possible, however, to get to that conclusion by talking about "dependence." Lauritzen is dependent on migrant labor; he cannot move his farm, or change his crop after planting cucumbers. The workers, by contrast, can and will go elsewhere if Lauritzen offers too little money. The majority's observation when dealing with the fifth "factor" that families come back to Lauritzen year after year, and see 624 F. Supp. at 969, indicates that he offers a satisfactory return on their [**40] labor.

So the seven factors are of uncertain import in theory and cut both ways in practice. The list also is curious by its omission. It does not mention the method of compensation. One common feature of an independent contractor relation is compensation by a flat fee (common in the construction business) or a percentage of revenues (the sharecropper and the investment bank). The migrants who picked Lauritzen's crop received more than half of the proceeds of the sales. True, piecework and commission sales are not inconsistent with status as an "employee," see *Rutherford Food Corp. v. McComb*, 331

U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173 (7th Cir. 1987); *Silent Woman, Ltd. v. Donovan*, 585 F. Supp. 447 (E.D. Wis. 1984); but the wrinkle here is that the migrants share the market risk with Lauritzen. Each gets part of the sales price, which may rise or fall with the demand for pickles and the supply of cucumbers each season. If the price collapses, the workers and Lauritzen share the loss; so too they share the gain if the price rises. This is not an ordinary attribute of [**41] employment. Employees' "profit sharing" arrangements rarely provide for loss sharing. Why should this be irrelevant to the status of the migrant workers?

If we are to have multiple factors, we also should have a trial. A fact-bound approach calling for the balancing of incommensurables, an approach in which no ascertainable legal rule determines a unique outcome, is one in which the trier of fact plays the principal part. E.g., *Wisconsin Real Estate Investment Trust v. Weinstein*, 781 F.2d 589, 597-99 (7th Cir. 1986). That there is a legal overlay to the factual question does not affect the role of the trier of fact. See *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982) ("ultimate" questions); *Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986) ("mixed" questions). See also *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, [*1543] 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986) (applying Rule 52(a) standards to a determination that workers are "seamen" for FLSA purposes); *Brock v. Mr. W Fireworks*, 814 F.2d 1042, 1044 (5th Cir. 1987) (treating the definition [**42] of "employee" under the FLSA as one of fact). Given *Icicle* we cannot readily say, as my colleagues do (At 1535), that the "ultimate conclusion as to whether the workers are employees or independent contractors" is one of law. The drawing of inferences from subordinate to "ultimate" facts is a task for the trier of fact -- if, under the governing legal rule, the inferences are subject to legitimate dispute.

II

We should abandon these unfocused "factors" and start again. The language of the statute is the place to start. Section 3(g), 29 U.S.C. § 203(g), defines "employ" as including "to suffer or permit to work". This is "the broadest definition . . . ever included in any one act." *United States v. Rosenwasser*, 323 U.S.360, 363 n.3, 89 L. Ed. 301, 65 S. Ct. 295, 297 n.3 (1945), quoting from Sen. Hugo Black, the Act's sponsor, 81 Cong.Rec. 7657 (1937). No wonder the common law definition of "independent contractor" does not govern. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51, 91 L. Ed. 809, 67 S. Ct. 639 (1947); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985). [**43] The definition, written in the passive, sweeps in almost any work done on the employer's premises, poten-

tially any work done for the employer's benefit or with the employer's acquiescence.

We have been told to construe this statute broadly. *Rutherford Food Corp.*; *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296, 85 L. Ed. 2d 278, 105 S. Ct. 1953 (1985). Knowing the end in view does not answer hard questions, for it does not tell us how far to go in pursuit of that end. *Rodriguez v. United States*, 480 U.S. 522, 107 S. Ct. 1391, 1393, 94 L. Ed. 2d 533 (1987). "Always the question about a 'remedial' statute is, how much help was it intended to give the benefited group?" *Moore v. Tandy Corp.*, 819 F.2d 820, 822 (7th Cir. 1987) (emphasis in original). See *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310-11 (7th Cir. 1986). To know how far is far enough, we must examine the history and functions of the statute.

Unfortunately there is no useful discussion in the legislative debates about the application of the FLSA [**44] to agricultural workers. This drives us back to more general purposes -- those of the FLSA in general, and those of the common law definition of the independent contractor. Section 2 of the FLSA, 29 U.S.C. § 202, supplies part of the need. Courts are "to correct and as rapidly as practical eliminate", § 2(b), the "labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers", § 2(a). We recently summarized the purposes of the overtime provisions of the FLSA -- which turn out to be the important ones here (in conjunction with the child labor provisions) in light of the parties' apparent belief that the migrant workers regularly earn more than the minimum wage. See *Mechmet*, 825 F.2d at 1176:

The first purpose was to prevent workers willing (maybe out of desperation . . .) to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours. In particular, unions' efforts to negotiate for overtime provisions in collective bargaining agreements would be undermined if competing, non-union firms were free to hire workers [**45] willing to work long hours without overtime. The second purpose was to spread work and thereby reduce unemployment, by requiring the employer to pay a penalty for using fewer workers for the same amount of work as would be necessary if each worker worked a shorter week. The third purpose was to protect the overtime workers from themselves: long hours of work might impair their

health or lead to more accidents (which might endanger other workers as well). This purpose may seem inconsistent with allowing overtime work if the [*1544] employer pays time and a half, but maybe the required premium for overtime pay is intended to assure that workers will at least be compensated for the increased danger of working when tired.

To recite these purposes is not to endorse them; maybe, as Lauritzen says, the FLSA does more harm than good by foreclosing desirable packages of incentives (such as payment by reference to results rather than hours) or by reducing the opportunities for work, and hence the income, of those, such as migrant farm workers, who cannot readily enter white-collar professions and make more money while working fewer hours. The system in place on Lauritzen's farm [**46] may be the most efficient yet devised -- best for owners, workers, and consumers alike -- but whether it is efficient or not is none of our business. The judicial function is to implement what Congress did, not to ask whether Congress did the right thing. ⁴ *Id.* at 1176.

4 Or whether, as seems likely, the parties can cope with a change in the legal rule. If the Act applies, Lauritzen can maintain a system of incentives tied to the price the cucumbers will fetch. The farm must keep records and ensure that the total payment exceeds the statutory minimum; if it does this, the FLSA is indifferent to the device by which the excess is determined.

The purposes Congress identified in § 2 and we amplified in *Mechmet* strongly suggest that the FLSA applies to migrant farm workers. We also observed in *Mechmet* that the statute was designed to protect workers without substantial human capital, who therefore earn the lowest wages. No one doubts that migrant farm workers are short on human capital; [**47] an occupation that can be learned quickly ⁵ does not pay great rewards.

5 The parties dispute whether "quickly" means days or only minutes, but the difference is unimportant for current purposes.

The functions of the FLSA call for coverage. How about the functions of the independent contractor doctrine? This is a branch of tort law, designed to identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries). To say "X is an independent contractor" is to say that the

chain of vicarious liability runs from X's employees to X but stops there. This concentrates on X the full incentive to take care. It is the right allocation when X is in the best position to determine what care is appropriate, to take that care, or to spread the risk of loss. See *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938-39 (7th Cir. 1986); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984). This usually follows [**48] the right to control the work. Someone who surrenders control of the details of the work -- often to take advantage of the expertise (= human capital) of someone else -- cannot determine what precautions are appropriate; his ignorance may have been the principal reason for hiring the independent contractor. Such a person or firm specifies the outputs (design the building; paint the fence) rather than the inputs. Imposing liability on the person who does not control the execution of the work might induce pointless monitoring.⁶ All the details of the common law independent contractor doctrine having to do with the right to control the work are addressed to identifying the best monitor and precaution-taker.

6 If the parties could re-contract at no cost about the allocation of damages, of course, it would produce no change at all if both parties were solvent. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

The reasons for blocking vicarious liability at a particular point [**49] have nothing to do with the functions of the FLSA. The independent contractor will have its own employees, who will be covered by the Act. Electricians are "employees" of someone, even though the electrical subcontractor is not the employee of the general contractor. Indeed, the details of independent contractor relations are fundamentally contractual. Firms can structure their dealings as "employment" or "independent contractor" to maximize the efficiency of incentives to work, monitor, and take precautions. Cf. *Moore*; Paul H. Rubin, *The Theory of the Firm and the Economics of the Franchise Contract*, 21 J.L. & Econ. 223 (1978). The [*1545] FLSA is designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept \$ 2.00 per hour, the agreement is ineffectual. See *Walton*, 786 F.2d at 305-06. In other FLSA cases we have looked past the contractual terms. E.g., *Mechmet*, 825 F.2d at 1177 ("we attach no

weight to the fact that the collective bargaining agreement between the Ritz-Carlton and its waiters describes the waiters' income from the service charge as a 'gratuity' rather than [**50] a 'commission.'). In this sense "economic reality" rather than contractual form is indeed dispositive.

The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health, are valuable traits and all too scarce. Those who possess these traits will find employment; those who do not cannot work (for long) even at the minimum wage in the private sector. But those to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health. So the baby-sitter is an "employee" even though working but a few hours a week, and the writer of novels is not an "employee" of the publisher even though renting only human capital. The migrant workers labor on the farmer's premises, doing repetitive tasks. Payment on a piecework rate (e.g., 1 cents per pound of cucumbers) would not take these workers out of the Act, any more than payment of the sales staff at a department store on commission avoids the statute. The link of the migrants' compensation to the market price of pickles is not fundamentally different [**51] from piecework compensation. Just as the piecework rate may be adjusted in response to the market (e.g., to 1 cents per 1.1 pounds, if the market falls 10%), imposing the market risk on piecework laborers, so the migrants' percentage share may be adjusted in response to the market (e.g., rising to 55% of the gross if the market should fall 10%) in order to relieve them of market risk. Through such adjustments Lauritzen may end up bearing the whole market risk, and in the long run must do so to attract workers.

There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA -- without regard to the crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort. Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become.

LEXSEE

**STATE OF OREGON, ex rel JACK R. ROBERTS, Commissioner of the OREGON
BUREAU OF LABOR AND INDUSTRIES, Appellant, v. ACROPOLIS
MCLOUGHLIN, INC., an involuntarily dissolved Oregon corporation, and
HARALAMBOS POLIZOS, individually, Respondents, and KONSTANTINOS
POLIZOS, Defendant.**

CA A93158

COURT OF APPEALS OF OREGON

150 Ore. App. 180; 945 P.2d 647; 1997 Ore. App. LEXIS 1295

September 24, 1997, Filed

PRIOR HISTORY: [***1] 9503-01597. Appeal from Circuit Court, Multnomah County. Anna J. Brown, Judge. On appellant's petition for reconsideration filed July 29, 1997; on respondent's motion to dismiss; alternatively, response to appellant's petition for reconsideration filed August 15, 1997. Opinion filed July 16, 1997, 149 Ore. App. 220, 942 P.2d 829 (1997).

DISPOSITION: Reconsideration allowed; former opinion modified; affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, the Oregon Bureau of Labor and Industries, sought reconsideration of the court's prior opinion that affirmed the judgment of the Circuit Court of Multnomah County (Oregon) that denied the bureau recovery against respondent, bar and manager, for the payment of minimum wages pursuant to Or. Rev. Stat. § 653.010 et seq. for dancers at the bar and that awarded respondent dancer minimum wages.

OVERVIEW: The bureau claimed that its claim was for injunctive relief, which was an equitable proceeding, and the court should have reviewed the trial court's application of the common law test instead of the economic realities test for distinguishing employees from independent contractors and the question of the dancers' status for errors of law. The court allowed the bureau's request for reconsideration, modified its former opinion, affirmed the trial court's denial of the bureau's claims for injunctive and declaratory relief against the bar and manager, and allowed the dancer to recover minimum wages as an employee, holding that the evidence showed that the dancers after the date specified by the bureau were not

employees of the bar and manager based on their lack of control over the dancers and the dancers' source of income came from the customers' tips and not the bar and manager. The court further held that the bar and manager were not subject to the minimum wage requirements of Or. Rev. Stat. § 653.010 et seq.

OUTCOME: The court allowed the reconsideration of its prior opinion that was requested by the bureau, modified its former opinion, affirmed the trial court's denial of the bureau's claims for injunctive and declaratory relief against the bar and manager, and allowed the dancer, who the court found to be an employee, to recover minimum wages as an employee.

CORE TERMS: dancer, stuff, bartender, economic realities, waitress, booking, tip, minimum wage, dancing, costume, assignments of error, music, customer, de novo review, danced, nude, doormen, dance, skill, meal, former opinion, independent contractors, employment relationship, establishments, terminated, booked, wear, matter of law, injunctive relief, reconsideration

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN1]An appellate court reviews a question when it is argued on appeal and preserved at trial.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
[HN2]There is no error by a trial court in failing to apply the economic realities test exclusively to a minimum wage claim that is brought by the Oregon Bureau of Labor and Industries.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
[HN3]An appellate court considers on de novo review whether under the mixed economic realities or common law standards the trial court errs in finding that persons are or are not employees in minimum wage claims.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN4]An appellate court does not review de novo a jury's findings with respect to claims.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview
[HN5]The economic reality test for determining whether a person is entitled to a minimum wage by an employer necessarily depends on the circumstances of the individual person.

COUNSEL: Hardy Myers, Attorney General, Virginia L. Linder, Solicitor General, and Mary H. Williams, Assistant Attorney General, for petition.

Gordon L. Osaka and Williams, Zografos & Peck, contra.

JUDGES: Before Riggs, Presiding Judge, and Landau and Leeson, Judges.

OPINION BY: RIGGS

OPINION

[*182] [**649] RIGGS, P.J.

The Oregon Bureau of Labor and Industries (BOLI) has filed a petition for reconsideration of our opinion in this case, *State ex rel Bureau of Labor v. Acropolis McLoughlin*, 149 Ore. App. 220, 942 P.2d 829 (1997), contending that we erroneously determined that BOLI did not preserve its first two assignments of error and did not request *de novo* review of the record. We allow reconsideration, modify our former opinion and affirm the trial court.

BOLI brought this action under [***2] ORS 653.010 et seq to enforce the minimum wage provision for dancers working at "The Acropolis," the club of defendant Acropolis McLoughlin, Inc. (Acropolis). BOLI sought injunctive and declaratory relief with regard to dancers dancing at The Acropolis after September 1993, which the court denied on the ground that the dancers were not employees entitled to minimum wage. The specific circumstances of each claim and the court's dispositions are set forth in our original opinion. *Acropolis McLoughlin*, 149 Ore. App. at 222.

On appeal, the state framed the questions presented:

"Does the 'economic realities test' based on the federal Fair Labor Standards Act apply to a determination whether individuals are employees or independent contractors for purposes of the state minimum wage provisions pursuant to ORS chapter 653?"

"Under the economic realities test, does the evidence support the conclusion *as a matter of law* that the dancers in the defendant club are employees and not independent contractors?"

"If the economic realities test does not apply to the definitions in ORS 653.010, under the common law factors the trial court presented in the jury instruction, does the evidence [***3] support the conclusion *as a matter of law* that the dancers in the defendant club are employees and not independent contractors?" (Emphasis supplied.)

[*183] For its first assignment of error, BOLI said:

"The trial court erred in denying the state's claim for declaratory relief." For its second assignment of error, BOLI said:

"The trial court erred in denying the state's claim for injunctive relief." In its statement of the standard of review, BOLI said:

"This court reviews the trial court's application of the common law test instead of the economic realities test for distinguishing employees from independent contractors and the question of the dancers' status for errors of law.

"Complaints for injunctive relief are proceedings in equity. This court reviews *de novo* to determine whether the evidence presented justifies the granting of injunctive relief. ORS 19.125. Similarly, where a declaratory judgment proceeding is in the nature of a suit in equity, this court tries all factual issues *de novo*." (Citations omitted.)

The first portion of BOLI's argument was directed at its contention that the trial court

"erred in refusing to apply the 'economic realities' [***4] test to determine whether the dancers working for defendant after September 1993 were and are employees or independent contractors."

The portion of its brief addressing that contention asserted that the trial court erred as a matter of law in not applying the economic realities test to decide whether the dancers working at The Acropolis after September 1993 were and are employees.

In our opinion, we concluded that because BOLI argued to the trial court that criteria of both the economic realities and common-law tests should be considered, BOLI had not preserved its argument on appeal that *only* the economic realities test is applicable. We adhere to that conclusion. In its petition, BOLI now contends that its position on appeal is merely that the unique factors of the economic realities test should be *considered* in making the determination of an employment relationship. Contrary to the implication of BOLI's argument, it is clear that the trial court did consider [*184] factors from both the economic realities and common-law tests. In the light of the argument made to the trial court that criteria of both tests are applicable, there was no error.

BOLI says in its petition [***5] that

"one of the reasons for pursuing this appeal is BOLI's interest in having this court determine *which* test applies to state minimum wage cases." (Emphasis supplied.)

[HN1]This court will take up that question when it is argued on appeal *and* preserved at trial.

In the second portion of its argument under the first two assignments of error, BOLI argued that under the economic realities test, "the evidence in this case" shows that dancers working for defendant after September 1993 were employees. We disposed of that contention, along with the first contention, for the reason that, in the light of the arguments made to the trial court, [HN2]there could be no error in failing to apply the economic realities test exclusively. We adhere to that determination.

Finally, in the remaining portion of its brief addressing the first and second assignments of error, BOLI contended that, even under the trial court's modified common-law definition of employee, the dancers should be considered employees of Acropolis. Although no assignment specifically asserted error in the trial court's findings, as opposed to its application of the law, we give BOLI the benefit of the doubt and now [***6] conclude that BOLI's final argument under the first and second assignments of error can be read as a request for *de novo* review. The question that [HN3]we consider on *de novo* review is whether, under the mixed economic realities/common law standard formulated by the parties for the trial court, the court erred in finding that the dancers after September 1993 were not employees of Acropolis. The court's jury instructions, which are not challenged on review and which encompass the legal standard that the parties presented to the court, are set out in full in our former opinion.¹ [*185] 149 Ore. App. at 227. [**650] We summarize the pertinent facts, as we find them:

1 As we noted in our former opinion, claims for the period *before* September 1993, were tried to a jury. [HN4]We do not review *de novo* the jury's findings with respect to those claims.

The Acropolis is open from 11:00 a.m. until 2:00 a.m., seven days a week. The club has been in existence since 1976 and has provided entertainment in the form of nude dancing [***7] since 1988. It provides meals, alcoholic beverages and nude dancing during all hours of operations. Haralambos Polizos is the manager of The Acropolis and president of the defendant corporation, Acropolis McLoughlin, Inc. Polizos advertises the business of The Acropolis on the building marquee and through a yearly calendar containing pictures of nude or partially dressed women. Meals at The Acropolis are about one-half of the price of meals at restaurants that do not provide nude dancing entertainment.

From April 1991 to September 1993, the hiring, scheduling and management of dancers was the job of Don Cloud, who was an employee of Acropolis. Dancers

auditioned for Cloud and the customers, bartenders and waitresses, but only waitresses and bartenders made the decision whether to hire a dancer. Waitresses, bartenders and Polizos' son, Konstantinos, kept a list of those dancers who would not be permitted to return to The Acropolis. Cloud was required not to schedule those dancers. Dancers worked in three shifts. Polizos decided how many dancers were needed and how many stages would be open for each shift; Cloud scheduled the dancers. Dancers paid no fee to Cloud.

From June 1991 to [***8] January 1993, dancers were paid minimum wage by Acropolis for all shifts, and Acropolis issued to dancers and Cloud Internal Revenue Service W-2 Forms reflecting their wages and withholdings. In January, Polizos decided that during the busier shifts the dancers were earning enough in tips alone and did not need to be paid wages. He continued to pay minimum wage to those dancers working the quieter shifts on Sunday and Wednesday afternoons and to those who complained that they had earned no tips on a shift. He was aware of the minimum-wage law but was not aware that tips could not be counted against the minimum wage.

Dancers were required to abide by rules established by Polizos, which included complying with requirements of [*186] the Oregon Liquor Control Commission (OLCC): No drugs, no prostitution, no stage props, no touching of customers or self, no "table dancing" and remaining at least one foot from the customer. Dancers were required to arrive about 15 minutes early for their shifts and, until September 1993, were not permitted to wear street clothes on stage during their performance. There was a dressing room on the premises. Dancers showed their identification to a bartender or [***9] doorman when they arrived, to determine whether they were above minimum age. Until September 1993, dancers were also required to check in at the bar before their work shift and sign out at the bar after their shift. The first dancer to arrive for a shift got to leave first. If a dancer arrived late for her shift, the bartender or waitresses would report that to Polizos or Cloud. If a dancer did not show up for a shift at all, the last dancer to arrive for the previous shift was required to stay and dance a second shift. Dancers reported their work hours to Cloud, who maintained records for each dancer. In their five-hour shifts, dancers performed four-song sets, taking breaks between sets and while other dancers performed their sets. Until September 1993, dancers and staff of The Acropolis brought their concerns to Polizos. After September 1993, dancers were required to bring their concerns only to the agent.

Dancers were not required to have specialized training. All testified that they had had nude dancing experience before dancing at The Acropolis. Dancers provided

their own costumes and taped music and were responsible for developing their own routines. Bartenders and waitresses [***10] controlled the tape player and its volume to accommodate the competing needs of customers, waitresses and dancers. Before September 1993, dancers were expected to wear high heels when they danced and to remove all their clothing by the fourth song in their set. One dancer testified that if dancers wore street clothes during the finale, the bartender would turn off the music, and the dancers would not be allowed to go home until all the dancers were [**651] either nude or in costume. Dancers had no say in the operation of The Acropolis.

In September 1993, Polizos terminated Cloud's employment and arranged for an agency by the name of "Hot Stuff" to schedule dancers for The Acropolis. Hot Stuff leased [*187] stages at The Acropolis for \$ 500 per month and agreed to provide dancers for the shifts Polizos established. Dancers requested shifts from Hot Stuff and picked up their "bookings" from the offices of Hot Stuff. Hot stuff would try to schedule dancers for their requested performance times, but it was not always possible. Dancers paid Hot Stuff a \$ 2 to \$ 4 booking or stage rental fee for booking them at The Acropolis. Dancers were not required to accept a booking from Hot Stuff. Acropolis no [***11] longer paid wages to dancers for any shift. It issued no W-2 Forms to dancers or to Hot Stuff.

After it entered into its agreement with Hot Stuff, Acropolis no longer was involved in the disciplining of dancers. If a bartender or waitress had a concern about a dancer, that concern would be brought to Hot Stuff. If a dancer had a concern, she would address it to Hot Stuff. Dancers reported violations of OLCC rules to Hot Stuff. Dancers notified Hot Stuff of performance cancellations; Hot Stuff booked a replacement dancer. Waitresses and bartenders notified Hot Stuff if a dancer did not show up, and Hot Stuff provided the replacement. If dancers timely canceled a performance, their booking fee was returned. If they canceled late, they forfeited their booking fee and their next performance.

Dancers signed a service agreement with Hot Stuff, in which they agreed that they were an independent business with a separate business telephone listing, that they were not solely dependent on Hot Stuff and that they booked their performances through at least one other agency or performed at least at one club that was not booked by Hot Stuff. Dancers testified that they did not contribute to the [***12] terms of their agreement with Hot Stuff. Hot Stuff printed business cards for dancers. Dancers performed at several clubs in addition to The Acropolis.

In April 1994, Polizos terminated Acropolis' relationship with Hot Stuff and entered into a similar agreement with an agency run by Brett Owenby, who had worked previously for Hot Stuff. In August 1994, Polizos terminated Acropolis' relationship with Owenby and began dealing with Michael Henry, doing business as Star Promotions (Star). [*188] Star originated in 1992 and characterizes itself as an entertainment coordinator, booking dancers not only at The Acropolis but also at three other establishments. Star Promotions pays Acropolis \$ 100 per month to lease stages at The Acropolis, and Henry receives a bonus from Acropolis of approximately \$ 100 per month for doing a good job. Star uses space for its office in Acropolis' empty warehouse and pays no rent. Defendants have no input into the terms and conditions of the dancers' contracts with Star. Dancers audition for Star at a location other than The Acropolis. Under their agreements with Star, the dancers are "volunteers" who "donate their time and talent to perform on said stages." Dancers [***13] have no input as to the terms and conditions of the agreements with Star. A dancer who wishes to dance at The Acropolis must schedule a shift through Star.

Dancers pay Star a stage rental fee of \$ 4 to \$ 7 for performing at The Acropolis, depending on the time of performance, and dancers' income comes exclusively from customer tips. As under Hot Stuff, dancers are paid no minimum wage by Acropolis. They are free to choose their own stage name, hair style, costume, music and dance routine. They provide their own music and determine how much of their costume they will remove. They are not required to undress completely and can wear whatever they want on stage, even street clothes. They are free to do what they want in between their performances, except that they must wear a "cover-up" if they circulate among the customers.

Dancers have monthly meetings at Star's office. Dancers developed and voted on their own list of Conduct Recommendations, with input from Polizos and The Acropolis bartenders and waitresses. After September 1993, dancers no longer check in at The Acropolis bar and are no longer required to perform a finale.

[**652] At the relevant time, Acropolis employed 27 bartenders, [***14] waitresses, cooks and doormen. Those employees were required to punch a time clock. Acropolis scheduled their work time, determined their compensation, coordinated work and vacation schedules and hired and fired them. Those employees were paid an hourly wage of \$ 5 to \$ 7. They were provided with one free meal and drink per day. Cooks and [*189] doormen were provided with uniforms, and bartenders and waitresses were required to dress in black and red. Each employee had a 10-minute break after lunch time.

In contrast to the circumstances of waitresses, bartenders, cooks and doormen, dancers did not punch a time clock. They were not provided with a free meal or drink. Acropolis did not schedule their work hours or vacations. They did not receive a 10-minute break. Acropolis cross-trained its waitresses and bartenders. It did not cross-train dancers. Bartenders, waitresses, cooks and doormen attended monthly meetings with Polizos. Dancers did not attend those meetings but attended only their separate meetings at the office of Star. There was testimony from dancers and Cloud that, although tipping by dancers was not required, it was "traditional" for dancers to tip bartenders, waitresses and [***15] doormen. There was testimony from one dancer that bartenders started their shifts with 100 one dollar bills that they would give customers change in one dollar bills to be used to tip dancers and that bartenders would not give one dollar bills as change if they did not like the dancer. There was testimony that a doorman was terminated for demanding a tip from a dancer.

Polizos rents his stages for private parties for \$ 90 for two hours. When there is a private party, Polizos requests two additional dancers from Star. On two occasions, when stages leased by Star needed repairs, Acropolis made the repairs.

Several dancers testified at trial. Susan Mazur testified that she danced at The Acropolis from August 1992 to April 1994, and that her job was to "try to promote beer sales by entertaining the guys, making them want to stay there and come back and want to spend their money." In 1992, 1993 and 1994 she filed federal and state income tax returns in which she declared herself to be a self-employed dancer, taking business expense deductions for makeup, tanning, costumes and jewelry. She and the other dancers who testified said that they regarded themselves as self-employed and that [***16] they worked with other booking agents who would book performances for them at other establishments.

[*190] A jury found that, with regard to wage claims prior to September 1993, the dancers' relationship with Acropolis was one of employment. In BOLI's view, the changes that occurred in September 1993 in the day-to-day management of the dancers did not alter the relationship of the dancers and Acropolis. Although there was evidence that the September 1993 changes in the management of the dancers did not affect many of the factors that were relevant to the court's inquiry, considering all of the criteria that the trial court had before it we find that the relationship between Acropolis and the dancers after September 1993 was not one of employment:

1) The durations of the relationships of the dancers and The Acropolis. With the exception of four or five

dancers, dancers typically danced at The Acropolis intermittently, for brief periods, and simultaneously worked for other clubs.

2) The right or lack of right of Acropolis to control the method of doing the work. BOLI argues that Acropolis and its various booking agents after 1993, especially Star, were not sufficiently distinct to be treated [***17] separately for the purpose of the determining whether Acropolis had a right to control the dancers. In other words, although Acropolis purported to book dancers for its club through an agent, the agents were connected so closely to Acropolis, rather than to the dancers, that Acropolis had not relinquished control over the dancers. In our view, the evidence shows that the entities were separate. Unlike Cloud, Henry was not compensated as an employee by Acropolis. Although Star received no fee from Acropolis for its services, it used Acropolis space for its office, rent free. Although Star "leased" stages from Acropolis, it received a monthly bonus equal [**653] to the lease amount. Acropolis had no say in the agreements between Star and the dancers. From its office space, Star booked dancers for other clubs. Contrary to BOLI's contention, these facts lead us to conclude that the entities were separate. We find, as BOLI contends, that Acropolis' use of a booking agent did not mean that Acropolis had given up control of its stages; it retained control of the general venue and circumstances of the dancers' work, such as the stage to be danced on, the length of the shift, the number of stages used, [***18] and the length and number of sets. However, we find, additionally, that the dancers [*191] were not subject to the control of either Acropolis or the agent with regard to the manner of performing their work.

3) Form of payment. Dancers were not paid by Acropolis or Star but through customer tips only. As BOLI points out, this factor is of relatively little weight here, where the issue is whether Acropolis *should* have been paying minimum wage to the dancers.

4) Equipment. Dancers provided their own equipment including costumes, makeup and music. The stage that Acropolis provided was not equipment but the situs of the performance. See Cy Investment, Inc. v. Natl. Council on Comp. Ins., 128 Ore. App. 579, 584 876 P.2d 805 (1994).

5) Extent to which dancers' income depended on their skills. Although dancers were not required to have any specific training to dance at The Acropolis, the evidence was that their tips were 80 percent dependant on their ability to entertain, which included their dancing and personal skills and their ability to use makeup and costumes. Evidence also was introduced that tips were dependant in part on a dancer's physical appearance,

which, of course, is not [***19] exclusively a question of skill.

6) Acropolis' right to discipline or fire dancers. There is no evidence that either the Acropolis or the agent ever fired a dancer. When a dancer decided not to dance at The Acropolis, there was no requirement to notify Acropolis. The dancer simply asked the agent not to schedule a shift.

7) The parties' view of their relationship. The dancers testified that they regarded themselves to be self-employed.

8) Control over opportunity for profit. BOLI takes the position that the dancers' opportunity for profit was, in fact, dependant on Acropolis, through its provision of the venue, its setting of general shift times and lengths, its control of the number of dancers and stages used, control of music volume and exclusive control of the operation of The Acropolis. Certainly, the dancers could not have earned income from dancing at The Acropolis in the absence of that venue. There was testimony, however, that a dancers' profits were almost exclusively dependent on the skill of the dancer [*192] and that dancers danced at other establishments, not just The Acropolis.

At trial, BOLI took exception to the trial court's failure to instruct the jury that the relative [***20] investments of the parties in the business is a factor to be considered in determining the nature of the relationship. Although no assignment of error challenges the trial court's failure to instruct the jury on that factor, BOLI asserts on review that, in considering the post-September 1993 period, that factor weighs in favor of an employment relationship. BOLI contends that the investments made by the dancers in their costumes and music are minimal compared to Acropolis' investment in its business, which includes the building, seating, stages, food, beverages and service. Defendants note that a dancer's investment goes beyond the mere physical trappings of the work, such as costume and music, and includes skill and experience, which cannot be measured comparatively.

Further, BOLI asserts, the trial court erred in failing to consider the extent to which the dancers are an integral part of Acropolis' business. BOLI notes that the dancers are featured in advertising and that The Acropolis' food prices are low because The Acropolis' beverage sales are enhanced by the presence of dancers. It contends that both this factor and the investment factor go to the essence of the "economic realities" [***21] [**654] test: the dependance of the dancers on The Acropolis for their earnings.

Were it not for the fact that the dancers testified that they danced at other establishments as well as The Acropolis, we might be persuaded by BOLI's arguments concerning the need to consider factors bearing on dancers' economic dependence. Additionally, [HN5]the economic reality with regard to each dancer necessarily depends on the circumstances of the individual dancer, evidence that is not in this record. We are not persuaded that the two criteria aid in the determination of an employment relationship in this case.

Considering the factors discussed, we conclude that they weigh in favor of the determination that the relationship between Acropolis and the dancers after 1993 was not one of employment. Accordingly, the trial court did not err in [*193] holding that Acropolis was not

subject to minimum-wage requirements for the dancers after 1993.

Our findings apply as well to the claims of Susan Mazur. BOLI's third assignment of error challenged the trial court's granting of defendants' motion for directed verdict with respect to the assigned wage claim as it relates to the dancer Mazur for the time period after September [***22] 1993. In our first opinion, we concluded that there was evidence from which it could be found that Mazur was an employee. On *de novo* review, we conclude now that there was no employment relationship.

Reconsideration allowed; former opinion modified; affirmed.

LEXSEE

CARLOS TORRES, BOBBY IRIZARRY, RUBEN MORA, JOSELITO AROCHO, LEWIS CHEWNING, JOSEPH CREMA, ALFRED CROKER, FRANK DELEON, MARIO DIPRETA, WILLIAM HELWIG, ROBERT MISURACA, ROBERT PASTORINO, VICTOR PHELPS, DANIEL SALEGNA, and GILBERTO SANTIAGO, on behalf of themselves and all others similarly situated, Plaintiffs, - against - GRISTEDE'S OPERATING CORP., NAMDOR, INC., GRISTEDE'S FOOD, INC., CITY PRODUCE OPERATING CORP., GRISTEDE'S FOODS NY, INC., GALO BALSECA, JOHN CATSIMATIDES, and JAMES MONOS, Defendants. GRISTEDE'S FOODS NY, INC., GRISTEDE'S OPERATING CORP., NAMDOR, INC., GRISTEDE'S FOODS, INC., and CITY PRODUCE OPERATING CORP., Counter-Claimants, - against - CARLOS TORRES and LEWIS CHEWNING, Counter-Defendants.

04 Civ. 3316 (PAC)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

**628 F. Supp. 2d 447; 2008 U.S. Dist. LEXIS 66066; 156 Lab. Cas. (CCH) P35,495; 14
Wage & Hour Cas. 2d (BNA) 294**

**August 28, 2008, Decided
August 28, 2008, Filed**

PRIOR HISTORY: Torres v. Gristede's Operating Corp., 2006 U.S. Dist. LEXIS 74039 (S.D.N.Y., Sept. 28, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a class of current and former employees of defendant supermarket chain, filed suit alleging that the failure to record, credit, and compensate them for overtime wages violated the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., N.Y. Lab. Law § 650 et seq., and common law. The employees moved for partial summary judgment on nine legal claims for which they asserted there were no material factual issues.

OVERVIEW: The employees were entitled to summary judgment on the chain's claim of the "white collar exemption" the FLSA. The overwhelming weight of the evidence was that the chain's co-managers and department managers received a regular paycheck that was tied automatically to the amount of hours they worked during the pay period. The chain could not overcome both the overwhelming statistical evidence suggesting frequent and widespread impermissible deductions and the testi-

mony of its payroll director, who confirmed that class members were paid only for time worked. Accordingly, the chain could not claim the "white collar exemption" exemption, and the chain was liable for overtime compensation pursuant to 29 U.S.C.S. § 207(a)(1) and N.Y. Comp. Codes R. & Regs. 12, § 142-2.2. The only claim at issue on which the employees were not entitled to summary judgment was the record keeping claim. Although there was considerable evidence that the chain's failed to maintain accurate records, it was equally clear that a key complicating factor in assembling such data was the failure of the employees to properly "punch in and out."

OUTCOME: The employees' motion was granted, with the exception of the claim that the chain's-- Maintenance of records by employees failed to keep accurate records of the employees' time, which entitled the employees to appropriate presumptions, evidentiary rulings, and jury instructions at trial, as to which the motion was denied.

CORE TERMS: counterclaim, overtime, class members, manager, co-manager, salary, retaliation, summary judgment, exemption, workweek, faithless, impermissible, servant, unauthorized, retaliatory, paycheck, partial-

day, compulsory, misconduct, hourly, salaried, permissive, payroll, white collar, supplemental jurisdiction, protected activity, quotation, genuine, weekly, hours worked

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

[HN1]A motion for summary judgment shall be granted if the pleadings demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

[HN2]On a motion for summary judgment, a genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. But where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

[HN3]On a motion for summary judgment, the moving party initially bears the burden of demonstrating that no genuine issues of material fact remain. Once this showing is made, the nonmoving party may not rely solely on conclusory allegations, conjecture, and speculation, but must present specific evidence in support of its contention that there is a genuine dispute as to the material facts. Fed. R. Civ. P. 56(e).

Civil Procedure > Summary Judgment > Standards > Appropriateness

[HN4]On a motion for summary judgment, the court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but only if there is a genuine dispute as to those facts. Fed. R. Civ. P. 56(c).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN5]The Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., requires that all hours worked in excess of 40

hours per week be compensated at one and one-half times the minimum wage. 29 U.S.C.S. § 207(a)(1). The statute exempts from overtime coverage, however, any employee employed in a bona fide executive, administrative, or professional capacity as such terms are defined and delimited by regulations of the Secretary of Labor. 29 U.S.C.S. § 213(a)(1).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN6]The regulations promulgated by the Secretary of Labor define an executive, administrative, or professional employee as someone who performs certain duties and is paid on a salary basis at a rate of not less than \$ 455 per week. 29 C.F.R. §§ 541.100, 541.600. The requirements are substantially the same under the New York Labor Law.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN7]New York's overtime provisions expressly incorporate the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., exemptions. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. Courts regularly look to the FLSA when considering the scope of overtime exemptions under the New York Labor Law (NYLL). Like the FLSA, the NYLL white collar exemption requires a salary of not less than a fixed amount. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.14(c)(4)(i)(e). Under the NYLL, "salary" means receipt of fixed, regular compensation that is not subject to weekly variation by hours worked.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN8]Courts apply the salary basis test to distinguish bona fide white collar employees from non-exempt, hourly employees, i.e., employees who may be disciplined by piecemeal deductions from pay. An employee is paid on a salary basis if the employee receives a predetermined amount each pay period that is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.602(a).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN9]Absent certain exceptions outlined in the Secretary's regulations, a white collar employee should expect to receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. This is because deductions from pay in less than one week increments for discipli-

nary violations are inconsistent with compensation on a salary basis. An employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN10]The fact that an employer has made an actual deduction is insufficient by itself, however, to find an employee non-exempt. Rather, the relevant inquiry is whether the employer engages in an actual practice of making impermissible deductions such that the employer necessarily has no intention of paying its employees on a salary basis. 29 C.F.R. § 541.603(a).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN11]The question of the employer's intent to pay its employees on a salary basis cannot be answered by simply dividing the number of impermissible pay deductions by the number of managerial employees. Instead, assessing this "objective intention" entails a more nuanced consideration of the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. 29 C.F.R. § 541.603(a).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN12]In the context of the white collar exemption to Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., overtime coverage, the existence of a policy either permitting or prohibiting improper deductions remains a relevant factor in assessing whether the employer maintains an actual practice of making such deductions. 29 C.F.R. § 541.603(a).

Governments > Legislation > Interpretation

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN13]As with all exemptions to Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., overtime coverage, courts must construe the white collar exemption narrowly against the employer seeking to assert it and ensure that

it applies only to those employees plainly and unmistakably within the exemption.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN14]Assessing the employer's intent is more than an arithmetic exercise--there is no magic number of deductions that suffice to vitiate the white collar exemption to Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., overtime coverage.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN15]An employer must demonstrate that it reimburses the employees for such improper deductions in order to invoke the window of correction. 29 C.F.R. § 541.603(c).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN16]An employer is responsible for compensating an employee for any work it suffers or permits the employee to work. 29 U.S.C.S. § 203(g). Thus, if an employer has knowledge that an employee is working hours in excess of forty per week, it is responsible for compensating that employee even where the employer has not requested the overtime be performed or does not desire the employee to work.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN17]See 29 C.F.R. § 785.13.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN18]An employer with knowledge of its employees' overtime work cannot insulate itself simply by promulgating a maximum 40-hour workweek policy.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

[HN19]Laches is an equitable defense that bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant. When a limitation on the period for bring-

ing suit has been set by statute, laches will generally not be invoked to shorten the statutory period.

Civil Procedure > Equity > Maxims > Clean Hands Principle

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

[HN20]The doctrine of unclean hands holds that the equitable powers of the court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

[HN21]As a matter of law, a collective bargaining agreement cannot waive a plaintiff's Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., rights.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN22]Under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., a district court is generally required to award a plaintiff liquidated damages equal in amount to actual damages. 29 U.S.C.S. § 216(b). A district court can deny liquidated damages, however, in an exercise of its discretion where the employer demonstrates that it acted in subjective good faith with objectively reasonable grounds for believing that its conduct did not violate the FLSA. 29 U.S.C.S. § 260. The employer's burden in this regard is a difficult one.

Labor & Employment Law > Wage & Hour Laws > Recordkeeping Requirements

[HN23]The Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., and its implementing regulations require employers to maintain adequate employment records. 29 U.S.C.S. § 211(c). 29 C.F.R. § 516.2(a)(7) requires that employers maintain records of hours worked each workday and total hours worked each workweek by employees. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.6(a)(4) requires employers to keep records of employees' hours worked for six years.

Labor & Employment Law > Wage & Hour Laws > Wage Payments

[HN24]Under New York law, one who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation. An employer is entitled to recover compensation paid to a faithless servant upon a showing (1) that the employee's disloyal activity was related to the performance of his duties, and (2) that the disloyalty permeated the employee's service in its most material and substantial part.

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims

[HN25]A compulsory counterclaim is defined as any claim that--at the time of its service--the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction. Fed. R. Civ. P. 13(a).

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Permissive Counterclaims

[HN26]Any counterclaim that is not compulsory by this definition is considered permissive. Fed. R. Civ. P. 13(b).

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Permissive Counterclaims

[HN27]Whether a counterclaim is compulsory or permissive turns on whether the counterclaim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and the United States Court of Appeals for the Second Circuit has long considered this standard met when there is a logical relationship between the counterclaim and the main claim. Although the logical relationship test does not require an absolute identity of factual backgrounds, the essential facts of the claims must be so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

[HN28]Supplemental jurisdiction exists over all other claims in a civil action so related to claims in the action within the court's original jurisdiction that they form part of the same case or controversy under U.S. Const. art. III. 28 U.S.C.S. § 1367(a). Thus, even where the court

lacks an independent basis for its exercise of subject matter jurisdiction over permissive counterclaims, it must still determine whether the claims fall under its supplemental jurisdiction pursuant to 28 U.S.C.S. § 1367. Counterclaims raising issues of state law are part of the same case or controversy where they share a common nucleus of operative fact with the plaintiff's underlying claim.

***Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Supporting
Materials > General Overview***

[HN29]S.D.N.Y. & E.D.N.Y. Civ. R. 56.1(b) permits non-movants to provide additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried. S.D.N.Y. & E.D.N.Y. Civ. R. 56.1(b).

Civil Procedure > Summary Judgment > Evidence

[HN30]Evidence submitted in support of a summary judgment motion must be admissible at trial, and the proponent of the evidence bears the burden of showing that the evidence is admissible.

***Civil Procedure > Summary Judgment > Evidence
Evidence > Hearsay > Exceptions > Business Records
> General Overview***

[HN31]Generally, an investigatory report prepared by an employer would be hearsay, and therefore inadmissible at the summary judgment stage, unless it qualified as a business record under Fed. R. Evid. 803(6).

***Civil Procedure > Summary Judgment > Burdens of
Production & Proof > Nonmovants***

[HN32]A non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture.

***Evidence > Procedural Considerations > Burdens of
Proof > Allocation***

***Labor & Employment Law > Wage & Hour Laws >
Wage Payments***

[HN33]Poorly described and unsubstantiated incidents of alleged wrongdoing are insufficient as a matter of law to support application of the faithless servant doctrine.

***Labor & Employment Law > Wage & Hour Laws >
Wage Payments***

[HN34]The faithless servant doctrine provides that an employer is entitled to the return of compensation paid to the employee during his period of disloyalty.

***Labor & Employment Law > Wage & Hour Laws >
Wage Payments***

[HN35]One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary.

***Labor & Employment Law > Wage & Hour Laws >
Coverage & Definitions > General Overview***

[HN36]The Fair Labor Standards Act's (FLSA), 29 U.S.C.S. § 201 et seq., anti-retaliation provision makes it unlawful to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under the FLSA. 29 U.S.C.S. § 215(a)(3).

***Civil Procedure > Summary Judgment > Burdens of
Production & Proof > General Overview***

***Labor & Employment Law > Discrimination > Retalia-
tion > Burdens of Proof***

***Labor & Employment Law > Wage & Hour Laws >
Coverage & Definitions > General Overview***

[HN37]At the summary judgment stage, courts address Fair Labor Standards Act's, 29 U.S.C.S. § 201 et seq., retaliation claims under the McDonnell Douglas burden-shifting framework for the analysis of claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

***Labor & Employment Law > Discrimination > Retalia-
tion > Burdens of Proof***

***Labor & Employment Law > Wage & Hour Laws >
Coverage & Definitions > General Overview***

[HN38]In order to establish a prima facie case of retaliation under the Fair Labor Standards Act, 29 U.S.C.S. § 201 et seq., a plaintiff must show (1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. The burden of proof at the prima facie stage is de minimis. If the plaintiff meets this burden, the defendant must offer a legitimate non-retaliatory reason for its actions. If the defendant puts forth such a reason, the plaintiff must demonstrate that

there is sufficient evidence for a reasonable juror to find that the reason offered by the defendant is mere pretext for retaliation.

Labor & Employment Law > Discrimination > Retaliation > Elements > Adverse Employment Actions

[HN39]In order to establish an adverse employment action, a plaintiff alleging retaliation must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Thus, the category of conduct that constitutes actionable retaliation includes more than just adverse employment actions or ultimate employment decisions.

Labor & Employment Law > Discrimination > Retaliation > Elements > Adverse Employment Actions

[HN40]Baseless claims or lawsuits designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions, even though they do not arise strictly in an employment context. Bad faith or groundless counterclaims and other legal proceedings against employees who assert statutory rights are actionable retaliation precisely because of their in terrorem effect.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

[HN41]Baseless and unsupported counterclaims are not entitled to First Amendment protection. The First Amendment interests involved in private litigation--compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts--are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims.

Labor & Employment Law > Discrimination > Retaliation > Elements > Causal Link

[HN42]An inference of retaliation is established by a causal connection between the protected activity and the adverse action. The causal connection may be established by (1) evidence of retaliatory animus directed against a plaintiff by the defendant; or (2) a close temporal proximity between the protected activity and the adverse employment action.

COUNSEL: [**1] For Carlos Torres, on behalf of himself and all others similarly situated, Plaintiff: Adam T Klein, Douglas Christopher James, Justin Mitchell

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JUDGES: HONORABLE PAUL A. CROTTY, United States District Judge.

OPINION BY: PAUL A. CROTTY

OPINION

[*453] ORDER AND OPINION

HONORABLE PAUL A. CROTTY, United States District Judge:

Plaintiffs¹ are a class of current and former "managerial" employees of the New York supermarket chain Gristede's. In their original Complaint, filed April 30, 2004, Plaintiffs alleged that Defendants² willfully failed to record, credit, and compensate similarly situated employees for hours worked in excess of forty hours per week in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and New York Labor Law ("NYLL") §§ 650 *et seq.* They have subsequently alleged claims for common law fraud and retaliation pursuant to FLSA, 29 U.S.C. § 215(a)(3), and NYLL § 215(2), against Defendant Gristede's only. By Memorandum Decision and Order dated September 29, 2006, the Court approved Plaintiffs' [**4] motion to certify a collective action under the FLSA pursuant to 29 U.S.C. § 216(b) and to proceed as a class action on the state law claims under Federal Rules of Civil Procedure 23(a) and 23(b)(3). See *Torres v. Gristede's Operating Corp. (Torres I)*, No. 04 Civ. 3316 (PAC), 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730 (S.D.N.Y. Sept. 29, 2006). Specifically, the Court certified a class of "all persons employed by defendants as Department Managers or Co-Managers who were not paid proper overtime premium compensation for all hours that they worked in excess of forty in a workweek any time between April 30, 1998 and the date of final judgment in this matter." 2006 U.S. Dist. LEXIS 74039, [WL] at *11.

1 The Individual and Named Plaintiffs are (1) co-managers Lewis Chewning ("Chewning"), Alfred Croker ("Croker"), Frank Deleon ("Deleon"), William Helwig ("Helwig"), Bobby Irizarry ("Iri-

zarry"), Ruben Mora ("Mora"), Gilberto Santiago ("Santiago"), and Carlos Torres ("Torres") and (2) department managers Joselito Arocho ("Arocho"), Joseph Crema ("Crema"), Mario DiPreta ("DiPreta"), Robert Misuraca ("Misuraca"), Robert Pastorino ("Pastorino"), Victor Phelps ("Phelps"), and Daniel Salegna ("Salegna").

2 Defendants are Gristede's Operating Corporation, [**5] Namdor, Inc., Gristede's Food, Inc., City Produce Operating Corp., and Gristede's Foods NY, Inc., (collectively, "Gristede's"). Plaintiffs reserve the right to move separately for a determination that the individual named defendants, Galo Balseca ("Balseca"), John Catsimatides ("Catsimatides"), and James Manos ("Manos") are individually liable as joint employers. (*See* P. Mem. at 1.)

Plaintiffs now move for partial summary judgment on nine legal claims for which they assert there are no material factual issues are left to be tried:

1) Defendants' Fifth Affirmative Defense--the "white collar exemption" to the FLSA and NYLL claims;

2) Defendants' liability for the overtime claims of the co-manager Plaintiffs and class members;

3) Plaintiffs' claim that Gristede's policy of deleting "unauthorized overtime" from class members' time records was unlawful and constituted a violation of the FLSA and NYLL;

4) Defendants' Second, Third, and Fourth Affirmative Defenses of laches, unclean hands and improper conduct, and waiver and estoppel, respectively;

5) Plaintiffs' demand for liquidated damages, based on their contention that Defendants cannot prove their allegedly unlawful actions were conducted [**6] in "good faith" and upon a "reasonable" belief of lawfulness;

6) Plaintiffs' demand for a three-year statute of limitations, based on allegations of willful misconduct;

7) Plaintiffs' claim that Gristede's failed to keep accurate records of class members' time, which would entitle [*454] Plaintiffs to appropriate presumptions, evidentiary rulings, and jury instructions at trial;

8) Defendants' allegedly frivolous counterclaims against Torres and Chewning; and

9) Plaintiffs' claim that Gristede's retaliated against the Individual Plaintiffs by filing the counterclaims.

For the reasons stated below, Plaintiffs' motion is GRANTED, with the exception of their seventh claim which is DENIED.

I. Background

A. Facts

For the purposes of this opinion, the Court assumes familiarity with *Torres I*. That opinion provides a comprehensive description of Plaintiffs' FLSA, NYLL, and common law claims and requested relief. See 2006 U.S. Dist. LEXIS 74039, [WL] at * 1. It also contains a thorough statement of the relevant facts, dividing the factual discussion into four categories: payroll practices; analysis of duties; unauthorized overtime; and working past the clock. See 2006 U.S. Dist. LEXIS 74039, [WL] at **2-5. As the parties conducted no additional discovery subsequent [**7] to *Torres I*, the Court's factual summary was based on substantially the same source material—primarily expert reports, depositions, and affidavits—on which the parties rely for the present motion. In lieu of a duplicative factual statement, the Court relies on *Torres I* and makes additional references to the record where appropriate for the discussion that follows.

B. Procedural History and Counterclaims

On April 30, 2004, Plaintiff Carlos Torres filed an initial class action complaint alleging violations of federal and state wage and hour laws. (See Compl.) On June 29, 2004, Torres amended the complaint to add Named Plaintiffs Mora and Irizarry. (See 1 st Am. Compl.) On March 25, 2005, Plaintiffs amended the complaint again, adding Defendants Balseca, Catsimatides, and Manos (the "Individual Defendants"), joining twelve more Named Plaintiffs, including Chewning, and alleging a new cause of action for common law fraud against Gristede's. (See 2d Am. Compl.) On April 22, 2005, Defendants answered Plaintiffs' pleadings for the first time, denying all claims and asserting unspecified counterclaims against Torres and Chewning. (See Answer to 2d Am. Compl.) Plaintiffs considered the counterclaims [**8] an impermissible act of retaliation and immediately filed a Motion for an Order to Show Cause on April 26, 2005 seeking injunctive and other relief and sanctions. (See Neilan Decl., Ex. III ("Pls.' Mem. of Law in Support of Motion for an Order to Show Cause").) A hearing

on the Order to Show Cause went forth on April 27, 2005 before Magistrate Judge Andrew J. Peck, who declined to enter Plaintiffs' proposed order, but noted that the counterclaims appeared to be "somewhat retaliatory on the defendant." (See Neilan Decl., Ex. III ("OSC Tr.") at 16:21.) Plaintiffs then filed a Third Amended Complaint stating FLSA and NYLL retaliation claims on May 3, 2005. (See 3d Am. Compl.)

C. Legal Standard for Summary Judgment

[HN1]A motion for summary judgment shall be granted if the pleadings demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). [HN2]A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). But "[w]here the record taken as a whole [*455] could not lead a rational [**9] trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted). [HN3]The moving party initially bears the burden of demonstrating that no genuine issues of material fact remain. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once this showing is made, the nonmoving party may not rely solely on "[c]onclusory allegations, conjecture, and speculation," Niagara Mohawk Power Corp. v. Jones Chem. Inc., 315 F.3d 171, 175 (2d Cir. 2003) (internal citations and quotation marks omitted), but must present specific evidence in support of its contention that there is a genuine dispute as to the material facts. Fed. R. Civ. P. 56(e). [HN4]The Court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007) (citing Fed. R. Civ. P. 56(c)).

II. Discussion

A. The "White Collar" Exemption

As its Fifth Affirmative Defense, Gristede's maintains that it is under no obligation to pay co-managers and department managers overtime wages because they are executive [**10] or administrative employees covered by the so-called "white collar exemption" to the FLSA, 29 U.S.C. § 213(a)(1), and corresponding NYLL regulations, 12 N.Y.C.R.R. §§ 142-2.2, 142-2.14. Plaintiffs contend they are entitled to summary judgment on this affirmative defense because Gristede's cannot prove that class members perform work or earn compensation

commensurate with executive or administrative employment.

[HN5]The FLSA requires that all hours worked in excess of forty hours per week be compensated at one and one-half times the minimum wage. 29 U.S.C. § 207(a)(1). The statute exempts from overtime coverage, however, "any employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited . . . by regulations of the Secretary [of Labor]." *Id.* § 213(a)(1). [HN6]The regulations promulgated by the Secretary of Labor (the "Secretary") define an executive, administrative, or professional employee as someone who performs certain duties and is paid on a salary basis at a rate of not less than \$ 455 per week. *See* 29 C.F.R. §§ 541.100, 541.600.³ The requirements are substantially the same under the NYLL.⁴ The parties do not dispute that [**11] co-managers and department managers receive compensation [**456] that meets the minimum amount required.

3 The duties are different for each category of employment. *See* 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), 541.300 (professional). Defendants do not claim that either co-managers or department managers could be exempt as a professional employee.

4 [HN7]New York's overtime provisions expressly incorporate the FLSA exemptions. 12 N.Y.C.R.R. § 142-2.2. Courts regularly look to the FLSA when considering the scope of overtime exemptions under the NYLL. *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 78 (2d Cir. 2003); DeBejian v. Atl. Testing Labs., Ltd., 64 F. Supp. 2d 85, 87 n.1 (N.D.N.Y. 1999); Lopez v. Silverman, 14 F. Supp. 2d 405, 411 n.4 (S.D.N.Y. 1998). Like the FLSA, the NYLL white collar exemption requires a "salary of not less than . . . [a fixed amount]." 12 N.Y.C.R.R. § 142-2.14(c)(4)(i)(e). In *Torres I*, the Court held that, under the NYLL, "salary" means "receipt of fixed, regular compensation" that is "not subject to weekly variation by hours worked." 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730, at *13; *see also* Definition of "Salary," Op. N.Y. Dep't of Labor, File No. RO-06-0005 (Mar. 30, 2006) (submitted [**12] as Neilan Decl. Ex. JJJJ). Accordingly, the ensuing analysis focuses solely on federal law, but applies with equal force to Plaintiff's claims under New York State law.

[HN8]Courts apply the salary basis test to distinguish bona fide white collar employees from non-exempt, hourly employees, "i.e., employees who may be disciplined "by piecemeal deductions from . . . pay." Yourman v. Giuliani, 229 F.3d 124, 130 (2d Cir. 2000)

(quoting Auer v. Robbins, 519 U.S. 452, 456, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)). An employee is paid on a salary basis if the employee receives "a predetermined amount" each pay period that is "not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). [HN9]Absent certain exceptions outlined in the Secretary's regulations, a white collar employee should expect to receive "the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." *Id.* This is because "[d]eductions from pay in less than one week increments for disciplinary violations are inconsistent with compensation on a salary basis." Yourman, 229 F.3d at 128 (citing Auer, 519 U.S. at 456); *see also* Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2d Cir. 1991) [**13] ("[A]n employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." (citations omitted)).

[HN10]The fact that an employer has made an actual deduction is insufficient by itself, however, to find an employee non-exempt. *See* Yourman, 229 F.3d at 130. Rather, the relevant inquiry is whether the employer engages in an actual practice of making impermissible deductions such that the employer "necessarily has no intention of paying its employees on a 'salary basis.'" *Id.* (quoting Klem v. County of Santa Clara, 208 F.3d 1085, 1091 (9th Cir. 2000)); 29 C.F.R. § 541.603(a) ("An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis."). [HN11]The question of the employer's intent "cannot be answered by simply dividing the number of impermissible pay deductions by the number of managerial employees." Yourman, 229 F.3d at 130. Instead, assessing this "objective intention" entails a more nuanced consideration of:

the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; [**14] the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

29 C.F.R. § 541.603(a). Accordingly, the Court weighs these factors to determine whether Plaintiffs are entitled to summary judgment.⁵

5 The Court need not address separately Plaintiffs' alternate contention that Gristede's maintains an employment policy that creates a significant likelihood of pay deductions. (P. Mem. at 14.) Though the Supreme Court, in *Auer*, held that the exemption does not apply "if there is *either* an actual practice of making [impermissible] deductions or an employment policy that creates a 'significant likelihood' of such deductions," 519 U.S. at 461 (emphasis added), the policy inquiry is ill-suited for the case at bar. The policy test was designed to alleviate somewhat the evidentiary burden on employees who are "subject to," but have not yet suffered, impermissible deductions. *Id.* (noting that this approach "rejects [**15] a wooden requirement of actual deductions"); see also *Yourman*, 229 F.3d at 130 ("Actual deductions from pay are [not] necessary for an employee to be found non-exempt."). Here, however, Plaintiffs' chief argument is not that co-managers and department managers labor under the *threat* of impermissible salary deductions per Gristede's policy; rather, they contend that their salaries were actually reduced. When real deductions are alleged to have occurred, proving the policy rather than the actual occurrence of the deduction itself is superfluous. See *Coleman-Edwards v. Simpson*, No. 03 Civ. 3779 (DLI) (VVP), 2008 U.S. Dist. LEXIS 53853, 2008 WL 820021, *7 (E.D.N.Y. Mar. 25, 2008) ("Engaging in post-hoc analysis to divine a policy of pay deductions would be inconsistent with the clarity that *Auer* requires."). Note, however, that [HN12]the existence of a policy either "permitting or prohibiting improper deductions" remains a relevant factor in assessing whether the employer maintains an actual practice of making such deductions. 29 C.F.R. § 541.603(a).

[*457] In *Torres I*, after reviewing Plaintiffs' evidence for the purposes of certifying a collective action, the Court determined that "Gristede's clearly sought to treat workers as [**16] 'hourly' for some purposes (*i.e.*, docking them for hours not worked during the workweek), but 'salaried' for other purposes (*i.e.*, not paying them overtime for hours worked in excess of the workweek)." 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730, at *10. Now, faced with substantially the same evidence, the Court discerns no legitimate justification for reaching any other conclusion. The Court reaches this conclusion mindful that the burden of proving the exemption at trial ultimately falls upon Gristede's, the em-

ployer claiming the exemption. See *Martin*, 949 F.2d at 614. Moreover, [HN13]as with all exemptions to FLSA overtime coverage, the Court must construe the white collar exemption narrowly against the employer seeking to assert it and ensure that it applies only to those employees plainly and unmistakably within the exemption. *Auer*, 519 U.S. at 463; *Martin*, 949 F.2d at 614. Here, the overwhelming weight of the evidence suggests just the opposite, *i.e.* that the class members were not salaried executives or administrators within the contemplation of the FLSA. Instead, as discussed below, Gristede's co-managers and department managers received a regular paycheck that was tied automatically to the amount of hours [**17] they worked during the pay period.

1. The Number of Deductions

Gristede's payroll records demonstrate that there was no intention to pay class members a fixed, regular compensation "without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a). An employee paid on a salary basis should expect to receive regular paychecks with the same number listed in the gross pay column. Though the Secretary's regulations allow for some lawful variations in gross pay,⁶ regular receipt of payment in a predetermined amount is the hallmark of salaried compensation. See *id.* Here, however, class members frequently received paychecks with a gross pay notation that ranged either above or below the expected compensation for the hours scheduled. That figure was tied directly to the number of hours actually worked.⁷

6 For instance, the regulations explain that deductions may be taken when an employee is absent for a full day for reasons other than illness or accident, 29 C.F.R. § 541.602(b)(1), or if an employee violates a safety rule of major significance, *id.* § 541.602(b)(5). Cf. *Ergo v. Int'l Merchant Servs.*, 519 F. Supp. 2d 765, 770 (N.D. Ill. 2007) ("Courts have specifically interpreted [**18] the phrase, 'subject to reduction,' to mean that the exemption is unavailable if the employer deducts from the employee's pay for violations of non-safety-related rules or partial-day absences.") (citation omitted).

7 To take one example, department manger Lead Plaintiff Robert Misuraca regularly earned \$ 978.00 gross pay per week based on a workweek of forty hours. (See Neilan Decl. Ex. VVV.) However, for the check dated June 20, 2003, Misuraca received only \$ 929.10 for 38 hours of work, a deduction consistent with compensation at an hourly rate of \$ 24.45. (*Id.*)

[*458] At oral argument, Plaintiffs' counsel set aside the findings of his own statistical expert, Dr.

Stephen Schneider, regarding under- and over-payments of class members and relied instead on the report prepared by Gristede's expert, Dr. Mark Berkman. The Court does the same. Dr. Berkman's report demonstrates that class members' gross payments vary from week to week with considerable frequency. Dr. Berkman analyzed 42,074 weeks of payroll data for all co-managers and department managers other than the named plaintiffs and determined that they were paid less than a full week's salary 4,249 times, or slightly more than 10% of the [**19] total workweeks.⁸ (Neilan Decl. Ex. UU, Expert Report of Mark Berkman, Ph.D. ("Berkman Report") Tbl. 4, cols. 1, 2.) He then subtracted from this total the weeks in which the underages were in multiples of a single work day--which, at least in many instances, indicate permissible pre-approved days-off without pay.⁹ *Id.* Tbl. 4, col. 4; see also 29 C.F.R. § 541.602(b)(1) (allowing that "[d]eductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability"). This left 3,131 employee workweeks--roughly 7.5% of the total workweeks--in which Gristede's made partial-day deductions from class members' purported salaries. (Berkman Report, Tbl. 4, col. 4.)¹⁰

8 Co-managers received paychecks for less than their fifty scheduled hours 20% of the time. (Berkman Report, Tbl. 4, col. 3.) Department managers received checks for less than their forty scheduled hours in 6% of workweeks. (*Id.*)

9 This corresponds to paychecks with compensation equal to 10, 20, 30, or 40 weekly working hours for co-managers and 8, 16, 24, or 32 hours for department managers. (Berkman Report, Tbl. 4, col. 4 & n.4.) The Court acknowledges [**20] that the experts' method for determining partial-day absences--*i.e.*, discounting workweeks in which the total hours are a multiple of the per day hourly total, see *infra* note 10--is imprecise. It is, of course, possible that a co-manager could have been absent for an entire day (-10 hours) but worked two extra hours (+2) over the course of the week. This would result in a 42-hour workweek, from which the experts would infer a partial-day deduction when, in fact, that was not the case. Likewise, a co-manager could receive a partial-day deduction of four hours on one day and six hours on another day in the same week. This would result in a 40-hour workweek, which the experts would consider a permissible full-day deduction when, in fact, the co-manager was penalized for multiple partial-day absences.

10 Gristede's made partial-day deductions on more than 15% of co-managers' paychecks and

more than 4% of department managers' paychecks. (Berkman Report, Tbl. 4, col. 1, 4)

As noted above, [HN14] assessing the employer's intent is more than an arithmetic exercise--there is no magic number of deductions that suffice to vitiate the exemption. See Yourman, 229 F.3d at 130 (noting the absence of a "bright-line [**21] test"). Plaintiffs cite a number of circuit court opinions, however, in which employers failed the salary basis test based on considerably fewer impermissible deductions. See, e.g., Block v. City of Los Angeles, 253 F.3d 410, 419 (9th Cir. 2001) (thirteen impermissible deductions); Takacs v. Hahn Auto. Corp., 246 F.3d 776, 781 (6th Cir. 2001) (seven); Klem v. County of Santa Clara, 208 F.3d 1085, 1095 (9th Cir. 2000) (fifty-three).

Dr. Berkman also reports a significant number of overages--weeks in which co-managers or department managers were paid for more than a full week's work (*i.e.*, [**459] more than fifty hours for co-managers and more than forty hours for department managers). (Berkman Report, Tbl. 4, col. 7.) While overages are nowhere near as probative as underages, they are still relevant for two related reasons. First, they add context to the compensation practices at Gristede's. Even if class members were not underpaid, they still received a fluctuating weekly paycheck contingent on the amount of hours worked per week. This is inconsistent with executive compensation. Second, the fact that additional compensation was provided belies Gristede's claim that it paid its employees on [**22] a salary basis. The white collar exemption exists precisely because executive or administrative employees "are given discretion in managing their time and their activities and . . . are not answerable merely for the number of hours worked or number of tasks accomplished." Kinney v. District of Columbia, 301 U.S. App. D.C. 279, 994 F.2d 6, 11 (D.C. Cir. 1993). This discretion makes premium overtime unnecessary. If class members, as purportedly executive or administrative employees, felt it necessary to work extra hours to accomplish that week's essential tasks, they should not have been entitled to additional compensation.

Defendants fail to submit any credible evidence to counter the logical conclusion to be drawn from the statistical data of its own expert--that Gristede's made a significant number of impermissible changes to the weekly compensation of allegedly salaried class members. There is no showing, for instance, that *any* of the partial-day deductions identified above were permissible per the Secretary's guidelines. Even more critically, Defendants do not identify even one instance where a class member worked fewer than the scheduled hours but still received a full salary. Thus, based largely on the [**23] data compiled by Defendants' expert, the Court must conclude that this factor tips decidedly against a finding

that Gristede's intended to pay class members on a salary basis.

2. The Breadth of Deductions

Plaintiffs offer the expert report of Dr. Stephen Schneider to demonstrate just how widespread the deductions were. He analyzed 12,717 paychecks of 129 co-managers and determined that 2,693 co-manager paychecks were for less than 50 compensable hours. (Neilan Decl. Ex. TT, Dr. Stephen Schneider's Expert Report in Support of Class Certification for Plaintiffs ("Schneider Report") P 22.) He found that the co-manager paychecks for less than 50 compensable hours were issued to 110 (85%) of the 129 co-managers, at 48 (96%) of the 50 stores, and in 297 (97%) of the 306 workweeks. (*Id.*) The numbers drop only slightly when the analysis is focused on impermissible partial-day absences. Dr. Schneider found deductions for partial-day absences for 71% of all co-managers at 90% of the stores and in 92% of workweeks. (*Id.* P 24.)

Dr. Schneider performed a similar analysis for department managers. He analyzed 31,117 paychecks of 188 department managers and found that 1,724 department manager paychecks [**24] were for less than 40 compensable hours. (*Id.* P 27.) Paychecks of less than 40 compensable hours were issued to 158 (84%) of 188 department managers, at 48 (96%) of 50 stores, and in 296 (97%) of 306 workweeks. (*Id.*) Partial-day absences were deducted for 78% of department managers at 96% of Gristede's stores in 84% of workweeks. (*Id.* P 28.)

This unchallenged data demonstrates that instances of impermissible deductions were not confined to a handful of stores and cannot be explained by temporary phenomena like miscalculations or computer payroll problems. Week in and week out, across the Gristede's chain, co-managers [*460] and department managers received less money than the terms of their employment required. This factor weighs strongly in favor of an intention to pay on an hourly, not salaried, basis.

3. Policy Considerations

Next, Plaintiffs argue that Gristede's maintains an unwritten policy of making impermissible deductions from the purported salaries of co-managers and department managers. They cite chiefly the deposition testimony of Deborah Clusan, Director of Payroll for Gristede's, who stated that co-managers and department managers are expected to work close to their expected number [**25] of hours per week in order to draw their full weekly "salary." (Neilan Decl. Ex. X ("Clusan Dep.") 343:8-18.) She conceded that, if class members fail to reach this required number of hours, their pay is docked. (*Id.*)¹¹ As the Second Circuit has noted, "a company's

general requirement that its employees work at least eight hours a day strongly suggests that the company views these employees as hourly and not salaried." Martin, 949 F.2d at 617.¹² Clusan also testified that, in the event of a partial-day absence for illness, for example, a salaried Gristede's employee would not be paid for the time missed if that employee had already used his allotted sick days. (Clusan Dep. 503:12-25.)

11 Clusan testified as follows:

Q: Actually, I want to know whether they are guaranteed a weekly minimum salary.

A: I don't know what you mean by "guaranteed." They are supposed to work at least 50 hours to obtain that minimum salary.

Q: So what if they don't work 50 hours?

A: Well, if it's within reason and it's an hour one way or the other, they'll still get their 50 hours. If they're coming in three hours late every day, then somebody is going to dock their pay.

...

Q: Does that apply to all co-managers?

A: [**26] It applies to all management people. If they are not putting in the hours close to the hours that they are expected to work for that minimum salary, they are not going to continuously get paid that minimum salary.

(Clusan Dep. 343:8-344:2).

12 Gristede's clearly does not have the kind of "clear and particularized policy . . . which effectively communicates that [impermissible] deductions will be made in specified circumstances." Ahearn v. County of Nassau, 118 F.3d 118, 121 (2d Cir. 1997). Such a policy would be sufficient, by itself, to demonstrate that employee compensation is "subject to reduction," and render the employer's exemption claim meritless. Yourman, 229 F.3d at 128-29. Rather, Plaintiffs' proof with regard to Gristede's unofficial policies is probative of its intent to pay on a salaried basis. See *supra* note 7.

Several other upper-level Gristede's employees, including store managers responsible for payroll spending, testified that department manager class members were, in fact, hourly employees. (See Neilan Decl. Ex. II ("Molina Dep.") at 46:21-25; Neilan Decl. Ex. MM ("Paliophilos Dep.") at 54:23-56:6.) Defendants only respond by claiming that Gristede's paid its department [**27] managers a "weekly wage" pursuant to the assorted collective bargaining agreements it negotiated with various unions. (See D. App'x Ex. 2-4.) They fail to explain, however, why Gristede's classified class members as hourly employees on New York State Workers' Compensation Board C-240 forms. (Neilan Decl. Ex. DDD (Forms C-240).)

4. Other Considerations

Defendants speculate that partial-day deductions made in the first or last weeks of class members' employment may have skewed the statistical data in Plaintiffs' favor. While Defendants are correct that such deductions are permitted under the regulations, see 29 C.F.R. § 541.602(b)(6), [*461] they overlook the fact that their expert excluded the first and last weeks of employment from his salary basis analysis (Berkman Report P 15), yet still found underpayments in at least 20% of co-managers' workweeks and 6% of department managers' workweeks. Defendants' argument is therefore unavailing.

Defendants further protest, however, that the vast majority of weekly underpayments are the result of either inadvertent computational errors or the failure of class members to properly punch in and out of work. Defendants claim that some of its partial-day deductions [**28] may have been "inadvertent" and therefore fall within the FLSA's "window of correction," 29 C.F.R. § 541.603(c); but they fail to support this argument with reference to admissible evidence. [HN15]An employer must demonstrate that it "reimburses the employees for such improper deductions" in order to invoke the window of correction. *Id.* Defendants never point to an improper deduction that was specifically corrected. In addition, given the sheer number of impermissible deductions, Gristede's cannot credibly claim inadvertence. Kelly v. City of N.Y., Nos. 91 Civ. 2567 (JFK), 91 Civ. 7343 (JFK), 91 Civ. 7755 (JFK), 2001 U.S. Dist. LEXIS 16596, 2001 WL 1132017, at *2 (S.D.N.Y. Sept. 24, 2001) (holding that the "window of correction is not available to employers who exhibit no intention of paying the relevant employees on a salary basis" (citing Klem, 208 F.3d at 1092)). Finally, Gristede's is silent as to why the weekly wage of salaried employees was tied at all to the number of hours they were "punched in" at work. (See D. Mem. 28.) Gristede's reliance on a pay-

ment system designed to credit hourly work does not somehow excuse their failure to pay on a salary basis.

Having evaluated all of the evidence adduced by the parties, [**29] the Court must conclude that no reasonable juror could find that Gristede's intended to compensate the class members on a salary basis. Defendants cannot overcome both the overwhelming statistical evidence suggesting frequent and widespread impermissible deductions and the testimony of its payroll director, who confirmed that class members are paid only for time worked. The remainder of Defendants' arguments are not supported with the credible evidence necessary to survive summary judgment. Accordingly, class members do not receive compensation consistent with white collar employment and Defendants cannot claim the exemption.¹³ The Court grants Plaintiffs' motion for summary judgment on this issue.

13 On the basis of this finding, the Court need not address the employer's second required showing to properly claim the exemption: the duties test. Executive and administrative employees are defined, not only by their receipt of a salaried compensation in excess of \$ 455 per week, but also by their performance of certain primary duties. See 29 C.F.R. § 541.100(a)(2)-(4) (characterizing the duties of executive employees), 29 C.F.R. § 541.200(a)(2)-(3) (characterizing the primary duties of [**30] administrative employees). Here, because Defendants cannot show that class members were compensated on a salary basis, the exemption cannot apply regardless of the types of duties performed by the class members.

B. Liability For Overtime Claims

Next, Plaintiffs seek summary judgment on Gristede's liability for back overtime pay for co-manager class members. Gristede's does not dispute that its co-managers worked more than forty hours during many workweeks; in fact, they were scheduled to work fifty hours per week. It is also undisputed that co-managers were not paid premium overtime compensation for hours they worked in excess of forty each workweek. Accordingly, in [*462] light of the Court's finding that the class members are non-exempt, Gristede's is liable to the co-manager class members for overtime compensation pursuant to 29 U.S.C. § 207(a)(1) and 12 N.Y.C.R.R. § 142-2.2.¹⁴

14 At this time, the Court does not resolve the amount of damages owed to co-manager class members, which can be set after additional proceedings. See Barfield v. N.Y. City Health & Hosps. Corp., 432 F. Supp. 2d 390, 395

(S.D.N.Y. 2006) (granting summary judgment on liability and directing counsel to submit an estimate [**31] of unpaid wages for purposes of damages award), *aff'd*, 537F.3d132, 2008 U.S. App. LEXIS 16731, 2008 WL 3255130 (2d Cir. 2008); *Bongat v. Fairview Nursing Care Ctr., Inc.*, 341 F. Supp. 2d 181, 186 (E.D.N.Y. 2004) (granting summary judgment on liability--without finalizing damages--for unpaid overtime after concluding plaintiffs were non-exempt).

C. Unauthorized Overtime

Plaintiffs next argue that Gristede's maintained a company-wide policy not to pay department manager class members for overtime hours they worked without prior authorization (the "Unauthorized Overtime Policy"). The Court provided an extensive review of the facts supporting Plaintiffs' contention in *Torres I*, noting the testimony of numerous employees that Gristede's did not pay overtime to department managers unless it had been pre-approved. See 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730, at **4-5. Both central office employees and store managers testified that they eliminated overtime hours for hourly workers by editing employees' time records. See *id.* Plaintiffs now seek a declaration that this policy and the payroll practices conducted thereunder constitute a violation of the FLSA and the NYLL.

[HN16]An employer is responsible for compensating an employee for any work it suffers [**32] or permits the employee to work. See 29 U.S.C. § 203(g). Thus, if an employer has knowledge that an employee is working hours in excess of forty per week, it is responsible for compensating that employee "even where the employer has not requested the overtime be performed or does not desire the employee to work." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2d Cir. 2008); see also *Barfield v. N.Y. City Health & Hosps. Corp.*, 537F.3d 132, 2008 U.S. App. LEXIS 16731, 2008 WL 3255130 (2d Cir. 2008). With regard to unauthorized overtime, the Department of Labor's regulations state:

[HN17]In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. . . . The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13. Thus, [HN18]an employer with knowledge of its employees' overtime work cannot insu-

late itself simply by promulgating a maximum forty-hour workweek policy. See *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1083 (11th Cir. 1994).

In *Chao v. Gotham Registry*, the Second Circuit addressed the steps an employer [**33] must take to prevent unwanted overtime. 514 F.3d at 280. In that case, a nursing referral agency maintained a well-articulated policy that, in order to be compensated for overtime work, its employee nurses had to notify the agency in advance and receive authorization for extra shifts. *Id.* at 284. It claimed this was sufficient to disclaim compensation for unwanted overtime in light of the fact that the nurses worked their additional hours off-site at client hospitals without either the agency's prior knowledge or supervision. *Id.* at 287, 290-91. The Second Circuit disagreed, holding that the agency could not overcome the presumption "that an employer [**463] who is armed with knowledge has the power to prevent work it does not wish performed," *id.* at 290, because it did not demonstrate that it had adopted "all possible measures" to dissuade unauthorized overtime, *id.* at 291 (citing 29 C.F.R. § 785.13). In concluding its analysis, the Second Circuit noted it was "skeptical whether an employer with full knowledge respecting the activities of its employees ever lacks power, at the end of the day, to require those it retains to comply with company rules that implicate federal law." *Id.*

These principles [**34] apply with even greater force to the case at bar. Unlike the nursing agency in *Chao*, which at least compensated its employees for unauthorized extra shifts with straight-time, rather than premium, pay, *id.* at 284, Gristede's does not pay its department manager class members at all for unauthorized overtime. Gristede's offers no evidence that it exhausted all possible options before taking this drastic measure. The record reflects that Gristede's undertook only minimal measures to ensure compliance. For instance, Regional Director Christopher Lang testified that employees were given a warning when they worked hours in excess of their scheduled allotment, though he does not describe the nature of this warning or indicate how often the warning was given. (Neilan Decl. Ex. FF (Lang Dep.) at 116:8-23.) Gristede's also posted a bulletin indicating that its employees would not be paid for extra work absent the approval of a manager. (Neilan Decl. Ex. YY (Bulletin to All Employees).) Given that store managers observed overtime work contemporaneously and reviewed department managers' time records after the fact in order to "correct" the hours for payroll, these efforts are plainly insufficient [**35] to demonstrate that Gristede's took all reasonable efforts to minimize instances of unwanted overtime.

Having established that Gristede's Unauthorized Overtime Policy was unlawful, Plaintiffs urge that de-

partment manager class members should be accorded a presumption that all edits to their time records were made pursuant to this unlawful policy. In support of this contention, Plaintiffs rely primarily on *Teamsters v. U.S.*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). In *Teamsters*, the Court found that Petitioners' pattern and practice of racial discrimination in violation of Title VII of the Civil Rights Act of 1964 constituted "standard operating procedure," *id.* at 336, and therefore gave rise to a presumption "that any particular employment decision, during the period in which the [unlawful] policy was in force, was made in pursuit of that policy." *Id.* at 362. Consequently, the burden shifted to Petitioners to demonstrate a lawful basis for their employment decisions. *Id.* Plaintiffs analogize the illegal hiring practices at issue in *Teamsters* [**36] to Gristede's editing of employee time records; and claim that all such edits should be presumed to have been performed pursuant to the Unauthorized Overtime Policy.

While the Court has determined that Gristede's Unauthorized Overtime Policy is unlawful under both the FLSA and NYLL, it cannot conclude that Plaintiffs are entitled to the presumption that all edits to time records were made because of this policy. First, the cases upon which Plaintiffs rely apply the pattern-or-practice burden-shifting analysis solely within the context of Title VII employment discrimination cases. See *Teamsters*, 431 U.S. at 324; see also *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). In the absence of case law applying *Teamsters*-style burden shifting to FLSA violations, the Court will not apply that analysis to the present case.¹⁵ [*464] Moreover, there are sufficient factual disputes over the reasons for Gristede's edits to refrain from presuming that all such edits were made pursuant to the Unauthorized Overtime Policy. Specifically, Gristede's contends that many of the edits Plaintiffs cite as unlawful overtime deletions actually corrected department managers' improper "punching" [**37] practices—that is, they ensured that the hour logs and payroll reflected the hours that class members actually worked. At the remedial stage, Gristede's will have an opportunity to prove that the Unauthorized Overtime Policy was not the reason it deleted recorded work time for particular individuals, just as Plaintiffs will have the opportunity to prove that it was. At present, there is no basis for drawing a presumption in favor of either party.

¹⁵ Plaintiffs point to *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973), as an example of the application of the pattern-or-practice burden-shifting framework to an FLSA violation. *Brennan*, however, cannot be said to reflect the *Teamsters*-style burden shifting Plaintiffs seek for the simple reason that it was

decided four years before *Teamsters*. Moreover, in sharp contrast to *Teamsters*' extensive Title VII burden-shifting analysis, *Brennan*'s discussion of burden shifting in the FLSA context is highly perfunctory. It does not provide a sufficient basis for this Court to draw a presumption in favor of Plaintiffs in the case at bar.

D. Gristede's Additional Affirmative Defenses

Gristede's cannot maintain its affirmative defenses [**38] of laches, unclean hands, and waiver and estoppel.

1. Laches

[HN19]Laches "is an equitable defense that bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Ikelionwu v. U.S.*, 150 F.3d 233, 238 (2d Cir. 1998). "When a limitation on the period for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period." *Id.* (internal quotation omitted). Here, the doctrine is inapposite because Plaintiffs' wage and hour claims are rooted in statutory, not equitable, law, and were raised within the applicable statutory limitations period.

2. Unclean Hands

[HN20]The doctrine of unclean hands holds that "the equitable powers of th[e] court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage." *PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004) (internal quotation omitted). Again, the Court need not invoke its equitable powers to adjudicate Plaintiffs' statutory claim. Defendants also fail to adduce evidence tending to show that Plaintiffs engaged in any misconduct. The doctrine is [**39] inapplicable.

3. Waiver and Estoppel

Finally, Defendants argue that Plaintiffs waived their wage and hour claims by failing to avail themselves of the arbitration and grievance procedures stipulated in Gristede's assorted collective bargaining agreements ("CBAs"). (D. Mem. 29-31.) [HN21]As a matter of law, the CBAs cannot waive Plaintiffs' FLSA rights. See *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 744, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (FLSA rights unwaivable). Defendants rely on *Tyler v. City of N.Y.*, where the Court enforced an arbitration provision precisely because it did not purport to waive the plaintiffs' FLSA rights. No. 05 Civ. 3620 (SLT) (JO), 2006 U.S. Dist. LEXIS 29650, 2006 WL 1329753 (E.D.N.Y.

May 16, 2006). [*465] Here, however, the CBA cited by Defendants stipulates that "[t]he sole remedy for any breach or threatened breach of this Agreement shall be arbitration as provided." (D. App'x Ex. 2 at 17.) This cannot constitute a waiver.

Defendants' estoppel defense must also fail. The Second Circuit has deemed estoppel inconsistent with both the language and the policy of the FLSA. Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959).

Accordingly, Plaintiff is entitled to summary judgment on these affirmative defenses.

E. [**40] Liquidated Damages

Plaintiffs also seek a judgment that any damages they are ultimately awarded should be liquidated under the FLSA because Gristede's cannot meet its burden of demonstrating good faith and reasonableness. [HN22]Under the FLSA, a district court is generally required to award a plaintiff liquidated damages equal in amount to actual damages. See 29 U.S.C. § 216(b). A district court can deny liquidated damages, however, in an exercise of its discretion where the employer demonstrates that it acted in subjective "good faith" with objectively "reasonable grounds" for believing that its conduct did not violate the FLSA. See 29 U.S.C. § 260. As the Second Circuit recently reiterated, the employer's burden in this regard is "a difficult one." Barfield, 537 F.3d 132, 2008 U.S. App. LEXIS 16731, 2008 WL 3255130, at *14 (quotation omitted). Here, Gristede's fails to make any credible evidentiary showing that it, for instance, took "active steps to ascertain the dictates of the FLSA and then act to comply with them." *Id.* (quoting Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999)). Accordingly, Defendants cannot meet their burden, and Plaintiffs are entitled to liquidated damages as a matter of law.

F. Statute of [**41] Limitations

For similar reasons, Plaintiffs are entitled to a three-year statute of limitations. Given Gristede's failure to demonstrate that it undertook to inquire whether its conduct was in compliance with the FLSA, see 29 C.F.R. § 578.3(c)(3), there are no genuine issues of material fact as to whether Gristede's violations of the FLSA were willful, see 29 U.S.C. § 255(a). See Reich v. Waldbaum, Inc., 52 F.3d 35, 41 (2d Cir. 1995) (finding employer's violations willful because "the law was clear . . . that employees compensated on an hourly basis are subject to the FLSA, and that the 'bona fide executive' exemption is inapplicable to such employees").

G. Recordkeeping

[HN23]The FLSA and its implementing regulations require employers to maintain adequate employment records. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(7) (requiring that employers maintain records of "[h]ours worked each workday and total hours worked each workweek" by employees); see also N.Y. Comp. Codes R. & Regs. Tit. 12, § 142-2.6(a)(4) (requiring employers to keep records of employees' hours worked for six years). Here, there is considerable evidence that Gristede's failed to maintain accurate records for its class member [**42] employees; however, it is equally clear that a key complicating factor in assembling such data was the failure of class members to properly "punch in and out." The Court cannot give Plaintiffs the presumption they seek given their involvement in the problem. As to this issue, Plaintiffs' summary judgment motion is denied.

H. Gristede's Counterclaims

On April 22, 2005, Gristede's filed barebones counterclaims against Individual [*466] Plaintiffs Carlos Torres and Lewis Chewning as part of its Answer to the Plaintiffs' Second Amended Complaint, but alleged neither a statutory nor a common law basis for these counterclaims. (See Answer to 2d Am. Compl. PP 58-61 (Torres), 62-65 (Chewning).) Essentially, these same counterclaims were repeated in the Answer to Plaintiffs' Third Amended Complaint dated May 23, 2005. (See Answer to 3d Am. Compl. PP 63-70 (Torres), 71-77 (Chewning).) Now, for the first time in its opposition memorandum, Gristede's finally asserts a faithless servant claim. (D. Mem. 34.) Plaintiffs argue that these counterclaims are ripe for dismissal because: (1) the Court lacks subject matter jurisdiction over claims so factually distinct from Plaintiffs' wage-and-hour cause of action; [**43] and (2) the counterclaims are predicated on vague and conclusory evidence and do not support a cause of action under the faithless servant doctrine. As the following discussion indicates, Plaintiffs are entitled to summary judgment on both grounds.

1. The Faithless Servant Counterclaims

[HN24]Under New York law, "[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation." Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 200, 203 (2d Cir. 2003) (internal quotation omitted). An employer is entitled to recover compensation paid to a faithless servant upon a showing "(1) that the employee's disloyal activity was related to 'the performance of his duties,' and (2) that the disloyalty 'permeated the employee's service in its most material and substantial part.'" Sanders v. Madison Square Garden, L.P., No. 06 Civ. 589 (GEL), 2007 U.S.

Dist. LEXIS 48126, 2007 WL 1933933, at *3 (S.D.N.Y. July 2, 2007) (quoting *Phansalkar*, 344 F.3d at 200, 203).

Gristede's claims are small beer. They invoke the Individual Plaintiffs' purported misconduct in the course of their employment as co-managers. It is alleged that Torres sexually [**44] harassed coworkers and falsified information on his employment application. Gristede's claims it was forced to incur costs of \$ 13,848.91 for an investigation of Torres's misconduct and the legal defense against the unemployment insurance claim Torres raised subsequent to his termination. The claim against Chewning, which alleges the fraudulent misuse of a customer credit card, amounts only to about \$ 2,000 for investigation costs.

2. The Hearing Before Magistrate Judge Peck

Considering the flimsy nature of the counterclaims, Plaintiffs thought them to be retaliatory and filed a Motion for an Order to Show Cause on April 26, 2005 seeking injunctive and other relief, and sanctions. (See Neilan Decl., Ex. III.) At the April 27, 2005 hearing on the Order to Show Cause, Magistrate Judge Andrew J. Peck asked why the counterclaims were "surfacing for the first time now," and Gristede's counsel, Kevin Nash, replied, "[b]ecause the answer was served--this is the first pleading with the time to counterclaim." (OSC Tr. at 5.) Magistrate Judge Peck said the counterclaims seemed to be made for the purpose of "sending a message to people as to opt-in issues, to say hey, you opt in and we will investigate [**45] you and bring retaliation claims against you." (*Id.* at 4.) Nash replied, "I think it is a fair comment and I thought about it before I filed the counterclaims." (*Id.*) Ultimately, Magistrate Judge Peck declined to enter Plaintiffs' proposed order for injunctive relief, but noted that the counterclaims appeared [**467] to be "somewhat retaliatory on the defendant." (*Id.* at 16.) Plaintiffs then filed their Third Amended Complaint stating FLSA and NYLL retaliation claims on May 3, 2005. (See 3d Am. Compl.)¹⁶

¹⁶ Plaintiffs made a final, ultimately unsuccessful attempt to urge Defendants to drop the counterclaims by a letter dated November 21, 2006 in which Plaintiffs characterized the counterclaims as "patently retaliatory" and noted their failure to state a claim--contentions they maintain in the present motion. (See Neilan Decl., Ex. HHH.)

3. Analysis

a) Subject Matter Jurisdiction Over The Counterclaims

Plaintiffs argue that the Court lacks subject matter jurisdiction over the counterclaims because they do not "derive from a common nucleus of operative facts" as Plaintiffs' overtime compensation claims and, therefore, are not subject to the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). [**46] (See P. Mem. 34 (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)); P. Reply 18 (same).) Gristede's fails to address this point directly, arguing instead that its counterclaims are "compulsory" under Federal Rule of Civil Procedure 13(a). (D. Mem. 32-33.) Thus, the Court addresses: (1) whether Gristede's counterclaims are compulsory or permissive under Rule 13(a); and (2) if they are permissive, whether they fall within the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

i) The Counterclaims Are Permissive, Not Compulsory

[HN25]A compulsory counterclaim is defined as:

any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a). [HN26]Any counterclaim that is not compulsory by this definition is considered "permissive." Fed. R. Civ. P. 13(b). The Second Circuit has instructed that:

[HN27][w]hether a counterclaim is compulsory or permissive turns on whether the counterclaim arises out of the transaction or occurrence [**47] that is the subject matter of the opposing party's claim, and this Circuit has long considered this standard met when there is a logical relationship between the counterclaim and the main claim. Although the logical relationship test does not require an absolute identity of factual backgrounds, the essential facts of the claims must be so logically connected that con-

siderations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.

Jones v. Ford Motor Credit Co., 358 F.3d 205, 209 (2d Cir. 2004) (internal citations, quotation marks, and brackets omitted).

Gristede's faithless servant counterclaims are clearly not compulsory; they are permissive. The Plaintiffs' wage-and-hour claims center on Gristede's chain-wide compensation practices for all co-managers and department managers. Gristede's faithless servant counterclaims are not related to any aspect of these practices; rather, they focus on discrete allegations of misconduct--sexual harassment and credit card fraud--pertaining to only two Plaintiffs. The only possible connection between Plaintiffs' overtime claims and the counterclaims is that they arise out of the same employer-employee relationship. [**48] This slender reed will not support [*468] a finding that the counterclaims are compulsory. See Williams v. Long, 558 F. Supp. 2d 601, 2008 WL 2388042, at *4 (D. Md. 2008) (concluding that the defendant's counterclaims were permissive where the only connection was the plaintiff's status as an employee). In addition, the essential facts for proving the counterclaims and the overtime claims "are not so closely related that resolving both sets of issues in one lawsuit would yield judicial efficiency." See Jones, 358 F.3d at 210. The complete absence of facts in the record regarding the counterclaims, see *infra* Part II.H.3(b)(i), as opposed to the abundant evidence of wage-and-hour violations, demonstrates exactly that. Thus, the Court concludes that the counterclaims are non-compulsory.

ii) The Court Lacks Supplemental Jurisdiction Over The Counterclaims

[HN28] Supplemental jurisdiction exists over "all other claims" in a civil action "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Thus, even where, as in the case at bar, the Court lacks [**49] an independent basis for its exercise of subject matter jurisdiction over permissive counterclaims, it must still determine whether the claims fall under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367. See Jones, 358 F.3d at 213 (court may have supplemental jurisdiction over counterclaims even where their factual relationship to the underlying claim "is not such as would make the counterclaims compulsory"). Under the Supreme Court's classic formulation, counterclaims raising issues of state law are part of the "same case or controversy" where they share a "common nucleus of operative fact" with the plaintiff's underlying

claim. Gibbs, 383 U.S. at 725; Padilla v. Clovis & Roche, Inc., No. 07 Civ. 267 (TJM), 2007 U.S. Dist. LEXIS 88293, 2007 WL 4264582, at *3 (N.D.N.Y. Nov. 30, 2007). But see Jones, 358 F.3d at 213 (positing, apparently in *dicta*, that § 1367 may require only "' [a] loose factual connection between the claims,' a standard that appears to be broader than the Gibbs test" (quoting Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996))).

Gristede's fails to make a showing sufficient to ground its counterclaims within the Court's supplemental jurisdiction. Critically, none [**50] of the events alleged in Gristede's state law faithless servant claims are relevant to Plaintiffs' overtime claims. See Bu ex rel. Bu v. Benenson, 181 F. Supp. 2d 247, 254 (S.D.N.Y. 2001) (claims were not part of the same case or controversy where state law claims "involve[d] different rights, different interests, and different underlying facts" than the federal law claims). Gristede's does not allege, for instance, that it did not pay Torres and Chewing premium overtime compensation because of their alleged misconduct. Again, the only possible connection between the parties' claims is that they both arise out of Individual Plaintiffs' employment at Gristede's. As in the compulsory versus permissive counterclaim context, however, the employment relationship does not establish a "common nucleus of operative fact" where it is the sole fact connecting Plaintiffs' federal overtime claims and Gristede's state law counterclaims. See Wilhelm v. TLC Lawn Care, Inc., No. 07 Civ. 2465 (KHV), 2008 U.S. Dist. LEXIS 19911, 2008 WL 640733, at *3 (D. Kan. Mar. 6, 2008) (dismissing state law counterclaims "[b]ecause defendant relie[d] solely on its employer-employee relationship with plaintiffs to support supplemental jurisdiction, [**51] and [did] not identify a more specific factual connection between its counterclaims and plaintiffs' FLSA claim"); Kirby v. Tafco Emerald Coast, Inc., No. 3:05CV341 (RV/MD), 2006 U.S. Dist. LEXIS 6088, [*469] 2006 WL 228880, at *2 (N.D. Fla. Jan. 30, 2006) (finding that, while "[t]he FLSA claims deal[t] only with the question of the number of hours worked and the compensation paid[,] the state counterclaims for breach of contract and nonpayment of a promissory note "necessarily involve[d] different and separate factual matters"). Cf. Rivera v. Ndola Pharmacy Corp., 497 F. Supp. 2d 381, 395 (E.D.N.Y. 2007) (holding connection between plaintiff's state law sexual harassment and federal overtime claims too tenuous when based solely on employment relationship). Accordingly, Gristede's counterclaims under the faithless servant doctrine do not arise out of a "common nucleus of operative fact" and, thus, are not subject to the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

In light of the foregoing, Gristede's state law counterclaims are hereby dismissed. In light of Plaintiffs' FLSA retaliation claims, *see infra* Part II.I, however, the Court addresses Plaintiffs' second argument that Gristede's counterclaims [**52] lack sufficient evidentiary support to survive the motion for summary judgment.

b) The Counterclaims Are Ripe For Summary Judgment

i) Gristede's Fails To Produce Sufficient Evidence Of Misconduct

Gristede's does not meet its burden of proving the Individual Plaintiffs' alleged misconduct underlying its faithless servant claims. As a general matter, Gristede's completely fails to cite any evidence in its memorandum in opposition to Plaintiffs' motion for summary judgment with regard to its faithless servant claims. There is not a single reference to Defendants' Counter-Statement of Material Facts in Dispute Pursuant to Local Rule 56.1(b) ("D. 56.1"), nor to Defendants' voluminous appendix of supporting exhibits. (*See* D. Mem. 34-35.) Gristede's fares no better in its responsive statement of facts, where its only responses to Plaintiffs' statements as to the counterclaims lack any evidentiary attribution whatsoever. (D. 56.1 PP 266-280.) Gristede's apparently neglected to consult [HN29]Local Civil Rule 56.1(b), which permits non-movants to provide "additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists [**53] a genuine issue to be tried." Local Civil Rule 56.1(b). Thus, even though Plaintiffs specifically argued that the counterclaims lacked "any factual support" (P. Mem. 34), Gristede's failed to clearly and specifically set forth evidence in the record supporting those claims. Instead, the Court was forced to do exactly what Local Civil Rule 56.1(b) was designed to prevent: scour the record on its own in a search for evidence which might support Gristede's contention that certain facts regarding its counterclaims were in dispute. *See Global Vision Prods., Inc. v. Pfizer Inc.*, 04 Civ. 9198 (LAK), 2006 U.S. Dist. LEXIS 6042, 2006 WL 344757, at *2 (S.D.N.Y. Feb. 14, 2006).

Gristede's cites no real evidence of the Individual Plaintiffs' alleged misconduct because whatever Gristede's has, it is plainly insufficient to sustain a cause of action under the faithless servant doctrine. As to the first counterclaim, Gristede's offers only a report dated February 17, 2004 summarizing the findings of an internal investigation into complaints of sexual harassment allegedly filed against Torres by his female co-workers. (*See* Appendix of Defs.' Exhibits ("D. App'x"), Ex. 37.) Plaintiffs argue that the entire investigatory report prepared [**54] by Gristede's, including the statements of female employees and other witnesses contained therein, is

hearsay and therefore inadmissible. (P. Reply 16.) [HN30]Evidence submitted in support of a summary judgment motion [*470] must be admissible at trial, and the proponent of the evidence bears the burden of showing that the evidence is admissible. *See Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 219-220, 222 (2d Cir. 2004) (proponent needed to submit affidavit stating that prior testimony he proffered would be admissible under Fed. R. Evid. 804(b)(1)). [HN31]Generally, an investigatory report like that prepared by Gristede's would be hearsay, and therefore inadmissible at the summary judgment stage, unless it qualified as a business record under Federal Rule of Evidence 803(6). *See Vahos v. Gen. Motors Corp.*, No. 06 Civ. 6783 (NGG) (SMG), 2008 U.S. Dist. LEXIS 47971, 2008 WL 2439643, at *4 (E.D.N.Y. June 16, 2008). Gristede's has not authenticated the report as a business record and does not identify any other applicable exception to the hearsay rule. Accordingly, the Court will not consider the contents of the report for the purposes of the present motion.

Aside from the inadmissible report, Gristede's offers no evidence of [**55] Torres's alleged misconduct. It does not identify potential witnesses to corroborate its allegations nor does it put forth any formal complaints of sexual harassment. Even though Torres is accused of misrepresenting his prior work history (*see* Answer to 3d Am. Compl. P 69), Gristede's does not offer the testimony of Torres's prior employer, police records verifying his prior arrest, or the original employment application containing the misstatement. Although Gristede's seeks to recover the more than thirteen thousand dollars it claims it spent in its internal investigation of Torres's misconduct (*see id.* P 70), it provides no itemization of the supposed costs of the investigation. In short, Gristede's offers only an *ipse dixit*.¹⁷

17 The only admissible evidence in the record on this issue is Torres's deposition testimony that he did not sexually harass anyone. (*See* D. App'x, Ex. 21 (Torres Dep.) at 173:2-5, 182:7-183:11, 184:4-186:17, 190:13-17.)

Gristede's second counterclaim, which alleges Chewning engaged in "fraudulent conduct involving various unauthorized credit card transactions" (*id.* P 73), is also untenable. Gristede's offers two cashier checkout forms and a credit card receipt [**56] for \$ 200 (*see* D. App'x, Ex. 37), but fails to explain the significance of these documents or how they are probative of Chewning's alleged fraud. Accordingly, this claim, too, cannot survive summary judgment. *See Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) ([HN32]"The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the

motion through mere speculation or conjecture.") (internal quotations and citations omitted).

ii) The Counterclaims Fail As A Matter Of Law

Gristede's does not even allege, let alone prove with competent evidence, that the alleged disloyal conduct "permeated the employee's service in its most material and substantial part." Sanders, 2007 U.S. Dist. LEXIS 48126, 2007 WL 1933933, at *3. [HN33] Poorly described and unsubstantiated incidents of alleged wrongdoing are insufficient as a matter of law to support application of the faithless servant doctrine. See Phansalkar, 344 F. 3d at 201-2 & nn. 12-13 (addressing requirement that agents' disloyalty is "substantial"). Nor can it be, as Gristede's apparently supposes, that every routine termination for sexual harassment or credit card fraud necessarily [**57] raises faithless servant claims.

Moreover, by seeking damages incurred in its investigations of both Torres [*471] and Chewning, Gristede's fundamentally misapplies the faithless servant doctrine. [HN34] The doctrine provides that an employer is entitled to the return of compensation paid to the employee during his period of disloyalty. See Phansalkar, 344 F.3d at 200; Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc., 100 A.D.2d 81, 474 N.Y.S.2d 281, 287 (N.Y. App. Div. 1st Dep't 1984). The doctrine derives from agency law, which provides that [HN35]"[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary." Feiger v. Iral Jewelry, Ltd., 41 N.Y.2d 928, 928, 363 N.E.2d 350, 394 N.Y.S.2d 626 (1977) (citing Restatement (2d) of Agency (1958), § 469). Gristede's offers no support for its claim of entitlement to reimbursement for non-compensation expenses related to the alleged misconduct.

Accordingly, even if the Court had supplemental jurisdiction over Gristede's counterclaims, given the manifestly deficient evidentiary record, the Court would grant Plaintiffs' motion for summary judgment as to those claims.

I. Individual Plaintiffs' Retaliation Claims: FLSA § 15(a)(3) [**58] & NYLL § 215

As Magistrate Judge Peck surmised, these counterclaims are so flimsy that they must have been made for another purpose: to punish the Individual Plaintiffs for joining the FLSA suit and having the temerity to name certain Gristede's officers. Plaintiffs now contend that Individual Plaintiffs Torres and Chewning are entitled to summary judgment on their claims pursuant to FLSA § 15(a)(3) and NYLL § 215 that Gristede's now-dismissed counterclaims are retaliatory.¹⁸ They argue that the counterclaims are a "mean-spirited, patently frivolous" at-

tempt to deter the participation of both actual and potential class members in the present suit. (P. Mem. 35.)

18 NYLL § 215 and FLSA § 15(a)(3) are "nearly identical" provisions. See Perez v. Jasper Trading, Inc., No. 05 Civ. 1725 (ILG), 2007 U.S. Dist. LEXIS 92375, 2007 WL 4441062, at *7 (E.D.N.Y. Dec. 17, 2007) (finding it acceptable to rely on cases analyzing FLSA retaliation claim when adjudicating similar claims under the NYLL). Though the Court addresses Plaintiffs' retaliation claims under FLSA § 15(a)(3), its analysis is also applicable under NYLL § 215.

[HN36] The FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate [**59] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the FLSA] . . ." 29 U.S.C. § 215(a)(3). [HN37] At the summary judgment stage, courts address FLSA retaliation claims under the familiar "burden-shifting" framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), for the analysis of claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. See Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 876 (2d Cir. 1988); Fei v. WestLB AG, No. 07 Civ. 8785 (HB) (FM), 2008 U.S. Dist. LEXIS 16338, 2008 WL 594768, at *2 n.2 (S.D.N.Y. Mar. 5, 2008); see also Beltran v. Brentwood N. Healthcare Ctr., LLC., 426 F. Supp. 2d 827, 833 (N.D. Ill. 2006) ("FLSA retaliation claims are governed by the same legal analysis applicable to retaliation claims under Title VII.").¹⁹

19 Both Title VII and the FLSA are remedial statutes whose effectiveness depends on the employee's ability to bring claims thereunder with impunity. Thus, the same basic analysis applies to retaliation claims under either statute. See Robinson v. Shell Oil, Co., 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) [**60] ("[A] primary purpose of antiretaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms."); Darveau v. Deteccon, Inc., 515 F.3d 334, 342 (4th Cir. 2008) ("Although the two statutes [Title VII and the FLSA] seek to combat separate workplace problems, the purpose of their retaliation provisions is one and the same--namely, to secure their substantive protections 'by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.'").

[*472] [HN38] In order to establish a prima facie case of retaliation under the FLSA, a plaintiff must show "(1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." Mullins v. City of N.Y., 554 F.Supp.2d 483, 488 (S.D.N.Y. 2008) (citation and internal quotation omitted). The burden of proof at the prima facie stage is *de minimis*. See Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). If the plaintiff meets this burden, the defendant must offer a legitimate non-retaliatory reason for its [*61] actions. See Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008). If the defendant puts forth such a reason, the plaintiff must demonstrate that there is sufficient evidence for a reasonable juror to find that the reason offered by the defendant is mere pretext for retaliation. See Weinstock, 224 F.3d at 42.

1. Plaintiffs' Initial Burden

Gristede's concedes that the Individual Plaintiffs satisfy the first element of a prima facie claim of retaliation,²⁰ but argues that the second and third showings have not been satisfied.

20 There is no question that Torres and Chewning participated in a statutorily protected activity when they filed formal complaints alleging overtime violations under the Fair Labor Standards Act. See Correa v. Mana Prods., Inc., No. 04 Civ. 2344 (DGT), 550 F. Supp. 2d 319, 2008 WL 728903, at *9 (E.D.N.Y. Mar. 17, 2008) (citing McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996) (defining statutorily protected activity as filing or instituting a proceeding under the FLSA, or related to the FLSA, and testifying in an FLSA or FLSA-related proceeding)). Gristede's knowledge of the Class's engagement in protected activity is also undisputed: Gristede's answered the Class's [*62] initial complaint. See Kessler v. Westchester County Dep't of Soc. Serv., 461 F.3d 199, 210 (2d Cir. 2006) (stating that the defendant's submissions in support of its opposition motion plainly evidenced the defendant's knowledge that the plaintiff was engaging in protected activity).

a) Adverse Employment Action

[HN39] In order to establish an adverse employment action, a plaintiff alleging retaliation must "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53,

68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (analyzing adverse actions in the context of Title VII retaliation claims) (citations and internal quotations omitted). Thus, the category of conduct that constitutes actionable retaliation includes more than just "adverse employment actions" or "ultimate employment decisions." Wright v. Stern, 450 F. Supp. 2d 335, 373 (S.D.N.Y. 2006) (citing White, 548 U.S. at 67).

Courts have held that [HN40] baseless claims or lawsuits designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory [*63] actions, even though they do not arise strictly in an employment context. See Bill Johnson's Restaurant v. NLRB, 461 U.S. 731, 740, [*473] 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); see also Darveau v. Detecon, Inc., 515 F.3d 334, 343 (4th Cir. 2008) (finding allegation that plaintiff's employer filed a lawsuit against him alleging fraud with a retaliatory motive and without a reasonable basis in fact or law an actionable adverse employment action under FLSA); Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) (reporting plaintiffs to the INS and making baseless allegations to the government that plaintiffs are terrorists, constitute an adverse employment action). Bad faith or groundless counterclaims and other legal proceedings against employees who assert statutory rights are actionable retaliation precisely because of their in *terrorem* effect. See Bill Johnson's, 461 U.S. at 740 (1983) (acknowledging that "by suing an employee who files charges . . . an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit"); Jacques v. DiMarzio, 200 F. Supp. 2d 151, 162-63 (E.D.N.Y. 2002) (discussing retaliatory effect of bad faith [*64] counterclaim to plaintiff's NYLL claim); Gliatta v. Tectum, Inc., 211 F. Supp. 2d 992, 1008-09 (S.D. Ohio 2002) (noting the "adverse chilling effect" of baseless retaliatory counterclaims).²¹

21 Gristede's does not challenge Plaintiffs' retaliation claim on First Amendment grounds. It is clear, however, that, even though "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances," Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), Gristede's [HN41] baseless and unsupported counterclaims are not entitled to First Amendment protection, see Bill Johnson's, 461 U.S. at 743 ("The first amendment interests involved in private litigation--compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts--are not advanced

when the litigation is based on intentional falsehoods or on knowingly frivolous claims.").

Here, the Court has already concluded that Gristede's counterclaims have no credible evidentiary support and fail to state a cause of action under New York's faithless servant doctrine. *See supra* Part II.H.3(b). They are completely baseless. [**65] Furthermore, as Plaintiffs note, by countersuing, Gristede's sent both the Individual Defendants and other actual and potential class members a strong message that, by initiating and/or maintaining claims against Gristede's, they would be subject to burdensome countersuits. (P. Mem. 37.) Accordingly, the Individual Plaintiffs have established the second element of their FLSA retaliation claim: by initiating its groundless counterclaims, Gristede's engaged in an adverse employment action.

b) Causal Connection

[HN42]An inference of retaliation is established by a causal connection between the protected activity and the adverse action. *Patane v. Clark*, 508 F.3d 106, 115-16 (2d Cir. 2007) (addressing standard for Title VII claim). Here, the causal connection may be established by (1) "evidence of retaliatory animus directed against a plaintiff by the defendant"; or (2) a close temporal proximity between the protected activity and the adverse employment action. *DeCintio v. Westchester County Medical Ctr.*, 821 F.2d 111, 115 (2d Cir. 1987) (Title VII).

Plaintiffs raise a compelling inference of retaliatory motive due to close temporal proximity. Initially, in their Complaint dated April 30, 2004 and [**66] First Amended Complaint dated June 29, 2004, Plaintiffs filed wage and hour claims only against Gristede's and a number of related corporate entities. (*See* Compl. PP 13-14; [**474] 1st Am. Compl. PP 19-20.) Almost a year later, on March 25, 2005, Plaintiffs amended their complaint to state overtime claims for the first time directly against Defendants (1) Catsimatides, Gristede's owner, Chief Executive Officer, and President, (2) Monos, Gristede's District Manager, and (3) Balseca, Gristede's Vice President. Less than a month later, on April 22, 2005, Gristede's interposed its counterclaims against Individual Plaintiffs Torres and Chewing.

Causation can be inferred here because the 28 days between the protected activity and an adverse employment action is "very close." *Clark County School District v. Breedon*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001); *see also* *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 168 (2d Cir. 2006) ("[T]he lapse of only several months after the letter and several weeks after the press conference between the protected speech and adverse employment action is sufficient to support an allegation of a causal connection strong enough to survive summary judgment."); [**67]

Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 555 (2d Cir. 2001) (passage of up to five months short enough for causal connection); *Richardson v. N.Y. State Dep't of Corr. Service*, 180 F.3d 426, 446-47 (2d Cir. 1999) (acts within one month of receipt of deposition notices may be retaliation for initiation of lawsuit more than one year earlier). The fact that Gristede's had almost an entire year to raise its counterclaims, but chose to do so only three weeks after Plaintiffs amended their complaint to allege wrongdoing by top-level corporate executives, strongly suggests an impermissible retaliatory motive.

Other considerations strengthen this inference. First, Gristede's filed its counterclaims without stating a legal basis. This sends a strong message to other potential claimants that participation in the lawsuit will result in costly legal action, whether or not there is a legal justification for such claims. Second, by half-heartedly supporting the counterclaims and failing even to reference evidence supporting those claims in its opposition brief, Gristede's leaves no doubt that the counterclaims are frivolous and unworthy. It suggests that Gristede's does not care whether [**68] the counterclaims are successful because the real purpose of their filing--to deter other claimants--is no longer a key concern. ²²

²² Magistrate Judge Peck noted the huge disparity between the costs of litigating this matter and the amount of relief sought from Torres and Chewing (Neilan Decl., Ex. III, Apr. 27, 2005 Tr. at 9), indicating that, in his view, Gristede's would not benefit in any meaningful way from the counterclaims, even if successful. Indeed, counsel for Gristede's admitted at oral argument that he did not devote considerable attention to the counterclaims, stating "We haven't really pressed it" and "It hasn't gotten a lot of time in the case." (Transcript of Oral Argument dated Jan. 15, 2008 ("Oral Ar.") at 34.)

In light of the foregoing, Plaintiffs have established a prima facie case of retaliation under the FLSA.

2. Defendant's Burden: A Legitimate, Non-Retaliatory Justification

Gristede's argues that, even if it is assumed that the Individual Plaintiffs could establish a prima facie case of retaliation, it has articulated a legitimate, non-retaliatory reason for filing its counterclaims--namely, that it was bound to do so under the pleading requirements for compulsory [**69] counterclaims. (D. Mem. 32-33.) Other federal courts have held that a compulsory counterclaim is not actionable for retaliation unless it is totally baseless. *See* *Ergo v. Int'l Merch. Servs.*, 519 F.Supp.2d 765, 781 (N.D. Ill. 2007). *Accord Orr v. [**475] James D.*

Julia, Inc., Civ. No. 07-51-B-W, 2008 U.S. Dist. LEXIS 49687, 2008 WL 2605569, at *17 (D. Me. June 27, 2008) ("[D]efendants' filing of the counterclaim does not generate a genuine issue of retaliatory motive, especially where [the plaintiff] fails to demonstrate in his presentation that the counterclaims are baseless on factual or legal grounds."). Here, however, the Court has already held that Gristede's counterclaims are permissive, not compulsory, and furthermore they lack any factual basis or evidentiary support. *See supra* Part II.H.

Absent any additional justification, no reasonable jury could conclude on the basis of the evidence presented that the counterclaims were brought for any legitimate, non-retaliatory purpose. Accordingly, the Court grants Plaintiffs' motion for summary judgment and finds that Individual Plaintiffs Torres and Chewing are entitled to relief for Gristede's retaliatory conduct pursuant to FLSA § 15(a)(3) and NYLL § 215.

III. Conclusion

For [**70] the reasons stated above, Plaintiffs' motion for summary judgment is GRANTED, with the exception of its seventh issue for summary judgment--recordkeeping--which is DENIED.

The parties should meet and confer regarding matters post-summary judgment and should contact the Court no later than Monday, September 8, 2008 to schedule a status conference. The Clerk of Court is directed to terminate this motion.

Dated: New York, New York

August 28, 2008

SO ORDERED

/s/ Paul A. Crotty

PAUL A. CROTTY

United States District Judge

Not Reported in F.Supp.2d, 2005 WL 1027467 (S.D.W.Va.)
(Cite as: 2005 WL 1027467 (S.D.W.Va.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. West Virginia.
Mary WHITING, Plaintiff,
v.
W & R CORPORATION, et al, Defendants.
No. Civ.A. 2:03-0509.

April 19, 2005.

Bradford W. Deel, Deel Law Offices, Nitro, WV,
for Plaintiff.

Christopher S. Smith, Jennelle L. Harper, Hoyer
Hoyer & Smith, William C. Forbes, Charleston,
WV, for Defendants.

MEMORANDUM OPINION AND ORDER

GOODWIN, J.

*1 Pending before the court is the defendant, W & R Corporation's, motion for summary judgment [Docket 13]. For the foregoing reasons, the court DENIES the defendant's motion. The court FINDS that there remains a genuine issue of material fact regarding the employment relationship between the plaintiff and the defendant and the plaintiff's earnings during her employment with the defendant.

I. Background

The plaintiff, Mary Whiting, worked at Shockers Bar in Kanawha County, West Virginia from 1996 to 2003. Shockers, an exotic dance club, is owned by the defendant, W & R Corporation. There are very few facts regarding the plaintiff's employment that are undisputed by the parties. These undisputed facts are as follows. First, the parties agree that Mary Whiting signed an independent contractor agreement at the outset of her employment. Second,

it is undisputed that Ms. Whiting kept the cash tips she received from patrons. At this point, the parties' description of Ms. Whiting's work history with W & R Corporation diverge. The plaintiff argues that she was an employee of the establishment, that she was a waitress, that she did not set her own schedule, but was told by the defendants' agents what days to work and for how long, and that the plaintiff was required to follow defendant's dress code and was provided a uniform bearing the Shockers logo. The plaintiff further argues that she was not compensated at a level consistent with minimum wage requirements and that the defendant was not entitled to tip set-offs. Although the plaintiff admits signing a form stating that she was an independent contractor and admits that the defendant did not withhold taxes from her pay, the plaintiff disputes the relevance of this information to the determination of whether she was an employee for the purposes of the Fair Labor Standards Act or the West Virginia Minimum Wage and Maximum Hours Act. In contrast, the defendant claims that Ms. Whiting was not a waitress, but was an exotic dancer, that she was an independent contractor, that she set her own schedule, that she chose and provided her own costumes, props, and music, and that she was compensated at a level that surpassed the minimum wage requirements.

II. Analysis

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P.* 56(c). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,

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475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252.

*2 The defendant argues that summary judgment is appropriate in the present case because under the Fair Labor Standards Act and the West Virginia Minimum Wage and Maximum Hours Act, the plaintiff, Mary Whiting, was not an employee of W & R Corporation. The defendant further argues that even if Mary Whiting qualifies as an employee for the purpose of these acts, she was compensated in an amount greater than minimum wage. In contrast, the plaintiff argues that she fits the definition of an employee provided by these Acts and that the defendant was not entitled to a tip set-off because it never paid any wages to Ms. Whiting.

The requirements and protections of the Fair Labor Standards Act (FLSA) apply only to employees. The statute defines an “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1). The FLSA further defines “to employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). Finally, the Act defines “employer” as “any person acting ... in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). Because these definitions are broad and do little to “solve[] problems as to the limits of the employer-employee relationship under the [FLSA],” the Supreme Court

has explained that courts must determine whether, as a matter of “economic reality,” an individual is an employee or an independent contractor in business for himself. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). Since the Supreme Court’s decision in *Rutherford*, courts have developed several factors to guide the economic reality inquiry. These factors include: (1) the nature and degree of the alleged employer’s control as to the manner in which the work is performed; (2) the alleged employee’s opportunity for profit or loss, depending on his managerial skill; (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer’s business. *See Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947); *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947); *Donovan v. Dial-America Marketing, Inc.*, 757 F.2d 1376 (3d. Cir.); *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir.1984).

The parties’ factual disputes prevent the court from weighing and considering almost all the factors listed above. For example, the parties dispute the nature and degree of W & R Corporation’s control over the manner in which Ms. Whiting performed her work. In fact, the parties even dispute what type of work Ms. Whiting performed for W & R Corporation. The plaintiff alleges that she was a waitress under the direct control of W & R Corporation. Ms. Whiting claims that the defendant and its agents made her schedule, provided her uniform, and instructed her to wait on various customers and wipe down tables. In contrast, the defendant claims that Ms. Whiting was an exotic dancer who made her own schedule and provided her own costume and props. The court further cannot determine if the employment required a special skill and cannot assess the extent to which the service rendered is an integral part of the employer’s business, as there is a fac-

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tual dispute regarding the type of work that Ms. Whiting provided to W & R Corporation. Accordingly, the court finds that there remains a genuine issue of material fact as to whether or not the plaintiff was an employee of the defendant or simply an independent contractor in business for herself. The parties have presented the court with conflicting factual descriptions of the hallmarks of the plaintiff's employment with W & R Corporation, and such factual disputes are best resolved by a jury. For the court to resolve this matter on the record before it, the court would be forced to engage in impermissible weighing of the conflicting evidence. Accordingly, the court declines to award the defendant summary judgment based on an independent contractor exception to the Fair Labor Standards Act.

*3 The plaintiff has also stated a claim pursuant to the West Virginia Minimum Wage and Maximum Hours Act. Without offering or pointing to any evidence in the record, the defendant states that it is entitled to summary judgment on this claim because more than eighty percent of W & R Corporation's employees are subject to the FLSA relating to minimum wage and maximum hours, and therefore, "under § 21-5C-1(e), W & R is not included in the West Virginia Act." This section of the Act provides that the "term 'employer' shall not include any individual, partnership, association, corporation, person, or group of persons or similar unit if eighty percent of the persons employed by him are subject to any federal act relating to minimum wage, maximum hours and overtime compensation." § 21-5C-1(e). The defendant argues that 100 percent of the employees of W & R Corporation are covered by the minimum wage and maximum hours requirement of the FLSA because the dancers it employs are independent contractors, and thus not employees under the act.

The defendant's argument, however, relies in large part on the same disputed facts discussed above-W & R Corporation excludes from its definition of employees those individuals it defines as independ-

ent contractors. As noted above, there are factual disputes regarding the employment relationship between the W & R Corporation and the dancers and/or waitresses that worked at Shockers. Because the court finds that a genuine issue of material fact still remains in dispute regarding the degree of control W & R Corporation had over its dancers and/or waitresses and the employment relationship between the plaintiff and W & R Corporation, the court also declines to grant summary judgment on this claim.

III. Conclusion

Accordingly, the court DENIES the defendant's motion for summary judgment [Docket 13]. The court FINDS that there remains a genuine issue of material fact as to the employment relationship between the plaintiff and the defendant and the plaintiff's earnings during her employment with the defendant. The court DIRECTS the Clerk to send a copy of this written opinion and order to counsel of record and any unrepresented party.

S.D.W.Va.,2005.

Whiting v. W & R Corp.

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(S.D.W.Va.)

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Not Reported in F.Supp.2d, 2008 WL 2944661 (M.D.Tenn.)
(Cite as: 2008 WL 2944661 (M.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Nashville Division.

Jenny WILSON, on behalf of herself and all others
similarly situated, Plaintiffs,

v.

GUARDIAN ANGEL NURSING, INC., a Tennessee
Corporation; Guardian Angel Nursing, Inc., a Missis-
sippi Corporation; On-Call Staffing of Tennessee,
Inc., and On-Call Staffing, Inc.; Leawood, Inc.; E.L.
Garner, Jr.; and E.L. Garner, III, Defendants.

No. 3:07-0069.

July 31, 2008.

R. Scott Jackson, Jr., Randall W. Burton, Jackson &
Burton, PLLC, Nashville, TN, for Plaintiffs.

James L. Holt, Jr., Stephen L. Shields, Jackson,
Shields, Yeiser, Holt, Speakman & Lucas, Cordova,
TN, for Defendants.

MEMORANDUM ORDER

JOHN T. NIXON, Senior District Judge.

*1 Pending before the Court are the parties' cross-motions on the question of summary judgment. Defendants have filed a Motion for Summary Judgment ("Motion for Summary Judgment") (Doc. No. 130), a Memorandum in Support (Doc. No. 137), and Undisputed Facts in Support ("Undisputed Facts") (Doc. No. 131). Plaintiff Jenny Wilson and, at present, 72 others who have opted-in to this litigation ("Plaintiffs") have filed their own Motion for Partial Summary Judgment (Doc. No. 133), a Memorandum in Support (Doc. No. 135), and a Statement of Material Facts As to Which There Is No Genuine Issue for Trial in Support ("Statement of Material Facts") (Doc. No. 134).

There have been two rounds of responsive pleadings. In the first round, Plaintiffs filed a Response to Motion for Summary Judgment (Doc. No. 151) and a

Memorandum in Support (Doc. No. 158), as well as a Response to Defendants' Undisputed Facts in Support of Motion for Summary Judgment and Plaintiffs' Statement of Additional Material Facts (Doc. No. 153). Defendants filed a Responsive Memorandum in Opposition to Plaintiffs [*sic*] Motion for Partial Summary Judgment (Doc. No. 154), Additional Facts in Response to Plaintiffs [*sic*] Motion for Partial Summary Judgment ("Additional Facts") (Doc. No. 155), and a Response to Plaintiffs' Statement of Material Facts (Doc. No. 159).

In the second round, Plaintiffs filed a Response to Defendants' Additional Facts in Response to Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 160) and a Reply to Response to Motion for Partial Summary Judgment (Doc. No. 161). Defendants filed a response to Plaintiff's Statement of Additional Material Facts, (Doc. No. 164).

For the reasons set forth herein, Defendant's Motion for Summary Judgment is **DENIED** and Plaintiffs' Motion for Partial Summary Judgment is **GRANTED in part**.

I. BACKGROUND

A. Procedural Background

On January 18, 2007, Joanie Christie filed a Complaint (Doc. No. 1) against Defendant Guardian Angel Nursing, Inc., a Tennessee corporation. On February 23, 2007, Plaintiff Jenny Wilson opted-in to this action as a representative plaintiff and filed an Amended Complaint (Doc. No. 4) which added Guardian Angel Nursing, a Mississippi corporation, On-Call Staffing of Tennessee, Inc., and On-Call Staffing as Defendants. Those four (4) Defendants filed an Answer (Doc. No. 10) on March 30, 2007. Plaintiffs filed a Motion to Amend/Correct Complaint (Doc. No. 61) on July 20, 2007, which was granted by Magistrate Judge John S. Bryant (Doc. 72) on August 2, 2007. Plaintiffs then filed a Second Amended Complaint (Doc. No. 73) the same day, August 2, 2007, adding Leawood, Inc., Friendship Home Health, LLC, E.L. Garner, Jr., and E.L. Garner, III, as defendants. On August 8, 2008, Plaintiffs

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filed a Motion to Amend Complaint to Correct Clerical Error (Doc. No. 74), which was granted by Magistrate Judge Bryant on August 10, 2007 (Doc. No. 75), and Plaintiffs filed their Third Amended Complaint (Doc. No. 76) on the same day. The Third Amended Complaint reflected the fact that Joanie Christie was voluntarily dismissed from this lawsuit on March 7, 2007. *Id.*; see (Doc. Nos. 6, 75). Friendship Home Health, LLC was voluntarily dismissed without prejudice on September 13, 2007. (Doc. No. 92).

*2 Plaintiffs allege violations of the overtime provisions of the Fair Labor Standards Act (“FLSA” or “Act”). 29 U.S.C. § 207. (Doc. No. 76). They seek overtime backpay under § 207, an equal amount of liquidated damages under § 216(b), and attorney’s fees under § 216(b). Jurisdiction is proper in this Court under 28 U.S.C. § 1331.

B. Factual Background^{FN1}

FN1. All facts in this section are undisputed unless otherwise noted. Facts are taken from Defendants’ Undisputed Facts (Doc. No. 131), Plaintiff’s Statement of Material Facts (Doc. No. 134), Plaintiff’s Response to Defendants’ Undisputed Facts and Plaintiffs’ Statement of Additional Material Facts (Doc. No. 153), Defendants’ Additional Facts (Doc. No. 155), Defendants’ Response to Plaintiffs’ Statement of Material Facts (Doc. No. 159), Plaintiffs’ Response to Defendants’ Additional Facts (Doc. No. 160), and Defendants’ Response to Plaintiffs’ [*sic*] Additional Material Facts (Doc. No. 164), unless otherwise cited.

1. Defendants

Defendants are a single business entity that places trained nurses in private homes and medical facilities on an as-needed basis. Defendants’ main office is located in Batesville, Mississippi. Defendants have other office locations in Memphis, Maryville, Manchester, and Lebanon, Tennessee. Each office acts as a hub which coordinates nursing services in the surrounding area. However, Defendants provide nursing services across a geographic region that extends significantly beyond Tennessee and Mississippi; Defendants maintain a list of nurses in Tennessee, Missis-

issippi, Kentucky, Louisiana, Ohio, Alabama, and Arkansas.

The working arms of Defendants’ business are On-Call Staffing of Tennessee, Inc., a Tennessee corporation, and On-Call Staffing, Inc., a Mississippi Corporation (collectively, “On-Call”). The two Guardian Angel Nursing, Inc., Defendants—one a Tennessee corporation, the other incorporated in Mississippi (collectively, “Guardian Angel”)—are now dormant, their business being conducted through the respective On-Call branches. Defendant Leawood, Inc. was incorporated in Mississippi. Its vitality is in dispute.^{FN2}

FN2. Defendant Leawood, Inc. (“Leawood”) has asserted in a Motion to Dismiss (Doc. No. 79) that it is not properly subject to suit because it was dissolved in 2001 and has been inactive since 1999. *See* (Doc. No. 79 and Attach. Ex.). Plaintiffs argue that Leawood remained active as late as February 26, 2007, as evidenced by a memorandum sent on that date from Leawood to “All Independent Contractors” stating that On-Call had contracted payment of all independent contractors to Leawood as of January 1, 2007. *See* (Doc. No. 83 and Attach. Ex. 1).

Attached to Leawood’s Motion to Dismiss were documents outside of the pleadings, and this Court accordingly treated the motion as one for summary judgment. *See* (Doc. No. 179). Following Federal Rule of Civil Procedure 12(d), the parties were given additional time to file facts pertinent to disposition of that motion. Leawood’s converted Motion for Summary Judgment remains pending. The fact that Leawood’s Motion to Dismiss has not been resolved does not preclude the Court’s decision in this Order.

Defendant E.L. Garner, Jr. (“Mr. Garner”) is at the helm of the business enterprise. His two sons, Dee Garner, and Defendant E.L. Garner, III (“Mr. Garner, III”) run the day-to-day operations. Dee Garner is the company’s operations manager. Mr. Garner, III oversees operations for the Memphis, Tennessee location. He has held this position since at least the spring of 2007, but perhaps since June of 2006; the evidence is conflicting on this point.^{FN3} Mr. Garner, III is also the

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lone shareholder and President of each of the Defendant corporations. Defendant corporations have no other corporate officers. Mr. Garner speaks to his sons on a daily basis about the running of the business, offering counsel and making executive decisions where necessary.

FN3. Mr. Garner, III testified that he began work for On-Call in Memphis starting in either June or July of 2006. (E.L. Garner, III Dep. 53:8). However, affidavits from both he and Mr. Garner state that Mr. Garner did not work for and had no authority within Defendants' companies before the spring of 2007. (E.L.Garner, Jr.Aff.4); (E.L. Garner, III Aff. 3).

Mr. Garner became involved in the business of private duty nursing in April, 1984 by financing and setting up Premier Nursing. Also in the mid-1980's, he founded a nurse-staffing company called Associated Nursing.

In 2002, Mr. Garner created Guardian Angel, which placed nurses in homes and medical facilities until January 5, 2005. On that date, the Tennessee Department of Licensure issued a Cease and Desist Order to Guardian Angel stating that the company could not lawfully provide nursing services without a Certificate of Need (CON), which Guardian Angel did not possess. Defendants circumvented this obstacle in two steps. First, On-Call was established in Mississippi and Tennessee in March, 2005, to assume the business of Guardian Angel. Second, because On-Call did not have a CON, On-Call established contractual associations with Home Health Agencies ("HHAs") like Friendship Home Health and Cumberland River. HHAs have CONs and so are permitted to provide private duty nursing services under Tennessee law. By contracting with HHAs, Defendants were able to continue doing business through On-Call in essentially the same manner as they had through Guardian Angel, with the technical distinction that they were doing business under the umbrella of the HHAs. For this benefit, Defendants pay the HHAs a substantial percentage of their profits. The HHAs with which Defendants associate play no role in the running of Defendants' business. Mr. Garner likened the role played by in Defendants' business to the circumstances of "signing off on law papers and you have to go across the street and get another lawyer to

sign off with you." (E.L.Garner, Jr.Dep.24:4-6).

*3 The personnel responsible for operation of Defendants' business are classified as follows. Marketers and Staffers work out of one of Defendants' offices. Marketers assist Mr. Garner in soliciting business. Staffers are individuals who coordinate and oversee the staffing of clients with nursing services. Both Marketers and Staffers are treated as "employees" by Defendants within the meaning of the FLSA: they are paid overtime for any hours worked over 40 per week. The remainder of Defendants' office personnel are either Human Resources or part of the management hierarchy; the total number of office employees-between all of Defendants' offices-is less than 80. The majority of Defendants' personnel are nursing staff who work in the field. Defendants' business incorporates approximately 15 Registered Nurses (RNs), 100 Certified Nursing Assistants (CNAs), and between 500-750 LPNs. Defendants treat around three (3) RNs as "employees" within the meaning of the FLSA; all other nurses are classified by defendants as "independent contractors."

2. Plaintiffs

Plaintiffs are 73 licensed practical nurses ("LPNs") who performed in-home, or "private duty," continuous care nursing under contract with Defendants. To become an LPN, an individual must complete a one-year nursing program and pass a three (3) hour National Council Licensure Examination (NCLEX) with a score of 80 or better. After passing the exam, an individual is licensed as an LPN within the state that the exam was administered. LPNs are generally considered more skilled than CNAs, but less skilled than RNs.

LPNs such as Plaintiffs come to work for Defendants in the following manner. First, an individual LPN contacts Defendants and expresses interest in working for On-Call. On-Call then sends an application packet to the LPN which contains an extensive list of materials for the LPN to review, as well as forms to be completed and returned. Included among these materials are an Employee Code of Conduct, a Nurse's Skills Checklist, an Independent Contractor Agreement, and a Contractor's Statement of Understanding.

Next, interested LPNs must complete and return ap-

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plication materials, provide proof of professional liability insurance or apply for same, and send in a copy of their driver's license, nursing license, social security card, proof of tuberculosis ("TB") skin test, and proof of cardiopulmonary resuscitation ("CPR") certification. If an LPN returns all of the necessary paperwork, On-Call verifies the validity of the LPN license, TB skin test, and CPR certification, and then conducts a background check for previous felonies as well as a reference check with previous employers. An LPN must also pass an In-Service Test which examines proficiency in matters of basic nursing. Once each of Defendants' requirements in these regards is satisfied, an LPN is placed on the "active list."

LPNs on Defendants' active list are not yet working for Defendants. LPNs come to earn a paycheck from Defendants in the following manner. First, Defendants acquire a new client requiring private duty nursing, either from an HHA with whom Defendants have contracted, from an insurance company, or directly from the client. The client has already been prescribed private duty nursing by this point, and Defendants receive detailed information about the care the client requires as signed by a physician. The care prescribed a patient by a medical doctor is referred to as the Form 485.

*4 The work required of LPNs on private duty detail depends greatly on the particularities of the individual client and the Form 485. All LPNs must perform certain rudimentary health care functions, such as making assessments at the beginning of a shift and assisting with feeding, elimination, medication, and hygiene, where necessary. But the Form 485 may vary widely across clients. Plaintiff Jenny Wilson ("Ms. Wilson") provides just one example. During her tenure with On-Call, she worked with a pediatric patient who required 24/7 monitoring of respiratory, musculoskeletal, gastrointestinal, endocrinal, mental, and integumentary (skin) status, as well as monitoring of signs and symptoms of infection. Ms. Wilson learned the requisite skills for this work in nursing school, as is the case for all of the work done by Defendants' LPNs. Defendants neither provide nor reimburse for any training for LPNs. In fact, LPNs are expected to maintain the necessary accreditations to remain practicing LPNs independently. This includes maintenance of CPR accreditation, personal liability insurance, LPN licensure, and compliance with con-

tinuing education requirements.

LPNs are also expected to provide their own supply of basic nursing equipment, including a uniform, scissors, stethoscope, thermometer, and blood pressure cuff. Many of these items are provided to LPNs in nursing school, but in any event, the sum total of these items is less than \$45. Any more expensive medical equipment, such as a ventilator or computerized monitoring device, is provided by the client or their insurer, as necessary.

The tenure of LPNs with Defendants' companies varies significantly. Ms. Wilson worked with On-Call from June 16, 2006, to August 20, 2006—approximately 10 weeks. Other LPNs stay longer. Because the evidence suggests that Guardian Angel came into existence in 2002, and because the present suit was initiated in 2007, approximately five (5) years would seem the upper boundary for an LPNs tenure with Defendants' business.

LPNs also work divergent hours in a given week. About half of all LPNs work at least four (4) 12-hour shifts per week for a 48-hour work week. Of that half, many work 60-80 hours per week. Ms. Wilson often worked 100 hour weeks during her time with On-Call. Approximately half of all LPNs, however, work an average of less than 40 hours per week

3. The Working Relationship Between Plaintiffs and Defendants

LPNs on the active list must, by virtue of completing the Independent Contractor agreement ("ICA") and Contractor's Statement of Understanding, agree to a number of conditions regarding their work for Defendants. First and foremost, LPNs stipulate that they are "independent contractors," not "employees," that provide care in accordance with their own judgment, and who take direction in the course of their work only insofar as Defendants require on behalf of their contractual partners, whether HHAs or individual clients:

*5 As an independent contractor, Contractor shall determine, according to his/her professional judgment, expertise, and discretion, his/her own method of operation and the manner, order, and sequence in which the Services will be performed for the Client(s), and shall (a) complete all such Services

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in the highest professional manner consistent with applicable medical practices and procedures, clinical guidelines, and legal and ethical considerations, as well as consistent with On-Call Staffing and/or the Client's standards and specifications, and (b) within a reasonable period of time, comply with any requests concerning the performance of the Services to On-Call Staffing's satisfaction. It is expressly understood that any such requests are for the sole purpose of performing the specific Services requested to ensure satisfactory completion of same, and are not intended to amend or alter this Agreement in whole or part.

(Doc. No. 138 attached Exhibit 1 at 1).

The ICA also speaks to the compensation paid to LPNs. LPNs are not entitled to overtime, receive no benefits, and have no taxes withheld. (*Id.* at 4-5). In short, LPNs agree to flat-rate, straight-time compensation. LPNs are prohibited from contracting with or taking money directly from clients.

LPN's are specifically authorized to engage in other work, including nursing services, by the "Non-exclusivity" provision of the ICA. (*Id.* at 5). Indeed, it is common in the industry and among those contracting with Defendants to work for more than one nurse staffing agency or HHA. However, this allowance is limited by the "Non-Competition/Non-Solicitation Covenant" provision of the ICA: LPNs are not permitted to compete for the service of any client or employee of Defendants for a period of one (1) year after working for Defendants. (*Id.* at 6-7).

The scheduling of LPNs is the work of Defendants' Staffers. Defendants assign each new client to a Staffer, and Staffers generally handle a number of cases, but not more than 15. For each incoming case, the Staffer reviews the active list for LPNs in the area whose skills match those required for the individual patient. The Staffer then calls any matching LPNs and describes the assignment, as well as the compensation. The hourly compensation which Defendants offer to LPNs may vary from case to case, depending on which HHA is involved and the skills required. In some circumstances, an LPN may successfully negotiate a higher rate of pay than that originally offered by Defendants, particularly where an assignment would entail considerable travel. Generally, the bookends for compensation are \$18 and \$25 per hour.

An LPN who is offered shifts by Defendants is under no obligation to accept. An LPN may refuse the work unconditionally, make special requests as to which shifts are most desirable, or condition acceptance upon meeting and approving of the client and the client's family. Once an LPN accepts shifts with a particular client, a meeting is arranged between the LPN, the client, and the client's family. If all are agreeable to the arrangement, an LPN may begin to work for pay thereafter.

*6 Once all the shifts are filled for a particular client, the assigned Staffer draws up a monthly schedule which is faxed to the home of the client. All changes to the schedule must go through the Staffer. Some LPNs consider the Staffer assigned to their client to be their "supervisor." If an LPN cannot report for a shift, the LPN must notify the Staffer assigned to the client no less than three (3) hours before the shift begins. If an LPN wishes to swap or dump a shift and finds another LPN willing to cover, the substitution must be approved by the Staffer. In the event that an LPN on duty is not relieved by an incoming nurse as dictated by the schedule, the LPN may not leave the client unattended. In some cases, taking the case of Ms. Wilson as an example, this policy may require an LPN to remain on duty for as long as 48 hours at a stretch. Failure to comply with Defendants' scheduling policies may result in an LPN's removal from the active list, which amounts to termination. Defendants remove an average of two (2) to three (3) LPNs from the active list each month.

Working LPNs are required to remain in nearly constant contact with Defendants. LPNs are not required to come into any of Defendants' offices, and rarely do so. Telecommunication from the clients' homes to Defendants' offices is thus paramount.

LPNs complete Nurse's Notes (NNs) on an hourly basis and fax them in to the appropriate On-Call office. LPNs are also required to submit their NNs twice a week by mail; Defendants then check to make sure that the faxed and mailed copies match. This serves to insure that LPNs are working their scheduled shifts and providing the prescribed care. LPNs must also submit time sheets indicating their hours worked. If time sheets and NNs are not submitted with respect to a particular shift or hour, an LPN is not paid for that time. Defendants also ascertain how LPNs are performing in the course of conversations

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between Staffers and the client's family, which occur on an almost daily basis.

Defendants also require that LPNs complete and fax to Defendants' offices any number of forms that correspond to the condition of the particular client and events which may occur during a given shift. These forms include Intake and Outtake Vital Sign Sheets ("I & O's"), where the LPN details anything consumed or eliminated by the client, Respiratory Care and Control Substance Sheets, Medication Administration Record ("MAR") Forms, Narcotic Flow Sheets, Diabetic Flow Sheets, Seizure Report Sheets, Infection Control Sheets, Occurrence Reports, CNT Assessment Sheets, and CNT Notes.^{FN4} In essence, Defendants require LPNs to document with specificity any matters of interest that may occur during the course of a shift. All of the materials necessary for this communication-forms, fax machines, ink cartridges, etc.-are provided by Defendants and stored in the homes of clients. LPNs are required to submit a Supply Request Sheet if any paper or fax supplies are running low. *See* (Doc. No. 138 attached Exhibit 46).

FN4. It is not clear from the factual record what sort of information LPNs are expected to convey on all of these forms. For instance, "CNT" is not defined in any deposition or affidavit. However, regardless of such ambiguities, the Court is able to glean from the factual record that Defendants require LPNs to document and inform Defendants of all aspects of their shifts and to make special note of any medical conditions or events. This much is undisputed.

*7 Defendants also proactively monitor the work done by LPNs. Under Tennessee state law, Defendants are required to send an RN to the home of a client every 30 days to insure that the LPN is performing the prescribed care properly. Defendants employ approximately three (3) RNs for this purpose. This requirement, however, was not put into place until around May, 2007. Ms. Wilson, who left On-Call in 2006, never met an RN face-to-face in her two (2) months working in a client's home. On one occasion, she received a telephone call from an RN inquiring as to whether there had been any changes in the client's medication.

In addition, Defendants send LPNs company memo-

randum which cover a range of subjects. Memoranda sometimes address administrative concerns, requiring LPNs to submit updated nursing license, TB skin test, or CPR card information. (Doc. No. 138 Attach. Ex. 30). Others concern the manner of payment (Doc. No. 83 Attach. Ex. 1) and procedure for resolving payment issues (Doc. No. 138 Attach. Ex. 33). Most common are correspondences addressing the paperwork which LPNs are required to submit in conjunction with their shifts. Memoranda frequently insist that LPNs turn in notes or forms regularly and in accordance with certain specifications, often those of the relevant HHA. *See* (Doc. No. 138 Attach. Exs. 32, 34, 36, 42, 44). Some memoranda chastise the LPNs for improper behavior on the job, such as smoking in the client's house, failure to bathe clients who resist bathing (*Id.*), or sleeping during working hours (Doc. No. 138 Attach. Ex. 31). The tone of these reprimands is frequently one of urgency, frustration and condescension; memoranda contain regular use of all-caps (*Id.*) ("TERMINATION"); (Doc. No. 138 Attach. Ex. 30) ("UNACCEPTABLE"; "THIS IS MANDATORY") and exclamations points (*Id.*) ("This will not be taken carelessly!"; "This must begin *immediately!*"; "THIS IS NOW MANDATORY!") (emphasis in original); (Doc. No. 138 Attach. Ex. 31) ("There is no sleeping while you are working!").

Defendants also outfit every client's home with both a Policy and Procedure Manual ("P & PM") and a Procedure Manual for Pediatric Patients ("PMPP"). The P & PM is 344 pages long and contains detailed information on the role of the LPN in the company, policies regarding virtually all aspects of LPN work, and a detailed explanation of the proper way to perform an extensive list of medical procedures. (Doc. No. 138 Attach. Ex. 21). The PMPP details with specificity the proper manner of performing many types of procedures on pediatric patients. The parties are in agreement that the P & PM and PMPP are placed in the homes of clients for the benefit of LPNs. However, beyond this threshold fact, the purpose of these manuals is very much in dispute.

Defendants contend that the manuals are simply a resource for the LPNs to refer to in case they need to perform a procedure with which they are unfamiliar or out of practice. Many of the procedures may be performed in a number of ways which are equally satisfactory, and Defendants claim that the manuals

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do not require LPNs to use the precise methods listed in the manuals if they prefer a suitable alternative. Defendants maintain that the contents of the manuals—in both the policies and procedures sections—were lifted almost wholesale from Tennessee state government websites and other online resources, and that the manuals therefore do not represent an authoritative statement of carefully reasoned tenets of Defendants' business.

*8 Plaintiffs argue to the contrary that both manuals state unequivocally that LPNs are expected to study the manuals and comply with the policies and procedures therein verbatim. Plaintiffs' interpretation comes from the text of the manuals themselves. In the introductory "Welcome," the P & PM states, "[w]e have outlined in this manual an explanation of policies and procedures that apply to all who work within our company. Please study this manual carefully and keep it for future reference." (Depo.Ex. 21). The "Purpose of Policy and Procedure Manual" section states that the manual was written "to inform you as to what you can generally expect from our organization and what we expect from you." (*Id.*). Plaintiffs also note that the policy section of the P & PM regulates all aspects of LPN work and conduct in the home of clients. For instance, LPNs are forbidden from wearing excessive "body spray, perfume, or cologne." (*Id.* at 5). LPNs are warned that "[d]isobedience or insubordination to supervisors ... will constitute disciplinary action and may result in immediate termination." (*Id.* at 7). The length of LPN meal times and rest periods is strictly defined and susceptible to extension only at the discretion of the LPNs "supervisor and/or administrator." (*Id.* at 8). Personal relationships with clients or their family members "which conflict with, detract[] from, or adversely affect[] the interest of the agency [Defendants]" must be avoided or reported to Defendants. (*Id.*). In all, the Employee Code of Conduct contains 44 such rules, the violation of which may result in the sanction or termination of an offending LPN. (*Id.* at 9).

Plaintiffs also argue that both manuals list only one method for performing any given procedure, and that there is nothing in either of the manuals to support the Defendants' contention that LPNs are free to use the method of their choice.

4. Defendants' Knowledge of the FLSA

In 1984 or 1985, Defendant Mr. Garner, sought the help of an attorney in drafting a contract that would be binding as to all of the nurses with whom Mr. Garner intended to contract. Mr. Garner told the attorney how he intended to run his business, and the attorney drafted the ICA which Defendants have used, unchanged, since that time. At the time of his deposition, Mr. Garner could not recall the name of the attorney with whom he consulted in 1984 or 1985. (E.L.Garner, Jr.Dep.86:4-5). Shortly after the ICA was drafted, Mr. Garner brought it to a judge^{FN5} who assured Mr. Garner of the attorney with whom Mr. Garner had consulted, "that's his specialty. You'll just have to go with that." (E.L.Garner, Jr.Dep.82:16-17). Defendants have never contacted another attorney to discuss the ICA or the legality of their compensation of nurses.

FN5. The judge is referred to only as "Judge McKenzie" in the segment of Mr. Garner's deposition as filed with the Court. (E.L.Garner, Jr.Dep.82:15). The jurisdiction of this judge is not known by the Court.

In 2005, Defendants entered into an agreement with HHA Friendship Home Health ("Friendship") to purchase 50% of Friendship and assume responsibility for payment of Friendship's nurses. At the same time, Friendship was being sued by the Department of Labor ("DOL") for violation of the FLSA for failure to pay overtime to its nurses. As a result of that suit, Friendship entered into a settlement and awarded backpay to its nurses. Just before finalizing a transaction with Friendship, Mr. Garner asked the CEO of Friendship, Theo Egbujor ("Mr.Egbujor"), "if I get ready to exercise and if I'm able to exercise the option to buy 50 percent of your company, Friendship, there are no liens or any lawsuits out there, are there?" (E.L.Garner, Jr.Dep.51:13-16). Mr. Egbujor responded that Friendship had indeed been sued by the DOL and that the matter was still pending. However, Mr. Egbujor assured Mr. Garner that the suit would be resolved by the end of the year and that Mr. Garner had nothing to worry about. Mr. Garner was told nothing further and asked no further questions.

*9 Throughout the time period that Defendants have been in business, LPNs with whom Defendants contracted have occasionally filed for unemployment benefits. Each time, LPNs were denied benefits based

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on the Tennessee Employment Security Division's ("ESD" 's) finding that LPNs were independent contractors, not employees of Defendants.

After the filing of this suit in 2007, Dee Garner received an email from Defendants' previous attorneys relaying information from the Wage and Hour Division of the DOL. The Wage and Hour Division representative informed Defendants' prior counsel that the DOL was having difficulty classifying Defendants' nurses under the FLSA and had yet to reach a decision as to whether they were employees or independent contractors.

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Generally, summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 601 (6th Cir.1998) (quoting FED R. CIV. P. 56(c)). All the facts and the reasonable inferences to be drawn from those facts must be viewed in the light most favorable to the non-moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In order to succeed, the moving party must show that there is an absence of evidence to support the non-moving party's case and that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 233 (6th Cir.1996). Mere allegations of a factual dispute are not sufficient to defeat a properly supported motion for summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one which, if proven at trial, would lead a reasonable fact finder to find in favor of the non-moving party. *Id.* at 247-48. The substantive law involved in the case will underscore which facts are material and only disputes over outcome-determinative facts will bar a grant of summary judgment. *Id.* at 248.

III. DISCUSSION

Defendants seek summary judgment on four grounds: (1) Plaintiffs were not "employees" but "independent contractors", and so are not entitled to overtime backpay under the FLSA; (2) Defendant Mr. Garner, III, exercised no authority to correct an FLSA violation and so is not properly subject to individual liability; (3) in the alternative, Defendants acted in good faith and so should not be subjected to liquidated damages under 29 U.S.C. § 260; and (4) in the alternative, Defendants' violation of the FLSA was not willful such that the statute of limitations should be set at two (2) instead of three (3) years under 29 U.S.C. § 255(a).^{FN6} (Doc. No. 137).

FN6. Defendants conflate the standards for showing an absence of "willfulness" and "good faith." (Doc. No. 137 at 16-20). The standards are distinct, and the issues of willfulness and good faith will be addressed separately in this Order.

*10 Plaintiffs seek partial summary judgment on two grounds: (1) Plaintiffs were "employees" within the meaning of the FLSA; and (2) all Defendants are liable under the FLSA. (Doc. No. 135).

A. Whether Plaintiffs Were "Employees" or "Independent Contractors"

On the question of whether Plaintiffs were "employees" or "independent contractors" within the meaning of the FLSA, "summary judgment may be appropriate, because the question '[w]hether a particular situation is an employment relationship is a question of law.' " *Imars v. Contractors Mfg. Servs., Inc.*, 1998 WL 598778 at *3 (6th Cir.1998) (quoting *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir.1994)); accord *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir.1984).

Normally, a judge will be able to make this determination [whether "employee" or "independent contractor"] as a matter of law. However, where there is a genuine issue of fact or conflicting inferences can be drawn from the undisputed facts, ... the question is to be resolved by the finder of fact in accordance with the appropriate rules of law."

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Lillev v. BTM Corp., 958 F.2d 746, 750 n. 1 (6th Cir.1992). If this Court can determine whether Plaintiffs were employees or independent contractors on the basis of the undisputed facts and the necessary inferences arising therefrom, then resolution of this issue is proper at the summary judgment stage.

Under the FLSA, an “employee” is “any individual employed by an employer,” 29 U.S.C. § 203(e)(1), to “employ” is “to suffer or permit to work,” *id.* § 203(g), and an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* § 203(d). Being circular, these definitions provide little guidance for determining whether an employment relationship exists.

Instead, courts use a multi-factor “economic realities” test to determine whether an individual or class of workers are employees or independent contractors. *Imars*, 1998 WL 598778 at *3; *Lilley*, 958 F.2d at 750; *accord Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir.1987); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir.1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1383 (3d Cir.1985). This balancing test is designed to determine, under the totality of circumstances, whether “the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.” *Superior Care*, 840 F.2d at 1059; *accord Imars*, 1998 WL 598778 at *3; *Lily*, 958 F.2d at 750; *Brandel*, 736 F.2d at 1116.

The factors to be considered under the economic realities test are as follows:

- (1) the permanence of the working relationship between the parties;
- (2) the degree of skill the work entails;
- (3) the extent of the worker’s investment in equipment or materials;
- (4) the worker’s opportunity for profit or loss;
- *11 (5) the degree of the alleged employer’s control over the worker;
- (6) whether the service rendered by the worker is an

integral part of the alleged employer’s business.

Imars, 1998 WL 598778 at *3; *Brandel*, 736 F.2d at 1117.

In *Brandel*, the Sixth Circuit “inverted” the sixth factor to ask whether the workers were economically dependent upon the business for which they were laboring, 736 F.2d at 1120; *see Imars*, 1998 WL 598778 at *3 (characterizing its earlier treatment of the sixth factor in *Brandel* as an inversion). In answering that question, the Sixth Circuit looked to other factors, such as (a) whether the worker was subjected to long hours at low wages; (b) whether similar work was available elsewhere; and (c) whether the alleged employer unilaterally controlled the rate of pay. *Brandel*, 763 F.2d at 1120. Other circuits have endorsed similar inquiries under the heading of a separate, seventh factor. *See, e.g., Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir.1987); *see also, Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir.1976); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir.1985). Others still have simply held that the six factors are not exclusive as listed, and that courts may consider any relevant facts under the totality of the circumstances. *Superior Care*, 840 F.2d at 1058.

Ail courts that have dealt with the issue are in agreement, however, that one factor does not control: “explicit contractual arrangements,” *Imars*, 1998 WL 598778 at *4; *accord Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (“[w]here the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act”); *Robicheaux v. Radcliffe Material, Inc.*, 697 F.2d 662, 667 (5th Cir.1983) (“[a]n employee is not permitted to waive employee status”). As the Sixth Circuit noted, the reason for looking past contractual arrangements “is simple: ‘The FLSA is designed to defeat rather than implement contractual arrangements’ ” in as much as the Act represents a repudiation of the freedom of contract principles of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). *Imars*, 1998 WL 598778 at *4-5 (quoting *Lauritzen*, 835 F.2d at 1544-45 (Easterbrook, J., concurring)).

Likewise, classifications made by the Tennessee Employment Security Division will not influence the

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Court's decision. The ESD distinguishes between "employees" and "independent contractors" on the basis of factors distinct from the economic realities test.^{FN7} Moreover, the ESD is not a binding authority on this Court.

FN7. The Employment Security Division arrives at decisions on the basis of factors listed at T.C.A. § 50-7-207(e). *See, e.g.*, (Doc. No. 31 Attach. Ex. A). An individual is considered an independent contractor under those factors if:

(A) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under any contract for the performance of service and in fact;

(B) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

T.C.A. § 50-7-207(e)(1).

There are several critical differences between the economic realities test and the Employment Security Division factors. Notably, factor (A) gives significant weight to the intention of the parties as expressed in contract form. Factor (B) is different in that it places emphasis on where the worker actually performs services for the alleged employer. Most importantly, however, the Employment Security Division's test does not take into account a number of factors under the economic realities test, such as the permanence of the working relationship, the degree of skill of the worker, the opportunity for profit or loss, or the worker's investment in equipment or materials.

The utility of the economic realities test has been questioned in this Circuit. In *Imars*, the Sixth Circuit wrote that, "few of the factors necessarily makes economic sense, and all of the factors are far too easy to manipulate and mold during application to suit a preconceived result." 1998 WL 598778 at *5. The Sixth Circuit is not alone in this regard. In *Lauritzen*, Judge Easterbrook of the Seventh Circuit remarked that, "any balancing test begs questions about which aspects of 'economic reality' matter, and why." 835 F.2d at 1539 (Easterbrook, J., concurring). Indeed, it requires only a very cursory view of the economic realities factors to recognize that they permit of numerous exceptions and may be dubious indicators. For example, with respect to the permanence of the working relationship, while it is plausible to presume that employment relationships are more likely to span greater periods of time than independent contracting ones, which tend to be job specific, it is obvious that a prototypical employment relationship may be terminated almost as soon as it's begun. The second factor—the degree of skill involved—is similarly porous; this factor presupposes that a higher degree of skill suggests independent contractor status, but examples to the contrary are myriad.

*12 The portent of these difficulties with the economic realities test is that this Court must proceed with caution in applying it. In keeping with the purpose of the FLSA, to provide workers with minimum protections against exploitative labor practices, Congress gave the term "employee" the "broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945) (internal citation omitted). It is with this understanding, as well as the overarching question of whether Plaintiffs were reliant on Defendants or were in business for themselves, that this Court proceeds.

1. *Permanence of the Working Relationship*

Under the permanence prong, the duration of the working relationship is not as significant as the number of hours worked and the exclusivity of the working arrangement. *Donovan v. Gillmor*, 535 F.Supp. 154, 162-63 (D.C. Ohio 1982) *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982); *Lauritzen*, 835 F.2d at 1537. This is particularly true where the industry is such that work is partitioned among discrete projects, as

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here, where LPNs are assigned shifts for individual patients. *Gillmore*, 535 F. Supp at 162-63; *Lauritzen*, 835 F.2d at 1537.

Plaintiffs in this case are a somewhat impermanent work force. LPNs are scheduled to work only those shifts which they agree to in advance, and they may accept as many or as few shifts as they choose. About 50% of Defendants' LPNs work less than 40 hours per week, and many simultaneously perform other nursing work. There is variance in the amount of time that LPNs stay with Defendants, but some, following the example of Ms. Wilson, work with Defendants for only a period of weeks. These facts support a finding of transience.

The Court determines that Plaintiffs are a moderately and not highly transient group because approximately half of all LPNs working for Defendants log over 48 hours per week, and many work more. Defendants acknowledge that it is common for LPNs to work between 60 and 80 hours, and Ms. Wilson worked between 80 and 100 hours for the duration of her 10 weeks with On-Call.

Ordinarily, the fact of transience weighs in favor of a determination of independent contractor status. *See, e.g., Brandel*, 736 F.2d at 1117. However, "even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060-61 (2d Cir.1988); *accord Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1053-54 (5th Cir.1987). In *Superior Care*, the Second Circuit dealt with the very question before this Court at present, whether LPNs are employees or independent contractors under the FLSA.^{FN8} 840 F.2d 1054 (2d Cir.1988). In affirming the district court's finding that LPNs are employees, the Second Circuit held that transience is intrinsic to private-duty LPN work, and accordingly gave little weight to the fact of LPN impermanence in its decision. *Id.* at 1060-61. Defendants' in the present action concede that it is characteristic of nursing work on the LPN level to change companies or work for more than one at a time. (Janice Ayers Dep. at 140:13-24). Indeed, the experience of Ms. Wilson suggests that LPNs are sometimes forced to leave Defendants' company because there is insufficient work or their calls are not re-

turned. As a result, this Court finds that the relative transience of Plaintiffs as a group of workers is to be given little weight; it signals not that Plaintiffs are an enterprising group who successfully brokered their skills for isolated assignments, but rather that the industry does not guarantee steady work with one company for those in need of full-time hours.

FN8. Defendants argue that *Superior Care* is inapposite because factually distinct on three (3) grounds: (1) defendants in *Superior Care* divided their nurses into two groups, one of which was treated like employees and the other like independent contractors, though there was no difference in the work done by the two groups; (2) the contracts between plaintiffs and defendants differed from the ICA; and (3) *Superior Care* defendants were in the business of health care, whereas Defendants in this action are in the business of staffing. (Doc. No. 154 at 7-10).

Defendants first contention, while a real factual distinction, does not distinguish *Superior Care*. The Second Circuit in that case noted that the district court was right to consider the differential treatment between the two groups of nurses in addition to the factors of the economic realities test. *Superior Care*, 840 F.2d at 1059. However, this fact did not control. As the Appellate Court held, "[a]nalysis of the five economic reality factors fully supports the District Court's conclusion that the nurses are employees." *Id.*

Defendants second distinction is without merit. As noted above, the terms of the ICA do not control this Court's determination of whether Plaintiffs were employees or independent contractors.

Finally, Defendants' third alleged distinction is illusory. Defendants allege that they are solely in the staffing business, whereas the *Superior Care* defendants were in the business of health care. Apparently, Defendants would have the Court believe that, once assignments are made and schedules are drawn, Defendants wash their hands of the health care

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afforded clients. The evidence is to the contrary, as discussed below, under the “degree of control” factor. Because Defendants do engage in monitoring the care afforded clients, their third alleged distinction of *Superior Care* amounts to little more than semantical manipulation.

2. Degree of Skill

*13 In evaluating the Plaintiffs' skills under the economic realities test, the Court first notes that “skills are not the monopoly of independent contractors.” *Lauritzen*, 835 F.2d at 1537. The question under the skills factor is whether the worker's skills are “more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *Brandel*, 736 F.2d at 1118 n. 7; *Superior Care, Inc.*, 840 F.2d at 1060 (“[a] variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA”) (citations omitted). It is thus essential to ask whether, in the larger picture, LPNs have the skills necessary to locate and manage discrete work projects characteristic of independent contractors, or whether their skills are of the task-specific, specialized kind that form a piece of a larger enterprise, suggesting employee status.

The Court finds Plaintiffs' skills to be of the latter variety. LPNs must graduate from a one-year nursing program, pass a three (3) hour NCLEX exam, and obtain CPR certification. This training endows LPNs with a moderate base level of skills in nursing procedures. However, LPNs do not have the skills or connections to find their own clients, but rather rely on companies such as Defendants for placements. The fact of reliance upon others for job placements was determinative in *Richardson v. Genesee County Community, Mental Health Services.*, 45 F.Supp.2d. 610, 614 (E.D.Mich.1999), where the district court determined that RNs were determined to have a skill set more typical of employees. RNs are widely considered to be more skilled than LPNs.

Once placed, LPNs do not budget their time but rather report for shifts as scheduled by a Staffer. They are not permitted to rearrange their schedule on

their own, but must instead request that Staffers approve any scheduling changes. On the job, LPNs provide treatment that is prescribed by physicians and overseen by RNs; they are the arms, eyes, and ears, but not the organizational or medical “head,” of an in-home patient's holistic care. Thus, at every stage in the process, the skill-set of LPNs plays a limiting role, forcing LPNs to rely on the expertise of others while leaving for themselves a narrow, rather mechanized role. In *Superior Care*, the Second Circuit found these considerations to be dispositive under the skills factor, stating that “[t]he nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way.” 840 F.2d at 1060.

For these reasons, the Court determines that, while Plaintiffs are moderately skilled as a group, their skills are of the kind that weigh in favor of a determination of employee status.

3. Investment in Equipment or Materials

*14 The Sixth Circuit holds that “[t]he capital investment factor is most significant if it reveals that the worker performs a specialized service that requires a tool or application which he has mastered or that the worker is simply using implements of the landowner [alleged employer] to accomplish the task.” *Brandel*, 736 F.2d at 1118-19. Neither is the case here.

The parties are in agreement that Plaintiffs were required to invest very little of their own resources in equipment or materials. Defendants require that LPNs provide their own uniform, scissors, stethoscope, thermometer, and blood pressure cuff. These items can be purchased for approximately \$45 total. Defendants invest slightly more in the hardware that LPNs use in the course of their work, providing the fax machine, ink cartridges, and forms which LPNs use in their daily communications with Defendants. It appears that the most expensive equipment, however, is provided not by the parties to this suit but by the clients themselves; if any sort of specialized medical apparatus becomes necessary for a client's care, it is generally furnished by the client's insurance provider. As a result, as in *Brandel*, this case presents a working environment in which neither Plaintiffs nor Defendants expend considerable resources on the tools of Plaintiffs' trade. 736 F.2d at 1118-19. Accordingly,

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analysis under this factor offers no insight into the nature of the working relationship between the parties and the Court assigns it no weight.

4. Opportunity for Profit or Loss

The question under the opportunity for profit or loss factor is whether Plaintiffs' earnings were tied to their performance once they accepted work. See *Imars*, 1998 WL 598778 at *6; *Brandel*, 736 F.2d at 1119. It is the mark of an independent contractor that a stake in the venture provides both carrot and stick, such that planning, efficiency and skill are rewarded above and beyond the initial contract. *Id.* Viewed in this light, it is obvious that Plaintiffs had no opportunity for profit or loss; once the work was accepted, Plaintiffs were paid a predetermined rate without regard to their skill, efficiency, or any other variable relative to performance or the circumstances of the client. In analyzing under this factor, the Second Circuit came to the identical conclusion on nearly the same facts. *Superior Care*, 854 F.2d at 1059 (finding LPNs had no opportunity for profit or loss).

Defendants argue that Plaintiffs did have an opportunity for profit or loss because they were in a position to accept or refuse offers for shifts, negotiate hours and rates of pay, and consider working for multiple companies. (Doc. No. 154 at 13-14). According to Defendants, Plaintiffs' financial status was thus a function of their skill, because, for example, an LPN "accepting a job with a two hour commute ... could suffer a loss after factoring in transportation and other incidental costs." (*Id.* at 13). Plaintiffs could profit, Defendants argue, by "hold[ing] themselves out to the highest bidder." (*Id.*).

*15 Defendants' argument proceeds from too great a level of abstraction. Certainly there is a sense in which LPNs may profit or suffer losses based on their decisions in the course of working for defendants, but this is the same sense in which any employee might profit by accepting a high paying job, or suffer loss by accepting a low-paying one or refusing to work altogether. What is significant is whether Plaintiffs had a stake in the venture, and they had none. As a result, the Court finds that the Plaintiffs' inability to profit or suffer loss weighs in favor of an employment relationship.

5. Degree of Control

Defendants maintain a high degree of control over LPNs with whom they contract. First, Defendants retain ultimate control over the hours worked by LPNs. LPNs, while not obligated to accept any shifts, can only work those hours approved by Defendants. LPNs who are unable to work shifts as scheduled must notify Defendants, and Defendants must approve any potential shift-swapping or substitution. Additionally, LPNs may be required to work more than the hours scheduled if the next scheduled nurse does not timely relieve the prior one.

Defendants also control the manner in which LPNs conduct their duties while in the homes of patients. The parties dispute the significance of the PPM distributed by Defendants, but even ascribing to the PPM the meaning which Defendants stress, the evidence is overwhelming that Defendants manage and oversee the work of LPNs to a very high degree. From the moment LPNs arrive for a shift, their work is largely pre-determined by Defendants' company policy. LPNs must make an assessment of the client and then proceed with the plan of care outlined in the Form 485. LPNs must make Nurse's Notes hourly, and must also fill out forms which correspond with any of a number of procedures which may be performed. LPNs fax documentation to Defendants throughout the course of their shifts, and Defendants, for their part, speak to the clients' families on a near daily basis in addition to reviewing all documentation to check it against the physician's plan of care. Indeed, Defendants are required to conduct this level of oversight because LPNs are not physicians, and so cannot prescribe-but only carry out-medical care.

Defendants argue that because such supervision is mandated by the State or the HHAs with which they contract, it is somehow outside the bounds of this Court's analysis under the economic realities test. (Doc. No. 154 at 11). It is not. What is significant to the determination of an employment versus an independent contractor relationship is that Defendants told Plaintiffs how to do their job.

But Defendants also control the manner in which LPNs conduct themselves as representatives of Defendants' company. Both Defendants' Code of Conduct and periodic memos make clear that LPNs are required to comport themselves in the manner which Defendants' deem proper. LPNs are forbidden from

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smoking in the homes of clients, sleeping on the job, forming personal relationships with clients or their families, performing personal work on the job, wearing excessive perfume or cologne, and so forth. While many of these rules likely reflect sound judgment, the fact remains that LPNs are not free to exercise discretion on these matters.

*16 Furthermore, it is worth noting that the tone of many of Defendants' memos to Plaintiffs suggests that Defendants believe themselves to exercise control over their LPNs. The memos convey directives in combination with threats, whether blatant or veiled, that are expressed harshly and make no effort to restrain Defendants' frustration and condescension.

Defendants argue that they exercised little to no control over Plaintiffs in the course of their work, but instead urged Plaintiffs to make use of their own professional judgment. (Doc. No. 154 at 11-12). This contention is rooted in two (2) sources. First, Defendants rely on the language of the ICA, which specifically denies Defendants the right to oversee or direct LPNs in their work. This language has no bearing on the Court's analysis for the reason noted above, that the FLSA is designed to subvert, rather than enforce, the authority of labor contracts.

Second, Defendants argue that they did not control Plaintiffs insofar as Plaintiffs were free to perform their work in the manner of their choosing. (Doc. No. 154 at 11) (claiming Plaintiffs relied on their "own training and education and not on any direction from On-Call). Contrary to Defendants' claim, the work performed by Plaintiffs on the basis of their training and education was largely formulaic: Plaintiffs performed those tasks which were required by Defendants, either as outlined in a Form 485, as a matter of Defendants' policy, or as the unanticipated circumstances of a particular client might require. What Defendants' contention amounts to is the fact that Plaintiffs were alone in the home with clients without any supervision at the job sight. This is not enough to defeat a finding of control. As the Second Circuit noted in finding that Defendant Superior Care exercised substantial control over its LPN workforce, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control." *Superior Care*, 840 F.2d at 1059 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1383-84 (3d Cir.1985)). Where the nature of the industry is such

that constant oversight is implausible, the absence of such oversight is not relevant to the control factor of the economic realities test. *Id.* Because private duty nursing is just such an industry, there is nothing in Defendants' arguments to undercut the substantial control which Defendants in fact exercised over Plaintiffs, and the Court finds that this factor weighs heavily in favor of a finding of an employment relationship.

6. *Extent to Which Plaintiffs' Services Ate Integral*

The work performed by Plaintiffs is at the heart of Defendants' business. Defendants provide nursing services, primarily private duty, and the overwhelming majority of their nurses are LPNs. Under nearly identical circumstances, the Second Circuit found that "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request." *Superior Care*, 840 F.2d at 1059-60. Accordingly, the Court finds that this factor weighs in favor of an employment relationship.

7. *Economic Dependence*

*17 In *Brandel*, the Sixth Circuit examined three (3) factors in determining the degree of workers' economic dependence on an alleged employer: (a) whether the worker was subjected to long hours at low wages; (b) whether similar work was available elsewhere; and (c) whether the alleged employer unilaterally controlled the rate of pay. *Brandel*, 763 F.2d at 1120.

The Court notes that labeling this seventh factor "economic dependence" may result in some confusion. The purpose of the economic realities test is to determine "whether the putative employee is economically dependent upon the principle or is instead in business for himself." *Imars v. Contractors Mfg. Servs., Inc.*, 1998 WL 598778 at *3 (6th Cir.1998). Lest the seventh factor be understood to swallow or supplant the entire test, it should be understood that, interpreting the *Brandel* decision, "economic dependence" under the seventh factor refers to the degree that the workers in question are "bound" to their alleged employer. A worker is so bound when there is no similar work available elsewhere, or when long hours and low wages-unilaterally set by the alleged employer-make the liberty to find new work unavail-

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able.

With regard to Plaintiffs, the evidence is mixed under this seventh factor. Plaintiffs were indeed subjected to long hours, sometimes without their initial consent. Ms. Wilson was forced to stay on duty for 48 consecutive hours because a replacement nurse did not arrive. Furthermore, while Defendants have argued that Plaintiffs were in a position to negotiate their rate of pay, the evidence suggests that negotiation was not especially commonplace, and more importantly, that negotiation could yield only moderate returns. The upper boundary set by Defendants was firm at around \$25 per hour.

On the other hand, the lower boundary for payment was approximately \$18 per hour, which is by no means a poor hourly wage. Plaintiffs were also free to work for other companies, and the fact many LPNs do so suggests that work with other nursing agencies is not difficult to find. It seems, in sum, that Plaintiffs were capable of being periodically trapped into working long hours for a rate largely determined by Defendants, but that it was economically feasible for Plaintiffs to leave Defendants and find other work. The Court thus concludes that analysis under this factor offers no definitive insight into whether Plaintiffs were employees or independent contractors.

8. Determination of Employment Relationship

On the basis of the foregoing considerations, the Court determines that Plaintiffs were employees of Defendants within the meaning of the FLSA. Plaintiffs performed a largely mechanized function within Defendants' business. They were reliant on Defendants for placements and scheduling, and their skill set did not permit them to make decisions about the care to be given to clients. For their part, Defendants made certain that Plaintiffs provided the care prescribed by a physician in accordance with the procedures approved by HHAs. Plaintiffs did not make any significant investment in equipment or materials, and they had no opportunity for profit or loss in the course of their work for Defendants. Defendants maintained a high degree of control over Plaintiffs, monitoring their work for purposes of State regulations, the wishes of contractual partners, and for their own business goodwill. Finally, Plaintiffs performed the most essential function within Defendants' enterprise: private duty nursing. As a result, the Court

concludes that there is no genuine issue of material fact as to whether Plaintiffs were employees or independent contractors. Plaintiffs were employees entitled to the overtime protections of the FLSA.

B. Whether Defendant E.L. Garner, III Was an "Employer"

*18 As stated above, an "employer" under the language of the FLSA is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C.A. § 203(d). The Sixth Circuit has held that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir.1991) (internal citations omitted).

Defendants argue that Mr. Garner, III is not an "employer" for purposes of this lawsuit because Mr. Garner, III played no role in the running of Defendants' companies until after initiation of this lawsuit. Plaintiffs argue, to the contrary, that Mr. Garner, III was both owner and president of all On-Call and Guardian Angel entities, and that Mr. Garner, III did in fact assist in running Defendants' business before initiation of this action.

It is undisputed that Mr. Garner, III is the sole owner and corporate officer of all of Defendants' companies. The question for present purposes is whether he exercised any degree of operational control prior to initiation of the present suit. On this question, there is conflicting evidence. Mr. Garner, III testified that he began work for On-Call in June or July of 2006. However, both he and Mr. Garner swore in affidavits that Mr. Garner, III did not begin work for Defendants until the spring of 2007, after the date this suit commenced. The Court finds this discrepancy to raise a genuine issue of material fact which precludes determination of this issue at the summary judgment stage.

C. Whether Good Faith^{FN9}

FN9. The Court sees no issue in resolving questions of good faith and willfulness while leaving unresolved whether Leawood and Mr. Garner, III are properly made defendants in this action. If the court finds will-

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fulness and an absence of good faith, liquid damages and a three (3) year statute of limitations will extend to defendants. If Leawood and Mr. Garner, III are not proper defendants, then the questions of good faith and willfulness are mooted as to them.

Section 216(b) of the FLSA authorizes liquidated damages for violation of the overtime provisions of the FLSA. Liquidated damages “are compensation, not a penalty or punishment.” *McClanahan v. Mathews*, 440 F.2d 320, 322-23 (6th Cir.1971) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942)). A district court is permitted to deny an award of liquidated damages “if and only if, the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not violating the Act.” *Elliott Travel & Tours*, 942 F.2d at 967 (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir.1982) (emphasis in original)). The two pronged requirement that an employer show both good faith and reasonableness is derived from the FLSA itself. 29 U.S.C.A. § 260. Summary judgment may be proper on the question of liquidated damages as the existence of “good faith” is a matter left to the discretion of the Court. *McClanahan*, 440 F.2d at 322.

The burden of establishing good faith for an employer is “substantial.” See, e.g., *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 836 (6th Cir.2002); *Elliot Travel & Tours*, 942 F.2d at 967. An employer must prove that it took “affirmative steps” to discover the meaning and application of the FLSA to the employer's business. *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 584 (6th Cir.2004) (quoting *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir.1991)). Moreover, failure to comply with the FLSA must be based on reasonable grounds; “an employer who negligently misclassifies an employee as exempt is not acting in good faith.” *Id.*

*19 Defendants in this case have not established good faith. Mr. Garner met with an attorney in 1984 or 1985 for the purpose of drawing up an enforceable contract for all of the nurses with whom Defendants' company contracted. The result of that consultation was the ICA, which Mr. Garner was informed would comply with all relevant laws. Defendants have neither altered nor reassessed the ICA-or for that matter, the legal advice it embodies-in the 20 plus years that

Defendants have contracted with nurses. Additionally, Mr. Garner testified that he was not aware of the existence of the FLSA until the present suit. In and of itself, the Court finds that this complacency and ignorance of law constitutes negligence sufficient to defeat good faith. It is inexcusable that a business which hires nearly 1000 nurses and has been operating under various names for over 20 years is in the dark regarding the FLSA and its requirements. See *Indiana Michigan Power*, 381 F.3d at 584 (“[t]he employer has an affirmative duty to ascertain and meet the FLSA's requirements”); *Elwell*, 276 F.3d at 841 (finding that defendant should have requested an opinion from the DOL regarding compliance with the FLSA).

Defendants argue that, in spite of the minimal affirmative steps taken, Defendants acted reasonably in believing themselves to be in compliance with the law. First, Defendants claim that the lawyer consulted in the mid 1980's was an expert in the field. (Doc. No. 137 at 20). The Court finds this justification to be insufficient. Mr. Garner testified that he was directed to an attorney-whose name he could not recall at the time of deposition-and sought his services exactly once. Defendants never sought a second opinion from an attorney, or even, it would seem, recorded the name and contact information of the attorney for follow-up consultations. Defendants seem instead to have treated compliance with the law as an obligation that could be outsourced for a one-time consulting fee. As a matter of law, this does not constitute affirmative steps, particularly given the fact that no conversation regarding the FLSA ever took place between Defendants and the consulting attorney. See *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C.Cir.1993) (holding that for consultation with counsel to show “good faith,” counsel must have been asked about the applicability of the FLSA to the workers in question); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 509 (8th Cir.1990) (finding “good faith” because counsel was consulted on the specific question of the FLSA's applicability to the workers in question).

Defendants also argue that they received assurances from other governmental bodies concerning the legality of their labor practices. (*Id.*). The Tennessee ESD repeatedly denied unemployment benefits to LPNs, deeming them independent contractors, and the DOL Wage and Hour Division notified Defendants that it

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was unable to classify the relationship between the LPNs and Defendants. As a threshold matter, it is unclear how ESD determinations that LPNs were independent contractors could have reassured Defendants that they were in compliance with the FLSA if, as Defendants argue, Defendants were oblivious to the existence of the FLSA until initiation of this lawsuit. However, putting this point aside, the determinations of the ESD are not significant for FLSA purposes, and Defendants would have known this had they taken affirmative steps to discover the legality of their hiring practices under the FLSA.

*20 As far as the notification which Defendants received from the Wage and Hour Division is concerned notification was received by Defendants after initiation of this lawsuit. As a result, this notification can have no bearing on whether Defendants acted in good faith during a time period that preceded this action.

For these reasons, Defendants have failed to meet their burden of establishing good faith, and thus liquid damages are mandated under the FLSA for violations of § 207.

D. Whether Willful Violation

Finally, Defendants contend that a two (2) year statute of limitations is appropriate in this case because any violations of the FLSA were not “willful.” Where violation of the FLSA is “willful” a three (3) rather than two (2) year statute of limitations applies. 29 U.S.C.A. § 255(a); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *Elliot Travel & Tours*, 942 F.2d at 966. The party alleging willfulness bears the burden of proof “that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute.” *Richland Shoe*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)). To make out recklessness, the moving party may satisfy its burden by showing that the “employer disregarded the very ‘possibility’ that it was violating the statute.” *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir.2003); accord *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2d Cir.1999). The determination of “willfulness” for purposes of § 255(a) is an appropriate issue for decision by the Court on sum-

mary judgment. See *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468, 472 (6th Cir.1999) (approving finding of willfulness by the district court).

Defendants in this case showed reckless disregard to the possibility that their conduct was unlawful under the FLSA. In 2005, Defendants entered into an agreement with Friendship in which Defendants purchased 50% of Friendship and agreed to take over payment of Friendship's nursing staff. Friendship was sued by the Department of Labor for failure to pay overtime to its nurses, and Friendship settled that case and issued backpay to its nursing staff. This was going on at exactly the time Defendants entered into the agreement with Friendship, and Defendant Mr. Garner was aware of that fact. According to his testimony, Mr. Garner asked Mr. Egbujor the Friendship CEO, “if I get ready to exercise and if I'm able to exercise the option to buy 50 percent of your company, Friendship, there are no liens or any lawsuits out there, are there?” (Depo. of Lee Garner at 51). Mr. Garner was informed by Mr. Egbujor that Friendship had indeed been sued by the DOL, but Mr. Egbujor assured Mr. Garner that the matter would be resolved by year's end and was, in any event, of no concern. Mr. Garner asked no further questions and received no further information on the subject.

*21 The Court finds that the above evidence establishes Defendants' recklessness. Defendants were planning to take over the payment of Friendship's nurses, as well as a significant ownership share in the company. Defendants should have inquired what payment practices of Friendship had triggered suit by the DOL, lest Defendants commit the same mistake or unwittingly assume a portion of Friendship's liability. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir.1999) (finding recklessness where defendant company turned a blind eye towards the FLSA violations of a company that defendants took over). Defendants recklessly relied on the passing assurances of a man whose company had been sued by the DOL, which suit led to a settlement agreement. See *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir.1999) (finding recklessness where defendant relied on the assurances of someone defendant knew to have been investigated and successfully sued by the Internal Revenue Service). Moreover, Defendants chose to rest on the validity of a labor contract drawn up approximately 20 years prior. In this regard, De-

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defendants' conduct went well beyond negligence into willful ignorance.

Furthermore, while Defendants maintain that they had no awareness of the applicability of the FLSA to their company until the initiation of the present lawsuit, Defendants certainly understood some legal distinction between employees and independent contractors because Defendants hired both under separate contracts. A small number of Defendants' nurses, and all of Defendants' office personnel, were treated as employees, whereas the majority of nurses were treated differently under the ICA. If Defendants, in fact, were unaware of the relevant legal distinction between these two classes of workers, and merely relied on the advice of legal counsel dating back to the mid-1980's, again, this constitutes willful ignorance of the law. Defendant Mr. Garner was in the business of providing private duty nursing for over 20 years. Many competing businesses, including HHAs, paid overtime to their nurses during this time. Indeed, Defendant Mr. Garner, III stated that he was almost certain that one of Mr. Garner's earlier businesses had paid its nurses overtime.

In this light, Defendant's ignorance of the law is more than negligent-it is reckless indifference to the possibility of violation of the FLSA. As a result, under § 255(a) of the FLSA, a three (3) year statute of limitations is appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court determines: (1) that Plaintiffs were "employees" under the meaning of the FLSA; (2) that there is an issue of genuine material fact as to whether Defendant E.L. Garner, III, was an "employer" under the Act, precluding summary judgment on that question; (3) that Defendants' conduct was not in good faith, such that liquidated damages are mandated; and (4) that Defendants' conduct was willful, such that a three (3) year statute of limitations is proper.

*22 Accordingly, Defendants' Motion for Summary Judgment is **DENIED** and Plaintiffs' Motion for Partial Summary Judgment is **AFFIRMED in part**.

It is so ORDERED.

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Restatement of the Law — Agency
Restatement (Second) of Agency
Current through August 2009

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Chapter 7. Liability Of Principal To Third Person; Torts
Topic 2. Liability For Authorized Conduct Or Conduct Incidental Thereto
Title B. Torts Of Servants
Who Is A Servant

§ 220. Definition Of Servant

Note: Agency Second has been superseded by Agency Third, which was adopted in 2005 and published in 2006.

[Link to Case Citations](#)

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;**
- (b) whether or not the one employed is engaged in a distinct occupation or business;**
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;**
- (d) the skill required in the particular occupation;**
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;**
- (f) the length of time for which the person is employed;**
- (g) the method of payment, whether by the time or by the job;**
- (h) whether or not the work is a part of the regular business of the employer;**
- (i) whether or not the parties believe they are creating the relation of master and servant; and**
- (j) whether the principal is or is not in business.**

Comment on Subsection (1):

a. Servants not performing manual labor. The word “servant” does not exclusively connote a person rendering manual labor, but one who performs continuous service for another and who, as to his physical movements, is subject to the control or to the right to control of the other as to the manner of performing the service. The word indicates the closeness of the relation between the one giving and the one receiving the service rather than the nature of the service or the importance of the one giving it. Thus, ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them. The rules for determining the liability of the employer for the conduct of both superior servants and the humblest employees are the same; the application differs with the extent and nature of their duties.

b. Non-contractual employment. The word “employed” as used in this Section is not intended to connote a contractual or business relation between the parties. In fact, as pointed out in Section 225, the relation may rest upon the most informal basis, as where the owner of a car invites a guest to drive the car temporarily in his presence or to

assist him in making minor repairs.

c. Generality of definition. The relation of master and servant is one not capable of exact definition. It is an important relation in that upon it depends the liability of the master to third persons and to his employees under the provisions of various statutes as well as under the common law; the relation may prevent liability, as in the case of the fellow servant rule. It cannot, however, be defined in general terms with substantial accuracy. The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. See Comment *g*. If the inference is clear that there is, or is not, a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.

d. Control or right to control. Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking. In other types of situations where an emergency creates peril to human lives, as in the case of a ship in a storm, a servant--in this case the captain--might properly refuse to be controlled by the ship owner and still cause his master to be liable for his negligence or other faulty conduct.

When two persons are engaged in a common undertaking, it may be understood that there is to be joint control, as where two men hire an automobile for a vacation trip, alternating in driving. On the other hand, two servants, directed to drive on their master's business and alternating in driving, do not agree to joint control, and one of them would not be liable to a person hurt by the negligent driving of the other.

Where the owner of a vehicle driven by a guest is in the vehicle, there is ordinarily an inference that he is in control, rebuttable only if he agrees with the guest to surrender complete control to him.

e. Independent contractors. It is important to distinguish between a servant and an agent who is not a servant, since ordinarily a principal is not liable for the incidental physical acts of negligence in the performance of duties committed by an agent who is not a servant. See § 250. One who is employed to make contracts may, however, be a servant. Thus, a shop girl is, and a traveling salesman may be, a servant and cause the employer to be liable for negligent injuries to a customer or for negligent driving while traveling to visit prospective customers. The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both "independent contractors" and do not cause the person for whom the enterprise is undertaken to be responsible, under the rule stated in Section 219.

Illustrations:

1. P employs A as a broker to sell Blackacre. A, while driving T, a prospective customer, to inspect the premises, negligently injures him. P is not liable to T.
2. The salesman of a real estate broker, while driving T, a prospective customer, to view a house, negligently injures him. The broker, but not the broker's principal, is subject to liability to T.
f. Subservants. A subservant is a servant of the servant who employed him and also of the master for the conduct of whose affairs he was employed. See § 5(2).

Comment on Subsection (1), continued:

g. Statutory interpretation. The word servant has retained its early significance in cases involving the liability of the master to third persons and the common law liability of master and servant. However, in statutes dealing with various aspects of the relation between the two parties, the word “employee” has largely displaced “servant”. In general, this word is synonymous with servant. Under the usual Employers' Liability Acts and the Workmen's Compensation Acts the tests given in this Section for the existence of the relation of master and servant are valid. Beyond this there is little uniformity of decision. Under the existing regulations and decisions involving the Federal Labor Relations Act, there is little, if any, distinction between employee and servant as here used. Under the federal and state wages and hours acts, the purpose of which is to raise wages and working conditions, persons working at home at piece rates and choosing their own time for work have been held to be employees, although clearly not servants as the word is herein used.

Comment on Subsection (2):

h. Factors indicating the relation of master and servant. The relation of master and servant is indicated by the following factors: an agreement for close supervision or de facto close supervision of the servant's work; work which does not require the services of one highly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a considerable period of time with regular hours; full time employment by one employer; employment in a specific area or over a fixed route; the fact that the work is part of the regular business of the employer; the fact that the community regards those doing such work as servants; the belief by the parties that there is a master and servant relation; an agreement that the work cannot be delegated.

i. Effect of custom. The custom of the community as to the control ordinarily exercised in a particular occupation is of importance. This, together with the skill which is required in the occupation, is often of almost conclusive weight. Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price. If, however, one furnishes unskilled workmen to do work for another, it is not abnormal to find that the workmen remain the servants of the one supplying them. See § 227. Even where skill is required, if the occupation is one which ordinarily is considered as a function of the regular members of the household staff or an incident of the business establishment of the employer, there is an inference that the actor is a servant. Thus, highly skilled cooks or gardeners, who resent and even contract against interference, are normally servants if regularly employed. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants. On the other hand, the question of the degree of skill requisite for the job is often determinative where the actor is employed temporarily to enter the household or establishment and render incidental assistance. Thus, one employing a laborer for a specific job is normally, as stated above, his master; whereas one engaging a plumber to repair a boiler is not, in the absence of a special arrangement for supervision. The fact that the state regulates the conduct of an employee through the operation of statutes requiring licenses or specific acts to be done or not to be done does not prevent the employer from having such control over the employee as to constitute him a servant.

Illustrations:

3. P, who knows little of social affairs, employs A as a social secretary to instruct P in her own department and the conduct of all social events, it being agreed that A is to live at P's home and to have complete management within her sphere. P is subject to liability for A's conduct within the scope of employment.⁴ P employs a woman to open his summer house. It is agreed that she is to come just before his arrival to clean it and put it in order. For this she is to receive thirty dollars. During her presence in the house, she is P's servant.

Comment on Subsection (2), continued:

j. Period of employment and method of payment. The time of employment and the method of payment are important. If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is to

be made by the job and not by the hour. If, however, the work is not skilled, or if the employer supplies the instrumentalities, the workman may be found to be a servant.

k. Ownership of instrumentalities. The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value.

Illustrations:

5. P employs A to drive him around town in A's automobile at \$4.00 per hour. The inference is that A is not P's servant. If P supplies the automobile, the inference is that A is P's servant for whose conduct within the scope of employment P is responsible. 6. P employs a salesman who agrees to give substantially his full time to the employment and who is furnished a car by the employer. On these facts it is inferred that he is a servant. 7. P employs a salesman who agrees to give full time to the work but furnishes his own car, is paid by commission and can call on those whom he pleases. It is inferred that the salesman is not P's servant.

Comment on Subsection (2), continued:

l. Control of the premises. If the work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner, and this inference is not necessarily rebutted by the fact that the workmen are paid by the amount of work performed or by the fact that they supply in part their own tools or even their assistants. If, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are servants of the person making the rules.

Illustrations:

8. P conducts a manufacturing establishment for the manufacture of woolen goods. Certain factory employees normally arrive at eight in the morning and leave at five in the afternoon, but are not required to work a fixed number of hours or during specified periods, provided they accomplish a specified amount of work during the week, for each unit of which they receive compensation. Such employees are servants. 9. P is the owner of a coal mine employing miners. He provides them with the larger units of machinery and the means of ingress and egress. The miners supply their own implements, the powder necessary, and their own helpers, being paid for each ton mined and brought to the surface. The miners, including the assistants, are the servants of the mine owner. The assistants are servants of the miners and subservants of the owner.

Comment on Subsection (2), continued:

m. Belief as to existence of relation. It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance.

Illustrations:

10. A, employed by a taxi company, is sent by P, his employer, to drive B from X to Y, and it is agreed between A, P, and B that for the purposes of the trip A is to be B's servant, although B is to exercise no more control over A's conduct than is normal in the ordinary case of passengers in taxicabs. A is not B's servant. 11. A is employed by P as resident cook for his household under an agreement in which P promises that he will in no way interfere with A's conduct in preparing the food. A is P's servant.