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NO. 66956-7-I

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

ANDREW FIORE,

Respondent,

v.

PPG INDUSTRIES, INC., a Pennsylvania Corporation,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 15 AM 10: 51

BRIEF OF RESPONDENT

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INTRODUCTION

PPG's opening brief could effectively be used as a motivational pamphlet for a paint-sales seminar: "Sell, sell, sell!" But it is well settled that retail sales workers like Fiore are not administratively exempt. Re-labeling their work as "promoting sales" – a term of art meaning work directly related to management policies or general business operations to increase sales *generally* – cannot promote them into an administrative position. Otherwise, every retail salesperson in the Country would be exempt. The trial court properly granted summary judgment here.

PPG's other claims are equally incorrect. PPG willfully (*i.e.*, knowingly) misclassified Fiore, but failed to establish a bona fide dispute because its "promoting sales" argument is not fairly debatable. PPG's "half time" method is the "fluctuating workweek" method for calculating overtime, which does not apply here because the parties had no clear mutual understanding that Fiore's salary compensated him for all hours worked – no matter how unreasonable. Again, the trial court was correct.

Finally, the trial court properly awarded fees to Fiore under the statutes, and the amounts are reasonable in response to the oppressive litigation tactics PPG used in this national test case.

STATEMENT OF THE CASE[1]

A. PPG's three-member Management Team sets policy and procedure for PPG's National Lowe's Sales Team, and its 12 Regional Sales Managers then give directions to its 167 Territory Managers (TMs or Regional Sales Representatives) who do retail sales.

PPG Industries, Inc. produces Olympic-brand paint, stains and finishes. CP 906. It has a comprehensive agreement to sell its products at Lowe's, a national retailer. CP 1432-33. PPG therefore has a Lowe's National Olympic Field Sales Team ("Sales Team") consisting of a three-member "Management Team," 12 Regional Sales Managers, and 167 Territory Managers (TMs). CP 357, 526. This Sales Team is dedicated exclusively to selling Olympic products at Lowe's. CP 1712-13.

The Management Team consists of (1) PPG's North American Field Operations Manager – Lowe's Account, Kyle Gube, who lives in Chicago and reports directly to (2) PPG's North American Field Sales Manager-Lowe's, Sherry Calhoun, who lives in California and reports directly to (3) PPG's North American Sales Manager – Lowe's, Rick Russell, who lives in North Carolina (or to Chris Kiral, who replaced Russell). CP 357, 662-63. The Management Team creates, implements and disseminates 100% of

[1] The detailed facts relevant to each issue are discussed *infra*. This Statement identifies the players and provides a brief summary of the case.

the policies and procedures governing the Sales Team. CP 359, 390-443 (TM policy & training manuals), 663-65.

Below the 12 Regional Sales Managers – at the bottom rung of the Sales Team – are the 167 TMs; PPG still calls them Retail or Field Sales Representatives, former titles for the same job. CP 357, 526, 579, 582. PPG states their responsibilities as

(1) training Lowe's sales associates to sell product,
(2) selling product to retail customers,
(3) selling product to contractors, and
(4) servicing product.

CP 528. As one Regional Manager put it, "We're selling product and promoting product." CP 1051. Calhoun and PPG describe the TM position as manual labor with no light-duty component and hazardous. CP 445, 469-72, 614-16.

PPG also admitted the following undisputed facts showing that TMs just follow directions:

- TMs do not formulate management policies or operational procedures for PPG or Lowe's;
- TMs do not participate in planning long- or short-term business objectives for PPG or Lowe's;
- TMs do not develop pricing strategies or monitor trends for new product development for PPG or Lowe's;
- TMs do not develop budgets for PPG or Lowe's;
- TMs may not bind PPG or Lowe's on significant matters;
- TMs may not sign contracts for PPG or Lowe's;

- TMs do not develop or direct advertising campaigns or place advertisements generally for PPG or Lowe's;
- TMs must obtain permission to deviate from official product display strategies from PPG and Lowe's;
- TMs may not mark-down prices;
- TMs may not waive or deviate from established policies and procedures without prior approval.

CP 548-60, 566-69, 571, 573-77 (Calhoun); CP 640, 643-57 (PPG Field Operations Manager Grube).

B. In 2009, PPG hired Andrew Fiore as a TM, but failed to pay him overtime wages.

PPG hired Andrew Fiore as a TM on February 18, 2009. CP 314. Fiore had a B.A. in Cultural Anthropology, and no prior marketing or advertising experience. CP 314. PPG assigned Fiore to Region 10, servicing nine Lowe's stores in Washington and two in Oregon. CP 314, 1713, 1715. It told Fiore to service two stores a day, for eight hours of in-store time per day. CP 314, 362, 370, 485. Fiore had to service each store at least three times a month. CP 362, 370, 485. PPG tracked Fiore's time on the Lowe's time-tracking system, where he was required to clock in and out. CP 362, 370, 570, 860.

Fiore spent many hours driving to, from, and between the stores. CP 314-15. PPG did not pay him for drive time. CP 315. He also had to load, transport, and unload merchandising items

and display materials. CP 315. He was required to set up a sign announcing his presence and to wear a vendor bib over clothing PPG provided. CP 318.

After servicing two stores, Fiore returned home, or to his hotel, to review and respond to emails and voicemail directives from PPG management. CP 319. He also accessed "The Torch" (CP 375-89) – PPG's intranet "main pipeline of information from management" (CP 379). *Id.* PPG also required Fiore to submit various reports to his regional manager, including weekly tracking reports, a monthly letter, and expense reports. *Id.* PPG did not compensate Fiore for any of this time. *Id.*

C. <u>Procedure</u>: The trial court ruled that PPG willfully withheld Fiore's overtime pay.

Fiore sued PPG for the unpaid overtime. CP 1-6, 255-61.[2] PPG claimed that Fiore was administratively exempt. CP 746-66. On cross-motions for summary judgment, the parties agreed that there were no genuine issues of material fact and that the court should decide this issue as a matter of law. RP 21-22. The trial court ruled that Fiore was not an administrative employee and that PPG could not use the fluctuating-workweek method to calculate

[2] PPG repeatedly references the arbitrator's decision, which is improper. *See* accompanying Motion to Strike References to Arbitrator's Decision.

the amount of back overtime it owed to Fiore. CP 1737-39. The court determined that disputed issues of fact remained on whether PPG willfully withheld the overtime and how much overtime PPG owed to Fiore. CP 1738-39.

The parties then jointly asked the court to decide willfulness. CP 2039. On cross-motions, the trial court ruled that PPG willfully withheld Fiore's overtime pay. CP 2039-42. The parties then stipulated that Fiore's overtime pay was $12,203.10, which the court doubled due to its willfulness finding. CP 2043-44, 2047-48.

Fiore requested statutory attorney fees, including a .5 multiplier for the risks he faced in seeking a trial de novo. CP 2070-74. Entering detailed written findings of fact and conclusions of law, the trial court awarded Fiore $579,947 in reasonable attorney fees largely due to PPG's excessive litigation tactics, including a .25 multiplier for Fiore's risk. CP 2507-12 (attached).

SUMMARY OF ARGUMENT

PPG argues both that there are no genuine issues of material fact and that there are. BA 3. Below, PPG agreed that no genuine issues exist. RP 21. To win summary judgment here, PPG must show that – taking the facts in the light most favorable to Fiore – there are no genuine issues of material fact and it is entitled

to summary judgment as a matter of law. CR 56(c). PPG fails to even address the facts most favorable to Fiore, so it is not entitled to summary judgment. It cannot do this for the first time in a reply, so it cannot achieve summary judgment here. ***Cowiche Canyon Conserv. v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

On the other hand, PPG's brief sets forth a highly argumentative version of the facts slanted strongly in its favor. Accepting PPG's version of the facts (and its own admissions) PPG has failed to prove that the exemption "plainly and unmistakably" applies. *See, e.g.*, ***Tift v. Prof'l Nursing Servs., Inc.***, 76 Wn. App. 577, 582-83, 886 P.2d 1158 (1995). The claimed exemption is strictly construed against the employer. *Id.*; ***Bothell v. Phase Metrics, Inc.***, 299 F.3d 1120, 1125 (9th Cir. 2002). Fiore was thus entitled to summary judgment as a matter of law.

PPG also willfully denied Fiore overtime. "Willfully" simply means knowingly. PPG's Calhoun admitted that PPG repeatedly discussed the issue. PPG acted willfully in misclassifying TMs to deprive them of overtime. Double damages were appropriate.

The fluctuating-workweek method of calculating overtime applies only when (1) the parties have a clear mutual understanding that the salary encompasses all hours worked, and

(2) the overtime is paid contemporaneously. Neither occurred here. The trial court correctly rejected the fluctuating-workweek method.

The court also acted within its discretion in entering detailed findings awarding Fiore his statutory attorney fees and costs.

ARGUMENT

A. Review is *de novo*.

The Court reviews summary judgments *de novo*. ***Schilling v. Radio Holdings, Inc.***, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). "A summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Dowler v. Clover Park Sch. Dist. No. 400***, 2011 Wash. LEXIS 663 *17 (Aug. 25, 2011); ***Wilson v. Steinbach***, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); CR 56(c). A material fact is one on which the outcome of the litigation depends. ***Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.***, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). There is no genuine issue of material fact where, as here, PPG failed to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." ***Hiatt v. Walker Chevrolet Co.***, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

B. PPG fails to establish "plainly and unmistakably" the "absolute" requirements of the administrative exemption, so summary judgment is appropriate here.

Employers must pay nonexempt employees time-and-a-half for overtime. RCW 49.46.130. Washington regulations explain that an "administrative" exemption applies to (1) salaried workers[3] (2) whose primary duty is office or non-manual labor (3) directly related to management policies or general business operations and (4) requires discretion and independent judgment. WAC 296-128-520(4)(b) (the applicable "short test") (copy attached). "'The criteria provided by regulations are absolute,'" and the employer must prove that the "'employee meets every requirement before the employee will be deprived of the protection of the Act.'" ***Bothell***, 299 F.3d at 1125 (quoting ***Mitchell v. Williams***, 420 F.2d 67, 69 (8th Cir. 1969)). The exemption must "plainly and unmistakably" apply.[4] ***Tift***, 76 Wn. App. at 582-83.

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[3] Fiore conceded this element. CP 1135.

[4] On August 23, 2004, the U.S. Department of Labor revised its regulations explaining the administrative exemption. *See* Wash. State Dept. of Labor & Indus., *Exemption from Minimum Wage and Overtime Requirements for Administrative Positions*, at 1 (June 24, 2005) ("ES.A.9.4") (copy attached, CP 1127-34); 29 C.F.R. § 541.200-203. But Washington's exemption has not changed. ES.A.9.4 at 1. Before the changes, state and federal regulations had many identical provisions. *Id.* at 2. L & I relies on interpretations of the pre-August 23, 2004 regulations, where identical. *Id.* at 2. Where differences exist between the state and federal regulations, **an employer must follow the regulation that is most favorable to the worker**. *Id.* at 1.

Summary judgment is appropriate where, as here, an employer claims the administrative exemption for a sales representative who undisputedly handled individual sales and had no management or general business-operations authority. ***Turcotte v. Renton Coil Spring Co.***, 2008 U.S. Dist. LEXIS 80086 (W.D. Wash.). There, as here, the parties agreed that there were no genuine issues of material fact and that the court should decide the exemption issue as a matter of law. ***Turcotte***, at *2 n.1; RP 21 (specifically in reference to ***Turcotte***, PPG agrees that the trial judge should decide this case on summary judgment); 22 (Fiore also agrees). There, as here, summary judgment was appropriate.

In ***Turcotte***, Judge Robart granted summary judgment to a sales representative who had much more authority than PPG even claims Fiore had. For instance, Turcotte was hired to promote and sell products by contacting customers, independently attending trade shows and setting up booths, issuing press releases, and even maintaining consistency in product advertising. ***Turcotte*** at *3-4. Although the employer argued that the employee had "input" on administrative-level decisions, her daily activity – like Fiore's – was vastly dominated by retail sales, not by working in the

marketing division or other administrative-level department. *Id.* at *13. ***Turcotte*** disposes of PPG's claims.

1. Fiore's primary duty was not office or non-manual labor: he did manual labor and retail sales at Lowe's.

The administrative exemption solely applies to employees whose primary duty is office or non-manual work. Fiore plainly did not do office work: he had no office in any Lowe's store, no desk, chair, computer, email or internet access. CP 318. Even PPG does not claim that Fiore did office work.

That leaves non-manual labor. Whether a duty is primary depends on all the facts in the particular case, but 50% of the employee's work time is a good general rule. ES.A.9.4, at 3. Federal regulations add that the term "means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). Pertinent factors may include the relative importance of various duties, whether (and how much) time is dedicated to allegedly exempt work, whether the employee is free from supervision, and how the employee's salary compares to other employees' salaries. *Id.*; ES.A.9.4 at 3.

PPG's mantra is that Fiore "promote[d] sales" instead of performing manual labor. *E.g.*, BA 8. The two are not, of course,

mutually exclusive. *See, e.g.*, CP 318 (Fiore did 90% to 95% manual labor, 3% to 8% selling, and 1% to 2% talking to Lowe's employees or managers). While an exempt employee may perform some manual labor, "if the employee performs so much manual work . . . that he or she cannot be said to be basically a white-collar employee, he or she does not qualify for [the administrative] exemption." ES.A.9.4 at 4. This includes employees like Fiore who spend most of their time "using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required." *Id.* For instance, it is undisputed that Fiore used hammers, mallets, crow bars, wrenches, and screwdrivers to assemble or dismantle displays. CP 318. Even heavy machinery and automatic tools came into play. *Id.* PPG itself considered his job manual labor with no light-duty component and hazardous. CP 445, 469-72, 614, 615-16.

Fiore routinely had to carry product weighing from 10 to 75 pounds, sometimes up and down ladders. CP 653-57. A 10 lb. weight restriction would prevent Fiore from doing 90% of this job. CP 447. PPG's own checklist of physical requirements says Fiore would spend 61% to 100% of his day reaching above or below his shoulders, doing repetitive motion, climbing up and down stairs or

ladders, and lifting between 1 and 50 lb. CP 444. Another 26% to 60% of his day involved walking, bending or stooping, twisting, kneeling, crouching, crawling, and carrying up to 100 lb. *Id.*

Unable to dispute its own job descriptions, PPG instead claims that what matters here are only those functions PPG deems valuable. BA 17-25. But "prior to undertaking the 'principal value' analysis they urge, the Court must first determine, as a threshold matter, that Plaintiff is a 'white-collar' employee eligible for the bona fide administrative employee exemption." ***Tanner v. Emma Bixby Med. Ctr.***, 1998 U.S. Dist. LEXIS 21127 *11-12 (E.D. Mich. 1998). The regulations restrict the administrative exemption to white-collar employees. *Id.* at *12. They are interpreted strictly in Fiore's favor. ***Tift***, 76 Wn. App. at 582; ***Bothell***, 299 F.3d at 1125.

Again, PPG's own documents show that Fiore did a lot more manual labor than simply replenishing a chip rack or occasionally down-stocking product, as PPG implies. BA 17. In addition to those tasks, the undisputed evidence PPG produced confirms that Fiore completed the following manual-labor tasks:

- building, maintaining, and replenishing in-aisle displays and end-caps, including lifting one-gallon cans of paint, four-gallon boxes of paint, and five-gallon buckets of paint, all weighing between 10 and 75 lbs.; and climbing, bending, kneeling and stooping (CP 414, 447-55, 491, 648-57);

- building stack-outs and displays (CP 1047);
- assisting with resets, including moving shelves and large amounts of product (CP 476, 660-61);
- maintaining Olympic computer/tinting equipment and mixing paint for customers (CP 413, 646);
- maintaining the Olympic chip racks, organizing over 1200 colors, and maintenance (CP 475, 645-46, 1574).

As Fiore put it, by the time he was finished with his manual labor, there was little time left for "build[ing] relationships." CP 317-18.

Nothing PPG cites or argues contradicts the evidence cited above from its own manuals and management employees. PPG does not dispute the facts, but rather attempts to re-characterize the legal definitions of administrative employees and "promoting sales."[5] The meanings of those terms are plainly legal questions.

The closest PPG came to disputing the facts was in submitting Calhoun's declaration in reply on PPG's summary judgment motion, where she directly contradicted her earlier deposition admission that Fiore spent 90% to 95% of his work day doing manual labor. *Compare* CP 633 (Calhoun Dep.):

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[5] PPG simply misconstrues regulations and case law that an employee who "engages in marketing activity for purposes of promoting . . . customer sales *generally*" satisfies the third element ("directly related to management policies or general business operations"). ES.A.9.4 at 4; ***Reich v. John Alden Life Ins. Co.***, 126 F.3d 1, 10 (1st Cir. 1997). As discussed below, PPG's own facts show that Fiore did no marketing to promote sales *generally*; he did extensive manual labor and retail sales at Lowe's. Such employees are not administrators because their work is not directly related to management policies or general business operations. *See, e.g.*, ***Turcotte***, *supra*; ***Martin v. Cooper Elec. Supply Co.***, 940 F.2d 896, 903-05 (3d Cir. 1991), *infra*.

Q. . . . we identified a number of duties that entail manual labor, right?

A. Yes.

Q. I don't need to go through all the guard stocking, and building endcaps, and carrying paint from one place to the other . . . It's a lot of those duties you recognize as manual labor, correct?

A. Yes.

Q. And as Mr. Fiore, he says that he spent at least 90 or 95 percent of his time, actually, performing manual labor in the stores.

You don't dispute that, correct?

A. No.

with CP 1735 (Calhoun Reply Decl.):

> In answering "No" to that question, I was not agreeing or admitting that Mr. Fiore actually spent 90 to 95 percent of his time in the Lowe's stores performing manual labor.

But a party may not dispute her own sworn testimony to create a genuine issue of material fact:

> When a party has given clear answers to unambiguous questions that negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. ***Marshall v. AC&S, Inc.***, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

Ramos v. Arnold, 141 Wn. App. 11, 19, 169 P.3d 482 (2007). Under ***Marshall*** and ***Ramos***, PPG could not use Calhoun's declaration to stave off summary judgment. PPG's own documents show that Fiore spent 90% to 95% of his time doing manual labor, so his primary duty was non-office, manual labor.

PPG's Achilles' Heel is its flawed premise that the amount of time Fiore spends on each work duty is irrelevant. BA 23-24. Relying on that flawed premise, PPG fails to establish how much of his day Fiore spent doing allegedly non-manual, administrative work. But a worker who spends most of his time manually laboring is not an administrative employee. ES.A.9.4 at 4; ***Saver v. Hyatt Corp.***, 407 So.2d 228, 229 (Fl. Dist. Ct. App. 1981).

Yet PPG argues that the administrative exemption can apply, even if "90%" of Fiore's job was manual labor. BA 23-24 & n.8. PPG's cases[6] do not support its assertions. ***Baldwin*** and ***Kastor*** are inapposite because they address the executive exemption. ***Baldwin***, 266 F.3d at 1112; ***Kastor***, 131 F.Supp.2d at 869 n.5. Whether the employee performs office or non-manual labor is not an element of the executive-exemption analysis. *Contrast* WAC 296-128-510 *from* WAC 296-128-520. Instead, an executive must perform managerial duties, which may include non-office, manual labor. WAC 296-128-510. ***Baldwin*** and ***Kastor*** analyze the wrong exemption.

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[6] ***Baldwin v. Trailer Inns, Inc.***, 266 F.3d 1104 (9th Cir. 2001); ***Kastor v. Sam's Wholesale Club***, 131 F.Supp.2d 862, 866 (N.D. Tex. 2001); ***Dambreville v. City of Boston***, 945 F. Supp. 384, 392-95 (D. Mass. 1996); ***Austin v. CUNA Mutual Ins. Soc'y***, 240 F.R.D. 420, 429 (W.D. Wisc. 2006); and ***Johnson v. Home Team Prod., Inc.***, 2004 U.S. Dist. LEXIS 13251 (E.D. La. 2004).

In *dictum*, ***Austin*** says duties "of principal importance to the employer" may be considered primary "even though they occupy less than fifty percent of the employee's time." 240 F.R.D. at 429. But ***Austin*** never held that the plaintiff's primary duties occupied less than fifty percent of her time. *Id.* Also, the plaintiff did not even claim to do manual labor. *Id.*

Austin actually supports Fiore: the court "looks at the actual day-to-day job activities of the employee, not the labels the employee or the employer places on those duties." *Id.* While PPG re-labels Fiore's work as "promoting sales," day-to-day Fiore performed manual labor and retail sales. ***Austin*** does not hold that the amount of time Fiore spent performing non-administrative manual labor is irrelevant, nor could it.

Johnson found an executive exemption. 2004 U.S. Dist. LEXIS, at *12-13, 26. It then summarily held that the employer therefore met the administrative-duties test. *Id.* at *28-30. ***Johnson*** elides the important distinction between the administrative exemption, which requires office or non-manual labor, and the executive exemption, which does not. ***Johnson*** is inapposite and unhelpful.

In ***Dambreville***, the parties agreed that the employee did almost entirely office work. 945 F.Supp. at 391. The court did not analyze whether this job involved so much manual labor that it could not be considered white-collar. ***Dambreville*** is inapposite.

In sum, since PPG has failed to prove the white-collar element, it cannot prove that Fiore was an exempt employee. The Court can end its analysis here and affirm the summary judgment on this basis alone. *See, e.g.*, ***Bratt v. Cnty. of Los Angeles***, 912 F.2d 1066, 1071 (9th Cir 2000).

2. Fiore's non-office, manual labor was not "directly related to management policies or general business operations" of PPG or Lowe's.

Since PPG has not established that Fiore did office or non-manual labor, it cannot establish that he did office or non-manual labor directly related to management policies or general business operations, the third element. But assuming *arguendo* that the Court will reach this element, PPG cannot establish that anything Fiore did was directly related to management policies or general business operations at PPG or Lowe's. The Court should affirm.

The administrative exemption includes those who "participate in the formulation of management policies, or in the operation of the business as a whole, and includes those whose

work affects policy or whose work is to execute and carry the policy out." ES.A.9.4 at 4-5. Examples include consultants, experts, analysts, marketers, and promoters. *Id.* at 5. This also includes employees who affect business operations to a substantial degree. *Id.* While it is difficult to define when work is of substantial importance to management or business operations, employees who hold "run-of-the-mill positions are not performing work directly related to management policies or general business operations." *Id.* For instance, employees operating expensive office equipment could cause serious loss to the employer, but they are not performing work of substantial importance to management policies or general business operations. *Id.*

Under Washington's regulations, the phrase "directly related to management policies or general business operations" describes activities "relating to the administrative operations of a business ***as distinguished from*** production or . . . sales work in a retail or service establishment." ES.A.9.4 at 4 (emphasis added). Salespeople are generally considered production employees because they "engage in activities relating to the day-to-day production of sales within the plain meaning of the regulation rather than the administrative operation of a business." ***Martin***, 940 F.2d

at 903 (internal quotes omitted). The federal regulations also explain that an employee is nonexempt when "selling a product in a retail or service establishment." 29 C.F.R. § 541.201.

By contrast, administrative employees engage in "'running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of the business' affairs." ***Bothell***, 299 F.3d at 1125; *accord* ***Bratt***, 912 F.2d at 1070. Business administrative operations include "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 69 Fed. Reg. 22122, 22138 (April 23, 2004). In this context, "promoting sales" means "marketing activity aimed at promoting (*i.e.*, increasing, developing, facilitating and/or maintaining) customer sales *generally*." ***Martin,*** 940 F.2d at 905; ***Reiseck v. Universal Commc'ns of Miami, Inc.***, 591 F.3d 101, 106-07 (2d Cir. 2010). It does not include activities necessary to closing specific sales. *Id.* Otherwise, "any sales clerk in a retail store would 'promote sales' when assisting potential customers." ***Reiseck***, 591 F.3d at 106-07.

Fiore was not involved in management policy or general business. TMs took no role in negotiating PPG's comprehensive agreement with Lowe's. CP 357, 580-81. TMs do not advise or

consult on formulating or implementing management policies or general business operations. CP 576-77. PPG's Management Team makes those decisions. CP 359. TMs also do not advise or consult Lowe's on matters of significance. CP 576-77.

Having no evidence that Fiore participated in formulating, creating, or enacting the PPG or Lowe's management policies or general business operations, and no evidence that Fiore was involved in the PPG or Lowe's advertising or marketing departments, PPG instead claims that Fiore satisfied this element by "promoting sales." BA 15-17. Yet none of its facts show that Fiore "promoted sales" in a manner that is legally relevant. Fiore did not "promote sales" for PPG or Lowe's *generally*; he handled retail sales, not administrative duties. *See* ***Martin***, 940 F.2d at 905; ***Reiseck***, 591 F.3d at 106-07.

PPG nonetheless contends that Fiore "promote[d] sales" by (a) training Lowe's personnel, (b) making retails sales, (c) placing product, (d) talking to customers, and (e) "building relationships." BA 7-15. These facts show that Fiore worked in retail sales. He was not engaged in marketing activity to increase sales *generally*.

PPG submits several more immaterial facts in its attempt to redefine "promoting sales." BA 17-23. First, Fiore attending

various meetings and trainings does not show that Fiore was part of PPG's administrative or marketing departments working to improve sales generally. BA 18-20. It rather shows that PPG trained Fiore to make retail sales. Second, Fiore promoting the Olympic brand while performing manual labor and talking to Lowe's associates and customers is just sales work. BA 20. Third, Fiore explaining in his monthly letters to Regional Manager Webb that his goals were to build relationships; gain stackouts, end caps, and other displays; train associates; and gain exposure in the stores for interior paint; all show Fiore's ability to parrot PPG's sales strategies for Lowe's stores. BA 20-21. This is not creating a PPG or Lowe's marketing campaign on an administrative level. Finally, that PPG's bonuses were not based on his many manual-labor tasks suggests that PPG viewed Fiore's primary duty as retail sales. BA 22. Again, selling is not administrating.

In sum, PPG presents no facts showing that Fiore was involved in forming management policies, running business operations, or promoting sales generally. Rather, PPG's own evidence demonstrates that Fiore was a paint-product salesman. Fiore did not spend his time administering management policies or general business operations. He was not an exempt employee.

3. Fiore's primary duty did not require the exercise of discretion and independent judgment.

An exempt employee's primary duty of office or non-manual work directly related to management policies or general business operations must also require his exercise of discretion and independent judgment. WAC 296-128-520(4)(b). Again, since PPG can establish neither prior requirement (office or non-manual work nor directly related) the Court need not address this element. If it does, PPG again fails to provide material evidence.

Discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." ES.A.9.4 at 5. The employee must have "authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." *Id.* Simply using skill by "applying techniques, procedures or specific standards" is not an exercise of discretion and independent judgment. *Id.* at 6. Work requiring discretion and independent judgment "is work that is not ordinary or routine in nature." *Id.* at 8.

Where, as here, an employee makes $250 or more per week, the primary duty must require the occasional exercise

discretion and independent judgment. WAC 296-128-520(4)(b); 69 Fed. Reg. 22122, 22142. Relevant factors include (a) whether the employee carries out major assignments in operating the business, (b) whether the employee may commit the employer on matters of significance, (c) whether the employee may deviate from established policies and procedures without prior approval, and (d) whether the employee provides consultation or expert advice to management. 29 C.F.R. § 541.202(a).

Fiore exercised no discretion or independent judgment on matters of significance. *See, e.g.*, ***In re Novartis Wage & Hour Litig.***, 611 F.3d 141 (2nd Cir. 2010), *cert. denied sub nom.* ***Novartis Phrams. Corp. v. Lopes***, 131 S. Ct. 1568 (2011). In ***Novartis***, the plaintiffs were pharmaceutical representatives (reps) who went to doctors' offices to talk about various drugs. *Id.* at 144-46. The undisputed facts were that the reps (1) had to adhere to Novartis's "core messages," but not participate in marketing strategy; (2) had to visit a given doctor and promote a given drug a certain number of times per trimester; (3) had to hold promotional events; and (4) had to answer questions only as scripted. *Id.* at 157.

Novartis argued that the reps exercised discretion by deciding in what order to visit the doctors, how to gain access, how

to allocate their budget for promotional events, and how to allocate their promotional samples. *Id.* Rejecting these arguments, the Second Circuit held that Novartis's controls on the reps meant that they did not exercise discretion and independent judgment. *Id.*

Similarly here, the undisputed facts show that Fiore had no role in planning PPG's marketing or formulating PPG's core message. CP 551, 566. PPG required Fiore to visit each store a certain number of times per month and to sell a certain amount of paint. CP 316, 487, 1505. Like in ***Novartis***, Fiore could not deviate from PPG or Lowe's policies without permission. CP 573-74, 576. Like the reps in ***Novartis***, Fiore did not exercise discretion or independent judgment.

Also like in ***Novartis***, PPG argues that Fiore exercised discretion and independent judgment by deciding how to allocate his time (BA 28), how to approach Lowe's managers and contractors (BA 25-28), what events to attend (BA 27), and how to develop sales strategies (BA 25-30). But as in ***Novartis***, PPG's controls dictated the outcomes. 611 F.3d at 157. For instance, it is undisputed that Fiore could not deviate from policy or add promotional displays without approval from a Lowe's store manager. CP 359, 566, 573-74, 576, 1472. Any "creative" ideas

(BA 26-28) also had to be approved. CP 566, 1472. And while PPG asserts that TMs had discretion to allocate their time (BA 28-29), PPG undisputedly required Fiore to visit two stores a day for eight hours total. CP 314, 362. It required him to clock in and out. CP 362, 370, 485. It required him to complete a punch list at each store and to have a Lowe's manager sign-off on it. CP 515-17. Fiore was never free from supervision.

PPG similarly asserts that TMs reviewed sales numbers and developed strategies to "promote sales." BA 29. But Fiore just had access to Lowe's sales numbers and could only regurgitate them to store managers. CP 1029-30. Lowe's decided what to do about its numbers. CP 1013, 1080.

PPG makes additional immaterial assertions. It argues that TMs exercise discretion and independent judgment by assessing the "personalities" of the stores and developing a plan on how best to promote sales at each store. BA 26. It argues that TMs do this by determining what will persuade store managers to allow additional end caps or stack outs, how and what to train on, what events to hold, what products to drive, and how to encourage Lowe's associates to sell Olympic. BA 27. PPG also cites Fiore's monthly letters, where he "analyzed sales volume by product, and

based on that analysis he developed specific goals and determined what strategies to utilize." BA 29-30. But as PPG admits, Fiore had to report "his" "strategies" and "goals" to management. BA 29-30. Fiore had no authority to decide whether to do any of these things. PPG's controls dictated the outcomes.

Moreover, PPG presents no evidence showing that Fiore's alleged "decisions" were on matters of significance to PPG or Lowe's. Instead, without explanation, PPG compares Fiore to a marketing representative, arguing that "the work of the marketing representatives is critically important" to the success of the employer's business. BA 30 (citing ***John Alden***, 126 F.3d at 11; ***Hines v. Longwood Events, Inc.***, 2010 U.S. Dist. LEXIS 62259 *7, 24 (D. Mass. 2010)). But as PPG admitted, Fiore was not a marketing representative. CP 666-67.

In any event, PPG's cited cases are inapposite. In ***John Alden***, insurance marketing representatives (IMRs) provided information to insurance agents about the company's many products. 126 F.3d at 4. The First Circuit held that IMRs exercised discretion and independent judgment by choosing agents to contact, tailoring proposals to each agent, and evaluating and distinguishing other products from John Alden's products. *Id.* at 13.

Unlike here, ***John Alden*** involved insurance agents, whom federal regulations make generally administratively exempt (along with workers in the financial services industry). 29 C.F.R. § 541.203. And unlike in ***John Alden***, Fiore did not have many products to push to diverse insurance agents, who in turn sold them to many individual customers. Fiore just sold Olympic product to Lowe's customers. ***John Alden*** is inapposite.

Hines is also distinguishable. There, sales managers sold, planned, and advised clients on holding events at their employer's venues. ***Hines***, at *3-8. The managers convinced clients to host events, finalized the contracts using multiple variables, and could even execute contracts with supervisor approval. *Id.* at *9. The managers then worked closely with their clients to plan details, execute the event, and manage expectations. *Id.* at *9-10. The ***Hines*** court ruled that the managers exercised discretion and independent judgment on major assignments. *Id.* at *24.

But here, PPG presented no evidence (and there is none) that Fiore negotiated contractual agreements between PPG and Lowe's or that Fiore worked closely with the Lowe's management's needs. CP 357, 575-77, 580-81. He sold product to Lowe's customers. CP 316, 487. ***Hines*** is inapposite.

In conclusion, PPG utterly failed to establish that Fiore's primary duty was office or non-manual work directly related to management or general business operations and requiring the exercise of discretion and independent judgment. The trial court correctly granted summary judgment. This Court should affirm.

C. PPG willfully withheld Fiore's overtime pay.

PPG briefly raises three arguments challenging the trial court's ruling that it willfully withheld Fiore's overtime wages: (1) that the trial court improperly shifted the burden to PPG; (2) that a *bona fide* dispute existed; and (3) that the trial court made an adverse inference against PPG based on its assertion of the attorney-client privilege. BA 34-37. PPG's arguments are wrong on the facts and the law.

An employer may not withhold wages. RCW 49.52.050. Willful violations authorize double damages. RCW 49.52.070. Courts liberally construe the statutes to ensure payment. ***Ellerman v. Centerpoint Prepress, Inc.***, 143 Wn.2d 514, 520, 22 P.3d 795 (2001). The willfulness test thus is not stringent: the "'person knows what he is doing, intends to do what he is doing, and is a free agent.'" ***Schilling***, 136 Wn.2d at 159-60 (quoting ***Brandt v. Impero***, 1 Wn. App. 678, 681, 463 P.2d 197 (1969)).

At the outset, PPG mischaracterizes the trial court's ruling, claiming that the trial court placed the burden on PPG to prove that it did not willfully violate the Act. BA 34-35. The trial court instead ruled that PPG had to prove that there was a bona fide dispute, not that PPG had to prove it did not act willfully. CP 2040-41.

Fiore met his burden to prove that PPG willfully withheld his pay. Both Calhoun and Balest admitted to meetings discussing the matter. CP 1896-97, 1909-24. Calhoun even testified that the meetings occurred in response to lawsuits. CP 1897. The trial court correctly determined that PPG acted willfully. ***Brandt***, 1 Wn. App. at 681 (knowing and intentional action is enough).

While Fiore met his burden, PPG had to prove a bona fide dispute sufficient to negate the willfulness finding. *Cf.*, ***Schilling***, 136 Wn.2d at 161-63, 165 (bona fide dispute "over the obligation to pay or the amount of the wages may effectively negate the necessary statutory willfulness"); ***Ebling v. Gove's Cove, Inc.***, 34 Wn. App. 495, 501-02, 663 P.2d 132 (1983) (trial court "correctly concluded that the dispute was insufficient to remove" the employer's nonpayment of wages "from the sanctions imposed by RCW 49.52.050(2) and 49.52.070"); ***Flower v. T.R.A. Indus., Inc.***, 127 Wn. App. 13, 36-37, 111 P.3d 1192 (2005) (employer's

"implausible rationale for its failure to pay [the employee's] signing bonus supports a finding that there is substantial evidence of its willful and intentional deprivation of this payment").

Federal case law goes even further, holding that the employer must prove it acted in good faith. *See, e.g.*, ***Martin***, 940 F.21d at 910 (employer must demonstrate that legal uncertainty pervaded and markedly influenced the employer's belief); ***Reich v. S. New Eng. Telcomms. Corp.***, 121 F.3d 58, 71-72 (2nd Cir. 1997) (employer must show that it acted in good faith to ascertain the law, but nonetheless violated its provisions). Under state and federal law, PPG bore the burden to prove a bona fide dispute.

PPG failed to meet this burden. PPG declined to present facts showing what it considered when determining that TMs are exempt. CP 1948-49. It instead improperly asserted that the underlying facts were protected by the attorney-client privilege. BA 36; CP 1221-22; *but see* ***Wright v. Group Health Hosp.***, 103 Wn.2d 192, 195, 691 P.2d 564 (1984) (privilege "extends only to protect communications and not the underlying facts"; *citing* ***Upjohn Co. v. United States***, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). Moreover, as discussed at length above, the

administrative exemption is not fairly debatable. PPG's refusal to acknowledge the undisputed facts is willful, even in this Court.

PPG argues that its state of mind is irrelevant. BA 35-36.[7] PPG's cases either contradict PPG's argument or are inapposite. For instance, ***Schilling*** found willfulness when the employer admitted that it could not pay overtime because of its financial condition. 136 Wn.2d at 160-65. ***Schilling*** contradicts PPG.

Moran also contradicts PPG, holding that a bona fide dispute existed because the compensation denial was based on a collective bargaining agreement and county ordinances, the employees' failure to exhaust remedies, and the statute of limitations. 45 Wn. App. at 81. The Court thus examined the employer's state of mind in relying on these reasons.

Wingert is inapposite. The Court there remanded for a trial on willfulness, where the employees were fully paid for all hours worked, but the employer failed to properly pay break time. 146 Wn.2d at 850-51. ***Wingert*** does not support PPG.[8]

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[7] Citing ***Wingert v. Yellow Freight Sys., Inc.***, 146 Wn.2d 841, 849, 50 P.3d 256 (2002); ***Schilling***, 136 Wn.2d at 161-62; ***Cannon v. City of Moses Lake***, 35 Wn. App. 120, 125, 663 P.2d 865 (1983); and ***Moran v. Stowell***, 45 Wn. App. 70, 81, 724 P.2d 396 (1986).

[8] ***Cannon*** is indeterminate. Its analysis is limited to saying the "issues in this case are fairly debatable and there is no evidence the City acted willfully." 35 Wn. App. at 125. There is no explanation of what the court considered.

Finally, PPG again misrepresents the trial court's ruling in claiming that she made an adverse inference against PPG based on its assertion of the attorney-client privilege. BA 36-37. The trial court simply refused to require Fiore to prove a negative, where PPG had stonewalled on its reasons for withholding overtime:

> PPG's state of mind on the issue [of willfulness] is not within Fiore's control, given that PPG has declined to put forward the facts it considered when consulting on the issue with counsel, and therefore cannot sustain its burden of putting forth evidence of a bona fide dispute.

CP 2041. There is no indication that the trial judge made an "adverse inference" against PPG based on its improper assertion of privilege. PPG just failed to prove a bona fide dispute.

D. The fluctuating-workweek method does not apply because the parties did not have a clear mutual understanding that Fiore's salary would compensate him for all hours worked.

PPG's argument on calculating overtime is confusing. PPG falsely claims that the trial court was wrong to assume that PPG advocated for the fluctuating-work week method. BA 34.[9] PPG's "half-time" method "is referred to as the 'fluctuating workweek' method." ***Clements v. Serco, Inc.***, 530 F.3d 1224, 1230 (10th Cir.

[9] PPG also falsely contends that it argued for the "half-time" method in the trial court. BA 31-34. At the summary judgment hearing, PPG repeatedly referred to the "fluctuating workweek" method. RP 54-55, 61.

2008). There is no difference between what PPG calls the "half-time" method and the fluctuating-workweek method.

The fluctuating-workweek method requires "a clear mutual understanding" between the parties "that the fixed salary is compensation . . . for the hours worked each workweek" and that it is not "for working 40 hours or some other fixed weekly work period." ***Inniss v. Tandy Corp.***, 141 Wn.2d 517, 525, 7 P.3d 807 (2000) (quoting 29 C.F.R. § 778.114(a)); *see* ***Monahan v. Emerald Performance Materials, LLC***, 705 F. Supp. 2d 1206 (W.D.Wa. 2010). In ***Monahan***, a collective bargaining agreement said that employees work 12-hour shifts for an average of 40 hours per week over six weeks. 705 F.Supp.2d at 1210. The employees were not paid overtime. *Id.* at 1210-11.

Monahan explains that the employer failed to meet two prerequisites of 29 C.F.R § 778.114: (1) the employer did not make contemporaneous overtime payments, and (2) the parties did not have a clear mutual understanding that the salary compensated employees for all hours worked because the parties did not agree on how overtime would be calculated. *Id.* at 1217-18 (citing ***Russell v. Wells Fargo & Co.***, 672 F. Supp. 2d 1008, 1016 (N.D.

Cal. 2009) (also holding that fluctuating workweek does not apply in misclassification cases)).

Here, the parties did not have a clear mutual understanding that Fiore's salary compensated him for all hours worked, including overtime. Fiore's employment contract is not in evidence, but PPG's own hiring form says that Fiore's salary was for a 40-hour workweek. CP 324. Further, like in ***Monahan***, PPG never paid Fiore any overtime, so the parties never agreed to an overtime-pay-calculation method. CP 319. Absent a clear mutual understanding and contemporaneous payment, the fluctuating-workweek method cannot be used. ***Inniss***, 141 Wn.2d at 525-28; ***Monahan***, 705 F. Supp. 2d at 1217-18. This Court should affirm.

PPG cites foreign cases to argue that merely by cashing his paychecks, Fiore agreed to a fluctuating-workweek calculation. BA 31-34.[10] ***Inniss*** and ***Monahan*** have resolved this issue to the contrary in Washington. ***Inniss*** notes that ***Missel*** can be read only to permit the fluctuating-workweek method. 141 Wn.2d at 524.

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[10] *Citing* ***Overnight Motor Transportation Co. v. Missel***, 316 U.S. 572, 580 (1942); ***Desmond v. PNGI Charles Town Gaming, LLC***, 630 F.3d 351, 354-57 (4th Cir. 2011); ***Urnikis-Negro v. Am. Family Prop. Servs.***, 616 F.3d 665, 672-83 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1484 (2011); ***Clements***, 530 F.3d at 1230-31; ***Valerio v. Putnam Assoc., Inc.***, 173 F.3d 35, 39-40 (1st Cir. 1999); ***Blackmon v. Brookshire Grocery Co.***, 835 F.2d 1135, 1138-39 (5th Cir. 1988); U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2009-3 (Jan 14, 2009).

And ***Missel*** was silent as to whether the employee would be paid 50% or 150% of the regular rate, so the Court never adopted a "half-time" method. 316 U.S. at 579-81. ***Missel*** does not say what PPG claims it says.

In ***Urnikis-Negro***, the Seventh Circuit held that 29 C.F.R. § 778.114 was inapplicable in an employee misclassification case. 616 F.3d at 679. The Court held that the parties had a clear mutual understanding that the employee's salary compensated her for however many hours she worked, so the fluctuating-workweek method was appropriate. *Id.* at 680-81. But here there was no such clear mutual understanding, and Washington applies 29 C.F.R. § 778.114. ***Urnikis-Negro*** is inapplicable.

Desmond is similarly inapplicable because Washington applies § 778.114 for purposes of calculating overtime pay. Also unlike in ***Desmond***, these parties did not agree that Fiore's salary compensated him for all hours worked. CP 324. The same is true for ***Blackmon***, 835 F.2d at 1138-39.

Clements and ***Valerio*** both rely on ***Bailey v. Cnty. of Georgetown***, 94 F.3d 152, 156-57 (4th Cir. 1996). ***Clements***, 530 F.3d at 1230; ***Valerio***, 173 F.3d at 40. ***Bailey*** held that neither the FLSA nor 29 C.F.R. § 778.114 require a prior understanding on

how overtime will be calculated. 94 F.3d at 156-57. ***Bailey*** dealt with nonexempt employees who sued over how their employer paid overtime. *Id.* at 153. It did not deal with remedial payments to misclassified employees. *Id.* Washington follows § 778.114, so these cases are no help.

PPG also relies on the U.S Department of Labor's 2009 opinion letter stating that misclassified employees are entitled to only one-half their regular pay for overtime because they accepted a salary knowing that it covered whatever hours they worked. BA 33 (citing U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2009-3 (Jan. 14, 2009)). But Washington requires a clear mutual understanding that the salary compensated for all hours worked and contemporaneous payment of half-time overtime. ***Inniss***, 141 Wn.2d at 520, 534-35; ***Monahan***, 705 F.Supp.2d at 1217. The opinion letter is inconsistent with Washington law.

Moreover, as the ***Russell*** Court held, the letter is not even persuasive. 672 F. Supp. 2d at 1016. Deferring to the letter would amount to making a substantive regulatory change because it reads out the requirements of 29 C.F.R. § 778.114. *Id.* The letter also resulted from DOL's abandoned effort to revise § 778.114, and was released less than one week before a change in

administration. *Id.* Further, the "letter lacks thoroughness in its explanation and consistency with DOL's earlier FLSA interpretation." *Id.* Like the ***Russell*** Court, this Court should find the letter unpersuasive.

PPG erroneously argues that WAC 296-128-550 requires that a salaried employee's "regular rate" be determined by "'dividing the amount of compensation received per week by the total number of hours worked during that week.'" BA 32. This WAC says the regular rate "may be determined" by this method. *See also* ***Inniss***, 141 Wn.2d at 519. Washington follows § 778.114. *Id.* at 525; ***Monahan***, 705 F.Supp.2d at 1217. Under that reg, PPG loses.

E. The trial court did not abuse its discretion in awarding Fiore his reasonable attorney fees in light of the "incredible circumstances" PPG imposed on Fiore.

PPG generally advances three abuse-of-discretion claims regarding the fee award: (1) judicial estoppel; (2) evaluation of the fee petition; and (3) .25 multiplier. These arguments lack merit. This Court should affirm.

1. PPG fails to disclose the facts supporting the award.

PPG fails to disclose the facts justifying the fee award. What follows is just sampling of what Fiore faced in this litigation:

- Fiore hired Patrick McGuigan of Heyrich Kalish McGuigan, PLLC, pursuant to a written contingent fee agreement. CP 2078. McGuigan was an experienced employment-law attorney. CP 2085. Before April 2010, his hourly rate was $325; thereafter, it was $350. CP 2086. His partners had similar rates, though Don Heyrich charged $400 per hour. *Id.* His firm's lone associate, Lisa Burke, at $275. CP 2086.
- PPG hired Littler Mendelson, a national law firm known for uncompromising litigation. CP 2079. Robert W. Pritchard, a Littler shareholder in Pittsburgh, and Kerry E. Notestine, a Littler shareholder in Huston, appeared *pro hac vice* with Douglas E. Smith, a Littler shareholder in Seattle. CP 2081.
- PPG used substantial resources. CP 2081. For instance, McGuigan received an email from Mr. Pritchard's assistant that copied six Littler Mendelson attorneys. CP 2082.
- There were several other lawsuits by TMs against PPG for unpaid overtime wages. CP 2079. Fiore's case became the "test case," having "national implications" for the other cases. CP 2084; RP 21-22.
- PPG sought to remove the case to the Western District of Washington, arguing that the amount in controversy necessary to achieve diversity jurisdiction would be met once the court factored in prospective attorneys' fees. CP 2079-80. PPG filed a motion to stay and to transfer the case to a multi-district panel. CP 2079.
- Fiore moved to remand, and PPG filed a lengthy response, supported by declarations from an attorney and from former state Supreme Court Justice Roselle Pekelis. CP 2080. They opined that Fiore's attorney fees could reach nearly $400,000. CP 2080. The District Court remanded the case to state court. CP 67.
- After Fiore served his first interrogatories and requests for production, PPG moved to transfer the case to mandatory arbitration and to stay discovery. CP 2080-81. Fiore brought motions to obtain discovery, and the Court denied PPG's motion to stay, continuing discovery until an arbitrator was assigned. CP 2081. PPG still refused to provide documents and relevant information. CP 2081.

- The parties had a two-day mandatory arbitration. CP 2082-83. To save costs, associate Burke conducted research and drafted the Prehearing and Closing Arguments. CP 2082-83. McGuigan and Burke handled the unsuccessful arbitration, but Burke's fees were written off. CP 2082.
- If Fiore sought a trial de novo, he risked having to pay all of PPG's attorney fees and costs. CP 2083. PPG's attorney reminded McGuigan of that risk. CP 2083. Fiore ultimately decided to proceed. CP 274-75.
- PPG eventually produced over 40,000 documents. CP 2083. McGuigan and Burke spent weeks reviewing the production to determine what was relevant. CP 2083, 2436.
- As discovery proceeded, McGuigan traveled to Pittsburgh, Pennsylvania for a week to take depositions of several PPG executives. CP 2083-84. PPG there provided thousands of additional relevant documents. CP 2084.
- Both parties moved for summary judgment. CP 285-313, 744-67, 2084. The trial court granted Fiore partial summary judgment, determining that Fiore was not an administrative employee. CP 1737-39. Fiore continued to prepare for trial on the remaining issues. CP 2084.
- Both parties then submitted cross-motions *in limine*. CP 1741-60, 1939-43, 2084. The court granted Fiore's motion, finding that PPG willfully failed to pay Fiore overtime. CP 2039-42. PPG finally agreed to compromise, stipulating that Fiore's back overtime totaled $12,203. CP 2043-44.

2. The standard of review is abuse of discretion.

Attorney fee awards are reviewed for an abuse of discretion. ***Brand v. Dep't of Labor & Indus.***, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). When awarding fees, the trial court calculates a lodestar figure, the product of the attorneys' reasonable hourly rate multiplied by the number of hours reasonably expended in the litigation. ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581,

597, 675 P.2d 193 (1983). The trial court may then adjust the lodestar figure using a multiplier to account for the risks involved in the case. ***Broyles v. Thurston Cnty.***, 147 Wn. App. 409, 452, 195 P.3d 985 (2008). Our Supreme Court recently found an abuse of discretion in denying a contingency-risk multiplier. ***Pham v. Seattle City Light***, 159 Wn.2d 527, 541-44, 151 P.3d 976 (2007).

3. The trial court did not abuse its discretion in rejecting judicial estoppel.

PPG argues that Fiore should be judicially estopped from arguing that his fees were more than about $50,000 – less than 10% of the amount the trial court found reasonable. BA 37-40. Courts review judicial estoppel rulings for an abuse of discretion. ***Miller v. Campbell***, 164 Wn.2d 259, 536, 192 P.3d 352 (2008). Judicial estoppel has three elements:

> (1) a party asserts a position that is clearly inconsistent with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.

Baldwin v. Silver, 147 Wn. App. 531, 535, 196 P.3d 170 (2008) (internal quotation marks and citations omitted). PPG fails to address these elements. BA 38-40. The Court should affirm.

Fiore did not assert inconsistent positions. Judicial estoppel "may not be used to hamstring a litigant from advancing a particular position when this position is not clearly inconsistent with a prior position." ***Ingram v. Thompson***, 141 Wn. App. 287, 293, 169 P.3d 832 (2007). Fiore predicted that a "typical wage case" would take about 100 hours and that – "absent incredible circumstances" – the total award would be under $75,000. CP 2149. But as PPG admitted, it turned this into a test case with "national implications," bringing "incredible circumstances" into the case. RP 21-22. Counsel's predictions were not clearly inconsistent with the later reality. *Cf.*, ***Ingram***, 141 Wn. App. at 293 (prediction of future value too speculative to be clearly inconsistent with later reality).

The fee award also does not indicate that either court was misled. The Superior Court obviously was not misled. And Fiore told the District Court that it should not look to predictions about future fees in determining diversity jurisdiction. CP 67, 2446-47 (citing ***Dukes v. Twin City Fire Ins. Co.***, 2010 U.S. Dist. LEXIS 3617 (D. AZ 2010); and ***Hart v. Schering-Plough Corp.***, 253 F.3d 272 (7th Cir. 2001)) (both relying on ***Gardynski-Leschuck v. Ford Motor Co.***, 142 F.3d 955, 958-59 (7th Cir. 1998) (jurisdictional requirements determined by existing fees, not by predictions about

future fees)). PPG cannot establish that the District Court even considered future fees when remanding the case.

Finally, if PPG's argument were accepted, then it, not Fiore, would derive an unfair advantage from turning this into a test case. Those tactics drastically drove up Fiore's fees. PPG would benefit from its questionable tactics, improperly discouraging workers from seeking wages owed. This Court should affirm the fee award.

4. The trial court did not abuse its discretion in calculating the lodestar.

The trial court properly calculated the lodestar. It examined the attorneys' rates and found them reasonable. CP 2509-12. It considered the attorney hours, disregarding duplicative work. CP 2510. The trial court did not abuse its discretion in setting the lodestar at $438,946.80. CP 2512.

PPG repeatedly claims that the court failed to consider its arguments or to create a sufficient record for review. BA 37, 41, 47. Courts need not explicitly rule on every argument. *See, e.g.*, ***Matheson v. Gregoire***, 139 Wn. App. 624, 638-39 & n.10, 161 P.3d 486 (2007). PPG's complaints are meritless.

PPG's specific challenges also lack merit. First, PPG argues proportionality. BA 41. But proportionality may undermine public

policy. *See, e.g.*, ***Steele v. Lundgren***, 96 Wn. App. 773, 784-85, 982 P.2d 619 (1999) (proportionality "would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts"); *see also* ***Perry v. Costco Wholesale, Inc.***, 123 Wn. App. 783, 809, 98 P.3d 1264 (2004) (trial court abused its discretion in rejection multiplier based on proportionality concerns).

Similarly here, the Legislature "evidenced a strong policy in favor of payment of wages due employees." ***Schilling***, 136 Wn.2d at 157. As the trial court correctly stated, PPG's proposed rule "would effectively preclude meritorious wage claims under RCW 49.52.070, while simultaneously promoting frivolous defense litigation strategies." CP 2512. PPG contradicts public policy.

PPG argues that the court should have denied fees related to Fiore's successful motion to remand. BA 41-42. PPG fails to cite authority. *Id.* The District Court had discretion to award fees. ***Balcorta v. Twentieth Century-Fox Film Corp.***, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000). But it did not foreclose the possibility that fees could be awarded if Fiore ultimately prevailed. CP 67. When Fiore did prevail, RCW 49.46.090 and 49.52.070 required the trial court to award fees. No abuse of discretion occurred.

PPG contends that the court should have reduced the lodestar by $71,566 for unsuccessful work on a motion to compel, a response to protective order motion, and the arbitration. BA 42 (citing ***Pham***, 159 Wn.2d at 538-40). But ***Pham*** holds that fees may be awarded on unsuccessful claims where, as here, they have a "'common core of facts and related legal theories.'" 159 Wn.2d at 538 (quoting ***Martinez v. City of Tacoma***, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996)). Like Industrial Insurance Act claims, Wage Act claims are unitary and cannot be segregated. *See* ***Brand v. Dep't of Lab. & Indust.***, 139 Wn.2d 659, 671-74, 989 P.2d 1111 (1999). No abuse of discretion occurred.

PPG argues that Fiore was improperly awarded $9,675 for work by two attorneys. BA 42-43. There is no evidence that counsel were doing duplicative work or that only one attorney actively participated. Fiore already eliminated duplicative time and included a number of courtesy write-offs in its requested award. CP 2435, 2510. No abuse of discretion occurred.

PPG repeatedly cites ***Morgan v. Kingen***, 141 Wn. App. 143, 162, 169 P.3d 487 (2007), *aff'd*, 166 Wn.2d 526, 210 P.3d 995 (2009), arguing that it affirmed deductions for duplicative effort, improper staffing, and excessive fees in a "straightforward case."

BA 43, 45. But ***Morgan*** does not support some of these contentions, and whether that trial judge properly exercised discretion on those facts has little bearing on whether this court did so. This trial court correctly believed that counsel's time was necessary and productive and that this case was anything but "straightforward" due to PPG's tactics.

PPG argues that the trial court considered "impermissible" factors such as (a) that PPG used attorneys from three different states and (b) that PPG did not submit a record of its own attorney fees. BA 45-46. PPG cites no Washington authority holding such considerations "impermissible." *Id.* Using three shareholders from different states, plus several other attorneys (CP 2081-82) on a case worth only $24,000, evidences PPG's aggressive litigation tactics. CP 2433. Multiplying PPG's 167 TMs by just the relatively modest $24,000 award to Fiore, produces over $4 million in potential liability to PPG, not including the fees on both sides.

The trial court also properly found noteworthy that PPG made no attempt to compare the hours it expended defending the case. *Contra* BA 46. The court could "only assume" that PPG's fees were "not substantially lower (if lower at all) than Plaintiff's hours and fees." CP 2510. This assumption is permissible: when

"a party fails to produce relevant evidence within its control" without satisfactory explanation, the court may infer "that such evidence would be unfavorable." ***Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.***, 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (citing ***Pier 67, Inc. v. King Cnty.***, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)). Comparing the opposing parties' fees "is a common practice when the hours are disparate." CP 2510. Absent contrary evidence, the trial court properly inferred PPG's actual fees would have been unfavorable to PPG. No abuse of discretion occurred.

PPG does cite two cases, ***Mirabal v. General Motors Acceptance Corp.***, 576 F.2d 729, 731 (7th Cir. 1978); ***Canlas v. Eskanos & Alder, P.C.***, 2006 U.S. Dist. LEXIS 83111, at *3-4 (N.D. Cal. 2006) (relying on ***Mirabal***). But whether other courts considered opposing counsel's fees is not relevant here. And several courts have found ***Mirabal*** unpersuasive.[11] These cases explain that evidence of opposing counsel's time can have significant bearing on the reasonableness of a fee request. ***Citgo***, 466 F. Supp. 2d at 1264-65; ***Blowers***, 526 F. Supp. at 1327;

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[11] *See, e.g.*, ***Citgo Petroleum Corp. v. Krystal Gas Marketing Co.***, 466 F. Supp. 2d 1263 (N.D. OK 2006); ***Blowers v. Lawyers Coop. Pub. Co.***, 526 F. Supp. 1324 (W.D. N.Y. 1981); ***Naismith v. Professional Golfers Ass'n***, 85 F.R.D. 552 (N.D. GA 1979); ***Stastny v. S. Bell Tel. & Tel. Co.***, 77 F.R.D. 662 (W.D. N.C. 1978) (decided before ***Mirabal***).

Naismith, 85 F.R.D. at 562-63; ***Stastny***, 77 F.R.D. at 663-64. The trial court did not abuse its discretion.

In sum, the trial court carefully and actively considered Fiore's fee request, complying with ***Mahler v. Szucs***, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998) and its progeny. It added its own interlineated findings, showing its independent reasoning. CP 2507-12. It did not abuse its discretion. This Court should affirm.

5. The trial court did not abuse its discretion in awarding a multiplier.

The trial court was also within its discretion in awarding a .25 multiplier based on the risks Fiore faced if he lost. CP 2512. If he lost, Fiore's attorneys would have been paid nothing, and Fiore would have had to pay all of PPG's fees. CP 2512. A trial court has discretion to award a multiplier based on such risks. ***Broyles v. Thurston Cnty.***, 147 Wn. App. 409, 452, 195 P.3d 985 (2008). This contingency adjustment is designed "'solely to compensate for the possibility ... that the litigation would be unsuccessful and that no fee would be obtained.'" ***Bowers***, 100 Wn.2d at 598-99. No abuse of discretion occurred.

PPG again cites to ***Morgan*** to argue that multipliers in wage cases are inappropriate. BA 48. Contrary to PPG's claim, neither

Morgan court held that multipliers in wage cases are inappropriate. 141 Wn. App. at 165, *aff'd*, 166 Wn.2d at 539-40. The Supreme Court, agreeing with the Court of Appeals, held that no risks were present in that case. ***Morgan***, 166 Wn.2d at 540. ***Morgan*** left open awarding a multiplier when, as here, risks are present. *Id.*

PPG contends that the hourly rates for Fiore's attorneys were sufficient to account for any contingency. BA 48. But the enormity of this case significantly limited counsel from working on other cases. CP 2436-37. The trial court did not abuse its discretion in finding that a multiplier was warranted.[12]

PPG contends that other cases filed against it had no bearing on Fiore's risks. BA 48-49. This test case has "national implications." CP 2084; RP 21-22. Our Supreme Court has affirmed a "test case" fee award. ***Beeson v. Atlantic-Richfield Co.***, 88 Wn.2d 499, 511, 563 P.2d 822 (1977). No abuse of discretion occurred.

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[12] PPG also argues that Fiore did not use the "best evidence" on the contingent fee agreement. BA 47-48. But the "best evidence rule" (ER 1002) does not apply to McGuigan's fee declaration. That rule requires an original copy of a writing to prove its contents. ER 1002. McGuigan was not proving the writing's contents, but swearing to his payment arrangement with Fiore. CP 2078.

F. Fiore is entitled to fees on appeal.

Fees on appeal are proper under RCW 49.52.070. ***Schilling***, 136 Wn.2d at 166; RAP 18.1. This Court should award Fiore his fees on appeal. RAP 18.1.

CONCLUSION

For the reasons stated above, this Court should affirm and award Fiore fees on appeal.

RESPECTFULLY SUBMITTED this 14th day of September, 2011.

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The Honorable Laura Inveen

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANDREW FIORE, Plaintiff, vs. PPG INDUSTRIES, INC., a Pennsylvania Corporation; Defendant.	No. 09-2-46813-3 SEA [~~PROPOSED~~] ORDER APPROVING PLAINTIFF'S ATTORNEYS' FEES AWARD IT IS ORDERED that moving party is required to provide a copy of this order to all parties who have appeared in the case.

This matter came before the Court for final approval of Plaintiff's Counsel's fee award. The Court has considered the prior proceedings in this case and the materials submitted by the parties concerning the fee award. The Court hereby approves the revised fee award requested by Plaintiff's Counsel in Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Reasonable Attorneys' Fees and Costs (dated April 4, 2011) for the following reasons:

FINDINGS OF FACT

1. Plaintiff spent 9 months of his life working for the Defendant in a manual labor-intensive capacity. While Plaintiff had some ancillary sales duties, the undisputed facts have established that neither his manual labor nor his retail sales duties were exempt under the MWA. To the contrary, the facts established that Plaintiff was a nonexempt manual labor/retail sales worker entitled to the benefits and protections of the MWA. For all of the hours Plaintiff worked over his 40 hour workweek, he should have

ORIGINAL

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been paid his statutory overtime. Plaintiff has spent the past 13 months of his life trying to recoup wages the Defendant willfully denied him.

2. Instead of acknowledging its wrongful classification of Plaintiff and rightfully paying him his back wages, Defendant has endeavored to protract litigation and make Plaintiff jump through every conceivable hoop to obtain his statutory rights under the MWA. As a result, Plaintiff has fought removal to federal court, reviewed more than 40,000 thousand discovery documents, labored through a failed mandatory arbitration, and prepared an entire case-in-chief for trial, only to have the case resolve on summary judgment and pretrial motions. Plaintiff has done all of this to secure $24,406.20 in damages.

3. While Plaintiff's Counsel fought to secure Plaintiff's rights under the MWA, Defendant persisted in maintaining its litigation course. With multiple cases pending against Defendant throughout the country, Plaintiff was in the unfortunate situation of being the "test case," whereby Defendant's strategy was to out-litigate Plaintiff and set the course for prospective litigation. Plaintiff's only recourse was to find an attorney willing to litigate against one of the largest and most aggressive employment defense firms in the country.

4. An experienced lawyer, with a practice emphasized in employment law, Patrick Leo McGuigan was hired by Plaintiff, pursuant to a written fee agreement, to handle his overtime wage claim. Pursuant to that agreement, Mr. McGuigan represented Plaintiff on a contingency fee basis. There was no guarantee of all or any part of the fees incurred – it was wholly contingent upon success in the litigation.

5. Mr. McGuigan accepted Plaintiff's case, understanding the difficulties it imposed, and continued to represent Plaintiff even after he became aware of the Defendant's aggressive litigation strategy. At the same time, Mr. McGuigan attempted over and over and over to resolve the case for a reduced wage claim amount and low attorneys' fees, which continued to increase as Defendant fought this case without regard to the expense. Furthermore, Plaintiff's counsel was forced to under-take an extraordinary risk, given the risk of attorneys fees if he did not prevail after the unsuccessful arbitration – fees that were sure to be substantial, given the aggressive litigation tactics taken by Defendant, including the use of attorneys from three different states. yeJ

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6. Mr. McGuigan's advocacy has spanned the course of 13 months and has entailed unsuccessful removal to federal court by the Defendant, extensive discovery, failed mandatory arbitration, summary judgment, trial preparation, and pretrial motion practice. The amount of time Mr. McGuigan has expended on this case not only limited his ability to work on other matters but similarly limited the firm's only associate attorney, Lisa Burke, from doing the same.

7. In addition to Mr. McGuigan and Ms. Burke's time, this case required the additional time and resources of attorneys, and Partners at Heyrich Kalish McGuigan PLLC, Daniel Kalish and Don Heyrich. Moreover, in order to reduce attorney's fees, Mr. McGuigan also utilized the assistance of two paralegals, Melissa DeLeon and Soula Stefanopoulos.

8. The attorneys and paralegals who worked on this case have billed at the following rates (through February 4, 2011):

NAME	TITLE	RATE	HOURS	WRITE-OFF	TOTAL
D. Heyrich	PARTNER	$400	1.8	$560.00	$160.00
P. McGuigan	PARTNER	$325	82.9	$3,247.50	$23,695.00
		$350	780.7	$1,190.00	$272,055.00
D. Kalish	PARTNER	$325	7.2	$812.50	$1,527.50
		$350	86.1	$700.00	$29,435.00
L. Burke	ASSOCIATE	$275	445.30	$7,837.50	$114,620.00
M. DeLeon	PARALEGAL	$95	5.3	$228.00	$275.50
S.Stefanopoulos	PARALEGAL	$95	37.44	$2,423.00	$1,133.80
TOTALS			**1,446.74**	**$16,998.50**	**$442,901.80**

These hourly rates are reasonable, and the defense does not argue otherwise. jcr These bill included $3995 unrelated to this case (ex M to Declaration of Douglas Smith). Thus the total should have been $438,946.80 jcr

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9. The attorneys and paralegals who worked on this case have continued to bill at these rates (after February 5, 2011):

NAME	TITLE	RATE	HOURS	WRITE-OFF	TOTAL
D. Heyrich	PARTNER	$400	3.3	$280.00	$1,040.00
P. McGuigan	PARTNER	$350	23.3	$577.50	$7,577.50
D. Kalish	PARTNER	$350	1.2	$0.00	$420.00
L. Burke	ASSOCIATE	$275	125.4	$8,418.00	$26,067.00
S.Stefanopoulos	PARALEGAL	$95	1.9	$66.50	$114.00
Data-entry errors from chart above			(11.3)	$3,955.00	($3,955.00)
TOTALS			**143.8**	**$13,297.00**	**$31,263.50**

10. Plaintiff has eliminated $3,955.00 in data-entry errors, discovered by Defendant, and acknowledged by Plaintiff.

11. Despite the time and expense involved in litigating this case, Mr. McGuigan has taken steps to reduce Plaintiff's attorney's fees and costs throughout the course of this litigation. As a result, Mr. McGuigan and Ms. Burke have provided the Court with comprehensive billing records, reflecting numerous courtesy write-offs and cost adjustments. These adjustments reflect duplicative or unproductive billable work and costs associated with this litigation.

CONCLUSIONS OF LAW

12. In determining the amount to award Plaintiff's Counsel, the Court considered whether the fees are reasonable under RCW 49.52.070.

11a. The court notes that attorneys for defendant argue Plaintiff's counsel's hours were extraordinary in number. However, the court finds it noteworthy that Defense counsel makes no attempt to compare the hours they expended in defending the case. This is a common practice when the hours are disparate. This court can only assume that the number of hours, and amount of fees defending the case were not substantially lower (if lower at all) than Plaintiff's hours and fees.

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13. The record before the Court shows that the fees requested are reasonable for several reasons. First, Plaintiff's Counsel have a high degree of skill in litigating complex employment issues, and they have an excellent reputation. This action presented an unusually high risk for Plaintiff's Counsel as there was no controlling precedent, the issues were complicated, the Defendant vigorously defended the action, and Plaintiff's Counsel failed to prevail at the mandatory arbitration stage of litigation. The fee here is also reasonable because the results were excellent, with Plaintiff recouping both his lost wages and double damages. In addition, Plaintiff's Counsel represented Plaintiff for roughly 13 months without getting paid and with the possibility of never getting paid. Plaintiff's Counsel spent 1,579.24 hours on the case, and Plaintiff's Counsel, Mr. McGuigan and Ms. Burke, were precluded from other work as a result thereof.

14. In assessing the reasonableness of Plaintiff's Counsel's requested fees, the Court has also reviewed the time Plaintiff's Counsel spent on this action and their hourly rates (the "lodestar method"). Plaintiff's Counsel's 1,579.24 hours are reasonable under the circumstances. Plaintiff was required to labor through removal to federal court; extensive discovery involving the document review of over 40,000 pages; failed mandatory arbitration; dueling summary judgment motions; pretrial motions; and extensive trial preparation including being familiar with litigating dealing with this defendant and these issues in other judicial cases. Moreover, Plaintiff's Counsel's hourly rates are also reasonable. Throughout the course of the litigation, Plaintiff's Counsel's composite rates for attorneys Patrick McGuigan and Daniel Kalish varied between $325 and $350, both reasonable rates in the market. Moreover, attorney Don Heyrich billed at an hourly rate of $400; this amount represents a significant reduction in Don Heyrich's normal hourly rate of $510, which this Court has awarded him in comparable matters. Finally, attorney Lisa Burke, an associate at the firm, billed at an hourly rate of $275, a lower rate than the prevailing market rate for associates with her skill level and experience. Moreover, the Court also takes notice of the fact that Ms. Burke billed substantially more than attorneys Daniel Kalish and Don Heyrich, further reducing the attorney billable hours.

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A multiplier in the amount of .25 is reasonable

15. ~~Plaintiff's Counsel's requested percentage of recovery fee here is also reasonable because the multiplier here is .5, and this is a reasonable multiplier for prevailing plaintiffs to pay their contingency-fee attorneys in cases, such as this one, where the risk of non-recovery is substantially high~~: Moreover, Plaintiff's Counsel have reduced their billable hours, by way of courtesy write-offs, and have not inflated their hourly rates to account for this risk.

given the multiple risks in this case: 1) contingent fee, 2) risk of paying attorneys, 3) risk of paying attorneys fees which would likely be higher than ordinary, given the "test case" posture of the case, and the use of national counsel from a large firm from three different states.

16. The Court rejects a proportionality requirement imposed on the attorneys' fees awarded. The Court understands that such a rule would effectively preclude meritorious wage claims under RCW 49.52.070, while simultaneously promoting frivolous defense litigation strategies.

17. Accordingly, Plaintiff's Counsel are awarded the ~~$706,296.17~~ $548,683.50 ($438,946.80 (adjusted fees incurred before Plaintiff prevailed) (.25) 109,736.70) + ~~$219,473.40~~ (~~.5~~ .25 multiplier on applicable fees) + $10,325.50 (costs accrued at the time Plaintiff filed his fee motion) + $31,263.50 (fees incurred after Plaintiff prevailed) + $6,286.97 (costs accrued after Plaintiff filed his fee motion) fee requested. This award includes all of Plaintiff's fees up through April 4, 2011, as well as all of Plaintiff's costs and expenses through April 4, 2011.

Dated: ~~April~~ June 16, 2011

Judge Laura Inveen

Presented by:

/s/ Patrick Leo McGuigan
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ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**EXEMPTION FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR ADMINISTRATIVE POSITIONS**	**NUMBER: ES.A.9.4** **ISSUED: 6/24/2005**	
CHAPTER:	**RCW.49.46.010(5)(c), RCW 49.46.130(2)(a), WAC 296-128-520**	**SEE ALSO: ES.A.9.2 – 3, And ES.A.9.5 - 8 ES.A.8.1 and ES.A.8.2, ES.A.9.1, ES.A.10.1, ES.A.10.2 and ES.A.10.3**	

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ADMINISTRATIVE (WAC 296-128-520)

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the "white collar" overtime exemptions, including executive, administrative, professional, and outside sales positions. The State regulation on the administrative job classification has not changed. The federal changes, and existing state regulations, affect *white-collar employees only (executive, administrative, professional, outside sales).*

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington State and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. The following chart is designed to provide an analysis of both state and federal regulations for the administrative exemption. Greater details of the state administrative exemption follow this chart. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243, or at their Web site at http://www.dol.gov/WHD/overtime_pay.htm or with a qualified consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

Exhibit I
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Administrative

Requirements under state regulations	Requirements under new federal regulations	Differences between state and federal regulations
Must meet all three parts of the test in the state regulation to be exempt from overtime pay: 1. Meets minimum salary or fee payment requirement of not less than $250/wk 2. Primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; 3. Work must require the exercise of discretion and independent judgment.	Must meet all parts of this three-part test in the federal regulations: 1. Meets minimum salary or fee requirement of $455/wk; 2. Non-manual office work directly related to management or general operations of employer or employer's customers; 3. Primary duty includes discretion and independent judgment on matters of significance.	Washington's minimum salary for overtime-exempt workers is $250/wk vs. the new federal minimum of $455/wk. Washington's regulation requires performance of office or non-manual work directly related to management policies, while the new federal rule deleted that word

The new federal regulations provide that executive, administrative, or professional workers are also exempt from overtime pay if they are earning more than $100,000 per year as long as they perform at least one duty in an executive, administrative, or professional function job. State regulations contain no similar provision. Administrative workers must meet all of the state requirements for the exemption to apply.

The new federal regulations allow an employer to impose *unpaid* disciplinary suspensions of *one or more full days* for workplace-conduct rule infractions for exempt workers. Washington State allows an *unpaid* disciplinary suspension in increments of less than one week *only* for violations of safety rules of major significance. Unpaid disciplinary suspensions for non-major safety violations cannot be in less than full-week increments.

2. Reliance On Pre-August 23, 2004 Federal Interpretation. Prior to August 23, 2004, state and federal "white collar" exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

3. Short Test Proviso for Administrative Employees. The administrative exemption contains a special proviso in the latter part of **WAC 296-128-520** (4) (b) after the word "Provided" for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption will be deemed to be met by an employee who 1) receives the $250 per week on a salary or fee basis; 2) the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers; and 3) duties include work requiring the exercise of discretion and independent judgment. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under the long test.

4. Administrative Workers Must be Compensated On a Salary Basis. In addition to "duties" requirements, an administrative employee must be compensated on a salary basis in order to qualify for the exemption from minimum wage and overtime. The salary requirement will be met if the salary is paid weekly or if it is paid bi-weekly, semi-monthly, or monthly and translates into the appropriate weekly equivalent. See Administrative Policy *ES.A.9.1* for Questions and Answers About Salary Basis.

5. How to Determine Primary Duty. Primary duty must be based on all facts in the particular case. Generally, 50% is a good rule of thumb but is not the sole test. There may be situations where the employee does not spend over 50% of his or her time in administrative duties, but still be exempt if other pertinent factors support such a conclusion. Pertinent factors might include the relative importance of the administrative function compared with other duties performed in which the employee exercises discretionary powers, freedom from supervision, etc.

The employee must have as the primary duty office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or, in the case of academic administrative personnel, the employee must have as the primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

6. Job Titles Are Not Determinative. The employees for whom exemption is sought under the term "administrative" have extremely diverse functions and a wide variety of titles. However, the title alone is of little or no assistance in determining the employee's exempt or nonexempt status. Questions of whether the employee meets the criteria of the administrative exemption must be considered on a case-by-case basis.

7. Types of Administrative Employees. The administrative exemption is intended to cover white-collar workers, who perform office or non-manual work. Clerical staff performing routine clerical duties as their major function, regardless of the extent of their discretion in the method by which those duties are performed, are not performing work of substantial importance to the management or operation of the business. Three types of employees qualify for exemption as administrative employees, which include executive and administrative assistants, staff employees, and those who perform special assignments.

7.1 Executive and Administrative Assistants. The first type is the assistant to a proprietor, to an executive, or to an administrative employee. These are persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated. This exemption would not apply to a receptionist whose duties are to answer the phone, open and distribute mail to others, and to greet customers or clients and other routine duties. This exemption does not generally apply to a bookkeeper whose duties are to prepare the payroll, or to track and pay accounts receivable or record accounts payable and other routine and repetitive duties.

7.2 Staff Employees. Staff employees are those who can be described as staff rather than production or line employees. They include among others employees

who act as advisory specialists to the management. Typical examples of such advisory specialists are tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, and statisticians. Also included are persons who are in charge of a so-called functional department, which may frequently be a one-employee department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations' directors.

7.3 Those That Perform Special Assignments. Among them are to be found a number of persons whose work is performed away from the employer's place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, and location managers of motion picture companies. This classification also includes employees whose special assignments are performed entirely or partly inside their employer's place of business. Examples are special organization planners, customers' brokers in stock exchange firms, account executives in advertising firms and contact or promotion men of various types.

8. Office or Nonmanual Work and Directly Related to Management Policies or General Business Operations: The administrative employee's primary duty must consist of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer of the employer's customers. An administrative employee may perform office work that is manual. The performance by an otherwise exempt administrative employee of some manual work that is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to white-collar employees. However, if the employee performs so much manual work, other than office work, that he or she cannot be said to be basically a white-collar employee, he or she does not qualify for exemption as a bona fide administrative employee. This is true even if the manual work performed is directly and closely related to the work requiring the exercise of discretion and independent judgment. Employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees.

9. Directly Related to Management Policies or General Business Operations of the Employer or Employer's Customers. This phrase describes those types of activities relating to the administrative operations of a business as distinguished from production or, sales work in a retail or service establishment. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers. This must be considered on a case-by-case basis to determine this applies.

Generally, examples of administrative operations include advising the management, planning, negotiating, representing the company, purchasing, promoting sales, business research. Individuals performing this work can be administrative even if he or she is an assistant to an executive rather than the executive.

"Directly related to management policies or general business operations" includes those who participate in the formulation of management policies, or in the operation of the business as a whole, and includes those whose work affects policy or whose work it is to execute and carry

the policy out. It may also include advisory specialists, consultants, experts, analysts, marketers, promoters, etc.

Employees whose work is directly related to management policies or to general business operations include those whose work affects policy or whose responsibility it is to execute or carry it out. The phrase is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. Generally, those employees who hold the run-of-the-mill positions are not performing work directly related to management policies or general business operations and are not exempt even though he or she may exercise some measure of discretion and judgment as to the manner in which he performs the clerical tasks. An employee operating very expensive office equipment may cause serious loss to his employer by the improper performance of his duties. An investigator for an insurance company may cause loss to the employer by the failure to perform the job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be directly related to management policies or general business operations.

The test of directly related to management policies or general business operations is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, and many others.

Management policies or general business operations may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of this section qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

10. Administrative Employees Must Exercise Discretion and Independent Judgment. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

In the data processing field a systems analyst is exercising discretion and independent judgment when he or she develops methods to process, for example, accounting, inventory, sales, and other business information by using computers. He or she also exercises discretion and independent judgment in determining the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programmer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When a computer programmer does this preliminary work he or she is exercising discretion and independent judgment. A computer programmer would also be using discretion and independent judgment when determining exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented.

Examples of work not requiring the level of discretion and judgment are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. The duties of data processing employees such as tape librarians, computer operators, junior programmers and programmer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

10.1 Exercise of skill does not require discretion and independent judgment. The use of skill in applying techniques, procedures or specific standards as opposed to having the freedom to make decision independently on matters of little consequences is not work that requires the exercise of discretion and independent judgment.

An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment. This is true even if there is some leeway in reaching a conclusion. The employee is engaged in exercising skill rather than discretion and independent judgment.

A personnel clerk may screen applicants and has skill in the application of techniques and procedures for that task. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. The data may be entered on a form specially prepared for the purpose. The screening operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. This personnel clerk does not exercise discretion and independent judgment.

10.2 Some routine tasks may be performed by exempt employee. Tasks that are comparatively routine in nature can involve the exercise of discretion and judgment if the person who actually makes the ultimate decisions is doing them.

An exempt personnel manager will often perform functions similar to the personnel clerk. That is, he or she will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the personnel manager who does the hiring performs the interviewing and screening, that constitutes exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

10.3 The decisions do not have to be final. The phrase "discretion and independent judgment" does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This action by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that the assistant does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, for example, six months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

11. Discretion and Independent Judgment On Decisions in Significant Matters. Some difficulty with this phrase concerns the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. It is frequently left to a truck driver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether to post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level required in

this regulation. The discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence.

Work that requires discretion and independent judgment is work that is not ordinary or routine in nature. It is not possible to state a general rule that will distinguish each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. The phrase "significant matters" does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise.

12. Short Test Does Not Apply to Academic Administrators. The short test does not apply to academic administrators and the full criteria under the long test must be applied. The academic administrative exemption applies to workers whose primary duty consists of the work in the administration of a school system, educational establishment or institution, or of a department or subdivision of one of the above. The employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

Exempt academic workers must perform all of the required duties and must be compensated on a salary or fee basis of at least $155.00 per week or must perform all of the required duties and be compensated on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he or she is employed.

Individuals engaged in the overall academic administration of an elementary or secondary school system include the superintendent or other head of the system and those of his assistants whose duties are primarily concerned with administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. In individual school establishments those engaged in overall academic administration include the principal and the vice principals who are responsible for the operation of the school. Other employees engaged in academic administration are such department heads as the heads of the mathematics department, the English department, the foreign language department, the manual crafts department, and other departments. Institutions of higher education have similar organizational structure, although in many cases somewhat more complex.

13. Administrative Trainees. The exemption does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee. However, an administrative employee does not lose his or her status merely by undergoing further training for the job performed.

RCW 49.46.005
Declaration of necessity and police power.

Whereas the establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature to establish minimum standards of employment within the state of Washington, therefore the legislature declares that in its considered judgment the health, safety and the general welfare of the citizens of this state require the enactment of this measure, and exercising its police power, the legislature endeavors by this chapter to establish a minimum wage for employees of this state to encourage employment opportunities within the state. The provisions of this chapter are enacted in the exercise of the police power of the state for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.

[1961 ex.s. c 18 § 1.]

RCW 49.46.090

Payment of wages less than chapter requirements — Employer's liability — Assignment of wage claim.

(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

(2) At the written request of any employee paid less than the wages to which he or she is entitled under or by virtue of this chapter, the director may take an assignment under this chapter or as provided in RCW 49.48.040 of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

[2010 c 8 § 12043; 1959 c 294 § 9.]

RCW 49.46.130
Minimum rate of compensation for employment in excess of forty hour work week — Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her 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 or she is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or

horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

(b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW 49.46.020, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one

week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed.

[2010 c 8 § 12045; 1998 c 239 § 2. Prior: 1997 c 311 § 1; 1997 c 203 § 2; 1995 c 5 § 1; 1993 c 191 § 1; 1992 c 94 § 1; 1989 c 104 § 1; prior: 1977 ex.s. c 4 § 1; 1977 ex.s. c 74 § 1; 1975 1st ex.s. c 289 § 3.]

RCW 49.52.050
Rebates of wages — False records — Penalty.

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

[2010 c 8 § 12055; 1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

RCW 49.52.070
Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

[2010 c 8 § 12056; 1939 c 195 § 3; RRS § 7612-23.]

WAC 296-128-510
Executive.

The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(2) Who customarily and regularly directs the work of two or more other employees therein; and

(3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(4) Who customarily and regularly exercises discretionary powers; and

(5) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this section: Provided, That this paragraph (5) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and

(6) Who is compensated for his services on a salary basis at a rate of not less than $155 per week exclusive of board, lodging, and other facilities: Provided, That an employee who is compensated on a salary rate of not less $250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-510, filed 2/24/76.]

WAC 296-128-520
Administrative.

The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(3) Who customarily and regularly exercises discretion and independent judgment; and

(a) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in this regulation), or

(b) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(c) Who executes under only general supervision special assignments and tasks; and

(4) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (3) of this section; and

(a) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week exclusive of board, lodging, or other facilities; or

(b) Who, in the case of academic administrative personnel is compensated for his services as required by paragraph (4)(a) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he is employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers; which

includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-520, filed 2/24/76.]

WAC 296-128-550
Regular rate of pay.

The regular rate of pay shall be the hourly rate at which the employee is being paid, but may not be less than the established minimum wage rate. Employees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate, unless specifically exempt, are entitled to one and one-half times the regular rate of pay for all hours worked in excess of forty per week. The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week. The employee is entitled to one and one-half times the regular rate arrived at for all hours worked in excess of forty per week.

[Order 76-5, § 296-128-550, filed 2/24/76.]

29 CFR 541.200

§ 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $ 455 per week (or $ 380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

HISTORY:
[69 FR 22122, 22260, Apr. 23, 2004]

29 CFR 541.201

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

HISTORY:
[38 FR 11390, May 7, 1973; 69 FR 22122, 22260, Apr. 23, 2004]

29 CFR 541.202

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated

by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

HISTORY:
[38 FR 11390, May 7, 1973; 69 FR 22122, 22260, Apr. 23, 2004]

29 CFR 541.203

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the

exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the

administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

HISTORY:
[38 FR 11390, May 7, 1973; 69 FR 22122, 22260, Apr. 23, 2004]

29 CFR 541.700

§ 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

HISTORY:
[69 FR 22122, 22260, Apr. 23, 2004]

29 CFR 778.114

§ 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose total weekly hours of work never exceed 50 hours in a workweek, and whose salary of $ 600 a week is paid with the understanding that it constitutes the employee's compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $ 15.00, $ 16.00, $ 12.00, and $ 12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $ 600; for the second week $ 600.00; for the third week $ 660 ($ 600 plus 10 hours at $ 6.00 or 40 hours at $ 12.00 plus 10 hours at $ 18.00); for the fourth week $ 650 ($ 600 plus 8 hours at $ 6.25, or 40 hours at $ 12.50 plus 8 hours at $ 18.75).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly

wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

HISTORY:
[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981; 76 FR 18832, 18857, Apr. 5, 2011]

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 14th day of September 2011, to the following counsel of record at the following addresses:

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 15 AM 10: 51

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