

NO. 34234-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DAVID WESTON, individually and as representative of a class,

Plaintiff-Appellee,

v.

EMERALD CITY PIZZA LLC, d/b/a PIZZA HUT, a Washington  
corporation,

Defendant-Appellant.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

In this case the Court must decide if the plaintiff, David Weston, formerly employed by defendant Emerald City Pizza ("ECP") as a restaurant manager, may properly represent a class of all of ECP's current and former restaurant managers on his claim that he was misclassified as "exempt" from overtime pay because the work he actually performed on a day-to-day basis was not really "management." Although he concedes that all of ECP's written job descriptions and personnel guidelines assigned to him the "management" functions in his restaurant, he says that, by an unwritten policy and practice, he performed almost solely the "production" tasks assigned to other employees, such as taking telephone orders, making pizzas, working the cash register, and cleaning the restaurant, while his regional manager was actually responsible for managing his restaurant.

On his motion for class certification, Weston's only evidence that class members' primary duty was "production" rather than management was his own declaration about his own day-to-day experience in his own restaurant. He offered no evidence concerning the job duties of any other manager or putative class member. In opposition to the motion, ECP offered extensive

evidence that the proposed class members, consistent with ECP's written policies, job descriptions and procedures, performed the management functions in their restaurants, such as hiring, firing, scheduling, training, and disciplining other employees, and that they enjoy extensive discretion and freedom from supervision by their regional managers, who rarely even visit their restaurants. This evidence showed that, in effect, plaintiff had proved a class of one—himself. The trial court nonetheless granted class certification, without explanation. The Commissioner of this Court granted discretionary review, finding probable error.

A retail store manager challenging his exempt status may not represent a class where his own version of the material facts is inconsistent with the employer's written job descriptions and the testimony of other proposed class members. See *infra* note 4. In *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003), the court explained that if "the class members' job duties varied too much to be established by representative testimony, the advantages of the class action vehicle would all but disappear, and it would be difficult to justify class certification." 115 Wn. App. at 828. In this case, the *undisputed* evidence shows that plaintiff's allegations about his own job duties do not conform to defendant's

written job descriptions or the testimony of other class members and Area Coaches. Defendant asks that this Court reverse the trial court's certification order and remand for trial on plaintiff's individual claims.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in certifying a class where the central issue in dispute is how the plaintiff actually performed his job, and all of the evidence shows that his account is materially different than the experience of the putative class.

## **III. STATEMENT OF THE CASE**

ECP owns and operates approximately 60 Pizza Hut restaurants in Western Washington. (CP 55 at 6:4) Each restaurant is managed by a Restaurant General Manager ("RGM"), each RGM is overseen by a regional manager called an Area Coach, and each Area Coach reports to ECP's president, Terry Hopkins. (Clerk's Papers ("CP") 56 at 12:2) Like most companies in the pizza business and in the food service industry in general, ECP classifies its restaurant managers as salaried executives, exempt from minimum wage and overtime laws. (CP 60 at 67:1); *see also Palazzolo-Robinson v. Shari's Mgmt. Corp.*, 68 F. Supp. 2d 1186, 1190 (W.D. Wash. 1999). Weston, who worked for ECP

as an RGM from December 2000 to May 2002, contends this classification was improper, and that he is entitled to unpaid overtime. (CP 25-26) He seeks to represent all of ECP's restaurant managers as a class representative under CR 23.

In his 3-page declaration supporting class certification, Weston claims he spent the vast majority of his workweek (i.e., 80-90%) performing "production" work, such as making pizzas and answering phones, and that he did not have any real authority or discretion to make "management" decisions in his restaurant, such as scheduling, hiring, and firing employees, because such decisions were made by the Area Coach. (CP 25-26) These factual contentions, whether or not true of Weston, are not true of the class he seeks to represent. All of the evidence in the record shows that the other RGMs are assigned and in fact perform the management functions of their restaurants:

(1) ECP's employment records including RGM job descriptions, training records, and evaluations, set forth solely management functions for the position, not production duties. (CP 74-92)

(2) A December 2004 survey of all current RGMs, taken just before this suit was filed, shows RGMs actually perform primarily management functions, not production work. (CP 94-152)

(3) Six sworn declarations from current RGMs and Area Coaches show RGMs exercise extensive authority and discretion in managing their restaurants. (CP 153-87)

Weston has not contradicted any of this evidence and did not undertake any attempt to submit any evidence describing the responsibilities or work performed by other RGMs.

**A. ECP's Written Policies Require RGMs to Manage Their Restaurants, Not Perform Production Work.**

Weston concedes ECP's job descriptions and other written expectations of RGMs show that ECP employs RGMs to perform management, not production work. (CP 72 at 260:12) For example, ECP's job description for RGMs says the overall responsibilities of the RGM are to:

- Run Great Restaurants
- Build a Great Team
- Grow Pizza Hut
- Make Plan

(CP 74) The "behaviors" required of RGMs in order to meet these overall objectives include "Be a visible leader," "Coach restaurant management and crew," "Recruit and select qualified team members," "Manage brand image," and "Analyze results." (*Id.*) ECP rates RGMs on these management responsibilities several times a year, and pays them frequent bonuses based on those ratings. (See CP 68-69 at 224:4-226:6; CP 76-78)

ECP further details the RGMs' management role in its list of "Leadership Behaviors" necessary for successful restaurant management. (CP 80-83)<sup>1</sup> For example, RGMs are expected to handle all employee grievances "without involving the [Area Coach]." (CP 80; CP 68 at 223:9-10) RGMs are responsible for coaching the other employees in the restaurant and ensuring they comply with ECP's policies. (See, *e.g.*, CP 81) RGMs are expected to ensure that the Customer Service Representatives (CSRs), not the RGMs, handle all the telephone calls in the store,

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<sup>1</sup> On the left side of this document are the restaurant performance outcomes ECP considers unacceptable, which it labels "Below Target" (BT) or "Slightly Below Target" (SBT); in the middle column are outcomes ECP considers "On Target" (OT); and on the right are the outcomes it considers "Above Target" (AT) or "Significantly Above Target" (SAT). (CP 68 at 222:10)

so the RGM has time to manage the restaurant. (CP 83; CP 72 at 258:24-259:2)

Weston acknowledges that the written record suggests that management was his primary duty, but claims there was an unwritten policy of forcing RGMs to work production jobs in order to save on labor costs, and giving all the significant "management" tasks to the Area Coaches. (CP 72 at 259-60) When asked where he had heard this unwritten policy, Weston admitted that it was based solely on oral communications he allegedly heard. (CP 71 at 255:13) The only such communication he specifically recalled was allegedly made to him alone, by a particular Area Coach, a few months before he left his employment at ECP:

I had an area coach tell me, one time I was over in labor for one week, and I needed to cut some people. And he said, if that meant I needed to make pizzas, then so be it.

(CP 69 at 248:19-22) Weston admitted this alleged edict was not a good way to perform the job of RGM and was contrary to the established objectives of his position. (See CP 69 at 249-51; see *also* CP 57-58 at 44:15-45:6, 56:12-17)<sup>2</sup> Weston has offered no

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<sup>2</sup> In fact, Weston's own personnel files show he was expressly instructed to perform management functions, not production work. In one performance review, he was disciplined for not recruiting and hiring enough production workers to adequately staff his restaurant. (CP 85-88) In another, he was

evidence that this alleged unwritten policy applied to anyone but him, and the evidence is all to the contrary.

**B. Other Class Members Say They Spend Most of Their Work Time Performing Management, not Production, and They, not the Area Coaches, Are in Sole Charge of the Restaurants They Manage.**

Other RGMs have consistently stated that they perform primarily management work and they have extensive discretion and authority to manage their restaurants. In December 2004 (prior to being sued by Weston), ECP took a survey of all 59 of its RGMs, asking them to report how much time they spent in various job activities. (CP 94-152) Only nine stated they spent more than 50% of their time performing production work. *Id.* Eighty percent of the RGMs (47 out of 59) reported that they spent between 60% and 100% of their time on management functions such as training, scheduling, and supervising. (CP 94-139)<sup>3</sup>

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advised how he could get more out of his employees by communicating his goals, cross-training his tenured staff, and performing "detailed weekly forecasting and scheduling." (CP 91)

<sup>3</sup> Of the remaining 12 RGMs surveyed, one said he spent 50% of his time on production work, one said 51%, one said 54%, one said "5-50%," and four were unclear. CP 144, 146, 148, 150) Of those that were unclear, one seems to have written 50% and then changed it to 40% (CP 157); one wrote 55% but came up with a total allocation of 125% (CP 159); and two stated they performed some production work "every day" or "every shift" without stating how much time they devoted to it (ECP A100-01). Only four (less than 7%) of the 59 RGMs surveyed reported spending significantly more than half (65-75%) of their time on production work. (CP 141-43, 145) One of those four expressly stated that he spent "100%" of his time "multi-tasking." (CP 142)

In addition, the five RGMs and one Area Coach who have testified in this case all say the RGMs exercise virtually unlimited authority and discretion in the management of their restaurants, and specifically deny the extent of production work and close supervision alleged by Weston. (See CP 154-87) They testified that RGMs determine the weekly work schedules of their employees and decide what shifts they will work, without needing approval from their Area Coach; that they have unrestricted authority over the hiring and firing of crew members in their restaurants and do not need the consent of an Area Coach; that their respective Area Coaches visit their restaurants only occasionally and rarely or never do their Area Coaches overturn a decision they make about their restaurants or their employees. (CP 154-87)

#### **IV. ARGUMENT**

##### **A. Standard of Review and Burden of Proof for Certifying a Class**

Weston sought class certification under CR 23(a) and (b)(3), which imposes six requirements: Under CR 23(a), he must show numerosity, commonality, typicality, and adequacy of representation; under CR 23(b)(3), he must show that common questions predominate over individual questions and that a class

action is superior to other methods of resolving the controversy. See *Schwendeman v. USAA Casualty Ins. Co.*, 116 Wn. App. 9, 18 (2003). It is well-established that the plaintiff bears the burden of demonstrating that he meets each of these requirements for a class action. *Miller*, 115 Wn. App. at 820. "Class actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with the requirements of CR 23." *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). The court must engage in a "rigorous analysis" to determine whether each of the rule's prerequisites are met. *Id.* (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)). In doing so, the Court may "go beyond the pleadings and examine the parties' evidence to the extent necessary" to determine whether a class action is appropriate. *Miller*, 115 Wn. App. at 820.

This Court reviews the trial court's class certification decision for manifest abuse of discretion. *Schwendeman*, 116 Wn. App. at 14-15. A trial court has "necessarily" abused its discretion where its ruling is based on an erroneous view of the law. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). The trial court's decision is contrary to law and therefore should be reversed.

**B. Class Certification Should Have Been Denied Because Plaintiff's Allegations Are Not True of the Class.**

In order to represent a class, Weston must do more than allege facts supporting his own right to overtime, he must also show that there is a "common nucleus of operative facts" that connects his claim to each class member's claim. *Schwendeman*, 116 Wn. App. at 18. His account of the operative facts must encompass facts proving the case of other class members. *Falcon*, 457 U.S. at 155,158. The "operative facts" in this case are the degree to which the RGMs exercised managerial authority and discretion in their restaurants. Weston must do more than allege that he lacked any real authority or discretion, he must also show that his experience is representative of that of other class members so that class claims can be proved through his testimony. *See Miller*, 115 Wn. App. at 828 (if class members' job duties "varied too much to be established by representative testimony," class certification would be inappropriate); *see also Falcon*, 457 U.S. at 158; *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 136 (2d Cir. 2001) ("a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole ... predominate over those issues that are subject

only to individualized proof.") Weston has not and cannot do so, and it was legal error to certify his claim as a class action.

Many courts have held, in cases just like this one, that a retail store manager challenging his exempt pay status cannot represent a class based solely on his own testimony about his job duties if (a) that testimony is contradicted by his written job description or (b) the employer has shown that the duties performed by members of the proposed class vary significantly from the plaintiff's alleged duties.<sup>4</sup> These are precisely the circumstances of this case: Weston's testimony as to his day-to-day job duties is contradicted by all of the written job descriptions and by the other members of the class.

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<sup>4</sup> See *Miller*, 115 Wn. App. at 828 (outside sales representatives would not be entitled to class certification of state overtime claim if employer showed that class members' job duties varied too much to be established by representative testimony); *Smith v. Heartland Automotive Servs., Inc.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) (store managers did not establish they were similarly situated to others with respect executive exemption under federal overtime law where their testimony was contrary to the written job description and declarations from other managers); *Holt v. Rite-Aid Corp.*, 333 F. Supp. 2d 1265, 1274-75 (M.D. Ala. 2004) (same); *Stubbs v. McDonalds Corp.*, 227 F.R.D. 661, 666 (D. Kan. 2004) (same with respect to restaurant assistant managers, under both state and federal law); see also *Mike v. Safeco Ins. Co.*, 223 F.R.D. 50, 53-54 (D. Conn. 2004) (same with respect to insurance claims representative). Each of these cases involved practically identical facts to this case, as is further discussed in subsection 3 below.

**1. Plaintiff's Claim Turns on Whether His "Primary Duty" Was Management**

Under the Washington Minimum Wage Act, an employee is exempt from overtime pay if he is employed in a "bona fide executive capacity." RCW 49.46.130(2)(a) & 49.46.010(5)(c). The "executive" exemption is applicable if the employee's "primary duty" is management of the enterprise or a recognized subdivision thereof, and he regularly directs the work of two or more other employees. RCW 49.46.010(5)(c); WAC 296-128-510(6).<sup>5</sup> The only element actually in dispute in this lawsuit is whether Weston's "primary duty" was management of his restaurant.

There are no cases in Washington that define "primary duty." Accordingly, the courts look to federal case law defining that term under the Fair Labor Standards Act (FLSA). See *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000). Under the FLSA, courts may consider the following in determining whether an employee's "primary duty" is management:

- (1) The amount of time the employee spends on managerial tasks;

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<sup>5</sup> This is the "short test" for the executive exemption, which applies to employees whose salary is \$250 per week or more. WAC 296-128-510(6); see also *Smith*, 404 F. Supp. 2d at 1148 (explaining similar short and long tests under Fair Labor Standards Act). Weston's salary was over \$600 per week.

- (2) The relative importance of the employee's managerial tasks;
- (3) The frequency with which the employee exercises discretion;
- (4) The employee's relative freedom from supervision;
- (5) The relationship between the employee's salary and the wages paid to the non-exempt employees for the kind of non-exempt work performed by the exempt employee.

*See, e.g., Baldwin v. Trailer Inns, Inc.*, 206 F.3d 1104, 1113 (9th Cir. 2001); 29 C.F.R. § 541.103 (1973).<sup>6</sup> No one consideration is controlling, and the determination of an employee's "primary duty" must be based upon "all the facts in a particular case." *Baldwin* at 113 (quoting 29 C.F.R. § 541.103). To determine which employees are properly classified as exempt often "depends on an individual, fact-specific analysis of each employee's job responsibilities." *Holt v. Rite Aid*, 333 F. Supp. 2d at 1271 (quoting *Moriskey v. Public Service Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D. N.J. 2000)).

Weston has not denied that the second and fifth considerations above support ECP, i.e., that ECP considered his management duties most important to ECP and that he was paid

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<sup>6</sup> The federal regulations were amended effective August 23, 2004. *See Smith*, 404 F. Supp. 2d at 1148 n. 2. The most significant change was that the threshold salary was raised from \$250 per week to \$455 per week, a change which Washington has not adopted and which is immaterial in this case. *See Id.*; 29 C.F.R. §§ 541.100(a)(1), 541.700 (2004).

significantly more than the "production" workers he supervised. (See CP 67 at 218:22, CP 59 at 56:12, CP 56 at 11:21) In order to sustain his claim that he was not properly classified as exempt, he relies on the first, third, and fourth considerations above, i.e., the amount of time he spent on managerial tasks, the amount of discretion he exercised, and the amount of supervision he received. (See CP 24-26) These are the factual issues that will determine the outcome of this claim at trial. On each of these essential, Weston is not representative of the class.

**2. Where Plaintiff's Essential Factual Allegations Are Contrary to the Written Job Descriptions and the Statements of Other Class Members, Class Certification is Not Appropriate.**

Weston cannot fairly represent the class of RGMs because his version of what the job entailed does not accurately describe how the class members actually performed the job. Where Weston claims he spends 80-90% of his time performing production work such as answering telephones and making pizzas, most RGMs say they spent most of their time performing managerial tasks such as training, scheduling, supervising others, recruiting, hiring, and evaluating employees, etc. (*Compare* CP 25 *with* CP 94-152; CP

155, 162, 167, 173, 180)<sup>7</sup> Where Weston claims he had "little or no discretion" in the key management decisions in his store, other RGMs testified that they are solely in charge of making those decisions. (*Compare* CP 25 with, CP 154-87) And where Weston claims his Area Coach controlled all significant matters in his restaurant, other RGMs say their Area Coaches seldom even visit their restaurants and they receive little or no supervision on virtually all aspects of daily management of their restaurants. (*Id.*)

Simply put, the key factual allegations that are essential to Weston's claim are not true of the class. Even if the jury were to believe Weston's testimony, it would prove nothing about the "primary duty" of other RGMs, so a decision on his claims is not a fair or reliable disposition of the claims of other RGMs.

This is not a case in which there is a central, common issue that will be resolved in the same manner on the same evidence for

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<sup>7</sup> ECP's survey results were produced to Weston in discovery four months before he moved for class certification, yet he offered nothing to rebut them. See *Alston v. Virginia High School League, Inc.*, 184 F.R.D. 574, 580 (W.D. Va. 1999) ("Plaintiffs could have designed and conducted their own survey, or simply gathered individual opinions expressed in affidavits by other girls who are not plaintiffs but are class members. But plaintiffs chose not to do so, and presented very little in the way of evidence of attitudes and interests of girls other than those named in the lawsuit. **The court cannot invent evidence that plaintiffs failed to supply and therefore finds no reason to doubt the validity and merit of defendant's survey results.**" (emphasis added)).

all members of the class, thereby advancing the litigation and making class adjudication more efficient and expeditious. Where, as here, resolution of the claim is dependent upon "highly specific factual and legal determinations that will be different for each class member," class certification is not an appropriate means of adjudication. See *Miller*, 115 Wn. App. at 824. In this case, the legal issue of whether ECP misclassified its RGMs as exempt depends on the individual employee's allocation of time between "management" and "production" tasks, but also on the degree of autonomy and discretion they actually exercised on the job.<sup>8</sup>

Where, as here, the evidence shows that each of these issues differs between the named plaintiff and members of the class, class treatment is improper.

In *Miller*, the Court of Appeals held that if the class members differ from the named plaintiff in critical respects, any advantages of class certification "all but disappear," and individual litigation is required. *Id.* at 828. In that case, two route sales representatives sought class certification for their claim that they were misclassified

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<sup>8</sup> See *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982) ("[T]he person 'in charge' of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions"); *Palozollo-Robinson*, 68 F. Supp. 2d at 1190 (same, construing both federal and Washington law).

as exempt under the "outside sales agents" exemption. *Id.* at 819 (citing RCW 49.46.010(5)(c)). Like ECP, the defendant had submitted declarations of class members showing that they did not share the plaintiff's allocation of duties. *Id.* at 825.<sup>9</sup> The court held that this evidence, if believed, would make class-wide adjudication inappropriate. *Id.* at 825-27.

If, however, the trial court were to agree with Farmer's argument that the class members' job duties varied too much to be established by representative testimony, the advantages of the class action vehicle would all but disappear, and it would be difficult to justify class certification.

*Id.* at 828. That is exactly the situation presented here. The other RGMs not only did not share plaintiff's day-to-day allocation of time to performing "production" work, but they also exercised almost unfettered discretion and complete autonomy in running their restaurants. (See CP 154-87) That was the job ECP gave them and that is what they did. Their status as salaried, exempt

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<sup>9</sup> *Miller* differed from this case because the exemption at issue there depended on whether the employee's delivery work was incidental to his sales work, or vice-versa. *Id.* at 826 (citing WAC 296-128-540(2)). Thus, the "overriding" factual issue in *Miller* was a class-wide issue, subject to generalized proof for the whole class. *Id.* The Court still held that significant individual differences in the allocation of time would make class certification inappropriate. Here, the overriding factual issue which will determine the outcome on the ultimate legal question is the degree to which the plaintiff exercised authority and discretion in his restaurant, which has been shown to differ radically between him and the class he seeks to represent.

executives cannot fairly or accurately be determined from Weston's testimony, because Weston's testimony does not describe what they did.

Several federal courts have addressed precisely the facts presented here and held that plaintiff could not represent a class.<sup>10</sup> For example, in *Stubbs v. McDonald's Corp.*, 227 F.R.D. 661 (D. Kan. 2004), the plaintiff, an assistant manager at McDonald's, claimed that despite his manager title, he was really just another line worker.<sup>11</sup> In support of his motion to certify a class, Stubbs made the same allegations as Weston:

Plaintiff's affidavit . . . asserts that [McDonald's] had a business practice of purposefully under-staffing its restaurants in order to reduce or eliminate overtime of hourly employees, and that this business practice forced plaintiff, as well as other first and second assistant managers, to carry-out the duties and responsibilities of the staff, who were compensated on an hourly basis.

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<sup>10</sup> Federal decisions on class certification are considered "highly persuasive" in Washington courts. *Pickett v. Holland America Line-Westours, Inc.*, 145 W.2d 178, 188, 35 P.3d 351 (2001). The FLSA has its own "class" mechanism whereby a plaintiff may assert claims on behalf of other "similarly situated" employees. 29 U.S.C. § 216(b). The standards for certifying a § 216(b) class are lower than the standards applicable here under CR 23. *Sheffield v. Orius Corp.*, 211 F.R.D. 411 (D.Or. 2002) ("The requirements of § 216(b) are clearly less stringent than the Rule 23 standard.").

<sup>11</sup> Unlike many retail franchise operations, ECP classifies all of its assistant restaurant managers as non-exempt hourly employees; the only exempt employee in ECP's restaurants is the RGM. (See CP 56 at 12:1-2) *Cf. Donovan*, 672 F.2d 221 (challenge to exempt status brought by assistant restaurant managers); *Palazzolo-Robinson*, 68 F. Supp. 2d 1186 (same).

*Id.* at 663 (internal quotations omitted). Like Weston, the plaintiff offered no evidence beyond his own declaration to demonstrate that other managers shared his experience. *Id.* at 664.

McDonalds, like ECP, submitted affidavits of other assistant managers stating their job duties and refuting the plaintiff's claim that they were forced to perform the duties of hourly employees. *Id.*

Moreover, each affiant stated that, while their role as first or second assistant managers occasionally or oftentimes required them to perform the duties normally done by hourly employees for short periods of time, they continued managing employees and supervising the restaurant while doing so.

*Id.* at 666. All of the RGMs interviewed in this case state exactly the same thing. (CP 154, 160, 164, 169, 175) The *Stubbs* court denied class certification, holding that these declarations rebutted any presumption that the plaintiff's claims were representative of the class he sought to represent. *Stubbs*, 227 F.R.D. at 666.

*Smith v. Heartland Automotive Services*, 404 F. Supp. 2d 1144 (D. Minn.), is also directly on point. There, a group of Jiffy Lube store managers sued for overtime, claiming that despite their title, they performed primarily "production" work rather than management tasks. *Id.* at 1150. The court noted that this was "not a case in which Plaintiffs can rely on a common job description" to

support class action treatment because the applicable job description, like Weston's, "sets out mainly managerial tasks." *Id.* at 1151 & n. 5. Therefore, resolution of the plaintiffs' individual claims would require their individual testimony as to the degree to which their work differed from the job description. *Id.*

In *Smith*, as here, the employer also submitted declarations showing that many of the members of the class did not have the same experience as the named plaintiffs in their "ability to exercise discretion, perform management tasks, and act independently of the district manager." *Id.* at 1152. Because these facts were precisely the facts that would need to be proven in order for the plaintiffs to prevail, the court found class treatment to be inappropriate. *Id.* at 1153, 1154. The evidence of record in this case is even more stark: Weston's declaration, true or not, describes a much different job than the declarations of the other RGMs on precisely the issues that will determine the outcome on his claim. (*Compare CP 25-26 with CP 154-87*)<sup>12</sup>

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<sup>12</sup> This is a hazard in any case in which plaintiff's claims depend entirely on oral descriptions of job responsibilities. As a consequence, claims based on oral representations are generally ill-suited for class certification. See, e.g., *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 484, 597 (7th Cir. 1993) ("claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir. 1998) ("Fifth Circuit case law even suggests a *per se*

Similarly, in *Holt v. Rite-Aid Corp.*, 333 F. Supp. 1265 (M.D. Ala. 2004), a group of drug store managers and assistant managers sued for overtime claiming that they performed the same tasks as the hourly workers in their stores. *Id.* at 1269. Like *Smith* and this case, the plaintiffs could not rely upon a common written job description because the applicable job description described managerial tasks.

Clearly, ... this is not a case where janitors are being classified as exempt executives. Evidence before the court of the formal, written job descriptions of Store Managers and Assistant Store Managers contains many managerial tasks. It is only once the Plaintiffs' testimony as to the degree of tasks are performed that the application of the exemption becomes questionable.

*Id.* at 1271. As in this case, the named plaintiffs' testimony was also inconsistent with testimony from other proposed class members. *Id.* at 1273-74. This evidence, the court held, precluded a finding that members of the class were "similarly situated." *Id.* at 1275.

Finally, in *Mike v. Safeco Ins. Co.*, 223 F.R.D. 50 (D. Conn. 2004), an insurance claims representative sought class certification of his claim that he was misclassified as exempt. Like ECP, the

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prohibition against class actions based on oral representations." (citation omitted)).

employer had a written job description which listed a variety of managerial tasks, but the plaintiff claimed he did not really perform most of them and instead spent all of his time appraising damage to cars. *Id.* at 52. The court observed:

In order to proceed on behalf of a class, Mike must establish that Safeco deviated from its job description in a similar manner in assigning tasks to other Field Claims Representatives so that the court can readily identify the class members.

*Id.* at 53-54. The court denied certification "because class membership is not founded upon any Safeco policy or other generalized proof, but rather on the fact-specific determination of each individual plaintiff's day-to-day tasks." *Id.* at 54. This is exactly the case here: Weston's essential allegations are directly contrary to his job description as well as an extensive written record showing that RGMs are expected to manage their restaurants, not perform production work, and that they are given extensive authority and discretion to do so. Weston's contrary declaration about his own experience is not sufficient to warrant certification of a class of all RGMs on this issue.

Weston's claim must be resolved on an individual rather than class basis because the critical facts he relies upon to prove his claim are demonstrably not true of the class members. Even if he

convinces a jury that he performed almost solely production work and had almost no management authority, it will not prove the same of the other RGMs.

## V. CONCLUSION

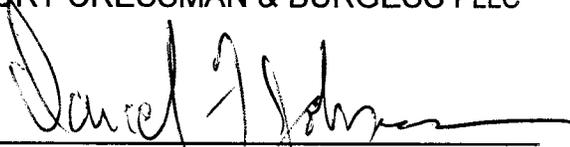
A "rigorous analysis" of the actual evidence in the record and the material factual issues in dispute reveals that any finding concerning Weston's status as an exempt manager will not be a fair or reliable finding concerning the members of the class. The trial court erred in granting class certification in these circumstances and its order should be reversed.

RESPECTFULLY SUBMITTED this 30th day of June,

2006.

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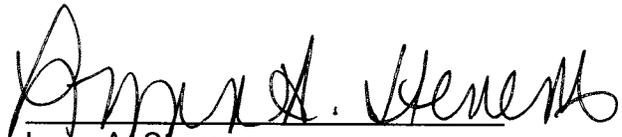
**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Will Aitchison  
Mark Crabtree  
Aitchison & Vick, Inc.  
3021 N.E. Broadway  
Portland, OR 97232

- via electronic mail**
- via U.S. mail**
- via hand delivery
- via air courier
- via facsimile

DATED this 30<sup>th</sup> day of June, 2006.

  
Lynn A. Stevens

FILED  
COURT OF APPEALS DIV. #1  
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