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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 635182

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

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

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INSTRUCTION 9 WAS ERRONEOUS

A. The Letter And Spirit Of The FLSA Call For Workers Who, As A Matter Of Economic Reality, Are Dependent On A Business To Be Employees Of That Business.

The Fair Labor Standards Act (“FLSA”) was passed in 1938 and broadly defined “employ” and “employee”: “a broader or more comprehensive coverage of employees ‘would be difficult to frame.’” *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945). In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Supreme Court specifically rejected the use of the common law test for determining who is an employee under the FLSA. The Court explained that the FLSA:

[C]ontains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.

Id. at 323 U.S. at 150-151 (emphasis added).¹ More than sixty years ago, the Supreme Court held an employee “ultimately” is one who “as a matter of economic reality” is “dependent upon the business to which they render services.” *Bartels v. Birmingham*, 332 U.S. 126 (1947). Moreover, the Court of Appeals’ opinion in *Anfinson v. FedEx Ground*, 159 Wn. App.

¹ See also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), an FLSA case holding that boners in a slaughterhouse were employees rather than independent contractors. *Rutherford* quoted *Walling*, 330 U.S. at 726-727. It also quoted approvingly from the lower court decision that held that economic realities rather than the common law test of control should be used in correcting “economic evils through remedies which were unknown as common law.”

35, 244 P.3d 32 (2010) correctly pointed out that “the Supreme Court and all federal circuits agree that the “the economic realities” test is the applicable test for the Fair Labor Standards Act (FLSA), on which the Washington Minimum Wage Act (MWA) is based.²

B. The MWA Is A Remedial Statute That Should Be Interpreted Broadly In Favor Of Employees And That Washington Courts In Interpreting The MWA Properly Look To The FLSA And Federal Cases Interpreting The FLSA.

This Court has repeatedly held that the MWA, including its definitions, is patterned on the Fair Labor Standards Act of 1938.³ In *Stahl*, this Court also explained that in enacting the MWA, “the legislature broadly defined employee in RCW 49.46.010(5) to include any individual employed by an employer.” As also correctly held by the Court of Appeals, citing *Stahl*, *Drinkwitz* and *Innis*:

“[T]he legislature used the term ‘any’ to modify ‘employee,’ and Washington courts have consistently interpreted the word ‘any’ to mean ‘every’ and ‘all.’” Thus, the broad sweep of the statute evidences its remedial purpose. It is also significant that the Supreme Court noted

² Note 17 of the Court of Appeals opinion includes one case on this issue from each circuit, *i.e.*, *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1947 (1947); *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg. Inc.*, 757 F.2d 1376, 1383 (3d Cir. 1985); *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007); *Herman v. Express Sixty-Minute Delivery Service, Inc.*, 161 F.3d 299, 303 (5th Cir. 1998); *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989); *Brouwer v. Metropolitan Dade County*, 139 F.3d 817, 818-19 (11th Cir. 1998). Respondents also cite numerous other Court of Appeals cases to similar effect, *infra*.

³ *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 64 P.3d 10 (2003); *Innis v. Tandy Corp.*, 141 Wn.2d 517, 7 P.3d 807 (2000); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 996 P.2d 582 (2000).

both that the MWA is “based on the Fair Labor Standards Act of 1983 (FLSA),” and that a review of that act supported the Court’s conclusions regarding the MWA.

Stahl at 884. Every one of those principles applies directly to this case and defendant provides no reasonable argument challenging their application to this case.

C. DLI Bulletin 11 Is An Interpretation Of General Applicability By The Washington Department Of Labor & Industries Which Adopts The FLSA Economic Realities Test For Determining Who Is An Employee, And Further Supports The Court Of Appeals Analysis In This Case.

Technical Bulletin 11⁴ was issued by DLI as a guide to the interpretation of the MWA, and to assist the DLI staff to “evaluate whether there is an independent contractor or employer/employee relationship.” The Bulletin thus meets the requirements of *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992), and is entitled to the same consideration that this Court in *Stahl* gave to the DLI interpretative guidelines issued on January 2, 2002, as discussed at 148 Wn.2d at 886-87.

D. There Is No Good Basis For Adopting FedEx’s Efforts To Subvert The Economic Dependency Test By Adding Additional Factors To The Test Such As The Subjective Belief Of The Workers.

No FLSA appellate case cited by either party lists subjective belief of a party in any “multi-factor test.” Even when cases held that the

⁴ That Bulletin was submitted in the Statement of Additional Authorities by Appellants/Plaintiffs dated July 12, 2010.

parties' written or oral understanding can be relevant, the relevance is generally limited to situations in which the understanding is meaningless unless it "mirrors" economic realities. For example, in *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983), the Fifth Circuit held:

In determining an individual's status as "employee" within the meaning of the FLSA, however, defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the "economic realities" of the relationship. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S. Ct. 1473, 1476, 91 L. Ed. 1772 (1947);

That holding was adopted by the Fourth Circuit in *Reich v. Shiloh True Light Church of Christ*, 895 F.Supp. 799, 815 (W.D.N.C. 1995), *aff'd*, 85 F.3d 616 (4th Cir. 1996), *Morrison v. International Programs Consortium*, 253 F.3d 5, 11 (D.C. Cir. 2001), and made an almost identical holding as did courts in the Ninth and Tenth Circuits.⁵

Instructing the jury about a worker's subjective belief is particularly problematic in Washington given RCW §49.46.090 which states:

Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

⁵ See *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) ("the subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above"); *Dole*, 875 F.2d at 804. Other cases emphasize the relevance of subjective belief when it is the alleged employer who characterizes the worker as an employee. *Brock v. Superior Care, Inc.*, 840 F.2d at 1059 (employer admission that his workers covered by the FLSA is "highly probative").

An employer is thus not permitted to defend by introducing evidence of a worker agreeing that he or she is an independent contractor.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT APPLYING JUDICIAL ESTOPPEL

The defendant raised judicial estoppel at the trial court level. However, as the Court of Appeals explained “[t]he trial court appears to have rejected FedEx’s argument by dealing with the issue on the merit.” 159 Wn. App. at 63. There should be no dispute that appellate review of the trial court’s decision not to apply judicial estoppel is limited to determining whether there was an abuse of discretion. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). As discussed in Respondents’ Answer to Petition For Review at pages 16-17, not only was the trial court’s refusal to apply judicial estoppel correct, but there was no evidence or even argument that the trial court abused its discretion, *i.e.*, was “manifestly unreasonable or based on untenable grounds or untenable reasons.” *See In Re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

III. INSTRUCTION 8 WAS ERRONEOUS

As approved by the trial court, Instruction 8 stated:

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

CP 2194. The Court of Appeals rejected this instruction and pointed out the inconsistency between the trial court's statement of the law outside the presence of the jury and defendant's use of the instruction to make an incorrect and inconsistent argument. The facts underlying this discrepancy are as follows.

The trial court rejected defendant's position that Instruction 8⁶ should impose on plaintiffs the burden of proof that employee status was common to all class members and ruled that it was deleting the word "all". RP 3/26/09, pp. 93-97. The Court later explained:

Specifically the court is persuaded that commonality does not require each and every class member be affected individually by the actions, conduct, or work experience if they have promulgated pursuant to a policy or widespread procedure or practice common to the class members during the class period.

RP 3/27/09, p. 16. Plaintiffs sought a ruling on March 26th that "if it says common to the class members, the defense is not free to stand up and argue that that means every single class member." RP 03/26/09, p. 97. The court refused to make such a ruling stating "if they want to argue it applies to everyone, they can argue it applies to everyone." *Id.* During closing, defendant argued that:

⁶ The word "common" was ambiguous because the definition of "common" can either mean "widespread" or "of or relating to the community as a whole." Compare definition 1(b) and 2 in the definition of "common" in the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Third Edition), p. 381.

There's 15 terminals here, statewide, for all four years to all 320 class members. That is their burden. They have to show you that all 320 of those people are employees.

And I will show you in just a second that if they showed you that only 319 were and one wasn't, your verdict should be for FedEx Ground because they haven't met their burden. They have to show you all.

RP 03/30/09, p. 69 (emphasis added).

Instruction 8, by permitting an argument directly contrary to the trial court's correct statement of the law outside the presence of the jury quoted above, was not only prejudicial, but also misleading and thus insufficient under cases such as *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). The Court of Appeals also properly concluded that "the instruction appears to be legally incorrect." 159 Wn. App. at 66. Instruction 8 is legally incorrect for at least five separate reasons.

1. Instruction 8 Permitted An Absurd and Unfair Result.

It is unfair to the point of absurdity for an instruction to permit a jury to believe that 319 of 320 workers were employees, but nevertheless to believe it should find that none of the workers are employees because plaintiffs did not prove employment status for one worker. That is also inconsistent with the principle that the MWA must be interpreted broadly. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007). This is particularly true if the jury believes that a defendant's action or conduct resulted from "a policy or widespread procedure or practice."

2. The Instruction Would Permit An Employer To Violate The Law For The Vast Majority Of Its Workers Without Fear Of A Class Action.

As discussed above, the reason for the “economic reality” test is to base employment status on “dependency based on economic reality” rather than on a legal structure that employers might devise to avoid paying overtime or minimum wages. If the law permitted an employer of a group of 320 workers to prevent a successful class action claiming misclassification of workers as independent contractors by actually treating only 5% or 10% of the workers as independent contractors and treating the rest as employees, that would be a cheap way for employers to insulate themselves from a class action enforcing its liability as employers.

Indeed, that reasoning would not be limited to wage and hour statutes. For example, if an employer who engaged in a pattern or practice of racial or gender discrimination towards most workers could insulate itself from class action liability by treating 5% or 10% of the workers in a non-discriminatory fashion, that would encourage just such cynical behavior. Moreover, defendant provides no precedent for Instruction 8.

3. Both Common *And* Individual Evidence Is Routinely Permitted In Multi-Party Wage and Hour Cases.

Multi-party cases other than class actions do not routinely limit admissible evidence only to “common” evidence. For example, a multi-defendant case (either civil or criminal) often involves some testimony

applicable to all defendants as well as individual testimony applicable to only one defendant. *See, e.g., Lockwood v. AC&S*, 109 Wn.2d 235, 744 P.2d 605 (1987). The juries in those cases are not routinely instructed that they have to find against all defendants or none of them. Nor are juries generally instructed to ignore totally individual evidence.

The same is true both in (a) multi-plaintiff wage and hour cases, and in (b) wage and hour cases in which the Secretary of Labor, by statute, represents many workers.

(a) For example, in *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (3d Cir. 1983), five workers sued under the FLSA for overtime based on being employees rather than independent contractors. The Court of Appeals affirmed the trial court's finding on liability which was based, *inter alia*, on individual evidence, *e.g.*, "one worker testified, for example, that if he did not appear at the proscribed time in the morning, he knew he would lose his job." *Id.* at 665. In *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308, 1314 (5th Cir. 1976), evidence that "many" but not all of the workers had a "longtime" relationship with defendant was relevant to establishing employment status for 60 workers.

Defendant's Petition at page 17 cited *In Re FedEx Litigation*, 662 F. Supp. 2d 1069 (N.D. Ind. 2009) because while the trial court there found that the "economic reality" test was the proper FLSA test for

distinguishing between employees and independent contractors, it also concluded that a nationwide FLSA class should not be certified as a collective action because “there is a lack of substantial similarity among the putative class workers sufficient to justify treatment as a collective action.” *Id.* at 1083. That conclusion does not apply to the present case for at least three reasons. First, in *Scovil v. FedEx Ground Package System, Inc.*, -- F. Supp. 2d --, 2011 WL 4347017, the District Court in Maine rejected that conclusion and conditionally certified a class of Maine FedEx drivers as a collective action challenging their independent contractor status. The *Scovil* court rejected *In Re FedEx Litigation*, and relied upon a number of other cases certifying FLSA collective actions “challenging independent contractor classification.”⁷ Secondly, a single-state Washington class action is much more like the single-state Maine collective action than the nationwide collective action considered by the Indiana court. Finally, this case has already been tried as a class action, which directly supports its suitability for class action treatment.

(b) Pursuant to the FLSA (29 U.S.C. §216(c)), the Secretary of Labor is authorized to bring suits on behalf of employees against employers for wage and hour violations including those based on

⁷ See, e.g., *Kerce v. West Telemarketing Corp.*, 575 F. Supp. 2d 1354 (S.D. Ga. 2008); *Spellman v. American Eagle Exp., Inc.*, Slip Copy, 2011 WL 4102301 (E.D. Pa. 2011); *Putnam v. Galaxy 1 Marketing, Inc.*, 2011 WL 4072388 (S.D. Iowa 2011).

misclassifying employees as independent contractors. In many of these cases brought for the benefit of multiple workers, the Secretary prevailed even though (i) the evidence of misclassification was not uniform as to all workers, and (ii) the Secretary presented both individual and common evidence. For example, in *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981), when defendant pointed out that 2 of 66 workers exercised “extensive powers and option,” the Ninth Circuit responded that:

[T]his argument, however, ignores the “circumstances of the whole activity” and the “economic reality” of sixty-four “agents” and focuses instead on specific factors relating to two.

656 F.2d at 1371 (emphasis added). In *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 328 (5th Cir. 1993), the court held

The parties do agree, and the district court found, that most dancers have short-term relationships with Circle C. Although not determinative, the impermanent relationship between the dancers and Circle C indicates non-employee status.⁸ (Emphasis added.)

Since workers in non-class wage and hour cases involving multiple private plaintiffs or being represented by the government may have their cases proved by evidence (including representative evidence) affecting many but not all workers, the same should be true for workers in a class action.

⁸ In *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1048-1049 (5th Cir. 1987) (a case involving 109 firework stand operators, court determined control by the employer despite testimony by a number of workers indicating lack of control). See also *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) (decision affecting more than 40 stores based on testimony from 6 stores).

Otherwise, this Court would be applying a more onerous substantive legal burden to class actions than to other multi-party cases, which would be inconsistent with CR 23.

4. Instruction 8 Is Inconsistent With The Well-Established Concepts Of Representative Evidence And “Pattern Or Practice” In Wage And Hour Litigation.

The trial court’s order granting class certification specifically approved plaintiffs using “representative evidence” to prove their case. CP 217. The Court of Appeals correctly recognized that proving “whether the class of plaintiffs were, as a matter of economic reality, dependent on FedEx,” requires not only an analysis of written practices and procedures, but also “requires analysis of the actual working relationship of the parties, which may only be presented in the form of representative evidence from individual class members.” 159 Wn. App. at 70-71.

Defendant misstates the nature of representative evidence by arguing that representative evidence can never be common evidence and that “class action claims cannot be proven using anything other than common evidence.” Pet., p. 16. That is both logically incorrect and contrary to ample precedent. Logically, the testimony of one person in a group as to what he or she observed while there is representative of what the group likely observed. Moreover, testimony by a single worker as to statements made separately to her or him by a person who supervises 50

workers can in appropriate circumstances be used to draw inferences as to what the supervisors likely tell other workers. That also is representative testimony. *See, e.g., Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991), in which both the Secretary of Labor and the First Circuit agreed that:

“[T]he adequacy of the representative testimony necessarily will be determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony.”

Representative testimony from a small percentage of workers can be used to determine whether an employer is liable to a larger group of workers under wage and hour laws. *Martin v. Selker Bros. Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991) (“the testimony and evidence of representative employees may be sufficient to establish prima facie proof of a pattern and practice of FLSA violations.”). *See e.g., Donovan v. Burger King Corp.*, 672 F.2d at 224-225, which permitted representative testimony to prove liability in a misclassification. *See also Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989), where the Court of Appeals determined that 34 workers were employees rather than independent contractors based on the testimony of one worker stipulated to be “representative.” Since testimony can be

stipulated to as “representative,” testimony could also be found by the jury to be representative even in the absence of stipulation.⁹

There is also ample precedent that an employer can have a pattern or practice of violating wage and hour laws even if not every worker is covered by the pattern or practice. For example, in *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116, n.2 (4th Cir. 1985), the Fourth Circuit held that:

² Case law clearly holds that the Secretary can rely on the testimony of representative employees as prima facie proof of a pattern or practice.

....
Also meritless is Bel-Loc's contention that the inconsistency of the alleged evidence of pattern or practice makes the court's factual determination clearly erroneous. The evidence as a whole clearly suffices to establish the existence of a pattern or practice, at least as a “just and reasonable inference.” Though some employees testified that they received thirty minute breaks, that testimony pales in comparison to the much more extensive testimony that the pattern of conduct was to the contrary.¹⁰

⁹ Similarly, in *Donovan v. Tehco, Inc.*, 642 F.2d 141, 144 (5th Cir. 1981), the Court of Appeals analogized to *Anderson v. Mt. Clemens*, 328 U.S. 680, 66 S.Ct. 1187 (1946). It relied on “the exceptionally broad definition of employee in the FLSA” to conclude that wage transcriptions based on Tehco's payroll records “was enough to shift the burden of producing evidence to Tehco” in determining whether a group of workers were employees or independent contractors.

¹⁰ In *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973), the court explained the impact of lack of unanimity:

At that point the burden of proof shifted to the defendant, and it was his obligation to show which of the employees had reported all overtime hours. Appellant produced ten such employees and the trial court accordingly omitted them and one other from its award. The ten men who reported all overtime hours were those who resisted the “pervasive effect” of the supervisors' instructions.

5. Class Action Precedent In And Out Of Washington Rejects FedEx's Arguments.

Plaintiffs have found no class action appellate Washington cases that support Instruction 8 as FedEx argued it and many cases rejecting the positions that unless all class members are entitled to relief, then none are entitled to relief. On the contrary, the cases hold that if a pattern or practice of illegal conduct is found, the existence of any exceptions to the pattern or practice do not furnish a reason to deny class relief; rather, those class members who are not adversely affected are not awarded damages for any kind.

For example, in *Johnson v. Moore*, 80 Wn.2d 531, 496 P.2d 334 (1972), this Court affirmed a class action ruling concerning Seattle's practice of holding people in jail "on suspicion." This Court rejected the argument that class action relief was not appropriate because some class members would not be entitled to pretrial release. Drawing on discrimination class actions involving schools, this Court explained at

In *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471-472 (11th Cir. 1982), the court awarded relief to some workers who were subject to the pattern or practice of wage and hour violations, but denied it to others not subject to such pattern or practice. *See also Pythagoras General Contracting Corp. v. DLI*, 17 Wage & Hour Cas.2d (BNA) 1118, 1125 (2011), where the U.S. Department of Labor, Administrative Review Board, held that:

The Department of Labor may rely on representative employees' testimony to establish a prima facie case of a pattern or practice of violations. Once a pattern or practice is established, the burden shifts to the employer to rebut the occurrence of violations or to show that particular employees do not fit within the pattern or practice.

page 536 that:

The fact that some members of such a broadly defined class might not be entitled to enter the schools even in the absence of racial discrimination against them, or the possibility that some individuals held on suspicion of various crimes in the Seattle city jails might not be entitled to release under constitutional standards of reasonable detention, does not bar a class action. (Emphasis added.)

Similarly, in *Hanson v. Hutt*, 83 Wn.2d 195, 204-205, 517 P.2d 599 (1974), this Court affirmed a class action judgment and ordered notice and an opportunity to file a new claim for 1,668 pregnant women who had been denied unemployment benefits even though a number of those women may have been:

[J]ustifiably disqualified because they voluntarily quit work, or because they were unable to work, or because they were not seeking work, or for any other reasons for which a claimant may not be qualified under RCW 50.20.010.

Class relief should be extended to those who were improperly denied benefits under RCW 50.20.030.

In *Hanson* and *Johnson*, as in this case, the fact that not all class members would qualify for substantive relief was not a proper basis for ruling against everyone. That is particularly true in the present case which was bifurcated so there will be a subsequent proceeding to deal with relief. (damages).

In *King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994), the Court held:

Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate. In *Zimmer*, the Court of Appeals stated that the fact that some members of a class might not wish to benefit by the relief sought does not impair the legitimacy of a class action. *Zimmer*, at 870, 578 P.2d 548.

See also Miller v. Farmer Bros. Co., 115 Wn. App. 815, 825, 64 P.3d 49 (2003), where the Court of Appeals held:

This common “course of conduct” is sufficient to satisfy the commonality requirement of CR 23(a). The fact that some employees within the class spent more time making sales contacts than the declarants who supported class certification might affect the merits of the claim, but it does not defeat commonality. (Emphasis added.)

This Court recently has looked to the California Supreme Court for relevant class action precedent. *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 851-52, 161 P.3d 1000 (2007), quoting *Vasquez v. Superior Court*, 484 P.2d 964 (1971), about the importance and utility of class actions. The California Supreme Court has repeatedly held that a class does not have to unanimously be entitled to relief in order for class relief to be given. For example, in *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 174 Cal.Rptr. 515 (1981), the court held:

The results of the flyer questionnaire show no more than approximately 6 percent of the class of some 4,000 persons antagonistic to the class action suit. This small number should not be sufficient to defeat the motion for certification.

Another close precedent from the California Supreme Court is *Sav-On Drug Stores, Inc. v. Superior Court of Los Angeles County*, 96 P.3d 194 (2004) which was a state wage and hour misclassification class action much like this one. Far from requiring all evidence to be “common” or inapplicable to all class members, the Court held that such class actions were appropriate when:

[P]laintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception,

[Defendant] does not suggest any per se bar exists to certification based partly on pattern and practice evidence or similar evidence of a defendant’s class-wide behavior. California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant’s centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.¹¹ Indeed, as the Court of Appeals recently recognized, the use of statistical sampling in an overtime class action “does not dispense with proof of damages but rather offers a different method of proof” (*Bell v. Farmers Ins. Exchange* 115 Cal. App. 4th 715, 750, 9 Cal.Rptr.3d 544 (2004)).

On June 22, 2011, defendant submitted to this Court as additional authority *Wal-Mart Stores v. Dukes*, 180 L.Ed.2d 374, 131 S.Ct. 2541 (2011), a Title VII case, and argued that *Dukes* supports “its argument that

¹¹ See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977) (statistics bolstered by specific incidents “are equally competent in proving employment discrimination”).

evidence of liability in a class action must be common to the certified class.” *Dukes* does no such thing. To the contrary, *Dukes* reaffirmed that in it, as in other Title VII class action cases, the plaintiffs’ “merits contention” was that defendant “engages in a pattern or practice of discrimination.” Slip Op., p. 11, emphasis in original. The *Dukes* court, at note 7, explained that:

[I]n a pattern or practice case, the plaintiff tries to ‘establish that ... discrimination was the company’s standard operating procedure[,] the regular rather than usual practice.’ *International Broth. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843 (1977).

Teamsters, however, is contrary to FedEx’s argument to the jury. In that case, the Court explained that a pattern or practice did not have to be a universal practice. *Teamsters*, 431 U.S. at 336, n. 16, e.g., a pattern or practice is “if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.” That is why a pattern or practice finding only supports a “rebuttable inference that all class members were victims of the discriminatory practice.” Slip. Op., p. 11, n. 7 (emphasis added). Moreover, *Teamsters* (contrary to the second sentence of Instruction 8 in this case) affirms the use of individual testimony as well as “common” statistical evidence. *Id.* at 338.

Nor does the “common” statistical evidence have to show that 100% of class members were affected by the discriminatory practice. For example, in *Dukes*, the court in rejecting Dr. Bielby’s expert testimony, stated:

[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking” is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

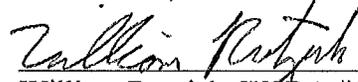
The fair inference from that analysis is that the court’s decision in *Dukes* might well have been different if there had been substantial evidence that less than 100%, *e.g.*, 95%, of the employment decisions at Wal-Mart were determined by stereotyped thinking.

IV. CONCLUSION

For the foregoing reasons and the reasons previously given, this Court should affirm the decision of the Court of Appeals in this case.

RESPECTFULLY SUBMITTED
this 24th day of **October, 2011.**

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DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on October 24, 2011, I caused to be e-mailed (per agreement) and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this document, Supplemental Brief of Respondent, addressed to the following counsel of record:

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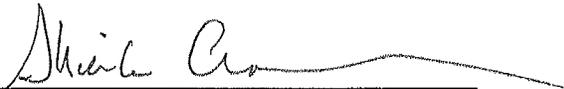
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