## Ninth Circuit Provides Much-Needed Guidance On Evidentiary Burdens In Overtime Misclassification Litigation

*by Matthew Bainer*

With the expiration of the employer's deadline to seek review, one of the more modest but significant recent California wage and hour law decisions has now become final. The Ninth Circuit's unpublished decision in *Whiteway v FedEx Kinko's Office and Print Services* (9th Cir 2009) 2009 WL 725152, issued on March 19, 2009, reversed a Northern District order, (2007 WL 2408872), and reinstated a class action lawsuit seeking unpaid overtime and related penalties on behalf of a class of hundreds of the company's Center Managers. This short three-page memorandum opinion, (before Thomas, Bybee, and Southern District Judge Roger Benitez), carries monumental implications for all California employees who are paid on a "salaried" basis and denied compensation for overtime work. (The opinion was summarized in **CELA Bulletin**, April 09, p.7.)

The complaint, filed in May of 2005, alleged that Center Managers at FedEx's California locations were improperly classified as "exempt" from the overtime pay requirement on the basis of what is commonly referred to as the "managerial" exemption. Under California law, exemptions from overtime pay are narrowly construed and the employer has the burden of proving that the exemption applies. For the managerial exemption to apply, the employer must prove, *inter alia*, that the employees spend more than one-half of their work time on exempt duties and "customarily and regularly" exercise discretion and independent judgment under Cal Labor Code § 515.

The case was certified as a class action in 2006. In May of 2007, FedEx moved for summary judgment, asking the District Court to conclude that the entire class was exempt from overtime under the "executive" exemption of Wage Order 7-2001. The District Court agreed and granted Defendant's motion. The Plaintiff appealed to the Ninth Circuit, seeking to have summary judgment overturned.

The decision is significant for what it reveals about the Ninth Circuit's views concerning the burdens of proof in overtime misclassification cases, and what evidence is sufficient—or, in this case, insufficient—to satisfy the employer's burden. Because the Ninth Circuit omitted a recitation of the evidence presented, a brief summary will be helpful.

In support of its motion for summary judgment, FedEx submitted deposition testimony by seven current or former Center Managers who described their duties and asserted that they spent more than one-half of their work time on managerial tasks. The defense evidence also included deposition excerpts and a declaration from higher-level managers concerning the job duties and responsibilities of Center Managers and why they believed that the Center Managers were properly classified as exempt executives.

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FedEx also submitted a declaration by Dr. Christina Banks who had been hired to conduct a questionnaire study of 150 FedEx Center Managers in Oregon, Washington, Arizona, and Texas to determine what tasks and activities Center Managers perform on the job and how much time they spend on exempt work. (Because this litigation covers only California Center Managers, the Banks study did not survey any actual class members.) According to Banks, 75 percent of the Center Managers surveyed reported spending more than 50 percent of their time on exempt work, while 25 percent of them reported a figure below 50 percent.

In opposition to summary judgment, the plaintiffs submitted 22 declarations from class members—current or former California Center Managers—including plaintiff Stephen Whiteway. The declarants had managed approximately 50 different stores throughout California, (out of a total of 200), and had spent an average of nearly five years in the Center Manager position. Each of the declarations stated, on "personal knowledge," that Center Managers are required to spend, and in fact do spend, the majority of their time performing manual labor and tasks requiring little or no independent thought. The plaintiff submitted deposition testimony by class members that was consistent with the declarations.

Plaintiff also submitted the declaration of Dr. George Johanson, a tenured Professor of Educational Studies at Ohio University, who regularly teaches courses in statistics, research, and questionnaire design, and classical test and item response theory. Dr. Johanson opined that the main results obtained by the Banks survey "[were] unreliable and invalid." Additionally, three class members submitted declarations explaining why they found the Banks questionnaire confusing and poorly drafted. In reversing the Northern District's grant of summary judgment, the Ninth Circuit wrote:

"Reviewing the evidence in the light most favorable to the Center Managers, as we must at this stage, [cite omitted], we conclude that the Center Managers' tendered evidence was sufficient to establish a genuine issue of material fact regarding whether the Center Managers were realistically expected to spend at least half their time on exempt tasks. FedEx Kinko's bore the burden of establishing that Center Managers were 'primarily engaged in duties that meet the test of the exemption.' *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 324 (2004). The evidence tendered by the Center Managers—including declarations of class members and expert rebuttal of FedEx Kinko's statistics—was sufficient to create a genuine issue of material fact as to whether the Center Managers were 'primarily engaged' in exempt tasks. For this reason, we must reverse the grant of summary judgment." 2009 WL 725152 at *1.

The decision is important for its statements regarding both the legal and evidentiary standards in misclassification cases. The Court reinforced previous decisions in squarely placing the heavy burden of proof on the employer, and elucidated the type of evidence that may be used to make or defeat that required showing.

Significantly, the plaintiff's expert here did not state an opinion in contradiction to that of the defense expert. Rather, he only called into question the validity of the defense expert's findings. And because the plaintiff bore no burden of proof, this was sufficient, the court held, for purposes of raising a fact issue and supporting a denial of summary judgment. Similarly, the plaintiff's declarations and deposition testimony were found sufficient for purposes of defeating summary judgment, not because they were more credible than the defendant's, but simply because they called into question the validity of the assertions made by the defense witnesses.

The lesson to be taken from this decision is that the heavy burden of proof placed on the employer in these cases is to be taken seriously. While it might initially seem counter-intuitive that a defendant should be required to prove its "innocence," it is nonetheless the clear law in California that employees are presumptively entitled to overtime until it is proven otherwise. Litigants on both sides of these cases, as well as those counseling employers on the propriety of their overtime classification practices, would be well advised to look carefully at *Whiteway v FedEx Kinko's* in anticipating how courts are likely to analyze misclassification cases in the future.

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