

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DAVID COOPER and JERRY SCOTT,)
individually and on behalf of all those)
similarly situated,)

Plaintiffs,)

v.)

ALSCO, INC., a foreign corporation,)

Defendant.)
_____)

NO. 12-2-31451-9 SEA

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

THIS MATTER came before the Court on the parties' cross-motions for summary judgment. The Court has considered all of the submissions made in connection with the motions, the underlying pleadings on file and the oral argument presented by counsel in open court on Friday May 16, 2014. If necessary for appellate review, counsel should prepare and submit for entry an addendum to this Order cataloging the various submissions. Deeming itself fully advised in the premises, the Court now issues this brief memorandum opinion and Order.

ORDER RE: MOTIONS
FOR SUMMARY JUDGMENT - 1

HON. WILLIAM L. DOWNING
King County Superior Court
516 3rd Avenue
Seattle, WA 98104

The facts of the case need not be detailed by the Court because they are well known to the parties and not significantly in dispute. What is in dispute is the question of applicability to these plaintiffs of the “Retail Sales Exemption” or “RSE” in Washington’s law regarding the compensation that must be paid for overtime work.

As employees of the defendant and pursuant to a collective bargaining agreement and an election on their parts, the plaintiffs were compensated under a structure that provided a base pay plus commissions. Compensation for work they regularly performed in excess of 40 hours in a week is at issue in this case. For such hours, the plaintiffs assert they should be paid at “time and a half” pursuant to RCW 49.46.130(1) while the defendant counters that they are exempt from this provision by operation of RCW 49.46.130(3) which exempts employees of a “retail or service establishment” who are paid by commission.

Although designated “Route Sales Representatives” or “RSR’s”, the plaintiffs really don’t themselves do much work that would ordinarily be thought of as retail sales. Rather, for the most part, they deliver fresh products to commercial entities on their routes and service these accounts in contractual relationships developed by others. With the holding of Stahl v. Delicor, 148 Wn. 2d 876, 886 (2003) that “all employees of retail and service establishments could be paid under the RSE regardless of their duties,” the exemption is arguably applicable.

Since the plaintiffs are paid more than 1.5 times the state minimum wage with more than half their pay being calculated by a commission formula, the central question here is whether defendant AlSCO, Inc. is what the law considers to be a “retail or service establishment.” The statutory definition of this term is “an establishment seventy-five

percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.” RCW 49.46.010(6).

The bulk of the defendant’s earnings come from sales and services provided to its commercial customers pursuant to long-term contracts and usually in bulk. It is the Court’s understanding that more than 90% of the defendant’s trade involves rental and laundering of uniforms and other textile products used by businesses. These customers do not “re-sell” the goods or services the defendant has sold them but what they do is to utilize them for their own business purposes.

State and federal labor department policies direct the present inquiry to whether a given business possesses or lacks a “retail concept.” Deriving from the same root as “tailor”, the concept of the word retail connotes something being cut up into pieces. It has traditionally been used to describe the sale of small amounts of goods or services directly to private individuals or households. Along with developments in modern business and lifestyles, the term has also evolved. These historical developments are traced in Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 963 (1965) and, of course, have continued since the days when Willard Wirtz was Labor Secretary.

In the context of the Retail Sales Exemption, it is now accepted that the term retail may be applied in some business-to-business transactions that are not necessarily small and do not necessarily involve household needs. Yet the analytical focus on “retail concept” remains.

While Ansco’s goods and services may be accurately characterized as “not for resale,” the situation is still markedly different from that in Stahl v. Delicor, *supra*, where

route drivers were delivering snack items into vending machines which they serviced. In that case, individual members of the general public would consume the snack items after dropping their quarters into the slot of a vending machine and those very quarters would then go into Delicor's "volume of sales."

In this case, AnSCO's customers may be the "end of the line" in the sense that their employees alone wear the uniforms and spread the tablecloths; however, they do so not as consuming members of the public but rather as a means to assist their own employers in their efforts to make a profit by selling their own goods or services to the general public.

It may well be that deference both to the realities of the modern world and to freedom of contract suggest the focus on the "retail" nature of the business in question ought to fall away with attention left solely on the nature of the work and the manner of compensation. Nonetheless, it bears restating that, because of the purposes and remedial nature of the Minimum Wage Act, there is a heavy burden on the defendant to establish that the work at issue falls "plainly and unmistakably" under a "narrowly construed" exemption as it is framed under current law. On the evidence before it, the Court cannot find this to be the case.

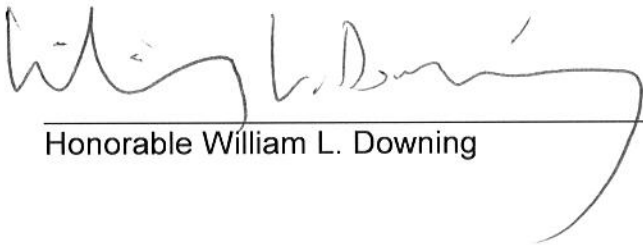
A second aspect of the plaintiffs' Motion for Summary Judgment concerns the methodology that should be utilized for the calculation of damages. Somewhat regrettably, the Court finds itself unable to resolve this issue at the present time. For reasons suggested at oral argument, the Court is uncomfortable endorsing a methodology that would work an injustice upon either party. If there is a fair third alternative (e.g., one that would begin with mutual understandings and expectations as

to the ratio between hours to be worked and compensation), the Court would welcome it. If there is no alternative other than what has been put forward thus far, then the Court will make a determination at a later date if necessary.

The plaintiffs' Motion for Summary Judgment is GRANTED as to the determination that the Retail Sales Exemption is not applicable to their claims for overtime compensation. By agreement, the defense assertion of applicability of the "Outside Salesperson Exemption" is also stricken. As to the issue of methodology for calculating damages, the plaintiffs' Motion is DENIED WITHOUT PREJUDICE.

The defendant's Motion for Summary Judgment is GRANTED as to the striking of plaintiffs' claims for exemplary damages under RCW 49.52 but DENIED in all other respects.

Dated this 19th day of May 2014.



Honorable William L. Downing