NO. 91801-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

BRIEF OF *AMICUS CURIAE* WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. IDENTIFICATION OF AMICUS

The Washington Employment Lawyers Association (WELA) appears as amicus curiae supporting the position of Plaintiffs David Cooper and Jeffrey Scott. WELA has approximately 150 members and is a chapter of the National Employment Lawyers Association, a non-profit organization. WELA's members are Washington attorneys who primarily represent employees in employment law matters, including cases brought under state and federal anti-discrimination and wage statutes. WELA's principal goals are to advocate in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

There are two issues presented to the Court for resolution in this case. The first concerns the scope of the "retail and service establishment" (RSE) exemption to the overtime rules of Washington's Minimum Wage Act (MWA). The second concerns the proper method for calculating overtime pay damages for employees misclassified as exempt. In accordance with the employee-protective purposes and principles embodied in the MWA, this Court should affirm the trial court's narrow construction of the RSE exemption. Likewise, this Court should affirm the trial court's method for calculating overtime damages.

Plaintiffs worked as Route Sales Representatives (RSRs) for Defendant Alsco, Inc., and their job duties primarily involved the delivery and pickup of linens, towels, uniforms, and other similar equipment leased to commercial clients under ongoing contracts. At regular intervals, RSRs delivered fresh items and picked up dirty items to be laundered. RSRs also delivered bathroom supplies, such as soap and paper towels, which had been purchased by the clients.

Beginning in 2009, RSRs were given the "option" of being paid under a salary-plus-commission pay structure. Those who chose this pay structure were paid a consistent weekly salary as well as a commission that was based on the amount of revenue generated on their assigned route. Alsco did not pay RSRs paid under the salary-plus-commission system any additional compensation for overtime work.

The trial court properly determined, after a highly fact-specific inquiry, that these RSRs were improperly classified as exempt under the RSE exemption because they did not meet all of the requirements for the exemption. Though several of these requirements were met, the trial court concluded that Alsco's business was not "recognized as retail sales or services in the industry." CP 800-04. The trial court thus construed the exemption narrowly, holding it applies only when the facts clearly establish all elements required for the exemption. *Id.*

Because they were improperly classified as exempt, RSRs paid a salary plus commissions are entitled to damages representing the overtime compensation they should have received as non-exempt employees for all hours worked over 40 in any workweek. The proper method for calculating such damages is unclear, as the guidance for how to calculate these damages for employees paid a salary plus commissions is conflicting. But the MWA's language and purpose, as well as relevant state case law and analogous federal guidance, support the trial court's determination that the "regular rate of pay" for RSRs should be calculated as the weekly compensation divided by the presumed 40-hour workweek, regardless of whether they are paid a straight salary or salary plus commissions. This method of calculating overtime pay damages properly protects employee rights and disincentivizes unscrupulous employers from using misclassification and commission payments to limit their liability in overtime cases.

WELA respectfully asks the Court to affirm the trial court's rulings. First, WELA urges the Court to narrowly construe the retail and service establishment exemption by holding the exemption applies only where all elements are met. Second, WELA asks the Court to adopt the method used by the trial court for calculating overtime compensation for employees misclassified as exempt under the MWA. WELA urges the

Court to find that the purposes of the MWA are best served by rejecting a fluctuating workweek analysis in this context.

III. ARGUMENT

A. The Retail and Service Establishment Exemption.

1. The retail and service establishment exemption should be narrowly construed.

Remedial statutes such as the MWA "should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001)). "Employer exemptions from remedial legislation such as the MWA will be 'narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.'" *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 881, 64 P.3d 10 (2003) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000)). This construction of exemptions protects employees from being denied the benefits of the overtime pay rules unless there is a clear legislative intent to exempt those employees.

The RSE exemption to the MWA applies where an employee is employed by "a retail or service establishment," "the regular rate of pay of the employee is in excess of one and one-half times" the minimum wage,

and "more than half of the employee's compensation … represents commissions on goods or services." RCW 49.46.130(3); *see also* Dep't of Labor & Indus. ("DLI") Administrative Policy No. ES.A.10.1 at 1-2 (updated July 15, 2014). A "retail or service establishment" is defined as "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) (emphasis added). This definition contemplates two distinct requirements: first, 75 percent of the establishment's annual dollar volume of sales of goods or services is not for resale (i.e., is used or consumed by the direct purchaser of the goods or services); and second, the establishment's business is "recognized as retail sales or services."

Therefore, there are four distinct elements to the RSE exemption: (1) 75 percent of the annual volume of sales of the establishment's goods or services are not for resale; (2) the establishment's business is "recognized as retail sales or services" in the industry; (3) the employee's regular rate of pay is more than 1.5 times the minimum wage; and (4) more than half of the employee's compensation represents commissions on goods or services. "Unless all … conditions [for the RSE exemption] are met, the exception is not applicable, and overtime premium pay of at least time and one-half the regular hourly wage must be paid for all hours

worked over 40 in a workweek." DLI Administrative Policy No. ES.A.10.1 at 2. In the absence of any element, an employee's situation is not "plainly and unmistakably consistent" with application of the exemption.

2. The test for whether a business falls under the retail and service establishment exemption must include an analysis beyond whether the goods are for resale.

The following issue is presented in this case: whether the requirement that an establishment's business be "recognized as retail sales or services in the particular industry" is an inquiry separate and distinct from whether the establishment's goods and services are for resale. The Court should answer this question in the affirmative, as the requirement that a business be "recognized as retail sales or service" cannot be ignored without contravening the language and purpose of the MWA. If the legislature intended the other three elements of the RSE exemption to be sufficient, then this language would not appear in the statute. *See, e.g.*, *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("The drafters of legislation are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute…. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") (citations omitted); *see also HomeStreet, Inc. v. State, Dep't of Revenue*,

166 Wn.2d 444, 454-55, 210 P.3d 297 (2009) (stating that "all words in a statute must be accorded their meaning" and reasoning that if the legislature did not intend all words to have meaning, it would not have included them).

Alsco argues that because the goods and services it provides are not resold by its business customers, but instead are used by those businesses and thus are "end of the line" transactions, this largely ends the inquiry of whether the company is a "retail or service establishment." The trial court properly rejected Alsco's argument. Alsco's position would render meaningless the additional language in the RSE definition requiring that the business be "recognized as retail sales or services in the particular industry." RCW 49.46.010(6). Unless and until the legislature decides to remove or modify such language, it must be given meaning and effect.

Though the determination of whether an establishment is "recognized as retail sales or services" in the industry is a highly fact-based inquiry, there is substantial guidance at both the state and federal level as to what falls within and outside this category. In DLI Administrative Policy ES.A.10.3, the examples that fall within the exemption consist almost entirely of businesses whose primary customers are individual consumers who purchase small amounts of goods or services for personal or household use. Establishments that are

"recognized as retail sales or services" include auto repair shops, stores, cemeteries, hotels, public parking lots, and restaurants. DLI Administrative Policy No. ES.A.10.3 (issued Jan. 2, 2002). Alsco does not "plainly and unmistakably" fall into any of these categories, nor is its business model clearly analogous to these consumer situations. On the other hand, the list of establishments to which the RSE exemption does not apply are more analogous to Alsco's business model. Those non-exempt businesses include sellers of barber and beauty parlor equipment, laundries, and providers of store equipment. *Id*.

Further, federal regulations governing the identical exemption provide that "an establishment … will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public." 29 C.F.R. § 779.319; *see also Drinkwitz*, 140 Wn.2d at 298 ("Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance."). Alsco sells its goods and services almost exclusively to business establishments pursuant to long-term contracts. Thus, despite meeting most of the elements for the RSE exemption, Alsco does not "plainly and unmistakably" qualify as a business "recognized as retail sales or services" in its industry. The trial court properly concluded that

Alsco is not a "retail or service establishment" and thus does not fall within the RSE exemption.

B. Overtime Pay Calculations in the Salary-Plus-Commissions Context.

1. There is limited and potentially conflicting guidance for determining the "regular rate of pay" for employees paid salary plus commission.

RCW 49.46.130 is the statutory basis for requiring employers to pay nonexempt employees at an increased rate for overtime work. RCW 49.46.130(1) provides "no employer shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of [forty hours] at a rate not less than one and one-half time the regular rate at which he or she is employed." This statutory requirement that employers pay employees 1.5 times their regular rate of pay for all hours over 40 makes no distinction between employees compensated using different payments methods, such as hourly, salary, commission, and piece rate pay. The entitlement to overtime pay, therefore, applies regardless of an employee's compensation structure.

The MWA does not define "regular rate," but the Washington Administrative Code explains "regular rate of pay" as follows:

> 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 40 per week. The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate 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 40 per week.

WAC 296-128-550 (emphasis added). Notably, the regulation makes no distinction between salaried employees and employees paid commissions.

Division I of the Court of Appeals recently addressed the proper method for calculating overtime pay for misclassified employees. In *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 279 P.3d 972 (2012), the court held that unless (1) there is a clear agreement between employer and employee to a fluctuating workweek (or to having the salary cover a specified weekly number of hours other than 40) and (2) the employer pays overtime compensation contemporaneously with the overtime work, an employer cannot use a fluctuating workweek calculation method to calculate overtime pay. *Id.* at 346 (citing *Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 2d 1206, 1216-17 (W.D.

Wash. 2010)). In other words, when an employer has misclassified salaried employees as exempt from the MWA's overtime provision, the employer is prohibited from retroactively applying the regular rate calculation method permitted under WAC 296-128-550 of dividing total compensation by total hours worked. *Id.* at 344. Misclassified employees paid solely on a salary basis are entitled to have their regular rate of pay calculated based on a presumed 40-hour workweek and, further, are entitled to one and one-half times that rate for all hours worked over 40. *Id.* at 346.

The DLI administrative policies have incorporated *Fiore*'s calculation methodology and its rejection of the retroactive application of the fluctuating workweek in the salary pay context. The policies generally provide that for salaried employees, "the regular rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate." DLI Administrative Policy No. ES.A.8.1 at 5 (updated July 15, 2014); *see also* DLI Administrative Policy No. ES.A.8.2 at 2 (updated July 15, 2014). "In the absence of a clear understanding of the number of hours to be included in the weekly salary, the department will consider the salary agreement to be based on 40 hours." DLI Administrative Policy No. ES.A.8.1 at 4. The 40-hour presumption

likewise applies if the employer fails to pay overtime compensation "contemporaneously with straight-time pay." *Id*. at 5.

Left unclear by the statutes, regulations, and administrative policies is the proper method for calculating overtime pay where an employee is paid a salary plus commissions. DLI Administrative Policy No. ES.A.8.1 suggests that the "regular rate" for all employees other than hourly employees "is determined by dividing the total weekly compensation received by the total number of hours the employee worked during the workweek, including the hours over forty." DLI Administrative Policy No. ES.A.8.1 at 2 (citing WAC 296-128-550). Because salaried employees are not hourly employees, this would seem to apply to salaried employees. But the same administrative policy adopts the *Fiore* rule rejecting broad application of the "divide by total hours worked" language of WAC 296-128-550 where the purposes of the MWA would be better served by a different calculation method. *See* DLI Administrative Policy No. ES.A.8.1 at 5. This inconsistency in the guidance on how to calculate overtime damages for misclassified employees who also receive commissions should be resolved in favor of protecting employees.

2. The rationale behind *Fiore* is equally applicable to employees paid a salary plus commissions.

The problem that the *Fiore* rule remediates arises when employers, seeking to maximize employee output without increasing labor costs, attempt to stretch the MWA's statutory exemptions to avoid paying any overtime compensation to employees. As explained below, the *Fiore* rule protects employees by disincentivizing employers from improperly classifying employees as exempt. Employers who have misclassified employees as exempt and thus have failed to pay those employees any overtime compensation should not be entitled to take advantage of the employer-friendly fluctuating workweek method for retroactively calculating overtime pay. *See Perkins v. S. New England Tel. Co.*, No. 3:07-CV-967 (JCH), 2011 WL 4460248, at *4 n.5 (D. Conn. Sept. 27, 2011) ("[A]ssessing damages using the fluctuating workweek method provides a perverse incentive to employers to misclassify workers as exempt, and a windfall in damages to an employer who has been found liable for misclassifying employees under the FLSA."). Such a result would be contradictory to the employee-protective purposes of the MWA.

If *Fiore* were limited to the salaried-employee situation only, misclassified individuals who earn a straight salary and regularly work overtime would end up receiving more in total compensation than

employees paid a similar amount as a salary plus commissions. Employers generally have substantial control over the hours employees work and methods by which employees are compensated, and a narrow application of *Fiore* would incentivize employers to classify employees as exempt and pay a portion of their wages on a basis other than salary. If the exempt classification is subsequently found to be unlawful, the employer pays no more in overtime compensation than it would have at the outset under the fluctuating workweek approach. This backdoor escape from the *Fiore* rule should not be permitted. The employee-protective purpose of the MWA is better served by applying the *Fiore* rule to compensation structures beyond straight salary, including to salary plus commission pay.

To illustrate the problem in the context of employees who are misclassified under the RSE exemption, assume Worker 1 earns $800 per week in the form of a straight salary, and Worker 2 earns $900 per week total, $400 as "salary" and $500 as "commissions."[1] Also assume that both employees work 50 hours in a week and that the employer has

[1] Because employers typically set the terms of employment, including the hours employees are permitted to work, employers often have substantial control over the amount of compensation an employee can earn through commissions. Depending on the structure of the commissions system, an employee may have little opportunity to increase or decrease their commissions earnings through longer hours or through higher quality work. As a result, it is not unusual for an employee to earn nearly the same amount in commissions every week. Ultimately, this amount is controlled by the employer.

improperly failed to pay overtime to either employee. Under *Fiore*, Worker 1 should earn a total of $1,100 for the week. To arrive at this number, you first divide $800 by 40 (since the salary is presumed to cover only 40 hours per week) to get a regular rate of $20 per hour. You then multiply that rate by 1.5 to get an overtime rate of $30 per hour. The overtime rate is then multiplied by the number of overtime hours (10), yielding a result of $300. When the $300 of overtime pay is added to the salary of $800, the total compensation for the week is $1,100.

Worker 2, on the other hand, would earn only $990 per week, even though he is paid more than Worker 1 for straight time worked. Under Alsco's reasoning, Worker 2's "regular rate" for purposes of calculating overtime damages must be determined by dividing the total pay for the week by the potentially fluctuating number of total hours actually worked each week, rather than by the presumed 40 hours. The total straight-time pay for Worker 2 is $900 ($400 salary plus $500 commission), so the regular rate of pay for a 50 hour workweek is $18 per hour ($900 divided by 50 hours). The overtime premium is calculated as one-half of the regular rate (or $9) and is then multiplied by the number of overtime hours (10), yielding overtime pay in the amount of $90. Worker 2, therefore, earns just $990.

As a result, salary-plus-commission employees improperly classified as exempt under the RSE exemption will be shortchanged on overtime compensation compared to similar employees who are paid a salary alone. If commissions are treated differently from salaries for purposes of calculating overtime damages in misclassification cases, employers will be incentivized to split employee pay into "salary" and "commission" components so as to avoid paying the higher overtime rate associated with salary-only employees. Employers can then comfortably treat employees as exempt under the RSE exemption and if the employers are proven wrong, the damages for this violation will be substantially less than the employers would otherwise have to pay.

Further, failure to apply the *Fiore* rule to employees paid a salary plus commission will result in employer incentives to pay ostensibly exempt employees (under <u>any</u> claimed MWA exemption) a salary plus a tiny commission and then work them very hard. If the exempt status is challenged and the employer loses, the employer will nevertheless avoid the *Fiore* "divide by 40" rule and thus severely limit overtime liability simply because the employer paid a small portion of the employees' pay as a "commission." *See Klein v. Torrey Point Grp., LLC*, 979 F. Supp. 2d 417, 436 (S.D.N.Y. 2013) (explaining that federal regulation governing application of the fluctuating work week "is carefully drafted to ensure

that the [fluctuating workweek] method does not permit employers to manipulate pay scales so as to escape the FLSA's overtime requirements"). As a result, *Fiore* must be applied to employees earning a salary plus commissions in order to serve the employee-protective purposes of MWA.

This result is further underscored by the broad range of employees who can be paid "commissions." Though neither state nor federal guidance directly defines "commission" for purposes of the overtime pay statutes, this Court has agreed with administrative guidance stating that employees of retail and service establishments can be subject to the RSE exemption "whether they work in sales or in other activities." *Stahl*, 148 Wn.2d at 886-87. In other words, an employee may earn "commissions" on an employer's sales or on revenue generated, even without having any opportunity to directly influence those sales.

The circumstances of RSRs illustrate this point. Alsco controls the routes to which RSRs are assigned and then pays its RSRs commissions based on the revenues generated from their assigned routes. The amount of revenue generated on a particular route, and thus the amount an RSR can earn each week in commissions, varies little, since customers serviced on those routes have long-term contracts with Alsco for a particular delivery schedule and particular types and amounts of products delivered.

As a result, paying RSRs a "commission" does not create incentives for employees to work additional hours or opportunities to materially increase their compensation by working harder or better. Rather, the "commission" operates much like a salary, in that RSRs are paid nearly the same amount per week for the same work of delivering on the same route. Because "commissions" can be paid in this type of situation, commissions should be treated the same as salary compensation for purposes of calculating overtime pay for misclassified employees.

IV. CONCLUSION

For all of the foregoing reasons, WELA respectfully requests that the Court affirm the trial court's ruling. First, the Court should narrowly construe the retail and service establishment exemption and find that it applies only where all required elements are met. Second, the Court should clarify that the method embodied in *Fiore* is the proper method for calculating overtime compensation for employees misclassified as exempt under the MWA and paid on a salary-plus-commission basis.

RESPECTFULLY SUBMITTED AND DATED this 25th day of April, 2016.

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CERTIFICATE OF SERVICE

I, Elizabeth A. Adams, certify that on April 25, 2016, I caused the foregoing to be transmitted by electronic means and by first-class mail via the U.S. Postal Service, postage prepaid from Seattle, Washington, to the counsel listed below:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of April, 2016.

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