

MSG
WR
PJH
KE
Calendar

HONORABLE GREGORY P. CANOVA

RECEIVED

JAN 30 2008

SCHROETER GOLDMARK & BENDER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM,
INC., JOHN SCHNEBECK, CHERYL
PILAKOWSKI, AND JOHN DOES 1 through
10,

Defendants.

No. 04-2-39981-5-SEA

~~PROPOSED~~ FINDINGS AND
ORDER GRANTING CLASS
CERTIFICATION

The above-entitled Court, having considered plaintiffs' motion for class certification, and supporting declarations, defendant's opposition to the motion and supporting declarations, plaintiffs' reply and supporting declarations, defendant's motion to file surreply with supporting declarations, defendant's surreply, plaintiffs' opposition to motion to file *defendants' objection to proposed findings and Order, plaintiffs' reply thereto,* surreply, and the arguments of counsel at the hearing held on December 14, 2007,

HEREBY FINDS:

1. Plaintiffs have satisfied the CR 23(a) elements of numerosity, commonality, typicality, and adequacy of representation, as follows:

1 (A) CR 23(a)(1) - Numerosity: There are in excess of 320 current and
2 former “contractors”¹ who performed pick-up and delivery services for the FedEx Ground
3 and FedEx Home divisions of defendant FedEx Ground Package System, Inc. (collectively
4 referred to herein as “FedEx”) during the period covered by the complaint in this action,
5 December 21, 2001 through December 31, 2005 (referred to herein as the “class period”).
6 These contractors reported to fifteen (15) FedEx terminals located throughout the state of
7 Washington, and worked for varying lengths of time during this class period.
8

9 A class should only be certified where a plaintiff demonstrates that the proposed class
10 “is so numerous that joinder of all members is impracticable.” *Miller v. Farmer Bros.*, 115
11 Wn. App. 815, 821 (2003). Courts have found that anywhere between 20 and 40 class
12 members make joinder impracticable and raise a rebuttable presumption that this factor has
13 been satisfied. *Id.* Defendant does not contest that this element has been satisfied here.
14 Accordingly, I find that plaintiffs have met the numerosity requirement under CR 23(a)(1).
15

16 (B) CR 23(a)(2) - Commonality: To satisfy this requirement, plaintiffs’
17 allegations must derive from a “common course of conduct” with respect to the class. *Miller*,
18 *supra*, at 824. “The commonality test is qualitative rather than quantitative, that is, there need
19 be only a single issue common to all members of the class.” *Smith v. Behr Process Corp.*,
20 113 Wn. App. 306, 323 (2002). Thus, there is a “low threshold” to satisfy this test. *Id.* at 320.
21

22 Plaintiffs are former single route contractors who have sued FedEx on behalf of
23 themselves and others similarly situated for overtime wages they allege are owed under the
24 Washington Minimum Wage Act (“MWA”), RCW 49.46, and for unreimbursed uniform
25

26 ¹ Plaintiffs refer to the putative class members as “drivers” and defendant refers to them as
“contractors.” For the purposes of this Order, and without making any judgment as to their
employment status, the Court will refer to them as “contractors.”

1 expenses owed under the Industrial Welfare Act, RCW 49.12. The underlying issue on the
2 merits (as to both the overtime and the uniform reimbursement claims) is whether the contractors
3 were misclassified by FedEx and should be treated as employees. ~~The parties agree that the~~
4 critical test is whether FedEx had the "right to control" the manner and means of the work
5 performed. See e.g., *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 497-98, 663 P.2d 132
6 (1983), citing *Hollingbery, Jr., v. Dunn*, 68 Wn.2d 75, 79, 411 P.2d 431 (1966); see also
7 *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-120, 52 P.3d 472 (2002). ~~App~~

9 ~~Defendant argues that *Hollingbery* requires in this case an individualized inquiry into~~
10 ~~the circumstances of each contractor making class treatment inappropriate. The Court~~
11 ~~disagrees.~~ While defendant is entitled to argue that individual circumstances show that the
12 contractors are properly classified (i.e., as independent contractors), there is more than
13 sufficient evidence on this record that this analysis can be done on a class-wide basis.

14
15 All putative class members were required to sign the same standardized Operating
16 Agreement (with only minor differences between the FedEx Ground and FedEx Home
17 agreements), and this Agreement is presented to contractors on a "take-it-or-leave it" basis.
18 The existence of these uniform Operating Agreements undermines defendant's contention
19 that an individualized inquiry will be necessary. The Court also finds that all terminals and
20 all drivers are subject to FedEx policies that are issued on a national basis as to many aspects
21 of the pick-up and delivery work performed by the contractors. Moreover, plaintiffs have
22 presented declarations from 35 contractors who worked in all but 3 of the terminals who say
23 substantially similar things about the rules and practices governing their work. The fact that
24

25
26 ² ~~At oral argument, defendant argued that *Kamla* revised the traditional "right to control" test~~
~~of employee-independent contractor status. However, *Kamla* itself reaffirms this "retained~~
~~control" test. 147 Wn.2d at 120.~~

1 there may be some differences between contractors does not defeat commonality. *See Miller*,
2 115 Wn. App. at 825; *Schnall v. AT&T Wireless Serv.*, 139 Wn. App. 280, 296-97, 296-297,
3 161 P.3d 395 (2007). Indeed, as *Miller* points out, because “class certification is sought at
4 the early stages of litigation, courts generally assume that the allegations of the complaint are
5 true and will not attempt to resolve material factual disputes or make any inquiry into the
6 merits of the claim.” *Id.* at 820. Courts may go beyond the pleadings “to the extent
7 necessary to determine whether the requirements of CR 23 have been met.” *Id.* In this case,
8 the factual showing by plaintiffs is more than sufficient to satisfy this Court that these
9 elements have been met.
10

11 Since there is a common issue as to the employment status of the contractors,
12 plaintiffs have satisfied the CR 23(a)(2) requirement.
13

14 (C) CR 23(a)(3) - Typicality: Plaintiffs must also show that the claims of
15 the three proposed class representatives are typical of the class and are based on the same
16 legal theory. “A representative plaintiff’s claim is typical if the same legal theory underlies
17 all class members’ claims. *See Smith*, 113 Wn. App. at 320.” *Weston v. Emerald City Pizza*,
18 *L.L.C.*, 137 Wn. App. 164, 170, 151 P.3d 1090 (2007).
19

20 The plaintiffs have satisfied this test. Their claims, and the circumstances surrounding
21 their work as contractors, are typical for all other single route contractors during the same
22 time period.
23

24 (D) CR 23(a)(4)- Adequacy of Representation: Plaintiffs must demonstrate
25 that there is no adversity of interest between the class representative and other class
26 members, and that the attorneys for the class representative are qualified to conduct the
proposed litigation.

1 With respect to counsel for plaintiffs, they are experienced class action attorneys with
2 a demonstrated ability and capacity to handle this large case, and defendants do not argue
3 otherwise. Thus, the Court finds that counsel are adequate.

4 With respect to the proposed class representatives, defendant argues (a) as former
5 contractors, the three class representatives cannot represent current contractors, and (b) there
6 are credibility problems with all three class representatives. The Court disagrees. With
7 respect to the first argument, the Court agrees with plaintiffs that it is commonly the case that
8 former employees act as representatives for a class comprised of both current and former
9 employees. See e.g., *Olson v. Tesoro Refining and Marketing Co.*, 2007 U.S. Dist. LEXIS
10 67747 at * 11 (W.D.WA.); *Probe v. State Teachers Retirement System*, 780 F.2d 776, 781
11 (9th Cir. 1986). The Court accepts plaintiffs' argument that current contractors are less likely
12 than former contractors to bring a lawsuit against their current employer due to fear of
13 retaliation by the employer (whether or not that fear is reasonable), and that therefore former
14 employees are often in a better position to act as class representatives.³

17 Second, the Court is not persuaded that plaintiffs made conflicting statements in their
18 prior statements and testimony. Further, even if a limited number of conflicts exist, the Court
19 does not agree that they create the requisite "adversity of interest" between the plaintiffs and
20 the rest of class.

22
23 ³ The Court also observes that two of the class representatives were current contractors
24 when they filed this action in December, 2004. The mere passage of time should not make
25 them any less "adequate" than they were when they filed the case. The court also rejects
26 defendant's argument that the named plaintiffs' representation is inadequate because the
proposed class only includes claims through December 2005. A three-year statute of
limitations applies to claims under RCW 49.46. See *SPEEA v. Boeing Co.*, 139 Wn.2d 824,
837, 991 P.2d 1126 (2000). Thus, any putative class member is free, at any time before
December 31, 2008, to file a claim relating to 2006 or later. The existence of the present
class action does not limit this right.

1 2. The Court also finds that plaintiffs have satisfied the tests contained in CR
2 23(b), namely, predominance of common issues and superiority of the class action
3 mechanism.

4 (A) Predominance: Plaintiffs argue that this case should be certified
5 under CR 23(b)(3), which requires "questions of law or fact common to the members of the
6 class predominate over any questions affecting only individual members, and ... a class
7 action is superior to other available methods for the fair and efficient adjudication of the
8 controversy."

9
10 The CR 23(b)(3) predominance requirement is "somewhat more stringent than the CR
11 (a)(2) commonality requirement but involves a similar inquiry....[It] is not defeated "merely
12 because individual factual or legal issues exist; rather, the relevant inquiry is whether the
13 issue shared by the class members is the dominant, central, or overriding issue shared by the
14 class." *Miller, supra*, 115 Wn. App. at 825. Moreover, this requirement "is not a rigid test,
15 but rather contemplates a review of many factors, the central question being whether
16 'adjudication of the common issues in the particular suit has important and desirable
17 advantages of judicial economy compared to all other issues, or when viewed by
18 themselves.'" *Sitton v. State Farm*, 116 Wn. App. 245, 255, 63 P.3d 198 (2003)(quoting,
19 *Newberg On Class Actions*, § 4.25, at 4-86)
20
21

22 The Court finds that the overriding issue in this litigation is whether defendant
23 FedEx has the right to control the manner and means of the work performed by putative
24 class members. In *Miller, supra*, where the issue also involved an alleged misclassification
25 of employees, the court held that "[a]lthough the amount of time each class member spent
26 engaged in sales activity might have varied, the overriding issue in this case is whether

1 Farmer violated the MWA by classifying delivery drivers as sales agents.” As in *Miller*,
2 even though there may exist differences between contractors here, the dominant issue
3 presented in this case is whether a misclassification occurred.

4 The Court notes that in similar cases, *Estrada v. FedEx Ground Package System,*
5 *Inc.*, 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (2007) and *In re FedEx Ground Package*
6 *Systems, Inc. Employment Practices Litigation*, 2007 U.S. Dist. LEXIS 76798 (N.D. Cal.)⁴,
7 courts also certified proposed classes of FedEx contractors challenging their independent
8 contractor status. The facts set forth in those cases closely track the record evidence here
9 (e.g., the standardized Operating Agreements). While those cases are not determinative, the
10 Court finds their reasoning persuasive on the issue of class certification and rejects
11 defendant’s attempts to distinguish them. In particular, while defendant argues that, unlike
12 other states, Washington requires consideration of extrinsic evidence of each contractor’s
13 intent, the Court of Appeals in *Schnall, supra*, explained in a class action context that:
14

15
16 ... extrinsic evidence to determine the individual consumer's intent at
17 formation will not be necessary here because these consumers entered into a
18 standardized contract they were not able to negotiate or change on an
19 individual basis. Having availed itself of the benefits of a standardized,
20 boilerplate contract used across the nation, AT&T cannot now assert that the
21 contracts are to be interpreted individually based on the intent of each
22 consumer at the time of purchase.

23
24
25 139 Wn. App. at 299-300. That analysis applies to this case as well.
26

25 ⁴ While the class definition in *Estrada* closely tracks the definition here (both involve
26 contractors who themselves “own” and work on a single route), Judge Robert Miller certified
even a broader class in the *Craig* case in the federal multi-district litigation (a class
comprised of both single route and those who “own” more than one route).

1 (B) Superiority Rule 23(b)(3) requires consideration of (a) the interest of
2 members of the class in individually controlling the prosecution or defense of separate
3 actions; (b) the extent and nature of any litigation concerning the controversy already
4 commenced by or against members of the class; (c) the desirability or undesirability of
5 concentrating the litigation of the claims in the particular forum; [and] (d) the difficulties
6 likely to be encountered in the management of a class action. These factors favor class
7 certification.
8

9 Citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997), defendant
10 argues that the claims of all 35 declarants amount to, in the aggregate, over \$1.6 million
11 (based on the potential \$46,000 value of plaintiff Hardie's claim at the time of remand) and
12 the size of the claims makes this case inappropriate for class certification. Defendant's
13 analysis mistakenly assumes that all contractors have claims of equal worth, and there is no
14 evidence that this is true. In fact, and even assuming an equal number of work hours each
15 week, the 35 declarations submitted by plaintiffs reveal that many contractors worked
16 substantially fewer months than Mr. Hardie did during the class period, and therefore their
17 claims would be worth less than his, perhaps considerably so. Moreover, this factor (class
18 members' interest in controlling the litigation) must be viewed on an individual basis, not in
19 the aggregate. The Court finds that this litigation involves relatively modest or small claims.
20 Furthermore, the Court notes that similar class claims against defendant were certified in
21 California and in the *Craig* case in the MDL litigation.
22

23
24 Defendant also contends that the case is not manageable because of the need to
25 conduct individualized inquiries into circumstances of each contractor's relationship with
26

1 FedEx, as well as the absence of a trial plan. The successful prosecution of a trial in
2 California (in *Estrada*) is itself powerful evidence that such a trial with a similar number of
3 class members is practicable. The Court is also mindful that it possesses an array of tools at
4 its disposal to resolve complex issues, "including bifurcated trials, use of subclasses or
5 masters, pilot or test cases with selected class members, or even class decertification after
6 liability is determined." *Sitton, supra*, 116 Wn. App. at 256. Finally, given that
7 individualized inquiries will not be necessary, the Court sees no insurmountable obstacles
8 here.

9
10 With respect to the absence of a trial plan, the Court agrees with plaintiffs that no
11 such plan under CR 23 and therefore its absence is cannot a basis for finding against class
12 certification. Further, in light of FedEx's centralized method of doing business, the use of
13 representative evidence from a manageable number of drivers will permit resolution of the
14 merits of the dispute.

15
16 HAVING MADE THE FOREGOING FINDINGS,

17 IT IS HEREBY ORDERED that Plaintiff's Motion for Class Certification pursuant to
18 CR 23(a) and (b)(3) is GRANTED;

19 IT IS FURTHER ORDERED that the certified class be defined as follows: all persons
20 who performed services as a pick up and delivery driver, or "contractor," for defendant
21 during the class period (December 21, 2001 through December 31, 2005) who signed (or did
22 so through a personal corporate entity) a FedEx operating agreement and who handled a
23 single route at some point during the class period; excluding persons who only performed or
24 filled one or more of the following positions during the class period: multiple route
25 contractors, temporary drivers, line-haul drivers, or who worked for another contractor.
26

