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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JACOB DANIEL TUMULTY, an individual, and  
TAJ KARL UHDE, an individual,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,  
a Delaware Corporation; ROYONG  
ENTERPRISES, INC., a Washington  
Corporation; ROY CLEARY and JANE DOE  
CLEARY, Husband and Wife and their Marital  
Community; FAIRLEY M. SPARKS and JANE  
DOES SPARKS and their Marital Community,

Defendants.

No. C04-1425MJP

ORDER GRANTING PLAINTIFFS’  
MOTION FOR PARTIAL  
SUMMARY JUDGEMENT

This matter comes before the Court on Plaintiffs’ Jacob Daniel Tumulty and Taj Karl Uhde (“Drivers”) motion for partial summary judgement against Defendant FedEx Ground Package System, Inc. (“FEG”). (Dkt. No. 21). Plaintiffs seek to establish that FEG is their “joint employer” under the Fair Labor Standards Act (“FLSA”), U.S.C. § 201 et seq., and the Washington Minimum Wage Act (“MWA”), RCW 49.12.005 et seq. This Court, having considered the papers and pleadings filed herein and the oral argument by both parties, hereby GRANTS Platintiffs’ motion. The undisputed facts show that the Drivers were dependant on FEG for virtually every aspect of their job.

**Background**

1 The Drivers picked-up and delivered packages for FEG for various lengths of time between  
2 September 2001 and January 2003. The Drivers worked for independent contractors, and at one point  
3 Tumulty worked as a temporary driver for Pomerantz Staffing Services. The independent contractors  
4 had contracts with FEG to deliver packages along a specific route. In essence each contractor owned  
5 a route and had the exclusive right to deliver and pick-up packages along that route.

6 Tumulty was fired as a FEG delivery/pick-up truck driver on January 29, 2003. Uhde quit on  
7 January 17, 2003 due to a work related injury. The Drivers claim that they were denied overtime pay,  
8 breaks, and lunches. Additionally Tumulty claims that he was wrongfully terminated. The Drivers  
9 assert these claims against FEG under the MWA and the FLSA.

10 The Drivers argue that FEG is their “joint employer” under both the FLSA and the MWA,  
11 and is thus liable for the unpaid overtime and wrongful termination. FEG argues that it does not have  
12 an employment relationship with the Drivers since they are employees of independent contractors.

### 13 Analysis

14 This summary judgment motion presents a concise issue of law for the Court to decide.  
15 Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of  
16 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The operative facts  
17 of this case are not disputed. It is for this Court to balance the facts against the framework outlined  
18 by the law.

#### 19 I. Definition of Joint Employer under the MWA

20 The MWA requires employers to pay overtime to workers who work more than 40 hours  
21 during a week. RCW 49.46.130. The MWA was intended to mirror the provisions of the FLSA. Innis  
22 v. Tandy Corp., 141 Wn.2d 517, 523, 7 P.3d 807 (2000). Due to the related nature of the MWA and  
23 the FLSA, the Washington Supreme Court has held that “[t]he FLSA is persuasive authority” when  
24 interpreting the MWA. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 862, n. 6, 93 P.3d 108  
25 (2004). Thus, to determine the definition of “joint employer” under the MWA this Court may look to  
26 authority interpreting the term under the FLSA.

1 II.. “Employer” under the FLSA

2 The Supreme Court has noted that the term “employee” under the FLSA is defined with  
3 “striking breadth.” Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). The Ninth Circuit  
4 has similarly noted that “[c]ourts have adopted an expansive interpretation of the definitions of  
5 “employer” and “employee” under the FLSA, in order to effectuate the broad remedial purposes of  
6 the Act.” Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979).

7 When determining whether an employer-employee relationship exists, a court must look to the  
8 “economic reality” of the employment situation. Goldberg v. Whitaker House Cooperative, Inc., 366  
9 U.S. 28, 33 (1961). The Ninth Circuit has noted that “in the application of social legislation  
10 employees are those who as a matter of economic reality are dependent upon the business to which  
11 they render service.” Real, 603 F.2d at 754. The Ninth Circuit has developed a four-part test to  
12 determine the “economic reality” of an employment situation:

13 [A court should look to] whether the alleged employer (1) had the power to  
14 hire and fire the employees, (2) supervised and controlled employee work schedules or  
15 conditions of employment, (3) determined the rate and method of payment, and (4)  
16 maintained employment records.

17 Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).  
18 The court in Bonnette stated that this test should not be “blindly applied” and noted that “[t]he  
19 determination of whether an employer-employee relationship exists does not depend on “isolated  
20 factors but rather upon the circumstances of the whole activity.” Id. at 1469-70 (citing Rutherford  
21 Food Corp. v. McComb, 331 U.S. 722, 730 (1947)).

22 In Torres-Lopez v. May the Ninth Circuit applied the “economic reality” test to determine  
23 whether a farmer was the “joint employer” of farm-workers hired through a farm labor contractor.  
24 111 F.3d 633 (9th Cir. 1997). The FLSA recognizes that such joint employment relationships may  
25 exist. 29 C.F.R. § 791.2(a) (“A single individual may stand in the relation of an employee to two or  
26 more employers at the same time”). The court in Torres applied thirteen factors when determining  
whether a joint employment relationship existed. 11 F.3d at 640. The first five were taken from the  
Agricultural Workers Protection Act, 29 C.F.R. § 500.20(h)(4), and mirror the factors outlined in  
Bonnette. The other eight were derived from previous FLSA cases:

1 (1) whether the work was a “specialty job on the production line,” Rutherford, 331 U.S. at 730;

2 (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without “material changes,” Id.;

3 (3) whether the “premises and equipment” of the employer are used for the work, Id.; see also Real, 603 F.2d at 754 (considering the alleged employee’s “investment in equipment or materials required for his task, or his employment of helpers”);

4 (4) whether the employees had a “business organization that could or did shift as a unit from one [worksite] to another,” Rutherford, 331 U.S. at 730;

5 (5) whether the work was “piecework” and not work that required “initiative, judgment or foresight,” Id.; see also Real, 603 F.2d at 754 (considering “whether the service rendered requires a special skill”);

6 (6) whether the employee had an “opportunity for profit or loss depending upon [the alleged employee’s] managerial skill,” Id.;

7 (7) whether there was “permanence [in] the working relationship,” Id.; and

8 (8) whether “the service rendered is an integral part of the alleged employer’s business,” Id.

9 Torres, 11 F.3d at 640.

10 The Ninth Circuit recently reapplied these factors in the context of a “joint employer” relationship.

11 Moreau v. Air Fr., 343 F.3d 1179 (9th Cir. 2003) (Air France was not the joint employer of employee

12 of baggage handling company contracted by Air France). As discussed below, based on the

13 undisputed facts of the case, all but one of these four Bonnette factors and eight Torres factors

14 support the conclusion that FEG was Plaintiffs’ “joint employer” as a matter of law.

15 A. “The power to hire and fire the employees”

16 The Moreau court noted that this is a very difficult factor to satisfy since it is rare that there

17 will be a direct ability to hire and fire in a “joint employer” relationship. 343 F.3d at 1188. It is

18 undisputed by both parties that the Drivers had to fill out an FEG application and receive FEG

19 approval prior to being hired. FEG argues that it was not screening the merit of the Drivers, but

20 rather making sure that they could comply with Department of Transportation regulations. FEG

21 argues that such screening cannot be characterized as a hiring power. Herman v. Mid-Atlantic

22 Installation Services, Inc., 164 Supp. 2d 667 (2000 D. Md.), aff’d without op., 16 Fed. Appx. 104

23 (4th Cir. 2001). FEG’s screening of the Drivers for compliance with DOT regulations does not

24 appear to be a hiring power.

25 FEG had the power, however, to fire the Drivers. It is uncontested by either party that FEG

26 fired Tumulty. (Def’s Resp. at 9-10) (Tumulty Decl. ¶ 14). FEG argues that this does not support a

“joint employer” relationship since it was only trying to insure compliance with its contracted-for

1 performance. The Moreau court considered the same argument, and concluded that such supervision  
2 did not support “joint employment.” 343 F.3d at 1188. However, in Moreau the alleged “joint  
3 employer” never communicated directly to the employees and had no ability to terminate employees.  
4 Id. Here, it is uncontested that FEG communicated directly with Tumulty, and fired him without  
5 communicating with his contractor or supervisor. (Tumulty Decl. ¶ 14). Thus, the power to fire in this  
6 case is more substantial and direct than in Moreau. While FEG did not have the power to hire the  
7 Drivers, it did have the power to fire them. This power to fire supports a “joint employer”  
8 relationship.

9 B. “Supervised and controlled employee work schedules or conditions of employment”

10 The Torres court recognized that in a “joint employer” relationship control over the employee  
11 may be “indirect.” 111 F.3d at 643. The Moreau court noted that this indirect control must be more  
12 substantial than simply insuring contracted-for performance or compliance with statutory regulations.  
13 343 F.3d at 1188-89.

14 Plaintiffs present uncontested evidence that FEG exercised substantial supervision over the  
15 Drivers and control over their working conditions. FEG managers held weekly meetings with the  
16 Drivers, would comment on the Drivers’ uniforms and check to see if they delivered their packages.  
17 The Drivers were also required to call the FEG managers when they couldn’t deliver packages.  
18 (Tumulty Dep. at 211). Defendant does not contest this evidence, but rather argues that it should not  
19 be given great significance since the Drivers reported primarily to the contractors. FEG would assign  
20 extra work, order the Drivers to drive other routes, and suggest how many hours a day it wanted the  
21 Drivers to be on the road.<sup>1</sup> While individually the uncontested actions may not support a “joint  
22 employment” relationship, taken together they demonstrate that FEG exercised significant control  
23 over the Drivers’ daily routine. This factor supports a “joint employer” relationship.

24 C. “The power to determine the pay rates or the methods of payment of the workers”

25  
26 <sup>1</sup>Plaintiffs also present evidence that FEG would lock the gates to make sure that Drivers couldn’t  
leave early and reprimand the drivers for returning to early from their routes. Defendants dispute these  
two facts. (Def’s Reply at 12).

1 This is the only factor that does not demonstrate a “joint employer” relationship. It is  
2 undisputed that FEG did not maintain a payroll or directly pay the Drivers. However, the Drivers  
3 argue that FEG’s control over the “pot of money used to pay” the Drivers somehow supports a “joint  
4 employer” relationship. (Pl’s Mot. at 22). The Torres court made a similar finding, noting that the  
5 farmer increased his payments to the farm contractor with the intended effect of raising the farm  
6 laborer’s wage. 111 F.3d at 643. No such related action is present in the facts of this case. Contrary  
7 to Plaintiffs’ argument, Real and Bonnette are not supportive since they involved a contract rate set  
8 by the supposed “joint employer” which directly determined the wages of the employee. No such  
9 contract rate exists here. This factor weighs against a finding of a “joint employer” relationship.

10 D. “Maintained employment records”

11 FEG admits that it maintained “daily settlement records” which tracked the Drivers’  
12 deliveries. (Def’s Reply at 10 (citing Tumulty Decl. ¶ 7)). Additionally, FEG maintained customer  
13 complaint/satisfaction records for each Driver. Neither Torres or Moreau offers a definition of  
14 “employment records.” In keeping with the expansive definition of terms under the FLSA, this Court  
15 considers any records relating to employee performance to be employment records. Under such a  
16 broad definition, the records kept by FEG qualify as employment records. This factor supports a  
17 “joint employer” relationship.

18 E. “Whether the work was a specialty job on the production line”

19 The Torres court considered whether the work performed by the employees “constituted one  
20 small step in the sequence of steps” necessary to the alleged employer’s business model. 111 F.3d at  
21 643. Like the cucumber pickers in Torres, the Drivers’ job was to perform one task, collecting and  
22 delivering packages “according to standard industry practice.” Id. The Drivers perform only this step  
23 in the package delivery process; FEG handles all of the other major steps including scheduling,  
24 payment, and customer service.

25 FEG argues that the Drivers’ jobs were similar to the employees in Moreau, where the court  
26 found that this factor did not cut “either way.” 343 F.3d at 1189. The Moreau court’s analysis is  
inapplicable here because it was considering multiple jobs that required a varied level of skill. Id. Here

1 the Court is considering only one job that does not require a high level of skill. This factor weighs in  
2 favor of a “joint employer” relationship.

3 F. “Whether responsibility under the contracts between a labor contractor and an employer  
4 pass from one labor contractor to another without material changes”

5 The primary question under this factor is whether the labor contract is “standard for the  
6 industry,” Torres, 111 F.3d at 643, or “negotiated and quite specific,” Moreau, 343 F.3d at 1189.  
7 Here the former is the case. FEG does not provide any evidence to suggest that their labor  
8 agreements with the independent route contractors were “quite specific.” Plaintiffs provide evidence  
9 that the agreements with the contractors were standard for the industry, covering the payment  
10 formula and stating which route the contractor was agreeing to service. It is uncontested that the  
11 route contracts were transferable by the contractors, which further supports the finding that the  
12 agreements were fairly standard. This factor supports a “joint employment” relationship.

13 G. “Whether the premises and equipment of the employer are used for the work”

14 In considering this factor the Torres court focused on whether the alleged “joint employer”  
15 had made “considerable ‘investment in equipment and materials’” necessary to the work. 111 F.3d at  
16 643 (quoting Real, 603 F.2d at 754). It is undisputed that FEG leased much of the equipment used by  
17 the Drivers to the contractors. In isolation, this may not be considered a considerable investment.  
18 However, when coupled with the fact that FEG also invested in the customer service department,  
19 package delivery infrastructure, and terminal necessary for the Drivers’ work, it is clear that FEG has  
20 made considerable investments in the equipment and materials necessary for delivering packages.

21 Unlike Moreau, the Drivers’ use of the FEG premises was more than “incidental.” 343 F.3d at  
22 1189. The Drivers started and ended their workday at the FEG terminal. They had to interact with  
23 terminal employees when loading the trucks. They also had to interact with the Terminal managers  
24 when completing their “daily settlement records.” (Tumulty Decl. ¶ 7). While FEG’s suggestion that  
25 the Drivers used the trucks as their premises for work is novel, it ignores the extensive use of the  
26 FEG premises by the Drivers. (Def’s Reply at 11). FEG does not dispute the fact that Drivers used  
the terminal but rather argues that this contact was only incidental and that the bulk of their work  
occurred on the road. (Def’s Reply at 11). The Drivers use of the FEG premises cannot be considered

1 incidental when it was a necessary part of their daily routine. This factor supports a “joint employer”  
2 relationship.

3 H. “Whether the employees had a business organization that could or did shift as a unit from  
4 one worksite to another”

5 In Torres the court focused on the fact that the farm workers arrived individually to work at  
6 the farm and did not shift as a unit from one farm to another. 111 F.3d at 644. The court in Moreau  
7 focused on the fact that employees “worked for multiple carriers in a given work day.” 343 F.3d at  
8 1189. It is uncontested that the Drivers were able to switch from one FedEx route to another.  
9 However FEG argues that the Drivers also had “ample opportunity to work for other entities” while  
10 not servicing FEG routes. (Def’s Reply at 12). Though the Drivers may have been able to service  
11 other delivery companies during their off hours, they clearly did not have the ability to service  
12 multiple carriers simultaneously as in Moreau. More importantly, the Drivers did not change worksite  
13 but rather serviced different FEG routes originating from the same worksite. This factor supports a  
14 “joint employer” relationship.

14 I. “Whether the work was piecework and not work that required initiative, judgment or  
15 foresight”

16 This factor is very similar to factor E above. While the deliveries by the Drivers are not as  
17 “piecework” as the cucumber picking in Torres, they are considerably more routine than the work  
18 done by the master chefs in Moreau. The only initiative and foresight exercised in the delivery process  
19 was by the contractors, who had to determine how many truck drivers they would need to efficiently  
20 service their route. This factor supports a “joint employer” relationship.

20 J. “Whether the employee had an opportunity for profit or loss depending upon the alleged  
21 employee's managerial skill”

22 It is uncontested that the Drivers earned a daily wage for their work. Unlike the workers in  
23 Torres their wage was not “piece-rate” so they did not risk loss or profit based upon the number of  
24 packages they delivered or picked up. 111 F.3d at 644. Also, unlike the workers in Moreau the  
25 Drivers had no possibility of promotion based upon their work efficiency. FEG suggests that the  
26 Drivers could “advance to the status of business owners by purchasing one or more routes.” (Def’s  
Reply at 22). Even if this is true it is irrelevant since it does not represent an “opportunity for profit”

1 gained by exercising “managerial skill” as a delivery truck driver. This factor supports a “joint  
2 employer” relationship.

3 K. “Whether there was permanence in the working relationship”

4 The Torres court found that this was the only factor that did not support a “joint employer”  
5 relationship since the farms workers were employed by the alleged employer for only thirty-two days.  
6 111 F.3d at 644. Similarly, the employees in Moreau worked for multiple airlines as a part of their  
7 “working relationship.” 343 F.3d at 1189. It is undisputed that the Drivers did not work for any other  
8 delivery companies while servicing FEG routes. Although the Drivers did stop working for FEG at  
9 various points during the employment period in question, there is no evidence that Drivers left to  
10 service other companies as in Torres and Moreau. This factor supports a “joint employer”  
11 relationship.

12 L. “Whether the service rendered is an integral part of the alleged employer's business”

13 Similar to Torres, here “it is beyond dispute that the collective effort of the workers” is  
14 essential to the alleged employer’s business. 111 F.3d at 644. However, the Moreau court noted that  
15 this factor may be inapplicable outside the production line employment situation. 343 F.3d at 1189.  
16 Since this factor is inapplicable to this case it neither supports nor weighs against a “joint employer”  
17 relationship

18 **Conclusion**

19 This Court hereby GRANTS Plaintiffs’ motion for summary judgement and finds that  
20 Defendant FedEx Ground Package System, Inc. was the joint employer of Jacob Daniel Tumulty and  
21 Taj Karl Uhde under the FLSA and the MWA. Based on the undisputed facts, six of the relevant  
22 factors support, one is neutral, and one factor is against a “joint employer” relationship.

23 The “economic reality” of this case is that the Drivers are dependant on FEG for virtually  
24 every aspect of their jobs.

25  
26 The Clerk of the Court shall direct a copy of this order be sent to all counsel of record.

Dated: March 4, 2005.

/s//Marsha J. Pechman  
Marsha J. Pechman  
United States District Judge

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