

## A Tale Of Two Stores

By Ed Harold (New Orleans)

Most small box retailers treat the manager of each individual location as an exempt employee under the “managerial exemption” of the Fair Labor Standards Act. As such, the store managers are not paid for hours worked over 40 in a workweek. Many small retailers, those with stores typically between 7,000 and 10,000 square feet, have been assaulted with litigation from current and former store managers claiming they are not exempt employees. This article takes a closer look at two cases that came to diametrically different results based on very similar facts.

### The Plot

In order to qualify under this exemption, individual employees must meet a series of criteria. They must be paid at least \$455 per week on a salary basis, customarily and regularly direct the work of two or more full time employees, hire and fire employees or make recommendations on hiring and firing, and their primary duty must be the management of the enterprise by which they are employed, or of a customarily recognized department or subdivision of that enterprise.

The main focus of these claims is the “primary duty” prong of the test. The genesis of the litigation stems from the expectations companies place on their store managers to be prepared to perform – and to occasionally, or more often actually perform – virtually every function in the store when needed. This can include anything from running the register, to stocking shelves, to cleaning the bathroom.

These expectations are driven by the need to staff leanly and efficiently. There are times of the day where customer traffic simply does not warrant having more than two employees in the store, leaving the manager with the possibility of performing what would typically not be thought of as managerial tasks. Secondly, the plaintiffs will claim they do not manage because the company’s policies dictate uniformity and remove their discretion from managing.

These suits are generally filed as collective actions seeking damages on behalf of all store managers for the particular retailer. To participate, the managers and former managers must affirmatively opt-in as a plaintiff in the action. For larger companies, plaintiffs can number in the thousands. But even smaller retailers with only a few locations can be sued on behalf of a handful of individuals.

One of the difficulties of FLSA exemption litigation is the highly fact-specific nature of the inquiry. The same court could reach different conclusions about the exempt status of two store managers in the same company in the same area. Family Dollar has been the victim of just such a dichotomous set of findings. In 2008, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit affirmed a \$35 million dollar jury verdict in favor of a group of Family Dollar store managers that concluded they were not exempt employees and were owed overtime.

More recently, in March of 2011, the U.S. Court of Appeals for the 4<sup>th</sup> Circuit affirmed a district court decision granting summary judgment to Family Dollar against a former store manager who claimed she was not properly classified as an exempt employee. As a practical matter, while the



judges of the 4<sup>th</sup> Circuit claimed the 11<sup>th</sup> Circuit decision was distinguishable, there was very little difference in the underlying facts of the cases.

### It Was The Worst Of Times ...

In the first decision, *Morgan v. Family Dollar*, the court noted the following facts supported the jury’s verdict. First, the plaintiffs testified that they spent 80 to 90% of their time performing non-managerial duties such as stocking shelves and unloading delivery trucks. Under the DOL guidance, a finding that an employee performs exempt work more than 50% of the time is not conclusive, but strongly supports a finding that management is the employee’s primary duty. If an employee performs managerial duties less than 50% of the time, then the employer can still show that the managerial duties are the primary duties, based on their relative importance. The court called the 80 to 90% evidence “a far cry” from the DOL’s 50% guideline suggesting these judges believed the amount of time to be extremely important.

Next the court held that since the essential functions listed in the managers’ job description provided that store managers must do the same work as stock clerks and cashiers, the jury could find that these duties were of equal or more importance than the managerial functions. Another factor in assessing the primary duty is the amount and frequency the employee exercised discretion in performing their job. The court looked at the company’s store policies and concluded that these directives “micro-managed” the stores’ operations and credited the plaintiffs’ evidence that the District Managers closely supervised them. As a result, they concluded the jury appropriately found the store managers did not regularly exercise discretion.

An additional factor was the relationship of the employee’s salary to the other employees in the location. The court broke down the store manager salaries based on the hours they claimed they worked and concluded that on an hourly basis, the store managers were not paid significantly more than the other employees in the store. Finally, the court concluded that the employees’ testimony that they did not perform managerial duties concurrently with their manual duties was sufficient to prove they did not.

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### ...It Was The Best Of Times

The 4<sup>th</sup> Circuit's more recent decision, *In Re Family Dollar FLSA Litigation*, took a decidedly different view of similar evidence. In that case, a manager testified that she spent 99% of her time performing non executive functions of which 95% was spent working with freight. She also claimed to work between 50 – 65 hours per week at the store. The court reached diametrically opposite conclusions than the 11<sup>th</sup> Circuit. The 4<sup>th</sup> Circuit placed great weight on the fact the employee was the highest-ranking employee in her store.

The court concluded that she had to exercise discretion on a regular basis, even when performing manual labor on such issues as employee complaints, customer complaints, damaged goods, non-reporting employees, customer theft, and staffing of cash registers. It also noted that her District Manager was responsible for 17 stores and could hardly micro-manage her. With regard to the corporate policies dictating how the store was to be operated, the court concluded that the successful operation of her store was within her control.

None of these facts could have been significantly different than the evidence in the Morgan case. For example, the Morgan court acknowledged that the District Managers supervised the operations of 10 to 30 stores, but concluded they micro managed their stores through emails, task lists, electronic information flow, and phone calls. It is simply absurd, however, to believe that one individual could handle all decisions that need to be made in the retail setting for ten different locations on a daily basis.

The 4<sup>th</sup> Circuit rejected the *Morgan* case as precedential because of the individualized nature of the exempt status inquiry. It further noted that the *Morgan* court concluded that store managers did not perform manual tasks concurrently with management tasks, which was different from the situation that existed in the case before it. But there is little doubt that Family Dollar put on evidence of concurrent performance of duties in the *Morgan* trial. There is no doubt that the store managers in the *Morgan* case

had to handle all the same day to day discretionary functions as the plaintiff in the 4<sup>th</sup> Circuit case. But the 11<sup>th</sup> Circuit concluded that “every detail of how the store is run is fixed and mandated through Family Dollar’s comprehensive manuals.”

### It Is A Far Far Better Thing To Do...

Certainly much has been learned from the *Morgan* trial and the evidence on which the court focused. But managing the evidence in litigation is a far different process than taking affirmative steps to avoid litigation in the first instance. There are several items retailers can look to modify without revamping their entire operations that should assist.

First, review your manager job description. Make sure that it emphasizes the managerial role of the job such as training, supervising, and managing the store’s profitability. It should also include the factors that distinguish the manager from assistants.

Employee performance evaluations should also be reviewed. Determine if the evaluation is focusing on the performance of the store as a whole rather than individual pieces of job performance. An evaluation that focuses on the results, not the means used to get there, is more likely to suggest the importance of the managerial tasks. Clearly define a store manager’s role in the hiring and termination processes. While these employees do not have to have final authority in these areas, they should play an important role.

District Managers need to understand that while the manager’s recommendations do not need to be blindly followed, if they find themselves routinely overruling a manager’s recommendations, the reasons should be carefully considered. Tying manager compensation to the overall profitability of the store also suggests that the company is paying the manager for the results, not stocking the shelves.

As these two decisions prove, the outcome of exemption litigation is impossible to predict. But stores can take action now to be prepared should an employee contend he or she was improperly classified as exempt.

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