

ORAL ARGUMENT REQUESTED

Nos. 03-1432; 03-1434; 03-1473

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BILLY PRESLEY, *et al.*,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant.

On Appeal From the United States District Court for the District of Colorado,
Nos. 95-Z-1705 (CBS); 95-Z-2050 (CBS); 97-Z-257 (CBS), Judge Zita L. Weinshenk

BRIEF OF APPELLANT WAL-MART STORES, INC.

Robert P. Davis
David M. Gossett
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Steven J. Merker
Gregory S. Tamkin
DORSEY & WHITNEY LLP
Republic Place Building, Suite 4700
370 17th Street
Denver, CO 80202
(303) 629-3400

Counsel for Appellant Wal-Mart Stores, Inc.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Wal-Mart Stores, Inc. hereby states that it has no parent companies and that no publicly-held company owns 10% or more of its stock.

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STATEMENT OF RELATED CASES

There are three related cases pending before the Tenth Circuit: *Presley v. Wal-Mart Stores, Inc.*, No. 03-1432; *Presley v. Wal-Mart Stores, Inc.*, No. 03-1473; and *Yates v. Wal-Mart Stores, Inc.*, No. 03-1434. The parties have filed a Joint Motion to Consolidate these three cases, and this Brief is filed in each related case. No prior appeals have been taken in these cases.

JURISDICTIONAL STATEMENT

These three cases — two of which were consolidated in the district court (*Presley v. Wal-Mart Stores, Inc.*, No. 95-Z-1705, and *Fiorenzi v. Wal-Mart Stores, Inc.*, No. 95-Z-2050), and the third of which the parties have jointly moved to consolidate on appeal (*Yates v. Wal-Mart Stores, Inc.*, No. 97-Z-257) — all raise the question whether full-time pharmacists employed by Wal-Mart Stores, Inc. (“Wal-Mart”) should be classified as “exempt” professional employees under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 213, a question that in turn determines whether those pharmacists are entitled to statutory overtime pay under 29 U.S.C. § 207(a)(1).

Because all three cases arise under the FLSA, the District Court had jurisdiction over them pursuant to 28 U.S.C. § 1331. The District Court’s jurisdiction over *Fiorenzi* was also based on 28 U.S.C. § 1441, as that case was originally filed in state court. Plaintiffs filed the complaint in *Fiorenzi* in the District Court of Las Animas County, Colorado, on July 7, 1995. Wal-Mart received the complaint on July 12, 1995, and timely removed the case on August 10, 1995.¹

This Court’s jurisdiction is premised on 28 U.S.C. § 1291. Final judgment was entered in the consolidated cases of *Presley* and *Fiorenzi* on August 28, 2003,

¹ At various points in the litigation, the district court and magistrate judge mistakenly referred to *Presley* as the case filed in state court and *Fiorenzi* as the case filed in federal court.

and Wal-Mart's notice of appeal was filed on September 26, 2003 (Dkt. No. 03-1432). Similarly, final judgment was entered in *Yates* on August 28, 2003, and Wal-Mart's notice of appeal was filed on September 26, 2003 (Dkt. No. 03-1434). In each case, final judgment was entered between Wal-Mart and a group consisting of the vast majority of plaintiffs who had opted in to that litigation (the "Moving Plaintiffs"), disposing of all claims between those plaintiffs and Wal-Mart. Certain claims of additional plaintiffs who had opted into the collective actions remained, but in both cases the district court specifically found, pursuant to Federal Rule of Civil Procedure 54(b), that there was no just reason to delay entry of a final appealable judgment as to the Moving Plaintiffs.

STATEMENT OF ISSUES PRESENTED

1. Whether an employer may prospectively reduce an exempt salaried employee's expected amount of time worked and salary without violating the FLSA "Salary Basis Test" (29 C.F.R. § 541.118(a)) and becoming liable to that employee for overtime compensation for hours worked over forty hours per work-week.

2. Whether the court below erred in entering judgment that Wal-Mart is liable to all opt-in plaintiffs in *Presley* and *Fiorenzi* based on its finding, on plaintiffs' motion for summary judgment, that Wal-Mart engaged in a class-wide practice or policy of prospectively reducing base hours and base salaries of pharma-

cists, despite conflicting affidavits and deposition testimony on the point and despite substantial undisputed evidence that many opt-in plaintiffs were never subject to any such practice or policy.

3. Whether the court below erred, in *Presley* and *Fiorenzi*, in summarily denying Wal-Mart's motion seeking decertification of the class, despite the evidence submitted with that motion demonstrating that there was no class-wide policy or practice of prospective reductions and that such reductions were instead a highly localized practice.

4. Whether the court below erred in finding, based on the summary judgment ruling in *Presley* and *Fiorenzi*, that Wal-Mart was collaterally estopped from arguing in *Yates* that it was not engaged in a class-wide practice or policy of prospectively reducing base hours and base salaries of pharmacists in a manner that violates the FLSA "Salary Basis Test."

STATEMENT OF THE CASE

A. Overview

The core of these cases presents one narrow issue under the FLSA: whether an employer may prospectively reduce an exempt salaried employee's expected amount of time worked and salary without violating the FLSA "Salary Basis Test" and becoming liable to that employee for overtime compensation. Plaintiffs are pharmacists who are or were employed by Wal-Mart as at-will employees who

work a bi-weekly schedule in return for which they are paid a salary. Wal-Mart classifies full-time pharmacists as exempt from the overtime requirements of the FLSA because the pharmacists are professionals paid on a salary basis. In support of their summary judgment motion, the plaintiffs presented evidence that two or three of Wal-Mart's more than 150 district managers decided for business volume and workload reasons at one point to reduce the bi-weekly schedules of certain pharmacists on a prospective basis and, concomitantly, to reduce the salaries of those pharmacists. The schedule and compensation changes were announced in advance to those pharmacists, who then reported for work and performed their work under the new arrangements. In short, a new economic bargain was struck with each of these pharmacists — in the future they would work less and be paid less.

In granting the plaintiffs' summary judgment motion, the district court concluded as a matter of law under the FLSA that the economic bargain between an employer and each of the employer's overtime-exempt employees cannot be changed on a prospective basis to reduce the employees' salaries even if they are scheduled to work fewer hours. Neither the statute nor the Secretary of Labor's legislatively mandated regulations provide any textual support for this conclusion. Indeed, the Department of Labor ("DOL") has issued at least three administrative opinions (*see* Aplt. App. 4003-4007) under the FLSA that explicitly endorse the

ability of an employer to change the economic bargain on a prospective basis by paying overtime-exempt employees reduced salaries in return for reduced work schedules. Thus, the district court's erroneous legal conclusion that prospective reductions of work schedules and salaries violate the FLSA should be reversed, and judgment should be entered for Wal-Mart.

Even if prospective reductions in salary do violate the FLSA, however, the district court erred in its application of that legal principle to the facts of these cases. The evidence before the district court on plaintiffs' summary judgment motion was that (1) in 1995, two or — maybe — three of the 150 district managers at Wal-Mart prospectively reduced the work schedules and salaries of pharmacists under their supervision; (2) one of those three district managers wrote a memo in 1995 referring to prospective reductions in "pharmacist hours" without making clear whether he was referring to salaried pharmacists, "relief" — *i.e.*, hourly — pharmacists, or both, but later testified that the memorandum related solely to hourly relief pharmacists; (3) at least two other district managers never prospectively reduced the work schedules of any pharmacists under their supervision; and (4) a handful of the more than 4000 salaried pharmacists who worked for Wal-Mart experienced such a prospective reduction. In the face of this sketchy and conflicting evidence, and the genuine issues of material fact it created, the district court erred by finding that Wal-Mart had a policy or practice of prospectively re-

ducing work schedules and salaries, and therefore by entering summary judgment against Wal-Mart. Compounding that error, the court also mistakenly used the doctrine of collateral estoppel to justify summary judgment in *Yates*, even though that case involved different plaintiffs and a different time period.

Finally, the district court erred by denying Wal-Mart's motion seeking decertification of the class in *Presley* and *Fiorenzi* without considering — or even reading — that motion. The evidence submitted with that motion demonstrated that there was no class-wide policy or practice of prospective reductions, but that instead such reductions were at most a highly localized practice. Thus, under *Auer v. Robbins*, 519 U.S. 452 (1997), the individual plaintiffs were not “similarly situated,” as required by 29 U.S.C. § 216(b).

B. The Statutory And Regulatory Scheme

Under the FLSA, employers must pay employees one-and-a-half times their normal hourly rate for any hours worked over 40 in a given workweek. *See* 29 U.S.C. § 207(a)(1). However, the statute exempts from this requirement certain white-collar employees. Specifically, under 29 U.S.C. § 213(a)(1), Section 207 does not apply to “any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the secretary * * *).” *See Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996).

As this Court has recognized, “Congress expressly delegated supplying the definitions for its statutory scheme to DOL without accompanying guidance.” *Carpenter v. City & County of Denver*, 82 F.3d 353, 355 (10th Cir. 1996), *vacated on other grounds*, 519 U.S. 1145 (1997). DOL’s implementing regulations are contained in 29 C.F.R. Part 541. Specifically, 29 C.F.R. § 541.3 defines the phrase “*employee employed in a bona fide * * * professional capacity.*” (emphasis and omission in original). The regulation sets forth a two-part test, addressing both the duties of the employee (*id.* § 541.3(a)-(d)) and the manner in which the employee is compensated (*id.* § 541.3(e)). *See Spradling*, 95 F.3d at 1495. With regard to the latter, an employee must be “compensated for services on a **salary * * * basis** at a rate of not less than \$170 per week” to be considered an exempt professional. 29 C.F.R. § 541.3(e) (emphasis added); *see also Spradling*, 95 F.3d at 1495-1496 (“To satisfy the ‘salary’ test, ‘the employer must prove that the employees in question are paid on a salary basis rather than an hourly rate.’”) (quoting *Aaron v. City of Wichita*, 54 F.3d 652, 657-658 (10th Cir. 1995)).

The term “salary basis” is in turn defined at 29 C.F.R. § 541.118(a):²

An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay

² Technically, the term “salary basis” for a “professional” is defined in 29 C.F.R. § 541.312, but that section merely cross-references § 541.118, which defines the term for an exempt “executive.”

period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

These lawsuits turn on the meaning of this regulation, and in particular on the question whether the prospective reduction of an employee's salary, even if tied to a concomitant reduction in base hours, violates this "Salary Basis Test."

C. *Presley And Fiorenzi* Litigation

Both *Presley* and *Fiorenzi* were filed on July 7, 1995, *Presley* in the United States District Court for the District of Colorado and *Fiorenzi* in the District Court of Las Animas County, Colorado. Wal-Mart received the complaint in *Fiorenzi* on July 12, 1995, and, pursuant to 28 U.S.C. §§ 1331 and 1441, timely removed the case on August 10, 1995.

The complaints in these two cases were almost identical, except that *Presley* was brought as a collective action on behalf of similarly situated pharmacists nationwide, whereas *Fiorenzi* was brought as a collective action on behalf of similarly situated pharmacists in the state of Colorado. The district court consolidated the two matters for all purposes on November 14, 1995. *See* Aplt. App. 220. Throughout the remainder of this brief, we refer to the two cases collectively as *Presley*.

On April 8, 1996, the district court conditionally certified *Presley* as an opt-in collective action under 29 U.S.C. § 216(b), and ordered that notice of the collective action be sent to all full-time pharmacists currently or formerly employed by Wal-Mart. *See* Aplt. App. 362. The deadline for pharmacists to opt into *Presley* was December 2, 1996. *See* Aplt. App. 390.

On September 11, 1997, plaintiffs moved for summary judgment as to liability on four grounds: they claimed that (1) Wal-Mart's records allegedly show that they were paid hourly; (2) Wal-Mart allegedly docked their pay for partial days off ("partial-day docking claim"); (3) Wal-Mart allegedly required them to work off-the-clock; and (4) when business was slow, Wal-Mart allegedly prospectively reduced their base hours and concomitantly reduced their pay ("prospective reduction claim"). *See* Aplt. App. 510.

Magistrate Judge Pringle recommended that Plaintiffs' motion should be denied on the first three claims — finding that neither the first nor the third claim had legal merit, and that there were genuine disputes of material fact as to the second, partial-day docking claim — but that summary judgment should be granted as to plaintiffs' fourth claim, the prospective reduction claim. *See* Aplt. App. 3828-3836. Pursuant to 28 U.S.C. § 636(b)(1), Wal-Mart filed written objections to that Recommendation.

On August 2, 1999, the district court accepted Magistrate Judge Pringle's Recommendations in their entirety. *See* Aplt. App. 3961, reported at 58 F. Supp. 2d 1219. Wal-Mart moved for reconsideration or, in the alternative, for certification pursuant to 28 U.S.C. § 1292(b), but the district court denied that motion on December 15, 1999. Aplt. App. 6221.

Thereafter, discovery proceeded with respect to remaining issues. Trial was scheduled for June 2, 2003. Prior to that trial date Wal-Mart moved to decertify the collective action, arguing that evidence found during the discovery period demonstrated that the individual plaintiffs were not "similarly situated," as required by 29 U.S.C. § 216(b). On April 30, 2003, the district court summarily rejected that motion without explanation. *See* Aplt. App. 5513.

Shortly before trial, almost all of the *Presley* plaintiffs voluntarily agreed to dismiss with prejudice all of their legal claims except for the prospective reduction claim on which the district court had already granted summary judgment. Therefore, on August 28, 2003, the district court entered final judgment in favor of those plaintiffs as to that claim, and against them as to their remaining claims. On September 26, 2003, Wal-Mart filed its notice of appeal to this Court.

D. *Yates* Litigation

Two months after the deadline for Wal-Mart pharmacists to opt in to the *Presley* litigation, plaintiffs' counsel filed *Yates*, another collective action with

claims similar to *Presley*. See Aplt. App. 371. As the Magistrate Judge noted, “[t]he *Yates* case was filed solely because the time for opting into the *Fiorenzi/Presley* collective actions had passed.” See Aplt. App. 4315

On March 21, 2000, the *Yates* plaintiffs moved to extend the summary judgment in *Presley* — on the prospective reduction claim — to *Yates*, through the doctrine of collateral estoppel. See Aplt. App. 4075. Magistrate Judge Pringle recommended that plaintiffs’ motion be granted. See Aplt. App. 4313. Defendants filed objections to that Recommendation, arguing, first, that the *Presley* finding was insufficiently final to justify collateral estoppel, and, second, that the factual support for summary judgment in *Presley* was insufficient to justify summary judgment in *Yates* without additional discovery. See Aplt. App. 4343. The district court nonetheless adopted the magistrate judge’s Recommendations, and entered summary judgment in favor of the *Yates* plaintiffs on June 21, 2001. See Aplt. App. 4612.

Yates was thereafter held pending disposition of *Presley*. However, as part of the agreement in *Presley*, most of the *Yates* plaintiffs also agreed to dismiss with prejudice all of their legal claims except for the prospective reduction claim on which the district court had already granted summary judgment. Therefore, on August 28, 2003, the district court entered final judgment in favor of those plain-

tiffs as to that claim, and against them as to their remaining claims. On September 26, 2003, Wal-Mart filed its notice of appeal to this Court.

STATEMENT OF FACTS

A. Background

During the time relevant to these lawsuits, Wal-Mart employed over 6,000 pharmacists, of whom approximately 4,000 worked full time. Wal-Mart considered full-time pharmacists to be salaried members of management. They received various benefits provided only to management, including bonuses, certain types of insurance, and salary continuation if they were injured and unable to work. *See* Aplt. App. 3820, 4314. Full-time pharmacists were assigned a specified schedule (typically, 90 hours every two-week pay-period), and paid a specified base salary for each pay period. If a pharmacist performed certain approved work in addition to his or her specified schedule during a pay period (by covering for a pharmacist on vacation, for example), Wal-Mart paid that pharmacist additional compensation for that extra time, at that pharmacist's equivalent hourly pay rate — in other words, at a rate derived by dividing the pharmacist's base salary per pay period by his or her scheduled number of work hours, or “base salary hours,” per pay period.³

³ It is undisputed that the payment of additional compensation in this fashion does not render an otherwise-exempt professional non-exempt. A “salary,” for purposes of the FLSA, is merely a guaranteed minimum — “a predetermined amount constituting all *or part* of [the employee's] compensation, which amount is

Because Wal-Mart considered full-time pharmacists to be exempt professionals under the FLSA, it did not pay them the time-and-a-half overtime specified in 29 U.S.C. § 207(a)(1). As of February 4, 1998, the average full-time Wal-Mart pharmacist earned a salary exceeding \$65,500 per year. *See* Aplt. App. 3873.1.

Throughout the period at issue in these law suits, Wal-Mart operated over 2000 pharmacies within its stores nationwide. Wal-Mart pharmacies were grouped into 17 geographical regions (each supervised by a regional manager), and further subdivided into more than 150 districts (each supervised by a district manager). Under Wal-Mart's organizational structure, regional managers were generally responsible for merchandising and sales for their regions and for the profitability of their regions. Regional managers were not responsible for knowing or setting the schedules of individual pharmacists in their regions, were not responsible for knowing the details of the operations of individual store pharmacies, and would not necessarily know if the base hours or salaries of individual pharmacists were changed. *See* Aplt. App. 5407, 5408, 5411.

District managers were typically responsible for not more than 15 pharmacies, and were responsible for pharmacy staffing at the store level. *See* Aplt. App. 5412. Store pharmacies were staffed with at least one licensed pharmacist, who

not subject to reduction * * *.” 29 C.F.R. § 541.118 (emphasis added); *see also infra*, note 7.

was given the title pharmacy manager. Larger or busier pharmacies might also be staffed with one or more salaried staff pharmacists, non-exempt hourly pharmacists, non-exempt hourly pharmacy technicians, and non-exempt hourly sales clerks. *See* Aplt. App. 5488. It was the pharmacy manager's job to schedule all of these employees to insure that his or her pharmacy was properly covered during the hours it was open. *See* Aplt. App. 5413. It was the district manager's job to insure that each pharmacy in the district was staffed with the right number and combination of these employees. *See* Aplt. App. 5409-5410.

District managers were also responsible for all matters relating to the pay of pharmacists in their Districts. For example, district managers were responsible for knowing what Wal-Mart's competitors in their districts were paying pharmacists, and setting the base salary of Wal-Mart salaried pharmacists under their supervision at competitive levels. *See* Aplt. App. 5441, 5351. District managers were also responsible for determining (after discussion with newly hired pharmacists) what pharmacists' base salary hours would be. *See* Aplt. App. 5357. Finally, it was the responsibility of each district manager to insure that Wal-Mart's corporate policies were carried out in his or her district. *See* Aplt. App. 5354.

B. This Litigation

1. *Presley*

In December 1997, the plaintiffs in *Presley* moved for summary judgment on the issue of whether Wal-Mart violated the FLSA by treating its full-time pharmacists as exempt professionals. They did not dispute that the “duties test” of DOL’s regulation (29 C.F.R. § 541.3) was satisfied; they asserted, however, that Wal-Mart pharmacists were paid as hourly employees, and therefore did not meet the “Salary Basis Test” contained in 29 C.F.R. § 541.118(a). Among other claims, plaintiffs asserted that some pharmacists’ base hours and concomitantly their base salary were reduced on a prospective basis thus, they asserted, proving that Wal-Mart’s “actual practice” was not to pay its pharmacists a predetermined amount.⁴

The matter was referred to Magistrate Judge Pringle, who filed his Recommendation on September 17, 1998. Although the magistrate judge recommended denying summary judgment as to plaintiffs’ other claims, he recommended granting summary judgment on plaintiffs’ claim that, because the base hours and salaries of some pharmacists at a few particular pharmacies were prospectively re-

⁴ We do not address the evidence related to plaintiffs’ three other claims for why Wal-Mart purportedly violated the Salary Basis test — and in particular, the significant amount of conflicting evidence the parties presented about plaintiffs’ partial-day absence docking claim — because plaintiffs have voluntarily dismissed those claims with prejudice.

duced, a class-wide policy or practice of prospective reduction existed, and rendered all opt-in plaintiff pharmacists non-exempt. *See* Aplt. App. 3834.

Wal-Mart filed written objections to the *Presley* Recommendation. First, Wal-Mart pointed out that the prospective adjustment of base hours and base salary does not violate the FLSA Salary Basis Test. Second, Wal-Mart asserted that, even if it does, the evidence before the court was minimal and conflicting, and could not in any event support a finding that Wal-Mart had a class-wide policy or practice of prospective reduction, and certainly could not support such a finding on summary judgment.

Specifically, Wal-Mart noted that, of 150 pharmacy districts across the country, plaintiffs had presented evidence from only two or three district managers that they had prospectively reduced the work schedules and salaries of pharmacists under their supervision. Indeed, of those three, evidence relating to one district consisted only of a 1995 memo from that district manager referring to prospective reductions in “pharmacist hours” without making clear whether the district manager was referring to salaried pharmacists, hourly “relief” pharmacists, or both — and Wal-Mart included deposition testimony from the author of that memo explaining that the reduction in pharmacist hours “would not have involved changing pharmacists’ base. It was involving eliminating some relief [*i.e.*, hourly] pharmacists.” *See* Aplt. App. 3873.9. Moreover, Wal-Mart pointed out that although at

the time of the summary judgment motion there were more than 675 opt-in plaintiffs in the lawsuit, only six of those plaintiffs claimed in their affidavits to have experienced such a prospective reduction. *See* Aplt. App. 3989-3990.

Finally, Wal-Mart submitted affidavits from two other district managers that were directly in conflict with the plaintiffs' evidence — those district managers stated that they never prospectively reduced the work schedules of any pharmacists under their supervision.

For example, Wal-Mart pointed to the affidavit of Larry Talley, the former District Manager for District 7 and thereafter Wal-Mart's Pharmacy Operations Coordinator. Mr. Talley testified that it was *not* Wal-Mart's policy or practice to prospectively reduce the salaries and work schedules of salaried pharmacists in response to business conditions:

While it may be true that during the summer months sales were slower and the number of scheduled hours needed to be reduced, * * * [p]ayroll hours subject to reduction during the summer months *included only those employees paid on an hourly basis* such as relief pharmacists, part-time pharmacists, and hourly paid pharmacy associates.

Aplt. App. 2201 (emphasis added). Hiram Mojica, the District Manager for District 33, testified to similar effect. *See* Aplt. App. 2232.

Nevertheless, on August 2, 1999, the district court accepted Magistrate Judge Pringle's Recommendations in their entirety and granted plaintiffs' summary

judgment motion. *See* Aplt. App. 3961, reported at 58 F. Supp. 2d 1219. The court rejected Wal-Mart’s argument that nothing in the language or history of the FLSA or its implementing regulations precluded the prospective alteration of base salary and base hours. Although Wal-Mart argued that prospective alterations of salary “coincide with the policy of the statute, by setting the conditions of employment in advance as an offer for continued employment” (Aplt. App. 3963), the court nevertheless declined to interpret “predetermined amount” to mean that “an employee is salaried even if the employer has the discretion to change payments prospectively.” *Id.*

The district court also resolved the conflicts in the evidence by discounting entirely the evidence presented by Wal-Mart and crediting entirely the evidence presented by the plaintiffs. On the one hand, the court rejected the evidence presented by two Wal-Mart district managers that no policy or practice of prospective salary reduction existed, holding that such evidence indicated only that prospective salary reduction had not taken place in their specific districts. On the other hand, the court relied upon plaintiffs’ evidence that two district managers, Kurtis Barry and Mark Schneider, had prospectively reduced base hours and salaries of pharmacists in their districts, and that a third district manager had written an ambiguous memo that, the court concluded, indicated an intention to cut full-time pharmacists’ hours and base salary in that district. Aplt. App. 3965. *That* evidence, the court

concluded, established that Wal-Mart had a class-wide policy or practice of prospectively reducing the base salary and base hours of full-time pharmacists. The court therefore entered summary judgment for plaintiffs. Aplt. App. 3965-67.

The court denied Wal-Mart's subsequent motion for reconsideration, stating only that "[a]fter reviewing defendants' motion and plaintiffs' response, it is apparent to the Court that the August 2, 1999, opinion is neither in clear error nor likely to produce manifest injustice." *See* Aplt. App. 6221.

Thereafter, *Presley* was set for trial, shortly before which Wal-Mart filed a motion seeking decertification of the case as a collective action. In support of that motion, Wal-Mart submitted more evidence that there was no class-wide policy or practice of prospective reductions, but that instead such reductions were at most a highly localized practice. Thus, Wal-Mart explained, the individual plaintiffs were not "similarly situated," as required by 29 U.S.C. § 216(b). On April 30, 2003, the district court denied that motion without even reading it. *See* Aplt. App. 5513.

2. *Yates*

Although no discovery had been taken in the *Yates* case, on March 21, 2000, the *Yates* plaintiffs moved for summary judgment on their prospective-reduction-in-base-salary claim. In support of their motion, they relied on the doctrine of collateral estoppel, and summarily argued that *Yates* and *Presley* "raised identical issues and causes of action." *See* Aplt. App. 4079. The *Yates* plaintiffs discussed no

facts and cited to no evidence in support of their motion, other than to incorporate by reference the materials filed on behalf of the motion for summary judgment in *Presley*. Aplt. App. 4075-4080.

Wal-Mart opposed the motion, arguing that the summary judgment order in *Presley* lacked the finality required for the doctrine of collateral estoppel to apply, and that collateral estoppel was inappropriate because plaintiffs had not satisfied their burden of showing that there were no relevant factual distinctions between the two cases. *See* Aplt. App. 4127-4128. As Wal-Mart explained, there was no evidence in the record in *Yates* to suggest that even a *single* member of the class in *Yates* had ever had his or her salary prospectively reduced. Aplt. App. 4128.

On November 9, 2000, Magistrate Judge Pringle recommended that the motion be granted. Judge Pringle was dismissive of Wal-Mart's argument that the two cases were factually distinct, citing no facts but concluding that "[t]here is no distinction whatsoever in the claims asserted in [*Presley* and *Yates*]." Aplt. App. 4320. He also found that the summary judgment order in *Presley* was sufficiently "final" to warrant collateral estoppel, even though that order was interlocutory, non-appealable, and not a final judgment. Aplt. App. 4321-4322.

Wal-Mart filed objections to the Recommendation, again arguing that the *Yates* plaintiffs had not met their burden, as required for summary judgment under Rule 56, of demonstrating that there was no genuine issue as to any material fact.

Wal-Mart stressed that the summary judgment ruling in *Presley* was based on only a few pieces of evidence (*see supra*, pages 16-17), each of which related exclusively to Wal-Mart's policies and practices *in 1995*, but that the claims of many of the plaintiffs in *Yates* related only to periods *after 1997*. Wal-Mart explained that, even had there been a class-wide policy in 1995 that violated the FLSA, that policy had changed. For example, Wal-Mart showed that it had implemented a new, "Revised Pharmacist Compensation Program" after the time period addressed by evidence in *Presley*, and that under this new policy no pharmacist's salary and base hours had ever been prospectively reduced on an involuntary basis. *See* Aplt. App. 4355. Wal-Mart also stressed that it was the plaintiffs' burden to prove that Wal-Mart's policies had *not* changed. Finally, Wal-Mart challenged the magistrate judge's finding that the *Presley* ruling was sufficiently final to warrant application of the doctrine of collateral estoppel.

The district court rejected Wal-Mart's objections, and on June 20, 2001, granted the motion for summary judgment. The court did not address the fact that the evidence in *Presley* related to a different time period than that at issue for many of the opt-in plaintiffs in *Yates*. The court also found the *Presley* ruling to be sufficiently final to warrant application of the doctrine of collateral estoppel. *See* Aplt. App. 4615-4617.

SUMMARY OF ARGUMENT

1. The district court's order granting summary judgment to plaintiffs was based on a fundamentally incorrect understanding of the FLSA's salary basis test. Under this test, an employer may, on a prospective basis, reduce an overtime-exempt employee's salary along with a concomitant reduction in work schedule without rendering that employee non-exempt. Neither the statute nor the Secretary of Labor's legislatively mandated regulations provide any textual support for the district court's conclusion otherwise. In fact, DOL has repeatedly explained that such reductions do not violate the salary basis test. Thus, the district court's erroneous legal conclusion that prospective reductions of salaries and work schedules violate the FLSA should be reversed, and judgment should be entered for Wal-Mart.

2. Even if prospective reductions in salary do violate the FLSA, however, the district court erred in granting plaintiffs' motion for summary judgment. The evidence plaintiffs presented to show that Wal-Mart had a policy or practice of prospectively reducing the work schedules and salaries of pharmacists was, at best, sparse, and Wal-Mart provided the district court with directly conflicting evidence demonstrating that it had no such policy or practice. Thus, genuine issues of material fact exist, and summary judgment was inappropriate.

3. The district court also erred by denying Wal-Mart's motion seeking decertification of the class in *Presley*. The evidence Wal-Mart submitted with that motion demonstrated that there was, in fact, no class-wide policy or practice of prospective reductions, but that instead such reductions were at most a highly localized practice. The individual plaintiffs therefore were not "similarly situated," as required by 29 U.S.C. § 216(b). Thus, the district court should have decertified the class under *Bayles v. American Medical Response of Colorado, Inc.*, 950 F. Supp. 1053, 1066 (D. Colo. 1996), and *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102-3 (10th Cir. 2001).

4. Finally, the court mistakenly used the doctrine of collateral estoppel to justify summary judgment in *Yates*, even though that case involved different plaintiffs and a different time period than were at issue in *Presley*. The *Yates* plaintiffs presented no evidence whatsoever that they were subject to the same practice or policy that the district court had found to exist for the *Presley* plaintiffs, and Wal-Mart presented evidence that it had revamped its policies governing full-time pharmacists between the time periods relevant to the two cases. Thus, even if summary judgment had been appropriate in *Presley*, it would not have been appropriate in *Yates*.

ARGUMENT

I. THE PROSPECTIVE REDUCTION OF A PROFESSIONAL’S BASE SALARY DOES NOT RENDER THAT EMPLOYEE NON-EXEMPT UNDER THE FAIR LABOR STANDARDS ACT.

The district court plainly erred in concluding as a matter of law that a prospective reduction of base salary, even if tied to a concomitant reduction in base hours, renders an otherwise-exempt professional subject to the overtime requirements of the FLSA.⁵ The FLSA delineates certain narrow exceptions to the traditional rules of at-will employment; it creates a right to a minimum amount of salary for each workweek, but it does not preclude employers and employees from negotiating and renegotiating their arrangements otherwise as they see fit. As DOL explained over sixty years ago, “[t]he Administrator is not authorized to set wages or salaries for executive, administrative, and professional employees.” U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* 11 (1949) (the “Weiss Report” attached in addendum, Tab 5). Thus, DOL’s regulations, DOL’s controlling interpretation of those regulations, and case law all demonstrate that Wal-Mart was entitled to summary judgment as a matter of law.

⁵ This is a question of law that this Court reviews *de novo*. See *Kaw Nation v. Springer*, 341 F.3d 1186, 1189 (10th Cir. 2003).

A. The Text And History Of The Controlling Regulation Demonstrate That Prospective Reductions In Salary Do Not Violate The Salary Basis Test.

An examination of the language of the Salary Basis Test proves that Wal-Mart and its otherwise-exempt professional employees may renegotiate their compensation arrangements without rendering those employees non-exempt. First, the text of the regulation demonstrates that the analysis of whether an employee is exempt must be undertaken on a pay-period-by-pay-period basis. Thus, the relevant question must be whether there has been a reduction *within* a given pay period, rather than as to a *future* pay period. Second, the regulation is phrased in terms of barring *post-hoc* reductions in compensation for work *performed*, rather than of precluding reductions in compensation based on *ex ante* changes in work *to be* performed.

1. The text of the regulation shows clearly that the Salary Basis Test must be conducted for each pay period, standing alone:

An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives *each pay period* on a weekly, or less frequent basis, *a predetermined amount* * * *.

29 C.F.R. § 541.118(a) (emphasis added); *see also* 29 C.F.R. § 541.118(a)(6) (exemption not applicable to an employee as to whom improper deductions were made only during the “period when such deductions were being made”). Thus, so

long as an employee's salary for a given pay period is determined before the commencement of the pay period, and the details of that salary do not violate the specific rules contained in subsection 118(a)(1)-(6), that salary satisfies the Salary Basis Test. Absent obvious abuse (see *infra*, note 9), it is immaterial what amount that employee was or is scheduled to be paid in prior or future pay periods.

In fact, the Department of Labor has confirmed that the analysis of whether an employee is an exempt professional must be undertaken on a pay-period-by-pay-period basis. In Opinion Letter No. 1140 (WH-93), 1970 WL 26462 (Nov. 13, 1970), DOL addressed what would happen if an exempt employee's salary was reduced in one workweek from a level above the regulatory minimum to a level below the regulatory minimum, and then in a subsequent workweek the employee's salary was increased to a level above the regulatory minimum. DOL opined that in the workweek in which the salary was reduced below the regulatory minimum, "the exemption will be lost for that employee *in that workweek.*" *Id.* (emphasis added). But, it continued, "[t]his will not affect his previous exempt status, nor will it preclude the employee again being exempt at such time his salary again meets or exceeds the required amount." *Id.* As we discuss below (at page 31 n.8), this Court must defer to this DOL interpretation. And, under this interpretation, it is evident that a prospective reduction in salary does not violate the Salary Basis Test; the parties are entitled to set whatever "salary" they choose within a given

pay period, so long as it meets the other requirements of the FLSA and its implementing regulations.⁶

2. A straightforward textual reading of the regulation also demonstrates that only *ex post* reductions in pay, rather than *ex ante* changes in salary, violate the Salary Basis Test. Section 118(a) specifies that for an employee to be considered paid on a salary basis that employee must receive “a *predetermined amount* * * * which amount is not subject to *reduction* because of variations in the quality or quantity of the work *performed*.” 29 C.F.R. § 541.118(a) (emphasis added). The regulation does not address renegotiated salaries — *new* “predetermined amount[s]” — that may be higher or lower than a previous salary; it addresses only deductions from the already-predetermined salary for a given pay period.

⁶ Further confirmation that DOL means what it says when it uses a limiting term such as “pay period” — that the analysis must be conducted as to that period standing alone — can be found in the analogous situation of the Duties Test for whether an employee is exempt under Section 213. Under the so-called “long” Duties Test, which applies to less-well-compensated salaried employees, the exemption is lost if more than 20% of the employee’s time *in a given “workweek”* is spent on non-exempt duties; by contrast, for highly compensated salaried employees a “short” Duties Test is applicable, which focuses on the employee’s primary duty and doesn’t specify an analytical time period. *See Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1249-50 (3d Cir. 1980). It is well established that the analysis under the long test must be conducted for each workweek *standing alone*. *See id.* at 1250. Under the short test, by contrast, the regulation does not refer to the workweek, and thus the analysis may be conducted over a longer period. *See id.*; *see also Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 455 (4th Cir. 2003).

Thus, the subsections of section 118(a) all focus on delimiting those situations where an ex post reduction in salary *is* authorized. For example, the regulations specify that an employer may not dock an exempt employee’s salary for a partial-day absence, but may dock his or her salary for an absence of a full day or longer. *See id.* § 118(a)(2). Similarly, the regulations specify that no reduction may be taken for jury duty or temporary military leave (*id.* § 118(a)(4)), or for infractions of minor safety rules (*id.* § 118(a)(5)), but that reductions may be taken for absences due to sickness or disability if the employer offers compensatory insurance (*id.* § 118(a)(3)). The details of these rules are unimportant to this litigation; what is important, however, is that each addresses the question whether an employer may, as measured at the *end* of a pay period, reduce an employee’s salary for that *completed* pay period. Nothing in the regulation purports to constrain the parties from altering that employee’s salary in the future, as Wal-Mart is alleged to have done here.⁷

3. Finally, the history of the Salary Basis Test confirms that the test is meant to be applied on a pay-period-by-pay-period basis, and is designed only to

⁷ The regulations also specify that the payment of overtime to “salaried” employees does not render those employees non-exempt. *See* 29 C.F.R. § 541.118(b); *Aaron v. City of Wichita*, 54 F.3d 652, 658 (10th Cir. 1995). This further confirms that all the Salary Basis Test is designed to do is to guarantee the employee the benefit of his bargain – at least an agreed upon salary for the specified pay period, assuming that amount is above the statutory minimum. “Salary,” for purposes of the Salary Basis Test, need not be a fixed amount over time.

preclude retrospective, not prospective, reductions in pay. The initial regulations implementing 29 U.S.C. § 213(a)(1) did not contain a Salary Basis Test at all. *See* 3 Fed. Reg. 2518 (Oct. 20, 1938); 29 C.F.R. § 541.2 (1938). In 1940, DOL decided to adopt a Salary Basis Test as part of amended regulations promulgated under the FLSA. *See* U.S. Department of Labor, Wage and Hour Division, “*Executive, Administrative, Professional . . . Outside Salesman*” *Redefined* (1940) (the “Stein Report” attached in addendum, Tab 4); 5 Fed. Reg. 4077 (Oct. 15, 1940). Those regulations provided for minimum compensation amounts to be paid “on a salary * * * basis” (29 C.F.R. § 541.3(b) (1940)), but did not define the term “salary basis.” Under this version of the regulation, many employers concluded that they could impose disciplinary penalties as deductions from salaries. *See* Weiss Report at 24-27. Ultimately the language now found in 29 C.F.R. § 541.118(a) was adopted (*see* 14 Fed. Reg. 7730 (Dec. 28, 1949)), to “make it clear that the term ‘on a salary * * * basis’ requires that the employee *receive his full salary* for any week in which he performs any work without regard to the number of days or hours worked.” Weiss Report at 26 (emphasis added). The regulation has not changed in any relevant fashion since 1950.

In fact, in addition to this focus on deductions from salary, in the Weiss Report DOL also succinctly stated the limitations of the FLSA: “The Administrator is not authorized to set wages or salaries for executive, administrative, and profes-

sional employees.” Weiss Report, at 11. *See also* Wage & Hour Opinion Letter dated May 27, 1999, 1999 WL 1002410 (“[t]he setting of rates of pay which are above the minimum wage required by the FLSA is a matter for agreement between employers and employees”). If the district court’s interpretation of the Salary Basis Test is allowed to stand — under which an employer could never reduce a salary prospectively in return for a reduced work schedule — the Department would, as a matter of practical effect, be setting the salaries of exempt employees.

B. The Department Of Labor Has Consistently Interpreted Its Regulations As Authorizing A Prospective Reduction In Salary For Exempt Professionals.

Even if it weren’t self-evident from the text and history of Section 118 that prospective salary reductions are allowed, this Court should reach that conclusion based on DOL’s interpretation of that regulation. On numerous occasions DOL has been asked whether a prospective reduction in work hours and compensation would defeat the Salary Basis Test; it has consistently explained that such reductions do not. As the Supreme Court has explained, “[b]ecause the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, *controlling* unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (emphasis added; citation and internal quotation marks omitted); *see also Boykin v. Boeing Co.*, 128 F.3d 1279, 1281 (9th Cir. 1997) (referring to Wage & Hour Division opinion letters on Salary

Basis Test, “the Secretary’s interpretation of the salary-basis test as it relates to overtime compensation is articulated clearly in the DOL’s Opinion letters and is entitled to our court’s deference”); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 7-8 (1st Cir. 1997).⁸

In Wage & Hour Opinion Letter No. 1140 (WH-93), 1970 WL 26462 (Nov. 13, 1970) (the “1970 Opinion”), the employer wanted to reduce operating costs by moving from 52 five-day workweeks to 47 five-day workweeks and five four-day workweeks — a net reduction of five days over the year — with a “proportionate deduction” in the salary of each overtime-exempt employee. DOL opined that the salary-basis regulation “does not preclude a bona fide reduction in any employee’s

⁸ Because this case is about the interpretation of a regulation (29 C.F.R. § 541.118) rather than a statute (29 U.S.C. § 213), this Court must defer to DOL’s interpretation of that regulation under *Auer*. The lower deferential standard discussed in *Christensen v. Harris County*, 529 U.S. 576 (2000), which applied “*Skidmore*” deference to a DOL opinion letter that interpreted *a statute*, is inapplicable here. See *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (differentiating deference to interpretations of statutes from deference to interpretations of regulations); *Auer*, 519 U.S. at 462-63 (same).

However, even under *Christensen*, DOL letter opinions “are ‘entitled to respect’ under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), * * * to the extent that those interpretations have the ‘power to persuade.’” 529 U.S. at 587. Here, DOL’s interpretation of the Salary Basis Test is persuasive.

salary which is not designed to circumvent the salary basis requirement,” and thus that the proposed reduction would be allowed.⁹

Similarly, in a Wage & Hour Opinion Letter dated March 4, 1997, 1997 WL 998010 (the “1997 Opinion”), an employer that sought to reduce operating costs proposed to reduce the workweek of certain exempt employees from 40 hours to 31 hours “with a commensurate reduction in pay.” Citing the 1970 Opinion, DOL concluded that this prospective reduction would not defeat the Salary Basis Test. DOL again explained that “Section 541.118 does not preclude a bona fide reduction in an employee’s salary which is not designed to circumvent the salary basis requirement.” *Id.* The agency elaborated that, in particular, “[a] reduction in salary resulting from a reduction in the workweek * * * will not defeat an otherwise valid * * * exemption.” *Id.*

Finally, in a Wage & Hour Opinion Letter dated February 23, 1998, 1998 WL 852696 (the “1998 Opinion”), a large employer with several thousand employees throughout the United States requested advice about a plan it had devised

⁹ The Department acknowledged that this principle could be abused, if, for example, an employer repeatedly tried to manipulate working schedules and compensation frequently to meet short-term fluctuations in its labor needs. Anticipating that type of possible abuse, the Department explained that “[r]ecurrent changes in an employee’s status *may* lead to an across-the-board denial of the exemption.” The 1970 Opinion. (emphasis added). As we discuss below (at pages 33-34), there is no evidence in these cases that individual pharmacists’ salaries were changed prospectively on a regular basis, or that Wal-Mart ever altered a pharmacist’s base salary as a means “to circumvent the salary-basis requirement.”

“to deploy staff when serious and persistent work shortages occur in a defined work unit.” As part of that plan, employees would be shifted to a 32 hour work-week with a proportionate reduction in pay. Again citing the 1970 Opinion, DOL opined that “a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment.” *Id.*

The prospective reductions that Wal-Mart is alleged to have undertaken in this case are identical to those at issue in these opinion letters, and bear no resemblance to the sort of abusive conduct of which DOL warned in the Opinion Letters (*see supra*, note 9). The undisputed evidence before the district court established that no plaintiff was subject to the type of frequent or recurrent changes in his or her base salary that might be interpreted to be a method of “circumvent[ing] the salary-basis requirement.” *See* 1970 Opinion. For example, the plaintiffs submitted the affidavit of pharmacist Burcham in support of their contention that Wal-Mart had a corporate policy or practice of prospective salary reduction. Indeed, the Burcham affidavit was one of those specifically relied upon by the magistrate judge in his Recommendation (later affirmed by the district court). *See* Aplt. App. 3835. But, as the magistrate judge’s own finding indicates, Ms. Burcham’s base salary and base hours were only changed *once* between 1991 and 1995. Moreover, the reduction in hours in 15 stores that the district court believed plaintiffs’ Exhibit AA described (*see* Aplt. App. 3964) was, at most, a *one-time event* in May 1995;

moreover, that Exhibit was ambiguous as to whether the reduction it described related to salaried pharmacists or to hourly relief pharmacists. And the deposition testimony of district managers Kurtis Barry and Mark Schneider (*see id.*) contains no evidence of frequent or recurrent changes in the base salary of any of the plaintiffs, but instead shows merely that the base salaries of a very small number of full-time pharmacists were prospectively reduced. In fact, only six of the almost six hundred plaintiffs alleged even a *single* reduction in base salary in their affidavits submitted in support of plaintiffs' motion for summary judgment. *See* Aplt. App. 1117 at ¶ 3; Aplt. App. 1161; Aplt. App. 1195 at ¶3, Aplt. App. 1208 at ¶3; Aplt. App. 1223 at ¶3; Aplt. App. 1290 at ¶3.¹⁰ None alleged frequent, recurrent prospective reductions in their base salary. Applying the DOL's own understanding of the Salary Basis Test to these allegations, there is not the slightest basis to conclude that Wal-Mart's prospective reductions in base salary flunked the Salary Basis Test. This Court should defer to the expert regulator's interpretation of its own rules.

¹⁰ Many of the affidavits did not even allege a reason for the reduction. Given that, as District Manager Barry testified, pharmacists themselves often requested changes in their base hours (Aplt. App. 2451), the plaintiffs' allegations do not suffice to demonstrate that their base hours and base salaries were *ever* reduced involuntarily — and plaintiffs do not allege that a reduction in salary tied to a *requested* reduction in schedule would violate the salary basis test.

C. The District Court Erred In Not Following Those Cases That Have Held Prospective Reductions Not To Violate The Salary Basis Test.

Given the language of the controlling regulations and DOL's consistent interpretation of those regulations, it is unsurprising that at least two district courts have held that prospective reductions in base salary essentially identical to those that Wal-Mart is alleged to have undertaken do not violate the Salary Basis Test. This Court should follow these precedents. The few courts that have held otherwise were either faced with fundamentally different factual situations or misunderstood the FLSA.

The previously decided case that is most similar to the instant matter is *Caperci v. Rite Aid Corp.*, 43 F. Supp. 2d 83 (D. Mass. 1999). There, the defendant, a large drug store chain that competes with Wal-Mart's pharmacy business, employed pharmacists and paid them salaries using a weekly base-hours system that was very similar to Wal-Mart's biweekly one. The weekly salary of a Rite Aid pharmacist was subject to prospective change

if Rite Aid and the pharmacist agree to increase or decrease the pharmacist's regular number of hours at the store to which he or she is assigned. The latter can occur either because the pharmacist simply decides that he or she wants to work longer or shorter hours (and Rite Aid concurs) or because the local manager unilaterally decides to change the regular hours of store operation (such as by deciding to close at 9:00 p.m. instead of remaining open until 11:00 p.m.).

Caperci, 43 F. Supp. 2d at 87.

The *Caperci* plaintiffs, like plaintiffs here, argued that they were not paid on a salary basis because their compensation was subject to reduction when their regularly scheduled work hours were reduced. *Id.* at 96-97. In rejecting the plaintiffs' position, the *Caperci* court explained that "Plaintiffs' argument assumes that, once the employer and employee enter into an agreement that provides for the payment of a predetermined amount, that agreement can never be amended, and therefore, that the predetermined amount that is to be paid under it can never be changed." *Id.* at 97. Finding nothing in the Salary Basis Test "that says or implies that employment agreements, once made, cannot be amended, terminated, or superseded," *id.*, the court granted summary judgment for Rite Aid.

[T]he fact that the changes are imposed unilaterally by the employer does not mean that the employee is not receiving a new, predetermined amount under a new or amended employment agreement; it means only that the employer has chosen to exercise its common law right to terminate the existing at will agreement between itself and its employee and substitute in its place, upon acceptance by the employee, a new agreement calling for shorter hours and reduced pay.

Id. In so ruling, the court cited and relied on DOL's 1970 Opinion letter (*id.*), which, it explained, "must be given considerable deference" (*id.* at 92 (citations omitted)).

Similarly, in *Ackley v. Department of Corrections*, 844 F. Supp. 680 (D. Kan. 1994), the court rejected the argument that prospective reductions in salary, as a result, for example, of a less-than-satisfactory performance evaluation, would violate the Salary Basis Test:

The intent of § 541.118 is to prevent an employer from circumventing the overtime compensation requirements of the FLSA by purporting to pay the employee a “salary” while retaining the ability to adjust the employee’s pay depending on the quality or quantity of the work. In such a circumstance, an employee’s pay is not fixed, but is contingent in character. ***Future pay adjustments do not implicate the regulation’s intent because the employee knows before he or she performs the work what their pay will be.***

Id. at 686 (emphasis added).¹¹

Thomas v. County of Fairfax, 758 F. Supp. 353 (E.D. Va. 1991), the case on which the district court relied, involved a fundamentally different factual situation from that present in these cases. In *Thomas*, each employee’s pay varied ***from***

¹¹ See also *Anunobi v. Eckerd Corp.*, 2003 WL 22368153, at *5 (W.D. Tex. Oct. 17, 2003) (where employee moved to a new city and renegotiated his base hours and pay with employer, this “did not alter his exempt status”) (citing *Caperçi*); *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 739, 741 (6th Cir. 2000) (“no argument” that employee was not paid on salary basis even though base salary changed several times, including one change where base salary was reduced from \$1623 every two weeks to \$1540 every two weeks); *Clawson v. Grays Harbor College Dist. No. 2*, 61 P.3d 1130, 1137 (Wash. 2003) (calling district court decision in this case “questionable authority” and finding that policy where colleges set instructor salary on a quarterly basis based on course load did not violate Salary Basis Test under Washington State’s parallel regulatory scheme).

paycheck to paycheck, depending on the number of hours that employee was scheduled to work in that particular pay period. This is exactly what DOL described in the 1970 Opinion as being the type of frequent change in work hours and compensation that is a method to “circumvent the salary-basis requirement,” rather than being an acceptable “bona fide reduction” in salary. Moreover, *Thomas* says nothing about an employer’s general prerogative occasionally to adjust work week and compensation in light of longer-term economic circumstances. *See supra*, note 9. As discussed above (at pages 33-34), here there is no evidence of the sort of abusive conduct present in *Thomas*, and of which DOL disapproved.

In any event, although the decision in *Thomas* on frequent changes in work hours and compensation can readily be squared with the 1970 Opinion and is entirely distinguishable from the facts of Wal-Mart’s occasional, non-recurrent changes in work hours and compensation, *Thomas*’s underlying construction of the Salary Basis Test is in direct conflict with another case from the same district, *International Association of Fire Fighters, Alexandria Local No. 2141 v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989). Moreover, *Thomas* was subsequently disapproved by the Fourth Circuit in an unpublished opinion. *See Vogel v.*

Am. Home Prods. Corp. Severance Pay Plan, 122 F.3d 1065 (table), 1997 WL 577578 (4th Cir. 1997).¹²

In sum, the district court erred in holding that a prospective reduction in salary, even if tied to a concomitant reduction in hours, violates the Salary Basis Test. Therefore, this Court should reverse the district court's ruling and direct that judgment be entered in favor of Wal-Mart.

¹² *Dingwall v. Friedman Fisher Associates, P.C.*, 3 F. Supp. 2d 215, (N.D.N.Y. 1998), the only case of which we are aware that involved similar facts to this one but that found a prospective reduction in salary to violate the Salary Basis Test, is not persuasive. According to the *Dingwall* court, a prospective reduction in salary violates 29 C.F.R. § 541.118(a)(1), which precludes “deductions from [the employee's] predetermined compensation [that] are made for absences *occasioned by the employer or by the operating requirements of the business*. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.” *Dingwall*, 3 F. Supp. 2d at 220 (quoting 29 C.F.R. § 541.118(a)(1)) (emphasis in *Dingwall*). Citing no authority — and in particular, not addressing the DOL Opinion Letters discussed above — the *Dingwall* court concluded that “[t]his language makes it clear that a reduction in work time that is imposed by the employer may not be the basis for a reduction in salary.” *Dingwall*, 3 F. Supp. 2d at 220. But that is not what the regulation says; rather, the regulation bars ex post **deductions** from salary for **absences** from employment. Under this regulation, an employer may not telephone an employee at 8 am and tell her not to come in that day, and then deduct a concomitant amount from her pre-arranged salary. The cited regulation in no way alters the retrospective focus or the pay-period-by-pay-period nature of the Salary Basis Test, however. Thus, the *Dingwall* court simply erred.

II. BECAUSE THE MINIMAL EVIDENCE BEFORE THE DISTRICT COURT ON THE POINT WAS DIRECTLY CONFLICTING, THE DISTRICT COURT ERRED IN RESOLVING MATERIAL FACTUAL CONFLICTS TO FIND THE EXISTENCE OF A CLASS-WIDE POLICY OR PRACTICE OF PROSPECTIVE REDUCTIONS.

Although the principles governing motions for summary judgment are well-established, two of them bear repeating here because the district court so clearly failed to follow them. First, a summary judgment motion may not be granted if there exists a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). And second, in considering a summary judgment motion, the evidence in the record must be viewed “in the light most favorable to the non-movant.” *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991). This Court, of course, “review[s] motions for summary judgment de novo, applying the same standard as the district court.” *Wilburn v. Mid-South Health Dev., Inc.*, 343 F.3d 1274, 1277 (10th Cir. 2003). Under that standard, the district court’s summary judgment rulings in *Presley* and *Yates* were, quite simply, wrong.

The evidence before the district court on plaintiffs’ summary judgment motion was the following: (1) in 1995, two or three of 150 Wal-Mart pharmacy district managers, on a one-time basis, prospectively reduced the work schedules and compensation of pharmacists under their supervision, (2) one of those three district managers wrote a memo in 1995 referring to prospective reductions in “pharmacist hours” without making clear whether he was referring to salaried pharmacists or

hourly “relief” pharmacists, (3) plaintiffs submitted affidavits of only six of the more than 600 opt-in plaintiffs (who themselves amounted to no more than fifteen percent of Wal-Mart’s 4000 salaried pharmacists) who claimed to have experienced such a prospective reduction, and (4) at least two other district managers testified that they *never* prospectively reduced the work schedules of any pharmacists under their supervision. Based on that, the district court found that Wal-Mart had a class-wide policy or practice of prospectively reducing the working hours and pay of its salaried pharmacists, and that all of the *Presley* class members were subject to that policy during the entire class period.

In so finding, the district court not only resolved disputed issues of material fact and construed the evidence in the light *least* favorable to the non-moving party; it also contravened *Auer v. Robbins*, 519 U.S. 452 (1997). Indeed, *Auer* makes clear that the district court was simply not permitted to make such a finding in the absence of evidence, as to which there was no genuine issue, that all Wal-Mart salaried pharmacists *as a class* were operating under an employment policy that created either (1) “a significant likelihood” of impermissible deductions or (2) an “actual practice” of making impermissible deductions. *Auer*, 519 U.S. at 461. Here, the evidence failed on both counts.

A. The Conflicting Evidence Before The District Court Could Not Support A Summary Judgment Finding That Wal-Mart Had A Class-Wide Employment Policy Creating A “Significant Likelihood” of Impermissible Deductions On A Class-Wide Basis.

In *Auer*, an employer policy (the “Police Manual”) made all employees — exempt and non-exempt alike — potentially subject to pay deductions that, if actually made, would have violated the salary-basis regulation. Exempt employees whose pay was not reduced contended that this “theoretical possibility of such deductions” (*Auer*, 519 U.S. at 459) rendered them non-exempt. The Supreme Court disagreed, deferring to the DOL’s interpretation that an employer policy creates a “significant likelihood” of impermissible deductions only if there is “a clear and particularized policy — one which ‘effectively communicates’ that deductions will be made in specified circumstances.” *Id.* at 461. Because the employer’s policy applied both to exempt employees and to non-exempt employees, and not solely to the exempt employees, the Supreme Court would not infer that it was sufficiently likely that impermissible deductions would be made from the salaries of the exempt employees. *Id.* Implementing *Auer*, this Court has held that a pay deduction policy that applies to both exempt and non-exempt employees does not, as a matter of law, satisfy the “significant likelihood” test. *See Carpenter v. City and County of Denver*, 115 F.3d 765, 767 (10th Cir. 1997).

Here, the evidence of a class-wide “clear and particularized policy,” even if viewed in the light *least* favorable to the non-movant, Wal-Mart, was minimal and

conflicting. If viewed in the light *most* favorable to Wal-Mart — as it should have been — the evidence was that no such class-wide policy existed. Indeed, the only evidence even arguably demonstrating a *policy* of impermissible deductions is plaintiffs’ Exhibit AA, the memorandum from Norman Beck to all pharmacy managers in his *one* district. Plaintiffs adduced no evidence that the so-called policy contained in Exhibit AA, which applied to 15 stores in one of Wal-Mart’s 150 districts, was a company-wide policy, or that Exhibit AA was ever distributed outside of that one District. In fact, the affidavit testimony of other District Managers demonstrated that no such policy existed in other districts. Thus, if viewed in the light most favorable to Wal-Mart, the evidence was that no such class-wide policy existed. At a minimum, whether such a policy existed on a class-wide basis was a genuine issue of material fact not appropriately resolved by summary judgment.

Furthermore, Exhibit AA, a memo written by district Manager Norm Beck, itself is legally insufficient to satisfy the “significant likelihood” test. That memo on its face was unclear as to whether it applied to salaried pharmacists or not — and, significantly, Mr. Beck explained in his deposition that his memo was directed toward reducing the *total* number of pharmacist hours per week in his district, and that this would have “involv[ed] eliminating some relief [*i.e., non-exempt*] pharmacists,” rather than full-time, exempt pharmacists. *See* Aplt. App. 3873.9. Given Mr. Beck’s deposition testimony, it is at least a disputed question whether Exhibit

AA was aimed at both exempt and non-exempt employees. Thus, under *Auer* and *Carpenter*, the district court cannot have considered Exhibit AA, at the summary judgment stage, to be a policy that “effectively communicated” a “significant likelihood” of impermissible deductions to the entire class of exempt employees.

B. The Conflicting Evidence Before The District Court Could Not Support A Summary Judgment Finding That Wal-Mart Had A Class-Wide “Actual Practice” of Impermissible Deductions.

Even though the district court found that the base salaries of a small number of exempt pharmacists were prospectively reduced, there was at the very least conflicting evidence about whether there was a class-wide “actual practice” of impermissible deductions within the meaning of *Auer*. A small number of one-time salary deductions, as the court found happened in isolated instances at Wal-Mart, is not sufficient to constitute such an “actual practice” (nor is it sufficient to infer a “significant likelihood” of such deductions, *Auer*, 519 U.S. at 461).¹³ *E.g.*, *Carpenter*, 115 F.3d at 767 (deductions from salaries of two employees).

Moreover, in its summary judgment ruling, the district court impermissibly weighed and resolved conflicts in the evidence — it credited the deposition testimony of Kurtis Barry and Mark Schneider that isolated prospective reductions of

¹³ An “actual practice” clearly involves a more substantial number of impermissible deductions. See, *e.g.*, *Belcher v. Shoney’s, Inc.*, 30 F. Supp. 2d 1010, 1020 (M.D. Tenn. 1998) (“actual practice” found where 1,229 deductions were made over a several year period in 23 percent of the employer’s establishments covering 40 percent of its operational areas).

base salary and base hours occasionally occurred in their districts, but discredited contrary evidence presented by the defendants, which established that prospective base salary and base hour reductions were not occurring as a matter of course throughout Wal-Mart's disparate regions and districts. In other words, the district court engaged in precisely the sort of weighing of the evidence and resolving of genuine issues of material fact that is inappropriate at the summary-judgment stage.

Thus, at a minimum, there are material issues of disputed fact as to whether a class-wide "actual practice" of prospective reductions existed, and therefore the grant of summary judgment for plaintiffs was in error.

C. The District Court Impermissibly Short-Circuited The Two-Stage *Thiessen* Process In Finding Liability Against Wal-Mart, And Its Summary Judgment Ruling Was Therefore Erroneous.

In *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), this Court held that a case involving allegations of a "pattern or practice" of illegal conduct under the Age Discrimination in Employment Act ("ADEA") must be dealt with in two stages.¹⁴ In the first stage, the plaintiff has the burden of proving that the alleged "practice" was a regular procedure followed by the employer during the relevant period. The defendant, on the other hand, attempts to offer evi-

¹⁴ Although *Thiessen* addresses class actions under the ADEA, 29 U.S.C. § 626(b), the ADEA's class action provision "expressly borrows the opt-in class action mechanism of the [FLSA]." *Thiessen*, 267 F.3d at 1102.

dence that the plaintiff’s proof is either inaccurate or insignificant. At this stage, if the plaintiff succeeds, only prospective relief can be awarded. If the plaintiffs also seek individual relief for the victims of the alleged practice, the case moves to the second stage — the burden shifts to the defendant, in what is essentially a series of individual lawsuits, to prove that individual plaintiffs were not victims of the alleged practice. The plaintiffs who were victims of the practice get damages, and the plaintiffs who were not victims do not get damages. *Id.* at 1106.

Here, the district court engaged in the first stage of this process and as a result found — erroneously, as set forth above — that Wal-Mart had engaged in a “policy or practice” of prospective reduction of base hours and salaries. Under *Thiessen*, the district court should then have moved to the second stage of the case — a determination whether each individual opt-in plaintiff was a victim of the “policy or practice” and, if so, to what extent. *Id.* However, the district court skipped that stage entirely — it found the existence of a policy or practice and, from that, directly concluded that Wal-Mart was liable to all opt-in plaintiffs without affording Wal-Mart the opportunity to present evidence that individual opt-in plaintiffs were not subject to that policy or practice. Under *Thiessen*, that was error, and requires reversal of the district court’s summary judgment ruling.

III. THE DISTRICT COURT ERRED BY REFUSING TO GRANT, OR EVEN CONSIDER, WAL-MART'S MOTION FOR AN ORDER DECERTIFYING THE PRESLEY CASE AS A COLLECTIVE ACTION.

The district court also abused its discretion by refusing to decertify the class of opt-in plaintiffs before trial.¹⁵ The FLSA allows employees to maintain a “collective action” against their employers on their own behalf and on behalf of other “similarly situated” employees. *See* 29 U.S.C. §§ 207, 216(b). FLSA collective actions require court certification of a class of plaintiffs before the action may proceed as a collective action. *Id.* § 216(b). To qualify for certification, the plaintiffs bear the burden of showing that the members of the class are similarly situated, both to each other and to the named plaintiffs. *Id.*; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1062-63 (D. Colo. 1996).

Most courts have taken a two-step approach to the FLSA certification process. *See Bayles*, 950 F. Supp. at 1066; *Thiessen*, 267 F.3d at 1102-3. First, the court must determine whether to **conditionally** certify the collective action for notice and discovery purposes. In so doing, courts apply a lenient test of whether the potential members of the class are “similarly situated.” At that early point in the case, courts “require nothing more than substantial allegations that the putative

¹⁵ The decision whether to decertify a class is reviewed for abuse of discretion. *See Thiessen*, 267 F.3d at 1102.

class members were together the victims of a single decision, policy, or plan.” *Bayles*, 950 F. Supp. at 1066. If the class is initially certified, notice is then issued to potential collective action class members, who are given an opportunity to opt in to the action. *Id.*¹⁶

The second step of the certification process comes when discovery has been completed and the case is ready for trial. *Id.* As at the first stage, at the second stage the plaintiffs bear the burden of proof — they must prove that each of the opt-in plaintiffs is “similarly situated” to each other opt-in plaintiff. *Id.* However, at this second stage, the plaintiffs’ burden of proof is heavier because the standard for “similarly situated” is more rigorous than at the first stage. *Id.* At the second stage, courts consider the evidence relating to a variety of factors, including (1) whether there exist disparate factual or employment settings for individual plaintiffs, (2) whether there exist defenses available to the defendant that appear to be individual to individual plaintiffs, and (3) fairness and procedural considerations. *Id.*; see also *Thiessen*, 267 F.3d at 1105 (approving of *Bayles* approach); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1987), *vacated in part on other grounds*, 855 F.3d 1062 (3d Cir. 1988).

¹⁶ Here, the district court took this first step by Order dated April 8, 1996. In that Order, the district court noted that, by agreement between the parties, the matter would be certified as a collective action. The district court also ordered that the order certifying the class “may be modified, altered or amended to create subclasses or to decertify the class.”

One key factor in determining whether, at this second stage, the plaintiffs are similarly situated is whether the actions complained of were the result of a highly centralized policy promulgated by a company's top management, or whether those actions were the result of decisions made on a decentralized level by local management. Compare *Thiessen*, 267 F.3d 1095 (ADEA class improperly decertified where "blocker" policy was promulgated by top management) with *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1215 (5th Cir. 1995) (ADEA class decertified where there was no single company-wide plan but instead relevant decisions were made by local management); *Ray v. Motel 6 Operating L.P.*, 1996 WL 938231 (D. Minn. 1996) (FLSA class decertified where illegal overtime scheme was not carried out by central management but was instead implemented on a decentralized basis by area supervisors;); *Brooks v. Bellsouth Telecomm., Inc.*, 164 F.R.D. 561, 568-69 (N.D. Ala. 1995) (refusing to certify class, even at lenient first stage, where plaintiff failed to demonstrate that the proposed class members were the victims of a single decision, policy, or plan), *aff'd*, 114 F.3d 1202 (11th Cir. 1997).

Lusardi is illustrative. In *Lusardi*, the plaintiffs brought a collective action alleging violations of the ADEA. The plaintiffs claimed that the members of the class were all terminated or forced to retire as a result of age discrimination at Xerox. Although the court initially certified the class conditionally, after the completion of discovery the court granted Xerox's motion to decertify. In determining

that the opt-in plaintiffs were not “similarly situated,” the court noted that there was no single company-wide action occurring over a short period of time that affected all of the opt-in plaintiffs. Rather, there were several different reductions-in-force affecting many different Xerox organizations over a four year period. *See Lusardi*, 118 F.R.D. at 361.

In this case, the opt-in plaintiffs claimed that Wal-Mart violated the salary basis test by having a policy or practice of prospectively reducing their base hours and salaries in response to slow business. However, the evidence presented to the district court in support of Wal-Mart’s Motion for Decertification demonstrated that Wal-Mart’s corporate policy regarding cuts in base salary hours due to slow business conditions was quite the opposite — it should not happen. *See* Aplt. App. 5351, 5352, 5355. That evidence also showed that most Wal-Mart pharmacists never experienced a prospective reduction of base hours. *See* Aplt. App. 5172-5173. Moreover, of those who did, many had their base hours reduced for reasons other than slow business or lack of work but instead, for example, when they transferred stores or changed from being a pharmacy manager to a staff pharmacist or vice versa. *See* Aplt. App. 5258-5262, 5390-5393. Finally, the only evidence of prospective reduction in the record before the district court was the testimony of two of Wal-Mart’s 150 district managers that they had reduced the base hours and salary of pharmacists in their districts — testimony that was countered by the affi-

davits of two other Wal-Mart district managers that Wal-Mart had no policy of prospective reduction and that no prospective reduction had ever occurred in their districts. Accordingly, because the evidence on Wal-Mart's motion for decertification demonstrated that, if any prospective reduction occurred, it was the result of localized decisions and not any corporate policy promulgated by top management at Wal-Mart, the district court should have granted Wal-Mart's motion for decertification.

Rather than address Wal-Mart's motion to decertify on the merits, the district court denied it out of hand. In fact, the district court's ruling on that motion reads, in its entirety:

Let me * * * indicate that there was just handed to me this morning a motion for order decertifying this class as a collective action. It was filed at 4:51 yesterday afternoon. I have not read it. It will be denied. It's a waste of time to file it.

See Aplt. App. 5513. Ruling on Wal-Mart's decertification motion without even reading it was a clear abuse of discretion, and must be reversed.

IV. THE GRANT OF SUMMARY JUDGMENT IN *YATES* ON THE BASIS OF COLLATERAL ESTOPPEL WAS INAPPROPRIATE.

Collateral estoppel requires that the party seeking estoppel show identical ultimate facts between the two actions. *See Spradling v. City of Tulsa*, 198 F.3d 1219, 1222-23 (10th Cir. 2000). Plaintiffs must make a "strong initial showing" as to the common issue of ultimate fact. 18 WRIGHT, MILLER & COOPER, FEDERAL

PRACTICE AND PROCEDURE § 4425. Ultimately, issue preclusion requires “the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.” *Commissioner v. Sunnen*, 333 U.S. 591, 602 (1948); *see also Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994) (must show equivalence of “issue of ultimate fact”), *Community Hosp. v. Sullivan*, 986 F.2d 357, 360 (10th Cir. 1993); *Acevedo-Garcia v. Monroig*, ___ F.3d ___, 2003 WL 22871023 (1st Cir. Dec. 5, 2003) (vacating finding of collateral estoppel because of possibility that individual differences in proof would exist between first and second trial).

Here, neither plaintiffs nor the magistrate judge nor the district court pointed to any evidence that establishes the necessary “identical” fact — that the *Yates* plaintiffs were subject to the same practice or policy (prospective reductions of base salary and base hours) that the district court found had existed for the *Presley* plaintiffs. In fact, there is no such evidence, because plaintiffs never undertook any discovery in *Yates*. Thus, the record was clearly insufficient to support summary judgment.

The only evidence that the district court could possibly have considered in granting summary judgment in *Yates* is the evidence that it relied upon in granting partial summary judgment in *Presley*. But *even if* that evidence sufficed to demonstrate the existence of a practice or policy — and as we have argued above, it did

not — that evidence does not and cannot establish that the *Yates* plaintiffs were subject to the “same set of events” (*Sunnen*, 333 U.S. at 602)) as in *Presley*. The only evidence adduced in *Presley* relates to 1995.¹⁷ But given the nature of FLSA collective actions, evidence from 1995 is, as a matter of law, not sufficient to demonstrate that the opt-in plaintiffs in *Yates* were subject to a policy or practice of prospective reductions.

The FLSA contains a two-year statute of limitations (which extends to three years for willful violations). *See* 29 U.S.C. § 255(a). For each individual opt-in plaintiff, the statute of limitations period runs from the time *that specific person* files a consent to join a collective action. 29 U.S.C. § 256(b). In this case, nearly one-third of the *Yates* plaintiffs joined this action after 1997, which means that 1995-vintage proof is irrelevant to their claims under a two-year statute of limitations. Approximately one-fourth of the *Yates* plaintiffs joined the action in 1999 or thereafter, which means that 1995-vintage proof would be irrelevant to their claims under either a two-year *or* a three-year limitation period. In fact, the last plaintiff to opt in to this case filed his consent on March 10, 2001 — and thus, even if he

¹⁷ For example, “Exhibit AA” related, by its very terms, to a localized reduction that occurred in District 120 in May 1995. Similarly, the testimony of the two district managers that plaintiffs submitted in *Presley* related to specific incidents in 1995. *See* Aplt. App. 2574-2575, 2583-2586.

were subject to the three-year statute of limitations, he would be entitled to litigate only the question whether he was an exempt professional after March 10, 1998.

While plaintiffs and the lower courts focused on the 1995-vintage evidence from *Presley*, Wal-Mart showed that there was at the very least a disputed question of material fact over whether such evidence was relevant in *Yates*. For example, Wal-Mart demonstrated that, after the time-period relevant to *Presley* but before that at issue in *Yates*, it revamped its policies governing full-time pharmacists, and implemented a new “Revised Pharmacist Compensation Program.” Wal-Mart also explained that the undisputed record evidence shows that it has not involuntarily reduced a *single* full-time pharmacist’s base salary and base hours under that new policy. *See supra*, page 21. Thus, factual identity between *Yates* and *Presley* is lacking, and the grant of summary judgment in *Yates* cannot survive review.

Finally, summary judgment in *Yates* was inappropriate for the additional reason that an interlocutory partial summary judgment ruling, like the one in *Presley*, is insufficiently final to be considered preclusive. *See Avondale Shipyards, Inc. v. Insured Lloyd’s*, 786 F.2d 1265, 1269-72 (5th Cir. 1986) (collecting cases); *see also Arizona v. California*, 530 U.S. 392, 414 (2000) (existence of a final judgment on the merits is an essential prerequisite to collateral estoppel). Although the district court stressed in its *Yates* order that the question in *Presley* “was extensively briefed and vigorously litigated by the parties,” this misses the point.

As our argument in Parts I and II, *supra*, shows, the district court's ruling in *Presley* was at the very least open to dispute. It is entirely inappropriate to bind a party to such a ruling before that ruling has become final and the loser has had the opportunity to seek review in an appellate court. That this must be true is evident through consideration of a not-too-hypothetical possibility: What if these two cases had not been litigated in the same district court and had not been consolidated for purposes of appeal? Based on happenstances of timing, one could easily imagine a situation where the latter, collaterally estopped, litigation was reviewed on appeal before the former litigation had become final and reviewable. If a court of appeals were to reverse in the earlier case, the defendant would be left without any recourse in the latter case, where it had been collaterally estopped from challenging the ruling in that earlier case.

Thus, this Court should follow *Avondale* and hold that interlocutory summary judgment rulings that have not been reviewed on appeal are not sufficiently final to collaterally estop a party from litigating the same issue in another case.

CONCLUSION

For the foregoing reasons, this Court should reverse and enter judgment in Wal-Mart's favor as a matter of law. Alternatively, this Court should, at minimum, reverse the district court's grant of summary judgment on factual grounds, and remand for further proceedings.

Respectfully Submitted,

Robert P. Davis
David M. Gossett
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Steven J. Merker
Gregory S. Tamkin
DORSEY & WHITNEY LLP
Republic Place Building, Suite 4700
370 17th Street
Denver, CO 80202
(303) 629-3400

Counsel for Appellant Wal-Mart Stores, Inc.

DECEMBER 19, 2003

STATEMENT REGARDING ORAL ARGUMENT

Appellant Wal-Mart respectfully requests that this Court hear oral argument in these appeals. These cases are both factually and legally complex, and oral argument would therefore materially assist the Court. Furthermore, the district court's legal interpretation of the FLSA directly conflicts with the Department of Labor's own interpretation of that statute, and thus this litigation has significant implications for many other cases.

CERTIFICATE OF COMPLIANCE

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 13,339 words, which is fewer than the number specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

Steven J. Merker

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2003, I served two bound copies of the foregoing brief, as well as one copy of that brief in PDF format on a 3.5" floppy diskette, by courier delivery on the parties herein, at the following addresses:

Gerald L. Bader, Jr., Esq.
Renee Taylor, Esq.
Bader & Associates
14426 E. Evans Ave., Suite 200
Aurora, CO 80014

Franklin D. Azar, Esq.
Franklin D. Azar & Associates, P.C.
14426 E. Evans Ave.
Aurora, CO 80014

Steven J. Merker
DORSEY & WHITNEY LLP
Republic Place Building, Suite 4700
370 17th Street
Denver, CO 80202
(303) 629-3400