

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-Appellant.

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

REPLY BRIEF OF APPELLANT WAL-MART STORES, INC.

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INTRODUCTION

As we explained in our opening brief, the district court erred in numerous ways — by concluding as a matter of law that the prospective reduction of a salaried professional’s salary, even if tied to a reduction in that professional’s expected hours, violates the FLSA; by finding that there was uncontroverted evidence in the record showing that Wal-Mart in fact prospectively reduced the salaries of full-time pharmacists on a class-wide basis; by refusing to decertify this case despite evidence that there was no class-wide policy or practice of prospective reductions; and by collaterally estopping Wal-Mart from questioning the existence of such a policy or practice in *Yates*, even if such a policy or practice existed in *Presley*.

In attempting to defend the district court’s rulings, plaintiffs ignore foundational principles of the FLSA, attempt to explain away controlling legal authorities while citing to irrelevant material, and assert controverted facts as if there were no question as to their validity. When these missteps are avoided, it is clear that the district court’s rulings must be reversed, and judgment entered in Wal-Mart’s favor.

ARGUMENT

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

As we demonstrated in our opening brief, an employer may prospectively reduce an exempt employee’s salary, along with a concomitant reduction in work

schedule, without violating the FLSA “Salary Basis Test” and becoming liable to that employee for overtime compensation. Not only does the text of the governing regulation plainly authorize such reductions, but DOL has repeatedly explained that such reductions do not render a salaried employee non-exempt. In response, instead of grappling with our arguments or the authorities we cited, plaintiffs misrepresent the meaning of the Salary Basis Test and stress legal and factual irrelevancies in an effort to shift the Court’s focus. Before turning to plaintiffs’ specific efforts to rebut our arguments, we address these attempts to color the Court’s perception of the question before it.

A. Plaintiffs’ Arguments Are Based On A Flawed Interpretation Of The Salary Basis Test.

Plaintiffs try, in various ways, to cloud what is in the end a straightforward legal question. Rather than being convincing reasons for finding that Wal-Mart’s full-time pharmacists are not exempt professionals, the quibbles and distortions advanced by the plaintiffs simply demonstrate that the district court erred in finding the plaintiffs non-exempt.

1. For example, plaintiffs stress that, during the time period relevant to this litigation, (1) Wal-Mart kept track of the number of hours its full-time, salaried pharmacists worked; (2) the pay of those pharmacists was tied to the number of hours they were scheduled to work; and (3) Wal-Mart paid those pharmacists over-

time when they worked more hours than they were scheduled to work during a given pay period. *See* Appellees' Br. 6, 39-40.

However, there is nothing about any of these practices that is inconsistent with finding that Wal-Mart's pharmacists are compensated on a "salary basis" as that term is used in 29 C.F.R. § 541.118(a). In fact, this Court rejected just such arguments in *Aaron v. City of Wichita*, 54 F.3d 652 (10th Cir. 1995), in which various fire department supervisory officials asserted that they were not exempt executive employees under the FLSA. Although "[t]he district court [in that case] relied on the fact that the [supervisors] in question received compensation for overtime hours" (*id.* at 658), this Court explained that the payment of overtime is "not inconsistent with the salary basis of payment." *Id.* (quoting 29 C.F.R. § 541.118(b)). And "the fact that the paystubs of the allegedly exempt employees indicated the number of hours covered by the pay check" was also not inconsistent with them being paid on a salary basis, this Court noted, because "[s]uch an accounting of hours is necessary to compute overtime compensation." *Id.*¹

¹ This Court's holding in *Aaron* is uncontroversial. *See, e.g., Fife v. Harmon*, 171 F.3d 1173, 1175 (8th Cir. 1999) ("The Secretary 'has unequivocally and consistently declared that additional compensation in the form of hourly overtime payment does not defeat exempt status under the salary-basis test.'") (quoting *Boykin v. Boeing Co.*, 128 F.3d 12379, 1291 (9th Cir. 1997)); Wage & Hour Opinion Letter No. 2207, 1999 WL 33210909 (Nov. 2, 1999) ("it has been our long-standing position that * * * extra compensation by the hour, in addition to an exempt employee's guaranteed salary, for hours worked in excess of 40 in a work-

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But these issues are not merely irrelevant to the question whether plaintiffs in this case are paid on a salary basis. Rather, the fact that such practices are perfectly acceptable when dealing with employees who are paid on a “salary basis” is proof that the phrase “salary basis” has a special meaning in the context of the FLSA. *See* Appellant’s Br. 28 & n.7. Lay notions of what it means to be paid a “salary,” such as the fact that a typical salaried employee is not paid overtime and does not have his or her salary directly tied to his or her schedule, play little or no role in interpreting the FLSA. Instead, the question before the Court is the interpretation of a specific regulation.

2. Similarly, plaintiffs repeatedly argue that Wal-Mart cut pharmacists’ hours when pharmacies experienced slow times “due to seasonality or in instances when payroll was running higher than Wal-Mart’s sales to payroll ratio would allow.” Appellees’ Br. 25; *see also id.* at 16 (Wal-Mart made “compensation reductions for business budgeting reasons”). Even if this were true (*but see* Section II, *infra*), it would miss the point. Nothing in the FLSA guarantees the plaintiffs a perpetual entitlement to a particular salary amount once it has been set in the first instance. As we explained in our opening brief (at 24, 29-30), DOL has long disclaimed any authority to set or control the salary of exempt professionals. The

week would not, standing alone, defeat the exempt status of an otherwise exempt employee”).

only limitation on salary amount contained in the Regulations is the requirement that, to qualify as being paid on a “salary basis,” an exempt professional must be paid a salary of at least \$170 per week. *See* 29 C.F.R. § 541.311(a).

3. DOL long has recognized that employers can change salaries prospectively in relation to changes in business conditions or employee schedules. At the same time, however — and as we discussed in our opening brief — DOL also has recognized that if an *individual employee’s* salary and schedule are changed repeatedly, that could be an abuse of exempt status. *See* Appellant’s Br. 32 n.9, 33-34, 37-38. Despite plaintiffs’ efforts to describe the facts in a way that could fit into this narrow anti-abuse exception, the record is clear that no such abuse existed in this case.

A trenchant example of the type of abuse that could occur is *Thomas v. County of Fairfax*, 758 F. Supp. 353 (E.D. Va. 1991), in which each employee’s schedule and “salary” varied *pay-period-by-pay-period*. By contrast, instances of Wal-Mart’s reducing scheduled hours and concomitantly reducing salaries were, at most, rare. *See* Section II, *infra*. Thus, in our opening brief we explained that in the briefing to the district court plaintiffs presented no evidence that any given plaintiff had his or her salary reduced on more than a single occasion. *See* Appellant’s Br. 33-34. In response, plaintiffs litter their brief with statements implying

that Wal-Mart prospectively reduced pharmacists' salaries frequently.² However, plaintiffs are missing the critical distinction between the frequency with which such reductions occurred anywhere within Wal-Mart and the frequency with which such reductions happened to any specific person.³

Thus, plaintiffs have no evidence — and never even assert — that prospective reductions happened with any frequency to any given pharmacist. In fact, the only specific claim in plaintiffs' brief that any pharmacist had his or her base hours and base salary cut on more than one occasion is the quote from *one* pharmacist — Bonnie Bess — that her hours were reduced “[d]uring the summers [of] 1995 and 1996” (Appellees’ Br. 44) — that is, just twice during the multi-year period relevant to this litigation.

The distinction between weekly or other frequent variations in salary and the occasional need to renegotiate work schedules based on economic conditions or seasonal adjustments is reflected in the authorities we discussed in our opening brief. *See* Appellant’s Br. 32 n.9, 35-38. Plaintiffs are implicitly conflating occa-

² *See, e.g.*, Appellees’ Br. 7-8 (collecting examples), 31-32 (calling it “a business practice”), 33 (practice was not “a one time long term economic circumstance”), 38 (“this wrongful conduct was pervasive”), 42-45 (collecting examples).

³ As we discuss below (at 21-23), we dispute that the record in fact shows that any significant number of pharmacists were subject to even one prospective reduction. But as we explain in the text, such occasional deductions do not implicate the anti-abuse concern that DOL has described.

sional renegotiations of salary, such as they have alleged occurred here, with the abusive practice of altering salaries every week or two weeks that was discussed in *Thomas*. But wishing does not make it so; the evidence in this case bears no resemblance to that adduced in *Thomas*.

4. As we discussed in our opening brief (at 10, 11), plaintiffs dismissed with prejudice a number of legal claims beyond their prospective-reduction claim. Nevertheless, they stress to this court various facts or arguments that have no bearing whatsoever on the only claim left in the case. For example, Wal-Mart's invocation of the FLSA's "Window of Correction," 29 C.F.R. § 541.118(a)(6) — *see* Appellees' Br. 10-11 — focused exclusively on inadvertent violations of the rule against docking employees' salaries for partial-day absences. Similarly, the fact that for full-day absences Wal-Mart may have deducted from an employee's salary an amount based on the actual number of hours the pharmacist was scheduled to work during a day, rather than on that employee's average number of hours per day over the course of a pay period (Appellees' Br. 40 n.8), while perhaps relevant to the partial-day-absence claim, is irrelevant to the prospective reduction claim.

5. Finally, plaintiffs make much of the "burden" on the employer to prove that an employee is exempt from the FLSA's overtime provisions and the "narrow construction" courts give to FLSA exemptions. *See* Appellees' Br. 23-25. But while both are true, neither has any relevance in this case. As the cases plain-

tiffs cite also explain, “the Department of Labor regulations are entitled to judicial deference and are the primary source of guidance for determining the scope of exemptions to the FLSA.” *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1264 (10th Cir. 1999) (original alterations, quotation marks and citation omitted) (cited at Appellees’ Br. 24); *see also* Appellant’s Br. 30-31. Those regulations, and the agency’s interpretation of those regulations, demonstrate that the district court erred under any standard of proof.⁴

* * *

Thus, plaintiffs’ efforts to avoid the real issue before this Court are for naught. As we now show, their attempts to rebut the legal authority cited in our opening brief are equally unsuccessful.

⁴ Plaintiffs’ misapprehension of the rules of interpretation relevant to this case can best be seen by their citation to *Carpenter v. City & County of Denver*, 82 F.3d 353, 355 (10th Cir. 1996), for the proposition that “[n]arrowly construing the exemption furthers the congressional goal in the FLSA to provide broad federal employment protection to the furthest reaches consistent with congressional direction.” (Appellees’ Br. 24) (internal quotation marks and citation omitted). Plaintiffs’ claim that *Carpenter* was “vacated on other grounds by 519 U.S. 1145 (1997)” (*see* Appellees’ Br. 24), is at best misleading. The Supreme Court vacated *Carpenter* for further consideration in light of *Auer v. Robbins*, 519 U.S. 452 (1997). *See* 519 U.S. 1145. Because in *Auer* the Supreme Court gave great deference to DOL’s interpretation of the Salary Basis Test (*see* 519 U.S. at 463), on remand, this Court reversed its earlier course and held that the employees were exempt, noting the “controlling” deference due to DOL’s interpretation of the Salary Basis Test. 115 F.3d 765, 767 (10th Cir. 1997). By contrast, this Court’s original decision had relied heavily on the “belie[f] * * * we are to construe exceptions to the FLSA narrowly.” *See* 82 F.3d at 359.

B. The Controlling Regulation Demonstrates That Prospective Reductions In Salary Do Not Violate The Salary Basis Test.

As we discussed in our opening brief, under 29 C.F.R. § 541.118(a), so long as an employee is paid a “predetermined amount” of more than \$170 per week for any given pay period, which amount is not subject to specified deductions, that employee is paid “on a salary basis.” The regulation prescribes a pay-period-by-pay-period analysis, and bars reductions from the salary “predetermined” before the pay period — rather than precluding *ex ante* alterations in that predetermined amount. This is precisely how Wal-Mart’s full-time pharmacists are compensated; they are paid predetermined amounts for each pay period. That the predetermined amount may change over time — up or down, and tied to changes in regular hours or not so tied — is irrelevant. Thus, Wal-Mart’s full-time pharmacists are paid on a salary basis as that term is used in the FLSA. *See* Appellant’s Br. 25-28.

Plaintiffs’ responses are makeweight. For example, their first response — that it “would effectively ‘gut’” the FLSA to hold that “predetermined” “mean[s] that the employer can predetermine the amount of compensation at any point, prior to each and every pay period,” (Appellees’ Br. 25) is *ipse dixit* — and in any event is not our argument, as both we and DOL have acknowledged that the right to alter salaries prospectively could be abused by frequent recurrent changes to an individual employee’s salary and schedule. *See* pages 5-7, *supra*.

The related assertion that we have proffered no persuasive authority for distinguishing between *ex post* reductions and *ex ante* changes in salary (Appellees’ Br. 26) is false. We have cited to multiple DOL Opinion Letters and federal cases that are based on exactly that distinction. *See* Appellant’s Br. 31-33, 35-37.

Similarly, the claim that the DOL regulations mandate that “the quantity of work should not be a factor in the amount of compensation” (Appellees’ Br. 26) is a complete fiction. There is nothing in the FLSA or its implementing regulations that precludes an employer from treating two employees as both being paid on a salary basis even if the employer pays Employee One \$X, expecting that employee to work a schedule of approximately 20 hours a week, and pays Employee Two \$2X, expecting that employee to work a schedule of approximately 40 hours a week. Rather, as we explained in our opening brief, the Salary Basis Test precludes “reductions” from a base salary for variations in the “quantity of the work performed” (29 C.F.R. § 541.118(a) (emphasis added)) — that is to say, it bars *ex post* alterations in the predetermined amount to which an employer and an employee have agreed, regardless of the quantity of work the employee in fact performed during the covered period.

Plaintiffs’ final attempt to find support for the district court’s holding in the regulations is equally flawed. According to plaintiffs, prospective reductions in base salary and base hours run afoul of 29 C.F.R. § 541.118(a)(1), which states that

an employee is not paid on a salary basis “if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.” *See* Appellees’ Br. 27-28. But we already explained what this regulation means. By its terms, it proscribes “deductions” from the employee’s “predetermined compensation” for “absences.” Thus, Wal-Mart cannot reduce a salaried employee’s compensation if it sends him or her home during the middle of his or her shift. Similarly, no deductions are allowed if Wal-Mart decides not to open a store for the day because of a storm. However, this regulation does not preclude *prospective* changes in salary, whether or not tied to changes in base hours; there is no “absence” when an employee works all the hours he or she is expected to work (however many hours that may be). *See* Appellant’s Br. 39 n.12.

Thus, because the plain terms of the Salary Basis Test regulation authorize exactly the sort of prospective reductions that plaintiffs assert occurred in this case, and plaintiffs acknowledge that this Court must defer to those regulations (*see* Appellees’ Br. 21), this Court should reverse and enter judgment for Wal-Mart.

C. The Department of Labor’s Opinion Letters Demonstrate That the District Court Erred In Finding Prospective Reductions In Salary To Violate The Salary Basis Test.

In our opening brief, we discussed at length the three Opinion Letters in which DOL has specifically analyzed prospective reductions in base salary and

base hours and held that such prospective reductions do not render an otherwise-exempt employee non-exempt. *See* Appellant’s Br. 30-34. Plaintiffs’ claim (at 31-32) that this case is distinguishable from the situations discussed in these Opinion Letters is unsupportable.

To begin with, plaintiffs are simply wrong that these Opinion Letters address “a narrow factual scenario where an employer, faced with closures or layoff (most often because of governmental spending cutbacks), engages in an across-the-board type of salary reduction of its exempt employees.” The prospective reductions discussed in these letters were not one-time events: the 1970 Opinion Letter (Wage & Hour Opinion Letter No. 1140 (WH-93), 1970 WL 26462 (Nov. 13, 1970)) addressed a situation where an employer proposed to implement an annual prospective reduction for 5 weeks each year, and the 1998 Opinion Letter (Wage & Hour Opinion Letter dated February 23, 1998, 1998 WL 852696) addressed a situation where an employer proposed implementing prospective reductions as needed on a “defined work-unit” basis. Moreover, only the 1997 Opinion Letter (Wage & Hour Opinion Letter dated March 4, 1997, 1997 WL 998010) involved a situation where prospective reductions were the result of government spending cutbacks. Finally, the cutbacks addressed in the letters were not “across-the-board”; again, the 1998 Opinion Letter addressed cutbacks in specific work units.

More generally, even if plaintiffs were correct that “the deductions made in the present case were a business practice [caused by Wal-Mart’s financial needs and goals], not an isolated instance” (Appellees’ Br. 32), this does not distinguish the prospective reductions alleged here from those discussed in the three Opinion Letters. Thus, even assuming for the moment that it were true that Wal-Mart reduced some pharmacists’ salaries on a seasonal basis — because for business reasons it chose to close its pharmacies earlier during the summer — that is exactly what DOL has said is allowed: “[A] fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment.” 1998 Opinion Letter.⁵

Instead of adequately distinguishing these DOL Opinion Letters, plaintiffs discuss a number of other Opinion Letters. *See* Appellees’ Br. 29-31, 40 n.8. However, the Opinion Letters plaintiffs cite do not address prospective salary reductions, and neither explicitly nor implicitly call into question DOL’s consistently expressed conclusion that prospective reductions do not violate the Salary Basis Test.

⁵ Notably, plaintiffs never dispute that this Court must defer to DOL’s interpretation of the Salary Basis Test contained in these Opinion Letters. *See* Appellant’s Br. 30-31 & n.8.

For example, three of the Opinion Letters plaintiffs discuss involve variations on employer policies under which an employee's accrued leave account is charged, or the employee's salary is reduced, for an unpaid holiday or a day on which the employee is instructed not to work. These Opinion Letters simply reiterate the prohibition on *ex post* deductions; the letters do not involve *ex ante* prospective reductions.⁶ A fourth Opinion Letter discusses deductions from salary for disciplinary reasons and why such (again *ex post*) deductions violate the Salary Basis Test.⁷ There are no disciplinary deductions at issue in this case. Finally, the remaining three Opinion Letters plaintiffs cite simply reiterate the basic rule that deductions cannot be made from an employee's salary under the FLSA for partial-day absences⁸ — but as we've discussed, plaintiffs have dismissed with prejudice

⁶ The Wage & Hour Opinion Letter dated November 20, 1995, 1995 WL 1032511, forbids an employer from reducing an employee's salary if the employee does not work on a holiday and does not apply accrued vacation leave. Similarly, the Wage & Hour Opinion Letter dated April 20, 1999, 1999 WL 1002390, forbids an employer from reducing an employee's salary if the employee does not work on a holiday and is not eligible for a paid holiday benefit. Finally, the Wage & Hour Opinion Letter dated May 27, 1999, 1999 WL 1002408 forbids an employer from reducing an employee's salary if the employee does not work on a holiday and does not apply accrued paid time off credits.

⁷ See Wage & Hour Opinion Letter dated December 4, 1998, 1998 WL 1147741.

⁸ See Wage & Hour Opinion Letter dated December 1, 1994, 1994 WL 1004891 (no deduction from salary or accrued leave permitted for partial day absences); Wage & Hour Opinion Letter No. 555 (Dec. 7, 1966) (salary can only be deducted on a full-day pro rata basis and not on a partial-day basis); Wage & Hour
(continued)

their claim that Wal-Mart engaged in unlawful salary docking for partial-day absences.

* * *

Under *Auer*, DOL’s interpretation of the Salary Basis Test is “controlling unless plainly erroneous or inconsistent with the regulation.” 519 U.S. at 461 (internal quotation marks omitted). Because the agency consistently has interpreted the Salary Basis Test to authorize prospective reductions in salary, the district court plainly erred in not entering judgment for Wal-Mart as a matter of law.

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

Plaintiffs’ assertion that case law supports the district court’s decision (Appellees’ Br. 32-36) is as misguided as their attempt to shore up the decision using irrelevant DOL Opinion Letters. We dealt with two of plaintiffs’ cases in our opening brief. Thus, we have already discussed why *Thomas* is distinguishable from this case. In *Thomas*, employees’ schedules and paychecks varied on a bi-weekly basis — unlike the very infrequent prospective reductions that plaintiffs allege occurred here. *See* pages 5-7, *supra*; Appellant’s Br. 37-38. Similarly, we acknowledged in our opening brief (at 39 n.12) that *Dingwall v. Friedman Fisher*

Opinion Letter dated July 3, 1997, 1997 WL 1039254 (unpaid leave permitted under the Family and Medical Leave Act of 1993 cannot be charged on a full-day basis if the employee needs only a portion of a day for such non-FLSA leave).

Associates, P.C., 3 F. Supp. 2d 215, (N.D.N.Y. 1998), is consistent with the district court's decision — but we also explained why *Dingwall* is wrongly decided. Like plaintiffs, the court in *Dingwall* misinterpreted the rule prohibiting “deductions” from salary for “absences” to preclude prospective changes in salary. *See* pages 10-11, *supra*.

Plaintiffs cite two additional cases to support their position, but neither justifies ignoring the text of the regulation or DOL's controlling interpretation of that regulation. *Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3d Cir. 1988) (cited at Appellees' Br. 34) is both factually and legally unhelpful to plaintiffs. Like the employer in *Thomas*, the employer in *Claridge* scheduled its employees on a weekly basis, adjusting their pay based on the number of hours they worked. *See id.* at 182. In an attempt to fall within the terms of the Salary Basis Test, employees were guaranteed a “minimum” salary of \$250/week, but the court found that this minimum guaranteed salary was illusory, as “the only times the [minimum salary] guarantee came into play, [the employer] failed to apply it.” *Id.* at 187. In any event, the basic legal thesis underlying the court's decision in *Claridge* was that a “salaried” employee cannot have his workweek measured by a given number of hours, thus implying that salaried employees cannot be paid overtime. *See id.* at 184-85. That interpretation of the Salary Basis Test has been rejected by this Court (*see Aaron*, 54 F.3d at 658), as well as by numerous other courts. *See, e.g., Hilbert*

v. District of Columbia, 23 F.3d 429, 432-33 (D.C. Cir. 1994); *Hood v. Mercy Healthcare Ariz.*, 23 F. Supp. 2d 1125, 1139 (D. Ariz. 1997); note 1, *supra*.

Reeves v. Alliant Techsystems, Inc., 77 F. Supp. 2d 242 (D.R.I. 1999) (cited at Appellees’ Br. 34) is also unhelpful to plaintiffs. The court in *Reeves* acknowledged that *Dingwall* had held prospective reductions to be impermissible, but then distinguished *Dingwall* on the ground that any prospective reduction in *Reeves* would have been voluntary. *See id.* at 255-56. Because there were no employer-mandated prospective salary reductions in *Reeves*, the court had no need to analyze whether such prospective reductions would violate the Salary Basis Test.

Finally, plaintiffs are manifestly incorrect in claiming (at 35-36) that *Caperci v. Rite Aid Corp.*, 43 F. Supp. 2d 83 (D. Mass. 1999), and *Ackley v. Department of Corrections*, 844 F. Supp. 680 (D. Kan. 1994) — both of which held that prospective reductions in salary do not violate the Salary Basis Test — are distinguishable from this case. We have already explained why the construction given to the Salary Basis Test by the *Caperci* court is faithful to the regulatory text. And while it is true, as plaintiffs stress (at 35), that “the Caperci court specifically recognized that there are instances where an employer can be liable for prospective change[s] in hours,” the footnote plaintiffs cite discusses the *Thomas* situation, giving the hypothetical example of “an employer [that] had a regular practice each Friday of informing its professional staff of the work schedule for the following

week and of making prospective adjustments in compensation to reflect any changes.” 43 F. Supp. 2d at 97 n.14. In other words, the *Caperci* court was merely distinguishing between the types of prospective reductions that plaintiffs have alleged in this case from the *Thomas* situation, where an employer abuses its privilege to renegotiate salaries to avoid the Salary Basis Test.

Ackley is also directly on point. Although, as plaintiffs emphasize (at 36), the prospective salary reductions in *Ackley* were performance related, the Salary Basis Test prohibits “reductions” based on “the quality *or* quantity of the work performed.” 29 C.F.R. § 541.118(a) (emphasis added). Just as an employer may not retroactively reduce an employee’s salary based on the number of hours the employee worked, so too the employer may not retroactively reduce the employee’s salary based on the quality of that employee’s work. However, the Salary Basis Test says nothing about the prospective reduction of the employee’s salary for either of these reasons. Thus, *Ackley* is indistinguishable from this case.

* * *

Despite plaintiffs’ attempts to muddy the issue, this is a simple case. This Court must defer to DOL’s Salary Basis Test and the agency’s controlling interpretation of that regulation, under which prospective reductions in salary are allowed. Thus, the Court should reverse and enter judgment for Wal-Mart.

II. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS SUMMARY JUDGMENT BECAUSE THE RECORD EVIDENCE OF A CLASS-WIDE POLICY OR ACTUAL PRACTICE OF PROSPECTIVE REDUCTIONS WAS MINIMAL AND CONFLICTING.

As we have just demonstrated, prospective reductions do not violate the Salary Basis Test, and thus the district court erred as a matter of law in granting summary judgment for plaintiffs. However, as we explained in our opening brief (at 40-45), even were this Court to disagree, the record evidence of such reductions is minimal and conflicting, and therefore the district court erred as a factual matter in granting plaintiffs summary judgment. The litany of evidence plaintiffs set forth in each instance either fails to support their claim that a class-wide policy of prospective reductions existed, is subject to differing interpretations, or is directly contradicted by other evidence in the record.⁹ Accordingly, when the evidence is viewed in the light most favorable to Wal-Mart — as it must be, *see Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991) — it becomes apparent that the district court’s summary judgment rulings were unsupportable.

⁹ Although plaintiffs cursorily argue that Wal-Mart had the burden of proof on this issue, they cite cases that make clear that, when an employee asserts a pattern or practice of FLSA violations, the *employee* bears the burden of proving the existence of that pattern or practice. *See e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946) (“employee * * * has the burden of proving that he performed work for which he was not properly compensated”); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471-72 (11th Cir. 1982) (same).

A. There Was No Uncontroverted Evidence Before The District Court That Wal-Mart Had A Class-Wide Policy Of Prospective Salary Reductions.

Although plaintiffs acknowledge (at 38) the distinction between *Auer*'s two distinct ways of demonstrating a class-wide violation of the FLSA — under which a plaintiff must prove either a class-wide policy of impermissible reductions or a class-wide actual practice of such reductions (*see* Appellant's Br. 41) — they proceed to ignore that distinction and to conflate the evidence relevant to each. When the evidence relating to the existence of a class-wide policy is separately analyzed, it is clearly insufficient to support the district court's ruling.

As we explained in our opening brief, to support summary judgment on the ground that there was a class-wide policy, there would have to be record evidence, as to which there was no genuine issue, that Wal-Mart had a “clear and particularized” policy that “effectively communicate[d]” a “significant likelihood” of prospective salary reductions to the entire class of exempt employees. *See Auer*, 519 U.S. at 461.

Here, there is no such evidence, let alone uncontradicted evidence.¹⁰ Indeed, the only evidence of any such policy to which plaintiffs point (at 41-42) is Exhibit

¹⁰ In fact, there is specific testimony in the record from Wal-Mart's Vice President in charge of all pharmacies that prospective reductions of pharmacists' salaries in response to slow business conditions were contrary to Wal-Mart policy. *See* Appellant's Br. 50.

AA, the Beck memorandum. But we explained in our opening brief (at 43-44) that Beck testified that this memorandum addressed only part-time, non-exempt pharmacists. Accordingly, at minimum the interpretation of this memorandum was a disputed factual issue, and could not serve as the basis for summary judgment. *See* Appellant’s Br. 42-44.

Other “policies” that plaintiffs mention are either off point or unsupported by the record. For example, plaintiffs obliquely refer to Wal-Mart’s “budgetary directives” and to sales-tracking “reports and other documents,” and assert that “pharmacists’ hours were cut to meet the[se] budgetary directives.” *See* Appellees’ Br. 6-7, *see also id.* at 46. But this accusation is not supported by any citation to evidence in the record — an unsurprising omission, because the record contains no such evidence. And Wal-Mart’s practice of tying the pay of its salaried pharmacists to the hours they worked (*see* Appellees’ Br. 39) is not inconsistent with the Salary Basis Test, and thus cannot be a “policy” on which to base summary judgment. *See* pages 2-3, *supra*.

B. The Record Evidence Cannot Support Summary Judgment That Wal-Mart Had A Class-Wide “Actual Practice” Of Prospective Salary Reductions.

Plaintiffs are equally unsuccessful in defending the district court’s decision under *Auer*’s second method for proving a class-wide violation of the FLSA — evidence of a class-wide “actual practice” of prospective salary reductions. Al-

though they point to the testimony of several pharmacists or district managers that, they claim, supports the conclusion that Wal-Mart had an “actual practice” of prospectively reducing pharmacists’ salaries, in almost every case that testimony either does not support the claim or is directly contradicted by other evidence in the record.

For example, plaintiffs rely on the affidavit of Louisiana pharmacist Moore, in which he asserts that his district manager, Larry Talley, each month gave him a set number of hours to cut from each pharmacy in the district. *See Appellees’ Br. 8.* But plaintiffs fail to mention that Talley directly contradicts this testimony. *See Talley Aff. ¶ 14, Aplt. App. 2001* (explaining that the hours to be cut from each pharmacy were the hours of hourly pharmacists, not salaried pharmacists).

Similarly, plaintiffs rely on the affidavit of pharmacist O’Neill, in which she claims that district manager Mojica reduced her hours in response to slow business conditions. *See Appellees’ Br. 8.* Again, plaintiffs fail to mention that Mojica flatly denies O’Neill’s claim, and states that he only reduced hourly pharmacists’ hours in response to slow business conditions. *Mojica Aff. ¶ 14, Aplt. App. 2232.*

These evidentiary disputes are typical. Thus, plaintiffs also rely (at 44) on the affidavit of pharmacist Bess, who claimed that her district manager, Randy Miller, reduced her hours in response to slow business. Miller, however, denied that. *See Miller Aff. ¶ 13, Aplt. App. 1925.* Similarly, Amy Balmer’s affidavit

(Appellees' Br. 45) is contradicted by the affidavit of her district manager (Aplt. App. 1839), and Christopher Nevers's affidavit (Appellees' Br. 45) is contradicted by that of his district manager (Aplt. App. 2213).¹¹

Finally, plaintiffs cite (at 40-43) to the testimony of three district managers — Barry, Schneider and Ziobro — in support of their contention that Wal-Mart had a class-wide “actual practice” of prospective reduction of exempt pharmacists' salaries. Ziobro's testimony, however, was to precisely the opposite effect. He testified that he did not prospectively reduce salaried pharmacists' salaries in response to slow business conditions; instead, he reduced the hours of hourly pharmacists. *See* Aplt. App. 3197-99. And as we discussed in our opening brief (at 41, 44-45), the testimony of Barry and Schneider that they had prospectively reduced the salaries of pharmacists in their districts was countered by the affidavits of other district managers that it was Wal-Mart's policy not to do so. *See* Aplt. App. 2001, 2232.

The net effect of all of this is that the district court's summary judgment ruling is simply unsupportable. To the extent any evidence of a class-wide policy existed, it was flimsy, subject to differing interpretations, and flatly contradicted by

¹¹ Joan Winningham's affidavit, on which plaintiffs also relied (at 45), is irrelevant to the issues in this appeal; it deals with docking for partial day absences, a claim dismissed by the plaintiffs.

other evidence. Such genuine issues of material fact cannot be resolved at the summary judgment stage; that is what trials are for. The district court's summary judgment ruling was error, and should be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING WAL-MART'S MOTION FOR DECERTIFICATION.

As we explained in our opening brief, the district court abused its discretion by refusing to grant — or even consider — Wal-Mart's motion for an order decertifying the *Presley* case as a collective action. The opt-in plaintiffs were not “similarly situated” because there was no single class-wide decision, policy or plan affecting all opt-in plaintiffs. *See* Appellant's Br. 50-51.

Plaintiffs attempt to justify the district court's refusal to decertify by asserting (at 47) that because Wal-Mart's motion was filed after a March 15, 2003 deadline for “pretrial motions,” it was untimely. This assertion is simply false: that deadline was superseded in the course of a series of later status conferences, with the result being that there was no specific deadline for the decertification motion.

Specifically, in November 2002, the court set a March 15, 2003 deadline for “pretrial motions” — motions in limine and the like. At a status conference before Magistrate Judge Shaffer on January 13, 2003, plaintiffs refused to specify the issues that they intended to try to the jury, and thus Judge Shaffer ordered the parties to file trial management plans and proposed verdict forms by February 14, 2003. Aplt. App. 4734-37. Judge Shaffer also set another status conference for February

25, 2003. Aplt. App. 4743. At that later status conference, Judge Shaffer set new deadlines, essentially vacating (to the extent that it still existed) the March 15 deadline: he ordered the parties to file briefs regarding their respective jury verdict forms by March 17, and motions in limine regarding evidence and witnesses by April 14. *See* Aplt. App. 4763. No deadline was set for Wal-Mart's decertification motion. Accordingly, when Wal-Mart filed its decertification motion on April 29, that motion was not untimely.

Plaintiffs also claim (at 47) that the district court properly denied the decertification motion because Wal-Mart had earlier stipulated that its salaried pharmacists were similarly situated. That too, is false: Wal-Mart stipulated to no such thing. Rather, shortly after the *Presley* case was filed, the plaintiffs filed a Motion for Approval of Collective Action. After negotiation with the plaintiffs, Wal-Mart agreed not to oppose that motion, on the condition that Wal-Mart would later have the right to file a motion to decertify if the evidence supported its contention that the pharmacists were not similarly situated. Aplt. App. 1322. The plaintiffs agreed and, significantly, so did the district court. *Id.* Clearly then, the parties — and the district court — understood that Wal-Mart's agreement not to oppose initial certification was not a stipulation that its pharmacists were “similarly situated.”

The fact of the matter is that Wal-Mart's decertification motion was timely, and amply supported by evidence in the record. It should have been considered, and granted. The district court abused its discretion by not doing so.

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

As we explained in our opening brief (at 51-55), the district court's interlocutory summary judgment in *Presley* does not meet the requirements necessary to collaterally estop Wal-Mart from fully litigating *Yates*. Collateral estoppel should not have been applied because the *Presley* judgment was insufficiently final, and in any event plaintiffs did not demonstrate that there were no relevant factual distinctions between the cases.

1. Plaintiffs acknowledge that finality is necessary (Appellees' Br. 52), and implicitly admit that the interlocutory summary judgment in *Presley* was not final "in the strict sense" (*id.* at 53). Instead, plaintiffs attempt to squeeze into an exception to finality adverted to in the *Restatement (Second) of Judgments*, which proposes loosening the requirement of finality for purposes of collateral estoppel. *See* Appellees' Br. 53. But while plaintiffs quote extensively from the *Restatement*, they omit the explanation that this exception does not apply "invariably," but instead only where there would be "hardship" if finality was not loosened. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment G. Furthermore, factors that the *Restatement* considers relevant to whether a court should waive strict final-

ity include whether the prior decision has been “subject to appeal or was in fact reviewed on appeal” (*id.*) —which *Presley* was not.¹² In fact, almost all of the cases plaintiffs cite for the proposition that there is a “trend” towards “relax[ing] the traditional views of the finality requirement” (Appellees’ Br. 55, 56) involve decisions that had been, or at least could have been, reviewed on appeal.¹³ Thus, the district court erred in finding *Presley* sufficiently “final” to collaterally estop Wal-Mart in *Yates*.¹⁴

¹² Wal-Mart sought leave to appeal the summary judgment ruling in *Presley* interlocutorily under 28 U.S.C. § 1292(b), but the district court refused to grant leave.

¹³ See, e.g., *Lummos Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89-90 (2d Cir. 1961) (Friendly, J.) (predicating finding of sufficient finality on the fact that the earlier order “was appealable * * * and was appealed”); *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964) (finding decision that had been reviewed on appeal sufficiently final); *In re Brown*, 951 F.2d 564, 569 (3d Cir. 1991) (“In determining whether the resolution was sufficiently firm, the second court should consider whether * * * that decision could have been, or actually was, appealed.”); *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3d Cir. 1980) (prior decision preclusive only because the party “chose not to appeal the order when the opportunity was fully present”); *Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc.*, 945 F. Supp. 1421, 1435-36 (D. Colo. 1996) (finding partial summary judgment preclusive where party chose “to settle rather than secure an appeal,” and the first case had been dismissed with prejudice).

¹⁴ Although *Presley* and *Yates* are both on appeal to this Court together, the fact that this Court could now affirm the district court’s decision in *Presley* is irrelevant to the collateral-estoppel analysis. The point is that at the time *Yates* was presented to the district court for a ruling on summary judgment, Wal-Mart was well within its rights to require plaintiffs to prove their case affirmatively, rather than merely to rely upon the prior decision in *Presley*. Had plaintiffs attempted to do so, Wal-Mart could have rebutted that case as it applied to the *Yates* plaintiffs.

2. Plaintiffs are also wrong to claim that the facts are identical in *Presley* and in *Yates*. Two suits involving allegations under the same theory of liability do not automatically raise identical issues of fact. Here — as we explained in our opening brief (at 53-54) — all of the facts adverted to in the district court’s order in *Presley* related to 1995 or earlier. Instead of showing how facts from 1995 or before can suffice to prove that Wal-Mart engaged in similar practices in 1996, 1997, or early 1998, plaintiffs try to satisfy their burden merely by quoting various prior Wal-Mart motions that have nothing to do with the question whether there are factual differences between these two cases. *See* Appellees’ Br. 57-59. They do not explain how evidence from 1995 in *Presley* will apply to the significant number of plaintiffs in *Yates* who joined the latter action in 1997 or later, for whom the statute of limitations makes that 1995 evidence irrelevant. Therefore, plaintiffs have not met their burden of demonstrating factual equivalency between these two cases.

Thus, the district court erred by granting summary judgment in *Yates* on the basis of collateral estoppel.

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.

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FEBRUARY 4, 2004

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 exactly 7000 words, which is the maximum number specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

Steven J. Merker

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2004, 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:

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