

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK GOLDMAN, Individually and on : CIVIL ACTION
behalf of all others similarly situated :
 :
v. : NO. 03-0032
 :
RADIOSHACK CORPORATION :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

January 23, 2005

Mark Goldman, the unsuccessful plaintiff in a class action challenging RadioShack’s pay structure, asks this Court for judgment as a matter of law or a new trial on grounds he was prevented from proving to the jury some class members were entitled to overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*¹ I have ruled three times in this case class certification precludes individual proof of hours supervised. Goldman’s motion and argument give me no reason to reconsider.

FACTS

Goldman was a manager of a high-volume RadioShack store in Lancaster County. Goldman claimed the store manager’s job was really a sales position with a few extra duties and entitled to overtime for hours beyond forty each week. RadioShack argued the position was managerial and

¹Congress provided in § 7(a)(2) of the FLSA “no employer shall employ any of his employees ... for a workweek longer than forty hours ... unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(2).

exempt from the overtime requirements of the FLSA. Goldman brought this action under both the FLSA and Pennsylvania's wage and hour laws, which substantially parallel the FLSA.² The initial complaint was brought as a collective action under the FLSA which resulted in a group of managers of RadioShack stores with annual sales of more than \$500,000³ in Pennsylvania who opted-in to the suit. The opt-in class of 168 was complete at the time the case was re-assigned to me in July, 2004. This Court granted Goldman's renewed motion for class certification for the state law claims under Federal Rule of Civil Procedure 23 over vigorous opposition from RadioShack. The Rule 23 class certification created an "opt-out" class of 533. Class notification continued until the eve of trial.

In asking for class certification, Goldman persuaded this Court the opt-out class was so numerous joinder of all class members was prohibitively difficult, the class members shared common questions of law and fact, the representation was adequate and, most importantly, the claims of Goldman were typical of the claims of the class and the common claims predominate. Fed. R. Civ. P. 23.

RadioShack argued vigorously against class certification because determining which managers were exempt would require individual discovery and depositions.⁴ Before trial, Goldman

²This Court has supplemental jurisdiction under 28 U.S.C. § 1367 because the Pennsylvania Minimum Wage Act, 42 P.S. § 333.102 *et seq.*, and Pennsylvania's Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*, claims arise from a common nucleus of operative fact. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308 (3d Cir. 2003).

³As is here relevant, RadioShack categorizes its stores by dollar volume: Y stores sell more than \$500,000 annually and V stores less than that figure. For the period relevant to Goldman's claim, V store managers received overtime pay for any hours worked beyond forty. Y store managers did not.

⁴RadioShack did not address the issue which has become the focus of Goldman's trial and post-trial complaints – individualized proof of the number of subordinate hours supervised; instead, RadioShack concentrated on the differences among managers and their approaches to managing their

asked for partial summary judgment in favor of sixty-five managers who demonstrably did not regularly and customarily supervise the equivalent of two full-time sales associates. I denied the motion on grounds class certification precluded individualized inquiry.

The FLSA exempts “any employee employed in a *bona fide* executive, administrative, or professional capacity” from required overtime pay. 29 U.S.C. § 213(a)(1). Because the FLSA is a remedial statute, FLSA exemptions are narrowly construed against the employer. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694 (3d Cir. 1994).

To determine the scope of RadioShack’s burden of proof, the Department of Labor regulations are given “considerable and in some cases decisive weight.” *Skidmore v. Swift*, 323 U.S. 134, 140 (1944); *Brooks v. Village of Ridgefield Park*, 185 F.3d 130, 138 (3d Cir. 1999). To prove an exemption, the two-prong “short test” applies because Y store managers earn more than \$250⁵ a week. Under the short test, RadioShack was required to prove the primary duty of Y store managers is managerial and they regularly and customarily supervise the equivalent of two full-time employees. 29 C.F.R. § 541.1. “Management” includes selecting, and training of employees; setting

stores.

⁵ New Department of Labor regulations became effective in August, 2004. The new regulations are not applicable here. § 541.105. The Department of Labor has altered the “short test” to provide that employees earning less than \$100,000 annually are deemed exempt only if:

- (1) they receive weekly compensation of at least \$455;
- (2) their “primary duty” is management of the enterprise or a recognized subdivision thereof;
- (3) they “customarily and regularly direct[] the work of two or more other employees;” and
- (4) they have “the authority to hire and fire persons or his or her recommendations and suggestions as to hiring, firing, and promotion “are given particular weight.”

29 C.F.R. § 541.100.

and adjusting their rates of pay and hours of work; directing their work; planning the work; determining the techniques to be used; and, apportioning the work among the workers. 29 C.F.R. § 541.102(b). “Primary duty” is fact-specific. § 541.103.⁶ When an employee spends a majority of his time doing certain work, it is considered his primary duty as a rule of thumb. *Id.* An employee who spends less than half his time performing exempt work may still be exempt considering the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. *Id.*

The jury was asked to decide if Y store managers were sales associates from whom RadioShack was extracting more sales at less cost by avoiding paying overtime or if the duties of Y store managers were primarily managerial.

RadioShack made its case with testimony from eight current and former employees of RadioShack ranging from the president and chief executive officer to a former store manager.⁷ The life of a Y store manager, even from RadioShack’s perspective, is not an easy one. The managers were expected to work fifty-four hours a week and had to clear any weekend off with their district managers. By contrast, managers of V stores were paid overtime. Candidates for the job of Y store managers are generally selected from RadioShack’s best sales associates. When they become Y store managers they are expected to supervise subordinates from the sales floor in addition to being

⁶Section 541.103 provides, “[a] determination of whether an employee has management as his primary duty must be based on all the facts in a particular case.” 29 C.F.R. § 541.103.

⁷Testimony concerned RadioShack’s policies and procedures during the class period; they may or may not be true today.

responsible for the lay out of their stores, replenishing inventory, accounting for inventory, training and scheduling sales associates.

Some Y store managers are classified as hiring managers, others receive new employees from district managers. In both cases, higher-ups approve the number of sales associate hours a store may use. Two of RadioShack's executive witnesses testified no Y store manager supervises fewer than the equivalent of eighty subordinate hours a week. Goldman testified he worked for RadioShack for sixteen years in New Jersey and Pennsylvania and always had at least three sales associates. In the Park City store, which he was managing when he left RadioShack and brought this action, Goldman testified he had nine associates when he started and seventeen when he left.

Sales associates, Goldman testified, were paid commissions but managers were not. Managers receive bonuses. Y store managers at the relevant time were eligible for bonuses only when they personally sold \$13,000 worth of merchandise or registered a ten percent gain in personal sales. An accountant with RadioShack testified Goldman earned \$85,000 in twenty-one months as a Y store manager from December 1999 to August 2001. The accountant calculated, based on Goldman's reported hours, he would have earned \$65,000 for the same period as a V store manager with overtime and \$42,800 as an upper level sales associate for the same period. But, she acknowledged under cross examination, the hourly rate for a Y store manager is significantly lower than the other pay levels. David Edmondson, president and chief executive officer of RadioShack, testified no manager has been fired for lack of personal sales and some have been fired despite recording high personal sales. He and other RadioShack witnesses testified Y store managers are training their associates by example when they are on the sales floor.

Goldman and his witnesses painted a very different picture for the jury. They described an

organization in which everything is decided at the corporate level: store stocking is achieved by rotely following a “plan-o-gram,” inventory is allocated and replenished automatically, sales associates are sent from the district level and Y store managers are expected to spend seven hours a day selling, one hour training and one hour on paperwork. Training, a former manger said, consisted of turning on a videotape machine for a new sales associate to watch a training video.

On July 8, 2005 after eleven days of trial, a jury found the class of Y store managers exempt from the overtime requirements of the FLSA.

Goldman’s post-trial motion raises more than three dozen⁸ instances of alleged trial error, many of which are controlled by three questions of law:

- whether this Court erred when it relied on the jury to determine the number of hours a subordinate must work to be considered full-time and the percentage of time contained in the words “customarily and regularly” as facts;
- whether this Court erred when it allowed proof of the supervision element for the class as a whole and did not allow proof for each individual member; and,
- whether this Court erred when it instructed the jury RadioShack’s burden of proof was by a preponderance of the evidence rather than “plainly and unmistakably” or “clear and convincing.”

All of Goldman’s arguments in favor of his Motion for Judgment as a Matter of Law are subsumed in the first and second legal issues as are three of the four major section issues raised in his Motion for a New Trial.⁹ The fourth section raises evidentiary issues which are consigned to the

⁸The number is imprecise because six primary issues have myriad sub-issues. I repeat an admonition from the Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit, when a “brief . . . contains ten or twelve points, a presumption arises that there is no merit to **any** of them.” Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility-A View From the Jaundiced Eye of the Appellate Judge, 11 Cap. U. L. Rev. 445, 458 (1982).

⁹ The three subsumed sections include proof of the supervision element, jury instructions and motions *in limine*. Each has multiple subsections. Although Goldman asks for a new trial, were his

sound discretion of the trial court and which I have no reason to revisit. *David by Berkeley v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230, 238 (3d Cir. 1984).

DISCUSSION

A motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial pursuant to Federal Rule Civil Procedure 59 following a jury verdict falls within the sound discretion of the trial court. *Wagner v. Fair Acres Geriatric Cent.*, 49 F.3d 1002, 1017 (3d Cir.1995). Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could find liability. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir.1993) (citation omitted); *Raiczuk v. Ocean County Veterinary Hosp.* 377 F.3d 266, 269 (3d Cir. 2004) (citations omitted). Such a judgment should only be granted if “the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.” *Powell v. J.T. Posey Co.*, 766 F.2d 131, 133-34 (3d Cir. 1985).

The standard for granting judgment as a matter of law under Federal Rule of Civil Procedure 50(a) mirrors that for granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Glenn Distrib. Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 299 (3d Cir. 2002). A motion for summary judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view the facts and inferences in the light most favorable to the party opposing the motion. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*,

motion to have merit, the remedy would be decertification of the opt-out class.

507 U.S. 912 (1993).

The first element which RadioShack had to prove to exempt Y store managers from the overtime requirements of the FLSA, management as a primary duty, is unquestionably a factual question for the jury to decide. 29 C.F.R. § 541.103. This Court also ruled the second element, regularly and customarily supervises the equivalent of two full-time subordinates, is a factual question for the jury to determine.¹⁰

¹⁰ Jurors are presumed to have followed the court's instructions. *United States v. DiSalvo*, 34 F.3d 1204, 1223 (3d Cir. 1994). The following are the jury instructions the Court gave on the question: Supervision of Two of More Employees

The Court instructs you that the final prong of the short test for the executive exemption is satisfied if Plaintiffs as a class customarily and regularly directed the equivalent of two or more other full-time employees. Satisfaction of this prong is not limited to directing only two or more full-time employees, but may also be satisfied by having supervised the "equivalent" of two or more full-time employees. For example, the regulations provide that two or more full time employees are supervised if Plaintiffs directed "one full-time and two part-time employees of whom one works in the morning and one afternoons; or four part-time employees, two of whom work in the mornings and two afternoons." In other words, the prong may be satisfied by the combined average working hours of the employees supervised by the Plaintiffs.

The law does not define the meaning of "full-time" employment, or identify the number of hours per week an employee must work to be classified as "full-time." Rather, the number of hours worked qualifying an employee as a full-time employee is generally left to the practice of the employer. For example, companies in some industries have a standard work week of 37½ or 35 hours per week for their full-time employees. You must determine, based upon all of the evidence, the practice of RadioShack in defining a full-time employee. Based upon that determination, "two or more full-time employees or the equivalent" will be that which is equal to or greater than twice the number of hours you determine are required to meet RadioShack's definition of a full-time hourly store employee.

For example, if you find that a full-time RadioShack hourly store employee is defined as one working 40 hours per week, then directing two or more full-time employees or the equivalent is satisfied by the supervision of 80 or more subordinate employee hours in a given week. Similarly, if you find that a full-time RadioShack hourly store employee is defined as one working a minimum of 32 hours per week, then directing two or more full-time employees or the equivalent is satisfied by the supervision of 64 or more subordinate employee hours in a given week.

In addition, supervision is "customary and regular" if it is performed with a

In the first question, Goldman claims this Court erred when it refused to determine how many hours constitute full-time work at RadioShack, leaving the issue for the jury to decide based on the evidence presented. Goldman also argues this Court should have determined as a matter of law what percentage of time is required to prove a manager “regularly and customarily” supervises the equivalent of two full-time subordinates. Because the FLSA does not define full-time and part-time, this Court instructed the jurors to determine RadioShack’s full-time equivalent and then to decide if the class members customarily and regularly supervised the equivalent of two full-time employees. Goldman takes issue with that decision, arguing the two questions, what is regularly and customarily and what is full time, should have been treated as questions of law for the Court to decide.

FLSA claims “typically involve complex mixed questions of fact and law” *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 738, 743 (1981). How an employee spends his time is a question of fact, whether those activities exclude them from overtime benefits is a question of law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *see also Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991) (holding factual findings and inferences are reviewed for clear error).

In this case, RadioShack prevailed on the factual questions: whether Y store managers spent

frequency that is “more than occasional, but which, of course, may be less than constant” when viewed over a period of time sufficient to exclude anomalies, such as unannounced employee absences or terminations. Furthermore, Plaintiffs brought this action as a class action, thus the frequency with which the Plaintiffs directed the work of two or more full-time employees or the equivalent must be viewed as to the class as a whole, not by consideration of individual circumstances of particular class members.

Thus, this prong is met so long as Plaintiffs as a class supervised the equivalent of two or more full-time employees at a frequency, or rate, that while less than constant, was nonetheless greater than occasional.

most of their time on managerial responsibilities and whether they regularly and customarily supervised the equivalent of two full-time subordinates.¹¹

Goldman argues this Court erred when it allowed Radio Shack to prove the hours supervised with class-wide statistics rather than an individual examination for each of the 533 class members. RadioShack used an expert in economics and statistics, Stefan Boedeker, to calculate the number of subordinate hours Y store managers supervised weekly on a class-wide basis.

Bodeker made his calculations using both a forty-hour work week and the thirty-two-hour work week which RadioShack treats as full-time for purposes of benefits. The equivalent of two full-time subordinates would then be eighty hours or sixty-four hours of subordinate time. For comparison, Bodeker also used seventy and seventy-five hours of subordinate time. Bodeker collected a database which had every manager in the class, every week worked during the class period and the subordinate hours for every store in which the class managers worked. Bodeker testified he spent several weeks conducting cleaning procedures before running his analysis. His calculations are based on an analysis of the 46,000 work weeks spent by Y store managers as a class as a whole during the class period.¹²

Bodeker concluded Y store managers supervised at least eighty hours of subordinate time 88.89 percent of the time. Y store managers supervised at least sixty-four hours of subordinate time

¹¹ The jury questions were incorporated in a single decision for the jury: “Has Defendant proven by a preponderance of the evidence that Plaintiff Mark Goldman was exempt from receiving overtime pay?” The jury answered yes.

¹² During cross-examination Goldman’s attorney challenged Bodeker’s claim to have included every class member, arguing the number of managers in his report was lower than the number of managers in the two classes, opt-in and opt-out. That challenge goes to the weight of the evidence and is a jury question. *United States v. Galvin*, 394 F.2d 228, 229 n.1 (3d Cir. 1968).

96.04 percent of the time. At seventy and seventy-five hours of subordinate time the percentages were 93 and 91 respectively. By its verdict, the jury decided 88 percent or 96 percent of the manager weeks is “customarily and regularly.”

During cross-examination of Bodeker, I sustained an objection to questions about individual managers, reiterating my pre-trial ruling the number of subordinate hours would be determined on a class-wide basis rather than individually. The decision to allow RadioShack to prove the hours supervised statistically rather than examining every week worked for each of the 533 managers is a direct outgrowth of Goldman’s decision to pursue the case as a class action under Rule 23 rather than as a collective action under the FLSA.

The opt-in requirement of an FLSA collective action and Congress’s policy choice to encourage small wage and hour claims to be brought collectively make FLSA collective actions qualitatively different from Rule 23 class actions. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *Hunter v. Sprint Corp.*, 346 F.Supp.2d 113, 117 (D.D.C.2004) (FLSA collective actions are not subject to numerosity, commonality, and typicality requirements of class actions under Rule 23). “Congress clearly chose not to have the Rule 23 standards apply . . . and instead adopted the ‘similarly situated’ standard.” *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir.2001).

I have ruled three times on the question of proving the subordinate supervised hours: at plaintiff’s request on class certification, again in denying the motion for summary judgment, and on a motion in limine prior to trial. Each time my answer has been the same: certification of the class under Rule 23 precludes individual proof of subordinate hours supervised because due process requires I allow the defense an opportunity to prove unusual circumstances for each individual who

fell below the requirement, whether it is eighty hours or sixty-four hours,¹³ of subordinate time supervised. Had I allowed Goldman to examine the supervised hours for each manager, due process would have required that RadioShack be given an opportunity to demonstrate whether the deficiency was the result of unusual circumstances.

Unusual circumstances which would cause subordinate hours to fall below two full-time equivalents are defined in the case law as cutting costs to try to save a failing business or an industry which typically operates fewer hours a week, such as banking. *Murray v. Stuckey's, Inc.*, 50 F.3d 564, 568-69 (8th Cir. 1995); *Sec'y of Labor v. Daylight Dairy Prods, Inc.*, 779 F.2d 784, 787 (1st Cir. 1985). Neither of these cases suggests or requires that unusual circumstances are limited to those two instances. Had Goldman been allowed to question each week for each manager which fell below eighty or sixty-four hours, RadioShack makes a credible argument it would then be entitled to examine the reasons for the deficiency, reasons which might include subordinate vacations, illness, seasonal fluctuations in sales, construction which blocks access to the store and similar anomalies. Depositions of managers and their subordinates could easily have run into the thousands, a horror a class action is designed to avoid. Proof of subordinate hours on a class-wide basis is the natural result of a class action.

¹³The case law on the question of the number of hours which equal full-time is unsettled. The First Circuit adopted an eighty-hour standard because “it is easy to apply and allows employers to be confident that they are complying with the statute.” *Daylight Dairy*, 779 F.2d at 787. But that standard is hardly legally sufficient. An equally cogent argument could be made that full-time is the number of hours at which an employer pays benefits. *Stuckey's, Inc.*, 50 F.3d at 568-69 (reasoning “although forty hours per week is generally the equivalent of a full-time employee, the Department of Labor in applying this regulation recognizes that this is not a rigid standard”). In this case we do not need to resolve the issue because the class of Y store managers supervised eighty subordinate hours 88 percent of the time. To paraphrase *Daylight Dairy*, “that is ‘customarily and regularly’ by any definition.” *Daylight Dairy*, 779 F.2d at 787.

Goldman refers me to a case similar to this one brought in the Northern District of Illinois, *Perez v. RadioShack Corp.*, No. 02-7884. In that case the court reached a different decision on individualized inquiry. The *Perez* court granted plaintiff's motion for summary judgment for each manager who did not supervise eighty hours of subordinate time eighty percent of the time. *Perez v. RadioShack Corp.*, 386 F. Supp. 2d 979, 992 (N.D. Ill. 2005). RadioShack will have to prove the remaining Y store managers primarily managed during trial.

The case at hand is distinguished from *Perez* on two grounds: I do not read "unusual circumstances" as narrowly as the *Perez* court did and *Perez* is a collective action under the FLSA. The *Perez* court found neither a failing enterprise nor an industry with traditionally shorter hours and so found no unusual circumstances. *Perez*, 386 F. Supp. 2d at 985. The *Perez* court did not make any inquiry into the circumstances which caused the hours supervised by some managers to fall below the equivalent of two full-time subordinates.

The difference between a collective and a class action leads to the differing outcomes between our two courts. The FLSA simply requires that the employees be "similarly situated." The other factors required in class actions – numerosity, typicality, commonality and predominance – do not apply to collective actions. In a Rule 23 proceeding each class member is bound by the judgment, whether favorable or unfavorable, unless he has "opted out" of the suit. Under the FLSA, on the other hand, no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" given his written consent. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (stating "[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 216(b)") (internal citation omitted). Additionally, "the requirements for satisfying Rule 23 are considerably more involved than

is the unitary ‘similarly situated’ requirement of [§ 216(b)].” *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir.1996) (internal quotations omitted) (alteration in original).¹⁴ The *Perez* court was only asked to allow the action to proceed as a collective action under the FLSA. The court reasoned:

Plaintiffs take pains to explain, they are not seeking class certification under Rule 23. Under that Rule, the court must assess whether the proposed class meets the test of numerosity; whether common questions of law and fact are at issue; whether the named plaintiffs’ claims are typical; and whether the named plaintiffs are adequate class representatives. Under 29 U.S.C. § 216(b), plaintiff need only show that he is suing his employer for himself and on behalf of other employees “similarly situated,” a requirement that courts have characterized as “considerably less stringent” than the Rule 23 requirements.

Perez, 2003 WL 21372467 at *1 (N.D. Ill. June 13, 2003).

Had Goldman continued with his FLSA action alone, the smaller opt-in class of Section 216 might have made individual inquiry feasible; when Goldman chose to proceed with the larger opt-out class action he subjected his case to class-wide standards of proof.

In addition to challenging the scope of what RadioShack had to prove, Goldman also challenges the standard by which RadioShack was obliged to prove it. Goldman reads the case law as requiring RadioShack to prove Y store managers are exempt “plainly and unmistakably” or by “clear and convincing” evidence.

The standard of proof is preponderance of the evidence, the charge I gave. The Supreme Court’s language from 1947 has evolved but the standard has not changed. The Court held “one asserting that its employees are exempt from the wage and hour provisions of the Act has the burden

¹⁴A minority of federal courts have held a § 216(b) collective action is guided by the requirements of a Rule 23 class action. *See, e.g., Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 265 (D.Colo. 1990) (indicating that a § 216(b) collective action “must satisfy all of the requirements of Rule 23, insofar as those requirements are consistent with 29 U.S.C. § 216(b)”).

of showing affirmatively that they come clearly within an exemption provision.” *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 550 (1947).

By 1962, the language of *Walling* became “[o]ne asserting that an employee is exempt from the wage and hour provisions of the Act has the burden of establishing the exemption affirmatively and clearly.” *Legg v. Rock Prods. Mfg. Corp.*, 309 F.2d 172, 174 (10th Cir. 1962). The Tenth Circuit morphed the language again in *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984), holding “[t]he employer who asserts the exemption has the burden of establishing both of these requirements by clear and affirmative evidence.” The Fourth Circuit, citing *Walling*, added weight to the clear and affirmative language in *Clark v. J.M. Benson & Co.*, 789 F.2d 282, 286-89 (4th Cir. 1986) (reversing a district court which put the burden on the employee to disprove exemption).

The language of *Clark* was cited in *Roney v. United States of America*, 790 F. Supp. 23, 26 (D.D.C. 1992), as “[t]he defendant must establish through ‘clear and affirmative evidence’ that the employee meets every requirement of an exemption.” *Roney*, 790 F. Supp. at 26. In its turn, *Roney* was cited in *Ale v. Tennessee Valley Authority*, 269 F.3d 680, 691 n.4 (6th Cir. 2002), which held the employer “must establish each element of the exemption by a preponderance of the clear and affirmative evidence.” None of the evolutions of the language changes the standard of proof. Exemption is an affirmative defense which the employer must prove by a preponderance of the evidence.

Goldman has failed to advance an argument on any of the three legal questions he raises sufficient to induce me to grant judgment as a matter of law or a new trial. Accordingly, I enter the following:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK GOLDMAN, Individually and on	:	CIVIL ACTION
behalf of all others similarly situated	:	
	:	
v.	:	NO. 03-0032
	:	
RADIOSHACK CORPORATION	:	

ORDER

And now, this 23rd day of January, 2006, it is hereby ORDERED that Plaintiff's Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial (Document 295) is DENIED.

BY THE COURT:

Juan R. Sánchez, J.