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## COMMENT

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### EXEMPT EXECUTIVES? DOLLAR GENERAL STORE MANAGERS' EMBATTLED QUEST FOR OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT

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INTRODUCTION

Beginning in the early 1980s, and continuing for nearly three decades, federal circuit courts unanimously found retail store managers exempt from overtime pay under the Fair Labor Standards Act of 1938 (FLSA).<sup>1</sup> The overwhelming consensus even within the De-

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<sup>1</sup> 29 U.S.C. §§ 201-219 (2006). For circuit court cases denying store managers' overtime claims, see *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 502-03 (6th Cir. 2007); *Jones v. Va. Oil Co.*, 69 Fed. App'x 633, 639 (4th Cir. 2003); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 620 (8th Cir. 1991); *Donovan v. Burger King Corp. (Burger King II)*, 675 F.2d 516, 522 (2d Cir. 1982); *Donovan v. Burger King Corp. (Burger King I)*, 672 F.2d 221, 227 (1st Cir. 1982). In a 1999 report, the U.S. Government Accountability Office identified this same trend toward exemption. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-99-164, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 4 (1999) ("Our review of federal case law and [Department of Labor] compliance cases indicated that it is, in fact, difficult to challenge exempt classifications if employees supervise two or more full-time employees and spend some time—even if minimal—on management tasks.").

partment of Labor (DOL) itself—the body responsible for promulgating and enforcing the overtime regulations—was that supervisors in charge of a free-standing store were highly likely to fall within the exempt category of the statute.<sup>2</sup> However, in 2008 the Eleventh Circuit broke the unanimity by upholding a thirty-six million dollar jury verdict against Family Dollar for misclassifying its store managers as exempt executives.<sup>3</sup> While the extent to which the Eleventh Circuit's decision will affect retail store managers' status under the FLSA remains unclear,<sup>4</sup> it has undoubtedly resuscitated managers' hopes that they can prevail on overtime claims by providing them with circuit precedent on which to stand.

As the Eleventh Circuit's decision in *Morgan v. Family Dollar Stores, Inc.*, pointedly illustrates, the financial repercussions for large retailers of misclassifying employees can be immense.<sup>5</sup> Tens of millions of dollars hinge on complex judicial determinations of whether retail supervisors are exempt executives and therefore not owed overtime pay. Getting this determination right has serious implications not only for businesses but also for workers who stand to lose substantial wages to which they are statutorily entitled.

To a large extent, the DOL has already performed the interest balancing between employers and employees through notice-and-comment rulemaking,<sup>6</sup> with judges determining only the remainder

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<sup>2</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 30 (noting that one DOL attorney "indicated that, although there may be situations in which the exempt executive classification of an employee supervising two or more workers could be challenged, those situations are very limited").

<sup>3</sup> *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1258 & n.34 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

<sup>4</sup> The Eleventh Circuit's *Morgan* opinion has failed to convince at least the Fourth Circuit, which in March 2011 found a Family Dollar store manager exempt as a matter of law. See *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 518 (4th Cir. 2011) (distinguishing *Morgan* on its facts).

<sup>5</sup> Family Dollar is not the only large retailer that has had to dole out millions for misclassifying its employees. In 2009, for example, a jury found that Staples had willfully misclassified its assistant managers as exempt executives. *Stillman v. Staples, Inc.*, No. 07-0849, 2009 WL 1437817, at \*2 (D.N.J. May 15, 2009). Staples subsequently agreed to settle that claim and other pending overtime suits for up to \$42 million. Settlement Agreement at 3, *In re Staples, Inc. Wage & Hour Emp't Practices Litig.*, MDL No. 2025, No. 08-5746 (D.N.J. Feb. 5, 2010). Radioshack and Starbucks are two other notable retailers that have reached massive overtime settlements within the last decade, \$29.9 million and \$18 million, respectively, with store managers and assistant managers. Lisa Girion, *Starbucks Settles Suit on Overtime*, L.A. TIMES, Apr. 20, 2002, at C1; *Radioshack to Pay \$29.9 Million to Settle Lawsuit*, N.Y. TIMES, July 17, 2002, at C4.

<sup>6</sup> For a selective look at the notice-and-comment process during the DOL's 2004 revisions of the white collar exemptions, see *Defining and Delimiting the Exemptions for*

through case-by-case applications of the white collar exemptions. The regulations that have emerged from the administrative decisionmaking process purportedly strike a compromise between the competing interests of employers and employees.<sup>7</sup> This Comment argues that the current regulations governing the executive exemption, as well as the circuit case law that has developed around them, unduly favor the employer and pose a nearly insurmountable obstacle to overtime claims, at least in the context of low-salaried retail supervisors.

I will first discuss the current and former executive-exemption regulations promulgated by the DOL, as they provide the operating framework for analyzing FLSA overtime claims. Focusing primarily on a handful of cases from the First, Second, Fourth, Sixth, and Eighth Circuits, I will look at how courts administer the executive exemption and in particular how they determine whether an employee's primary duty is management—typically the dispositive inquiry in overtime suits. Appellate courts have almost universally adopted the Second Circuit's interpretation of the primary duty test in *Donovan v. Burger King Corp.* (*Burger King II*), which deemed retail supervisors exempt executives as a matter of law.<sup>8</sup> The only crack in this interpretive monolith appeared with the Eleventh Circuit's *Morgan* opinion. Ongoing litigation over whether Dollar General store managers should be exempt from overtime pay suggests that this crack could be expanding, although a recent Fourth Circuit opinion indicates otherwise. Nonetheless, I will show through a series of divergent summary judgment rulings on the exempt status of Dollar General store managers that judicial interpretations of the primary duty factors, and not the underlying facts of the cases themselves, are driving this split on the district level.

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Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,172 (Apr. 23, 2004) [hereinafter *Defining and Delimiting Exemptions*].

<sup>7</sup> The DOL's decision to include an automatic exemption for "highly compensated" employees in the current regulations exemplifies this interest balancing. The DOL originally proposed exempting employees who earned more than \$65,000 a year from overtime pay. *Id.* at 22,172. In response, employee groups advocated against a "highly compensated" cutoff while employer groups advocated for setting the cutoff even lower. *Id.* at 22,173. The National Association of Convenience Stores and the National Retail Federation, for example, recommended setting the cutoff at an annual salary of \$36,000 and \$50,000, respectively. *Id.* at 22,174. Considering the views presented by both employee and employer constituencies, the DOL ultimately set the bar at \$100,000 per year. 29 C.F.R. § 541.601(a).

<sup>8</sup> See *Burger King II*, 675 F.2d 516, 521-22 (2d Cir. 1982) (concluding that Burger King assistant managers' primary duties were managerial).

The divergent summary judgment rulings demonstrate that low-salaried retail supervisors, like Dollar General store managers, straddle the fence between being exempt from and being entitled to overtime pay. Not surprisingly, because of the decades of circuit precedent weighing against store managers' overtime claims, more district courts have exempted these managers from overtime pay than have not. These results, I will argue, would likely be different if (1) the DOL or the courts reconfigured the primary-duty analysis to level the playing field between employers and employees and (2) the executive exemption contained a more vigorous salary-level requirement. Unless the DOL reconsiders the current executive exemption or courts modify their approach to the primary-duty test, employees whom the FLSA was originally intended to cover will be denied earnings that they rightfully deserve.

#### I. THE GOVERNING FRAMEWORK: THE CURRENT AND FORMER EXECUTIVE EXEMPTION REGULATIONS

Under federal law, overtime claims are governed by the FLSA, which entitles employees who work over forty hours in a work week to receive wages at one-and-a-half times their regular rate of pay for any overtime.<sup>9</sup> The Act, though, contains certain white collar exemptions—executive, administrative, and professional—that restrict the categories of employees to whom employers must pay overtime.<sup>10</sup> The statute grants the Secretary of Labor “broad authority to ‘define and delimit’ the scope” of the exemption.<sup>11</sup> In 1938, the year of the FLSA’s enactment, the DOL issued its first set of regulations and revised them on multiple occasions throughout the 1940s.<sup>12</sup> Substantial revisions to the exemptions were not made again until 2004.<sup>13</sup>

While some minor changes were made to the executive-exemption regulations in 2004, they have largely remained intact and unaltered. Unless explicitly noted otherwise, this Comment refers to the pre-2004 regulations for several reasons: (1) the federal

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<sup>9</sup> 29 U.S.C. § 207(a) (2006).

<sup>10</sup> *Id.* § 213(a).

<sup>11</sup> *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting 29 U.S.C. § 213(a)(1) (1994)); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 613 n.6 (1944) (noting the Secretary of Labor’s authority to “define and delimit” the “terms” used in the white collar exemptions).

<sup>12</sup> *Defining and Delimiting Exemptions*, *supra* note 6, at 22,124.

<sup>13</sup> *See id.* (“The major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years.”).

circuit case law operates under the old regulations; (2) the Dollar General cases, for the most part, deal with claims that arose prior to 2004; and (3) courts have noted that their analyses would yield the same result regardless of whether the pre-2004 or current regulations were applied.<sup>14</sup> I discuss any changes in the regulations that could potentially impact ongoing and future litigation in Section IV.A.

To qualify as exempt under the white collar regulations, employees must satisfy three criteria: (1) be paid on a salary basis (salary-basis test); (2) earn above a certain minimum salary level per week (salary-level test); and (3) perform certain duties (duties test).<sup>15</sup> The current regulations require that employees earn a minimum of \$455 per week to qualify for the exemption, whereas the former regulations set the minimum at \$155.<sup>16</sup> Under the former regulations, courts applied two separate duties tests—a “short-duties” test and a “long-duties” test—based upon the employee’s weekly salary level.<sup>17</sup> If the employee earned less than \$250 per week, the long test was applied and, if the employee earned \$250 or more, the short test was used.<sup>18</sup> All cases referenced in this Comment apply the short-duties test,<sup>19</sup> which exempts from overtime pay only those employees who (1) have management as their primary duty and (2) regularly direct two or more employees.<sup>20</sup>

By and large, the exempt status of retail store managers has turned on the question of whether they have management as their

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<sup>14</sup> See, e.g., *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 504 n.5 (6th Cir. 2007) (“Because the current and former regulations are so similar, our resolution of this case under the former regulations provides guidance to courts performing the ‘primary duty’ analysis under the current regulations.” (quoting 29 C.F.R. § 541.700 (2007))).

<sup>15</sup> 29 C.F.R. § 541.100 (2010).

<sup>16</sup> Compare *id.* § 541.100(a)(1) (setting the minimum weekly salary level at \$455), with 29 C.F.R. § 541.117(a) (2003) (amended 2004) (setting the minimum weekly salary level at \$155).

<sup>17</sup> Compare 29 C.F.R. § 541.1(a)–(e) (2003) (amended 2004) (laying out the long-duties test), with *id.* § 541.1(f) (laying out the short-duties test).

<sup>18</sup> *Id.* § 541.1(f).

<sup>19</sup> Before the 2004 revisions, courts rarely applied the long-duties test because of the outdated salary levels, which even low-salaried retail supervisors generally satisfied. For a list of the factors considered in this test, see *id.* § 541.1.

<sup>20</sup> *Id.* § 541.1(f). The current regulations have done away with the two-tiered short-duties and long-duties test and instead adopt a single standard-duties test for all employees. The duties an employee must meet to qualify for executive exemption include: (1) having management as her primary duty; (2) regularly directing two or more employees; and (3) wielding the authority to hire or fire other employees or to recommend changes to their status which are given “particular weight.” 29 C.F.R. § 541.100(a) (2010).

“primary duty.” The current regulations define “primary duty” as the “principal, main, major or most important duty that the employee performs.”<sup>21</sup> The initial factor usually considered under the primary-duty analysis is the amount of time the employee spends on managerial (exempt) versus nonmanagerial (nonexempt) duties, or the “time-allocation prong” of the primary-duty test.<sup>22</sup> The updated and former regulations provide an illustrative list of managerial duties, which can be divided into two representative categories: (1) personnel management and (2) business operations. Personnel management constitutes the bulk of the managerial duties listed and includes tasks like interviewing and training employees, setting their pay rates and work hours, and generally supervising their work.<sup>23</sup> Meanwhile, on the business operations side, managerial responsibilities consist of procuring necessary supplies and materials, regulating merchandise flow, and ensuring the safety of employees and clients.<sup>24</sup>

If an employee spends more than fifty percent of her time on managerial duties, that employee, barring exceptional circumstances, has management as her primary duty.<sup>25</sup> If the employee spends the majority of her time on nonmanagerial duties, then courts should consider “other pertinent factors.”<sup>26</sup> These nonexclu-

<sup>21</sup> 29 C.F.R. § 541.700(a).

<sup>22</sup> See, e.g., *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 514-15 (4th Cir. 2011) (discussing the time-allocation prong first among the primary-duty factors); *Burger King II*, 675 F.2d 516, 520-21 (2d Cir. 1982) (discussing whether Burger King assistant managers spent the majority of their time on managerial duties before examining the other factors of the primary-duty test).

<sup>23</sup> The regulations include the following comprehensive list of personnel management duties:

Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers . . .

29 C.F.R. § 541.102 (2003) (amended 2004).

<sup>24</sup> *Id.* The updated regulations add two managerial business operations duties to the list: (1) “planning and controlling the budget” and (2) “monitoring or implementing legal compliance measures.” 29 C.F.R. § 541.102 (2010).

<sup>25</sup> I have been unable to find a case in which a retail store manager has argued that she is *not* an exempt executive even though she spent over fifty percent of her time on managerial duties, let alone a case that has held for an employee in such a circumstance.

<sup>26</sup> 29 C.F.R. § 541.103 (2003) (amended 2004).

sive factors<sup>27</sup> include: (1) the relative importance of an employee's managerial responsibilities as compared to her nonmanagerial duties (relative-importance prong); (2) the regularity with which an employee exercises discretion in her work (discretionary-powers prong); (3) the degree of freedom an employee has from supervision (freedom-from-supervision prong); and (4) the relationship between an employee's salary and the wages paid to other workers (wage-comparison prong).

## II. ONE CIRCUIT VERSUS MANY: NOT ALL RETAIL STORE MANAGERS HAVE MANAGEMENT AS THEIR PRIMARY DUTY

### A. *The Legacy of Burger King: Retail Store Managers Exempt as a Matter of Law?*

Circuit and district courts have overwhelmingly upheld retail employers' exempt classifications of frontline supervisors.<sup>28</sup> The prevailing appellate precedent dates from the early 1980s when the First and Second Circuits rejected the Secretary of Labor's arguments that Burger King misclassified its assistant managers as exempt, owed them overtime pay, and should have been enjoined from designating them as exempt in the future.<sup>29</sup> The dispute—as in

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<sup>27</sup> While the regulations permit the consideration of other factors, *see* 29 C.F.R. § 541.700(a) (2010) ("Factors to consider when determining the primary duty of an employee include, *but are not limited to* . . . ." (emphasis added)), courts have limited their analysis to those factors explicitly outlined by the DOL.

<sup>28</sup> Of course, retail store managers are always entitled to challenge these classifications since FLSA exemptions are determined on a case-by-case—factual circumstance to factual circumstance—basis. *See, e.g.,* *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 503 n.4 (6th Cir. 2007) ("We do not adopt a rule that any employee who is in charge of a store has management as her primary duty. . . . [T]he proper analytical approach is to scrutinize the factors in the Secretary's regulations, not simply to determine whether the employee was 'in charge.'"). However, lower-level supervisors are generally unlikely to succeed on such claims. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 29-30 (finding that among executive-exemption cases by "lower-income supervisor[s]" from 1994 to 1998 only one out of twelve supervisors making \$500 or less per week obtained a "favorable ruling"); Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 150 & n.66 (1993) (collecting cases and concluding that "court decisions have made it clear that frontline supervisors do not enjoy FLSA coverage").

<sup>29</sup> *See Burger King II*, 675 F.2d 516, 522 (2d Cir. 1982); *Burger King I*, 672 F.2d 221, 226-28 (1st Cir. 1982). A critical fact about the Burger King assistant managers is that each of them was generally the most senior employee at their restaurants when on duty. While two assistant managers and a store manager worked at the same location, their schedules rarely overlapped and so each essentially functioned like an independent store operator. *Burger King II*, 675 F.2d at 517; *Burger King I*, 672 F.2d at 223.

nearly all executive-exemption cases—centered on whether the assistant managers earning \$250 or more had management as their primary duty.<sup>30</sup> Secretary Shaun Donovan contended that management was not the workers’ primary duty because (1) they spent over fifty percent of their time on nonmanagerial tasks, and (2) Burger King’s corporate strictures excessively constrained their ability to exercise meaningful managerial discretion.<sup>31</sup>

Prior to the *Burger King* rulings, the DOL had rigidly applied the time-allocation prong of the executive-exemption regulations and treated it as fairly determinative of an employee’s exempt status.<sup>32</sup> If an employee spent over fifty percent of her time on nonmanagerial tasks—such as sweeping the floor and flipping burgers—the DOL was likely to consider the employee nonexempt and thus eligible for overtime pay. On the other hand, if a worker dedicated over fifty percent of her time to managerial duties—such as training, directing, and scheduling employees—that individual would have been ipso facto deemed an exempt executive.<sup>33</sup>

The Second Circuit, however, disagreed with the Secretary’s heavy reliance on the time provision and minimized the provision’s role in the primary-duty analysis. The court directed the Secretary to subsequent language in the regulations regarding an employee’s primary duties: “[T]ime alone . . . is not the sole test,’ and . . . an employee” who spends over fifty percent of her time on nonmanagerial duties “may ‘nevertheless have management as his primary du-

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<sup>30</sup> *Burger King II*, 675 F.2d at 520-21; *Burger King I*, 672 F.2d at 225. In the *Burger King* cases, there were two sets of assistant managers—those who earned less than \$250 per week and those who earned \$250 or more. Applying the long-duties test to those who earned less than \$250 per week, the circuits determined that such managers were not exempt as a matter of law and were accordingly owed overtime pay because they had spent forty percent of their time on nonmanagerial duties. *Burger King II*, 675 F.2d at 519-20; *Burger King I*, 672 F.2d at 222-28. Those assistant managers who earned at least \$250 per week had their status under FLSA governed by the short-duties test. *Burger King II*, 675 F.2d at 518; *Burger King I*, 672 F.2d at 225. As such, the assistant managers could have been exempted from overtime pay if they had “management” as their primary duty and regularly supervised the work of two or more employees. 29 C.F.R. § 541.1(f) (2003) (amended 2004).

<sup>31</sup> *Burger King II*, 675 F.2d at 521-22.

<sup>32</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 30 (explaining that the DOL revised its policy manual after the *Burger King* decisions to “require that investigators consider percentage limitations as only one factor when assessing the employee’s primary duty”).

<sup>33</sup> See 29 C.F.R. § 541.103 (“[I]t may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee’s time.”).

ty if the other pertinent factors support such a conclusion.”<sup>34</sup> In other words, the percentage allocation of a supervisor’s time between managerial and nonmanagerial duties offers a “rule of thumb” or “useful guide” for determining an employee’s primary duty, but the test is in no way dispositive.<sup>35</sup> The Second Circuit made abundantly clear that the time allocation between managerial and nonmanagerial duties constitutes the first—not sole—hurdle an employee must overcome in order to prevail on the primary-duty question.<sup>36</sup>

In minimizing the time element, the Second Circuit thrust the “other relevant factors”—relative importance of duties, exercise of discretion, freedom from supervision, and wage comparisons—to the forefront of the primary-duty analysis.<sup>37</sup> The issue of whether Burger King assistant managers exercised discretion when performing their managerial duties occupied a disproportionate amount of the court’s attention.<sup>38</sup> On the wage-comparison prong, the court summarily concluded that the assistant managers earned “substantially higher wages” than their coworkers without offering an analytical framework for future cases.<sup>39</sup> The Second Circuit’s observations about the relative-importance and freedom-from-supervision factors were more insightful.

In comparing the relative importance of the assistant managers’ exempt and nonexempt duties, the Second Circuit reached the conclusion that their managerial duties represented their “princip-

<sup>34</sup> *Burger King II*, 675 F.2d at 521 (quoting 29 C.F.R. § 154.103 (1981) (amended 2004)).

<sup>35</sup> *Id.* (quoting 29 C.F.R. § 541.103).

<sup>36</sup> The case law abounds with scenarios where a retail store manager post-*Burger King* has spent an overwhelming percentage of her time on nonmanagerial duties, yet has been deemed exempt. For examples, see *infra* note 87.

<sup>37</sup> See *Burger King II*, 675 F.2d at 521 (concluding that “[t]he other ‘pertinent factors’ . . . support [Burger King’s] position” (quoting 29 C.F.R. § 541.103 (1981))). The First Circuit’s *Burger King I* opinion does not offer the analytical framework for the primary-duty analysis that the Second Circuit’s does, which is why most cases cite to the Second, rather than the First, Circuit’s opinion.

<sup>38</sup> Notably, the current regulations have abandoned this prong of the primary-duty analysis. See 29 C.F.R. § 541.700(a) (2010). For a discussion of the impact this alteration could have on retail supervisors’ efforts to claim overtime pay, see *infra* text accompanying note 176.

<sup>39</sup> *Burger King II*, 675 F.2d at 522. The *Burger King* cases are not exceptional in how they handle the wage-comparison prong of the primary-duty analysis. In fact, courts tend to treat this factor as an afterthought and give it little, if any, weight when deciding cases. For more detailed discussion of the wage-comparison prong, see *infra* subsection IV.C.3.

al responsibilities.”<sup>40</sup> The court defined “principal responsibilities” as those duties “most important or critical to the *success* of the restaurant.”<sup>41</sup> As evidence that the managerial duties were more important, the court identified the following: (1) the assistant managers’ own testimony; (2) the fact that managerial duties were more vital to the restaurant’s success; and (3) the managers’ ability to perform exempt and nonexempt work concurrently.<sup>42</sup> Indeed, the Second Circuit turned the plaintiffs’ own testimony against them. The managers during the bench trial below had admitted that they considered their managerial responsibilities more important than their nonmanagerial duties.<sup>43</sup>

Second, and arguably most critical, the court tied the relative-importance inquiry to the store’s business success. In other words, the proper inquiry asks: are the managerial or nonmanagerial duties more critical to the economic viability of the Burger King restaurants? The Second Circuit found that managerial duties were more important: “[I]t is clear that the restaurants could not operate successfully unless the managerial functions of Assistant Managers, such as determining amounts of food to be prepared, running cash checks, scheduling employees, keeping track of inventory, and assigning employees to particular jobs, were performed.”<sup>44</sup> Under this “success” framework, the answer that managerial duties are more important seems rather predetermined. As subsequent cases reveal, that is largely true.

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<sup>40</sup> *Burger King II*, 675 F.2d at 521. While this Comment devotes substantial space to the Second Circuit’s treatment of the relative-importance prong, the court itself spent three sentences on the issue.

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> Courts since the *Burger King* cases have often cited deposition testimony by retail supervisors as support for finding that managerial duties were more important than nonmanagerial ones. See, e.g., *Aschenbrenner v. Dolgencorp, Inc.*, No. 10-0153, 2011 WL 2200630, at \*14 (D. Neb. June 3, 2011) (“Most important, [the store manager’s] own testimony supports the conclusion that her managerial duties represented the most important part of her job.”); *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 641 (E.D.N.C. 2011) (“Most significantly, the store managers’ own testimony demonstrates that their managerial tasks constituted the most important part of their jobs.”); *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*2 (M.D. Tenn. Nov. 18, 2010) (pointing to deposition testimony in which the plaintiff described herself as the store’s “leader” and the person “in charge”); *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*21 (N.D. W. Va. Sept. 17, 2010) (noting that the plaintiff testified that she was “‘the one in charge’ at the store” and “that she never stopped managing her store even when performing nonmanagerial tasks”).

<sup>44</sup> *Burger King II*, 675 F.2d at 521.

To further deemphasize the importance one might attribute to the significant amounts of time Burger King assistant managers spent on menial labor, the Second Circuit—in a move subsequently emulated by many courts<sup>45</sup> and now codified in the DOL regulations<sup>46</sup>—ruled that managerial and nonmanagerial duties could be performed concurrently.<sup>47</sup> While the Second Circuit did not expound upon its reasoning, one can infer that it did not see the managerial and nonmanagerial duties as entirely separable. The First Circuit, taking a similar stance in *Burger King I*, explained that “an employee can manage while performing other work, and that this other work does not negate the conclusion that his primary duty is management.”<sup>48</sup> If taken seriously, the *Burger King* cases stand for the proposition that managerial duties will almost inevitably, by their very nature, be more important than nonmanagerial responsibilities.

On the discretionary-powers prong, the Second Circuit refuted the Secretary’s contention that Burger King’s corporate policies unduly circumscribed the assistant managers’ ability to exercise judgment when managing their stores.<sup>49</sup> The court provided numerous illustrations of how, even within the constraints imposed by upper management, the managers exercised discretion, including the scheduling and directing of employees and the handling of “cash or inventory irregularities.”<sup>50</sup> In explication of its reasoning, the court offered the following:

We fully recognize that the economic genius of the Burger King enterprise lies in providing uniform products and service economically in many different locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success. The exercise of discretion, however, even where circumscribed by prior in-

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<sup>45</sup> See *infra* subsection IV.C.2.

<sup>46</sup> See 29 C.F.R. § 541.106 (2010) (mandating that “[c]oncurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met”). For further discussion of the regulatory definition of concurrent duties, see *infra* text accompanying notes 174-75.

<sup>47</sup> The Second Circuit reasoned, “[T]he fact that much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work” supported the conclusion that “the principal or most important work of these employees is managerial.” *Burger King II*, 675 F.2d at 521.

<sup>48</sup> *Burger King I*, 672 F.2d 221, 226 (1st Cir. 1982).

<sup>49</sup> *Burger King II*, 675 F.2d at 521-22.

<sup>50</sup> *Id.* at 521. Other examples of areas where the managers exercised discretion included ordering supplies, dealing with the public, and ensuring that employees were performing their jobs. *Id.*

struction, is as critical to that success as adherence to “the book.” Burger King, of course, seeks to limit likely mistakes in judgment by issuing detailed guidelines, but judgments must still be made. In the competitive, low margin circumstances of this business, the wrong number of employees, too many or too few supplies on hand, delays in service, the preparation of food which must be thrown away, or an underdirected or undersupervised work force all can make the difference between commercial success and failure.<sup>51</sup>

Thus, as interpreted by the First and Second Circuits, the regulations do not demand that exempt retail supervisors have the ability to exercise unfettered discretion. In fact, executing company-wide operating procedures suffices.<sup>52</sup>

Alongside its staple analyses of the relative-importance and discretionary-powers prongs, the Second Circuit has heavily influenced subsequent interpretations of the freedom-from-supervision factor. The court found that the Burger King assistant managers satisfied this condition because they were “in charge” of their restaurants and were the “‘boss’ in title and fact.”<sup>53</sup> The assistant managers called the shots while on duty, and although the managers could reach out to the lead manager by phone, the Second Circuit did not consider that sufficient supervision to find in their favor.<sup>54</sup> While not stating so explicitly, the court seemed to interpret the freedom-from-supervision prong as requiring some type of sustained direct oversight. In other words, unless someone physically oversees and di-

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<sup>51</sup> *Id.* at 521-22. The First Circuit reached the same conclusion and found the assistant managers exempt despite Burger King’s “well-defined policies” and the fact that “tasks [were] spelled out in great detail.” *Burger King I*, 672 F.2d at 226.

<sup>52</sup> When reformulating the executive-exemption test, the DOL initially proposed that an employer’s “well-defined operating policies or procedures should not by itself defeat an employee’s exempt status.” *Defining and Delimiting Exemptions*, *supra* note 6, at 22,185. The *Burger King* line of cases certainly influenced this proposed regulation, as it incorporated language from the First Circuit’s opinion. *See Burger King I*, 672 F.2d at 226 (“The fact that Burger King has *well-defined policies*, and that tasks are spelled out in great detail, is insufficient to negate th[e] conclusion” that the assistant managers had management as their primary duty. (emphasis added)). Perplexingly, the DOL abandoned the proposed rule change because “it seem[ed] relevant only to the administrative exemption.” *Defining and Delimiting Exemptions*, *supra* note 6, at 22,185. While courts have never treated the issue of corporate policies as dispositive of an employee’s primary duty, it is a factor they consider, particularly under the discretionary-powers prong, and the proposed rule could have potentially influenced the role such policies played in the analysis. Attributing the rule’s abandonment to “relevancy” seems strange and unsatisfying.

<sup>53</sup> *Burger King II*, 675 F.2d at 522; *see also Burger King I*, 672 F.2d at 227 (“[T]he person ‘in charge’ of a store has management as his primary duty . . .”).

<sup>54</sup> *Burger King II*, 675 F.2d at 522.

rects an employee's work on a regular basis, that employee will be considered free from supervision. Such an interpretation, of course, makes it extremely difficult, if not impossible, for managers responsible for the day-to-day operations of free-standing stores to prevail on this prong. In the end, the Second Circuit found that all four factors weighed in favor of exempting the managers from overtime pay.<sup>55</sup>

B. *In the Wake of Burger King: Circuits Solidify  
the Exempt Status of Retail Store Managers*

A little less than a decade after the *Burger King* cases, the Eighth Circuit, in *Murray v. Stuckey's, Inc.*, followed the First and Second Circuits' lead by finding that Stuckey's stores—stores that combined gasoline stations, convenience markets, and restaurants—properly classified their managers as exempt executives.<sup>56</sup> The influence of the *Burger King* cases on the Eighth Circuit's legal reasoning is evident. Even though the store managers claimed to have spent sixty-five to ninety percent of their time on manual tasks—like pumping gas, stocking shelves, and waiting on customers—the court largely ignored this purported imbalance between managerial<sup>57</sup> and non-managerial duties.<sup>58</sup> Instead, it focused on the other relevant factors, namely whether the store managers exhibited sufficient discretion in their managerial roles and operated free from supervision.<sup>59</sup>

Referencing the *Burger King* cases, the Eighth Circuit decided that “the manager of a local store in a modern multi-store organization has management as his or her primary duty even though the discretion usually associated with management may be limited by the

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<sup>55</sup> *Id.* at 522. The Second Circuit rejected the Secretary's contention that the court should defer to his interpretation of the regulations and find that the Burger King assistant managers were not exempt executives. *Id.* The court explained, “If the Secretary believes that the underlying legislation was intended to cover employees such as Burger King's Assistant Managers, or that employees doing identical work for an employer should have identical legal status so far as overtime is concerned, he should reconsider the regulations as issued.” *Id.*

<sup>56</sup> 939 F.2d 614, 620-21 (8th Cir. 1991).

<sup>57</sup> The managerial duties of the store managers highlighted by the court included hiring and firing workers, “training and supervising store employees, ordering merchandise, handling customer complaints, and safe-guarding cash receipts.” *Id.* at 618.

<sup>58</sup> *See id.* (“The district court's finding that the managers spent 65-90 percent of their time on non-managerial duties . . . is not a controlling factor under the regulations.”).

<sup>59</sup> *Id.* at 619. The Eighth Circuit, somewhat puzzlingly, failed even to mention the relative-importance or wage-comparison prongs of the primary-duty analysis.

company's desire for standardization and uniformity."<sup>60</sup> While admitting that the managers' "discretion was circumscribed," the court held that they were the "on-site employees ultimately responsible for the stores' operations" and therefore exempt.<sup>61</sup> The Eighth Circuit further found that, despite the store managers' being "actively supervised" by a regional manager,<sup>62</sup> they operated sufficiently free from supervision to merit their exemption from overtime pay.<sup>63</sup>

Some fifteen years later, leaning heavily on the *Burger King* and *Murray* opinions, the Sixth Circuit in *Thomas v. Speedway SuperAmerica, LLC*, reached a similar conclusion, finding the manager of a gas station and convenience store exempt as a matter of law.<sup>64</sup> The store manager allocated approximately sixty percent of her time to nonmanagerial tasks—stocking merchandise, sweeping floors, operating the register, etc.—and dedicated the remainder of her time to managerial duties, such as interviewing and hiring employees and setting weekly work schedules.<sup>65</sup> The court, though, found that the other relevant primary-duty factors overwhelmingly favored Speedway.<sup>66</sup>

Borrowing the analytical framework from *Burger King II*, the Sixth Circuit assessed the relative importance of managerial and nonmanagerial duties by looking at which was more critical to the success of the business and concluded that managerial duties were more important.<sup>67</sup> In an oft-quoted passage, the Sixth Circuit elaborated on its reasoning:

If Thomas failed to perform her nonmanagerial duties, her Speedway station would still function, albeit much less effectively. . . . If, however,

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<sup>60</sup> *Id.* When undertaking the primary-duty analysis, courts frequently cite this "modern multi-store organization" language. See, e.g., *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 507 (6th Cir. 2007); *Jones v. Va. Oil Co.*, 69 Fed. App'x 633, 638 (4th Cir. 2003).

<sup>61</sup> *Murray*, 939 F.2d at 620.

<sup>62</sup> *Id.* at 619. Active supervision in *Murray* meant that regional managers visited the store "from time to time" and communicated by phone with the store managers on a weekly basis. *Id.*

<sup>63</sup> *Id.* The Eighth Circuit at one point confusingly asserted that, under the DOL regulations, employers were entitled to have at least one exempt employee at retail stores like Stuckey's. See *id.* at 618 ("The employer is . . . entitled under the FLSA and the regulations to have one designated exempt executive at this type of facility."). Neither the former nor the current regulations support such a conclusion.

<sup>64</sup> *Speedway*, 506 F.3d at 509.

<sup>65</sup> *Id.* at 499, 507.

<sup>66</sup> *Id.* at 509.

<sup>67</sup> *Id.* at 505-06.

Thomas failed to perform her managerial duties, her Speedway station would not function at all because no one else would perform these essential tasks. Surely, a gas station cannot operate if it has not hired any employees, has not scheduled any employees to work, or has not trained its employees on rudimentary procedures such as operating the register.<sup>68</sup>

Following in the footsteps of the *Burger King* and *Murray* courts, the *Speedway* court also determined that the store managers could exercise discretion even if corporate dictates considerably circumscribed the ambit of their decisionmaking.<sup>69</sup> *Speedway* had delineated “detailed company policies and standardized operating procedures,” which the plaintiff was supposed to follow in fulfilling her managerial duties.<sup>70</sup> The Sixth Circuit nonetheless noted that the plaintiff had discretion in a number of areas, including evaluating employees’ performance, deciding what inventory to order during high-demand periods, and resolving employee complaints.<sup>71</sup> The court concluded that “[w]hile her discretion was by no means unfettered and abounding, she exercised discretion over important managerial functions on a sufficiently frequent basis to support a finding that management was her primary duty.”<sup>72</sup>

Once again combining the *Burger King II* and *Murray* analyses, the Sixth Circuit restricted the supervision inquiry to “direct over-the-shoulder oversight on a day-to-day basis.”<sup>73</sup> Although the district manager monitored the plaintiff’s job performance,<sup>74</sup> the court did not consider this monitoring extensive enough to push the freedom-from-supervision prong in her favor.<sup>75</sup> In the end, the *Speedway* court found all other relevant primary-duty factors for the employer and summarily rejected the plaintiff’s overtime claim.<sup>76</sup>

<sup>68</sup> *Id.* at 505. For examples of decisions that mimic the Sixth Circuit’s language, see *infra* note 161 and accompanying text.

<sup>69</sup> *Speedway*, 506 F.3d at 507-08.

<sup>70</sup> *Id.* at 499.

<sup>71</sup> *Id.* at 507.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 508.

<sup>74</sup> The district manager’s monitoring included site visits once or twice a week and regular communication over the phone and via email. *Id.* at 507.

<sup>75</sup> See *id.* at 508 (“[D]espite [the district manager’s] involvement and monitoring . . . , Thomas operated free from direct over-the-shoulder oversight on a day-to-day basis, and we conclude that this relative freedom from supervision was sufficient enough to support a finding that her primary duty was management.”).

<sup>76</sup> See *id.* at 509 (“*Speedway* . . . has established that each of the four factors supports its position and, in general, has produced abundant evidence indicating that

C. *Charting a New Course: The Landmark  
Family Dollar Class Action*

Despite the seemingly insurmountable circuit and district court precedent awaiting store managers seeking to challenge their classifications as exempt executives, Family Dollar store managers accomplished the unthinkable in 2006 and prevailed on their overtime claims, securing a jury verdict in excess of \$35.5 million, which the Eleventh Circuit subsequently upheld.<sup>77</sup> Predictably, Family Dollar evoked the *Burger King* line of cases in arguing that its store managers were exempt executives as a matter of law.<sup>78</sup> Family Dollar asserted that because its managers were “in charge” of the store, like the managers in *Burger King I* and *II*, *Murray*, and *Speedway*, a court could reach no conclusion other than exemption.<sup>79</sup> The Eleventh Circuit’s response was twofold: (1) the executive-exemption test is highly fact intensive and so it would be improper to limit the analysis to a single consideration, and (2) the Family Dollar set of facts was “materially dissimilar” to that in the cited cases.<sup>80</sup> In distinguishing the common facts of the *Burger King* line of cases, the Eleventh Circuit highlighted the convergence of three principal differences: (1) the high percentage of nonexempt work Family Dollar store managers performed; (2) the “severe degree of restriction” corporate policy imposed on manager discretion; and (3) the over-the-shoulder supervision district managers exercised.<sup>81</sup>

What is most striking about the Eleventh Circuit’s opinion is its tone, which contrasts sharply with that in *Burger King II* and its progeny. When reading the opinion, one is tempted to think that if the court in *Morgan v. Family Dollar Stores, Inc.*, had heard the arguments of Secretary Donovan, the *Burger King* cases might well have been de-

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Thomas’s primary duty was management.”). On the wage-comparison prong, the court found that the plaintiff earned a salary that was thirty percent greater than those of the employees under her supervision and concluded that was a “significant amount.” *Id.* at 509. For further discussion of this prong, see *infra* subsection IV.C.3.

<sup>77</sup> *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1285 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

<sup>78</sup> *See id.* at 1271 (“Family Dollar cites several cases concluding that managers of a free-standing store or restaurant were exempt as a matter of law.”). In fact, the Eleventh Circuit devoted an entire subsection to distinguishing *Morgan’s* facts from those of *Burger King I* and *II*, *Murray*, and *Speedway*. *Id.* at 1271-73.

<sup>79</sup> *See id.* 1271-72 (“Family Dollar insists its store managers were ‘in charge’ of the store, and therefore, exempt as a matter of law.”).

<sup>80</sup> *Id.* at 1272-73.

<sup>81</sup> *Id.* at 1272.

cided differently. Although the court attempts to distance its opinion from those of the other circuits, it clearly makes normative judgments that conflict with, or at the very least are in tension with, those made in *Burger King I and II*, *Murray*, and *Speedway*. For instance, the *Morgan* court viewed the effects of corporate policy on the primary-duty analysis differently than its sister circuits and placed much greater emphasis on the time-allocation prong.<sup>82</sup>

Notably, the *Morgan* court was reviewing a denial of a motion for judgment as a matter of law.<sup>83</sup> In other words, so long as “reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions based on the evidence presented,” then the jury verdict against Family Dollar would be upheld.<sup>84</sup> Given the standard of review, the Eighth Circuit did not necessarily have to agree that the jury reached the “right” conclusion, only that there was sufficient evidence to support whatever outcome it had reached. The court’s rhetoric, however, powerfully conveyed its belief that the lower court correctly resolved the issue and thus that the Family Dollar store managers were not properly classified as exempt.<sup>85</sup> Essentially, the court said that had it been the jury, it likely would have reached the same result, and that the case wouldn’t have been close.

The importance to the *Morgan* court’s analysis of the fact that Family Dollar store managers spent eighty to ninety percent of their time on manual tasks<sup>86</sup> cannot be overstated. Not only had its sister circuits implicitly rendered the time element irrelevant in their primary-duty analyses, so too had scores of district courts.<sup>87</sup> While this

<sup>82</sup> See *infra* text accompanying notes 86-88.

<sup>83</sup> 551 F.3d at 1247 n.8.

<sup>84</sup> *Id.* at 1248 n.8 (quoting *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1299-1300 (11th Cir. 2007)); see also FED. R. CIV. P. 50(a) (setting forth the standard for judgment as a matter of law).

<sup>85</sup> Perhaps most revealing were the descriptive words that the court used to describe the sufficiency of the evidence supporting the jury’s verdict. For example, the court characterized the evidence showing that Family Dollar store managers dedicated upwards of eighty to ninety percent of their time to nonmanagerial tasks as “overwhelming.” *Morgan*, 551 F.3d at 1269. Similarly, the court characterized the evidence relating to the other relevant factors as “substantial” and thus “support[ive of] the jury’s verdict” that management was not the managers’ primary duty. *Id.* at 1270. Lastly, the evidence that the managers’ nonmanagerial functions were more important than their managerial ones and that they could not operate free from supervision was “ample,” according to the court. *Id.*

<sup>86</sup> These nonmanagerial duties included “stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms.” *Id.* at 1269.

<sup>87</sup> In a 2006 opinion, the Southern District of Florida compiled a number of cases in which retail store managers were found exempt despite spending disproportionate

essential fact was by no means a lynchpin of the *Morgan* court's analysis, it did imbue the court's assessment of the other relevant factors. Rather than simply turn to these factors and evaluate them in isolation, as *Burger King* and its progeny had done, the Eleventh Circuit took a more holistic, totality-of-the-circumstances approach.<sup>88</sup>

For example, under the relative-importance prong, the court highlighted Family Dollar's "business model," observing that the performance of a "large amount of manual labor" by store managers was "a key" to the company's economic success.<sup>89</sup> As the court's analysis typifies, the fact that Family Dollar store managers spent upwards of ninety percent of their time on nonmanagerial tasks had significance beyond just the time-allocation prong of the primary-duty test. In particular, it affected the court's determination of whether Family Dollar valued store managers' performance of managerial or nonmanagerial duties more.<sup>90</sup> How store managers allotted time among their various duties may not matter in isolation, but when considered in conjunction with the other primary-duty factors, it certainly could.

A second critical distinction the *Morgan* court made was that the Family Dollar store managers could not simultaneously perform their managerial and nonmanagerial duties.<sup>91</sup> Given that no overlap could occur between these two sets of duties, the eighty to ninety percent of managers' time spent on manual labor consisted solely of nonexempt work.<sup>92</sup> The court based its conclusion on evidence that for store managers "[t]he amount of manual labor overwhelmed their capacity to perform managerial duties concurrently during store hours."<sup>93</sup> As an

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amounts of time completing nonmanagerial tasks. See *Posely v. Eckerd Corp.*, 433 F. Supp. 2d 1287, 1302-03 (S.D. Fla. 2006) ("[T]he case law is replete with decisions holding managers of retail establishments to be exempt, notwithstanding the fact that they spent the majority of their time performing non-exempt tasks . . ."); see also *Jackson v. Advance Auto Parts, Inc.*, 362 F. Supp. 2d 1323, 1334 (N.D. Ga. 2005) (agreeing with the employer that assistant managers were exempt despite spending ninety percent of their time on manual work); *Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1273, 1279 (S.D. Fla. 2004) (finding a store manager exempt who spent ninety-five percent of his time on nonmanagerial tasks), *aff'd per curiam*, 140 Fed. App'x 168 (11th Cir. 2005).

<sup>88</sup> See *Morgan*, 551 F.3d at 1273 ("[O]ur affirmance of the jury's verdict . . . is based on a fact-intensive application of the factors espoused in the regulations, and not on a categorical approach of whether a particular employee is 'in charge.'").

<sup>89</sup> *Id.* at 1270.

<sup>90</sup> See *id.* ("[A]mple evidence supported a finding that the non-managerial tasks not only consumed 90% of a store manager's time but were of equal or greater importance to a store's functioning and success.").

<sup>91</sup> *Id.* at 1272-73.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1272.

example, the court explained, “A store manager unloading a truck and stocking the storeroom was not concurrently supervising the cashier out front.”<sup>94</sup>

While grounded in the factual record, the inference drawn by the Eleventh Circuit is starkly at odds with that of *Burger King* and its ilk in which the courts more or less assumed that managerial and nonmanagerial duties can be performed simultaneously. For instance, the First Circuit in *Burger King I* reasoned that “an employee can manage while performing other work, and that this other work does not negate the conclusion that his primary duty is management.”<sup>95</sup> The problem with the First Circuit’s approach in practice is how courts are to separate managerial from nonmanagerial duties. If the *Morgan* court had fully embraced the concept of concurrent duties, it might have found the Family Dollar store managers exempt. But even if the outcome remained the same, it nonetheless would have made for a much closer case. Managerial responsibilities, at least in theory, never cease under the concurrent-duties framework—thus eviscerating the divide between exempt and nonexempt work.<sup>96</sup> Accordingly, the fact that the *Morgan* court did not find that the Family Dollar store managers could perform their managerial and nonmanagerial tasks concurrently is significant.

On the relative-importance prong, the Eleventh Circuit in *Morgan* found that Family Dollar store managers’ nonmanagerial tasks “were of equal or greater importance to a store’s functioning and success” than their managerial ones.<sup>97</sup> Like the *Burger King* and *Speedway* courts, the *Morgan* court isolated *success* as the variable that should be

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<sup>94</sup> *Id.* at 1273.

<sup>95</sup> 672 F.2d 221, 226 (1st Cir. 1982). To buttress its reasoning, the First Circuit cited to the DOL regulations which provided an example of an employee who performed both managerial and nonmanagerial functions. *See id.* (citing 29 C.F.R. § 541.103 (1981) (amended 2004)) (providing an example of a manager who engages in sales work while simultaneously performing managerial supervisory tasks). The new regulations contain a separate section entitled “Concurrent Duties.” *See* 29 C.F.R. § 541.106 (2010) (stating explicitly that a manager can have concurrent duties and still be exempt).

<sup>96</sup> For an example of a court that has taken the concept of concurrent duties to its logical extreme, see *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 515-17 (4th Cir. 2011). The Fourth Circuit stated, “In short, whether the [store manager] was simply standing around or stocking shelves, she remained responsible for addressing any problem that could arise and did arise during the course of the daily retail operations.” *Id.* For further discussion, see *infra* subsection IV.C.2.

<sup>97</sup> *Morgan*, 551 F.3d at 1270.

used to compare relative importance;<sup>98</sup> however, it reached a much different conclusion. While noting that the store managers undertook managerial duties,<sup>99</sup> the court was unconvinced that the performance of those duties was more critical to the store's success than the nonmanagerial duties<sup>100</sup>—an inference that the Sixth Circuit posited as virtually incontrovertible in *Speedway*.<sup>101</sup> As previously mentioned, the Eleventh Circuit emphasized the sheer amount of manual labor performed by Family Dollar store managers and how that was “a key” to the company’s “business model.”<sup>102</sup> The court ruled that there was “ample evidence” to support the jury’s conclusion that the managers’ nonexempt duties were more important.<sup>103</sup>

Perhaps the greatest divergence between the *Morgan* court’s reasoning and that in *Burger King* lies in the importance of corporate policies with regard to the discretionary-powers and freedom-from-supervision prongs. As discussed above, the *Burger King* opinions posited that highly prescriptive corporate policies were a fact of modern retail business practices but that employees will almost always be able to exert some discretion within that framework.<sup>104</sup> The *Morgan* court drew a line in its opinion and found that Family Dollar’s manuals and corporate directives “micro-managed” the essential functions of its store managers to the point that no meaningful discretion could be exercised.<sup>105</sup> The court also expounded on the role of the district manager and how he further circumscribed what limited management responsibilities the Family Dollar store managers did have.<sup>106</sup> In summing up its primary-duty analy-

<sup>98</sup> See *id.* (comparing Family Dollar store managers’ managerial and nonmanagerial duties to determine which “were of equal or greater importance to a store’s functioning and success” (emphasis added)).

<sup>99</sup> See *id.* (“Admittedly, the store managers’ job description includes managerial duties.”).

<sup>100</sup> See *id.* (noting that the managers’ job description also included nonmanagerial duties and that these were “essential,” not merely “an incidental part of a managerial job”).

<sup>101</sup> See *supra* text accompanying notes 67-68.

<sup>102</sup> *Morgan*, 551 F.3d at 1270.

<sup>103</sup> *Id.*

<sup>104</sup> See *supra* notes 50-52 and accompanying text.

<sup>105</sup> See *Morgan*, 551 F.3d at 1270 (“The manuals and other corporate directives micro-managed the days and hours of store operations, the number of key sets for each store, who may possess the key sets, entire store layouts, the selection, presentation, and pricing of merchandise, promotions, payroll budgets, and staffing levels.” (emphasis added)).

<sup>106</sup> See *id.* at 1271 (outlining numerous ways in which district managers actively supervised store managers, including “enforcing the detailed store operating policies,”

sis, the court explained, “[A]mple evidence showed that the combination of sweeping corporate micro-management, close district manager oversight, and fixed payroll budgets left store managers little choice in how to manage their stores and with the primary duty of performing manual, not managerial, tasks.”<sup>107</sup> The *Morgan* court, in the end, resoundingly affirmed the jury verdict below<sup>108</sup> and in so doing cracked open the door for future store manager overtime suits.

### III. SHAKING UP THE PRIMARY-DUTY ANALYSIS: *MORGAN*'S EFFECT ON DOLLAR GENERAL STORE MANAGERS' OVERTIME SUITS

While the desire to attribute the divergent holdings of *Morgan* and its sister courts to “materially dissimilar” facts is tempting, it is ultimately unconvincing, as emerging Dollar General case law illustrates. Within the past year, numerous district courts have issued opinions either granting or denying Dollar General’s motions for summary judgment on the question of whether its store managers were properly classified as exempt executives.<sup>109</sup> Nearly all of these managers’ claims were initially certified as a class action in the Northern District of Alabama in 2004.<sup>110</sup> After years of preliminary motions and midway through a 2006 trial on the merits, the judge overseeing the case decertified the class because the store managers were not “similarly situated with respect to damages.”<sup>111</sup> The claims of individual Dollar General store managers have slowly been transferred out of the Northern District of Alabama and have begun to make their way through district courts nationwide.<sup>112</sup>

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“closely monitor[ing] each store’s weekly payroll,” and “controll[ing] employee hourly rates and pay raises”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* For a discussion of the court’s wage-comparison analysis, see *infra* subsection IV.C.3.

<sup>109</sup> See *infra* note 113.

<sup>110</sup> *Brown v. Dologencorp, Inc.*, No. 02-0673, slip op. at 1 (N.D. Ala. Jan. 12, 2004) (order certifying a nationwide class).

<sup>111</sup> *In re Dollar Gen. Corp. Fair Labor Standards Litig.*, MDL No. 1635, No. 02-0673, slip op. at 1-2 (N.D. Ala. Aug. 7, 2006) (order on motion to decertify).

<sup>112</sup> A subsequent class action was filed on August 8, 2006, against Dollar General in the same court alleging the same FLSA violations and is currently pending. Complaint at 2, *Richter v. Dologencorp, Inc.*, No. 06-1537 (N.D. Ala. Aug. 8, 2006). Judge Scott Coogler of the Northern District of Alabama conditionally certified a nationwide class on March 23, 2007. *Richter*, No. 06-1537, slip op. at 11 (Mar. 23, 2007) (order certifying a nationwide class).

District courts are divided on whether these store managers are exempt executives as a matter of law.<sup>113</sup> Because the facts in these cases are not materially dissimilar from one another, I will argue that it is not the facts, but rather the way in which courts are interpreting the pertinent factors under the primary-duty analysis, that is causing these divergent outcomes. In other words, the Dollar General cases demonstrate that, if given identical sets of facts and told to apply the executive exemption to them, different judges will reach different outcomes. Some might conclude that Dollar General store managers are exempt as a matter of law, others might view the cases as fairly evenly divided, and still others may feel strongly that the managers are not exempt.

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<sup>113</sup> Eleven district court cases have granted summary judgment to Dollar General. *See* *Aschenbrenner v. Dolgencorp, Inc.*, No. 10-0153, 2011 WL 2200630, at \*1 (D. Neb. June 3, 2011); *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*10 (W.D. Ky. May 23, 2011); *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 650 (E.D.N.C. 2011); *Brown-Harrison v. Dolgencorp of Tex., Inc.*, No. 09-0116, slip op. at 17 (N.D. Tex. Dec. 28, 2010); *Speak v. Dolgencorp of Tex., Inc.*, No. 09-0124, slip op. at 1 (N.D. Tex. Dec. 28, 2010); *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*1 (M.D. Tenn. Nov. 18, 2010); *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*1 (N.D. W. Va. Sept. 17, 2010); *Hartman v. Dolgencorp of Tex., Inc.*, No. 09-0009, slip op. at 12 (N.D. Tex. June 24, 2010); *Johnson v. DG Retail LLC*, No. 08-0123, 2010 WL 1929620, at \*1 (D. Utah May 13, 2010); *Noble v. Dolgencorp, Inc.*, No. 09-0049, slip op. at 1 (S.D. Miss. May 11, 2010); *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 1 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge), *adopted by* No. 09-0146 (Jun. 17, 2010) (order adopting report and recommendation of magistrate judge)

Seven district court cases have denied Dollar General's motions for summary judgment. *Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*20 (N.D. Iowa June 8, 2011); *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*1 (N.D.N.Y. May 9, 2011); *Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*13 (M.D. Pa. Feb. 3, 2011); *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*14 (M.D. Pa. Dec. 14, 2010); *Kanatzer v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*1 (E.D. Mo. July 8, 2010); *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*1 (W.D. Va. June 23, 2010); *Myrick v. Dolgencorp, LLC*, No. 09-0005, 2010 WL 146874, at \*1 (M.D. Ga. Jan. 11, 2010).

Most of the store managers in these suits worked at Dollar General sometime between 1999 and 2004, before the current DOL regulations went into effect in August 2004. Several cases, though, concerned employees under the new regulations. *See, e.g., Johnson*, 2010 WL 1929620, at \*1 (stating that the plaintiff became a store manager in 2007); *King*, No. 09-0146, slip op. at 2 (report and recommendation of magistrate judge) (noting that the plaintiff became assistant store manager in 2005 and store manager in 2006).

A. *What's the Difference? A Detailed Comparison  
of the Facts in the Dollar General Cases*

1. A Look at the Role of a Dollar General Store Manager:  
Core Managerial and Nonmanagerial Responsibilities

A comparison of the Dollar General<sup>114</sup> cases reveals that they share the same essential facts. The same corporate policies and Standard Operating Procedures (SOP) manual dictated the duties that all the store managers were to perform.<sup>115</sup> Organizationally, the managers were overseen by district managers and were the most senior and only salaried employees at their stores.<sup>116</sup> The job descriptions were uniform, outlining the same managerial responsibilities for all store managers.<sup>117</sup> All managers had the opportunity to receive annual performance bonuses,<sup>118</sup> and all were evaluated using the same performance criteria.<sup>119</sup>

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<sup>114</sup> “Dollar General . . . is a nationwide retail chain of discount, consumable goods, such as cleaning supplies, health and beauty aids, foods/snacks, housewares, toys, and basic apparel.” *Jones*, 2011 WL 2261480, at \*1. Roughly twenty-five percent of these goods sell for a dollar or less, with the remaining merchandise typically priced below ten dollars.” *Id.* Dollar General operates over 9600 stores in thirty-five states throughout the country. *Store Locations Map*, DOLLAR GEN., <http://www2.dollargeneral.com/About-Us/pages/store-locations-map.aspx> (last visited Oct. 15, 2011). As of October 2011, Dollar General operated no stores within the jurisdiction of the First Circuit and had only Arizona-based stores within the Ninth Circuit. *Id.*

<sup>115</sup> *See, e.g., Jones*, 2011 WL 2261480, at \*1 (explaining that Dollar General’s corporate headquarters provided “detailed operating-procedures manuals to every store manager”); *Aschenbrenner*, 2011 WL 2200630, at \*1 (noting that “Dollar General operated its stores according to uniform Standard Operating Procedure manuals”); *Roberts*, 2010 WL 4806792, at \*1 (“All Dollar General stores are operated according to a uniform Standard Operating Procedures (SOP) manual distributed by Dollar General’s corporate offices.”).

<sup>116</sup> *See, e.g., Anderson*, 2011 WL 1770301, at \*1 (finding that store managers “occupy the highest level of supervisory authority and are the only employees paid on a salaried basis” at their store and “report[] to a District Manager”); *Johnson*, 2010 WL 1929620, at \*1-2 (explaining that the store manager was the “only salaried employee at the store,” “the boss of the store,” and “reported to a District Manager”).

<sup>117</sup> *See, e.g., Anderson*, 2011 WL 1770301, at \*1-2 (compiling essential duties listed in the Dollar General store manager job description); *Plaunt*, 2010 WL 5158620, at \*2 (listing duties that plaintiff, had, which were the same duties as those listed in *Anderson*); *Mayne-Harrison*, 2010 WL 3717604, at \*8 (same).

<sup>118</sup> *See, e.g., Roberts*, 2010 WL 4806792, at \*1 (stating that “all [Dollar General] store managers . . . are eligible for a bonus”); *Myrick*, 2010 WL 146874, at \*7 (noting that the plaintiff store manager had earned several bonuses for her job performance while working at Dollar General).

<sup>119</sup> Dollar General divided these performance criteria into seven categories: sales volume, safety awareness, loss prevention (or “inventory shrink”), training and development, controllable expenses, customer satisfaction, and merchandising. *Aschenbren-*

While the store managers offered varied testimony about the amount of time spent on nonexempt work—with some claiming they allocated upwards of ninety percent of their time to such duties<sup>120</sup>—all spent at least a majority of their time performing nonmanagerial tasks like cleaning, stocking shelves, and working the cash register.<sup>121</sup> Alongside the nonexempt manual labor they performed, Dollar General store managers undertook numerous core managerial responsibilities as provided in the company’s uniform job description.<sup>122</sup> These responsibilities can be split into two key functional areas: (1) assembling and supervising store staff and (2) overseeing store operations.

On the staffing side, the store managers recruited, interviewed, and hired new employees, although they typically could not hire more senior personnel, like assistant managers, without getting approval from their district managers.<sup>123</sup> Once new employees were hired, store managers trained and evaluated them, and recommended deserving employees for raises and promotions.<sup>124</sup> Store managers also informed employees of the expectations regarding their performance, conduct,

*ner*, 2011 WL 2200630, at \*2; *accord Anderson*, 2011 WL 1770301, at \*2; *Mayne-Harrison*, 2010 WL 3717604, at \*21.

<sup>120</sup> *See, e.g., Jones*, 2011 WL 2261480, at \*2 (explaining that the plaintiff store manager allegedly spent “only ten percent” of her time on managerial tasks); *Kanatzter v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*2 (E.D. Mo. July 8, 2010) (“According to Kanatzter, she spends nearly all of her time—up to 90% of her time—on . . . manual duties . . . .”); *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*3 (W.D. Va. June 23, 2010) (observing that the plaintiff store manager claimed to have “spent ten percent of her time, about six hours each week, performing management duties”).

<sup>121</sup> *See, e.g., Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*6 (W.D. Ky. May 23, 2011) (“Leonard spends about 70% of her time on manual labor or non-management issues.”); *Plaint*, 2010 WL 5158620, at \*7 (“While it is not clear what percentage of Plaintiff’s time was spent on managerial tasks, we will assume she spent less than 50% of her time performing purely managerial tasks.”); *Johnson*, 2010 WL 1929620, at \*3 (noting that the plaintiff store manager spent between seventy and eighty percent of her time on nonmanagerial work).

<sup>122</sup> *See cases cited supra* note 117.

<sup>123</sup> *See, e.g., Jones*, 2011 WL 2261480, at \*15 (commenting that the store manager “was responsible for taking applications, reviewing applications, interviewing job applicants, checking references, selecting, and hiring certain employees”); *Leonard*, 2011 WL 2009937, at \*2 (finding that the store manager spent roughly five percent of her work week “reviewing [job] applications, evaluating them and deciding on call backs, conducting interviews, and finally making a hiring recommendation”).

<sup>124</sup> *See, e.g., Aschenbrenner*, 2011 WL 2200630, at \*4 (asserting that the store manager was responsible for “training and ongoing development of employees,” as well as “making recommendations for adjustments to [their] pay rates”); *Plaint*, 2010 WL 5158620, at \*2 (finding that the plaintiff store manager “trained[,] evaluated[,] and counseled employees” and “recommended [them] for pay raises and promotions”).

and safety,<sup>125</sup> as well as set staff schedules and assigned work to employees.<sup>126</sup> While store managers did not have the power to suspend or fire employees, they could recommend that the district manager do so.<sup>127</sup> On the business operations side, store managers were responsible for maximizing store profitability by, among other things, keeping the shelves stocked with merchandise,<sup>128</sup> reducing inventory loss,<sup>129</sup> and maintaining cash control.<sup>130</sup> In addition, they oversaw the unloading and display of merchandise<sup>131</sup> and dealt with customer complaints.<sup>132</sup>

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<sup>125</sup> See, e.g., *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*1 (N.D.N.Y. May 9, 2011) (listing the communication of “performance, conduct and safety expectations” to employees as an essential job function of the store manager); *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 5 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge) (noting that the store manager held regular store meetings “to communicate to employees how to do their job; to discuss ongoing problems in the store; to air grievances; and to announce and explain new policies”), adopted by No. 09-0146 (June 17, 2010) (order adopting report and recommendation of magistrate judge).

<sup>126</sup> See, e.g., *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 644 (E.D.N.C. 2011) (finding that the store manager “directed the work of her employees by scheduling when they would work and by assigning or delegating daily tasks to them”); *Kanatz v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*4 (E.D. Mo. July 8, 2010) (explaining that, while the store manager “schedule[d] employee work shifts” and “assign[ed] tasks to the other employees at the store,” corporate dictates constrained her discretion in doing so).

<sup>127</sup> See, e.g., *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*2 (M.D. Tenn. Nov. 18, 2010) (“[W]hile authority to terminate employees rested with the district manager, Roberts . . . made termination recommendations to her district manager.”); *Kanatz v. Dolgencorp, Inc.*, 2010 WL 2720788, at \*1 (mentioning that if an employee seriously misbehaves, then the store manager “must report it to the district manager, who then takes responsibility for the situation”).

<sup>128</sup> See, e.g., *Aschenbrenner*, 2011 WL 2200630, at \*4 (listing “directing the flow of merchandise from the back door delivery to the sales floor” as a job performed by the store manager); *Plaunt*, 2010 WL 5158620, at \*2 (explaining that the store manager “facilitated efficient staging, stocking, and storage of merchandise”).

<sup>129</sup> See, e.g., *Plaunt*, 2010 WL 5158620, at \*2 (finding that the store manager “evaluated operating statements to identify . . . potential theft” and “maintained accurate inventory levels by controlling damage [and] markdowns”); *Roberts*, 2010 WL 4806792, at \*3 (explaining that the store manager played a “key role in reducing ‘shrinkage,’ or avoiding loss” by “ensuring that vendors were honoring their delivery obligations, preventing shoplifting, ensuring that her employees were not stealing, and marking down damaged merchandise, rather than simply throwing it away”).

<sup>130</sup> See, e.g., *Leonard v. Dolgencorp, Inc.*, No. 10-0057, 2011 WL 2009937, at \*3 (W.D. Ky. May 23, 2011) (“Leonard was responsible for proper cash handling procedures at her store and would monitor daily reports showing cashier shortages, voids and refunds.”); *Anderson*, 2011 WL 1770301, at \*3 (listing “ensuring that cash registers ‘balanced’” as one of the store manager’s duties).

<sup>131</sup> See, e.g., *Roberts*, 2010 WL 4806792, at \*4 (explaining that hundreds of boxes of inventory arrived on “truck day” every week and that the store manager facilitated the unloading and stocking of merchandise on these days); *Hale v. Dolgencorp, Inc.*, No.

Standard operating procedures within Dollar General, however, limited the degree of managerial discretion that the store managers could exercise. When scheduling employees, store managers had to adhere to the weekly labor budget set by district managers.<sup>133</sup> The weekly “truck day”—the day each week when a store’s inventory would arrive—typically consumed the majority of the labor budget as hundreds of boxes<sup>134</sup> had to be unloaded and unpacked, and then the merchandise stocked or stored.<sup>135</sup> Store managers could not set the pay rate of their employees,<sup>136</sup> could not hire “key-carrying” personnel, such as associate managers and lead clerks,<sup>137</sup> and could not fire subordinates.<sup>138</sup>

Store managers exerted minimal control over the type and quantity of products sold in their stores, as an automated inventory system

09-0014, 2010 WL 2595313, at \*3 (W.D. Va. June 23, 2010) (noting that the store manager was responsible for “unload[ing] supply trucks and plac[ing] merchandise on the store floors”).

<sup>132</sup> See, e.g., *Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*2 (M.D. Pa. Feb. 3, 2011) (commenting that the store manager “handled customer complaints if another employee could not resolve” the issue).

<sup>133</sup> See, e.g., *Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*1 (N.D. Iowa June 8, 2011) (“District managers strictly control[ed] the number of labor hours given to each store, and their approval [was] required before a store’s labor budget [could be] exceeded by the store manager.”); *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 635 (E.D.N.C. 2011) (explaining that the district manager “handed down a labor budget . . . each week”).

<sup>134</sup> See, e.g., *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 635 (explaining that “[t]he store would get one truck delivery per week and would receive about 1200 or more boxes of merchandise”); *Roberts*, 2010 WL 4806792, at \*4 (stating that “[s]tores generally received between 800 and 1200 boxes of merchandise on truck day”).

<sup>135</sup> See, e.g., *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 635 (“The majority of the labor budget was spent on truck day and the day after, which did not leave many hours to schedule for the rest of the week.”); *Hale*, 2010 WL 2595313, at \*3 (describing how the store manager would “save her staff’s hours for truck day so merchandise could be placed in the store within twenty-four hours” and how, as a result, the store operated with a “skeleton crew” for the remainder of the week).

<sup>136</sup> See, e.g., *Aschenbrenner v. Dolgencorp, Inc.*, No. 10-0153, 2011 WL 2200630, at \*16 (D. Neb. June 3, 2011) (noting that the plaintiff could not “set[] the initial pay rate of employees”); *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*14 (M.D. Pa. Dec. 14, 2010) (same).

<sup>137</sup> See, e.g., *Jones*, 2011 WL 2261480, at \*15 (stating that plaintiff “was not permitted to hire a full-time, key-carrying employee without the district manager’s approval”); *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*1 (W.D. Ky. May 23, 2011) (reporting that “interview[ing] applicants for ‘key carrier positions’” was the district manager’s duty).

<sup>138</sup> See cases cited *supra* note 127.

handled the bulk of merchandise ordering.<sup>139</sup> “Plan-O-Grams” dictated where and how to display much, if not all, of a store’s merchandise.<sup>140</sup> Dollar General’s SOP manuals further delineated how store managers were to complete certain tasks, such as “how to answer the telephone while also running the cash register, what items should be hung on a clipboard in the store’s office, how to handle weather emergencies, and what steps should be taken to ensure the floor was clean.”<sup>141</sup>

District managers typically supervised between fifteen to twenty-five store managers at a time<sup>142</sup> and would check up on stores in person roughly every month and stay anywhere from between several minutes to several hours.<sup>143</sup> District managers also tended to leave daily or weekly voicemail messages instructing store managers on certain issues.<sup>144</sup>

## 2. Weekly Salaries and Bonuses: Some Differences, but Not Any of Significance

Dollar General store managers’ weekly salaries and annual bonuses exhibited much greater divergence than did their managerial and non-managerial responsibilities and the manner in which their district managers treated them. Managers’ weekly salaries overwhelmingly

<sup>139</sup> See, e.g., *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 643 (explaining that “store merchandise is automatically ordered by Dollar General’s Basic Stock Replenishment System”); *Roberts*, 2010 WL 4806792, at \*3 (“[S]tore managers have virtually no control over the specific merchandise that is sold in the store, and the vast majority of ‘purchasing’ for the store is done by an automatic system that orders more of a good as it is sold.”).

<sup>140</sup> See, e.g., *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*13 (N.D. W. Va. Sept. 17, 2010) (noting that a “planogram” directs where “most” merchandise must be placed in the store, with placement of ninety percent of seasonal products being determined in such a manner by Dollar General’s corporate office); *Hale*, 2010 WL 2595313, at \*3 (“Typically, ninety percent of Hale’s store was organized according to the Plan-O-Gram . . .”).

<sup>141</sup> *Aschenbrenner*, 2011 WL 2200630, at \*15; accord *Jones*, 2011 WL 2261480, at \*1.

<sup>142</sup> See, e.g., *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*1 (N.D.N.Y. May 9, 2011) (noting that district managers “over[saw] from fifteen to twenty-five stores”); *Roberts*, 2010 WL 4806792, at \*2 (describing how the plaintiff’s district manager “generally oversaw between 16-18 stores”).

<sup>143</sup> See, e.g., *Speak v. Dolgencorp of Tex., Inc.*, No. 09-0124, slip op. at 13 (N.D. Tex. Dec. 28, 2010) (observing that the district manager visited the plaintiff’s store about twice a month and that these visits were “typically only a few hours long”); *Hale*, 2010 WL 2595313, at \*4 (explaining that the district manager visited the store manager’s location “once every few months for twenty to thirty minutes”).

<sup>144</sup> See, e.g., *Roberts*, 2010 WL 4806792, at \*2 (noting that the district manager left “regular, often daily,” voicemails for the store manager); *Mayne-Harrison*, 2010 WL 3717604, at \*3 (stating that the store manager received voicemail messages from the district manager “at least three times a week”).

fell between \$400 and \$600,<sup>145</sup> with a range of \$313 to \$768.<sup>146</sup> Notably, the store manager earning the most per week (\$768) managed to overcome Dollar General's summary judgment motion.<sup>147</sup> More generally, though, the differences in salary are inconsequential because (1) the salaries for those store managers who prevailed against Dollar General at the summary judgment phase and those who did not were roughly the same on average,<sup>148</sup> and (2) even if they were not, salaries are only considered under the wage-comparison prong of the primary-duty test—a prong that the Dollar General courts only marginally considered and gave little, if any, weight.<sup>149</sup>

Whether and how much store managers received in bonuses constitutes the most variable aspect among Dollar General cases. In some instances, store managers received no bonuses.<sup>150</sup> In others, they received bonuses worth thousands of dollars.<sup>151</sup> Bonuses in and of themselves, however, have no significance. Like store managers' weekly salaries, bonuses only enter the primary-duty picture when courts consider the wage-comparison prong.

<sup>145</sup> See, e.g., *Jones*, 2011 WL 2261480, at \*2 (explaining that the store manager's weekly salary ranged from \$440 to \$515); *Johnson v. DG Retail LLC*, No. 08-0123, 2010 WL 1929620, at \*3 (D. Utah May 13, 2010) (noting that the store manager received a weekly salary of \$538.40); *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 27 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge) (stating that the store manager earned a weekly salary between \$490 and \$500 during her tenure with Dollar General), *adopted by* No. 09-0146 (June 17, 2010) (order adopting report and recommendation of magistrate judge).

<sup>146</sup> See *Kanatzer v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*2 (E.D. Mo. July 8, 2010) (stating that the store manager's salary was \$768 per week); *Hale*, 2010 WL 2595313, at \*3 (noting that the store manager's weekly salary was \$313 at one point).

<sup>147</sup> See *Kanatzer*, 2010 WL 2720788, at \*5 ("Viewing Kanatzer's job as a whole, Dolgencorp has not shown that Kanatzer is exempt.").

<sup>148</sup> The average weekly salary of store managers who prevailed against Dollar General's summary judgment motions was \$489, and their median weekly salary was \$464. For store managers who did not, both the average weekly salary and median weekly salary was \$495. This translates into a \$312 average or \$1612 median annual salary difference. These averages and medians incorporated bonuses earned by the store managers.

<sup>149</sup> See *infra* subsection IV.C.3.

<sup>150</sup> See, e.g., *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*1 (M.D. Pa. Dec. 14, 2010) (stating that the store manager "never earned . . . a bonus"); *Noble v. Dolgencorp, Inc.*, No. 09-0049, slip op. at 3 (S.D. Miss. May 11, 2010) (explaining that the store manager "was eligible for bonuses throughout her employment but never received one").

<sup>151</sup> See, e.g., *Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*1 (M.D. Pa. Feb. 3, 2011) (noting that in 2002 the store manager received a bonus of \$7150.25 to share with store staff); *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*1 (M.D. Tenn. Nov. 18, 2010) (highlighting that the store manager received bonuses of \$7071 and \$9271 in 2001 and 2002, respectively).

Although bonuses did vary, they were spread out rather evenly among cases where summary judgment was granted and where it was not. For those store managers whose claims did not survive summary judgment, seven received a bonus<sup>152</sup> and two did not,<sup>153</sup> while three cases are unclear as to whether the manager earned a bonus.<sup>154</sup> For those managers whose claims survived summary judgment, four received a bonus<sup>155</sup> and one did not,<sup>156</sup> while courts in two cases made no mention of bonuses.<sup>157</sup> Moreover, the *Hartman*, *King*, *Roberts*, *In re Dollar General*, and *Mayne-Harrison* courts, which all granted summary judgment to Dollar General, did not fully factor whether store managers earned a bonus into their primary-duty analyses.<sup>158</sup> All in all,

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<sup>152</sup> See *Aschenbrenner v. Dolgencorp, Inc.*, No. 10-0153, 2011 WL 2200630, at \*19 (D. Neb. June 3, 2011); *Leonard v. Dolgencorp, Inc.*, No. 10-0057, 2011 WL 2009937, at \*3 (W.D. Ky. May 23, 2011); *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 633 (E.D.N.C. 2011); *Roberts*, 2010 WL 4806792, at \*1; *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*2 (N.D. W. Va. Sept. 17, 2010); *Hartman v. Dolgencorp of Tex., Inc.*, No. 09-0009 (N.D. Tex. June 24, 2010); *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 14 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge), *adopted by* No. 09-0146 (June 17, 2010) (order adopting report and recommendation of magistrate judge).

<sup>153</sup> See *Johnson v. DG Retail LLC*, No. 08-0123, 2010 WL 1929620, at \*1 (D. Utah May 13, 2010); *Noble*, No. 09-0049, slip op. at 3.

<sup>154</sup> See *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 635-36 (E.D.N.C. 2011); *Brown-Harrison v. Dolgencorp of Tex., Inc.*, No. 09-0116, slip op. at 2 (N.D. Tex. Dec. 28, 2010); *Speak v. Dolgencorp of Tex., Inc.*, No. 09-0124, slip op. at 8 (N.D. Tex. Dec. 28, 2010). The *In re Dollar General Stores* case involved two store managers' claims. The case notes that one of these managers received bonuses but says nothing about the other.

<sup>155</sup> See *Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*2 (N.D. Iowa June 8, 2011); *Pierce*, 2011 WL 398366, at \*1; *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*3 (W.D. Va. June 23, 2010); *Myrick v. Dolgencorp, LLC*, No. 09-0005, 2010 WL 146874, at \*7 (M.D. Ga. Jan. 11, 2010).

<sup>156</sup> See *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*1 (M.D. Pa. Dec. 14, 2010).

<sup>157</sup> See *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*13 (N.D.N.Y. May 9, 2011); *Kanatzer v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788 (E.D. Mo. July 8, 2010).

<sup>158</sup> The *Hartman* court mentioned that the store manager had received bonuses, but then did not incorporate that fact into the wage-comparison prong of the primary-duty analysis. *Hartman v. Dolgencorp of Tex., Inc.*, No. 09-0009, slip op. at 12 (N.D. Tex. June 24, 2010). The *King* court calculated the wage differential between the store manager and her assistant both with and without bonuses and determined that the difference was significant, even excluding bonuses from the calculation. *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 1, 27-28 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge), *adopted by* No. 09-0146 (June 17, 2010) (order adopting report and recommendation of magistrate judge). Following the Sixth Circuit in *Speedway*, the *Roberts* court decided that it "should estimate weekly hours on the low end, to compensate for the fact that the plaintiff was eligible for a bonus." *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*10 (M.D. Tenn. Nov. 18,

bonuses played an insignificant, if not nonexistent, role in the Dollar General cases.

B. *It's Not About the Facts: It's About Burger King and Morgan*

The ongoing Dollar General litigation pits the contrasting modes of reasoning displayed in the *Burger King* cases and *Morgan* against one another. A *Burger King*, *Murray*, or *Speedway* quote is likely to be found in those opinions granting summary judgment to Dollar General, while *Morgan* reigns as the supreme authority for those courts denying summary judgment.

In assessing the relative importance of managerial versus nonmanagerial duties, courts finding Dollar General store managers exempt as a matter of law determined that the performance of managerial duties was more critical to the *success* of their store. Some treated the issue summarily,<sup>159</sup> while others explored the relative-importance prong in greater depth. The Eastern District of North Carolina presented the most thorough analysis and pointed to the plaintiff's own testimony, her job description listing oversight responsibilities, her evaluations based on store performance, and her opportunity for bonuses based on store success.<sup>160</sup> In stating their conclusions, a number of

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2010). The plaintiff estimated that she worked between forty-five and eighty hours per week, so the court calculated her hourly wage based on a fifty-hour work week. *Id.* While the *Mayne-Harrison* and *In re Dollar General* courts factored bonuses into the wage-comparison analysis, they determined that the store manager in each case "was making more, or at least the same, in her management positions as nonexempt employees." *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 648-49 (quoting *Jones v. Va. Oil Co.*, 69 Fed. App'x 633, 639 (4th Cir. 2003) (internal quotation marks omitted)); *accord Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*23 (N.D. W. Va. Sept. 17, 2010). The courts' statements suggest that it was more the wage-comparison approach they undertook than the bonuses themselves that drove their conclusions. For instance, the *Morgan* court would have found that a manager making the same amount as a nonexempt employee tilted in favor of finding the manager nonexempt—in other words, the opposite of what the *Mayne-Harrison* and *In re Dollar General* courts found.

<sup>159</sup> See, e.g., *Roberts*, 2010 WL 4806792, at \*9 ("In light of . . . the clear language of *Speedway*, the court must conclude that the plaintiff's managerial role was 'much more important' than her non-managerial role." (quoting *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 505 (6th Cir. 2007))).

<sup>160</sup> *In re Dollar Gen. Stores*, 766 F. Supp. 2d at 640-43; see also *Mayne-Harrison*, 2010 WL 3717604, at \*21 (commenting that plaintiff was "the one in charge at the store"); *Johnson v. DG Retail LLC*, No. 08-0123, 2010 WL 1929620, at \*4 (D. Utah May 13, 2010) (evaluating plaintiff on managerial skills and profitability of store and noting that she was "ultimately in charge" and "the boss" of the store); *King*, No. 09-0146, slip op. at 20-23 (report and recommendation of magistrate judge) (pointing to plaintiff's performance review, her testimony, and her job description as evidence that her managerial duties were more important).

courts borrowed the language used in the Sixth Circuit's *Speedway* opinion; for instance, in *King v. Dolgencorp, Inc.*, the Middle District of Pennsylvania held: "If [the] plaintiff did not perform her nonmanagerial duties, her Dollar General store may not have functioned well; but if she did not perform her managerial duties, the store would have been incapable of doing business."<sup>161</sup>

Meanwhile, those district courts that denied Dollar General's motion for summary judgment reached the conclusion that reasonable minds could disagree about whether managerial or nonmanagerial duties were of greater importance.<sup>162</sup> What stood out most prominently to these courts was the overwhelming portion of a store manager's work day that nonmanagerial duties consumed.<sup>163</sup> Much like the *Morgan* court, these courts placed great weight on this vast disparity in time allocation between exempt and nonexempt work. As such, it was unclear whether store managers' managerial or nonmanagerial duties were more important. Several courts also pointed to the fact that these managers shared many similar responsibilities with the assistant manager, thus devaluing the significance of these managerial duties in the courts' eyes.<sup>164</sup>

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<sup>161</sup> *King*, No. 09-0146, slip op. at 23 (report and recommendation of magistrate judge); see also *Roberts*, 2010 WL 4806792, at \*9 ("As in *Speedway*, if the plaintiff did not [perform her nonmanagerial tasks,] the performance of the store would certainly be adversely affected; however, if she did not [do her managerial tasks,] the store would cease to function at all."); *Mayne-Harrison*, 2010 WL 3717604, at \*21 ("If Mayne-Harrison had not performed her nonmanagerial tasks her store may not have performed well; but if she had not performed her managerial functions . . . the store would not have operated at all.").

<sup>162</sup> See, e.g., *Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*14 (N.D. Iowa June 8, 2011) (finding that Dollar General had "failed to meet [its] burden of establishing no genuine issue of material fact on the question of whether Joyner's managerial duties were more important . . . than her non-managerial duties"); *Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*9 (M.D. Pa. Feb. 3, 2011) ("A reasonable jury could conclude . . . that Dolgencorp valued Pierce's manual labor more highly than her managerial functions.").

<sup>163</sup> See, e.g., *Jones*, 2011 WL 2261480, at \*14 ("While it is true that Joyner was responsible, as a store manager, for ensuring the store's profitability, she was also responsible for performing a substantial amount of the manual labor necessary to ensure its profitability . . ."); *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*11 (N.D.N.Y. May 9, 2011) (finding the "restrictiveness with which Dollar General . . . allot[ted] its labor budget" as "most significant[]" for why summary judgment was inappropriate on the relative-importance prong of the primary-duty test).

<sup>164</sup> See *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*8 (M.D. Pa. Dec. 14, 2010) ("A reasonable jury could, however, also conclude that, given the fact that Plaunt's ASM had a similar job description . . . that if Plaunt did not perform her managerial functions the store would have continued to operate, albeit less efficiently."); *Myrick v. Dolgencorp, LLC*, No. 09-0005, 2010 WL 146874, at \*5 n.7

The crux of the disagreement between these district courts, like in *Burger King I* and *II* and *Morgan*, centers on the discretionary-powers prong and what effect, if any, corporate policies have on store managers' ability to exercise managerial discretion. Those courts holding managers exempt did not find corporate strictures problematic, while those that rejected Dollar General's motions did. Among those granting summary judgment, the *Roberts* court, for example, noted that "stringent" oversight and "detailed company policies and standardized operating procedures" are not fatal to the employer's primary duty argument.<sup>165</sup> The court went on to find that the plaintiff had discretion to run the store on a day-to-day basis and listed a number of areas in which she exercised that discretion.<sup>166</sup> In contrast, the court in *Kanitzer v. Dolgencorp., Inc.*, found that the plaintiff's discretion in managerial duties was "substantially limited by company policies and the oversight of her supervisors."<sup>167</sup> Likewise, the district court in *Hale v. Dolgencorp, Inc.*, determined that a juror could find that the plaintiff exercised only infrequent discretion,<sup>168</sup> while in *Myrick v. Dolgencorp, LLC*, the district court noted that the plaintiff did not feel she had discretion to run the store.<sup>169</sup>

#### IV. A LOPSIDED AFFAIR: REBALANCING AN EXEMPTION THAT UNDULY FAVORS RETAIL EMPLOYERS OVER THEIR STORE MANAGERS

As these district court opinions reveal, Dollar General store managers represent a class of workers who fall squarely on the dividing line between overtime exemption and nonexemption. On the one hand, these managers undeniably undertook managerial duties, were evaluated on how well they performed those duties, and could be rewarded with bonuses if their stores met certain performance criteria. Although limited by corporate policy, these managers were largely responsible for what happened on a day-to-day basis at their stores. District managers kept tabs on what these managers were doing, but only visited in person from time to time. On the other hand, Dollar Gen-

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(M.D. Ga. Jan. 11, 2010) ("It should also be noted that many of Myrick's managerial tasks were also performed by non-salaried employees.").

<sup>165</sup> *Roberts*, 2010 WL 4806792, at \*9 (quoting *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 499 (6th Cir. 2007)).

<sup>166</sup> *Id.* at \*9.

<sup>167</sup> No. 09-0074, 2010 WL 2720788, at \*4 (E.D. Mo. July 8, 2010).

<sup>168</sup> No. 09-0014, 2010 WL 2595313, at \*5 (W.D. Va. June 23, 2010).

<sup>169</sup> 2010 WL 146874, at \*5.

eral store managers also spent significant portions of their time performing menial tasks. It is unclear, then, whether the managerial duties or the sheer amount of grunt work expected of these workers was more critical to the store's success. Similarly, the discretion exercised by the store managers could be characterized as severely circumscribed and insignificant. Also, the store managers were arguably not free from supervision, as the district managers could monitor the stores' performance remotely and intervene if necessary.

Despite the compelling case for nonexemption, the governing contours of the executive exemption—initially outlined in *Burger King II* and further refined in the updated DOL regulations—overwhelmingly favor Dollar General. The Fourth Circuit's ruling in *In re Family Dollar FLSA Litigation*,<sup>170</sup> with which it joined the *Burger King II* bandwagon, leaves little doubt that district courts denying summary judgment to Dollar General stand a sizeable risk of being overturned on appeal. While technically speaking the legal burden to prove the executive exemption falls on the employer—since the exemption is an affirmative defense to paying overtime wages—and the exemption is to be narrowly construed,<sup>171</sup> store managers bear the burden of overcoming decades of appellate precedent denying fellow managers overtime pay.

A. *Tightening the Noose on Retail Supervisors' Overtime Claims:  
The Anticipated Effect of the Updated DOL Regulations*

Going forward, retail supervisors will also have to surmount the 2004 revisions to the DOL regulations, which, while not altering the executive exemption significantly, codify circuit case law unfavorable to overtime claims. The current regulations, for instance, minimize the importance of the time-allotment prong of the primary-duty analysis. Like the previous regulations, the current ones explain that “[t]ime alone . . . is not the sole test” but add that “nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work.”<sup>172</sup> The updated regulations provide an illustrative example directed at retail supervisors:

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<sup>170</sup> 637 F.3d 508 (4th Cir. 2011).

<sup>171</sup> Cf. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (noting in discussing another FLSA exemption that “[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people”).

<sup>172</sup> 29 C.F.R. § 541.700(b) (2010). This section goes on to explain: “Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a

[A]ssistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register.<sup>173</sup>

The significance of this additional clause and illustration is to shift the primary-duty analysis even more overtly to the other pertinent factors delineated in the regulations.

Drawing heavily on the *Burger King* cases and in contrast to their predecessors, the current regulations introduce the idea of “concurrent duties.” The term “concurrent duties” essentially means that an employee can perform both managerial and nonmanagerial duties simultaneously, a notion that makes it difficult to separate managerial from nonmanagerial responsibilities for primary-duty purposes. The regulations provide, “Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work.”<sup>174</sup> Similar to the time-allocation provisions, an example—again directed at retail supervisors—offers insight into how the regulation might be applied:

[A]n assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager’s primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.<sup>175</sup>

Such a broad understanding of what constitutes concurrent duties complicates low-level supervisors’ requests for overtime pay.

Perhaps the most significant change to the executive-exemption test is that the discretionary-powers prong has been dropped from the primary-duty analysis. As the *Morgan* opinion and those district court opinions denying Dollar General summary judgment exemplify, this

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conclusion.” *Id.* The former regulations, by contrast, provided: “Time alone . . . is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion.” 29 C.F.R. § 541.103 (2003) (amended 2004).

<sup>173</sup> 29 C.F.R. § 541.700(c) (2010).

<sup>174</sup> *Id.* § 541.106(a).

<sup>175</sup> *Id.* § 541.106(b).

prong offered courts significant leeway in how to interpret the facts at hand. Some courts—most notably the Eleventh Circuit—have already decided to fold the issue of discretion into the freedom-from-supervision prong.<sup>176</sup> Still, the removal of this factor from those listed in the regulations makes it equally, if not more, likely that, going forward, discretion will play less and less of a role in determining an employee's primary duty. Such a change will make it that much harder for retail supervisors to prevail on their overtime claims.

### B. *Moving Beyond Burger King: The Call for a More Dynamic Primary-Duty Inquiry*

While the forecast for Dollar General-type store managers' overtime suits looks gloomy, especially after the Fourth Circuit's *In re Family Dollar* ruling,<sup>177</sup> it is important to remember that the DOL regulations call for a case-by-case application of the executive exemption and that the outcome in a particular case ultimately hinges on an individual judge's weighing of the primary-duty factors. The DOL regulations and prevailing circuit precedent undoubtedly tilt the balance in favor of employers and exemption and seriously circumscribe

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<sup>176</sup> The Eleventh Circuit in *Morgan* explicitly took this position: "Having discretionary power is one aspect of freedom from supervision." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1270 n.57 (11th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009). The court highlighted that the current regulations require a primary-duty determination "to be made 'with the major emphasis on the character of the employee's job as a whole.'" *Id.* (quoting 29 C.F.R. § 541.700(a) (2006)). The court concluded that "the new regulations do not preclude, and are consistent with, our consideration of the frequency with which an employee exercises discretionary powers in our primary duty analysis." *Id.*; see also *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*9 (M.D. Tenn. Nov. 18, 2010) (noting that while the new regulations omit the discretionary-powers prong, "issues of manager authority and control remain centrally relevant" to the primary-duty analysis).

<sup>177</sup> An opinion coming after *In re Family Dollar*—by the same Western District of Virginia judge who denied Dollar General's summary judgment motion in *Hale v. Dolgencorp, Inc.*—portends the negative impact the Fourth Circuit's opinion will have on overtime claims. In reviewing the proposed settlement agreements between Hale and other store managers with Dollar General, the judge noted that the settlement amounts were "significantly less than the amount of back wages and liquidated damages claimed" and that the "claims, if believed by a jury, might reasonably result in a verdict for the plaintiff[s]." *Taylor v. Dolgencorp, Inc.*, No. 09-0002, 2011 WL 1626557, at \*1 (W.D. Va. Apr. 28, 2011). While the judge pointed to his *Hale* opinion to demonstrate the legitimacy of the plaintiffs' overtime claims, he also conceded that the Fourth Circuit's *In re Family Dollar* opinion "on similar facts" had "substantially undercut [his] decision." *Id.* Were the judge confronted with another Dollar General case, his analysis would likely differ from that in *Hale* and the outcome very well could be summary dismissal of the manager's claims.

the ambit of lower courts' judicial interpretation. Though taut, the noose around low-level retail supervisors' overtime claims has not entirely strangled judges' ability to construe the primary-duty factors in a way that levels the playing field between employer and employee. For instance, in individual cases, courts must resolve a series of interpretative questions: How should the relative importance of managerial and nonmanagerial duties be determined? How significantly, if at all, do detailed corporate policies curtail managerial discretion? How great must the difference be between managers' wages and those of subordinates for the wage-comparison prong to weigh in favor of exemption? And, in the end, how should all of these factors be balanced? Are there any that should be given more weight than others? The way in which district judges analyze and measure these considerations can make the difference between store managers' being found exempt as a matter of law and getting an opportunity to put their cases before a jury.<sup>178</sup>

One would imagine that district courts in circuits that have definitively pronounced on these questions in favor of exemption, like the First, Second, Fourth, Sixth, and Eighth Circuits, would adhere to the appellate courts' interpretative approach. At least in the ongoing Dollar General litigation, that has not always been the case.<sup>179</sup> District courts in both the Second and Eighth Circuits have denied Dollar General's summary judgment motions despite the *Burger King II* and *Murray* precedents, respectively, that seemingly settled how the primary-duty analysis should be done.<sup>180</sup> The Northern District of New York in *An-*

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<sup>178</sup> At least in the Dollar General cases, it is more accurate to say getting an opportunity to negotiate a favorable settlement. Nearly all of the store managers who survived summary judgment have settled with Dollar General. See *infra* note 226.

<sup>179</sup> Thus far, district courts in the Sixth Circuit have leaned heavily on the *Speedway* opinion and used it as their controlling precedent when conducting the primary-duty analysis. See *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*1 (W.D. Ky. May 23, 2011) ("Recently, in *Thomas v. Speedway SuperAmerica*, the Sixth Circuit set out a clear roadmap for determining [whether a Dollar General store manager's primary duty is management]. The Court will follow this roadmap, noting that the facts in *Speedway SuperAmerica* are quite similar to those here." (citation omitted)); *Roberts*, 2010 WL 4806792, at \*6 n.4 (M.D. Tenn. Nov. 18, 2010) (discussing the split among courts regarding Dollar General store managers' FLSA-exemption status, but finding the issue "squarely controlled by the Sixth Circuit's ruling in *Speedway*"). Not surprisingly, both the *Leonard* and *Roberts* courts found the Dollar General store managers exempt as a matter of law. *Leonard*, 2011 WL 2009937, at \*10; *Roberts*, 2010 WL 4806792, at \*11.

<sup>180</sup> See *Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*12, \*14, \*16-18 (N.D. Iowa June 8, 2011) (determining that material factual disputes existed on all primary-duty prongs); *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*10-12 (N.D.N.Y. May 9, 2011) (finding disputed questions of fact on the time-allocation, relative-importance, and wage-differential prongs of the primary-duty test); *Kanatzter v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*5

*derson v. Dolgencorp of New York, Inc.*, did not defer even slightly to the Second Circuit's *Burger King II* opinion and referred to it only fleetingly in a citation outlining the executive exemption standard.<sup>181</sup> In *Kanatzner v. Dolgencorp, Inc.*, the Eastern District of Missouri treated the Eighth Circuit's *Murray* opinion similarly—ignoring it entirely except for a brief mention in a footnote explaining that Dollar General had cited the case in its brief.<sup>182</sup>

*Burger King II* and *Murray* are clearly the most relevant, if not controlling, precedents in those circuits on how to interpret the primary-duty factors as they relate to retail supervisors like Dollar General store managers. Perhaps the decisions by the *Anderson* and *Kanatzner* courts to disregard these circuit opinions were an unconscious one, but that seems unlikely. Rather, these decisions are better viewed as a silent indictment of the *Burger King* line of cases, which have over the years transformed an individualized executive-exemption inquiry into a legal conclusion that all retail supervisors are exempt as a matter of law. Granted, no circuit has formally issued such a sweeping proclamation because to do so would contravene the case-by-case approach required by the DOL regulations. Nonetheless, the body of work speaks for itself, as circuits have found fast food restaurant assistant managers, the managers of small gasoline and convenience stores, and the supervisors of low-end discount retailers all exempt as a matter of law.<sup>183</sup>

Given the supervisors' low-salary levels—a fact which tends to favor nonexemption—it is unclear when, if ever, retail managers could pre-

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(E.D. Mo. July 8, 2010) (concluding that material disputes of fact existed on all primary-duty prongs). *But see* *Aschenbrenner v. Dolgencorp, Inc.*, No. 10-0153, 2011 WL 2200630, at \*14 (D. Neb. June 3, 2011) (finding no factual issues upon which reasonable minds could disagree and thus granting summary judgment to Dollar General).

<sup>181</sup> *Anderson*, 2011 WL 177031, at \*7.

<sup>182</sup> *Kanatzner*, 2010 WL 2720788, at \*5 n.5. Two other district courts in the Eighth Circuit have ruled on Dollar General summary judgment motions since *Kanatzner*. *See Jones*, 2011 WL 2261480; *Aschenbrenner*, 2011 WL 2200630. These courts referenced *Murray* more frequently than *Kanatzner*, but neither found *Murray* dispositive of the primary-duty inquiry as applied to retail store managers. In fact, at various points throughout its opinion, the *Jones* court explicitly distinguished the Dollar General facts from the *Murray* precedent. *See Jones*, 2011 WL 2261480, at \*16 ("I recognize that under Eighth Circuit . . . precedent in *Murray* . . . Joyner need not have 'ultimate' authority for all managerial decision in order to be exempt from the FLSA. Nonetheless, I still find that a significant question of material fact exists concerning whether Dollar General's policies prevented Joyner from frequently exercising discretion 'day-to-day' . . ." (citation omitted) (quoting *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618-19 (8th Cir. 1991))).

<sup>183</sup> *See, e.g., In re Family Dollar*, 637 F.3d at 518 (discount retailers); *Burger King II*, 675 F.2d 516, 522 (2d Cir. 1982) (fast food restaurants); *Thomas v. Speedway Super-America, LLC*, 506 F.3d 496, 509 (6th Cir. 2007) (gasoline stores).

vail on overtime claims under the *Burger King II* framework. Once a court begins to travel down the *Burger King II* path, the outcome of overtime exemption is inevitable. Regardless of the individual set of facts, managerial duties will necessarily be more vital than nonmanagerial duties, and discretion can still be exhibited even if corporate policies are highly controlling. Thus, as interpreted in *Burger King II*, the relative-importance, freedom-from-supervision, and discretionary-powers prongs of the primary-duty inquiry will always favor exempting retail supervisors as a matter of law. The time-allocation prong is not dispositive and simply shifts the analysis to the other pertinent factors, while the wage-differential prong is largely irrelevant. Considering that exemption turns on the primary-duty analysis and that the *Burger King* line of cases resolves all of the critical factors in favor of the employer, courts cannot help but reach the legal conclusion of exemption under the *Burger King II* framework.

Along with other district courts that have denied Dollar General's motions for summary judgment, the *Anderson* and *Kanatzer* courts implicitly recognized that the rigid *Burger King II* framework was not sufficiently dynamic to account for the factual complexities of the Dollar General litigation. While disclaiming its attempt to counter the *Burger King II* framework, the Eleventh Circuit in *Morgan* still put forth alternative interpretations of the relative-importance and discretionary-powers prongs of the primary-duty analysis.<sup>184</sup> Managerial duties will not always be more valuable than nonmanagerial ones and corporate policies, if overly prescriptive, can suffocate any meaningful managerial discretion. Equally as important, the Eleventh Circuit reinserted the element of time into the primary-duty equation in a substantive way by allowing it to affect the analysis of other relevant factors.<sup>185</sup>

Due to managers' difficulty in securing overtime pay under *Burger King II*'s framework and the severe imbalance it creates between employers and employees as a result, the DOL and courts should begin to dismantle this paradigm. A test more responsive to various sets of fact patterns that will ensure greater parity between these competing interest groups should replace it. Reimagining the executive exemption will not be easy, but opinions like *Morgan* have begun to lay the groundwork. Since the DOL revisions to the executive exemption are so recent, it remains highly improbable that the regulatory piece of the

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<sup>184</sup> *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1270-71 (11th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009).

<sup>185</sup> *Id.* at 1269-70.

puzzle will be modified anytime soon. With that reality in mind, courts should recast the primary-duty inquiry—to the extent that the DOL regulations and circuit precedent allow—so as to equalize the overtime playing field between employer and employee.

In the following section, I suggest several ways this could be accomplished. Following *Morgan's* lead, courts should give more weight to the division of an employee's time between managerial and non-managerial duties by integrating it into the overall assessment of the relative-importance prong. I propose a sliding-scale approach whereby the more time an employee spends on nonmanagerial duties, the more evidence an employer must submit to prove that it actually considered the managerial responsibilities more important despite the significant time-allocation gap suggesting otherwise. Practically, for this proposal to work, courts will also have to cabin the notion of concurrent duties; if not, it will be impossible to separate managerial from nonmanagerial functions. This does not mean jettisoning concurrent duties entirely, as they are codified in the DOL regulations; rather, it means circumscribing their ambit as greatly as possible so that they do not distort the relative-importance analysis. Furthermore, the wage-comparison prong, currently a nonfactor, should also play a much more prominent role in the primary-duty inquiry.

While courts can do much to realign the balance between employers and employees, the DOL wields the ultimate rebalancing power through its rulemaking authority. The larger issue, which courts do not have the authority to rectify, is that the primary-duty analysis has for decades operated as the lynchpin of the executive exemption. As I will argue in Section IV.D, an employee's weekly salary level serves as a much better proxy for whether someone should be exempt from overtime pay than the primary-duty test. However, given the paltry salary-level requirement both before and after the 2004 revisions, this element excludes few, if any, low-salaried retail store managers from the executive exemption. The DOL should institute a more vigorous salary-level requirement and update it regularly to reflect changing economic conditions.

C. *Revitalizing the Relative-Importance and Wage-Differential  
Prongs of the Primary-Duty Analysis*

1. Making Time Count: The Sliding Scale Approach  
to the Relative-Importance Prong

The time-allotment prong of the primary-duty analysis—both as codified in the DOL regulations and as interpreted by circuit courts—serves no discernible purpose. Practically speaking, if this prong were removed from courts' application of the primary-duty test, case outcomes would not change. The only potential function of this prong is that it signals to courts when they should look to the other relevant primary-duty factors. If employees spend the majority of their time on nonexempt work, then management might not be their primary duty, and so it is necessary to look at the substance of their employment responsibilities. On the other hand, if employees spend the majority of their time on exempt work, then management by definition is their primary duty, and it is not necessary to look beyond the time-allocation prong. In practice, though, employees only bring overtime claims when they spend as much—or typically far more—time on nonexempt work. Given this reality, courts treat the time-allocation prong in a perfunctory fashion—summarily mentioning it before moving on to the other relevant factors.

Time should reenter the primary-duty analysis in a meaningful way by linking it to the relative-importance prong. Spending ninety percent of one's time on nonexempt work versus fifty percent, for example, is not a trivial fact. Intuitively, an employee who spends ninety percent of her time on nonexempt work is much less likely to have management as her primary duty than someone who splits her time evenly between menial and managerial tasks. Yet the current executive exemption, at least as applied by the overwhelming majority of appellate courts, fails to take into account this critical distinction. From *Burger King I* to *In re Family Dollar*, courts have entirely divorced the allocation of an employee's time from the other relevant factors and thus prevented it from bearing substantively on case dispositions.

The error of this divorce can be seen most powerfully in the relative-importance prong. Circuits have almost universally reached the conclusion that managerial activities are more important to the success of a business than the performance of nonexempt work. Assuming that an employee divides her time equally between exempt and nonexempt work, it is hard to disagree with this assessment. In these situations, if an employer had to choose whether it wanted the exempt or non-

exempt work performed, it would likely choose the exempt work, as nonperformance of exempt work would probably affect the successful operation of the business more so than that of nonexempt work.

However, the more time an employee spends on nonexempt work in relation to exempt work, the less tenable the position staked out by these circuits becomes. For instance, which becomes more important when an employee spends twenty percent of her time on managerial duties and eighty percent on menial work? Would an employer really value the managerial duties over the nonexempt work in that case? Stated differently, which is more important to the success of the business? The response might depend on the specific managerial tasks involved, but it is not immediately clear that the answer would be exempt work.

Given the contextual nature of the inquiry, courts should not compare the importance of managerial versus nonmanagerial duties without also considering how much time an employee devotes to each. Either the DOL, through revised regulations, or courts, within the existing regulatory framework, could operationalize the interplay between the time-allotment and relative-importance prongs of the primary-duty analysis by adopting a sliding-scale approach. If an employee's time is split relatively evenly between exempt and nonexempt work, then the relative-importance prong favors the employer, and the employee will have to put forth evidence to rebut the resulting presumption. As the amount of time dedicated to nonexempt work increases, the less the relative-importance prong favors the employer and the more it begins to favor the employee. If the percentage of time spent on nonexempt work exceeds seventy percent, say, the employer must convince the court that the exempt work is more important.

## 2. Limiting the Ambit of Concurrent Duties

Perhaps the most far-reaching and perplexing innovation of *Burger King II* is the notion of concurrent duties, which the DOL codified in its updated regulations.<sup>186</sup> The underlying premise is a sound one: exempt and nonexempt work can be performed simultaneously. The examples provided by the DOL in the regulations—as when an employee serves customers or stocks shelves while directing others' work<sup>187</sup>—demonstrate the concept.

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<sup>186</sup> 29 C.F.R. § 541.106 (2010).

<sup>187</sup> *Id.* § 541.106(b); see also *supra* text accompanying note 175.

Difficulty arises only when courts must separate exempt from nonexempt work for primary-duty purposes. If taken to their logical extreme, concurrent duties would swallow any meaningful distinction between exempt and nonexempt work. Theoretically, any menial task can be performed while supervising others. If something as solitary as stocking shelves can be considered a duty concurrent with management, then it is unclear what nonexempt task would fall outside of the concurrent-duties ambit.

The Fourth Circuit in *In re Family Dollar* takes concurrent duties to their logical extreme and in so doing illustrates how they can distort the primary-duty analysis. The court first determined that the Family Dollar store manager could both perform menial tasks and operate the store at the same time.<sup>188</sup> To demonstrate how the store manager was able to multitask, the court pulled statements from her deposition testimony. The manager herself, according to the court, admitted that she was “responsible for making sure the whole store ran successfully” regardless of whether she “happened to be putting up stock at a given moment or running a register or talking to a customer.”<sup>189</sup> While the store manager claimed to have spent ninety-nine percent of her time performing nonexempt work,<sup>190</sup> the court found that these non-managerial tasks could not be separated from her ever-present managerial duties as the store’s manager.<sup>191</sup> As such, the court held that the store manager “was performing management duties whenever she was in the store, even though she also devoted most of her time to doing the mundane physical activities necessary for its successful operation.”<sup>192</sup>

The implication of the Fourth Circuit’s ruling is that regardless of the actual amount of time retail store managers spend on nonexempt tasks, they are always “responsibl[e] to see that the store operate[s] successfully and profitably” and thus are always concurrently performing managerial duties.<sup>193</sup> In making the scope of concurrent duties boundless, the Fourth Circuit eroded any principled distinction between exempt and nonexempt duties and eviscerated the sliding-scale

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<sup>188</sup> See *In re Family Dollar*, 637 F.3d at 515-16 (“[W]hile [the store manager] performed nonmanagerial tasks around the store as she determined necessary, she *concurrently* performed the managerial duties of running the store.”).

<sup>189</sup> *Id.* at 516.

<sup>190</sup> *Id.* at 514.

<sup>191</sup> See *id.* at 516 (concluding that the store manager performed nonmanagerial functions “in the context of her overall responsibility to see that the store operated successfully and profitably”).

<sup>192</sup> *Id.* at 517.

<sup>193</sup> *Id.* at 516.

approach to the relative-importance prong proposed in subsection IV.C.1. The importance of concurrent duties within the court's opinion cannot be overstated, as it frames the court's analysis of the other primary-duty factors.<sup>194</sup> While not problematic on its face, this approach essentially renders these other factors irrelevant and transforms concurrent duties into the dispositive issue. When conducting the primary-duty analysis courts should accordingly cabin the notion of concurrent duties as much as possible.

### 3. Putting the Wage-Comparison Prong to Work

#### a. *The Hourly-Wage Versus Lump-Sum Salary Approach*

The wage-comparison prong<sup>195</sup> takes the prize for being the least developed and most underutilized factor when courts assess a retail store manager's primary duty.<sup>196</sup> This prong essentially requires courts to compare the store manager's earnings to the wages of the employees whom she supervises, namely assistant store managers.<sup>197</sup> Although some disagreement exists among district courts as to whether a store manager's salary should be measured against other employees'

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<sup>194</sup> The court spent eight rather sizeable paragraphs discussing concurrent duties and then four on the other relevant factors. *See id.* at 515-18. In introducing its analysis of the latter four factors, the court explained: "With respect to the second, third, and fourth factors for determining whether management was [the store manager's] primary duty, the facts discussed with respect to the first factor satisfy these factors also." *Id.* at 517.

<sup>195</sup> The executive-exemption regulations provide that courts, when undertaking the primary-duty analysis, should consider "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a) (2010). The previous regulations employed essentially the same language. *See* 29 C.F.R. § 541.103 (2003) (amended 2004) (providing that in performing the primary-duty inquiry courts should assess "the relationship between *his* [the supervisor's] salary and the wages paid other employees for the kind of nonexempt work performed by the *supervisor*" (emphasis added)).

<sup>196</sup> *See, e.g.,* Murray v. Stuckey's, Inc., 939 F.2d 614, 618 (8th Cir. 1991) (listing the wage-comparison prong among the primary duty factors but failing to consider it); *Burger King II*, 675 F.2d 516, 522 (2d Cir. 1982) (concluding that, relative to employees doing exclusively non-exempt work, the Burger King assistant managers "were paid substantially higher wages even taking their longer hours into account"); *Burger King I*, 672 F.2d 221, 225-26 (1st Cir. 1982) (finding that some of the primary duty factors "quite clearly cut in favor of" exemption, notably "a comparison of wages with other employees," but providing no analysis as to why).

<sup>197</sup> *See, e.g., In re Family Dollar*, 637 F.3d at 517 (explaining that courts are to "look to the relationship between the store manager's salary and nonexempt employees' wages").

weekly or hourly pay,<sup>198</sup> circuit courts have unanimously adopted the hourly-wage comparison approach.<sup>199</sup>

Without question, courts should compare wages on an hourly basis, as opposed to employing a weekly lump-sum salary approach. The purpose of the primary-duty inquiry's wage-comparison prong is not to determine whether the store manager received greater compensation overall than other employees, but whether she earned more per unit of time worked.<sup>200</sup> If the store manager only makes more than

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<sup>198</sup> Compare *Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1278-79 (S.D. Fla. 2004) (comparing the store manager's weekly salary to that earned by other employees without accounting for the difference in number of hours worked), *aff'd per curiam*, 140 Fed. App'x 168 (11th Cir. 2005), with *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903, 923 (E.D. La. 2009) (comparing the assistant store manager's salary to that earned by subordinates on an hourly basis). Only three of the eighteen Dollar General courts declined to convert a store manager's weekly salary into an hourly rate of pay. See *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*9 (W.D. Ky. May 23, 2011) (refusing to adopt an hourly-wage comparison approach because the managers' "hours reflect her greater responsibility and provide her the opportunity to earn more"); *Hartman v. Dolgencorp of Tex., Inc.*, No. 09-0009, slip op. at 12 (N.D. Tex. June 24, 2010) ("Although Plaintiff attempts to divide her weekly salary by alleged hours worked, courts have disregarded this attempt and focused instead on the weekly amount of pay."); *Johnson v. DG Retail LLC*, No. 08-0123, 2010 WL 1929620, at \*6 (D. Utah May 13, 2010) (contending that the store manager's "argument" that her salary should be converted into an hourly rate "collapses on itself" because she "was not confined to work a certain number of hours").

Rather than converting the store manager's salary into an hourly rate, the *Hale* court converted other employees' wages into a weekly salary based on the alleged number of hours that the store manager worked and then compared that figure with the store manager's weekly salary. *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*6 (W.D. Va. June 23, 2010). Per the FLSA's mandate, the court calculated the employees' wages at time and a half their regular pay rate for any time worked over the forty-hour work week. *Id.* While novel and intriguing, the court's approach to the wage-comparison prong assumes incorrectly that these other employees would have to put in more than forty hours per week to do the same amount of work as the store manager. Dollar General could instead hire part-time help at the same pay rate as these employees or schedule store clerks whose hours otherwise would fall below forty hours per week for more time.

<sup>199</sup> See *In re Family Dollar*, 637 F.3d at 517-18 (converting the store manager's salary into an hourly wage and comparing it to the hourly wages of other employees); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1271 (11th Cir. 2008) (same), *cert. denied*, 130 S. Ct. 59 (2009); *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 508-09 (6th Cir. 2007) (same).

<sup>200</sup> The *Plaunt* court, which denied Dollar General's summary judgment motion, captures this reasoning most powerfully:

We find that converting [the store manager's] weekly salary into an effective hourly wage is most appropriate in order to find a common basis with which to compare the wages paid to others. To ignore the fact that Plaunt worked more than forty hours per week would largely frustrate the purpose of this inquiry: to determine whether the employer sought to subvert the FLSA by at-

other employees because she works longer hours, she is not being compensated for her management skills. Rather, she is simply getting paid for the sheer amount of work done. In other words, evidence that the hourly wages of the store manager and the other employees are roughly equal tilts heavily against the contention that the manager's primary duty is management. If her primary duty were management, then she should be compensated accordingly.

b. *The Quandary of Bonuses*

Courts have disagreed about whether to consider bonuses within the wage-comparison prong, and if so, how to analyze them. Courts' approaches with regard to bonuses can be divided into four categories: (1) ignore bonuses entirely;<sup>201</sup> (2) compare managers' opportunity for bonuses or bonuses actually awarded with that of other employees;<sup>202</sup> (3) count managers' ability to earn bonuses as a plus factor for overtime exemption;<sup>203</sup> and (4) combine bonuses earned with managers' salaries.<sup>204</sup> While none of these approaches predominates in the Dollar General summary judgment rulings, most courts at least acknowledge that bonuses should be factored into the wage-comparison analysis.

Many courts examine bonuses independently of weekly salaries. Some courts electing this approach compare actual bonuses earned by store managers to those earned by fellow workers, while others compare the two groups' bonus-earning potential. Under either method,

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taching an overtime exemption to an employee who otherwise performs the same non-exempt tasks as hourly employees.

*Plaut v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*13 (M.D. Pa. Dec. 14, 2010); *see also Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*12 (M.D. Pa. Feb. 3, 2011) (employing verbatim *Plaut's* rationale).

<sup>201</sup> *See, e.g., Jones v. Dolgencorp, Inc.*, No. 10-3020, 2011 WL 2261480, at \*2, \*17-18 (N.D. Iowa June 8, 2011) (stating in the fact section that the store manager earned a bonus but failing to consider this bonus award in the wage-comparison prong); *Pierce*, 2011 WL 398366, at \*1, \*11-12 (same); *King v. Dolgencorp, Inc.*, No. 09-0146, slip op. at 14, 27-28 (M.D. Pa. May 6, 2010) (report and recommendation of magistrate judge) (same), *adopted by* No. 09-0146 (Jun. 17, 2010) (order adopting report and recommendation of magistrate judge).

<sup>202</sup> *See infra* notes 205-06 and accompanying text.

<sup>203</sup> *See infra* notes 207-09 and accompanying text.

<sup>204</sup> *See, e.g., Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*23 (N.D. W. Va. Sept. 17, 2010) (commenting that the store manager's "salary was not the totality of [her] compensation" and adding bonuses earned to her annual salary); *Myrick v. Dolgencorp, LLC*, No. 09-0005, 2010 WL 146874, at \*7 n.12 (M.D. Ga. Jan. 11, 2010) (factoring the store manager's bonuses into her salary when undertaking the wage-comparison analysis).

if the manager earned more or could potentially earn more in bonuses than other employees, the wage-comparison prong would tilt in favor of exemption. For instance, in *Hale v. Dolgencorp, Inc.*, the Western District of Virginia found that “the bonus paid to Hale weigh[ed] against a finding that Hale’s salary was similar, or close to, the salary of an hourly worker because Hale earned a ten percent bonus based upon the store’s profit while the remainder of the profit was prorated among lower-paid employees.”<sup>205</sup> Likewise, the District of Nebraska determined in *Aschenbrenner v. Dolgencorp, Inc.*, that the store manager’s opportunity to earn a “bonus was more than three times larger than her [assistant store manager’s] bonus and five times larger than the bonus pool split by all store clerks. As such, a reasonable jury could only conclude that Aschenbrenner was earning substantially more as a store manager than other, nonexempt employees.”<sup>206</sup>

Other courts that analyze bonuses independently of weekly salaries count managers’ ability to earn bonuses as a plus factor for overtime exemption. For example, the Fourth Circuit in *In re Family Dollar* developed the notion of a “profit center,” which considers “whether the manager had the ability to influence the amount of her compensation.”<sup>207</sup> The court found that the Family Dollar store manager’s bonus “depended on her store’s profitability” and thus that the store operated as a “profit center.”<sup>208</sup> The fact that the store manager could

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<sup>205</sup> No. 09-0014, 2010 WL 2595313, at \*6 (W.D. Va. June 23, 2010); see also *In re Dollar Gen. FLSA Litig.*, 766 F. Supp. 2d 631, 648-49 (E.D.N.C. 2011) (finding that the store manager “received a larger bonus than the other employees” and that this fact pushed the wage-comparison prong toward exemption).

<sup>206</sup> No. 10-0153, 2011 WL 2200630, at \*19 (D. Neb. June 3, 2011). *But see* *Anderson v. Dolgencorp of N.Y., Inc.*, Nos. 09-0360, 09-0363, 2011 WL 1770301, at \*13 (N.D.N.Y. May 9, 2011) (acknowledging that the store manager was “eligible for a larger bonus” than the assistant manager but that this “bonus eligibility, while relevant, does not . . . conclusively tip the scales in favor of summary judgment”).

<sup>207</sup> 637 F.3d 508, 517 (4th Cir. 2011). The Western District of Kentucky in a *Dollar* General summary judgment ruling picked up on the Fourth Circuit’s “profit center” concept. See *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*9 (W.D. Ky. May 23, 2011) (“The structure of [the store manager’s] compensation—that is, the substantial bonus opportunity—further reflects her central role in the store as a *profit center*. All of the discretion, authority and leadership she exercised was viewed as contributing to store performance. As such, she was paid accordingly.” (emphasis added)). Somewhat perplexingly, the *Leonard* court did not attribute its use of “profit center” to the Fourth Circuit.

<sup>208</sup> *In re Family Dollar*, 637 F.3d at 517.

influence the store's profitability, and, as a result, the amount in bonuses she earned, pointed toward management as her primary duty.<sup>209</sup>

While bonuses should be considered in the wage-comparison analysis, they should not be analyzed independently of managers' salaries. Comparing bonuses in isolation provides little insight into whether the store manager earned substantially more on the whole than her subordinates. Only when combined with a manager's salary do bonuses acquire significance. As such, courts should add bonuses to managers' annual salaries and then compute an hourly wage rate. This way the wage-comparison prong will take into account a manager's overall annual compensation.

c. *What Pay Differentials Are Significant?*

Even though most courts employ the hourly wage-comparison approach, and to some extent incorporate bonuses into the inquiry, there are serious disagreements as to how significant the pay differential must be to find that a store manager's primary duty is management. On one end of the spectrum, the *Morgan* court found that a two- to three-dollar-per-hour pay differential (i.e., a thirty-one percent pay gap) between Family Dollar store managers and their assistant managers constituted "a relatively small difference" in hourly rates.<sup>210</sup> On the other end, the *Speedway* court determined that an "approximately thirty percent" pay gap between the store manager and subordinate employees "equated to a significant amount."<sup>211</sup> District courts in the Dollar General cases have similarly disagreed about what pay gaps are significant.<sup>212</sup>

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<sup>209</sup> *Id.* at 517-18. Alongside its "profit center" analysis, the Fourth Circuit examined whether the Family Dollar store manager "earned more, in absolute terms, than nonmanagerial employees." *Id.* at 517. Here, the court not only compared the hourly wage rate of the manager and other employees but also the actual bonuses earned by the two groups. *Id.*

<sup>210</sup> *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1257-58, 1271 (11th Cir. 2008). The court did not state this percentage explicitly. But if one subtracts the hourly wage of the assistant store managers (\$7.60) from the store managers' (\$9.99) and divides by the assistant store managers' wage rate (\$7.60), the result is approximately thirty-one percent.

<sup>211</sup> *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 509 (6th Cir. 2007).

<sup>212</sup> *Compare, e.g., Myrick v. Dolgencorp, LLC*, No. 09-0005, 2010 WL 146874, at \*7 (M.D. Ga. Jan. 11, 2010) (finding that the store manager "made, at most, \$2.85 more per hour" than her assistant managers—a 40.7% pay differential—and that, in light of *Morgan*, this difference was not significant), *with Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*10 (M.D. Tenn. Nov. 18, 2010) ("The plaintiff's 'hourly' salary was between 20 and 36 percent higher than the next highest paid non-salary

The fundamental dilemma is that the DOL has failed to provide guidance on how courts are to use the wage-comparison prong, and more specifically, what constitutes a significant gap in pay. Courts understandably divide on the issue of whether a two-to-three dollar pay gap is significant. Such a small hourly differential may not seem like much, but over the course of a year it can add up to a sizeable amount. Most Dollar General store managers claimed to have worked at least fifty hours per week,<sup>213</sup> with many asserting that they worked sixty hours or more.<sup>214</sup> A two-dollar hourly differential translates into an annual difference of \$5200 and \$6240 for a fifty- and sixty-hour work week, respectively, while the same calculations at a three-dollar hourly pay gap yield \$7800 and \$9360 more for a store manager over a fifty-two week period.

Several courts in the Dollar General cases have held that so long as store managers make “more, or at least the same,” as assistant managers, then the wage-comparison prong weighs in favor of exemption.<sup>215</sup> If that were the case, then this prong would always support a finding that the store manager had management as her primary duty. Slight differences in pay, as discussed previously, surely point toward the contrary conclusion that the manager should be nonexempt. Although it is difficult, if not impossible, to develop a principled cutoff for when the pay differential favors, or does not favor, exemption, small differences in pay call into question whether a manager’s primary duty is in fact management. Differences of a dollar or less certainly favor nonexemption. Differences between one or two dollars, though closer, favor nonexemption as well, while two-to-three dollar differences could potentially go either way. The key, in the end, is that

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employee, not to mention other ‘subordinate employees.’ Under *Speedway*, this calculus supports the defendant’s primary duty argument.”).

<sup>213</sup> See, e.g., *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0084, 2010 WL 5158620, at \*1 (M.D. Pa. Dec. 14, 2010) (finding that “[o]n average” the store manager “worked fifty hours per week”); *Kanatzer v. Dolgencorp, Inc.*, No. 09-0074, 2010 WL 2720788, at \*2 (E.D. Mo. July 8, 2010) (noting that until 2005 the store manager “worked fifty hours per week”).

<sup>214</sup> See, e.g., *Leonard v. Dolgencorp Inc.*, No. 10-0057, 2011 WL 2009937, at \*2 (W.D. Ky. May 23, 2011) (explaining that the store manager “worked between 60 and 80 hours per week”); *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*3 (W.D. Va. June 23, 2010) (finding that the store manager “averaged between sixty to seventy hours of work per week”).

<sup>215</sup> *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*23 (N.D. W. Va. Sept. 17, 2010); accord *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 649 (E.D.N.C. 2011).

courts should inject more vigor into the wage-comparison prong and actually make it count in the primary-duty analysis.

D. *Taking the Executive Exemption's Salary-Level Requirement More Seriously*

Operating in the background of cases like those in the Dollar General litigation is the normative question of who merits FLSA overtime protection and why the white collar exemptions even exist. While neither the FLSA nor its legislative history provides a rationale for the white collar exemptions,<sup>216</sup> scholars have offered a number of explanations—from the exempted workers' social status to the indivisibility of the work they perform. L. Camille Hebert offers a helpful summary of these explanations:

The theory behind the [white collar] exemptions . . . has been that these employees do not need the protections of the overtime requirements because of their higher base pay and their greater job security. In addition, to the extent that the overtime provisions were intended to cause employers to create more jobs by hiring more workers to perform the additional work, it appears that this option is less feasible in connection with the type of work performed by these categories of employees. Finally, the value to the employer of the work of executive, administrative, or professional employees is thought to be generally unrelated to the number of hours worked by those employees, so that they are neither paid more for working more hours a week nor paid less for working less hours in a given week.<sup>217</sup>

Leading up to the 2004 revisions, scholars advocated for overhauling the exemptions in light of the modern service-oriented economy.<sup>218</sup> As Hebert explains,

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<sup>216</sup> See, e.g., Defining and Delimiting Exemptions, *supra* note 6, at 22,123-25 (describing the history of and the comments made on the exemption rules, but stopping short of providing a rationale); Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 124 (2004) ("The legislative history of the FLSA contains no explanation for the white collar exemptions.")

<sup>217</sup> L. Camille Hebert, "Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act, 7 EMP. RTS. & EMP. POL'Y J. 51, 56-57 (2003).

<sup>218</sup> See, e.g., DeChiara, *supra* note 28, at 187 (suggesting comp time as an alternative to overtime pay for overworked executives); Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 LAB. LAW. 357, 360 (2000) ("[T]he requirements of the exemption tests under the FLSA are no longer applicable to modern working conditions, and . . . should [be] reform[ed] . . . substantially in order to respond to the legitimate needs of today's employees and employers.")

These exemptions appear to have been shaped with a relatively small group of high-level management and administrative personnel and recognized professions in mind, but over the years the exemptions have been applied to a larger group of employees, many of whom do not receive the relatively high salaries thought to justify not providing extra compensation for hours worked over the traditional maximum.<sup>219</sup>

The DOL regulations support the notion that these white collar exemptions were only intended to cover a certain subset of workers—namely those who earned above a threshold salary level. Ever since the initial regulations were passed in 1938, the regulations have ensured that only employees earning above a certain amount may qualify for the executive exemption. For the latter part of the twentieth century, the floor for exemption was set at a weekly salary of \$155<sup>220</sup> and revised upwards to \$455 in 2004.<sup>221</sup>

The correlation between a worker's salary and the executive exemption makes intuitive sense.<sup>222</sup> Salaries are generally correlated with the level of skills—gained through education, experience, training, etc.—that a worker has to offer. Those with a greater skill set are more likely to earn a higher salary and therefore are in less need of FLSA overtime protection. Thus, the less skilled the worker, the lower the salary, and the more FLSA overtime protection might be warranted.

The level of pay for Dollar General store managers is critical in assessing whether they should be treated as exempt executives. Had the much-delayed increase in the threshold salary from \$155 to \$455 occurred several years earlier, many of these store managers would not have reached the requisite level and would have been barred from exemption.<sup>223</sup> Similarly, even those who met the \$455 cutoff did not

<sup>219</sup> Hebert, *supra* note 217, at 118 (footnotes omitted).

<sup>220</sup> 29 C.F.R. § 541.117(a) (2003) (amended 2004).

<sup>221</sup> 29 C.F.R. § 541.100(a)(1) (2010).

<sup>222</sup> This correlation is also borne out in the DOL's early and later experience with the test. *See* Defining and Delimiting Exemptions, *supra* note 6, at 22,173 ("The experience of the Divisions has shown that in the categories of employees under consideration the higher the salaries paid the more likely the employees are to meet all the requirements for exemption." (quoting HARRY WEISS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS AND REGULATIONS, PART 541, at 22-23 (1949))); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 31 ("DOL said that salary remains a good indicator of the degree of importance attached to a particular employee's job, which provides a practical guide, particularly in borderline cases, for distinguishing bona fide [white collar] employees from those who were not intended by the Congress to come within the categories of this exemption.").

<sup>223</sup> *See* Jones v. Dolgencorp, Inc., No. 10-3020, 2011 WL 2261480, at \*2 (N.D. Iowa June 8, 2011) (stating that the store manager earned a weekly salary of \$440 in April 2001); Anderson v. Dolgencorp of N.Y., Inc., Nos. 09-0360, 09-0363, 2011 WL 1770301,

earn much more than the minimum wage. Store managers on average in the Dollar General cases worked 60 hours and earned \$492 per week, resulting in an hourly wage rate of \$8.20—only about a dollar more than the current minimum wage of \$7.25.<sup>224</sup>

The DOL should either update the insufficient salary-level cutoff or consider an approach similar to that in California, where workers' salaries must be twice the minimum wage to qualify for the exemption.<sup>225</sup> Given that Dollar General's store managers do not earn significantly more on a per-hour basis than those earning the minimum wage, exempting these managers from overtime pay surely contravenes the spirit of the FLSA. Because of the regulations' paltry salary-level test, these retail supervisors' low economic position is not being adequately factored into the executive-exemption equation.

### CONCLUSION

As *Morgan* and numerous Dollar General cases reveal, retail store managers can prevail on their FLSA overtime claims,<sup>226</sup> but it is not an

at \*3, \*6 (N.D.N.Y. May 9, 2011) (noting that one of the store managers involved in the suit "was paid a fixed weekly salary of \$425," while the other manager initially earned \$423 per week); *Pierce v. Dolgencorp, Inc.*, Nos. 09-0079, 09-0097, 2011 WL 398366, at \*1 (M.D. Pa. Feb. 3, 2011) (stating that Pierce received weekly salaries of \$355.77 and \$423.08 in June 2001 and April 2002, respectively); *In re Dollar Gen. FLSA Litig.*, 766 F. Supp. 2d 631, 633 (E.D.N.C. 2011) (explaining that the store manager earned a weekly salary of \$385 in 2001); *Speak v. Dolgencorp of Tex., Inc.*, No. 09-0124, slip op. at 2 (N.D. Tex. Dec. 28, 2010) (noting that in September 2001 the store manager received a \$450 weekly salary); *Plaunt v. Dolgencorp, Inc.*, Nos. 09-0079, 08-0084, 2010 WL 5158620, at \*1 (M.D. Pa. Dec. 14, 2010) (reporting that the plaintiff initially earned \$425 per week); *Roberts v. Dolgencorp, Inc.*, No. 09-0005, 2010 WL 4806792, at \*1 (M.D. Tenn. Nov. 18, 2010) (stating that the plaintiff made \$420 per week in her first year); *Mayne-Harrison v. Dolgencorp, Inc.*, No. 09-0042, 2010 WL 3717604, at \*2 (N.D. W. Va. Sept. 17, 2010) (reporting that Mayne-Harrison made \$370 and \$423 per week in 2001 and 2002, respectively); *Hartman v. Dolgencorp of Tex., Inc.*, No. 09-0009, slip op. at 2 (N.D. Tex. June 24, 2010) (pointing out that the store manager earned between \$375 and \$435 from 2000 until 2003); *Hale v. Dolgencorp, Inc.*, No. 09-0014, 2010 WL 2595313, at \*3 (W.D. Va. June 23, 2010) (stating that Hale's salary ranged from \$313 to \$431 per week while she managed the store); *Noble v. Dolgencorp, Inc.*, No. 09-0049, slip op. at 2 (S.D. Miss. May 11, 2010) (reporting that the plaintiff initially made approximately \$425 per week).

<sup>224</sup> 29 U.S.C. § 206(a) (Supp. III 2010).

<sup>225</sup> See CAL. CODE REGS. tit. 8, § 11070(1)(A)(1)(f) (2002) (requiring an exempt employee to "earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment"); see also Faillace, *supra* note 218, at 387 (proposing that "all employees earning less than two times the minimum wage be classified as non-exempt").

<sup>226</sup> While denying summary judgment for Dollar General did not end those cases, it was a significant burden to overcome and has resulted in favorable outcomes for

easily accomplished feat and will only become more challenging under the amended DOL regulations. The executive exemption, in its current formulation, does not adequately account for frontline supervisors whose low-level salaries do not support their exemption from overtime pay. Courts should work on revitalizing the time-allocation, relative-importance, and wage-comparison prongs of the primary-duty inquiry in an effort to reel in the undue advantages currently afforded employers. Meanwhile, the DOL should make the salary-level requirement a more vigorous component of the executive exemption so that only those workers whose salaries justify exemption will be denied overtime wages.

Even with a heightened salary-level requirement and a more overtime-friendly primary-duty inquiry, many retail store managers, especially those charged with greater managerial duties and who earn a higher salary, will still be found exempt. This is how an exemption that strikes an appropriate balance between employers and employees should work—not all will be exempt and not all will be entitled to overtime pay. Thousands of retail supervisors' overtime claims hang in the balance. It is time for the courts and the DOL to get to work.

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plaintiffs. Dollar General has settled with the store managers in *Pierce*, *Plaut*, *Hale*, and *Myrick*. See *Pierce*, No. 09-0097, slip op. at 1 (May 26, 2011) (order approving individual settlement); *Plaut*, No. 09-0084, slip op. at 1 (May 26, 2010) (order approving individual settlement); *Hale*, 2010 WL 4261310, at \*1-2 (Oct. 28, 2010) (order approving the filing of settlement under seal); *Myrick v. Dolgencorp, Inc.*, No. 09-0005 (M.D. Ga. Feb. 19, 2010) (order of dismissal) (indicating that the action has been settled). In *Jones*, one of the plaintiffs has reached a settlement agreement with Dollar General. See No. 10-3020, slip op. at 2 (Aug. 31, 2011) (order approving settlement). Another plaintiff motioned for dismissal so that she could become a party in *Richter v. Dolgencorp, Inc.* See Joint Stipulation of Dismissal Without Prejudice at 1, *Kanatzer v. Dolgencorp, Inc.*, No. 09-0074 (E.D. Mo. July 26, 2010). As of October 2011, *Anderson* remains open.