

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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)	
In re FEDEX GROUND PACKAGE)	Cause No. 3:05-MD-527-RM
SYSTEM, INC., EMPLOYMENT)	(MDL 1700)
PRACTICES LITIGATION)	
)	
-----)	
THIS DOCUMENT RELATES TO:)	
)	
<i>Rob Carlson, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:06-cv-00393-RLM-CAN (MT))	
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AMENDED COMPLAINT
(CLASS ACTION)

Plaintiffs, on behalf of themselves and a Class of persons similarly situated, for their Amended Complaint against Defendant, states and alleges as follows:

PARTIES

1. Plaintiff, Rob Carlson, is a resident of Butte, Montana. Plaintiff Carlson has worked as a FedEx Ground driver since 1992. Plaintiff Rob Carlson, on behalf of himself and a class of similarly situated individuals, seeks relief for the causes of action complained of herein which arise out of the same series of transactions and involve common questions of law and fact.

2. Plaintiff, Penny Massa, is a resident of Hamilton, Montana. Plaintiff Massa worked as a FedEx Ground driver from May, 2003, to October, 2005. Plaintiff Massa, on behalf of herself and a class of similarly situated individuals, seeks relief for the causes of action

complained of herein which arise out of the same series of transactions and involve common questions of law and fact.

3. Plaintiff, Mike Callahan, is a resident of Butte, Montana. Plaintiff Callahan worked as a FedEx Ground driver from January 2001 to November 2005. Plaintiff Callahan, on behalf of himself and a class of similarly situated individuals, seeks relief for the causes of action complained of herein which arise out of the same series of transactions and involve common questions of law and fact.

4. Plaintiffs are, or has been employed by the Defendant and has, as a result of the acts of Defendant complained of herein, been economically damaged by Defendant.

5. Defendant FedEx Ground Package System, Inc. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as “Defendant” or “Defendant”), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. At all relevant times, Defendant was engaged in providing small package information, transportation and delivery services in the United States, including in the State of Montana.

6. Defendant is qualified to, and does, transact business in the State of Montana.

7. Defendant employs local package delivery drivers for FEG and FHD, all of whom, at FEG’s and FHD’s direction and control, perform package delivery to local businesses and residences.

JURISDICTION AND VENUE

8. Jurisdiction in this matter is based upon diversity of citizenship, as Defendant is a resident of the State of Delaware, and Plaintiffs are residents of the State of Montana, the amount

in controversy is in excess of the statutory minimum, thus jurisdiction is based upon 28 U.S.C. § 1332.

9. Venue herein is proper pursuant to the order of the Judicial Panel for Multidistrict Litigation transferring this action to this Court.

INTRODUCTION

10. The United States of America, and several States, have enacted laws and promulgated regulations intended to protect workers, employees and other persons from predatory, abusive and unfair business practices to which they may be exposed by their employers. Among these laws is the Montana Wages and Wage Protection laws, MCA §§39-3-201 through MCA §§ 39-2-217 and MCA §§ 39-3-401 through 39-3-410. Other laws, regulations and practices regulate the payment of wages and compensation, and the reimbursement of business expenses by employees.

11. Employers may not avoid these obligations by pretending that their employees are “independent contractors,” and misclassifying them as such when, in fact, their workers are not independent contractors because they do not have the right to control the means and manner in which they perform their so-called “independent” contract, but, rather, are directed by their employer, in this case, the Defendant.

CLASS ACTION ALLEGATIONS

12. This action is brought on behalf of a Class of persons currently and formerly employed by Defendant as employees within the definition of "employee" in the common and statutory law, but who, similar to the named Plaintiffs, are or were erroneously Classified as "contractors" or "independent contractors." Occupations or jobs in which Class Members worked or work include route delivery drivers for FEG and FHD. The Class includes all such persons

employed by Defendant within the six-year statute of limitations. The Class is specifically defined as follows:

All individuals who worked for Defendant FedEx Ground System, Inc. and/or its subsidiary FedEx Home Delivery, Inc. in Montana from March 21, 1999 to March 21, 2005 (the Class Period), as package pick-up and delivery drivers, and who were Classified as “independent contractors” and thereby deprived of various protections under Montana law.

13. FEG and FHD employ thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG and FHD driver is required to sign a lengthy form contract entitled the “Pick-up And Delivery Contractor Operating Agreement” that mischaracterizes each driver as an “independent contractor.” These Operating Agreements conceal the true nature of the relationship between Defendant and its drivers: that of employer and employee.

14. Plaintiffs, and Plaintiff Class Members, were denied the accoutrements of employment, including, but not limited to:

- a. wages;
- b. overtime pay;
- c. holiday pay;
- d. workers’ compensation;
- e. unemployment insurance;
- f. contributions to Defendant’s retirement plan;
- g. participation in Defendant’s Employee Stock Purchase Plan;
- h. income tax withholding; and,
- i. meal, break and rest periods.

15. Plaintiffs, and Plaintiff Class Members, were required to pay Defendant's operating expenses, all of which should have been paid by Defendant, including, but not limited to:

- a. delivery vehicle purchase;
- b. various insurances, including vehicle insurance and work accident insurance;
- c. delivery vehicle maintenance and repairs;
- d. purchase and maintenance of logos and uniforms;
- e. fuel;
- f. cargo claims; and,
- g. "business support," including maps, signs, logos, training and scanners.

16. Despite Defendant's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under Montana law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to misclassify its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Montana law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant's exclusive benefit and to work under other unlawful conditions. Defendant's mischaracterization of its drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights

and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant which this court should enjoin.

17. The named Plaintiffs are adequate representatives of the Class because they were treated in the same manner as other Class Members by the Defendant and has been damaged by this treatment in the same manner as other Class Members by their exclusion from employee compensation programs, plans and agreements and employee benefit plans and rights.

18. There are common questions of law and fact applicable to the entire Class including, but not limited to, the question whether the Plaintiffs and Plaintiff Class Members are entitled to certain types of employee compensation and benefits because they are employees of Defendant as defined by common and statutory law, even though Defendant has misrepresented to the Plaintiffs and Plaintiff Class Members their true employment status.

19. This case should be certified as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because the common questions of law and fact concerning Defendant's liability predominate over any individual question over the amount of damages to each person and that:

- a. The members of the Class are so numerous that their individual joinder in a single action is impossible and/or impracticable;
- b. The central questions of law and fact involved in this action are of a common or general interest and those common legal and factual issues predominate over any questions affecting only individual members of the Class. Among the common questions of law and fact are the following:
 - i. Whether Class Members have been misclassified as independent contractors pursuant to Defendant's operating agreements;
 - ii. Whether the Defendant has violated their legal obligations under various provisions of Montana law;

- iii. Whether Defendant unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the Class Members in violation of Montana Law;
- iv. Whether Defendant intentionally and/or negligently misrepresented to Plaintiff and the Class he seeks to represent their true employment status and thereby induced them to incur substantial expenses in reliance on such representations and;
- v. Whether injunctive and declaratory relief and an equitable accounting are proper.

20. The claims of the named Plaintiffs are identical to the claims of other members of the Class. The named Plaintiffs share the same interests as other members of the Class in this action because, like other Class Members, they have been misclassified and suffered financial loss of thousands of dollars due to Defendant's wrongful misclassification. Given the significance of their losses, they have the incentive, and are committed, to vigorously prosecute this action. They have retained competent and experienced counsel who specialize in Class action and employment litigation to represent them and the proposed Class. A Class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct alleged herein where each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings which would be contrary to the interest of justice and equity.

FACTS COMMON TO ALL CAUSES OF ACTION

21. Defendant is a national corporation whose businesses consists of offering package delivery and pick-up service to its customers using a single integrated nationwide network of transportation, sorting and communication facilities and integrating Plaintiffs into those existing

network operations. Defendant hired the Plaintiffs to timely deliver and pick up packages based at times, locations and for amounts determined solely by Defendant.

22. Each pick-up and delivery driver (referred to by Defendant as a “P&D contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and Addenda thereto (referred to hereinafter as “OA” or the “Operating Agreement” or the “Agreement”) as a mandatory condition of employment. The date, time and place of execution of each driver’s Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each Plaintiff and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences.

23. The Operating Agreement contains various statements purporting to classify Plaintiffs as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to inspect vehicles and drivers for compliance with Company-promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of Company uniforms, the right to take a vehicle out

of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

24. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiffs are required to sign the form contract as is, without any changes made to the terms contained therein. Each year, drivers are required to sign additional Addenda which are likewise not subject to negotiation and are unilaterally drafted adhesion contract provisions. The Agreement is, and at all material times has been unlawful, unconscionable and fraudulent in form and effect.

25. Defendant’s right of control over Plaintiffs are also retained and/or exercised by Defendant as demonstrated by concealed and/or undisclosed extra- contractual sources such as Company written rules and policies described above and unwritten practices which supplement and fill gaps in the written contract.

26. Defendant has created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless are required to follow in their work. Defendant's written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which Defendant fails to disclose and/or provide to drivers that govern the relationship between Defendant and the drivers. The other written handbooks and manuals and additional extra-

contractual sources include, but are not limited, to written rules on “contractor” termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to as “Business Discussion Notes” and retains these documents in secret driver files called “DOT” files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

27. Defendant retains the right to control the manner and means by which each Plaintiff performs their job. Drivers work from a terminal, where they are assigned packages for delivery and locations for pickups each day. Defendant employs a variety of managers at its terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other personnel of Defendant on a daily basis.

28. Defendant unilaterally sets the compensation to be paid to the drivers. Defendant pays drivers for the number of stops, deliveries and pickups made, as well as daily compensation for making themselves available for pickup and delivery work in a geographic areas solely determined by Defendant. Defendant pays its drivers for the number of stops, deliveries and pick-ups made. If a driver fails to check out with a terminal supervisor, he or she does not get paid for that day’s work.

29. Defendant unilaterally sets the prices charged to its customers for the services rendered by Plaintiffs. Defendant has a wide array of written and unwritten policies and

procedures that drivers are trained in and required to follow in their work. When drivers do not follow Defendant's rules, they suffer various types of punishment, some financial, and some disciplinary including loss of their route.

30. Plaintiffs provide service which is an integral part of Defendant's business enterprise and they have no separate or distinct occupation or business. By providing vehicles with required Defendant colors, logos and advertising, by reliably serving Defendant's customers, by following Defendant's controlled delivery routes and delivery and pick up methods, by providing Defendant with customer leads, by using Defendant's scanners which enable Defendant's customers to track their packages, and in other material ways, Plaintiffs have rendered and continue to render services to Defendant which are integral to the Defendant's nationwide package delivery system.

31. Defendant through the representations contained in the Agreement and other documents given to Plaintiffs induced Plaintiffs to enter into the Agreements in the belief that Plaintiffs would own their own business as an independent contractor. In reliance on those representations Plaintiffs have incurred substantial debt to purchase trucks and made to spend large sums of money for uniforms, insurance and expenses of owning, operating and maintaining his trucks. Defendant's representations to Plaintiffs in the Agreement were and are fraudulent and intended to mislead Plaintiffs into believing that Plaintiffs were independent businessman when the reality was that the Defendant retained such control over the Plaintiffs' work that they own virtually nothing except the obligation to continue to incur expenses for which they receive no reimbursement.

FIRST CAUSE OF ACTION
Violation of Montana Independent Contractor Law

Plaintiffs incorporate by reference Paragraphs 1 through 30 of this complaint as if fully set forth, and for a cause of action, allege as follows:

32. Defendant has violated Montana's laws regarding independent contractors by misclassifying Plaintiffs as independent contractors instead of an employees.

SECOND CAUSE OF ACTION
Violation of Montana Wage Law

Plaintiffs incorporate by reference Paragraphs 1 through 32 of this complaint as if fully set forth, and for a cause of action, allege as follows:

33. By such conduct in forcing the Plaintiffs to bear cost incident to Defendant's business operations, the Defendant also violated Montana Wages and Wage Protection laws by unlawfully requiring Plaintiffs to pay improper set-offs against their wages. This claim is brought pursuant to MCA §§39-3-201 through MCA §§ 39-2-217 and MCA §§ 39-3-401 through 39-3-410.

THIRD CAUSE OF ACTION
Fraud

Plaintiffs incorporate by reference Paragraphs 1 through 33 of this complaint as if fully set forth, and for a cause of action, allege as follows:

34. Plaintiffs were purportedly hired by Defendant to work as "independent contractors" pursuant to the terms of the OA described above. In fact, Defendant knew or should have known, at all times, that the "independent contractor" classification in the Operating Agreement was improper and that Plaintiffs and all persons similarly situated were "employees" entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are

informed, believe and on that basis allege, that through the OA Defendant intentionally misled Plaintiffs as to their employment status, or made such representations to Plaintiffs recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, Operation Management Handbook and Settlement Manual, other policies and secret driver files described above) that defined the employment relationship between Plaintiffs and Defendant, all for the purpose of realizing unjust profits from Plaintiffs' work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

35. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs in the OA concerning his employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs concerning their employment status and Plaintiffs' corresponding obligation to assume responsibility for all of their "own" employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

36. At all material times, Defendant intended to and did induce Plaintiffs to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by Defendant in the OA concerning their employment status and obligation to assume responsibility for all of employment related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks and suffered damage as a direct and proximate result.

37. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiffs' rights and protections guaranteed by Montana law and other applicable law.

FOURTH CAUSE OF ACTION
Rescission of Contract

Plaintiffs incorporate by reference Paragraphs 1 through 37 of this complaint as if fully set forth, and for a cause of action, allege as follows:

38. Despite the express terms of the Operating Agreement, Plaintiffs' relationship with Defendant satisfies every aspect of the test for employment, and not for independent contractor status.

39. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 1 through 20.

40. Despite this control and the actual status of the drivers as employees, Defendant mischaracterizes Plaintiffs as independent contractors. As a result, these drivers must pay substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

41. The Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of Plaintiffs in that Defendant evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

42. The Operating Agreement between Defendant and Plaintiffs is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs, and therefore denying them the legally cognizable benefits of employment.

43. The Operating Agreement between Defendant and Plaintiffs is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

44. The Operating Agreement illegally shifts the burden of certain costs that an employer must pay.

45. While acting on the direct instruction of Defendant and discharging his duties for Defendant, Plaintiffs incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiffs incurred these substantial expenses as a direct result of performing their job duties.

46. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay Defendant’s own expenses, Defendant has been unjustly enriched.

47. As a direct and proximate result of Defendant’s conduct, Defendant has received substantial benefits to which it had no entitlement, at Plaintiffs’ expense, including lost profits, self-employment taxes, premiums for insurance to replace workers compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

48. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by Defendant to bear, for all of the employment taxes, unemployment compensation and workers compensation the Defendant should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees.

FIFTH CAUSE OF ACTION
For an Accounting

Plaintiffs incorporate by reference Paragraphs 1 through 48 of this complaint as if fully set forth, and for a cause of action, allege as follows:

49. Plaintiffs are owed unpaid overtime compensation and unauthorized deductions from their compensation as detailed above.

50. Plaintiffs do not know the precise amount of compensation due them. Upon information and belief, Defendant possesses business records from which the amount of compensation due and owing to the Plaintiffs can be determined.

SIXTH CAUSE OF ACTION
Declaratory Judgment

Plaintiffs incorporate by reference Paragraphs 1 through 50 of this complaint as if fully set forth, and for a cause of action, allege as follows:

51. An actual controversy has arisen between the Plaintiffs, on the one hand, and Defendant, on the other hand, relating to the following matters:

- a. Whether Defendant has unlawfully misclassified Plaintiffs as independent contractors, and has thus denied Plaintiffs of the common benefits of employee status, such as
 - i. wages;
 - ii. holiday pay;
 - iii. workers' compensation;
 - iv. unemployment insurance;
 - v. contributions to the Defendant's retirement plan;
 - vi. income tax withholding; and
 - vii. meal, break and rest periods.
- b. What amounts Plaintiffs are entitled to receive in compensation and benefits.
- c. What amounts Plaintiffs are entitled to receive in interest on unpaid compensation due and owing.
- d. What amounts Plaintiffs are entitled to receive from Defendant in statutory penalties and interest.

52. Plaintiffs further seek entry of a declaratory judgment in their favor which declares Defendant's practices as heretofore alleged to be unlawful and which provides for recovery of all sums determined by this Court to be owed by Defendant to Plaintiffs.

PRAYER FOR RELIEF

Plaintiffs, jointly and severally pray for judgment as follows:

A. For an order certifying the class as described with the named Plaintiffs as class representatives;

B. For an order by the Court restoring and/or returning to Plaintiffs all of the Defendant's unfairly or illegally gotten profits measured by un-reimbursed expenses, workers compensation premiums, and/or unpaid unemployment insurance benefits incurred, together with interest thereon, as well as any other monetary damages caused by Defendant;

C. For an order by the Court enjoining Defendant from continuing its unfair and/or unlawful conduct;

D. For a declaration that Defendant's conduct is unfair and/or unlawful;

E. For an order by the Court rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;

F. For punitive damages in an amount to be determined at trial;

G. For an accounting;

H. For an award to Plaintiffs of his costs and expenses incurred in this action, including reasonable attorneys' and experts' fees pursuant to applicable Montana law; and,

I. For such other and further relief as this Court deems just and proper.

Dated: September 22, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on September 22, 2006, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filings to the following:

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