

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Jennifer C. Alexander, ABA #9511058  
Gregory S. Fisher, ABA #9111084  
Birch, Horton, Bittner and Cherot  
1127 West 7<sup>th</sup> Avenue  
Anchorage, AK 99501  
(907) 276-1550  
jalexander@bhb.com  
gfisher@bhb.com  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

IAN BORGE, CARY AITKEN, )  
MICHALE BEARDSLEY )  
BRANDON GIROUX, GARTH HITCHINGS, )  
VICKI MARCOTT, ROSANNE METHOD, )  
DENNIS MINSHALL, ROBERT MOE, )  
PENNY RISBY, and LAWRENCE WOOD, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
GETRONICS USA INC. and GETRONICS )  
WANG CO., LLC, )  
 )  
Defendants. )

Case No.: 3:07-CV-105(TMB)

**REPLY TO OPPOSITION TO MOTION FOR RULE OF LAW**  
**(RE: BURDEN OF PROOF ON EXEMPTIONS) [Docket 54]**

**I. Introduction**

Defendants Getronics USA Inc. and Getronics Wang Co., LLC, by and through undersigned counsel, respectfully file this Reply to their Motion for Rule of Law filed at Docket 54 regarding the burden of proof to establish the existence of

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

exemptions. Plaintiffs' opposition errs in four respects. First, plaintiffs confuse standards of review (such as "clear and affirmative" or "plain and unmistakable") for the burden of proof. It is a common error that courts have addressed and rejected. *See Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 506-09 (7<sup>th</sup> Cir. 2007). Second, and compounding the first error, plaintiffs read any reference to "clear and affirmative" as somehow establishing a heightened burden of proof. In point of fact, (as discussed in Getronics' motion at docket 54), only the Fourth Circuit and two other lower court cases relying on the Fourth Circuit apply a clear and convincing standard. Third, plaintiffs simply ignore inconvenient law, facts, precedent, and presumptions. Fourth, with respect to the standard of Alaska law, plaintiffs entirely ignore HB 182, which amended Alaska law in November 2005 to adopt federal law and standards. All of these errors are discussed below. At the end of the day, the same law and the same facts should be governed by the same burden of proof, especially when state law commands that the court look to and apply federal law. This Court should grant Getronics' motion and rule that the quantum of proof to establish the exemptions at issue in this case is by a preponderance of the evidence.

## II. Discussion

### A. The Court should rule that the burden of proof governing the FLSA exemptions is by a preponderance of the evidence

Federal civil pattern jury instructions recommend that courts apply the preponderance of the evidence standard to analyze FLSA exemptions. See Exhibit 1 (collecting together federal civil pattern instructions recommended by Judge Lee and Professor O'Malley). Concerning the appropriate burden of proof to govern

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

exemptions under the FLSA, Getronics is clearly entitled to a ruling that the burden of proof governing the FLSA exemptions is by a preponderance of the evidence.

Plaintiffs' chief error is that they confuse the "plain and unmistakable" or "clear and affirmative" standards of review for the burden of proof. This same argument has been addressed, explained, and soundly rejected by all reasoned authority. See *Yi*, 480 F.3d at 506-09; *Thomas v. Speedway SuperAmerica LLC*, 506 F.3d 496, 501-02 (6<sup>th</sup> Cir. 2007); *Renfro v. Indiana Michigan Power Co.*, 497 F.3d 573, 575-76 (6<sup>th</sup> Cir. 2007); *Goldman v. Radioshack Corp.*, 2006 WL 336020 at \*7 (E. D. Pa. 2006); *Mitchell v. Pemco Mutual Ins. Co.*, 142 P.3d 623, 626 (Wash. App. 2006). As the *Renfro* court explained:

We narrowly construe against [the defendant] the administrative employee exemption as applied to the technical writers. In *Renfro I*, we required [the defendant] to "establish each element of the exemption by a preponderance of the clear and affirmative evidence." Two panels of this court have questioned the meaning of the phrase "clear and affirmative evidence." **The phrase appears to have its genesis in the Tenth Circuit, though even there it went unexplained save a general citation to Walling. Walling, however, does not raise the evidentiary burden; it merely clarifies that the applicability of an FLSA exemption is an affirmative defense.**

\* \* \* \*

We clarify here that the phrase "clear and affirmative evidence does *not* heighten [the defendant's] evidentiary burden when moving for summary judgment. The word "clear," as used in this phrase, traces to the "clearly erroneous" Rule 52(a) standard, but the standard is inapposite to our current review of a motion for summary judgment. **And because establishing the applicability of an FLSA exemption is an affirmative defense, [the**

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

**defendant] has the burden to establish the . . . elements by a preponderance of the evidence.**

See *Renfro*, 497 F.3d at 575-76 (citations omitted)(emphasis added).

Other courts have also addressed the subject and explained how cryptic references to “clear and affirmative” or similar tests have been misunderstood, and do not mean that a heightened evidentiary standard is applied to examine wage and hour exemptions. See *Yi*, 480 F.3d at 506-09; *Thomas*, 506 F.3d at 501-02; *Goldman*, 2006 WL 336020 at \*7; *Mitchell*, 142 P.3d at 625-26.

The “plain and unmistakable” standard or the “clear and affirmative” standards are akin to standards of review and not burdens of proof. It is not unlike the standard of review for a summary judgment motion that provides, in part, that all facts and reasonable inferences must be drawn against the moving party and in favor of the nonmoving party. This does not mean that the burden of proof is somehow changed to a “beyond all reasonable inferences” test. Instead, all it means is that courts should analyze the motion in a particular manner. It is a test to assist courts in exercising their discretion, and nothing more. It does not change the burden of proof which remains the preponderance of the evidence burden. See *Yi*, 480 F.3d at 506-09; *Thomas*, 506 F.3d at 501-02; *Renfro*, 497 F.3d at 575-76; *Goldman*, 2006 WL 336020 at \*7; *Mitchell*, 142 P.3d at 625-26.

Plaintiffs do not understand this fundamental distinction. Indeed, plaintiffs’ argument that the Seventh Circuit did not apply a preponderance of the evidence standard in *Yi* demonstrates their confusion as between the standard of review and the burden of proof. In the extract quoted by plaintiffs (Docket 71 at p. 4),

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Judge Posner was explaining that it is irrelevant to rely on a so-called “clear and affirmative” burden of proof because there is no such burden. See *Yi*, 480 F.3d at 506-09. Mistakenly reading the “clear and affirmative” standard as a burden of proof, plaintiffs compound their primary error by misreading the clear weight of existing precedent. Anywhere plaintiffs see a reference to “clear and affirmative evidence” they understand that to mean a heightened evidentiary burden. They simply misread precedent.

As discussed in Getronics’ underlying motion, the overwhelming weight of authority has concluded that FLSA exemptions are governed by a preponderance of the evidence standard. See Getronics’ motion, Docket 54 at pp. 3-4. In fact, as noted above, the preponderance of the evidence standard is the standard recommended by federal civil pattern jury instructions. See Exhibit 1 (collecting together federal civil pattern instructions recommended by Judge Lee and Professor O’Malley). Getronics has provided the court with citations from circuit and district courts across the nation. In addition to those cases cited in the underlying motion, other courts have emphasized that the correct standard is the preponderance of the evidence standard. See *Shaw v. Prentice Hall, Inc.*, 977 F. Supp. 909, 913 (S. D. Ind. 1997); *Golden v. Merrill Lynch & Co.*, 2007 WL 4299443 (S. D. N.Y. 2007) (“in the Second Circuit, employers bear the burden of proof to establish an exemption only by a preponderance of the evidence. *Marshall v. Burger King Corp.*, 504 F. Supp. 404, 406-07 (E. D. N.Y. 1980), *aff’d*, 675 F.2d 516.”); *Fight v. Armour and Co.*, 533 F. Supp. 998, 1004 (W. D. Ark. 1982); *Rossi v. Associated Limousine Services, Inc.*, 438 F. Supp.2d 1354, 1359 (S. D. Fla. 2006); *Kowalski v. Kowalski Heat*

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

*Treating Co.*, 920 F. Supp. 799, 806 (N. D. Ohio 1996); *Caminiti v. County of Essex*, 2007 WL 2226005 at \*8 (D. N.J. 2007).

In actuality, properly understood, there is **no** serious confusion as between the circuits because plaintiffs ignore the fundamental presumption that, in the absence of an express burden of proof, the burden that applies in civil cases is the preponderance of the evidence standard. See *States Marine Corporation of Delaware v. Producers Cooperative Packing Co.*, 310 F.2d 206, 212 (9<sup>th</sup> Cir. 1962); see also *Yi*, 480 F.3d at 507-08 (discussing this principle in the context at issue here). Plaintiffs have no answer for this controlling presumption. Analyzed in light of this presumption, there is only one circuit that applies a heightened “clear and convincing” burden of proof—the Fourth Circuit. All other circuits have applied a preponderance of the evidence standard. See *Getronics’* motion, Docket 54 at pp. 3-4.

Plaintiffs argue that this court should ignore all other authority and follow an **unpublished** 1991 decision from the District of Oregon, *Hall v. Porter Yett Co.*, 1991 WL 66830 (D. Ore. 1991) that alluded to a clear and convincing standard of proof without reason or analysis. See plaintiffs’ motion, docket 71 at 9. Plaintiffs’ error is a good example of how mistakes get compounded. *Hall* cited a Tenth Circuit case, *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10<sup>th</sup> Cir. 1984). *Donovan* did **not** apply a clear and convincing burden—it referenced the “clear and affirmative” standard previously discussed, which is not a burden of proof. *Donovan*, in turn, has been addressed and explained by courts as **not** embracing a heightened evidentiary burden of proof. See *Renfro*, 497 F.3d at 576; *Yi*, 480 F.3d at 506-08. *Birdwell v.*

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

*City of Gadsen*, 970 F.2d 802, 805 (11<sup>th</sup> Cir. 1992), cited and relied upon by plaintiffs, made the same error and further erred by ignoring its own Circuit precedent as announced by *Dybach v. State of Florida Dep't of Corrections*, 942 F.2d 1562, 1566 n.5 (11<sup>th</sup> Cir. 1991). District courts in the Eleventh Circuit apply *Dybach*. See *Rossi*, 438 F. Supp.2d at 1359.

Instead of relying on *Hall*, thereby perpetuating further error, a better approach would be to follow Ninth Circuit precedent. It is correct that the Ninth Circuit has not specifically addressed the burden of proof for the § 213(a)(1) &(17) exemptions at issue in this case, but the Ninth Circuit has held that other § 213 exemptions are established by a preponderance of the evidence. See *Dickenson v. United States*, 353 F.2d 389, 391-92 (9<sup>th</sup> Cir. 1966) (burden of proof to establish a § 213(a)(2) retail exemption under the FLSA is by a preponderance of the evidence); *Coast Van Lines v. Armstrong*, 167 F.2d 705, 707 (9<sup>th</sup> Cir. 1948) (burden of proof to establish a § 213(b)(1) ICC exemption under the FLSA is by a preponderance of the evidence). Plaintiffs ignore this precedent. The exemptions are all part of the same statutory section. Customary rules of statutory construction would dictate that the same quantum of proof should govern these exemptions. See, e.g., *Meacham v. Knolls Atomic Power Laboratory*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2395, 2400-02 (2008) (analyzing ADEA defenses and concluding those within same statutory section should be construed and applied in harmony).

Moreover, the Ninth Circuit's silence is relevant because, under governing Ninth Circuit precedent, when a burden of proof has not been specified, the default standard in civil cases is the preponderance of the evidence standard.

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

See *States Marine Corporation*, 310 F.2d at 212; see also *Yi*, 480 F.3d at 507-08 (discussing this principle in the context at issue here). Again, plaintiffs ignore this controlling presumption.

Indeed, plaintiffs argue that “Congress has never sought to amend the law to apply a preponderance standard.” See plaintiffs’ response, docket 71 at p. 8. This only supplies further support for Getronics’ argument. As then-Judge (now Justice) Kennedy explained, “Congressional silence with regard to the applicable standard of proof” results in the preponderance of the evidence standard applying. See *United States v. Motamedi*, 767 F.2d 1403, 1407 (9<sup>th</sup> Cir. 1985) (in the context of statutory provisions governing pretrial proceedings).

In short, it is only by confusing standards of review for burdens of proof and then ignoring canons of statutory construction and presumptions applying to interpreting precedent that plaintiffs are able to make any type of argument at all—and even then plaintiffs seem to question their own conclusions by inviting this Court to enter a ruling without even considering the burden of proof. This Court should grant Getronics’ motion, apply the pattern civil instructions (instructions amply supported by overwhelming precedent) and rule that the § 213(a)(1) & (17) FLSA exemptions at issue in this case are governed by a preponderance of the evidence standard.

**B. Law, policy, and reason support the conclusion that the same burden should also govern plaintiffs’ AWA claim**

Concerning the appropriate burden of proof to govern exemptions under the AWA, plaintiffs completely ignore HB 182. HB 182 amended the AWA

in November 2005 to specify that federal law and standards governed the “white collar” exemptions at issue in this case. HB 182 provides, in part:

“bona fide executive, administrative, or professional capacity” has the meaning and shall be interpreted in accordance with 29 U.S.C. 201-219 (Fair Labor Standards Act of 1938), as amended, or the regulations adopted under those sections;

“computer systems analyst, computer programmer, software engineer, or other similarly skilled worker” has the meaning and shall be interpreted in accordance with 29 U.S.C. 201-219 (Fair Labor Standards Act of 1938), as amended, or the regulations adopted under those sections.

See AS 23.10.055 (c)(1) & (2).

HB 182 also retained AS 23.10.145: “If not defined in this title or in regulations adopted under this title, terms used in AS 23.10.050 - 23.10.150 shall be defined as they are defined in 29 U.S.C. 201-219 (Fair Labor Standards Act of 1938), as amended, or the regulations adopted under those sections.”

The Alaska Legislature expressly conferred retroactive effect on HB 182. HB 182 applies to all claims that accrued as of November 7, 2005 where suit is filed after that date. See Exhibit 2 at p. 7 (HB 182, Section 6); *id.* at p. 8 (Journal entry confirming effective date for HB 182 is November 7, 2005).

The sweeping effect of HB 182 is apparent in three respects. First, the Alaska Legislature did not simply adopt the federal regulations. The Alaska Legislature could have defined the white collar exemptions in AS 23.10.055(a)(9) by simply referencing the applicable federal regulations. For example, the Alaska Legislature could have drafted AS 23.10.055(a)(9) to read as follows (with the

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

addition underlined): “in a bona fide executive, administrative, or professional capacity as defined by 29 C.F.R. §§ 541.100-541.304.” Rather than take that approach, the Alaska Legislature adopted the federal standards in the definition section, and specifically emphasized that the exemptions have “the meaning and shall be interpreted” in accordance with federal law. Second, the Alaska Legislature took care to specify that the AWA as amended by HB 182 required that courts interpret the AWA exemptions in accordance with federal law, including the regulations adopted to enforce and apply federal law. Third and finally, the Alaska Legislature did not anchor its amendment in time. Instead, HB 182 is an open-ended or “rolling” amendment. As the FLSA and/or its regulations are amended in the future, the AWA will automatically track those amendments.

Plaintiffs ignore HB 182 and all of its legislative history. Instead of addressing the law as it currently stands, plaintiffs retreat to the past and base their entire argument on a pre-HB 182 case in which the Alaska Supreme Court referenced the burden of proof as being “beyond a reasonable doubt” without explanation or analysis. *See Fred Meyer of Alaska, Inc. v. Bailey*, 100 P.3d 881, 884 (Alaska 2004). Plaintiffs fail, however, to account for HB 182 which amended the AWA effective November 2005, a year after the Fred Meyer decision. Although HB 182 did not specifically address the burden of proof to establish exemptions, HB 182 did specifically provide that the administrative and computer employee exemptions should be interpreted in accordance with the FLSA standards. *See AS 23.10.055(c)(1) & (2)*. HB 182 also retained the guideline directing courts to interpret and apply the AWA by reference to federal law. *See AS 23.10.145*. The

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Alaska Legislature made it clear that it intended to amend the AWhA to bring Alaska law into closer alignment with federal law and standards. See Motion, Docket 54 at pp. 6-8 (for citation with discussion concerning legislative history). It would make no sense to apply the same standards to analyze the same exemptions in the same case using different burdens of proof.

This conclusion is only strengthened by the fact that both the FLSA and the AWhA apply the same “plain and unmistakable” standard for analyzing exemptions. Indeed, plaintiffs concede that both the FLSA and the AWhA apply the same “plain and unmistakable” standard for analyzing exemptions. See Plaintiffs’ motion, Docket 39 at p. 9 (quoting plain and unmistakable standard and declaring that “[t]his same standard applies to claims under the Alaska Wage and Hour Act”); see also *Whitesides v. U-Haul Co. of Alaska*, 16 P.3d 729, 732 (Alaska 2001) (“Like the federal Fair Labor Standards Act (FLSA), the terms of the AWhA, a remedial statute designed to effectuate the legislature’s goal of providing broad employment protection, are to be liberally construed. Accordingly, exemptions to the AWhA, including the bona fide administrative exemption, are to be narrowly construed and limited to those ‘plainly and unmistakably within their terms and spirit.’”). The same quantum of proof should govern the same standard.

Significantly, the Alaska Supreme Court has not addressed HB 182 and its impact on the AWhA. The Alaska Supreme Court has not discussed or referenced the appropriate burden of proof since HB 182 was passed.

Plaintiffs also fail to come to grips with the fact that *Fred Meyer’s* brief reference to a “beyond a reasonable doubt” standard lacks any support in law or

policy, and was not even an issue that was being litigated before the Alaska Supreme Court. The issue was never raised in the opening brief. See Opening Brief, 2003 WL 24048627 (July 17, 2003). It was only cursorily referenced in the opposition brief in a boilerplate paragraph. See Opposition Brief, 2003 WL 24048628 at \*8 (“Fred Meyer, which bears the burden of proving Bailey’s overtime exemption beyond a reasonable doubt, [citation to *Dayhoff* omitted], must prove that Bailey met each of six tests found at 8 AAC 15.910(a)(7) to qualify Bailey as an ‘executive.’”). The employer then made brief reference to the burden of proof in its reply brief, but did not analyze the subject or explain its argument. See Exhibit 3 at p. 3. Perhaps more importantly, arguments raised for the first time in a reply brief are not considered by the Alaska Supreme Court. See *Willoya v. State*, 53 P.3d 1115, 1125-26 (Alaska 2002). There was never any oral argument.<sup>1</sup> In short, traced back to its origins, the “beyond a reasonable doubt” standard expressed in *Fred Meyer* finds no logical or legal support. It is based on an attempt by an agency official for a now defunct federal agency to articulate the concept that exemptions are to be narrowly construed.

It is correct, of course, that considered dicta may well be persuasive. However, this Court has never blindly followed or applied state law where there are grounds to question continuing vitality of state law. See *Alaska Airlines, Inc. v. Lockheed Aircraft Corp.*, 430 F. Supp. 134, 137 (D. Alaska 1977) (“Because of the

---

<sup>1</sup> The Alaska Supreme Court’s case management system may be accessed at this website: <http://www.appellate.courts.state.ak.us/>. Researching the status of oral argument reveals that no oral argument was ever held. Instead, the case was submitted on the briefs on February 19, 2004.

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

paucity of conflicts decisions from the Alaska courts, and the vintage of those decisions in this rapidly changing and uncertain area of law, the court will base its decision on other grounds where possible.”).

HB 182 amended the AWhA in November 2005, a year after the *Fred Meyer* opinion was issued. As amended by HB 182, the AWhA instructs courts to apply federal law. *Fred Meyer* is simply dead letter. The same law and the same facts should be governed by the same burden of proof, especially when state law commands that the court look to and apply federal law. This Court should grant Getronics’ motion and rule that the burden of proof governing the AWhA exemptions is by a preponderance of the evidence.

**C. If the Court has any doubts it should certify the AWhA issue**

Certification should not be necessary where, as here, the issue rests on unsupported dicta that was subsequently overruled by implication when the Alaska Legislature adopted HB 182. However, if this Court concludes that it would be better to allow the Alaska Supreme Court to resolve this issue, certification could be referred on this question:

Under the Alaska Wage and Hour Act as amended in 2005 by HB 182, which adopted federal standards to govern AWhA exemptions, what is the burden of proof to establish professional, executive, administrative, and computer professional exemptions under the AWhA if federal law applies a preponderance of the evidence standard?

Contrary to plaintiffs’ opposition, it is not delay to ascertain and apply the correct standard. Indeed, it would be more inefficient to apply the wrong

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

standard. Applying the wrong standard would only lead to reversal on appeal. The issue as to what burden of proof governs the AWA since HB 182 amended Alaska law is now pending in another pending federal case, *Ian Black v. Colaska, Inc.*, No. C07-0823 JLR in the Western District of Washington. The parties have scheduled mediation for September 8, 2008. If the Alaska Supreme Court declines to accept certification, this Court would be free to address and resolve the issue, and should resolve it by granting Getronics' motion. The same law and the same facts should be governed by the same burden of proof, especially when state law commands that we look to and apply federal law.

**D. Plaintiffs' remaining arguments lack merit**

Plaintiffs' argument that the Court can ignore the applicable burden of proof betrays their lack of conviction in their own arguments. Plaintiffs have requested a jury trial. The issue as to what burden of proof should apply will have to be decided. It needs to be decided now because plaintiffs have filed a motion for partial summary judgment. The Court has to know what burden to apply before the Court analyzes the motion because the evidentiary burden at trial governs summary judgment practice in federal court. See *Security Farms v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1011 (9<sup>th</sup> Cir. 1997). The Court should not rule on a motion for partial summary judgment and then go back after the fact to plug in a burden that suits its predetermined conclusion.

Plaintiffs' argument that this Court can simply grant plaintiffs partial summary judgment on any standard can only be described as a hopeful misapprehension. The existing record is rife with genuine issues of material fact in

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

dispute. See Getronics' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed at Docket 62 and supporting exhibits filed at Docket 67.

Plaintiffs' argument that a heightened burden of proof is necessary to protect federal remedial rights is without logical or legal foundation. In point of fact, under Title VII, the most important federal remedial right designed to eradicate unlawful discrimination, employers may rebut an employee's prima facie case **on less than** a preponderance of the evidence. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259-60 (1981).

Finally, lacking any other legal or factual basis for answering Getronics' motion, plaintiffs impugn Getronics and its motives. Getronics filed this motion to ensure that the correct burden of proof is ascertained and applied. Not applying the correct burden of proof would lead to inexcusable delay. The parties could complete an entire jury trial and then have that reversed on appeal. The issue needs to be resolved now.

### III. Conclusion

This Court should rule as a matter of law that the burden of proof governing the overtime exemptions under the FLSA and the AWWA is by a preponderance of the evidence. A proposed order was lodged with the underlying motion.

BIRCH, HORTON, BITTNER AND CHEROT  
ATTORNEYS AT LAW  
1127 WEST SEVENTH AVENUE  
ANCHORAGE, ALASKA 99501-3399  
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

DATED this 4th day of September, 2008.

BIRCH, HORTON, BITTNER and CHEROT

By: /s/ Gregory S. Fisher  
Jennifer C. Alexander, ABA #9511058  
Gregory S. Fisher, ABA #9111084  
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of September, 2008, a true and correct copy of the foregoing document was served via ECF on the following parties:

Timothy Seaver, Esq.  
Seaver & Wagner LLC  
421 W 1<sup>st</sup> Avenue, Suite 250  
Anchorage, AK 99501  
[tseaver@seaverwagner.com](mailto:tseaver@seaverwagner.com)

Andrew M. Lebo, Esq.  
425 G Street, Suite 920  
Anchorage, AK 99501  
[amlebo@juno.com](mailto:amlebo@juno.com)

BIRCH, HORTON, BITTNER AND CHEROT

By: /s/ Gregory S. Fisher