

Rite Aid worker survey carries side-effects

By **Matthew Hirsch**
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When Senior U.S. District Judge Thelton Henderson handed down a key ruling in an employment suit against Rite Aid last week, his decision to certify a class of more than 1,000 store managers wasn't necessarily the most troubling part for the defense bar.

There also was the fact that much of the evidence to support his decision came paid for and delivered by Rite Aid itself.

In the suit filed by Oakland's Scott Cole & Associates in May 2005, name plaintiff Prag Tierno accuses the drugstore chain of improperly classifying its managers in California as exempt from state law granting certain workers overtime pay, and other benefits like

meal and rest breaks.

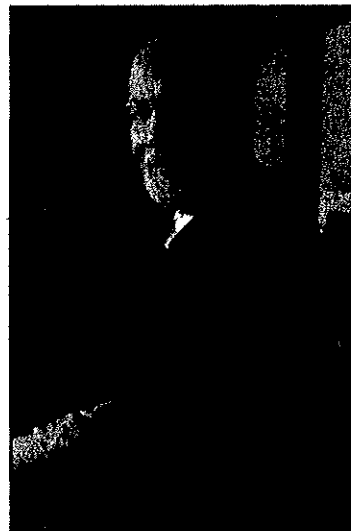
California law allows exceptions for professionals who are primarily engaged in management duties.

In February 2005 and again in June, Rite Aid prepared questionnaires for store managers to show they spend most of their time doing just that. Both times, more than 80 percent of the respondents reported spending most of their time on "management," or ex-

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TOO MUCH TOO SOON: Senior U.S. District Judge Thelton Henderson called defense questionnaires a "misguided" attempt to broach the merits — and said they hurt the company's argument against class certification.

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empt, activities.

While the questionnaires may help Rite Aid later in the case, the court concluded they gutted the company's position against class certification.

On Thursday, Henderson found that the name plaintiff's allegations in *Tierno v. Rite Aid*, 05-02520, are typical of claims that could be brought by other managers at Rite Aid stores — a finding that paved the way for class certification.

According to Henderson's ruling, Rite Aid had contended there were no typical stores or typical class members.

But Henderson pointed to the questionnaires as proof that Rite Aid managers share a typical work experience.

He noted that Rite Aid's use of the questionnaires now was a "misguided" effort to argue the merits of the case during a certification hearing.

Even putting aside those concerns, he also didn't find they provided persuasive evidence of the "tremendous variation" that Rite Aid argued exists among its managers. "Rite Aid has implicitly conceded that a single set of tasks is applicable to all store managers," he wrote in the order.

Paul, Hastings, Janofsky & Walker's Jeffrey Wohl, an attorney for Rite Aid, did not return calls Tuesday.

But some defense lawyers outside the case said they approach employee questionnaires with extreme caution.

W. Randolph Teslik, a partner in Akin, Gump, Strauss, Hauer & Feld's Washington, D.C., office, said he prefers depositions because they take place in front of both attorneys and allow cross-examination.

The problem with questionnaires, Teslik said, is they give just a snapshot of

how an employee spends his time. A deposition can give a more thorough look.

"It's very important for the court to learn what tasks the managers perform and how much time they spend performing those tasks, and that analysis has to occur on a week-by-week basis," said Teslik.

Last year, Teslik went up against Scott Cole & Associates — the same firm representing the Rite Aid plaintiff — and defeated a class certification petition in front of Alameda County Superior Court Judge Ronald Sabraw. In that case, *Dunbar v. Albertsons*, RG 04146326, Teslik said he didn't use an employee questionnaire.

"A declaration that's taken under oath is better than simply mailing a questionnaire out to an employee and having the employee fill in the blanks," he said.

Still, JAMS mediator Michael Loeb, a former employment defense lawyer, doesn't think questionnaires are an unusual tool for the defense.

"I have a sense that these are used very frequently by very experienced class action litigators."

Though he benefited from Rite Aid's questionnaires, Cole, the plaintiff lawyer who will represent the Rite Aid class, said he usually tries to gather a lot of employee declarations to argue for class certification.

"It's challenging to explain to the court how these people are doing the same thing. In some cases clearly they are, and in some cases it's not so clear. In Rite Aid, I think it was clear that store managers were doing the same thing across the chain."

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