

OCT 25 2007

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MARLO,

Plaintiff - Appellant,

v.

UNITED PARCEL SERVICE, INC.,

Defendant - Appellee.

No. 05-56446

D.C. No. CV-03-04336-DDP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted October 17, 2007
Pasadena, California

Before: KOZINSKI and McKEOWN, Circuit Judges, and JONES**, District
Judge.

Michael Marlo appeals the district court's grant of summary judgment in
favor of United Parcel Service ("UPS") on his claim that UPS misclassified its

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Jones, Senior United States District Judge
for the District of Oregon, sitting by designation.

Full-Time Supervisors (“FTS”) as nonexempt employees. Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Marlo has raised material issues of fact related to whether the FTS “customarily and regularly exercise[] discretion and independent judgment.” Cal. Code Regs. tit. 8, § 11090(1)(A)(1)(d) (2005). Accordingly, summary judgment as to that issue was improper.

REVERSED AND REMANDED.