S204804

IN THE SUPREME COURT OF CALIFORNIA

SUSAN J. PEABODY, Plaintiff and Appellant,

v.

TIME WARNER CABLE INC., Defendant and Respondent.

Pursuant to Request to Decide Question of California Law
Ninth Circuit No. 10-56846

ANSWER BRIEF ON THE MERITS OF RESPONDENT

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INTRODUCTION

Both California and federal law not only permit employers to allocate an employee's commission payments to the periods over which they were earned, they require it. Accordingly, the certified question must be answered in the affirmative.

This case involves minimum wage and overtime claims brought by a sales executive who was paid $74,464.75 for less than 10 months of work with Time Warner Entertainment Company, L.P. ("TWE"). While employed by TWE, Petitioner Susan Peabody was paid a base annual salary of $20,000 (paid biweekly in the amount of $769.23) and substantial commissions every month that unquestionably qualified her for California's commissions-paid exemption from overtime. In fact, it is undisputed that Peabody earned a total of $57,134.43 in commissions (77% of her earnings) over her 10 months of employment, earned almost $12,000.00 in commissions in one month ($13,288.09 in total compensation for that month), and never earned less than $3,195.49 in total compensation for any month. TWE paid these commissions on a monthly basis, as has been permitted by DLSE precedent for decades and as expressly agreed to by Peabody. These commission payments were then allocated over

the month in which they were earned, as permitted and required by both California and federal law.

Despite the above undisputed facts regarding her substantial compensation, Peabody tries to manufacture minimum wage and overtime claims by excluding her $57,000.00 in commissions (77% of her income) from her wage calculations. Specifically, Peabody argues that TWE could only count her commissions in the pay period in which they were actually paid, and was not permitted to allocate her monthly commissions over the month in which they were earned. Thus, Peabody isolates the bi-weekly pay periods when she received only her base salary from the substantial monthly commissions she received in the following and preceding pay periods, and then asks the Court to treat her as if she was a low paid, hourly laborer who was barely scraping by on her $20,000.00 salary. In fact, Peabody's brief is notable in that it wholly ignores her ***total*** compensation. Peabody's theory fails, as acceptance of her claims would require the suspension of logic, as well as turning a blind eye to the facts of this case and applicable law.

Indeed, both California and federal law **require** an employer to allocate commissions to the period over which they were earned. For

example, in the context of calculating and paying the correct overtime rate, employers are required to allocate commissions across the entire period for which they were earned to determine the correct "regular rate" of pay. This legal requirement exposes Peabody's theory as not only contrary to law, but also illogical and unworkable. That is, Peabody argues that she was entitled to overtime compensation in bi-weekly pay periods where she did not actually receive a commission check because, by **ignoring** her monthly commission payments, she claims she did not qualify for the commissions-paid exemption for those pay periods. Importantly, however, for TWE to pay Peabody the overtime she claims she was due for those pay periods where no commission check was received, the law would require TWE to allocate the monthly commission payment over the entire period in which the commissions were earned, **including** *the very periods Peabody argues the commissions cannot be allocated to.* Thus, Peabody's theory is inconsistent with both California and federal law.

Peabody's theory is also inconsistent with the DLSE's longstanding approval of commission plans that provide for monthly (rather than bi-weekly) pay periods for commissions. It is illogical that California law would permit commissions to be paid monthly,

while at the same time requiring the exclusion of those monthly commissions when determining whether a sales person qualifies for the commissions-paid exemption or received the minimum wage.

Additionally, Peabody's theory fails because she ignores the DLSE's express instruction that courts look to federal law to interpret and apply California's commissions-paid exemption, and federal law unquestionably permits the allocation of monthly commissions over the month in which they were earned, as TWE did here. For all of these reasons, answering the certified question in the affirmative and holding that employers may allocate an employee's monthly commission payments to the month over which they were earned is the only logical, just result, and the only result consistent with California and federal law.

Finally, Peabody's gratuitous arguments regarding her wage statement and "waiting time" claims must be summarily rejected, as they fall far outside the scope of the certified question. (Petitioner's Brief at 28, 31).

QUESTION PRESENTED

"May an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?"

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

The District Court held that Peabody "admitted without controversy" the facts set forth in Defendant's Statement of Uncontroverted Facts submitted to the United States District Court for the Central District of California ("District Court"). (Excerpts of Record ("ER") at 3:10-12.) Peabody did not appeal or otherwise challenge this aspect of the District Court's order. Thus, to the extent Peabody's "Statement of the Facts" purports to contradict the facts set forth below -- all of which are taken from Defendant's Statement of Uncontroverted Facts -- Peabody's alleged facts must be disregarded.

A. Peabody's Employment

Peabody started working for TWE on July 25, 2008 as an Account Executive in its Media Sales Department. (ER at 267:10-14, 221:12-14.) Peabody worked for TWE for only 10 months. (ER at 221:12-14.) As an Account Executive, Peabody was responsible

for selling advertising on TWE's cable network. (ER at 246:17-19, 221:15-19.) Over her brief 10 months of employment, Peabody was paid almost $75,000 in compensation, the vast majority in the form of sales commissions. (ER at 267:18 – 268:16, 271-318.)

B. Peabody's Compensation

When Peabody was first hired by TWE, her compensation was governed by the Time Warner Cable Media Sales 2008 Account Executive Individual Compensation Plan (the "2008 Plan"). (ER at 246:20-28.) Effective March 1, 2009, TWE implemented its Media Sales 2009 AE Compensation Plan (the "2009 Plan"). (ER at 247:22-24.) Under both plans, Peabody's compensation consisted of an annual base salary of $20,000 plus commissions. (ER at 246:20-28; 247:28 – 248:11, 255; and 248:4-5, 223:23-25.)

C. Payment of Commissions

Under both the 2008 and 2009 Plans, Peabody agreed she would receive her $20,000 annual salary bi-weekly and her commissions on a monthly basis. The method by which TWE paid commissions was the same under both Plans. TWE operates its advertising sales on a broadcast calendar, which is different than a regular calendar. (ER at 248:1-2, 216:19 – 217:1) Under the

broadcast calendar, each month is exactly four (4) weeks or five (5) weeks, depending on the month. (ER at 248:25-26, 237:11-13.) For example, the December 2008 broadcast month was exactly four (4) weeks, running from December 1 through 28, 2008. (ER at 248:28 – 249:1-2.) The January 2009 broadcast month was also four (4) weeks, running from December 29, 2008 through January 25, 2009. (ER at 249:2-3.) The November 2008 broadcast month, however, was five (5) weeks, running from October 27 through November 30, 2008. (ER at 249:3-5.)

Under both the 2008 and 2009 Plans, Account Executives such as Peabody earned, and TWE paid, commissions monthly on the actual broadcast (i.e., airing) of advertising.[1] (ER at 249:8-10, 216:4–217:1; 227:1-9.) Peabody admitted that she understood this payment schedule. (ER at 248:20-23, 218:5-8; 233:4-7; 238:9-12.)

D. Peabody's Actual Compensation from TWE

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[1] Peabody also understood that airing of the advertising was a critical part of completing the sale and earning the commission because "the nature of television advertising business makes it necessary to frequently service advertisers after they have placed an order for advertising time," (ER at 258-61, 232:1-4) and because many things can change before airing that impact how much the advertiser will pay, which affects revenue and ultimately how much commission is due. (ER at 232:9 - 234:3.)

TWE paid Peabody her $20,000 annual salary on a biweekly basis ($769.23 every two weeks) and her commissions on a monthly basis. (ER at 58:11-61:22; 76:11-23; 267:16-17; 248:20-23, 218:5-8; 233:4-7; 238:9-12.) Peabody claimed she worked 45 hours per week. (ER at 58:11 – 61:19.)

Table 1 shows the commissions paid to Peabody for each broadcast month:

TABLE 1

Broadcast Month	**Amount of Commission Paid**
July 2008	$5,074.40
August 2008	$4,583.33
September 2008	$4,583.33
October 2008	$2,041.33
November 2008	$5,415.17
December 2008	$1,657.03
January 2009	$2,253.87
February 2009	$11,949.63
March 2009	$9,383.24
April 2009	$6,345.64

May 2009	$3,847.46
TOTAL COMMISSIONS	$57,134.43

(ER at 267:18 – 268:16, 271-318.) Thus, during her brief tenure with the Company, Peabody was paid a total of $74,464.75, including $57,134.43 (or 77%) in commissions. (*Id.*)

E. Peabody's Earnings Exceeded One and One-Half Times the Minimum Wage and Her Commissions Exceeded 50% of Her Total Compensation At All Relevant Times

California's commissions-paid exemption -- Section 3(D) of Wage Order 4-2001 -- applies where: (1) the employee's principal function is selling a product or service; (2) the compensation for sales of the product or service is a percentage of the price of the product or service; (3) the employee's earnings exceed one and one-half times the minimum wage; and (4) more than one-half of the employee's earnings are commissions. *Erichs v. Venator Group, Inc.*, 128 F. Supp. 2d 1255, 1261-62 (N.D. Cal. 2001); *Keyes Motors, Inc. v. Division of Labor Standards Enforcement,* 197 Cal. App. 3d 557, 561-63, 242 Cal. Rptr. 873 (1987). Peabody does not dispute that her principal function was selling a product or service; that her compensation for those sales was a percentage of the price of the

products or services sold; and that more than one-half of her earnings came from commissions. The only element Peabody purports to dispute is whether her $74,464.75 in earnings over the course of ten months exceeded one and one-half times the minimum wage at all relevant times. The minimum wage in California during the time TWE employed Peabody was $8.00 per hour. *Cal. Min. Wage Order MW-2007*. Thus, to satisfy the one and one-half times minimum wage element of the Section 3(D) commissions-paid exemption, Peabody's earnings had to have exceeded $12.00 per hour. Because TWE paid Peabody commissions based on broadcast months consisting of either four (4) or five (5) weeks, the appropriate and logical time period for examination of the minimum wage element of the 3(D) exemption is the broadcast month. (ER at 5:189-26.) Thus, to satisfy the one and one-half times minimum wage element, Peabody's earnings must have exceeded either $2,160 for a 4 week broadcast month of 45 hours per week[2] (45 hours x 4 weeks =180 hours at $12 per hour) or $2,700 for a 5 week broadcast month of 45

2 As noted above, Peabody claimed she worked 45 hours per week. (ER at 58:11 – 61:19.)

hours per week (45 hours x 5 weeks = 225 hours at $12 per hour).[3] As demonstrated in Table 2, below, Peabody's compensation easily satisfied this element. Additionally, as shown in Table 2, Peabody's commissions constituted far more than 50% of her total compensation in each and every monthly commission pay period.

[3] During the brief time Peabody worked for TWE, only the August 2008, November 2008 and March 2009 broadcast months were five weeks.

TABLE 2

Broadcast Month	Salary Paid	Commissions Paid	Total Compensation	Commissions as % of Total Compensation
July 2008	$384.62	$5,074.40	$5,459.02	93%
August 2008	$1,923.10	$4,583.33	$6,506.43	70%
September 2008	$1,538.46	$4,583.33	$6,121.79	75%
October 2008	$1,538.46	$2,041.33	$3,579.79	57%
November 2008	$1,923.10	$5,415.17	$7,338.27	74%
December 2008	$1,538.46	$1,657.03	$3,195.49	52%
January 2009	$1,538.46	$2,253.87	$3,792.33	59%
February 2009	$1,538.46	$11,749.63	$13,288.09	88%
March 2009	$1,923.10	$9,383.24	$11,306.34	83%
April 2009	$1,538.46	$6,345.64	$7,884.10	80%
May 2009	$1,153.86	$3,847.46	$5,001.32	77%

PROCEDURAL BACKGROUND

On July 31, 2009 Susan Peabody filed a putative class action complaint in the Los Angeles Superior Court on behalf of a class of current and former employees who held the position of "Account Executive." The complaint alleged five causes of action: (1) failure to pay earned commissions; (2) failure to pay minimum wage; (3) failure to pay earned overtime; (4) failure to timely pay wages; and (5) failure to provide accurate wage statements.

On September 4, 2009, the action was removed to the District Court under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1331(d). The parties agreed to bifurcate the issue of liability to consider the merits of Peabody's claims prior to any motion for class certification. Accordingly, on July 19, 2010, TWC filed its motion for summary judgment on the merits. The District Court heard the motion on November 1, 2010 and granted the motion in its entirety on that same date. The District Court properly applied the commissions-paid exemption (Section 3(D) of IWC Wage Order 4-2001) and held that Peabody was not entitled to overtime wages because she was a commissioned salesperson who: (1) was paid more than one and one-half times the minimum wage; and (2) received over 50% of her

compensation in the form of commissions at all relevant times. As the District Court held in finding that Peabody was exempt from the payment of overtime, "Plaintiff's earnings regularly exceeded one and a half times the minimum wage. Considering Plaintiff earned *thousands* of dollars every month, this is not surprising." (ER at 5:27-28.)

Recognizing that Peabody's compensation regularly exceeded one and one-half times the minimum wage, the District Court also rejected Peabody's minimum wage claim, stating:

> It is wrong for Plaintiff to make a claim for minimum wage violations when she earned over $70,000 in the ten months she worked for Defendant. Plaintiff argues . . . that "she was compensated at an hourly rate of $9.61 for just 40 hours per week [and] therefore received no compensation for at least five hours per week," arguing that she worked at least 45 hours per week. [Citations omitted.] This is patently false. Plaintiff cannot ignore her commission payments – one in excess of $10,000 in a single month [citation omitted] – and ignore the fact that she was a salaried employee, not an hourly employee, and then claim she received "no" compensation for certain hours worked.

(ER at 6:9-17.) As the District Court properly recognized, as a salaried employee who was paid over $74,000 in just 10 months of employment including substantial commissions each month of her

employment, Peabody was compensated well in excess of the minimum wage for all hours she worked.

The District Court entered final judgment on November 9, 2010. Peabody appealed to the United States Court of Appeals for the Ninth Circuit on November 29, 2010.

On July 11, 2012, the Ninth Circuit heard argument on Peabody's appeal. By Order dated August 17, 2012 (Dkt. 32-1), the Ninth Circuit affirmed summary judgment in TWC's favor on Peabody's claim for unpaid commissions. The Ninth Circuit also certified the following question to this Court:

> To satisfy California's compensation requirements, whether an employer can average an employee's commission payments over certain pay periods when it is equitable and reasonable to do so.

By Order dated October 17, 2012, this Court accepted the certified question but altered the wording of the certified question as follows:

> May an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative: employers are permitted to allocate an employee's commission

payments to the periods over which they were earned. This is the only logically and legally sound answer. Logically, any other result would render significant commission earnings irrelevant, especially in situations like the instant case, where the employee earned the lion's share of her income in the form of monthly commissions. Highly-compensated employees should not be permitted to manufacture minimum wage and overtime claims by simply ignoring a major component of their compensation.

Legally, the affirmative answer is required because both California and federal law not only permit, but **require** employers to allocate commissions over the period for which they were **earned**, not just the pay period in which they received the commission check. That is, when determining the appropriate "regular rate" of pay for purposes of calculating overtime compensation, employers are **required** to allocate commissions over the entire period in which they were earned.

Likewise, allocating commissions over the month in which they were earned is consistent with the DLSE's longstanding approval of commission plans that establish monthly (or even longer) pay periods for commissions. Obviously, the DLSE would not

approve of monthly pay periods for commissions while at the same time silently prohibiting employers from applying those commissions to the month over which they were earned.

Finally, allocating commissions across the period for which they were earned is also consistent with federal authority, which California courts follow when interpreting parallel state labor law. This principle is especially applicable in this case, as the DLSE has expressly instructed that Section 3(D) of Wage Order 4-2001 -- the "commissions-paid" exemption at issue here -- should be interpreted and applied consistent with the federal law interpreting 29 U.S.C. 207(i), the federal counterpart to Section 3(D). Federal law regarding Section 207(i) establishes the common sense approach of allocating commission earnings to the weeks for which they were earned, which is exactly what TWE did here. That is, TWE simply allocated the monthly commissions to the four or five week period of the broadcast month over which they were earned. As shown above, using this analysis it is undisputed that Peabody's earnings more than satisfied the 1.5 times minimum wage component of the commissions-paid exemption at all relevant times.

Finally, the Ninth Circuit asked for guidance on a narrow issue

-- the allocation of commissions. The Ninth Circuit did not ask for guidance or certify any question regarding Peabody's wage statement or "waiting time" claims, nor did this Court purport to accept any questions regarding those claims. Accordingly, the Court should not consider Peabody's improperly asserted arguments regarding her wage statement or waiting time claims.

ARGUMENT

I. ALLOCATION OF PEABODY'S COMMISSION EARNINGS TO THE MONTHLY PERIOD OVER WHICH THEY WERE EARNED IS CONSISTENT WITH CALIFORNIA LAW

Throughout this entire case, in the District Court, in the Ninth Circuit and now in this Court, Peabody has ignored her significant commission earnings to make her arguments. Specifically, Peabody tries to fabricate minimum wage and overtime claims by arguing that her commission earnings only count for the pay period **in** which the commissions were paid rather than the time periods **for** which the commissions were paid and over which they were earned. Notably, and not surprisingly, Peabody cannot cite any authority that actually supports her position. Instead, Peabody relies on tortured analogies and hypothetical scenarios that ignore the key fact before the Court – her own substantial commissions. Moreover, as shown below,

Peabody ignores the numerous authorities and principles confirming that commissions must be allocated to the period for which they were earned, as TWE did here. Accordingly, all of Peabody's arguments are unavailing.

A. Allocation of Commissions Over the Period in Which They Were Earned Is Required by State and Federal Overtime Laws

Under both California and federal law, an employer is not only permitted, but **required** to allocate commissions over the period they were earned to calculate an employee's "regular rate of pay" for purposes of computing and paying overtime compensation. DLSE Manual at 49.1.1, 49.2.1.1, 49.2.1.2; 29 C.F.R. §§ 778.117, 778.119. Specifically, when calculating the regular rate of pay for overtime purposes where commissions are involved, federal law requires that the employer "apportion back" the commission "over the workweeks of the period during which it was earned." 29 C.F.R. § 778.119.[4] The

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[4] The DLSE's construction of California law as requiring that employers allocate commissions across the period in which they were earned, in accordance with federal law, is hardly surprising. Indeed, California law cannot be construed otherwise, as requiring an employer to allocate commissions over a different period would conflict with federal law and would therefore be preempted. *See Olszewski v. Scripps Health*,, 30 Cal. 4th 798, 822 (2003) (holding state Medicaid lien provisions preempted where conflict with federal Medicare laws).

DLSE also instructs that California law follows federal law when computing the regular rate. DLSE Manual at 49.1.1, 49.1.2, 49.1.2.1, 49.1.2.2, 49.1.2.4. Thus, the DLSE Manual provides that, under California law, "the regular bonus rate is found by dividing the bonus by the total hours worked during the *period* to which the bonus applies." DLSE Manual at 49.2.4 (emphasis added); *see also Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804, 808 (2009) (approving bonus plan where bonus payment included in regular rate calculation). Accordingly, both federal and California law **mandate** that employers allocate commissions across the pay for which they were earned, as TWE did here.

This same commission allocation rule necessarily applies when considering whether an employee received the minimum wage or fell within the commissions-paid exemption. Indeed, to require a different allocation of commissions in these contexts would be illogical, unworkable and produce absurd results. That is, according to Peabody's proposed rule, to determine whether she was eligible for overtime TWE would not be permitted to allocate commissions to the month over which they were <u>earned</u>, but would instead only be able to consider those commissions for the bi-weekly pay period in which

they were actually paid. Assuming, as Peabody does, that this would eliminate the exemption in any bi-weekly pay period where commissions were not actually paid (although they were earned during that period), then she would be owed overtime for that period. In calculating the overtime owed, however, federal and California law would require TWE to determine the "regular rate of pay" by going back and allocating the commissions across the entire month in which they were earned -- *including the pay period for which TWE was not permitted to consider the earned commissions for purposes of determining eligibility for the commissions-paid exemption.* Of course, as noted above, once the commissions are properly allocated across the period for which they were earned (as they must be), Peabody qualifies for the exemption.

Accordingly, there is no question that employers are not only permitted to allocate commissions to the period over which they were earned, they are required to do so. Therefore, the certified question must be answered in the affirmative.

B. Allocation of Commissions Across the Period in Which They Were Earned Is Consistent With California Law Permitting Monthly Pay Periods for Commissions

Allocation of commissions to the period over which they were earned is also consistent with the DLSE's guidance providing that commissions may be paid on a monthly basis. California does not mandate the payment of commissions on any particular timetable, but rather when they are reasonably calculable and as specified in the parties' commission agreement. DLSE Manual 5.2.5. Indeed, ***for over 20 years the DLSE has approved the payment of commissions on a monthly basis where, as here, a compensation plan provides for such monthly payments***. That is, the DLSE has specifically approved compensation plans where a commission plan (such as the one Peabody agreed to here) "calls for the commissions to be calculated once a month or less often. . . ." DLSE Op. Ltr. 1993.03.08.[5] In fact, the DLSE recognizes that "commission programs which calculate the amount owed once a month (or less often) are common." DLSE Op.

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[5] DLSE opinions "may be properly considered" by the courts. *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1007, 124 Cal. Rptr. 4th 996 (2011) quoting *United Parcel Serv. Wage and Hour Cases*, 190 Cal. App. 4th 1001, 1011, 118 Cal. Rptr. 3d 834 (2010). In fact, as noted above, Peabody has argued that the DLSE's guidance should receive special deference where, as here, the analysis involves the provisions of a Wage Order. (Petitioner's Brief at 27-28.)

Ltr. 2002.12.09-2. Notably, controlling case law is consistent with the principles announced by the DLSE that the terms of a compensation plan control the timing of an employer's payment of commissions. *Schacter v. CitiGroup, Inc.*, 47 Cal. 4th 610, 622 (2009); *see also Nein v. HostPro, Inc.*, 175 Cal. App. 4th 833, 850 (2009); *Beckman v. Umpqua Banking*, No. S-06-1205 RRB, 2007 WL 2418686, *2-3 (E.D. Cal. Aug. 24, 2007) (see Attachment A). Thus, there is no question that it was proper for TWE to establish, via agreement with Peabody, a monthly pay period for commissions, based on the broadcast month.

Certainly, the DLSE would not affirmatively authorize commissions to be paid monthly (instead of bi-weekly), while at the same time silently prohibiting the allocation of commissions payments across the very same monthly pay period for which they were earned. Indeed, it is clear that the DLSE contemplates that commissions will be allocated to the period over which they were earned because the DLSE has directed that the commissions-paid exemption be applied consistent with federal law, which permits such allocation, as discussed below.

C. Allocating Peabody's Commissions To The Weeks Over Which They Were Earned Is Consistent With The 7(i) Exemption On Which The Section 3(D) Commissions-Paid Exemption Is Based

1. In Applying Section 3(D), California Relies on Authorities and Regulations Regarding the Federal 7(i) Exemption

Long ago, this Court instructed that federal law should guide the interpretation and application of parallel California labor legislation. That is, this Court frequently refers to "federal precedent in interpreting parallel language in state labor legislation." *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 616, 116 Cal. Rptr. 507 (1974); *Building Material & Constr. Teamsters' Union v. Farrell*, 41 Cal. 3d 651, 658, 224 Cal. Rptr. 688, 692 (1986) ("Federal decisions have frequently guided our interpretation of state labor legislation the language of which parallels that of federal statutes"). In keeping with this principle, California courts rely on federal authority when interpreting similar California wage and hour statutes and wage orders.[6]

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[6] For example, in *Advanced Tech Sec. Services, Inc. v. Superior Court*, 163 Cal. App. 4th 700, 707-08, 77 Cal. Rptr. 3d 757, 762-63 (2008), the court, relying on *Fire Fighters Union*, applied the Fair Labor Standards Act ("FLSA") and its supporting regulations to find that the employer had not violated California Labor Code Section 510. Similarly, in *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal.

This principle holds especially true with respect to the interpretation and application of the Section 3(D) commissions-paid exemption at issue here. Indeed, the DLSE expressly contemplates that, in applying this exemption, courts will be guided by federal law interpreting Section 7(i):

> To the extent not inconsistent with California overtime law and policies, ***California in applying the provisions of Subsection 3(D) of Order 4-2001 and 7-2001, has adhered to the federal government's interpretation of the provisions of 29 U.S.C. § 207(i)***. (See also, *Hermann v. Suwanee Swifty Stores, Inc.*, 19 F. Supp. 2d 1365 (N.D. Ga. 1998).

DLSE Manual 50.6.2 (emphasis added).[7] The DLSE's instruction to look to federal law when applying the commissions-paid exemption makes perfect sense because the Section 3(D) commissions-paid exemption parallels the federal commissions-paid exemption found at 29 U.S.C. § 207(i). In fact, California's Section 3(D) exemption is

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App. 3d 16, 31, 38-42, 273 Cal. Rptr. 615, 622-23, 628-31 (1990), the court applied the FLSA, federal regulations and federal case law to interpret a California wage order "closely modeled after" the FLSA.

[7] While that section goes on to state that "the definition of commissions adopted by the U. S. Department of Labor and the definition of that term in California differ" and that the CFR is therefore not instructive on the issue of "what constitutes commissions," there is no dispute here over the definition of "commissions." That is, both parties agree that Peabody received commissions as defined by California law.

even broader than the parallel federal exemption because -- unlike the federal 7(i) exemption -- Section 3(D) is not limited to retail establishments. Thus, not surprisingly, the California Court of Appeal recently cited federal law in applying the commissions-paid exemption to affirm the dismissal of an employee's state law overtime claim. *Muldrow v. Surrex Solutions Corp.*, 208 Cal. App. 4th 1381, 1396 (2012).

2. The Law Regarding the 7(i) Exemption Confirms that Employers May Allocate Commissions Across the Period for Which They Were Earned

Application of on point federal law regarding the 7(i) exemption mandates an affirmative answer to the certified question and establishes the common-sense approach of allocating commissions to the period over which they were earned. In fact, 29 C.F.R. §778.120 specifically addresses and resolves the issue, as it provides:

> For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission **allocable** to each week.

29 C.F.R. § 778.120(a)(1) (emphasis added).

Here, because the commissions paid to Peabody were paid on a "commission computation period of a specific number of workweeks" (the 4 or 5 weeks of the broadcast month), 29 C.F.R. § 778.120 provides the precise guidance needed to answer the certified question in the affirmative. Other federal courts have taken similar approaches and have consistently held that commission payments should be allocated over the pay periods in which the commissions were earned. *See Schwind v. EW & Associates, Inc.*, 371 F. Supp. 2d 560, 567-68 (S.D.N.Y. 2005) (applying 29 C.F.R. § 778.120 and holding that employee was exempt from overtime provisions of FLSA under commissions-paid exemption based on allocation of commissions); *Cantu-Thacker v. Rover Oaks, Inc.*, Civil Action No. H-08-2109, 2009 WL 1883967, * 3 (S.D. Tex. June 30, 2009) (see Attachment B) (granting summary judgment to employer on federal commissions-paid exemption because plaintiff would have had to have worked 91 hours per week to not make 1.5 times minimum wage); *Ealy-Simon v. Liberty Med. Supply, Inc.*, No. 05-14059-CIV, 2007 WL 1521628, *4 (S.D. Fla. May 23, 2007) (analyzing satisfaction of one and one-half times minimum wage element of 7(i) exemption on quarterly basis) (see Attachment C); s*ee also Nascembeni v. Quayside Place Partners,*

LLP, No. 09-23322, 2010 WL 2351467 (S.D. Fla. June 11, 2010) (employee exempt form overtime where employee's base rate plus commission were regularly more than one and one-half times minimum wage rate)..

In short, there is no question that when analyzing the Section 3(D) commissions-paid exemption, California courts should look to federal law interpreting and applying the 7(i) commissions-paid exemption. That analysis unquestionably permits an employer to allocate commissions over the period for which they were earned, as TWE did here, and thus requires an affirmative answer to the certified question.

3. Peabody Ignores the DLSE's Instruction To Apply the Section 3(D) Exemption In Accordance with the Federal 7(i) Exemption

In contrast to the above authority, Peabody has failed to cite a single federal or California case that prohibits allocation of commissions across the period in which they were earned when

applying the commissions-paid exemption.[8] Instead, while Peabody argues that the DLSE's guidance should receive special deference where, as here, the analysis involves provisions of a Wage Order (Petitioner's Brief at 27-28), she nonetheless ignores the DLSE's explicit instruction to interpret the Section 3(D) exemption in accordance with the federal 7(i) exemption on which it is modeled. Indeed, Peabody blatantly misstates the Labor Commissioner's position regarding the use of federal regulations to interpret the Section 3(D) commissions-paid exemption by asserting that:

> The Legislature and IWC know how to incorporate select federal regulations when doing so is consistent with the purposes of California law. [Footnote omitted.] The Legislature's conscious decision not to incorporate federal regulations elected not to do so [sic] in connection with the averaging or allocation of commission wages.

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[8] In fact, the federal cases Peabody cites are minimum wage cases that did not involve the 7(i) commissions-paid exemption nd are factually inapposite. *See Rogers v. Savings First Mortgage, Inc.*, 362 F. Supp. 2d 624 (D. Md. 2005); *Marshall v. Sam Dell's Dodge*, 451 F. Supp. 294 (N.D.N.Y. 1978). *Rogers* is also distinguishable because the employer had established a bi-weekly pay period for commissions, and for many of those pay periods, the employees received no compensation at all. *Marshall* is distinguishable because the commission pay period was weekly basis, and unlike here, several employees did not earn any commissions during several pay periods. Further, the *Marshall* court limited its holding to the facts of that case. *Marshall*, 451 F. Supp. at 304. Here, TWE established a monthly pay period for commission payments (long approved by the DLSE).

(Petitioner's Brief at 10.) As shown above, Peabody is wrong: the DLSE *expressly* instructs that California law regarding Section 3(D) will rely upon authorities interpreting and applying the federal 7(i) exemption.

In short, there is no question that Peabody's commissions – *i.e.*, the 77% of her earnings she excludes when she attempts to manufacture minimum wage and overtime claims – must be included as part of her pay for the periods in which the commissions were earned, not just the pay period in which the commission payment was received. Therefore, the Court should answer the question presented in the affirmative: an employer may, consistent with California's compensation requirements, allocate an employee's commission payments to the periods for which they were earned, not just the period in which they were paid.

D. Peabody's Attempt to Exclude Her Commissions Defies Logic and Justice and Relies on Inapposite Case Law

1. Peabody's "Wage Averaging" Argument Is Inapposite

In an effort to convince the Court to disregard her substantial commission payments, Peabody ignores all of the above authority establishing that employers are permitted to allocate commissions

over the period in which they were earned. Peabody then concocts a plethora of counterintuitive and unpersuasive arguments as to why counting her commission earnings would somehow result in improper "wage averaging." While Peabody argues that allocation of commissions is somehow inconsistent with California's minimum wage law, public policy, DLSE interpretations and California and federal overtime law, she cannot and does not support her arguments with any *applicable* case law. Instead, as shown below, Peabody's arguments and purported authorities are patently inapposite.

a. There Is No "Wage Averaging" Issue Before the Court

As an initial matter, Peabody's "wage averaging" argument fails because -- contrary to her repeated assertions -- TWE did not "average" Peabody's commission compensation. Rather, TWE merely allocated the commissions to the weeks over which the commissions were earned. As shown above, Peabody was paid commissions on a monthly basis based on a broadcast month that consisted of exactly four or five weeks, depending on the month. For example, Peabody earned commissions of $11,749.63 for the four weeks of the February broadcast month. TWE then, as required by California and federal law, allocated the amount of $2,937.41 (1/4 of

the commissions earned in that broadcast month) to each of the four weeks in that broadcast month. Thus, contrary to Peabody's characterization of the issues here, TWE does not argue that her commissions should be averaged -- that is, TWE does not argue that the approximate $57,000 in commissions paid to Peabody during her 10 months with the TWE should be averaged over the total number of weeks she worked during that 10 month period, nor that her monthly commissions should be counted toward periods other than the month in which the commissions were earned. Instead, TWE merely allocated each monthly commission payment to the four or five weeks of the broadcast month for which that commission was earned, which is consistent with California law, as shown above.

b. The *Armenta* Case on Which Peabody Relies Does Not Apply to Employees Paid By Salary and Commission

In support of her argument that allocating her commission earnings is inconsistent with California's minimum wage law, Peabody relies on *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005). *Armenta*, however, is easily distinguishable from the present case and its application to the present facts has already been rejected by other courts.

Notably, *Armenta* did not involve employees who were paid a salary and/or commissions and, thus, the allocation of commissions and the commissions-paid exemption were not issues in the case. Instead, in *Armenta,* non-exempt utility pole maintenance workers who were paid by the hour claimed they had not been paid minimum wages because they were only paid for the time they actually worked on a utility pole and not for time spent doing work incidental to their utility pole work. 135 Cal. App. 4th at 317. The employer did not dispute that it failed to pay the employees for all time worked, but argued that it nevertheless paid them, on average, the minimum wage for all hours worked because the employees' total compensation divided by all hours worked exceeded the minimum wage. *Id.* at 321-22. The California Court of Appeal, while acknowledging that this type of averaging is permitted under the FLSA, held that it could not be used under the facts of that case because the employees would be deprived of the full payment of the wages they were promised for each hour they worked. *Id.* at 323. According to the court, "adopting the averaging method advocated by respondents contravenes [Labor Code sections 221, 222 and 223][9] and *effectively reduces respondents'*

[9] Labor Code section 221 makes it "unlawful for any employer to

contractual hourly rate." *Id.* (emphasis added). Thus, *Armenta* applies only to situations where *hourly* employees are not paid the agreed-upon *hourly* rate for every hour *actually* worked.[10]

Indeed, not long after deciding *Armenta,* the California Court of Appeal acknowledged the limitation of its holding in that case, explaining that *Armenta* applies only to situations where the employer does not pay an employee at the agreed hourly rate of pay. *Fitzgerald v. SkyWest Airlines, Inc.,* 155 Cal. App. 4th 411, 417 (2007). Thus, it is not surprising that **Peabody cannot cite a single case applying *Armenta* in a salary or commissions-paid context**. In fact, courts have specifically rejected the application of *Armenta* to salaried employees. *See Marlo v. United Parcel Serv., Inc.*, No. CV 03-04336 DDP (RZx), 2009 WL 1258491, * 3 (C.D. Cal. May 5, 2009) (see Attachmetn E) ("Although Marlo emphasizes that he must be paid for

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collect or receive from any employee any part of wages theretofore paid by said employer to said employee"), while section 222 prohibits an employer from withholding "any part of the wage agreed upon" in a collective bargaining agreement, and section 223 makes it "unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."

[10] This critical distinction also renders *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508 (2009) -- another case cited by Peabody -- entirely inapposite to the question presented.

'all hours worked,' he does not explain how *Armenta's* rejection of the averaging method for *hourly* employees bears on a *salaried* employee like him" (emphasis in original).)[11]

Accordingly, it is clear that *Armenta* simply does not apply where, as here, the employee is not paid a specific hourly rate of pay, but was instead paid an annual base salary ($20,000.00) plus commissions. (ER at 76:12-23, 252-53, 255-56.) Indeed, Peabody was paid almost $75,000.00 over only 21 pay periods, and her base salary did not decrease in any way, shape or form. Moreover, her commission earnings were nearly three times her base salary, resulting in total earnings of nearly four times her base salary. In contrast, the

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[11] Peabody cites the Ninth Circuit decision in *Marlo* for the proposition that exemptions from overtime must be examined on a week-by-week basis. *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942 (9th Cir. 2011). That decision, however, did not change or disapprove of the trial court's rejection of the application of *Armenta* to a salaried employee like Peabody. Further, the Ninth Circuit's *Marlo* decision focused on the trial court's decertification of a class, and the issue involved the trial court's examination of the "duties performed" prong of the executive and administrative exemptions on a week-by-week basis. *Id.* at 948. Thus, *Marlo* is inapplicable to the instant case where Peabody is arguing that the monthly commission payments she received should not be considered in determining the applicability of the 3(D) commissions-paid exemption. In fact, if *Marlo* were applicable, the Ninth Circuit would not have found it necessary to seek guidance from this Court on this issue, as they instead could have simply issued a decision based on their holding in *Marlo*.

Armenta employees were not paid anything for certain hours worked, thereby reducing their agreed upon hourly rate when it was averaged across the unpaid hours.

c. Applying *Armenta* Would Render Peabody's Substantial Commissions Meaningless

Armenta's application to the instant facts should also be rejected because it would render meaningless the 77% of Peabody's earnings attributable to commissions. Nevertheless, Peabody attempts to stretch *Armenta* well beyond all logical bounds by resorting to an excessively tortured statutory construction argument based on the fact that the term "minimum wage" appears in both Labor Code § 1194 and the 3(D) exemption. Of course, the definition of "minimum wage" is not at issue -- TWE and Peabody agree that the applicable minimum wage is $8.00 per hour. Rather, the focus of the 3(D) exemption is on the term "earnings." As other courts applying California law have held, the term "earnings," as used in the 3(D) exemption, specifically encompasses salary **and** commissions. *Erichs*, 128 F. Supp. 2d at 1264. Thus, the significant commissions TWE paid to Peabody must be accounted for, and *Armenta* cannot logically serve as contrary authority.

In short, Peabody's "wage averaging" theme is entirely

inapposite to the case before the Court. TWE did not "average" wages; it simply allocated commissions across the monthly period for which the commissions were earned. As shown above, such allocation is entirely consistent with California and federal law.

2. Peabody's Public Policy Argument is Absurd Given Her Earnings of Nearly $75,000 in Ten Months

Peabody also argues against the inclusion of her $57,000 in commission earnings in her minimum wage analysis by invoking a purported public policy that allocating commission earnings across the period for which they were earned, as opposed to ignoring those earnings, is somehow contrary to the "remedial nature and purpose" of California's wage and hour laws. She then casts herself as an example of an hourly worker making minimum wage, barely scraping by every month. That, of course, was not the case. Peabody was a highly compensated sales executive who made nearly $75,000 over the course of only ten months, earned over $13,000 in one month, and never earned less than approximately $3,200 in any month. It is inconceivable, with Peabody having been paid that amount of money, that the payment of commissions to Peabody on a monthly basis (as is permissible under California law) caused her any hardship or

somehow violated public policy. Thus, Peabody's "public policy" argument provides no basis for rejecting the allocation of commissions over the period for which they were earned.

3. Peabody's Various Other Arguments Are Unavailing

To further support her illogical position that her $57,000 in commission earnings should be ignored when analyzing her minimum wage and overtime claims, Peabody also argues that Section 4(B) of Wage Order 4-2001 requires employers to pay not less than the minimum wage on the established payday for the period involved. Peabody's argument ignores the fact that the established pay period for her commission earnings was a monthly pay period, and as discussed above, monthly pay periods for commissions are lawful in California. In other words, TWE was required to ensure that Peabody's monthly commission payments (repeatedly endorsed by the DLSE), combined with the payment of her salary, was not less than the minimum wage owed to Peabody for the hours she worked during the time period for which the commissions were paid – the four or five week broadcast month.

The same holds true for Peabody's purported reliance on Section 50.6.1 of the DLSE Enforcement Manual, which states that

the 1.5 times minimum wage element of the commissions-paid exemption must be paid in each pay period. This requirement is satisfied here because the pay period for the commissions was the 4 or 5 week broadcast month, and as demonstrated in Table 2 above, Peabody's commission and salary far exceeded 1.5 times the minimum wage in every one of the 10 broadcast months she worked for TWE.

Peabody also presents yet another novel argument (again lacking any support in case law) as to why her monthly commissions can be ignored in determining whether she was paid the minimum wage and qualified for the commissions-paid exemption from overtime. Peabody asserts that commissions do not count until earned and that because TWE's commission plans allow the Company to make prospective changes, the commissions are not earned until **paid**. (Petitioner's Brief at 13-16.) Peabody's newfound argument fails, as it contradicts the record evidence and defies the question presented for review. The question presented in this case properly assumes that commissions were earned during the broadcast month, with the only question being whether the allocation of the payment for those commissions over the month in which they were earned is proper.

Peabody cannot simply reinvent the record at this stage and circumvent the question presented by arguing for the first time that her commissions were not earned until the moment they were paid.

Accordingly, all of Peabody's attempts to exclude her commission payments from consideration when determining whether she was paid the minimum wage or fell within the commissions-paid exemption are without merit. Rather, as shown above, numerous aspects of California (and federal) law confirm that employers must be permitted to allocate commission payments over the period for which they were earned.

II. PEABODY'S ARGUMENTS REGARDING HER WAITING TIME AND WAGE STATEMENT CLAIMS ARE OUTSIDE THE SCOPE OF THE CERTIFIED QUESTION AND ARE THEREFORE IMPROPER

This Court should not consider Peabody's arguments regarding her wage statement and waiting time claims because these issues fall far outside the scope of the certified question. (Petitioner's Brief at 28-31.) The certified question concerns only the allocation of commission payments:

> [m]ay an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?

The Ninth Circuit did not seek guidance from this Court on Peabody's wage statement or waiting time claims, nor did it certify any question regarding those claims. Peabody's arguments on these claims are thus entirely improper, and her attempt to relitigate her entire appeal in this Court must be rejected. *See Retired Emp. Ass'n of Orange Cnty., Inc. v. Cnty. of Orange*, 266 52 Cal. 4th 1171, 1188, 1191 (2011) (declining to consider arguments beyond scope of certified question); *see also Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142 (2001) (because effect of newly-enacted statute was outside scope of certified question, Court declined to address issue).

In the event the Court decides to consider Peabody's gratuitous arguments on her wage statement and waiting time claims, TWE respectfully requests the opportunity to provide supplemental briefing to address the merits of those claims.

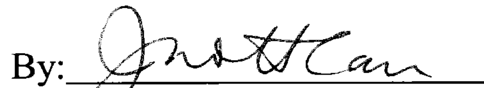
CONCLUSION

As shown above, allocating commissions to the periods for which they were earned is not only consistent with California law, it is required by both California and federal law. By contrast, there is no legal or logical support for Peabody's attempt to view her salary in a vacuum and exclude from the minimum wage and commissions-paid

exemption analysis the 77% percent of her earnings that came from commissions. Accordingly, TWC respectfully submits that this Court should answer the certified question in the affirmative: employers may allocate an employee's commission payments to the period over which those commissions were earned.

Dated: March 14, 2013

WARGO & FRENCH LLP

By: 

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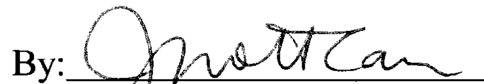
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Appellate Procedure, Rule 8.204(c)(1), counsel hereby certifies that the present brief contains 7,927 words, including footnotes and excluding tables of content and authority.

Dated: March 14, 2013

WARGO & FRENCH LLP

By: 

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Attachment A

2007 WL 2418686
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Aaron BECKMAN, Plaintiff,
v.
UMPQUA BANK and Does 1 through 20, inclusive, Defendants.

No. Civ. S-06-1205 RRB GGH. | Aug. 24, 2007.

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Opinion

Memorandum of Opinion and Order

RALPH R. BEISTLINE, United States District Judge.

*1 Aaron Beckman ("Beckman") filed an action against his former employer Umpqua Bank ("Umpqua") alleging that Umpqua failed to pay him for wages that he earned selling loans. Umpqua now moves for summary judgment on the ground that Beckman is not entitled to the relief his seeks because such an "incentive bonus" that Umpqua was contractually permitted to allocate at its discretion. reasons stated below, Umpqua's motion is **GRANTED.** [1]

1 Inasmuch as the Court concludes the parties have submitted memoranda thoroughly discussing the law and evidence in support of their positions, it further concludes oral argument is neither necessary nor warranted with regard to the instant matter. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir.1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required). As a result, the oral argument presently scheduled for August 22, 2007, at 10:00 a.m., is hereby **VACATED.**

I. BACKGROUND

Beckman is a former Business Development Officer of Umpqua who specialized in the marketing and sale of Government Guaranteed Loans, such as Small Business Administration Loans. Pl.'s Separate Stmt. of Undisputed Facts ("UMF") ¶¶ 2-3, In Opp. to Def.'s Mtn. for Summary Judgment ("MSJ"). Beckman began working for Umpqua in mid-2004 when Umpqua merged with his then employer, Humboldt Bank. Pl.'s UMF ¶ 2.

In January 2005, Beckman and Umpqua entered into a new compensation plan whereby Beckman agreed to receive a salary plus an "incentive bonus." Pl.'s UMF ¶ 4. As part of this new compensation plan, Beckman agreed to the terms of Umpqua Bank's Incentive Plan ("Incentive Plan"), [2] which expressly superseded any prior compensation plans. Pl.'s UMF ¶ 4.

2 The Incentive Plan is titled "Umpqua Bank Incentive Plan Terms & Conditions." Exh. 3, attached In Support of Def.'s MSJ. The stated purpose of the plan is to "drive and reward performance that ensures Umpqua Bank delivers outstanding customer service, products and financial results." *Id.* According to Umpqua, the plan "established an incentive schedule that compares favorably to industry standards and ensures the Bank's ability to attract and retain highly productive Employee's" by "recognize [ing] and reward[ing] them based on production and pricing." *Id.*

Under the new Incentive Plan, Beckman was eligible to receive a quarterly "incentive bonus." Pl.'s UMF ¶ 5. His eligibility for this bonus, and the amount thereof, was based on a variety of factors and payable at the sole discretion of Umpqua's Incentive Plan Administrators. Pl.'s UMF ¶ 6; Exh. 3, attached In Support of Def.'s MSJ. [3] The Administrators of the Incentive Plan are: Umpqua's Chief Executive Officer, his executive designee, and the Senior Vice President of Human Resources. Pl.'s UMF ¶ 6; Exh. 3, attached In Support of Def.'s MSJ.

3 The Incentive Plan, expressly states that: "[f]inal determination of goal attainment, including both individual and company performance, and approval of any payment awards made under the plan are subject to the discretion of the CEO, his executive designee and the SVP of Human Resources, the Administrators of the plan." Exh. 3, attached In Support of Def.'s MSJ. The Incentive Plan also states that: "[t]he Administrators have full power and authority to select participants from among those eligible, to determine the size and timing

of individual awards, to terminate or modify any plan or payout amount, and to adopt and revise such rules and procedures as they deem necessary." *Id.* Finally, the Incentive Plan states that it: "can be amended, suspended or terminated at any time by the Administrators. Umpqua Bank reserves the right to modify, suspend, change the size of the award or terminate any incentive plan or an individual award at any time." *Id.*

On August 18, 2005, Beckman resigned from Umpqua and joined a competitor, the day after Umpqua made an incentive payout for the second quarter of 2005. Pl.'s UMF ¶¶ 2, 11-12. Beckman purposely timed his resignation in this manner because he knew that, under the express terms of the Incentive Plan, employees were not eligible for an incentive payout if they were not employed on the day a payout was made, even if they had worked during the entire performance period. Pl.'s UMF ¶¶ 7, 10 & 12.[4]

4 The Incentive Plan expressly states that in order for an employee to be eligible for an incentive payout, he or she "must be employed by the Bank on the date of incentive payout, even if the associate was employed during the entire performance period ..." Exh. 3, attached In Support of Def.'s MSJ.

In September 2005, Beckman contacted Umpqua and requested that it make an exception to the terms of the Incentive Plan by paying him an incentive bonus for loans that he worked on during his employment but that closed after his resignation. Pl.'s UMF ¶ 13. Umpqua declined Beckman's request. Pl.'s UMF ¶ 14. On April 5, 2006, Beckman filed the instant action alleging the following claims: (1) breach of California Labor Code §§ 201 and 203; (2) breach of contract; and (3) violation of California Business and Professions Code § 17200. Pl's UMF ¶ 15.

II. DISCUSSION

Umpqua argues that each and every claim alleged by Beckman fails as a matter of law because the compensation he seeks is an incentive bonus that was payable at its sole discretion. Beckman's claims are addressed individually below.

A. Legal Standard

*2 Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

B. Labor Code Violations

Umpqua argues that this claim fails as a matter of law based on the plain language of the Incentive Plan.

"If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." Cal. Lab.Code § 202(a). " 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." Cal. Lab.Code § 200(a).[5]

5 "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." Cal. Lab.Code § 203.

Bonus incentive plans are considered wages within the meaning of Labor Code § 200. *Neisendorf v. Levi Strauss & Co.,* 143 Cal.App.4th 509, 522, 49 Cal.Rptr.3d 216 (2006).[6] In California, "once a bonus has been promised as part of the compensation for service, and the employee fulfills all the agreed-to conditions, the promised bonus is considered wages that must be paid." *Id.* "California courts have consistently characterized bonus ... plans as constituting an offer of the stated benefits in exchange for the service of an employee, and upon the employee's completion of the required services *in accordance with the terms of the plan,* a binding contract is formed under which the employer is obligated to deliver the promised benefits." *Neisendorf,* 143 Cal.App.4th at 523, 49 Cal.Rptr.3d 216 (italics in original). Thus, Beckman's eligibility for a bonus payment is properly determined by the specific terms of the bonus plan and general contract principles. *Id.*

6 Under Labor Code § 200, wages are defined to include commissions. " 'Commission wages are compensation paid to any person for services rendered in the sale

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of such employer's property or services and based proportionately upon the amount or value thereof.' " *See Ramirez v. Yosemite Water Co., Inc.,* 20 Cal.4th 785, 803, 85 Cal.Rptr.2d 844, 978 P.2d 2 (1999) (quoting Cal. Lab.Code § 204.1). Although an employee's sales commissions are "wages," contractual terms must be met before an employee is entitled to a commission. *Steinhebel v. Los Angeles Times Communications,* 126 Cal.App.4th 696, 705, 24 Cal.Rptr.3d 351 (2005).

Here, Beckman argues that he is entitled to a percentage of the loans he sold that closed after his resignation because such compensation constitutes unpaid wages. Beckman argues that Umpqua purposefully characterized such compensation as a bonus, instead of a commission, in order to create a forfeiture of earned wages. The court disagrees.

The undisputed evidence demonstrates that Beckman knew that the compensation plan offered by Umpqua superseded any prior compensation plans and that his eligibility for an incentive bonus under that plan was determined at the sole discretion of Umpqua's Administrators based on a variety of factors, including his performance, the financial performance of Umpqua and the general banking market. Pl.'s UMF ¶¶ 4-7. It is also undisputed that Beckman knew at the time he signed the Incentive Plan that he was only eligible for an incentive bonus for a given performance period if he was employed on the date of the bonus payout for that period. Pl.'s UMF ¶¶ 7, 10. Finally, it is undisputed that Umpqua has never paid an incentive bonus, in whole or part, to any individual that was not employed by Umpqua on the date of the bonus payout. Pl .'s UMF ¶ 9.

*3 Based on the foregoing, the court concludes that Beckman is not entitled to the compensation he seeks. This is because Beckman failed to complete all the agreed-to conditions, in accordance with the terms of the Incentive Plan, to make him eligible for an incentive bonus for loans closing after his resignation. Notably, Beckman was not employed on the date of the incentive payout for the third quarter. Therefore, pursuant to the plain terms of the Incentive Plan, Beckman was not eligible for an incentive bonus for loans closing during that period, i.e., loans closing after his resignation. *See Lucian v. All States Trucking Co.,* 116 Cal.App.3d 972, 974-75, 171 Cal.Rptr. 262 (1981) (granting summary judgment in favor of an employer against several employees who sought bonus payouts after voluntarily resigning before the end of the year, where a written employment plan provided for a bonus to be payable at the end of the year, but specified that employees who voluntarily left the company before the bonus determination date would not be entitled to the bonus).

Accordingly, because Beckman is not entitled to the compensation he seeks, Umpqua did not fail to pay earned wages in violation of the Labor Code.

With respect to Beckman's argument that he is entitled to the compensation he seeks because it is a commission, the court rejects this argument. The plain language of the Incentive Plan states that incentive payouts are discretionary[7] and subject to adjustment based on a variety of factors, including an employee's performance, the financial performance of Umpqua and the general banking market. As such, Beckman's incentive payouts were not based proportionately upon the percentage of loans sold. Therefore, because Beckman was not entitled to a certain percentage of the loans he sold, the incentive payouts are not accurately characterized as a commission.[8] Moreover, even assuming the incentive payouts are characterized as a commission, Beckman is not entitled to the compensation he seeks because the terms of the Incentive Plan expressly condition an incentive payout on an employee being employed on the day of the incentive payout. *See Steinhebel,* 126 Cal.App.4th at 705, 24 Cal.Rptr.3d 351 (noting that while an employee's sales commissions are "wages," contractual terms must be met before an employee is entitled to a commission).

7 Indeed, the incentive payouts were determined by Umpqua's Administrators who were vested with the "full power and authority to select participants from among those eligible, to determine the size and timing of individual awards, to terminate or modify any plan or payout amount, and to adopt and revise such rules and procedures as they deem necessary." Exh. 3, attached In Support of Def.'s MSJ. Beckman acknowledges that the Administrators have exercised their discretion to adjust bonuses up or down or to completely withhold a bonus. Pl.'s UMF ¶ 8.

8 There are two essential requirements for a compensation scheme to be deemed "commission wages": (1) the employee must be involved principally in selling a product or service, rather than making or providing the product or service; and (2) the amount of payment must be a percent of the price of the product or service. *Wayne v. Staples, Inc.,* 135 Cal.App.4th 466, 478, 37 Cal.Rptr.3d 544 (2006).

For these reasons, the motion is granted with respect to this claim.

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C. Breach of Contract

Umpqua argues that this claim fails as a matter of law because Beckman failed to demonstrate a breach of the Incentive Plan.

To state a cause of action for breach of contract, a plaintiff must plead the following elements: (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387 (1990).

Here, Beckman's breach of contract claim is premised on Umpqua's alleged failure to pay commissions for loans closing after his resignation. Because the unambiguous terms of the Incentive Plan require Beckman to be employed on the date of the incentive payout in order to be eligible for an incentive bonus, Umpqua did not breach the Incentive Plan as Beckman was not employed on the date of the bonus payout for the performance period in which the loans at issue closed.

***4** For these reasons, the motion is granted with respect to this claim.

D. Business & Professions Code § 17200

Umpqua argues that Beckman's § 17200 claim fails as a matter of law because there is no underlying unlawful act to support this claim.

Business and Professions Code § 17200 prohibits: any (1) unlawful, (2) unfair, or (3) fraudulent business practice or act. *See People ex rel. Bill Lockyer v. Fremont Life Ins. Co.,* 104 Cal.App.4th 508, 515, 128 Cal.Rptr.2d 463 (2002). "With respect to the *unlawful* prong, '[v]irtually any state, federal or local law can serve as the predicate for an action' under section 17200." *Id.* (italics in original). "[I]n essence, an action based on ... section 17200 to redress an unlawful business practice borrows violations of other laws and treats these violations, when committed pursuant to a business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to the distinct remedies provided thereunder." *Id.* (quotation marks omitted).

Here, because Beckman's § 17200 claim is premised on Umpqua's alleged failure to pay him earned wages in violation of substantive provisions of the Labor Code, it fails as a matter of law. *See Steinhebel,* 126 Cal.App.4th at 712, 24 Cal.Rptr.3d 351 (while an employer's policy or practice that violates the Labor Code may also be held an "unlawful business practice" under § 17200 et seq., where an employer's policy is lawful and permissible, there is no basis for relief under the unfair competition law).

For this reason, the motion is granted with respect to this claim.

III. CONCLUSION

For the above stated reasons, the court grants summary judgment.

IT IS SO ORDERED.

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Attachment B

2009 WL 1883967
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Houston Division.

Idalia Judith CANTU–THACKER, Plaintiff,
v.
ROVER OAKS, INC., et al., Defendants.

Civil Action No. H–08–2109. | June 30, 2009.

Opinion

MEMORANDUM AND ORDER

NANCY F. ATLAS, District Judge.

***1** This case is before the Court on the Motion for Summary Judgment [Doc. # 19] filed by Defendants Rover Oaks, Inc. ("Rover Oaks") and Stephen N. Smith. Plaintiff Idalia Judith Cantu–Thacker filed a Response [Doc. # 22], and Defendants filed a Reply [Doc. # 23]. Having reviewed the full record in this case and having applied governing legal authorities, the Court **grants** Defendant's Motion for Summary Judgment.

I. *FACTUAL BACKGROUND*

Defendant Rover Oaks, owned by Defendant Stephen N. Smith, provides grooming, boarding, and other services for pets. Plaintiff Cantu–Thacker began working for Rover Oaks as a pet stylist in September 2004, to be paid a commission consisting of 50% of the revenue generated on each pet she groomed.

In June 2006, Cantu–Thacker was promoted to supervisor of the grooming department. The promotion did not include an increase in pay, but Plaintiff was authorized to claim a right of first refusal for the first ten dogs each day. Although she was not required to work on weekends, Cantu–Thacker occasionally scheduled herself for weekend work.

In early 2007, Cantu–Thacker began to complain about her pay. In April 2007, Rover Oaks offered Plaintiff her choice of new compensation plans to address her request that she be paid for performing the managerial responsibilities. Cantu–Thacker selected a plan under which she would continue to receive the 50% commission on each pet she groomed. In addition, Rover Oaks would pay Cantu–Thacker a bonus equal to 20% of all grooming revenues over $48,855.00. The amount of "grooming revenues" excluded amounts expended for "atypical improvements or expenditures" for the grooming department. Rover Oaks and Cantu–Thacker agreed to revisit this compensation plan in December 2007.

In December 2007, Cantu–Thacker complained that she was not paid overtime compensation. Smith informed her that she was an exempt employee and, therefore, was not entitled to overtime compensation.

In 2008, Plaintiff advised Smith that she was unsure if she wanted to continue working for Rover Oaks. Smith told her that she could retain her position as grooming manager or, alternatively, Rover Oaks would hire another grooming manager and Plaintiff could continue working as a groomer. While awaiting Plaintiff's decision, Smith interviewed an applicant for the grooming manager position. Plaintiff eventually elected to retain her position as grooming manager and the applicant was not hired. Rover Oaks invited Cantu–Thacker to submit a proposed written compensation plan, but Plaintiff did not do so. Instead, Cantu–Thacker began developing her own competing dog-grooming business. Cantu–Thacker resigned from Rover Oaks on April 11, 2008.

On July 11, 2008, Plaintiff filed this lawsuit alleging that she was not paid overtime compensation as required by the Fair Labor Standards Act (the "FLSA"). Plaintiff also alleged that, after she complained that she was not being paid overtime compensation, Defendants retaliated against her "by reducing the amount of income she was able to generate through her piece rate work." *See* Complaint [Doc. # 1], ¶ 11.

***2** After an ample time for discovery, Defendants filed their Motion for Summary Judgment. The motion has been fully briefed and is ripe for decision.

II. *STANDARD FOR SUMMARY JUDGMENT*

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *see also Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp.,* 289 F.3d 373, 375 (5th Cir.2002). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and

any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex,* 477 U.S. at 322–23; *Weaver v. CCA Indus., Inc.,* 529 F.3d 335, 339 (5th Cir.2008).

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna,* 401 F.3d 347, 349 (5th Cir.2005). The moving party, however, need not negate the elements of the non-movant's case. *See Boudreaux v. Swift Transp. Co.,* 402 F.3d 536, 540 (5th Cir.2005). The moving party may meet its burden by pointing out " 'the absence of evidence supporting the nonmoving party's case.' " *Duffy v. Leading Edge Products, Inc.,* 44 F.3d 308, 312 (5th Cir.1995) (quoting *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 913 (5th Cir.1992)).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 282 (5th Cir.2001) (internal citation omitted). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" *DIRECT TV Inc. v. Robson,* 420 F.3d 532, 536 (5th Cir.2006) (internal citations omitted).

In deciding whether a genuine and material fact issue has been created, the facts and inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.,* 336 F.3d 410, 412 (5th Cir.2003). However, factual controversies are resolved in favor of the non-movant "only 'when both parties have submitted evidence of contradictory facts.' " *Alexander v. Eeds,* 392 F.3d 138, 142 (5th Cir.2004) (quoting *Olabisiomotosho v. City of Houston,* 185 F.3d 521, 525 (5th Cir.1999)). The non-movant's burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *See Diamond Offshore Co. v. A & B Builders, Inc.,* 302 F.3d 531, 545 n. 13 (5th Cir.2002). Likewise, "conclusory allegations" or "unsubstantiated assertions" do not meet the non-movant's burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.,* 530 F.3d 395, 399 (5th Cir.2008). Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l,* 343 F.3d 401, 405 (5th Cir.2003) (citation and internal quotation marks omitted). In the absence of any proof, the court will not assume that the non-movant could or would prove the necessary facts. *Little,* 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990)).

***3** Finally, "[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Malacara v. Garber,* 353 F.3d 393, 405 (5th Cir.2003). "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *See id.* (internal citations and quotations omitted).

III. *ANALYSIS*

A. *FLSA Claim for Overtime Compensation*

The FLSA provides that "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Defendants assert that Plaintiff is exempt from the overtime compensation requirements of the FLSA because Rover Oaks is a service establishment and Plaintiff is paid on a commission basis. Exemptions are narrowly construed, and the employer has the burden to prove that an exemption under the FLSA applies. *Cheatham v. Allstate Ins. Co.,* 465 F.3d 578, 584 (5th Cir.2006).

Section 7(i) of the FLSA excludes from the FLSA's overtime provisions "any employee of a retail or service establishment ... if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under the [minimum wage section of the FLSA], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." 29 U.S.C. § 207(i). It is uncontroverted that Defendants operate a "retail or service establishment" within the meaning of § 7(i).

For purposes of section 7(i) of the FLSA, the statutory "regular rate of pay" "is a rate per hour, computed for the particular workweek by a mathematical computation in which hours worked are divided into straight time earnings for such hours." 29 C.F.R. § 779.419. It is uncontroverted that the

applicable minimum wage for the entire time Plaintiff worked at Rover Oaks was $5.85 per hour. In 2005, Plaintiff was paid $42,675.00; in 2006, she was paid $39,974.00; in 2007, Plaintiff was paid $57,400.72. Consequently, it order for her rate of pay to fall below $8.78, or 1.5 times the minimum wage of $5.85 per hour, Plaintiff would need to have worked at least 93 hours per week in 2005, 87 hours per week in 2006, and 113 hours per week in 2007. [1] There is no evidence or allegation that Plaintiff worked a number of hours per week even approaching these numbers. As a result, Defendant has satisfied its burden on this element of the exemption.

The uncontroverted evidence establishes that more than 50% of Plaintiff's pay consisted of commissions. She received 50% of the revenue generated from each dog she groomed. This element of her compensation far exceeded any other element. For example, in 2007, Plaintiff was paid $57,400.72. Of that total amount, $55,106.45 was from commissions, $822.14 was from tips, and $1,472.13 was from bonuses.

***4** Plaintiff alleges in her Complaint that she was paid on a "piece rate" basis rather than on a commission basis. *See* Complaint, ¶ 5. In her Response to the Motion for Summary Judgment, Plaintiff questions whether her commission was a "bona fide commission." Response [Doc. # 22], at 9. Whether a particular payment constitutes a commission for purposes of the FLSA exemption is a question of law to be determined in light of the characteristics of the specific compensation system at issue. *See Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1254 (11th Cir.2001); *Mechmet v. Four Seasons Hotel Ltd.*, 825 F.2d 1173, 1175 (7th Cir.1987). For purposes of the FLSA, payment to an employee is a commission if it is based on a percentage of the charge to the customer. *See Huntley v. Bonner's, Inc.*, 2003 WL 24133000, *2–3 (W.D.Wash, Aug. 14, 2003) (citing U.S. Dept. of Labor's Field Operations Handbook, section 21h04(d)). In a "piece work" system, on the other hand, an employee is paid a certain amount per task regardless of the amount charged to the customer. *See id.* In this case, it is undisputed that Plaintiff was paid 50% of the amount charged to the customer and, as a result, was paid on a commission basis.

The uncontroverted evidence establishes that Plaintiff was an employee of a service establishment, that her "regular rate of pay" exceeded one and one-half times the applicable minimum hourly rate, and that more than half her compensation for any representative period was from commissions on dog grooming services. As a result, Plaintiff is an exempt employee under 29 U.S.C. § 207(i) and Defendants are entitled to summary judgment on her FLSA claim for unpaid overtime.

B. *Retaliation Claim*

Retaliation claims under the FLSA are analyzed under the *McDonnell Douglas* framework. *See Casey v. Livingston Parish Commc'ns. Dist.*, 2009 WL 577756, *5 (5th Cir. Mar. 6, 2009); *Kanaida v. Gulf Coast Med. Personnel LP*, 353 F.3d 568, 577 (5th Cir.2004). First, the plaintiff must establish a *prima facie* case of retaliation by showing that (1) she engaged in activity protected under the FLSA; (2) she suffered an adverse employment action; and (3) there exists a causal link between the protected activity and the adverse employment action. *See Casey*, 2009 WL 577756 at *5; *Aguirre v. SBC Communications, Inc.*, 2007 WL 2900577, *26 (S.D.Tex.Sept.30, 2007) (Rosenthal, J.). Defendant argues that Plaintiff cannot establish a *prima facie* case of FLSA retaliation because she did not suffer an adverse employment action. An adverse employment action for purposes of a retaliation claim must include conduct that "a reasonable employee would have found ... materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). "The significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69. It is important to separate "significant from trivial harms." *Id.* at 68.

***5** Plaintiff alleged in her Complaint that, after she complained that she was not being paid overtime compensation, Defendants retaliated against her "by reducing the amount of income she was able to generate through her piece rate work." *See* Complaint [Doc. # 1], ¶ 11. This allegation, however, is refuted by the uncontroverted evidence in the record. After Plaintiff complained in late 2007 that she was not being paid for overtime hours, her 50% rate of commission remained the same, her ability to claim a right of first refusal for the first ten dogs each day remained unchanged, and her actual income increased. Indeed, in 2008, Plaintiff earned $23,898 for the period until her resignation on April 11, 2008.

Plaintiff stated in her Response that Smith "began to openly interview candidates for [Plaintiff's] position, and even introduced [her] to at least one of the potential candidates on one occasion." *See* Response, p. 4. Plaintiff also asserted in her Response that, when she advised Smith that she was unsure if she wanted to continue as grooming manager, Smith

told her that he could not guarantee that she would make as much money as a regular groomer as she was making as the manager of the grooming department. *See id.* This alleged conduct does not rise to the level of an adverse employment action. A reasonable employee must anticipate that, if she threatens to resign her employment, the employer will begin to interview candidates to fill the vacated position. Smith's alleged statement that he could not guarantee that Plaintiff would earn as much if she chose to discontinue her position as grooming manager and become a regular groomer was accurate. As a regular groomer, Plaintiff would no longer be entitled to the bonuses or to claim a right of first refusal for the first ten dogs each day.[2] Plaintiff has failed to present evidence that raises a genuine issue of material fact on the "adverse employment action" element of her *prima facie* case of retaliation under the FLSA. As a result, Defendants are entitled to summary judgment on this claim.[3]

IV. *CONCLUSION AND ORDER*

Based on the foregoing, the Court concludes that Plaintiff was an exempt employee and is not entitled to overtime compensation under the FLSA. The Court further concludes that Plaintiff has failed to raise a genuine issue of material fact to support a *prima facie* case of FLSA retaliation. Accordingly, it is hereby

ORDERED that Defendants' Motion for Summary Judgment [Doc. # 19] is **GRANTED.** The Court will issue a separate Final Judgment.

Footnotes

1 These figures are calculated by dividing the annual pay by 52 weeks, then dividing the average weekly pay by $8.78. For example, Plaintiff earned $42,675.00 in 2005, for an average weekly pay of approximately $820.67. To earn that amount at the rate of $8.78, Plaintiff would need to have worked approximately 93.47 hours.

2 It is undisputed that Plaintiff elected to remain in the manager position rather than become a regular groomer.

3 Plaintiff states in the Conclusion section of her Response that she "believes she was constructively terminated from Rover Oaks." *See* Response, p. 13. An employee is constructively discharged when "the employer makes working conditions so intolerable that a reasonable employee would feel compelled to resign." *McCoy v. City of Shreveport,* 492 F.3d 551, 557 (5th Cir.2007). The constructive discharge inquiry is an objective one, asking "whether a reasonable person in the plaintiff's shoes would have felt compelled to resign." *Id.* Plaintiff did not allege a constructive discharge in her Complaint and the theory is not properly presented for decision. In any event, on the merits, Plaintiff has not presented evidence that raises a genuine issue of material fact that a reasonable person in the situation as she describes it would have felt compelled to resign. Plaintiff has not presented evidence that supports a constructive discharge, either as a separate claim or as an "adverse employment action."

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Attachment C

2007 WL 1521628
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

Catherine EALY-SIMON on behalf of herself and all others similarly situated, Plaintiffs,
v.
LIBERTY MEDICAL SUPPLY, INC., et al., Defendants.

No. 05-14059-CIV. | May 23, 2007.

Attorneys and Law Firms

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Opinion

ORDER RESOLVING REMAINING ISSUES OF LAW AND FACT; STRIKING PLAINTIFFS' REPLY BRIEF AND MEMORANDUM OF LAW OPPOSING DEFENDANTS' RETAIL OR SERVICE ESTABLISHMENT EXEMPTION; STRIKING DEFENDANTS' REPLY MEMORANDUM TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING THEIR AFFIRMATIVE DEFENSE APPLYING THE EXEMPTION PURSUANT TO 29 U.S.C. § 207(i); CLOSING CASE

K. MICHAEL MOORE, United States District Judge.

*1 THIS CAUSE came before the Court upon the hearing held March 6, 2007. At that hearing, the parties agreed that to the extent issues of fact remain to be decided, they may be decided by the Court. The parties also agreed that three issues of law remained to be decided:

1) Whether Plaintiffs may recover for unpaid "straight time" wages

2) The precise period of damage recovery

3) Whether the 49 disputed Plaintiffs are exempt from the FLSA

This Court set a briefing schedule (DE # 706). Each party filed a memorandum, a response, and a reply on each issue of law (DE # 708-725). Plaintiffs' Reply Brief and Memorandum of Law Opposing Defendants' Retail or Service Establishment Exemption (DE # 723) and Defendants' Reply Memorandum to Plaintiffs' Response to Defendants' Memorandum Regarding their Affirmative Defense Applying the Exemption Pursuant to 29 U.S.C. § 207(i) (DE # 722) are 13 and 21 pages, respectively, and therefore violate Local Rule 7.1(C)(2). Accordingly, they are STRUCK.

UPON CONSIDERATION of the memoranda and the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

The corporate Defendants are owned by or are subsidiaries of PolyMedica Corporation and constitute a common enterprise in the retailing of diabetes-related medicine and goods. PolyMedica, a Massachusetts corporation, operates its daughter corporations in Port St. Lucie, Florida. The Plaintiffs number nearly 300 current and former hourly-paid employees of these corporate defendants. The Plaintiffs worked in various departments and divisions, with a variety of different supervisors. However, the Defendants all used a common payroll system and shared common personnel policies which Liberty Medical Supply, Inc., administered until Liberty Healthcare Group, Inc., took these tasks over in 2003. The Plaintiffs complain that two of the Defendants' payroll practices wrongfully reduced their overtime compensation, thereby violating the FLSA.

The first disputed practice was the "lunch break rule," whereby the timekeeping system forced automatic deductions for break times. That is, the system automatically deducted a 30-minute break, regardless of how long employees actually took for lunch or whether they took one at all. The system also automatically extended non-meal breaks to 30 minutes if those breaks lasted between 16 and 29 minutes in duration. The automatic deductions were not absolute. There was a "checks and balances" system which allowed supervisors to

override the deductions, either before the end of the pay period, or after the employees' pay stubs were issued.

The second disputed practice was the Defendants' failure to add non-discretionary incentive pay to the regular pay rate when calculating overtime pay.

This Court filed an Order (DE # 704) granting Summary Judgement to the Plaintiffs on the following issues:

1) The FLSA applies.

***2** 2) The lunch break rule, as applied, resulted in undercounting of Plaintiffs' overtime hours.

3) Defendants willfully violated the FLSA, making the applicable statute of limitations three years.

4) Plaintiffs are entitled to liquidated damages, as a matter of law.

The Court also held that the Plaintiffs' method for calculating damages was consistent with the Code of Federal Regulations, 29 C.F.R. §§ 778.110, 778.209, and 778.331, and Plaintiffs' damages could be calculated objectively using that method.

At a hearing just before beginning the trial, the parties agreed that there were three issues remaining in this case, and that those issues could be decided by the Court.

II. THE STRAIGHT TIME WAGES CLAIM

This case was brought in federal court pursuant to the Fair Labor Standards Act. Generally, an employee cannot recover damages on a claim pursuant to the FLSA if his or her average wage exceeds the minimum wage for a work period in which the employee did not work overtime. *Blankenship v. Thurston Motor Lines,* 415 F.2d 1193, 1198 (4th Cir.1969); *United States v. Klinehoffer Bros. Realty Corp.,* 285 F.2d 487, 490 (2nd Cir.1960). For example, if a Plaintiff worked a 40 hour week, but had three half-hours deducted for lunch periods through which she actually worked, she would have a "straight time" claim for that hour and a half's worth of pay pursuant to Florida law.

Plaintiffs claim that, although they did not articulate a specific state law claim in their Second Amended Complaint (DE # 309), they provided sufficient notice to the Defendants of a claim for unpaid straight time, and this Court may construe a valid state law claim over which to exercise supplemental jurisdiction. Pl. Resp. (DE # 717) at 1-3. Defendants argue that, because the Plaintiff never specifically pled the state law claim, to allow the claim would "deprive Defendants of their right to defend against the state law claim." Def. Rep. (DE # 721) at 3. Rule 8 of the Federal Rules of Civil Procedure, the "General Rules of Pleading," provides:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief."

The liberal notice pleading requirements require only that the Defendants receive fair notice of the Plaintiffs' claims and the grounds for those claims. *Lombard's. Inc. v. Prince Mfg., Inc.,*

In the Second Amended Complaint, Plaintiffs refer repeatedly to claims for "unpaid wages" as well as "unpaid overtime wages." *See* Second Amended Compl. The Second Amended Complaint specifically separates a claim for "compensatory damages for lost pay for hours worked but for which no compensation was paid because of the effect of the 'lunch break rule' " from "lost overtime to the extent that the operation of the 'lunch break rule' deprived employees of credit for hours worked in excess of forty (40) hours per week...." *Id.* at ¶ 33. While it did not specify the state law grounds for the claim, Plaintiffs' cognizable claim for straight time wages is included in the Second Amended Complaint, and this Court will exercise supplemental jurisdiction over the claim pursuant to 28 U.S.C. § 1367.

III. PERIOD OF DAMAGE RECOVERY

***3** This Court has held that the applicable statute of limitations is three years for the Plaintiffs' recovery of damages for their claims brought under the FLSA. Order Adopting Report of Magistrate Judge (DE # 704) at 2. The parties dispute the date from which the three years should be counted (the "Operative Date"). The parties agree that for the Plaintiffs who opted in after the lunch-break rule claim was established, the Operative Date is the day that Plaintiff opted in, and for Plaintiffs who opted in before the claim was established, the Operative Date is the day the claim was established. The parties differ on when the lunch-break rule claim was established.

Defendants argue that the claim was established December 23, 2005, "after this Court granted leave to amend and the Second Amended Complaint was actually filed with the Clerk of Court." Def. Reply (DE # 714) at 4. Defendants claim they were not on notice of the lunch-break rule claim until the Second Amended Complaint was filed because it added defendants not previously named in this case, and that was when "the lunch break claim was first pending." Def. Mot. (DE # 710) at 3. Federal Rule of Civil Procedure 15(c), however, allows amendments of a pleading to relate back to the date of the original complaint when the newly named defendants had notice of the action and knew or should have known they would have been named as parties to the action, but for the Plaintiffs' error. Rule 15(c). As this Court has previously found that the corporate Defendants "constitute a common enterprise," and as the first Amended Complaint raised the lunch-break rule claim, this Court holds that the first Amended Complaint provided the required notice. *See* Report and Recommendation on Plaintiffs' Amended Motion for Partial Summary Judgment (DE # 623).

Plaintiffs argue they are entitled to damages for the three years prior to June 3, 2005, when the Motion for Leave to File and Amended Complaint (DE # 65) and the Amended Complaint (DE # 66), which first raised the lunch-break rule claim, were filed. Pl. Brief. (DE # 713) at 2. For the purposes of determining the statute of limitations, an amended complaint is deemed filed not on the date when leave is granted to amend, but on the date the amended complaint is docketed. *See Pompey v. Lumpkin,* 321 F.Supp.2d 1254 (M.D.Ala.2004). The docketing of the amended complaint provided the Defendants with notice of the new claims. Accordingly, damages for the FLSA claims will be granted for the three years prior to June 3, 2005, for those Plaintiffs opting in before that date, and each Plaintiff's opt-in date, for those opting in later.

The straight-time claims are subject to a two-year statute of limitations. *McRae v. Douglas,* 644 So.2d 1368, 1371 n. 1 (Fla.Dist.Ct.App.1994). Therefore, damages for the straight time claims will be granted for the two years prior to June 3, 2005, for those Plaintiffs opting in before that date, and each Plaintiff's opt-in date, for those opting in later.

IV. THE 46 DISPUTED PLAINTIFFS

***4** While the FLSA generally requires employees receive overtime compensation for time worked beyond forty hours per week, certain employees are exempt from this requirement. *See* 29 U.S.C. § 207(a); 29 U.S.C. § 213. Defendants claim that 46 Plaintiffs (the "Disputed Plaintiffs") are exempt from the overtime pay requirements of the FLSA for certain quarters, based on their "high-dollar commission-driven compensation." Def. Mem. at 3 (DE # 708). The Disputed Plaintiffs and the quarters for which the Defendants claim they are exempt are listed in Attachment A to the Defendants' Memorandum. Def. Mem. Ex. A at 6-13 (DE # 708-1). That exhibit lists 51 Plaintiffs, but Defendants Harkness, Landt, Powers, Stokes, and Votino are no longer parties to this action. Defendants bear the burden of proving a valid exemption under 29 U.S.C. § 213(i). *See Klinedinst v. Swift Investments, Inc.,* 260 F.3d 1251, 1254 (11th Cir.2001) 29 U.S.C. § 213(i) provides:

> No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

Although the Plaintiffs now question Defendants' proof that they qualify as a retail or service establishment, Plaintiffs have previously admitted as much. The Second Amended Complaint states: "the named Defendant corporations are part of a common enterprise established for the purpose of providing medical supplies, products, and services to the public." (DE # 309) at 10. Neither party claims Defendants provide these goods and services without being paid. Accordingly, the Defendants must show that the Disputed Plaintiffs regular rate of pay was more than one and one-half the applicable minimum hourly rate, and that more than half their compensation for representative periods represent commissions on goods or services.

A) The Disputed Plaintiffs' Regular Rate of Pay was more than One and One-Half the Applicable Minimum Hourly Rate

29 U.S.C. § 213(i) provides that, to be exempt, an employee must be paid a regular rate of pay "in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title." 29 USC 206(a)(1) sets the minimum wage at "not less than $5.15 an hour." One and one-half times $5.15 is $7.73. Defendants argue each Disputed Plaintiffs total compensation, divided by total hours worked (including the automatically deducted lunch-break periods) results in a regular rate of pay in excess of $7.75 for each relevant quarter, and therefore this element is satisfied. Def. Mot. (DE # 708) at 10-11. Plaintiffs do not dispute Defendants' calculations, but argue that the applicable minimum wage is Florida's minimum wage, rather than the Federal minimum wage. Pl. Mot. (DE # 712) at 4-5; Pl. Resp. (DE # 723) at 4-5. While the FLSA provides that "[n]o provision of this chapter ... shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter," 29 U.S.C. § 218(a), section 213(i) specifically refers to the Federal minimum wage. 29 U.S.C. § 213(i). Accordingly, this Court finds the Disputed Plaintiffs' regular rate of pay was more than one and one-half the applicable minimum hourly rate, and the Defendants have satisfied their burden on this issue.

B) The Flat-fee, Per-item Incentives Are Not Commissions

***5** Defendants show their calculations of the Disputed Plaintiffs' commissions as a percentage of their total compensation for the relevant quarters in Attachment A to the Defendants' Memorandum in Support of their Affirmative Defense Applying the Exemption Pursuant to 29 U.S.C. § 207(i). Def. Mem. Ex. A (DE # 708-1) at 6-13. Defendants calculated the Disputed Plaintiffs' total commissions by including incentive payments which were a percentage of their total sales, as well as flat-fee, per-item incentives they received for selling particular items. Def. Mem. (DE # 708) at 12-13. The flat-fee, per-item incentives were specific dollar amounts tied to particular items which the Defendant companies wished to sell, for example, a salesperson might receive $3 for each glucose meter sold. Def. Mem. (DE # 708) at 14. Defendants claim the flat-fee, per-item incentives are commissions, arguing that a flat-fee, per-item incentive is no different than a commission based on a percentage of the item's value. *Id.* at 13-14. As support, Defendants cite *Klinedinst v. Swift Investments, Inc.*, in which the Eleventh Circuit held an employer's "flat rate system constitutes a form of commission payment." 260 F.3d 1252, 1257 (11th Cir.2001).

In the flat rate system at issue in *Klinedinst,* automobile painters were paid a flat rate for individual tasks, determined by estimating the time necessary for the task and their hourly pay rate. *Id.* at 1253. Regardless of how long the task actually took, the painters received the flat rate for completing the job. *Id.* The Eleventh Circuit found that the *Klinedinst* flat rate system provided "incentives for employees to work efficiently and effectively to the benefit of the employer, who may then take on more customers at a greater profit margin, and the employee, who reaps the benefits of increased flag hours regardless of the actual amount of hours worked," and, therefore, the *Klinedinst* flat rate system provided commissions for the purpose of § 7(i). *Id.* at 1256.

Flat-fee, per-item payments of the type in use here are also called spiffs. *See* Def. Resp. (DE # 716) at 5 n. 3. Spiffs may be set by a manufacturer who wants to move a particular product, for example, and offers a payment to the salesperson for selling their product rather than another. Here, the spiffs were offered by the Defendants to encourage their salespeople to push particular products. The spiff amounts were set based on the Defendants goals, and not related to the value of the products. *See* Deposition of Jonathan Starr (DE # 723-4) at 47-48. Defendants cite to *Brennan v. Peel Motors,* which referred to spiffs as "commissions," as support for their position. Subsequently, however, the Eleventh Circuit, *distinguished* a spiff from a commission. In *Olson v. Superior Pontiac-GMC, Inc.*, the Eleventh Circuit remarked that the plaintiff car salesmen were paid both commissions and "daily cash bonuses called SPIFFS for selling designated cars or options," which were payable at different times. 765 F.2d 1570, 1571 (11th Cir.1985).

***6** Plaintiffs claim that the flat fees are not bona fide commissions. Plaintiffs first cite the Department of Labor Field Operations Handbook § 21h04(c) (the "Handbook") as support for this position. Def. Mot. (DE # 712) at 5. That section of the Handbook reads: "[s]ome auto service garages pay employees a flat fee to recondition used cars which are subsequently sold. Such payments which are paid without regard to the value of the service performed do not represent 'commissions on goods or services' for purposes of Sec 7(i)." Handbook § 21h04(c). Plaintiffs also rely

upon United States Department of Labor Opinion Letter, FLSA 2005-53 (the "Letter"). Pl. Mem. (DE # 712) at 5. The Letter notes that the "whole premise behind earning a commission is that the amount of sales would increase the rate of pay" and that "[c]omissions, for purpose of Sec[tion] 7(i) usually denotes a *percentage* of the amount of monies paid out or received." Letter at 2 (emphasis in original). The Letter distinguishes "compensation by flat dollar amounts per lesson or session conducted for instructional employees, like aerobics instructors, and to flat fees per membership sold for the clubs' membership sales employees [from] commissions that may be a percentage of a 'club's revenue per lesson or session,' or of a 'club's revenues per lesson sold.' " *Id.*

Unlike the flag hours in *Klinedinst,* the spiffs at issue here are not "incentives for employees to work efficiently and effectively." 260 F.3d at 1256. Rather than efficiency, they encourage the salespeople to push particular products, and the products for which spiff is given may change from time to time. Traditional commissions, given as a percentage of the value of the product sold, encourage salespeople to greater sales for their employer. Here, the price of the item sold is largely irrelevant to the associated spiff, and this Court finds that the flat-fee, per-item incentives here are not commissions for the purposes of the FLSA. Defendants fail to show that the Disputed Plaintiffs' commissions, without including the non-commission, flat-fee, per-item incentives, constitute more than half their compensation.

V. CONCLUSION

For the reasons described above, it is

ORDERED AND ADJUDGED that the Plaintiffs may recover for unpaid "straight time" wages. It is further

ORDERED AND ADJUDGED that damages for the FLSA claims will be granted for the three years prior to either June 3, 2005, or a Plaintiff's opt-in date, whichever is later. Damages for straight-time claims will be granted for two years prior to either June 3, 2005, or a Plaintiff's opt-in date, whichever is later. It is additionally

ORDERED AND ADJUDGED that the 46 Disputed Plaintiffs are not exempt from the FLSA and may recover for unpaid overtime wages. It is finally

ORDERED AND ADJUDGED that, as the only remaining issue in this case is the calculation of damages, which the parties assured this Court could be quickly and jointly accomplished upon the resolution of these final issues, the parties shall file a joint calculation of damages within tpn (10) days of the date of this Order. The Clerk is instructed to CLOSE this case for administrative purposes.

*7 DONE AND ORDERED.

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Attachment D

2010 WL 2351467
United States District Court,
S.D. Florida.

Cleris NASCEMBENI, Plaintiff,
v.
QUAYSIDE PLACE PARTNERS,
LLP, et al., Defendants.

No. 09-23322-Civ. | June 11, 2010.

West KeySummary

1 **Labor and Employment**
Tips
The "service charge" portion of hotel server's compensation constituted a commission rather than gratuity, in a suit brought by server claiming that employer's split compensation structure violated the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). The "service charge" was a non-negotiable charge added by the hotel to every banquet bill, and distributed to banquet staff. Fair Labor Standards Act of 1938, §§ 1, 16, 29 U.S.C.A. §§ 201-216; Fla. Stat. § 448.110 (2009); Florida Constitution, Art. X § 24.

Attorneys and Law Firms

Jamie H. Zidell, Miami Beach, FL, for Plaintiff.

Kathleen E. Mones, Brett C. Bartlett, Seyfarth Shaw LLP, Atlanta, GA, Richard Lee Barbara, Alvarez Almazan & Barbara LLP, Miami, FL, for Defendant.

Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MARCIA G. COOKE, District Judge.

***1** THIS CASE is before me on the Defendants' Motion for Summary Judgment [D.E. 38]. I have reviewed the arguments of the Parties, the record, and the relevant legal authorities. For the reasons explained in this order, the Defendants' summary judgment motion is granted, and judgment is entered in favor of the Defendants.

I. BACKGROUND

Cleris Nascembeni is a banquet server for the Renaissance Hotel. She claims that her employer failed to pay her overtime wages and minimum wages, and brings this lawsuit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-216, the Florida Minimum Wage Act, Fla. Stat. § 448.110 (2009), and the Florida Constitution, Art. X § 24.

Ms. Nascembeni is paid under a split compensation structure, that is, she is paid both an "hourly rate" and a portion of the "service charge" which the Hotel collects from its customers for all banquet events. (Defs.' S. of Material Facts ¶ 6 [D.E. 39]). From January 2006 through October 2009, Ms. Nascembeni's "hourly rate" ranged from $3.38 to $4.89 [1] (Palmer Decl., Ex. 1 [D.E. 39-4]; *see also* Rushing Decl., Ex. 5 [D.E. 46-1]). During this same time period, Ms. Nascembeni's portion of the "service charge" ranged from $173.08 to $1871.77, per pay period. (*Id.*). Ms. Nascembeni's compensation from January 2006 through October 2009, combining her "hourly rate" and the portion of the "service charge" ranged from $8.04 to $29.71, per hour. (*Id.*). The effect of these figures means that Ms. Nascembeni's "hourly rate" was below the applicable minimum wage, however, when combined with the "service charge" Ms. Nascembeni's income, calculated on an hourly basis, was higher than applicable minimum wage. (*See id.*).

It is this split compensation structure that is the source of the dispute between the Parties. Ms. Nascembeni argues that the "service charge" portion of her paycheck was a gratuity. The Hotel contends that the "service charge" is a commission. If Ms. Nascembeni's categorization of the "service charge" is correct, the Hotel is in violation of the both the minimum wage and overtime wage provisions of the FLSA and the Florida wage laws. If the Hotel's classification of the "service charge" as a commission is legally accurate, then it is not in violation of any of the minimum wage laws, and would qualify for certain exceptions to the overtime wage laws. For the reasons explained in this order, I find that the "service charge" portion of Ms. Nascembeni's compensation constitutes a commission, and therefore grant summary judgment in favor of the Defendants.

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II. LEGAL STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

***2** "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial ... [o]nly when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir.1991). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324 (internal quotation marks omitted). Thus, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks omitted); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1984) (stating "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

The Court must view the evidence in the light most favorable to the nonmoving party, and summary judgment is inappropriate where a genuine issue material fact remains. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Furthermore, the court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied. *Skop v. City of Atlanta, Ga.,* 485 F.3d 1130, 1140 (11th Cir.2007).

III. ANALYSIS

A. Ms. Nascembeni's Minimum Wage Claims Are Contrary To The Undisputed Facts, Since The "Service Charge" Is a Commission

A "service charge" added by a hotel to every banquet bill, and then distributed (in whole or in part) to its banquet staff, is properly classified as a "commission," and not a gratuity, under the FLSA. *Mechmet v. Four Seasons Hotels, Ltd.,* 825 F.2d 1173, 1174-77 (7th Cir.1987). A "service charge" is a commission despite the fact that the parties may describe it colloquially as a gratuity or a tip. *Id.* at 1177 (explaining that a service charge is not a tip if the customer had no discretion of whether to pay it or not).

In this case there is no dispute that the Hotel added a service charge to every banquet bill, and then distributed a portion of that service charge to its banquet staff. (Defs.' S. of Material Facts ¶ 5 [D.E. 39]). There is also no dispute that the service charge was non-negotiable, in other words, the Hotel's banquet customers had no discretion as to whether to pay the service charge or not. (*Id.*). Here the "service charge" is properly classified as a "commission," and not a gratuity. The fact that the earnings statements labeled the service charge portion of Ms. Nascembeni's income as "banquet tips," does not change the nature of the service charge. The Parties imprecise, or colloquial, use of the term "tip" does not transform this income source that would otherwise be a commission. *See Mechmet,* 825 F.2d at 1177 (attaching "no weight" to the fact that the parties described the payment of the service charge to the banquet staff as a gratuity).

***3** Ms. Nascembeni's compensation (combining her "hourly rate" and her share of the "service charge"), from January 2006 through October 2009, ranged from $8.04 to $29.71, per hour. (Palmer Decl., Ex. 1 [D.E. 39-4]; *see also* Rushing Decl., Ex. 5[D.E. 46-1].). This amount was always greater than the minimum wage law in effect. (Defs.' S. of Material Facts ¶ 9 [D.E. 39]). Ms. Nascembeni's claims for violation of the minimum wage provisions of the FLSA and the Florida wage laws fail, since her allegations are contrary to the undisputed facts. [2] Summary judgment is granted in favor of the Defendants as to all of the minimum wage claims.

B. Ms. Nascembeni's Position is Exempted From The FLSA's Overtime Wage Requirement.

"The FLSA, 29 U.S.C. § 201 *et seq.*, requires employers to pay employees at the enhanced rate of time-and-a-half when their workweek exceeds 40 hours." *Cremeens v. City of Montgomery*, 602 F.3d 1224, 1227 (11th Cir.2010) (quoting 29 U.S.C. § 207(a) (1)). As an exception to this overtime wage requirement, an "employee of a retail or service establishment" does not need to be paid time-and-a-half when his or her workweek exceeds 40 hours so long as (1) the employee's regular rate is more than one and one-half times the minimum hourly rate, and (2) more than half of the employee's compensation is from commissions. 29 U.S.C. § 207(i).

There is no dispute that Ms. Nascembeni is an employee of a service establishment. (Defs.' S. of Material Facts ¶ 3 [D.E. 39]). Based on my ruling that the service charge portion of Ms. Nascembeni's income is a commission, it is clear that she regularly earned more than one and one-half times the minimum wage rate. In 2006, one and one-half times the Florida minimum wage was $9.60, while Ms. Nascembeni's average hourly rate in 2006 was $14.86. (*See* Defs.' S. of Material Facts ¶ 9; *see also* Palmer Decl., Ex. 1 [D.E. 39-4]; Rushing Decl., Ex. 5 [D.E. 46-1]). In 2007, one and one-half times the Florida minimum wage was $10.00, and that same year Ms. Nascembeni's average hourly rate was $16.14. (*See id.*). In 2008, one and one-half times Florida's minimum wage increased to $10.18, and Ms. Nascembeni's average hourly rate increased to $17.40. (*See id.*). Finally, in 2009 one and one-half times the Florida minimum wage was $10.81, while Ms. Nascembeni's average hourly rate in 2009 was $17.49. (*See id.*). In addition to consistently being paid more than one and one-half times the minimum wage, it is undisputed that the commission portion of her income accounts for more than half of her compensation. (Defs.' S. of Material Facts ¶ 6; *see also* Rushing Decl., Ex. 5).

Ms. Nascembeni does not dispute these figures, except to argue that the Hotel should not factor the service charge into her income for these purposes. As I have explained, the service charge is properly construed as a commission and must be factored into the calculation. Accordingly, Ms. Nascembeni is within the commissioned work exemption as detailed in 29 U.S.C. § 207(i). As an exempted employee, the Hotel was not required to pay Ms. Nascembeni overtime wages. For these reasons, summary judgment is granted in favor of the Defendants as to overtime wage claims.

IV. CONCLUSION

***4** The facts of this case are clear and undisputed. The only unresolved issue is the nature of "service charge." Since 2006, the Renaissance Hotel has paid Cleris Nascembeni a base hourly rate and a portion of a service charge that is added to every banquet bill. This service charge is a commission, under the FLSA and the Florida minimum wage laws. The Hotel has not violated any federal or state minimum wage laws because, when added together, Ms. Nascembeni's base hourly rate plus the commission have always been higher than the applicable minimum wage. Additionally, Ms. Nascembeni falls within an exception to the FLSA's overtime wage requirement, and so the Hotel has not violated the FLSA's overtime law.

It is **ORDERED and ADJUDGED** that:

1. The Defendants' Motion for Summary Judgment [D.E. 38] is **GRANTED.** Final judgment is entered in favor of the Defendants as to all claims in the Plaintiff's Amended Complaint.

2. The Clerk shall **CLOSE** this case. All pending motions are **DENIED** as moot, and this matter is removed from the Court's trial calender.

DONE and ORDERED.

Parallel Citations

159 Lab.Cas. P 35,771

Footnotes

1 Although the allegations in Ms. Nascembeni's complaint reach back to June 2000, she has abandoned all claims of minimum wage and overtime wage violations prior to January 2006. (*Compare* Defs.' S. of Material Facts ¶ 9 [D.E. 39] *with* Pl.'s Resp. to Def.'s S. of Material Facts ¶ 9 [D.E. 45-1]).

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2 The Florida minimum wage laws are interpreted consistent with the FLSA. Fla. Const. art. X, § 24(f) ("It is intended that case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and any implementing statutes or regulations.").

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Attachment E

2009 WL 1258491
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Michael MARLO, Plaintiff,
v.
UNITED PARCEL SERVICE, INC., a corporation, Defendant.

No. CV 03-04336 DDP (RZx). | May 5, 2009.

West KeySummary

1 **Labor and Employment**
Particular Employees in General

The application of the Motor Carrier Act precluded an on-road supervisor from seeking pay for hours in excess of forty hours per week. The on road supervisor did not suggest his salary was intended to cover only forty hours, nor did he claim his employer failed to compensate him at his hourly rate. Because the Motor Carrier Act was enacted to limit the amount of time employees, such as the on-road supervisor, could work, he was precluded from seeking pay for hours in excess of forty. C.C.R. § 11090(3); 8 CCR § 11090.

7 Cases that cite this headnote

Opinion

ORDER RE: (1) SCOPE OF THE MOTOR CARRIER ACT EXEMPTION, (2) PREMIUM PAYMENTS PURSUANT TO LABOR CODE § 226.7, AND (3) THE MEANING OF "PROVIDE" UNDER § 226.7

DEAN D. PREGERSON, District Judge.

***1** This California wage and hour case proceeds to trial on Tuesday, May 5, 2009. In this Order, the Court addresses outstanding issues raised by the parties: (1) the scope of the Motor Carrier Act exemption, (2) payment for missed meal and rest breaks under California Labor Code § 226.7, and (3) the requirement that employers "provide" meal periods. [1]

I. MOTOR CARRIER ACT EXEMPTION-SCOPE

The Court turns first to an issue left unresolved by the Court's March 19, 2009 order granting UPS's motion for summary judgment on the Motor Carrier Act Exemption. *See* Order (1) Granting Defendant's Motion for Partial summary Judgment as to the Motor Carrier Act Exemption, (2) Denying Plaintiff's Motion for Summary Judgment as to the Motor Carrier Act Exemption, and (3) Denying in Part and Sustaining in Part Plaintiff's Request for Sanctions and Objections to Evidence (Docket Entry No. 798) (March 19, 2009). In that order, the Court held that Marlo falls under the exemption contained in section 3(L) of IWC Wage Order No. 9, codified at Title 8, § 11090 of the California Code of Regulations ("C.C.R."), during the periods that he held the position of On-Road Supervisor. The parties debate the implications that ruling for Marlo's potential recovery. [2] The parties agree that the Motor Carrier Act exemption does not exempt UPS from providing Marlo with meal or rest periods. *See* Def.'s Supp. Br. at 1 n. 1; Pl.'s Supp. Br. at 2. In particular, the parties debate whether, if only the Motor Carrier Act exemption applies to Marlo's time as an On-Road Supervisor (i.e., neither the executive nor administrative exemption applies), Marlo is entitled to compensation beyond his salary for any time worked over forty hours per week at his regular hourly rate-in other words, whether Marlo is entitled to "straight time."

Under California law, the Motor Carrier Act exemption is located at subsection L of section 3 of IWC Wage Order No. 9. 8 C.C.R. § 11090(3)(L). It provides that the provisions of *§ 3* are "not applicable to employees whose hours of service are regulated" by the Motor Carrier Act. [3] Section 3, titled "Hours and Days of Work," sets out: (1) overtime rates of pay and when those rates of pay apply; (2) alternative workweek schedules; and (3) limits on the number of hours an employee may work in certain situations. Section 4 contains the minimum wage requirement and sections 11 and 12 contain meal and rest break requirements.

Marlo argues that the Motor Carrier Act exemption exempts an employee *only* from (as relevant here) the premium rate for overtime compensation; it does not exempt an employee from being paid for hours worked over forty. For those hours, Marlo argues, he would be entitled to a regular rate of pay as established by dividing his weekly salary by forty hours. He would be entitled to that pay in addition to his salary. UPS

argues that the Motor Carrier Act exemption exempts UPS from paying Marlo any time beyond his salary because his salary is intended to cover all hours worked. The parties have cited no case that directly resolves this issue.

***2** The Court finds that because the overtime provisions do not apply and because Marlo neither alleges a Labor Code § 1194 claim nor a breach of contract claim, Marlo may not seek straight time beyond his salary for the time he was an On Road Supervisor. Section 3 of IWC Wage Order No. 9, like § 510 of the California Labor Code, sets out a prohibition on employee work over 40 hours per week unless the employee is compensated at the applicable overtime rate for all additional hours. Because § 3(L) of the wage order applies, however, the prohibition on hours worked contained is inapplicable. *See* Final Pretrial Conference Order (Docket Entry No. 870) (April 22, 2009), at 5-6.

The parties do not appear to debate that Marlo must be paid for all of the hours he worked. In support of his argument that he is entitled to straight time, Marlo cites two cases showing that the hourly employee who was exempt under the FLSA Motor Carrier Act was nevertheless actually paid for his work over forty hours. *See Morris v. McCombs,* 332 U.S. 422, 428-30, 68 S.Ct. 131, 92 L.Ed. 44 (1947) (addressing FLSA exemption, not California Wage Order); *Hodgson v. Ellis Transp. Co.*, 1971 WL 687 (C.D.Cal. January 14, 1971). That Marlo was paid on a salary basis, as opposed to hourly, is the critical distinction according to UPS. The parties do not appear to debate that, if Marlo were an hourly employee, he would be entitled to payment at his hourly rate (as opposed to an overtime rate) for all hours he worked. Indeed, UPS is not suggesting that Marlo deserves no pay for hours beyond 40 simply because he is salaried. Rather, UPS explains that, through his salary, Marlo *was* paid for *all* hours worked because his salary was intended to cover all hours worked.

Although Marlo notes that individuals who fall under the Motor Carrier Act exemption are often paid hourly, Marlo does not appear to argue that he may not be paid on a salary basis under California law or federal law interpreting the Motor Carrier Act. However, Marlo appears to argue that a salary cannot be considered to cover all hours worked unless the employee is exempt under the executive, administrative, or professional exemption; rather, Marlo appears to argue, any salary presumptively covers only a 40-hour work week. At first glance, Marlo's argument draws some support from the California approach to calculating the overtime rate. California law generally requires that, when a court or employer calculates the overtime rate of compensation for a salaried full-time employee, the individual's regular weekly salary is divided by 40. Cal. Labor Code § 515(d) ("For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40 th of the employee's weekly salary."); *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretations Manual, § 48.1.5.4. The DLSE's justification for its approach (as opposed to the "fluctuating work week" approach) is that California's "premium pay for overtime is to ... create a disencentive to employers to impose overtime on employees," and that dilution of that premium would lessen the disincentive. DLSE Manual, § 48.1.4. Marlo has pointed to no similar rule that applies in a wage and hour context other than calculating the rate of overtime pay, such as, for example, calculating minimum wage. Relatedly, Marlo has not explained how the forty-hour work week base line is relevant in a context where overtime is not required or why the flexible work week rule would be inappropriate outside the overtime context. [4] Because the Motor Carrier Act exemption provides that the *entirety* of the overtime rules do not apply, the Court is not persuaded that Marlo is entitled to a presumption that he receives straight time above and beyond his salary.

***3** The California court of appeal's decision in *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 37 Cal.Rptr.3d 460 (2005), does not counsel to the contrary. In *Armenta,* the plaintiffs were paid hourly wages ranging between $9.08 and $20.00, depending on their position. The plaintiffs claimed that the company had not paid them for hours to which they were entitled, had therefore violated the requirement that employees be paid a minimum wage. Cal. Labor Code § 1194. The employer argued that it had not violated the minimum wage requirement because, even though the plaintiffs had not been paid for certain hours, their average rate of pay including those extra hours was still above the minimum wage. The court rejected the employer's argument. The court explained that the "minimum wage standard applies to *each hour* worked by respondents for which they were not paid." *Id.* Although Marlo emphasizes that he must be paid for "all hours worked," he does not explain how *Armenta* 's rejection of the averaging method for *hourly* employees bears on a *salaried* employee like him. As far as the Court can tell, *Armenta* does not apply in this case: unlike the plaintiffs there, Marlo does not bring a Labor Code § 1194 claim and is not an hourly employee.

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The Court is wary of ruling in a way that undermines the protections afforded to workers under California's wage and hour laws or offends the structure set out by the wage and hour scheme. Upon consideration, however, it appears to the Court that the policy considerations underlying this issue point in both directions. On the one hand, California wage and hour law treats workers who are not exempt from an entire wage order (e.g., because they are executive employees) in a sense like hourly employees, whether or not they are paid by a salary: although employees may be paid by salary, employers must keep track of the hours these employees work, they are entitled to overtime above and beyond their salary when they work more than forty hours per week, and their overtime compensation is based on a calculation of their hourly rate. As Marlo points out, in many cases, employees subject to the Motor Carrier exemption will be so-called "blue-collar" workers, to whom the wage and hour laws were meant to apply. The employer-employee relationship is not devoid of flexibility or completely protected from the market, however. In a context where an overtime rate does not apply, the parties have pointed the Court to no provisions of the Labor Code that suggest it would be inappropriate for an employer and employee to contract for a different salary structure, i.e., one in which the employer is paid at a higher salary and has a flexible work week, on the basis of a market that will depend on the skill level and demand for a certain type of employees. The law does not leave such an approach without bounds: on one end, the minimum wage provisions, as well as the requirements that employees are provided meal and rest breaks, provide protections from salary abuse; on the other, the regulations enacted pursuant to the Motor Carrier Act further provide a limit on the amount of time such an employee may work.[5] And nothing precludes unionized employees from entering into collective bargaining agreements as to pay, time, and benefits.

***4** The Court therefore holds that the application of the Motor Carrier Act exemption precludes Marlo from seeking pay for hours in excess of forty. Marlo has not suggested that his salary was intended to cover only forty hours, and this is not a situation where Marlo was an hourly employee who claims he was not compensated at his hourly rate for hours he in fact worked under either Labor Code § 1194 (regarding minimum wage) or a breach of contract action.

II. CALIFORNIA LABOR CODE § 226.7 and § 512

The parties seek a ruling on two issues under California Labor Code § 226.7, related to Marlo's claims for damages for missed meal and rest periods. First, the parties debate whether § 226.7 provides for (1) one hour of pay for each workday an employee misses a meal period and one hour of pay for each workday an employee misses a rest period or (2) on hour of pay for each workday an employee misses a meal period, a rest period, or some combination. Second, the parties debate UPS's obligation to provide its nonexempt employees with meal periods under Labor Code § 226.7. Both issues arise in the context of jury instructions.

A. Payment for Missed Meal & Rest Breaks

The parties first dispute whether Marlo may be compensated once or twice per day under Labor Code § 226.7. The parties agree that the premium wage provided by § 226.7 is one additional hour of pay. They disagree, however, on how many additional hours Marlo is entitled to receive in the event he missed one or more meal periods *and* one or more rest periods on any particular day. Marlo argues that he may be compensated once for each workday that he missed a meal period and once for each work day that he missed a rest period-or, in other words, that he may receive up to two § 226 .7 premium work days. UPS argues that the statute evinces a clear intent to impose a premium wage that is not based on the number of violations that occur, but on the number of *days* any violations occur. Neither party proffers a case that resolves this issue as part of its holding or an administrative interpretation that might shed light on the section.

Section 226.7 provides, in relevant part:

> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Cal. Labor Code § 226.7(b). IWC Wage Order No. 9 considers meal periods and rest periods in different sections. Subsection 11(D) provides that "[i]f an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's

regular rate of compensation for each work day that the meal period was not provided." 8 Cal.Code Reg. § 11090(11)(D). Subsection 12(B) provides that "[i]f an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided." *Id.* at § 11090(12)(B).

***5** The Court begins with the text of § 226.7. Focusing on the use of the disjunctive "or" and the use of the term "work day," both parties present a reasonable way to parse subsection (b). Marlo focuses on the use of the disjunctive "or." Marlo argues that the use of "or" signals that the violation of a meal period requirement and the violation of a rest break requirement constitutes two separate violations. According to Marlo, the text therefore suggests that each *type* of violation can lead to one hour of extra compensation. UPS argues that the use of "or" signals that, even if distinct violations have occurred, the statute only punishes per *workday.* The parties do not appear to dispute that multiple violations of the rest break requirement in a single work day would result in only one additional hour of compensation for the employee. UPS essentially argues that if the legislature had sought to break out the premium wage requirement, it could have done so through providing separate sections for meal and rest breaks or through clearer language.

To support his interpretation, Marlo points to the language in § 226.7(b) referring to the IWC Wage Orders and to the structure of those orders. Subsection (b) provides that if an employer fails to provide a meal period or rest period "in accordance with" the applicable wage order, the employer must pay one additional hour of compensation for each workday that the meal or rest period is not provided. Marlo argues that this language signals an intent to incorporate the language of the Wage Order. The structure of the wage orders supports Marlo's position. [6] Using IWC Wage Order No. 9 as an example, the Wage Order sets out the requirements for meal and rest breaks in two separate sections. *See* 8 C.C.R. § 11090(11)-(12). Each section provides one hour of compensation for the violation of that section per workday. *Id.* [7] The grammatical structure of § 226.7(b) does not compel the result Marlo seeks, however. The "in accordance with" language is located in the *first* clause of § 226.7(b)-the clause describing when an employer violates § 226.7-as opposed to the *second* clause of § 226.7(b), which describes what the employer must pay when a meal or rest period is not provided.

The legislative history likewise could be read to support either party's position. The Legislature's apparent cognizance of the wage orders, however, suggests that Marlo's interpretation may square better with that history. On the one hand, as Marlo emphasizes, the legislature has signaled that it was cognizant of the requirements of the wage orders, and the timing of the respective provisions is consistent with such a reading. Additionally, at least one district court in California has quoted the following language from a letter from the author of Assembly Bill 2509, which enacted § 226.7: "this bill codifies the actions of the IWC establishing a penalty for an employer who violates the law requiring meal and rest periods." *See Doe v. D.M. Camp & Sons,* 2009 WL 921442, *10 (E.D.Cal. March 31, 2009); *accord Murphy,* 40 Cal.4th at 1107, 56 Cal.Rptr.3d 880, 155 P.3d 284 ("In discussing the amended version of section 226.7, which ultimately was signed into law, the Senate Rules Committee explained that the changes were intended to track the existing provisions of the IWC wage orders regarding meal and rest periods."). On the other hand, three factors suggest that the legislature may have intended to impose a different premium wage: (1) the legislature chose a different structure from that provided in the wage orders (one provision describing the premium wage to be applied as opposed to two provisions); (2) the legislature incorporated the wage orders into the first clause of § 226.7(b) and not the second; and (3) the legislature used the structure it did as opposed to an alternative that more clearly supports Marlo's reading, such as payment of one hour's compensation per workday that a meal period is not provided *and* one hour's compensation per workday that a rest period is not provided. [8]

***6** The only two cases that the parties cite to address the issue appear to support UPS's interpretation. The parties cite only two cases that seem to address this issue, though it does not appear to be part of the holding of either. In *Corder v. Houston's Restaurants, Inc.,* the district court primarily addressed whether the one hour compensation due under § 226.7(b) was a penalty. 424 F.Supp.2d 1205, 1207 (C.D.Cal.2006). Among other allegations, the plaintiff claimed that Houston's had failed to provide her with meal and rest periods or compensation in lieu thereof. *Id.* at 1206. In a footnote, the court explained that the parties "disagree[d] about whether Labor Code [§] 226.7 requires an employer to pay the employee for each break missed, or whether the statute requires an employer to pay the employee for each work day that breaks were not provided." *Id.* at 1207 n. 2. Based on the use of "for each work day," the court concluded that "the plain wording of the statute is clear that an employer is liable per work day, rather than per break not provided."

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Id. [9] The court did not discuss the legislative history, wage orders, or policy.

In *Murphy v. Kenneth Cole Productions, Inc.*, the California Supreme Court mentioned this issue, but did not address it as part of the holding in that case. 40 Cal.4th 1094, 1112, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007). In *Murphy,* the court addressed the question of whether the one hour of pay provided in § 226.7(b) constituted a penalty or a wage, and concluded that it was the latter. Discussing why it did not consider the premium wage to be a penalty, the court noted that the defendant argued in part that the additional hour of pay was a penalty "because it is imposed without reference to actual damage, since an hour of pay is owed whether the employee has missed an unpaid 30-minute meal period, two paid 10-minute rest periods, or some combination thereof." *Id.* at 1112, 56 Cal.Rptr.3d 880, 155 P.3d 284. Though the Supreme Court disagreed with the defendant's argument that this supported finding the premium wage to be a penalty, the court neither disputed plaintiff's characterization of § 226.7(b) nor expressly agreed with it. *Id.* The court explained that the pay "is not transformed into a penalty merely because a one-to-one ratio does not exist between the economic injury caused by the meal and rest period violations on the one hand and the remedy selected by the Legislature on the other hand.... Courts have long recognized that the monetary value of harm to employees can be difficult to ascertain." *Id.* Indeed, a "focus on the apparent lack of a perfect correlation between the section 226.7 remedy and the employee's economic injury also ignores the noneconomic injuries employees suffer from being froced to work through rest and meal periods." *Id.* at 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284. (The court of appeal had not addressed this issue. *See Murphy v. Kenneth Cole Productions, Inc.*, 36 Cal.Rptr.3d 418, 440 n. 25 (Cal.Ct.App.2005).) The Court notes that the *Murphy* reasoning would still apply whether or not the court had agreed with the defendant's characterization of the statute.

*7 Finally, Marlo looks to public policy. Because meal period violations and rest period violations are separate kinds of violations, Marlo argues, it would make sense to impose a premium wage for each type of violation. Marlo emphasizes that such an approach would best square with the "health and safety considerations" that "motivated the IWC to adopt mandatory meal and rest periods in the first place." *See Murphy,* 40 Cal.4th at 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284. However, because the premium wage reflects a calculation of noneconomic injury, the alternative interpretation would not necessarily be *contrary* to public policy. Overall, because the remedy does not exactly track with the economic injury, how the public policy weighs is difficult to discern.

The best resolution of this inconclusive authority is to look to the structure provided by the wage orders. In describing the legislative history of § 226.7, the *Murphy* court expressly noted that the Senate had changed the payment amount (from twice the wage to one additional hour of pay) to "track the existing provisions of the IWC wage orders regarding meal and rest periods." 40 Cal.4th at 1107, 56 Cal.Rptr.3d 880, 155 P.3d 284. Although the *Murphy* court did not quarrel with the defendant's characterization of how many premiums the plaintiff was to provide, the court did find the point for which the defendant made that characterization unavailing. *Id.* at 1112, 56 Cal.Rptr.3d 880, 155 P.3d 284. As described above, the Wage Orders provide a separate remedy for violations of meal period requirements and violations of rest period requirements. Allowing an employee to recover one hour of pay for each *type* of violation listed in the statute per work day is not contrary to the "one additional hour" "per work day" language in § 226.7(b). Moreover, providing one additional hour for each *type* of violation strikes the proper balance in incentives for employers: by providing no additional premium wage when the second type of violation occurs, the alternative approach would encourage an employer to require an employee who has missed a ten-minute rest break to also miss his lunch period.

Marlo may recover up to two additional hours of pay on a single work day for meal period and rest break violations: one if any meal period violations occur in a work day and one if any rest break violations occur in a work day. However, if more than one rest period violation occurs in a single work day but no meal period violations occur, Marlo may only recover one additional hour of pay for all of the rest period violations combined; likewise, if more than one meal period violation occurs in a single work day but no rest period violations occur on that day, Marlo may only recover one additional hour of pay for all of the meal period violations combined.

B. Requirement that Employers "Provide" Meal Periods

The parties also dispute UPS's obligation under California Labor Code §§ 512 and 226.7 and IWC Wage Order 9 to provide meal periods. [10] Relying on *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 35 Cal.Rptr.3d 243

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(2005), Marlo argues that employers have an affirmative obligation to ensure that workers are actually relieved of all duty during the required meal period. UPS argues that it need only provide nonexempt employees the opportunity to take a meal break, not to ensure that meal breaks actually are taken. The Supreme Court of California has granted review of this issue.

***8** Two Labor Code provisions and the language of IWC Wage Order No. 9 are principally at issue here. Section 512 reads, in relevant part: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes .... An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes ...." Cal. Labor Code § 512(a). Section 226.7 reads, in relevant part: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Wage Commission. (b) If an employer fails to provide an employee a meal period ...." *Id.* at § 226.7(a)-(b). IWC Wage Order 9 reads, in relevant part: "(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty minutes .... (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing an employee with a second meal period of not less than thirty minutes ...." 8 Cal.Code Regs. § 11090(11)(A)-(B).

Marlo argues that the California Court of Appeal's opinion in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 35 Cal.Rptr.3d 243 (2005), mandates that employers "ensure employees are actually relieved of all duty" so that they can actually take their meal periods. In *Cicairos,* the California Court of Appeal considered whether the employer of certain truck drivers had provided meal periods to the employees. The defendant employers had used an "Activity Based Compensation" system in determining the plaintiffs' wages. 133 Cal.App.4th at 955, 35 Cal.Rptr.3d 243. Each truck had a computerized system which recorded factors such as speed, starts and stops, and time, and the employees had to manually input factors for accurate tracking. *Id.* "Absent one of the designated reasons for a delay, a trip that took longer than expected resulted in a loss to the driver because the driver was not paid for the extra time." *Id.* at 955-56, 35 Cal.Rptr.3d 243. The defendant neither scheduled meal periods nor included an activity code for them such that they were on a list of acceptable delays. *Id.* The court found that the employer had not met its burden to establish at summary judgment that it provided the plaintiffs with their required meal periods. *Id.* at 962-63, 35 Cal.Rptr.3d 243. In particular, the court noted that the defendant did not schedule meal periods or provide an activity code for them while management simultaneously "pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." *Id.* at 962, 35 Cal.Rptr.3d 243. The court explained that "[u]nder the facts presented ..., the defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.' " *Id.* (quoting Dep't of Industrial Relations, DLSE, Opinion Letter No.2002.01.28 (Jan. 28, 2002)).

***9** UPS argues that the relevant provisions require an employer provide employees with the opportunity to take a thirty-minute meal period, but that the employer's obligation stops there. That is, UPS argues that employers have no obligation to keep track of whether or not their employees actually take the meal period that is provided. UPS looks first to the plain meaning of the word "provide," the word that all three relevant provisions consistently uses to characterize the employer's obligation, [11] as well as that word's use elsewhere in the Labor Code. The dictionary definition of that word includes "[t]o make available." Am. Heritage Dictionary, at 676 (4th ed.2000). Second, UPS explains that the California Supreme Court has characterized the employee's right as one against being "forced to forgo" or "forced to work through" a meal period. *See Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1104, 1110, 1113, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007). Third, UPS points to numerous federal cases interpreting California state law, and rejecting the suggestion in *Cicairos* that the employer has an affirmative obligation to keep track of an employee.

The Court holds that these provisions require that employers make a meal period *available* to employees, but place them under no further obligations. The Court agrees with UPS that this is the most natural reading of the statute's language. The Court recognizes that the language used by the *Cicairos* court contemplates an affirmative obligation on employers to ensure that employees are relieved of all duty during a meal period. So far as the court can tell, however, the majority of cases addressing *Cicairos* have held that the obligation is one to make a meal period *available. See White v. Starbucks,* 497 F.Supp.2d 1080 (N.D.Cal.2007) (Walker, C.J.); *Brown v. FedEx,* 249 F.R.D. 580 (C.D.Cal.2008) (Fischer, J.);

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Kenny v. Supercuts, Inc., 252 F.R.D. 641 (N.D.Cal.2008) (Breyer, J.); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529 (S.D.Cal.2008) (Gonzalez, C.J.); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508 (N.D.Cal.2008) (Hamilton, J.); *Gabriella v. Wells Fargo Fin., Inc.*, 2008 WL 3200190 (N.D.Cal.2008) (Illston). *See also Wren v. RGIS Inventory Specialists,* 256 F.R.D. 180, 208 (N.D.Cal.2009) (Spero, J.); *Watson-Smith v. Spherion Pacific Workforce, LLC*, 2009 WL 426122, *2 n. 1 (N.D.Cal. February 20, 2009) (White, J.); *Carter v. Anderson Merchandisers,* LP, 2008 WL 4948489 (C.D.Cal. November 18, 2008) (Phillips, J.). In particular, the *White* court explained that such an interpretation would place an undue burden on employers and would "create perverse incentives." *Brown,* 249 F.R.D. at 585 (citing *White*). The Court finds the reasoning from *White* and *Brown* persuasive, and holds that an employer has no further obligation than to make available the meal period. [12]

Marlo argues that UPS has missed its point, and *White, Brown,* and the other cases are unhelpful. According to Marlo, UPS is focusing on the issue of whether an employer must "force" an employee to take a break, but he is not advocating such a position. Put differently, Marlo argues that there is an important distinction between forcing an employee to take his break and "ensuring" that an employee is relieved of all duties so that the employee *may* take his break. At the same time, Marlo appears to argue that the cases UPS cites-e.g., *White* and *Brown*-are *consistent* with his rule. *See* Reply at 9:9-22 (*"Cicairos* is in accord with the authorities cited by Defendant because an employer's failure to ensure an employee is relieved of all duty means that an employee has not been 'provided' an opportunity to actually take the required meal break."). In sum, Marlo appears to be arguing that the statute (and wage order) requires one of two things: either (1) that an employers must ensure that employees actually take their meal breaks (a characterization which Marlo rejects) or (2) that UPS must offer him the opportunity to take a duty-free meal period, but need not follow up to ensure he actually takes that period.

***10** Assuming that Marlo advances the latter argument, it appears to the Court that the parties' approaches are not completely contrary, but primarily differ in phrasing. To the extent Marlo argues that the opportunity to take a meal break must be a meaningful one for it to count as a meal break "provided" by the employer, the Court agrees, and the Court does not read UPS's papers to advocate the opposite. The various cases that doubted the *Cicairos* rule largely did not disagree with its result based on the facts of that case, where the employer's policies effectively punished employees for taking meal breaks. *See White,* 497 F.Supp.2d at 1089; *Brown,* 249 F.R.D. at 586. Additionally, the Court does not understand UPS to argue that the meal break it makes available can *include* ongoing duties. *See* 8 C.C.R. § 11090(C). That said, the Court finds the "make available" language preferable to the language proposed by Marlo, that the employer has an "affirmative obligation to ensure that the employee is relieved of all duties." This phrasing from *Cicairos*-especially the term "ensure"-suggests that an employer's obligation is to actually determine that the employee is no longer engaged in job duties, i.e., to *force* a break. [13] Even if Marlo does not suggest that a forced break is required, the Court has some concerns that an instruction using this language would be misleading and/or confusing for a jury. Rather, consistent with the various courts cited above, the Court finds that the employer's obligation is to make a meal period available to an employee. The Court does not read the parties to be in disagreement as to whether this availability must be meaningful, or whether the meal period offered must be one during which the employee is "relieved of all duties." *See* 8 C.C.R. § 11090(11)(C). Whether UPS actually made meal periods available to Marlo, or whether Marlo was forced to forgo meal breaks, is a factual issue for the jury to decide.

IT IS SO ORDERED.

Footnotes

1 Because the facts and procedural history of this case are well-known to the parties, the Court does not recite that background here.

2 Because Marlo raised this issue at oral argument on the hearing for the Motion for Summary Judgment, the Court requested short supplemental briefing on the topic. *See* Order Requesting Short Supplemental Briefing on Two Issues (Docket Entry No. 794) (February 25, 2009).

3 By contrast, the executive, administrative, and professional exemptions provide an exemption from the entire wage order. 8 C.C.R. § 11090(1).

4 For example, the Wage Order's definition of "workweek" does not include a presumption that the appropriate work week is 40 hours. *See* 8 C.C.R. § 11090(2).

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5 *See, e.g.*, 8 C.C.R. § 11090(4); 49 C.F.R. § 395.3.

6 In light of what the Court considers to be the clear structure of IWC Wage Order No. 9, the Court is not persuaded by UPS's administrative history argument to the contrary.

7 Most of the other IWC wage orders are structured consistently. *See* 8 C.C.R. §§ 11010-130, 11150-60; *but see* 8 C.C.R. § 11140(11)-(12) (not explicitly providing premium wage for either meal period or rest period); *id.* § 11170 (not providing for rest period).

8 The Court finds other comments in the legislative history highlighted by the parties relatively unhelpful here. Because those comments largely track the language of the section, to the extent the language of the section is unclear, the commentary sheds little to no additional light on the intent in this situation.

9 Marlo correctly points out that *Corder's* conclusion that the one hour of pay was a penalty is not good law after *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007). It does not automatically follow, however, that every conclusion by the district court is likely to have been incorrect, particularly because the question of whether the one hour's pay is a penalty had led to conflicting views from the courts prior to *Murphy.*

10 As discussed above, Labor Code § 226.7 covers obligations for both meal periods and rest breaks. The parties do not dispute the nature of UPS's obligation with respect to ten-minute rest breaks. Rather, the parties dispute UPS's concern with respect to meal periods. *Compare* 8 C.C.R. § 11090(11)(A) ("No employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes ...") *with* 8 C.C.R. § 11090(12)(A) ("Every employer shall authorize and permit all employees to take rest periods ..."). *See White v. Starbucks,* 497 F.Supp.2d 1080, 1085-86 (N.D.Cal.2007).

11 The language of section 11(A) of IWC Wage Order No. 9 is slightly different. That subsection is also consistent, however, with the word "provide." Because Labor Code §§ 226.7 and 512(a) and IWC Wage Order No. 9's section 11(B) each use "provides," and because even *Cicairos* explains that the "language of IWC wage order No. 9 relating to meal periods tracks the language in the Labor Code," the Court finds that the language should be interpreted consistently. *Cicairos,* 133 Cal.App.4th at 952, 35 Cal.Rptr.3d 243. *See Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 586 (C.D.Cal.2008).

12 The Court notes that UPS framed its argument as "provide" means "provide an opportunity." Because the language used by the dictionary definition and the other courts on which UPS relies is that "provide" means "make available," the Court finds that language more appropriate.

13 That the various courts have framed the *Cicairos* holding in this way supports such a reading.

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CERTIFICATE OF SERVICE

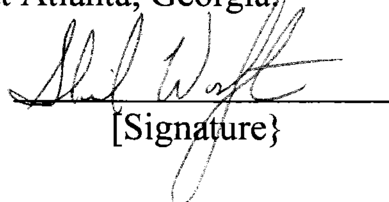
I am employed in the County of Fulton, State of Georgia. I am over the age of 18 and not a party to the within action; my business address is: 999 Peachtree Street, 26th Floor, Atlanta, Georgia 30309. On March 14, 2013, I served the foregoing document described as: ANSWER BRIEF ON THE MERITS OF RESPONDENT TIME WARNER CABLE INC. on the interested party below, using the following means:

Brian F. Van Vleck
Van Vleck, Turner &
Zaller, LLP
6310 San Vicente
Blvd., Suite 430
Loa Angeles, California 90048

☒ BY UNITED STATES MAIL I enclosed the document in a sealed envelope or package addressed to the respective address of the party stated above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☐ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 14, 2013, at Atlanta, Georgia.



Shirl Washington
[Print Name]

[Signature}