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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LYNN MARIE MUELLER,

Plaintiff and Appellant,

v.

JULIA MAY HUNT PAYNE, as Trustee,  
etc.,

Defendant and Respondent.

G047677

(Super. Ct. No. 30-2012-00555598)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane D. Myers, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Peter J. Porter and Peter J. Porter for Plaintiff and Appellant.

Arthur R. Angel for Defendant and Respondent.

\* \* \*

Plaintiff Lynn Marie Mueller was terminated from her employment at a mobile home park in 2008. Mueller, who claims she was entitled to (and did not receive) overtime pay (see Lab. Code, § 510)<sup>1</sup> for the year prior to her dismissal, appeals a defense judgment in favor of her ex-employer. As our review of the record reveals substantial evidence supporting the judgment, we affirm.

## FACTS

### *Evidence Pertaining to Mueller's Employment History*

Mamie Miller Hunt owned the Beach and Bay Mobile Home Port through the Mamie Miller Hunt Trust (the Trust). Mamie was hospitalized in May 2008 because of her deteriorating health. Mamie's daughter, Julia May Hunt Payne, gradually took over Mamie's duties at the mobile home park. Mamie's health did not improve, and, in August 2008, she passed away. Julia, as the current trustee of the Trust, is the defendant and respondent in this appeal.

Mueller was employed at the mobile home park from 1996 through September 5, 2008, when Mueller was terminated for alleged insubordination. Apparently, there was no written contract specifying the conditions of Mueller's employment. Mueller maintained the mobile home park premises. Her duties included "[c]leaning the trash house, sweeping the streets, trimming trees, running notes for Mamie to different tenants, packing the dumpster, painting trailers, mowing lawns, weed eating," and other such tasks. Mueller resided at the mobile home park in order to be available at all times to complete maintenance tasks. Mamie gave Mueller a mobile home; Mueller was not charged rent for her residence or asked to pay utilities.

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All statutory references are to the Labor Code.

Mueller claims she was a nonexempt employee paid at a rate of \$8.42 per hour. Julia asserts Mueller was an exempt managerial or administrative employee not entitled to overtime pay (even assuming Mueller worked more than 40 hours per week). Mueller received \$1,460 per month (designated a “salary” in the payroll records) from February 2005 to the end of her employment. Mueller never received formal overtime compensation.

According to Mueller, Mamie asked Mueller to keep track of her own hours. The only written record of Mueller’s hours in evidence are the documents presented by Mueller. According to Mueller, as she worked she contemporaneously recorded calendar entries, noting the tasks she completed as well as the total number of hours worked each day. The calendar entries do not indicate how much time Mueller spent on each task. For example, the entry for February 12, 2008 indicates Mueller worked 12 hours performing the following tasks: “Clean side of bank at top of hill, cut bamboo and clean out trash and construction debris, work all day very very hard, Jayson helped, pull weeds around utility and clear out under side of #11.”

After her termination, Mueller compiled four pages of timesheets, which supposedly reflected her working hours from April 29, 2007 to August 30, 2008. Mueller used the calendar entries as the basis for her timesheets. The timesheets state the number of hours Mueller claimed to have worked each week during the contested year and one half of employment. The timesheets indicate Mueller worked significant amounts of overtime nearly every week in the relevant time period, with 70 and 80 hour weeks typical (and one 92 hour feat the last week of November 2007). Based on this alleged overtime, Mueller claimed she was owed more than \$29,000 in unpaid wages.

Three percipient witnesses (James Yardley, Randy Johnson, and Patrick Grabowski) were called to testify regarding Mueller’s conduct at the mobile home park. Yardley lived across the street from Mueller. He was able to observe Mueller’s activities on a fairly regular basis, and he and Mueller talked because they were friends. Yardley

sometimes saw Mueller begin working just before Mamie arrived at the mobile home park each afternoon at 2:00 or 3:00 p.m. Yardley often observed Mueller departing and arriving in her truck on missions to collect discarded goods from streets and dumpsters. Yardley did not think Mueller adequately maintained the mobile home park. Part of the disorder consisted of Mueller's own collection of secondhand goods. Yardley opined that Mueller only worked "when Mamie would show up, do some raking, and act like she had been working all day. And when Mamie would leave, [Mueller] would" return to her personal activities.

Johnson lived in the mobile home park off and on. Johnson knew from conversations with Mamie that Mamie compensated Mueller for odd jobs in addition to her regular pay. Johnson saw Mueller's ongoing "garage sale" occupying four trailer spaces. As an attorney, he drafted and served some notices to Mueller in 2007 and 2008. These notices addressed Mueller's disrespectful statements toward Mamie, Mueller's occupancy of trailer spaces she was not entitled to occupy, and rent issues relating to those spaces. In Johnson's opinion, Mueller did not work overtime.

Grabowski, a friend of Mamie's, stayed at the mobile home park when he worked at construction sites in Orange County. According to Grabowski, state inspectors threatened to close the mobile home park for lack of proper maintenance. Grabowski also confirmed that Mueller directed an ongoing "swap meet" at the mobile home park and was paid extra for work done while on the clock. "A lot of times what [Mueller] did was personal." In Grabowski's opinion, Mueller's claims of unpaid overtime are "completely fabricated."

### *Procedural History*

After her termination, Mueller filed a claim seeking overtime compensation with the Labor Commissioner. The Labor Commissioner found that "[w]hen an employer has failed to fulfill its statutory obligation to keep records, testimony of the

affected employee is sufficient to establish the amount of hours worked.” The Labor Commissioner granted Mueller an award of \$67,311.32, composed of overtime pay, liquidated damages, interest, and a penalty.

Julia appealed the award to the trial court, which conducted a de novo trial. The court addressed two of the three issues put before it by the parties. First, the court determined Mueller did not work overtime and thus was not entitled to overtime pay. The court did not find Mueller’s testimony or timesheets to be credible, stating “it [was] unlikely that Lynn Mueller worked even the regular hours for which she was compensated let alone any overtime hours.” The court deemed “credible” the testimony of the other percipient witnesses, whose observations and opinions suggested Mueller did not actually work any overtime.

Second, the court found that, even if Mueller were owed overtime compensation, she received adequate compensation. Mamie paid Mueller for odd jobs in addition to her regular salary, paid for repairs to Mueller’s truck, and deeded four lots with a total value of \$128,600 to Mueller.

The court sidestepped the foundational question of whether Mueller was an exempt salaried employee or a nonexempt hourly employee. In other words, the court assumed without deciding that Mueller was a nonexempt employee entitled to hourly wages and overtime if she worked more than eight hours per day or 40 hours per week.

## DISCUSSION

### *We Review the Trial Court’s Judgment, Not the Labor Commissioner’s Award*

Nonexempt employees are entitled to recover unpaid overtime wages. (§§ 510, subd. (a) [overtime pay for more than eight hours per day or 40 hours per week], 515, subd. (a) [authorizing exemptions from overtime law], 1194, subd. (a) [“any employee receiving less than . . . the legal overtime compensation applicable to the

employee is entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit”).) “An employee pursuing a wage-related claim “has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. [Citation.] Or the employee may seek *administrative* relief by filing a wage claim . . . pursuant to a special statutory scheme codified in sections 98 to 98.8 . . . .”” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115 (*Murphy*)).) The Labor Commissioner conducts the administrative process, which is commonly referred to as a Berman hearing procedure. (*Ibid.*)

“The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims.” “[T]he purpose of the Berman hearing procedure is to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.”” (*Murphy, supra*, 40 Cal.4th 1094 at p. 1115.) “Within 15 days after the Berman hearing is concluded, the commissioner must file a copy of his or her order, decision, or award and serve notice thereof on the parties. [Citation.] The order, decision, or award must include a summary of the hearing and the reasons for the decision, and must advise the parties of their right to appeal.” (*Ibid.*)

“Within 10 days after service of notice of an order, decision, or award [from the Labor Commissioner], the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard *de novo*.” (§ 98.2, subd. (a).) “The timely filing of a notice of appeal forestalls the commissioner’s decision, terminates his or her jurisdiction, and vests jurisdiction to conduct a hearing *de novo* in the appropriate court. [Citation.] [Citation.] ‘Although denoted an “appeal,” unlike a conventional appeal in a civil action, hearing under the Labor Code is *de novo*. [Citation.] “A hearing *de novo* [under Labor Code section 98.2] literally means a new hearing,’ that is, a new trial.” [Citation.] The decision of the commissioner is “entitled to no weight

whatsoever, and the proceedings are truly ‘a trial anew in the fullest sense.’”” (*Murphy, supra*, 40 Cal.4th 1094 at p. 1116, fn. omitted.)

Our review, in turn, is from the trial court’s decision, not the Labor Commissioner’s award. (*Murphy, supra*, 40 Cal.4th at p. 1116.) As to factual questions decided by the court, “our authority begins and ends with a determination whether, on the entire record, there is any substantial evidence — that is, of “‘ponderable legal significance,’” reasonable, credible and of solid value — contradicted or uncontradicted, which will support the judgment. As long as there is such evidence, we must affirm.” (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) We “must consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment.” (*Ibid.*)

#### *Substantial Evidence Supports the Finding That Mueller Did Not Work Overtime*

Disagreeing with numerous specific factual findings in the court’s statement of decision, Mueller purports to identify 10 separate issues on appeal. But, in reality, there is a single issue that must be decided here — whether there was substantial evidence to support the court’s ultimate finding of fact that Mueller did not work any overtime.

Mueller contends the court was required to accept her testimony, calendars, and timesheets as conclusive proof because neither Mamie nor Julia kept their own records of Mueller’s working hours. Mueller points to Industrial Welfare Commission wage order No. 5, subdivision 7(A), which requires certain categories of employers to “keep accurate information with respect to each” employee’s time records, total wages paid, and total hours worked in each payroll period. (Cal. Code Regs., tit. 8, § 11050, subd. (7)(A).) Mueller posits that Mamie and Julia violated this rule and that an

employer's failure to comply with this rule results in the employee essentially winning a wage claim by default.<sup>2</sup>

Mueller's position is based on a misunderstanding of the relevant case law. In *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 (*Hernandez*), it was undisputed at trial "that [the employee] worked more than 8 hours per day and more than 40 hours per week from November 1983 through July 1984." (*Id.* at p. 726.) There was no credible evidence, however, of the precise number of hours worked by the employee during this time period. The trial court deemed time cards prepared by the employer to be "'clearly made up.'" (*Id.* at p. 725.) But at the same time, the trial court characterized as "unbelievab[le]" a calendar prepared by the employee one year after the relevant time period. (*Id.* at pp. 724-725.) In short, "the *fact* of damage [was] certain; the only uncertainty [was] the *amount* of damage." (*Id.* at p. 726.) The trial court erred by failing to award any damages to the employee in these circumstances. (*Id.* at pp. 726-728.) Where an employer has failed to meet its obligation of maintaining accurate records, "imprecise evidence by the employee can provide a sufficient basis for damages." (*Id.* at p. 727.) The appellate court remanded to the trial court "to draw whatever reasonable inferences it can from the employee's evidence . . . ." (*Id.* at p. 728.) Thus, in cases like *Hernandez*, employees are entitled to an overtime award regardless of whether their own evidence can be taken as gospel. (See *Reeves v. International Tel. and Tel. Corp.* (9th Cir. 1980) 616 F.2d 1342, 1346, 1351 [compensating employee for 60 hours per week, an

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We assume for purposes of this opinion that this rule actually applied to Mamie's and Julia's employment of Mueller. Of course, Mueller's testimony is that Mamie instructed her to maintain records of the time she worked. One can infer from the record that Mueller was the only employee of Mamie's present at the mobile home park most hours of the day. It seems odd for Mueller to assert that Mamie and Julia violated this rule, if Mueller (the only individual seemingly capable of keeping accurate time records regarding her own work) was actually tasked by her employer with keeping these records.

approximation based in part on employee's rough estimate that he worked 74.5 hours per week].)

Nothing in *Hernandez, supra*, 199 Cal.App.3d 721, requires trial courts to abdicate their traditional role of weighing credibility and resolving factual disputes when there are no clear, accurate records in a wage dispute case. Indeed, the Division of Labor Standards Enforcement Policies and Interpretation Manual (2002) section 41.1.1, reads, in part: "It is the employer's responsibility to keep accurate records of the time that employees work. If the employer fails to maintain accurate time records, the employee's *credible* testimony or other *credible* evidence concerning his hours worked is sufficient to prove a wage claim. The burden of proof is then on the employer to show that the hours claimed by the employee were not worked." (Italics added.) There is no conclusive presumption in the law that an employee's testimony or records must be accepted as credible if the employer did not separately maintain accurate time records.

In the instant case, the parties disputed the question of whether Mueller worked *any* overtime. This is not a case where the only question is how to set damages when the precise number of overtime hours is uncertain. Substantial evidence supports the court's finding that Mueller did not work any overtime. Three witnesses with personal knowledge of Mueller's activities provided testimony suggesting Mueller did not diligently maintain the mobile home park. Mueller spent a significant amount of time collecting goods for her ongoing yard sale and engaging in other personal ventures. (See *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393, 1400 [on call employees who reside at employment site entitled to compensation only for hours actually spent "carrying out assigned duties"].) Mueller shirked her tasks unless Mamie was present. There is no record of Mueller raising the issue of overtime until after she was fired. The court could reasonably conclude Mueller fabricated the calendars and timesheets with the intent to claim overtime hours that she never worked.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.