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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IGGY REGALADO,

Plaintiff and Respondent,

v.

LATITUDES INTERNATIONAL
FRAGRANCE, INC.,

Defendant and Appellant.

B212618

(Los Angeles County
Super. Ct. No. BC378245)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Michael L. Stern, Judge. Affirmed.

Law Offices of Christopher Norgaard and Christopher Norgaard for Defendant
and Appellant.

Alfonso & Hoyng and Frank A. Alfonso for Plaintiff and Respondent.

Plaintiff and respondent Iggy Regalado filed this action against his former employer, defendant and appellant Latitudes International Fragrance, Inc., alleging a host of Labor Code violations arising out of defendant's alleged misclassification of plaintiff as an exempt employee, defendant's alleged failure to pay plaintiff overtime, and defendant's alleged failure to provide plaintiff with meal and rest breaks. Following a bench trial, the trial court entered judgment in favor of plaintiff. Defendant appeals, claiming: (1) The judgment is not supported by substantial evidence. (2) The trial court erred in denying defendant's motion for a new trial and to vacate the judgment. (3) The trial court erred in awarding plaintiff attorney fees.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Pleadings

On September 28, 2007, plaintiff filed a complaint against defendant, alleging (1) violation of Labor Code section 6310; (2) violation of Labor Code section 2699; (3) tortious termination in violation of public policy; (4) failure to provide meal and rest breaks pursuant to Labor Code section 226.7; (5) failure to pay wages pursuant to Labor Code sections 1194 and 1197 et seq.; (6) waiting time wage continuation pursuant to Labor Code section 203; (7) failure to provide accurate itemized statements pursuant to Labor Code section 226; (8) unfair competition pursuant to Business and Professions Code section 17200 et seq.; and (9) conversion and theft of labor. Plaintiff's claims were based upon the allegation that he was misclassified as an exempt employee; that he was not paid overtime; and that he was denied meal breaks and rest periods. In his prayer for relief, plaintiff sought, inter alia, compensatory damages, penalties, and attorney fees.

Defendant filed its answer on November 7, 2007. In addition to a general denial, defendant alleged the following affirmative defense: "The Complaint and each and every purported cause of action contained therein are barred because plaintiff is an exempt

employee pursuant to Section 515 of the California Labor Code and California Industrial Welfare Commission Order No. 1-2001 ('Wage Order No. 1')."¹

Trial

On August 27, 2008, the case proceeded to a bench trial on five of the causes of action pled in the complaint: the second cause of action for violation of Labor Code section 2699; the fourth cause of action for failure to provide meal and rest breaks pursuant to Labor Code section 226.7; the fifth cause of action for failure to pay wages pursuant to Labor Code sections 1194 and 1197 et seq.; the sixth cause of action for waiting time wage continuation pursuant to Labor Code section 203; and the seventh cause of action for failure to provide accurate itemized statements pursuant to Labor Code section 226.²

In accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the following evidence was presented at trial: Plaintiff was hired by defendant on November 28, 2006. According to Manuel Gardner (Gardner), defendant's operations manager, plaintiff was hired to be defendant's head of the maintenance department, which was part of the warehouse department. At the time, Desiree Boardman (Boardman) was the warehouse manager. Boardman oversaw the maintenance department.

The only employees that were part of the maintenance department were Boardman, plaintiff, and Maria Casique (Casique), the housekeeper. While plaintiff checked Casique's work to see if she had finished her work, he was not her supervisor. He only checked Casique's work on Boardman's orders. And, Gardner could not state how much time plaintiff actually spent directing her.

¹ Wage Order No. 1 is located at title 8 of the California Code of Regulations, section 11010.

² The trial court dismissed the remaining causes of action.

Plaintiff's primary duties involved the upkeep of defendant's facilities. Thus, he was expected to fix things. Specifically, plaintiff painted bathrooms, made some wood tables, repaired equipment, adjusted certain machinery or tools, swept the entrances, changed light bulbs, put together a book shelf, fixed toilets or otherwise handled plumbing repairs, picked up exterior trash, planned and arranged for trash, oil drum, and corrugated pickups, purchased materials from retailers, changed electric ballasts in the buildings, and generally inspected and repaired machinery. According to plaintiff, he spent 99 percent of his time performing manual labor.

Occasionally, temporary employees were called in to work in the maintenance department. On one occasion, plaintiff suggested via e-mail that an agency worker be trained on maintenance work and hired by defendant as an employee if a position became available. While there is no evidence of a reply to plaintiff's e-mail, Gardner testified that plaintiff's suggestion was accepted although ultimately denied.

Defendant never kept time records for plaintiff. Plaintiff testified that he normally arrived at work between 6:00 a.m. and 8:00 a.m. Generally, he would leave work after eight hours, but "sometimes [he] had to stay longer." In fact, sometimes he did not arrive home until 8:00 p.m. or 9:00 p.m., even though he lived only about 45 minutes or one hour away from defendant's location. He also testified that he worked "several" weekends; he defined "several" as more than three or four. During those weekend shifts, he worked 14 or 15 hours per day.

Gardner admitted that plaintiff would work over eight hours per day on some occasions. Boardman likewise testified that plaintiff may have worked more than eight hours per day on "a couple instances." Gardner also conceded that plaintiff worked at least one weekend.

Regarding rest breaks, defendant never communicated to plaintiff that he was entitled to 10-minute rest breaks. At trial, plaintiff testified that he was not permitted to take either of his two 10-minute breaks. In fact, no one on behalf of defendant ever informed plaintiff that he was entitled to take two 10-minute breaks. That being said, plaintiff did testify that he would sometimes take a break to smoke a cigarette or drink a

soda, when there was time. And, Boardman testified that she “often” saw him take breaks and eating lunch.

Plaintiff’s employment was terminated on May 25, 2007.

Judgment

After summarizing the evidence and the applicable law, the trial court found that plaintiff was a nonexempt employee entitled to overtime pay (\$3,881.75). The trial court also found that plaintiff was entitled to damages as a result of defendant’s failure to afford plaintiff two 10-minute rest breaks per day (\$2,381.25). It further found that defendant did not pay plaintiff at the time of his termination nor within 30 days thereafter, thereby entitling plaintiff to 30 days payment (\$4,500). Moreover, it determined that although plaintiff was entitled to itemized pay stubs for the time of his employment, defendant neglected to provide them, entitling plaintiff to damages (\$4,000) on that claim as well. The trial court rejected plaintiff’s claim for civil penalties pursuant to Labor Code section 2699 or for damages for a lack of lunch periods.

Ultimately, plaintiff was awarded \$14,763 in damages, plus prejudgment interest, attorney fees and costs.

Defendant’s Motion for New Trial and for Order Vacating Judgment

On October 14, 2008, defendant filed a notice of intention to move for new trial and for order vacating judgment pursuant to Code of Civil Procedure sections 659 and 663. The motion was originally set for hearing on October 30, 2008. On that date, the trial court stated to the parties’ attorneys: “We had—or at least we have on the calendar a motion for a new trial. And I understand from my colloquy with the clerk who has spoken to one or maybe both of you that due to some misunderstandings, let’s put it that way, one end or another—and I’m not blaming anybody—the motion hasn’t been filed yet; right?” After defendant confirmed the trial court’s understanding, it stated: “My proposal is that we pick a date right now and go through the whole trial and—with no prejudices to the fact that it’s not going to be heard within the 60-day statutory period. That’s no fault of yours, I’ll say, because I don’t want to point in any direction.” There was no objection, so the trial court continued: “Okay. Well, we are going to waive the

time, and we are going to pick a date that's reasonable for you to— [¶] You should have your motion completed by now; right?" Defendant replied that the motion was completed, and advised the trial court that it would be filed once it received the transcript.

The trial court responded: "Well, I can't guarantee you that you are going to get the transcript in the calendar year, for that matter. It's beyond my control. [¶] We issued a pretty detailed memorandum decision, 11 or 12 pages. Just take aim at that." The trial court then scheduled defendant's motion for new trial for December 11, 2008, the same date reserved for plaintiff's motion for attorney fees.

In its subsequently filed memorandum of points and authorities, defendant argued that the judgment was not supported by the evidence.³ Specifically, plaintiff did not meet his burden of demonstrating that he was misclassified as an exempt employee. Defendant also asserted that plaintiff failed to prove that he was entitled to overtime pay or damages for uncompensated breaks.

Plaintiff opposed defendant's motion, arguing that it was untimely. Code of Civil Procedure section 660 provides that "the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of judgment by the clerk." (Code Civ. Proc., § 660.) The clerk of the court mailed the notice of entry of judgment on September 26, 2008. Thus, defendant had until November 25, 2008, to have its motion heard. Because the motion was not heard by that date, the trial court lacked jurisdiction to entertain defendant's motion. It was necessarily denied by operation of law.

Defendant's reply brief pointed out that unlike Code of Civil Procedure sections 659 and 659a, section 660 does not limit the trial court's ability to extend the 60-day time period prior to that period's expiration. And, defendant reminded the trial court and

³ Regarding the timeliness of the motion, defendant represented the following: "Because there was a delay in preparation of the trial transcript, which is dated and was received by defendant's counsel on November 6, 2008, the Court by order on October 30, 2008, ordered that the statutory time requirements for the filing and hearing of this Motion would be waived, and plaintiff also agreed to waive those requirements, and the Court set this Motion for hearing on December 11, 2008."

plaintiff that the parties and the trial court expressly waived all statutory time requirements and agreed to the December 11, 2008, hearing date. As the motion was otherwise unopposed, defendant urged the trial court to grant it.

At the hearing, the trial court indicated that it could deny defendant's motion on the grounds that it was untimely. Nevertheless, the trial court ruled on the merits of the motion, and denied it "based on the facts." As summarized in its written order, "the Court conducted a bench trial, weighed the evidence, found it to support plaintiff's theories, and issued a written opinion stating the reasons for the judgment in favor of plaintiff. The Court has heard and evaluated the evidence and credibility of the witnesses. There are no new facts or other circumstances warranting the Court to revisit its prior determinations. The motion is denied."

Plaintiff's Motion for Attorney Fees

In accordance with the trial court's judgment, on December 11, 2008, plaintiff moved for attorney fees. He requested \$87,120.

Defendant opposed plaintiff's motion, arguing that plaintiff was not entitled to a majority of the attorney fees sought as they were incurred in connection with plaintiff's unsuccessful claims.

The trial court granted plaintiff's motion in its entirety, noting: "When a complaint alleges multiple interrelated claims, then all requested fees may be allowed." As the claims in this action were alleged and tried as interrelated, the trial court declined to apportion the attorney fees. The trial court also found that the total fee amount was reasonable.

Appeal

Defendant's timely appeal ensued.

DISCUSSION

I. Standards of review.

The parties rightly agree that we review the trial court's judgment for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "Under [the substantial evidence] standard of review, our duty 'begins and ends' with

assessing whether substantial evidence supports the verdict. [Citation.] ‘[The] reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.’ [Citation.] We review the evidence in the light most favorable to the respondent, resolve all evidentiary conflicts in favor of the prevailing party and indulge all reasonable inferences possible to uphold the jury’s verdict. [Citation.]” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908.) “‘It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.’ . . . [W]e do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. [Citation.] Rather, ‘we defer to the trier of fact on issues of credibility. [Citation.]’” (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514–515.)

We review a trial court’s order denying a motion for new trial for abuse of discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Similarly, we review a trial court’s order denying a motion to vacate the judgment for sufficient evidence. (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.)

As for defendant’s challenge to the attorney fee award, we review the trial court’s order for abuse of discretion. (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 931.)

II. *Ample evidence supports the trial court’s finding that defendant did not prove that plaintiff was exempt.*

In challenging the judgment, defendant largely engages in an attack on the evidence. But, as set forth above, it is not within our purview to reweigh the evidence. Moreover, defendant does not adequately set forth the elements of this affirmative defense or demonstrate why the evidence unequivocally confirms that plaintiff was an exempt employee. On that ground alone, we could affirm the judgment. Nevertheless, for the sake of completeness, we discuss the applicable law and explain why substantial evidence supports the judgment.

In California, the Labor Code sets out an employer’s obligations to pay an employee’s wages, including the obligation to pay for overtime. (Lab. Code, § 510, subd. (a).) Labor Code section 515, subdivision (a), “authorizes the California Industrial

Welfare Commission ('IWC') to 'establish exemptions from [these laws] . . . for executive, administrative, and professional employees, provided [inter alia] that the employee is primarily engaged in duties that meet the test of the exemption, [and] customarily and regularly exercises discretion and independent judgment in performing those duties.' [Citation.] These exemptions are defined in 'wage orders,' regulations promulgated by the IWC." (*Campbell v. Pricewaterhousecooper, LLP* (E.D. Cal. 2009) 602 F.Supp.2d 1163, 1168 (*Campbell*)). "The IWC has promulgated different wage orders that apply to distinct groups of employees." (*Id.* at p. 1169.) The parties agree that the regulation applicable here is Wage Order No. 1.

The criteria for defining the status of executive employees exempt from hourly wage and other provisions are set forth in Wage Order No. 1. Wage Order No. 1 (Cal. Code Regs., tit. 8, § 11010, subd. (1)(A)(1)) provides, in relevant part that "[t]he following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from these sections: [¶] Executive Exemption. A person employed in an executive capacity means any employee:

"(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

"(b) Who customarily and regularly directs the work of two or more other employees herein; and

"(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

"(d) Who customarily and regularly exercises discretion and independent judgment; and

"(e) Who is primarily engaged in duties which meet the test of the exemption. . . . Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work

week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

“(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment.”

An employee bears the initial burden of proving that he performed work for which he was not compensated. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) Through his testimony, plaintiff met that burden here.

Thus, the burden shifted to defendant to prove that an exemption applied. “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption.” (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794–795.) Moreover, because the Legislature used the word “and” to connect subdivisions (a) through (e), we construe these five requirements in the conjunctive.⁴ (See, e.g., *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861; *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 189 [ordinarily, the word “and” connotes a conjunctive meaning].) Thus, if defendant could not establish any one of the criteria, it could not prevail on this defense. At a minimum, ample evidence supports the trial court's determination that defendant did not establish criteria (a), (c), (d), and (e).

A. Criterion (a)

Regarding criterion (a), substantial evidence indicates that plaintiff did not manage a department. Specifically, Boardman testified that she oversaw the maintenance department. Gardner confirmed that during the time plaintiff was employed by defendant, Boardman managed the maintenance department. As Gardner explained,

⁴ As plaintiff sets forth in his respondent's brief, we note that defendant neglected to point out in its appellate briefs that these five factors are connected by the word “and.”

plaintiff's primary duties involved the upkeep of defendant's facilities, not the management thereof.

B. Criterion (c)

Regarding criterion (c), there is no indication that plaintiff had the authority to hire or fire other employees or that his suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees was given particular weight. Defendant directs us to no evidence in the appellate record that plaintiff had the authority to hire or fire any other employees. And, there is no evidence that plaintiff's opinion was afforded any particular weight. (See 29 C.F.R. § 541.105 (2009) [describing the factors regarding "particular weight" as "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change of status of a co-worker"].)

Moreover, there is no evidence that plaintiff had the duty to make recommendations regarding the hiring and firing of employees. As for the frequency with which plaintiff made suggestions, at most, plaintiff sent one e-mail to Boardman, asking to train Jose Navarro to work on maintenance projects. While Gardner testified that plaintiff's suggestion was accepted and ultimately denied, that alone does not shed any light on whether plaintiff's opinion was given particular weight.

C. Criterion (d)

Regarding criterion (d), there is no evidence that plaintiff regularly exercised discretion and independent judgment. "To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of

conduct, and acting or making a decision after the various possibilities have been considered. The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.” (29 C.F.R. 541.202(a) (2009); see also *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1256 [portions of the Code of Federal Regulations are expressly incorporated by reference into portions of the California Code of Regulations].)

“The phrase ‘discretion and independent judgment’ must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.” (29 C.F.R. § 541.202(b) (2009).) “The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” (29 C.F.R. § 541.202(e) (2009).)

Ample evidence supports the trial court’s conclusion that plaintiff did not exercise discretion and independent judgment to matters of significance. Rather, as plaintiff

testified, he spent approximately 99 percent of time performing manual labor. The reason for this estimate is simple—his job was to upkeep defendant’s facilities. While plaintiff regularly inspected the facilities to determine what needed fixing, and may have “fetch[ed] maintenance and repair items [from] . . . supply stores,” such evidence does not rise to the level of exercising discretion and independent judgment.

D. Criterion (e)

Finally, the trial court’s determination that plaintiff was not “primarily engaged in duties” (Cal. Code Regs., tit. 8, § 11010, subd. (e)) that met the test of the exemption is supported by the evidence. The phrase “primarily engaged in” means that the employee spent over 50 percent of his time engaging in the subject activities. (Lab. Code, § 515, subd. (e); *Campbell, supra*, 602 F.Supp.2d at p. 1182.)

As set forth above, it is questionable whether plaintiff spent any of his time engaged in the duties to place him within the scope of the exemption. That being said, even if there were some evidence, there is no indication that plaintiff spent half of his time engaged in said duties. Rather, the evidence points to the conclusion that plaintiff was primarily engaged in the upkeep of defendant’s facilities.

III. *Substantial evidence supports the trial court’s award of damages.*

Defendant objects to the judgment on the grounds that plaintiff is not entitled to damages for unpaid overtime wages. It claims that defendant never directed or authorized plaintiff to work overtime, that it was unaware plaintiff was working any overtime, and that plaintiff did not prove that he actually worked overtime. It also argues that plaintiff did not prove how many days he actually worked for defendant. We cannot adopt defendant’s argument.

Pursuant to the Labor Code and Wage Order No. 1, an employee is entitled to overtime compensation for hours worked in excess of eight hours per day and 40 hours per week. “Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. [Citation.] ‘[W]here the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem

arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' [Citations.]" (*Hernandez v. Mendoza, supra*, 199 Cal.App.3d at p. 727.)

Here, the evidence established that plaintiff worked for defendant from November 28, 2006, to May 25, 2007, a total of 127 work days.⁵ As for the hours he worked, defendant did not maintain records showing when plaintiff arrived and left work; he was not required to "clock in or out." Thus, we are left with the witnesses' testimonies.

Plaintiff testified that he normally arrived at work between 6:00 a.m. and 8:00 a.m. Generally, he would leave work after eight hours, but "sometimes [he] had to stay longer." In fact, sometimes he did not arrive home until 8:00 p.m. or 9:00 p.m., even though he lived only about 45 minutes or one hour away from defendant's location. He also testified that he worked more than three or four weekends. During those weekend shifts, he worked 14 or 15 hours per day.

⁵ We draw this conclusion from witness testimony as defendant rightly objects to plaintiff's citation to and reliance on documents in his respondent's brief that were not admitted into evidence at trial.

Gardner confirmed, at least in part, plaintiff's testimony. He agreed that plaintiff worked over eight hours a day "on some occasions" and he worked at least one weekend.

Based upon this evidence, the trial court's finding that plaintiff in fact worked overtime on 90 work days is supported by the evidence. (*Hernandez v. Mendoza, supra*, 199 Cal.App.3d at pp. 727–728.)

Relying upon *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, defendant asserts that plaintiff only is entitled to overtime if it "authorized the overtime worked, or was specifically aware that [plaintiff] intended to work the overtime hours worked." We need not decide whether defendant must have known or had reason to know of plaintiff's overtime in order to affirm the judgment. Ample evidence supports the inference that defendant knew or had reason to know that he was working overtime. Boardman testified that plaintiff arrived at work around 6:00 a.m. or 7:00 a.m.; he usually was at work by the time she arrived between 7:00 a.m. and 8:00 a.m. She also testified that plaintiff was usually gone by the time she left, between 5:00 p.m. and 6:00 p.m. Based upon her testimony, defendant had reason to suspect that plaintiff could have been working an 11-hour day, between 6:00 a.m. and 5:00 p.m.

IV. Substantial evidence supports the trial court's award of damages for rest breaks.

In its judgment, the trial court rejected plaintiff's claim for damages for defendant's alleged failure to provide lunch periods. However, it did award plaintiff damages for defendant's failure to afford him two 10-minute rest breaks per day. Defendant challenges this finding and award as not supported by the evidence. Again, we cannot agree.

Pursuant to Wage Order No. 1, a nonexempt employee is entitled to a paid 10-minute rest period in the middle of each four hour work period. (Cal. Code Regs., tit. 8, § 11010, subd. (12)(A).) Thus, on a typical eight-hour workday, an employee is entitled to one paid 10-minute rest break in the morning and one in the afternoon. If an employer fails to provide the mandated breaks, the employee is entitled to one additional hour of

wages for each such day. (Lab. Code, § 226.7, subds. (a) & (b); *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 335.)

At trial, plaintiff testified that he was not permitted to take either of his two 10-minute breaks. Moreover, the evidence presented at trial established that no one on behalf of defendant even informed plaintiff that he was entitled to take two 10-minute breaks. It follows that the trial court's finding that plaintiff was denied his rest breaks and thus entitled to damages is supported by substantial evidence.

In urging us to reverse, defendant directs us to evidence that plaintiff did take breaks during the workday. Specifically, at trial, plaintiff testified that he would sometimes take a break to smoke a cigarette, when there was time. And, Boardman testified that she often saw him take breaks and eating lunch. Based upon this evidence, defendant argues that “there is no substantial evidence to support the conclusion, improbable on its face, that plaintiff never—ever—took a rest break.”

The flaw in defendant's argument is that it again asks us to reweigh the evidence, which we cannot and will not do. Regarding plaintiff's testimony, he stated that he would take “5 minutes” to smoke a cigarette, when there was time. But, his testimony does not compel the conclusion that plaintiff was offered adequate rest breaks. As for Boardman's statements, she never said when she saw him take breaks or how often. And, as noted above, the trial court rejected plaintiff's claim for damages for defendant's alleged failure to provide lunch periods. It is possible that the trial court declined to award plaintiff damages for failure to provide lunch periods because of plaintiff's testimony that he had taken a break to smoke and/or drink a soda. Thus, the damage award is proper.

In its brief, defendant argues that the issue is not whether plaintiff actually took his breaks; the issue is whether defendant offered them to him.⁶ While that may be true (see,

⁶ The proper interpretation of California's statutes and regulations governing an employer's duties to provide meal and rest breaks to hourly workers is currently before the California Supreme Court. (See *Brinker Restaurant Corp. v. Superior Court*, review granted Oct. 22, 2008, S166350.)

e.g., *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1088–1089), our conclusion is the same. From the witnesses’ testimonies, we can readily infer that plaintiff was never offered his 10-minute breaks and that defendant did not allow him to take such breaks.

V. *Itemized wage statement penalties.*

Defendant challenges the trial court’s award of penalties for failure to provide itemized wage statements, pursuant to Labor Code section 226.⁷ According to defendant’s opening brief, the penalties portion “of the damages award is merely derivative of the claims for ‘overtime’ and failure to provide rest breaks. Thus, such penalties [cannot] be assessed, since there is no evidence in the record that plaintiff is entitled to recover for ‘overtime’ proven to have been worked and authorized or known in advance by [defendant], or for failure to provide rest breaks.”

For the reasons set forth above, we conclude that the trial court properly awarded plaintiff damages. Thus, this portion of the judgment must be affirmed as well.

Defendant further argues plaintiff is not entitled to penalties because (1) plaintiff did not establish that he suffered injury as a result of defendant’s conduct, and (2) there is no evidence or finding that defendant knowingly and intentionally failed to comply with the statutory mandate that it provide itemized wage statements. We cannot agree. Without a proper itemized wage statement, plaintiff suffered injury because he was not paid overtime to which he was entitled. (*Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2006) 435 F.Supp.2d 1042, 1050.) And, at a minimum, this lawsuit and the difficulty and expense plaintiff has incurred is evidence of the injury he suffered as a result of defendant’s failure to provide itemized wage statements. (*Ibid.*)

⁷ Labor Code section 226, subdivision (a) requires an employer to provide each employee with “an accurate itemized statement” showing the payment of wages. “An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover” penalties not exceeding \$4,000. (Lab. Code, § 226, subd. (e).)

VI. *The trial court properly denied defendant's motion for new trial and to vacate the judgment.*

Defendant argues that the trial court erred in denying its posttrial motion as untimely. We need not reach this issue.⁸ Regardless of whether the posttrial motion was timely, the trial court considered the merits of defendant's motion and denied it. In so doing, the trial court found ample evidence to support the judgment and no basis to revisit its prior determinations. While the trial court may have misidentified defendant's posttrial motion as a motion for judgment notwithstanding the verdict, defendant suffered no consequential prejudice. (Cal. Const., art. VI, § 13.) As set forth above, we agree that the trial court's judgment is supported by the evidence and the trial court did not draw incorrect conclusions of law. (*Simac Design, Inc. v. Alciati, supra*, 92 Cal.App.3d at p. 153; *Westervelt v. McCullough* (1924) 68 Cal.App. 198, 210.) Thus, the trial court rightly denied defendant's posttrial motion.

VII. *The trial court's attorney fee award is proper.*

Finally, defendant argues that the trial court erred in awarding plaintiff attorney fees in the amount of \$87,120. It claims that the order was erroneous because it granted plaintiff substantial attorney fees for claims on which he did not succeed. We find no abuse of discretion.

“Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the [party's] fees even if the court did not adopt each contention raised.” (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.) “Attorney fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories.” (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493.)

⁸ Plaintiff argues that this order is not appealable. We disagree. A statutory motion to vacate is appealable. (Code Civ. Proc., § 904.1, subd. (a)(2).)

Here, the trial court awarded plaintiff all the attorney fees he sought, finding that all of plaintiff's claims were interrelated. Ample evidence supports the trial court's determination. All of plaintiff's claims arose out of his contention that he was improperly classified as an exempt employee. Thus, most of the pretrial discovery and examination of trial evidence surrounded this issue, including plaintiff's job responsibilities, hours he worked, and the like. It follows that the trial court's award was well-within its discretion.

DISPOSITION

The judgment is affirmed. Plaintiff is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ