No. S156555

IN THE
SUPREME COURT OF CALIFORNIA

FRANCES HARRIS et al.,
Petitioners,
vs.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
LIBERTY MUTUAL INSURANCE COMPANY et al.,
Real Parties in Interest.

LIBERTY MUTUAL INSURANCE COMPANY et al.,
Petitioners,
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
FRANCES HARRIS et al.,
Real Parties in Interest.

Second District Nos. B195121 and B195370 (Consolidated)
Los Angeles Superior Court Nos. BC 246139 and BC 246140
JCCP No. 4234 (*Liberty Mutual Overtime Cases*)
The Honorable Carolyn B. Kuhl

SUPPLEMENTAL BRIEF
(CAL. RULE OF COURT 8.520(D))

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Service on Attorney General and District Attorney Required by Bus. & Prof. Code, § 17209

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I. INTRODUCTION

Petitioners Frances Harris, Marion Brenish-Smith, Steven Brickman, Kelly Gray, Dwayne Garner, Adell Butler-Mitchell and Lisa McCauley (collectively, plaintiffs) respectfully submit this supplemental brief identifying "new authorities" and "other matters that were not available in time to be included in [their] brief on the merits." (Cal. Rules of Court, rule 8.520(d)(1).)

II. DISCUSSION

A. Federal Appellate Courts Have Recently Reaffirmed the Utility of the Administrative/ Production Dichotomy

A central issue in this case is whether California Wage Orders 4 and 4-2001 follow the administrative/production dichotomy, to quote the Court of Appeal, as that concept is "properly understood." (*Harris v. Superior Court* (2007) 154 Cal.App.4th 164, 177 (*Harris*).) The answer must be yes. The language of the incorporated federal regulations mandates the dichotomy analysis as does California precedent, both judicial and administrative, holding insurance claims adjusters non-exempt. (See Answer Brief on the Merits (Ans. Br.) 10-20, filed Apr. 10, 2008.) Although not essential for plaintiffs to prevail, federal appellate courts have recently issued opinions under federal overtime law in the same vein as the California authority.

In the most notable decision of late, the question presented was "whether underwriters tasked with approving loans, in accordance with detailed guidelines provided by their employer, are administrative employees exempt from the overtime requirements of the Fair Labor Standards Act [FLSA]." (*Davis v. J.P. Morgan Chase & Co.* (Nov. 20, 2009, No. 08-4092-CV) ___ F.3d ___ [2009 U.S. App. Lexis 25481, at p. *1] (*Davis*), copy attached as exhibit A.) Addressing the same exemption prong at issue here, the United States Court of Appeals for the Second Circuit stressed several points that plaintiffs too have stressed in this case. For the outcome, the panel even relied on many of the same authorities. (See, e.g., *id.* at p. *17, citing

Bratt v. County of Los Angeles (9th Cir. 1990) 912 F.2d 1066 (*Bratt*); *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120; and *Martin v. Cooper Electric Supply Co.* (3d Cir. 1991) 940 F.2d 896.)

There, as here, the Second Circuit was called upon to apply 29 C.F.R. part 541.205(a), as written in 2001. (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at pp. *4-*5.) The appellate panel repeatedly emphasized the need to keep the administrative exemption's prerequisites separate and distinct. "Notably," the court wrote, "the border between administrative and production work does not track the level of responsibility, importance, or skill needed to perform a particular job." (*Id.* at p. *8.) Those considerations "may be relevant to other, independent, requirements for exemption from the FLSA overtime provisions. The responsibility exercised by an employee, for example, would affect whether that employee 'customarily and regularly exercise[d] discretion and independent judgment.' [citation]." (*Id.* at p. *9, fn. 4.) Importantly, however, this determination "is entirely separate from whether an employee's function may be classified as administrative or production-related." (*Ibid.*; see also *id.* at p. *5, fn. 3; *id.* at pp. *22-*23.)

In *Davis*, the administrative/production dichotomy hinged, as it should, on whether the underwriters "performed day-to-day sales activities or more substantial advisory duties." (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at p. *13.) There, the class representative's "primary duty" was "to sell loan products under the detailed directions of the [Chase] Credit Guide." (*Ibid.*) The underwriters' work was not "related either to setting 'management policies' nor to 'general business operations' such as human relations or advertising, 29 C.F.R. § 541.2, but rather concerns the 'production' of loans – the fundamental service provided by the bank." (*Id.* at pp. *13-*14.)

Put another way, the work the underwriters did was "primarily functional rather than conceptual." (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at p. *15.) The underwriters "had no involvement in determining the

future strategy or direction of the business, nor did they perform any other function that in any way related to the business's overall efficiency or mode of operation." (*Id.* at pp. *15-*16.) This class of employees "played no role in the establishment of Chase's credit policy. Rather, they were trained only to apply the credit policy as they found it, as it was articulated to them through the detailed Credit Guide." (*Id.* at p. *16.)

The same is true for the class of insurance claims handlers now before this Court. They are not involved in making the policies and rules that govern operations, including claims handling, at Liberty Mutual Insurance Company (Liberty Mutual) and Golden Eagle Insurance Corporation (Golden Eagle). Others in the business, the genuine administrative employees, play that role. The adjusters' job is to take the policies and rules as they find them and process insurance claims accordingly. As to the work the adjusters primarily perform, the record places them unmistakably on the "production" side of the line. The insurers run a tight ship and allow no other option. (See Ans. Br. 6-8, 21-23; *Harris*, *supra*, 154 Cal.App.4th at pp. 178-180 [summarizing evidence on adjusters' role].)

Davis is analogous in another respect. There, "Chase itself provided several indications that they understood underwriters to be engaged in production work. Chase employees referred to the work performed by underwriters as 'production work.'" (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at p. *14.) "Underwriters were evaluated not by whether loans they approved were paid back, but by measuring each underwriter's productivity in terms of 'average of total actions per day' and by assessing whether the underwriters' decisions met the Chase credit guide standards." (*Ibid.*)

The insurers' practices here are similar. For instance, Golden Eagle's internal audits of its adjusters are called, fittingly, "'Claims Production'" reports. Those documents are chock full of numbers – claims opened and closed, paid or not, and so on. (4 Exhibits in Support of Petition for Writ of

Mandate in B195121 (Exs.) 1054-1111.) A Golden Eagle organizational chart in the record proudly proclaims: "We [the Property/Casualty Claims Department] provide the product (indemnity for covered claims, defense of covered third party claims) that an insured purchases with their premium dollars." (4 Exs. 1113.) Likewise, internal business records at Liberty Mutual refer coolly to the claims processed as "Production." (3 Exs. 638-640, 642, 657, 665, 667-676; see also 3 Exs. 619-624.) In short, performance of the adjuster position, at both companies, turns on meeting numerical targets.

Defendants' focus on volume and statistics pulls the employment here even further out of the administrative category. As the Second Circuit observed: "While being able to quantify a worker's productivity in literal numbers of items produced is not a requirement of being engaged in production work, it illustrates the concerns that motivated the FLSA." (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at p. *14.) "The overtime requirements of the FLSA were meant to apply financial pressure to 'spread employment to avoid the extra wage' and to assure workers 'additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act.'" (*Id.* at pp. *14-*15.) As common sense suggests, "[t]here is a relatively direct correlation between hours worked and materials produced in the case of a production worker that does not exist as to administrative employees." (*Id.* at p. *14.)

To be sure, the adjusters handle the insurers' money, but this does not make them exempt. The Second Circuit gave a pertinent example undermining this flawed approach to the administrative exemption. A "bank teller might deal with hundreds of thousands of dollars each month whereas a staffer in human resources never touches a dime of the bank's money, yet the bank teller is in production and the human resources staffer performs an administrative position." (*Davis*, *supra*, 2009 U.S. App. Lexis 25481, at p. *8.) The right focal point is that the adjusters are "directly producing the good

or service that is the primary output of [the] business" – namely, the processing of claims that the insurers, by their own description, are in business to receive and resolve. (*Id.* at p. *16.) As to the work they are primarily engaged in, the adjusters are not "performing general administrative work applicable to the running of any business." (*Ibid.*)

Earlier this year, the United States Court of Appeals for the Fourth Circuit confirmed the same analytical tenets. In *Desmond v. PNGI Charles Town Gaming, L.L.C.* (4th Cir. 2009) 564 F.3d 688 (*Desmond*), employees of a casino and horse track sought overtime compensation under the FLSA. They "assisted in various tasks associated with Charles Town Gaming's staging of live horse races." (*Id.* at p. 689.) In contrast to *Davis* and the present case, the administrative exemption in *Desmond* was controlled by the new federal regulations that became effective in 2004. (*Id.* at p. 691 and fn. 2.)

Nonetheless, the Fourth Circuit reversed the lower court for applying the wrong legal standard in determining whether the employees worked in an administrative capacity. "We agree that the district court erred in holding the position of Racing Official satisfied the requirement that the Former Employees' primary duty was 'directly related to [the] general business operations of the employer.'" (*Desmond, supra*, 564 F.3d at p. 692.) Quoting Fourth Circuit precedent, the appellate panel observed that "'[t]he regulations emphasize the nature of the work, not its ultimate consequence.'" (*Ibid.*) The "directly related" requirement under the new federal regulations was not met because "Racing Officials have no supervisory responsibility and do not develop, review, evaluate, or recommend Charles Town Gaming's business policies or strategies with regard to the horse races." (*Id.* at p. 694.) Just as with the claims adjusters' role here, the work at issue in *Desmond* "did not entail the administration of – the 'running or servicing of' – Charles Town Gaming's business of staging live horse races. The Former Employees were

not part of 'the management' of Charles Town Gaming and did not run or service the 'general business operations.'" (*Ibid.*)

Like the Second Circuit in *Davis*, the Fourth Circuit reaffirmed the continuing utility of the administrative/production dichotomy. "Although the . . . dichotomy is an imperfect analytical tool in a service-oriented employment context, it is still a useful construct." (*Desmond, supra*, 564 F.3d at p. 694.) Rejecting the employer's stance on its application, the Fourth Circuit concluded that "Charles Town Gaming 'produces' live horse races. The position of Racing Official consists of 'the day-to-day carrying out of [Charles Town Gaming's] affairs' to the public, a production-side role." (*Ibid.*, quoting *Bratt, supra*, 912 F.2d at p. 1070.) The defendant insurance companies similarly resist the dichotomy framework because when this touchstone is applied, the claims handlers are simply not administrative workers – just as they were not in the *Bell* litigation that has shaped California overtime jurisprudence.[1]

B. New Decisions Under State Law Also Support the Judgment of the Court of Appeal

Applying California law, another recent federal decision fortifies the conclusion that the Court of Appeal correctly decided this case. In *Campbell v. PricewaterhouseCoopers, LLP* (E.D.Ca. 2009) 602 F.Supp.2d 1163 (*Campbell*), a class of employees for the "PwC" accounting firm sought overtime pay. They sued solely under California law; the FLSA was not at issue. (*Id.* at pp. 1168-1169.) Called "associates," the employees assisted accountants but were not licensed as such themselves. (*Id.* at p. 1167.) The associates' "primary obligation" was "to verify financial statement items by obtaining and reviewing their underlying documentation." (*Id.* at p. 1168.)

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[1] See *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715.

To avoid paying overtime, PwC invoked California's administrative exemption. (*Campbell*, *supra*, 602 F.Supp.2d at p. 1171.) As relevant here, the federal court addressed "whether class members perform work directly related to the internal administration of PwC." (*Id.* at p. 1168.) PwC identified "a limited range of purportedly administrative work class members perform on behalf of PwC." (*Id.* at p. 1184.) This included "supervising junior associates, participating without authority in hiring and recruiting, participating in internal committees, such as the 'great place to work' committee, evaluating the performance of people class members supervise, and proposing draft engagement budgets." (*Ibid.*) Notwithstanding this argument, the federal court granted summary judgment for the plaintiff class. The order explained: "Even assuming that these activities are exempt, however, it is clear that class members are not 'primarily engaged' in them. PwC does not reasonably expect class members to spend more than half of their time proposing budgets or working on internal committees, and there is no evidence that any class member actually spends their time in this way." (*Id.* at p. 1185.)[2]

Campbell's logic is sound. Nearly all employers could point to isolated tasks performed by employees that may be administrative, and then try to claim the exemption. Under this grudging approach to employee compensation, the denial of overtime would become the norm, not a rarity. The Court of Appeal too recognized this would be problematic, and put its analytical emphasis in the right place. In concluding plaintiffs had proved their case on liability, the opinion explained that even if "***some*** plaintiffs might

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[2] The federal court certified its order for interlocutory review. (See *Campbell*, *supra*, 602 F.Supp.2d at p. 1186, citing 28 U.S.C. § 1292.) The Ninth Circuit Court of Appeals accepted review and the appeal is currently being briefed.

do ***some*** work at the level of policy or general operations . . . no evidence shows that even a single plaintiff ***primarily*** engages in such work." (*Harris*, *supra*, 154 Cal.App.4th at p. 179, emphasis in original.)

Consistent with the Court of Appeal's analysis and resolution, this Court has long recognized that meaningful judicial relief is essential to remedy overtime violations. (See Ans. Br. 24-26 [surveying authorities].) The lower California bench has been faithful to this guideline in recent decisions. Late last year, the Second District reversed a trial court order denying class certification of a wage-and-hour action. The decision reasoned, among other things, that the "ability of employees to find competent representation" would be jeopardized "if restricted to their own individual claims." (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1538.) The same court also ruled that overtime claims were for a court to hear, without forcing the pay dispute into arbitration. (*Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277; see also *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958 [approving discovery of class members' identities in overtime suit].) And, just a few weeks ago, the Fourth District held that the "public policy in favor of the employer's duty to pay overtime wages protects an employee from termination for making a good faith but mistaken claim to overtime." (*Barbosa v. IMPCO Technologies, Inc.* (Nov. 30, 2009, G041070) ___ Cal.App.4th ___ [2009 Cal.App. Lexis 1911, at p. *1], copy attached as exhibit B.)

Indeed, the concern this Court has expressed about "'employees in a relatively weak bargaining position,'" often facing retaliation for claiming overtime, is very real. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456.) A recent study concluded that "[l]ow wage workers are routinely denied overtime pay." (Greenhouse, *Low Wage Workers Are Often Cheated, Study Says*, N.Y. Times (Sept. 2, 2009), available at nytimes.com and copy attached as exhibit C.) Of more than 4,000 workers surveyed, a staggering "76 percent

of those who had worked overtime the week before were not paid their proper overtime." (*Ibid.*) Although "many low-wage employers comply with wage and labor laws," at the same time "many small businesses say they are forced to violate wage laws to remain competitive." (*Ibid.*) When elaborating California wage-and-hour law, the Court rightly does not close its eyes to the labor market's harsh realities.

III. CONCLUSION

For the reasons set forth above and in plaintiffs' prior briefing in this Court, the judgment of the Court of Appeal should be affirmed.

DATED: December 22, 2009

Respectfully submitted,

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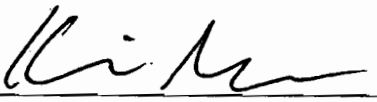

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **SUPPLEMENTAL BRIEF (CAL. RULE OF COURT 8.520(D))** is produced using 13-point Roman type, including footnotes, and contains approximately 2,590 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: December 22, 2009

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Counsel for Petitioners

1 of 1 DOCUMENT

MICHAEL J. DAVIS, and all others similarly situated, ELENA LOMBARDO, CAROL SMITH, DANIEL J. MCGRAW, Plaintiffs, ANDREW WHALEN, Plaintiff-Appellant, -v.- J.P. MORGAN CHASE & CO., Defendant-Appellee.

Docket No. 08-4092-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2009 U.S. App. LEXIS 25481; 15 Wage & Hour Cas. 2d (BNA) 932

August 3, 2009, Argued
November 20, 2009, Decided

PRIOR HISTORY: [*1]

Plaintiff, employed by J.P. Morgan Chase ("Chase") as an underwriter, challenges Chase's categorization of underwriters as administrative employees exempt from the Fair Labor Standard Act's overtime pay requirements. See *29 U.S.C. § 207(a)*. Plaintiff now appeals an award of summary judgment entered in the Western District of New York (David G. Larimer, Judge) in favor of Chase. *Whalen v. J.P. Morgan Chase & Co., 569 F. Supp. 2d 327, 2008 U.S. Dist. LEXIS 60319 (W.D.N.Y., 2008)*

DISPOSITION: REVERSED.

COUNSEL: J. NELSON THOMAS, Dolin, Thomas & Solomon LLP, Rochester, New York, for Plaintiff-Appellant.

SAMUEL SHAULSON, Morgan, Lewis & Bockius LLP, New York, New York (Carrie A. Gonnell, Irvine, California, on the brief), for Defendant-Appellee.

JUDGES: Before: POOLER, LIVINGSTON, and LYNCH, Circuit Judges. *

* At the time of oral argument, Judge Lynch was a United States District Judge for the Southern District of New York, sitting by designation.

OPINION BY: GERARD E. LYNCH

OPINION

GERARD E. LYNCH, *Circuit Judge*:

This appeal requires us to decide whether underwriters tasked with approving loans, in accordance with detailed guidelines provided by their employer, are administrative employees exempt from the overtime requirements of the Fair Labor Standards Act. Andrew Whalen was employed by J.P. Morgan Chase ("Chase") for four years as an underwriter. **[*2]** As an underwriter, Whalen evaluated whether to issue loans to individual loan applicants by referring to a detailed set of guidelines, known as the Credit Guide, provided to him by Chase. The Credit Guide specified how underwriters should determine loan applicant characteristics such as qualifying income and credit history, and instructed underwriters to compare such data with criteria, also set out in the Credit Guide, prescribing what qualified a loan applicant for a particular loan product. Chase also provided supplemental guidelines and product guidelines with information specific to individual loan products. An underwriter was expected to evaluate each loan application under the Credit Guide and approve the loan if it met the Guide's standards. If a loan did not meet the Guide's standards, certain underwriters had some ability to make exceptions or variances to implement appropriate compensating factors. Whalen and Chase provide different accounts of how often underwriters made such exceptions.

Under the Fair Labor Standards Act (FLSA), employers must pay employees overtime compensation for time worked in excess of forty hours per week. See *29 U.S.C. § 207(a)*. Whalen claims that [*3] he frequently worked over forty hours per week. A number of categories of employees are exempted from the overtime pay requirement. The exemptions are drawn along a number of lines demarcating the type of profession, job function, and other characteristics. One categorical exemption is for employees who work in a "bona fide executive, administrative, or professional capacity." *29 U.S.C. § 213(a)(1)*. [1]

1 Chase does not contend that Whalen engaged in "executive" or "professional" work, or fell within any other exception to the maximum hours provision of the FLSA.

At the time of Whalen's employment by Chase, Chase treated underwriters as exempt from the FLSA's overtime requirements. Whalen sought a declaratory judgment that Chase violated the FLSA by treating him as exempt and failing to pay him overtime compensation. Both Whalen and Chase filed motions for summary judgment. The district court denied Whalen's motions and granted Chase's motion, dismissing Whalen's complaint. This appeal followed.

We review the district court's ruling on a motion for summary judgment de novo, construing the evidence in favor of the non-moving party. See *Krauss v. Oxford Health Plans, Inc., 517 F.3d 614, 621-22 (2d Cir. 2008)*; [*4] *Petrosino v. Bell Atl., 385 F.3d 210, 219 (2d Cir. 2004)*. We may affirm the district court's grant of summary judgment on any ground upon which the district court could have relied. See *Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001)*. Exemptions from the FLSA's requirements "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960)*.

The statute specifying that employees who work in "bona fide executive, administrative, or professional capacit[ies]" are exempt from the FLSA overtime pay requirements does not define "administrative." *29 U.S.C. § 213(a)(1)*. Federal regulations specify, however, that a worker is employed in a bona fide administrative capacity if she performs work "directly related to management policies or general business operations" and "customarily and regularly exercises discretion and independent judgment." *29 C.F.R. § 541.2(a)*. [2] Regulations further explain that work directly related to management policies or general business operations consists of "those types of activities relating [*5] to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. § 541.205(a). [3] Employment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not.

2 The Department of Labor issued new regulations defining the administrative exemption in 2004. Unless otherwise specified, reference to the regulations is to the pre-2004 regulations.

3 Although there are other requirements to fall within the exemption, such as customarily and regularly exercising discretion, because we conclude that Whalen's work was not "administrative," we need not decide whether Whalen's employment as an underwriter met those requirements.

Precedent in this circuit is light but provides the framework of our analysis to identify Whalen's job as either administrative or production. In *Reich v. State of New York, 3 F.3d 581 (2d Cir. 1993)*, overruled by implication on other grounds by *Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*, we held that members of the state police assigned to the Bureau of Criminal Investigation (BCI), known [*6] as BCI Investigators, were not exempt as administrative employees. See *id. at 585, 588*. BCI Investigators are responsible for supervising investigations performed by state troopers and conducting their own investigations of felonies and major misdemeanors. Applying the administrative versus production analysis, we then reasoned that because "the primary function of the Investigators . . . is to conduct -- or 'produce' -- its criminal investigations," the BCI Investigators fell "squarely on the 'production' side of the line" and were not exempt from the FLSA's overtime requirements. *Id. at 587-88*.

The administrative/production dichotomy was similarly employed in a Vermont case we affirmed last year, but the circumstances of our affirmance limit its precedential value. The facts of that case were similar to

those presented here: the plaintiffs were employed as underwriters for a company in the business of underwriting mortgage loans that were then sold to the secondary lending market. See *Havey v. Homebound Mortgage, Inc., No. 2:03-CV-313, 2005 U.S. Dist. LEXIS 27036, 2005 WL 1719061, at *1 (D. Vt. July 21, 2005)*, aff'd, *547 F.3d 158 (2d Cir. 2008)*. The district court concluded with very little analysis that the **[*7]** underwriters were not employed in production because they performed "nonmanual work related to Homebound's business." *2005 U.S. Dist. LEXIS 27036, [WL] at *5* Significantly, the court appeared to assume that "production" must relate to tangible goods, citing a Connecticut case in which the court refused to grant summary judgment finding that material planning specialists, senior financial analysts, project financial analysts, and logistics specialists employed by a company that built submarines were exempt from FLSA's overtime requirements. See *2005 U.S. Dist. LEXIS 27036, [WL] at *5 n.6*, citing *Cooke v. Gen. Dynamics Corp., 993 F. Supp. 56 (D. Conn.1997)*. The Havey court noted that "[i]n that case . . . the corporation was in the business of producing submarines. Homebound was in the business of underwriting mortgage loans. No production was taking place." *Id.* (citations omitted).

As *Reich* illustrates, this literal reading of "production" to require tangible goods has no basis in law or regulation. We affirmed the district court in Havey, but the only issue presented on appeal was whether plaintiffs were paid on a salary basis under the payment structure adopted by Homebound. Accordingly, our opinion offered no analysis as to whether the underwriters **[*8]** performed work directly related to the management policies or general business operations of their employers under the FLSA. We therefore do not read our *Havey* opinion as adopting the flawed analysis of the Vermont court as to administrative and production job functions.

The line between administrative and production jobs is not a clear one, particularly given that the item being produced -- such as "criminal investigations" -- is often an intangible service rather than a material good. Notably, the border between administrative and production work does not track the level of responsibility, importance, or skill needed to perform a particular job. [4] The monetary value of the loans approved by Whalen as an underwriter, for example, is irrelevant to this classification: a bank teller might deal with hundreds of thousands of dollars each month whereas a staffer in human resources never touches a dime of the bank's money, yet the bank teller is in production and the human resources staffer performs an administrative position. Similarly, it is irrelevant that Whalen's salary was relatively low or that he worked in a cubicle. What determines whether an underwriter performed production or **[*9]** administrative functions is the nature of her duties, not the physical conditions of her employment.

> 4 Such considerations may be relevant to other, independent, requirements for exemption from the FLSA overtime provisions. The responsibility exercised by an employee, for example, would affect whether that employee "customarily and regularly exercise[d] discretion and independent judgment." *29 C.F.R. § 541.2.* Such a determination, however, is entirely separate from whether an employee's function may be classified as administrative or production-related.

The Department of Labor has attempted to clarify the classification of jobs within the financial industry through regulations and opinion letters. In 2004, the Department of Labor promulgated new regulations discussing, among other things, employees in the financial services industry. Although these regulations were instituted after Whalen's employment with Chase ended, the Department of Labor noted that the new regulations were "[c]onsistent with existing case law." *69 Fed. Reg. 22,122, 22,145 (Apr. 23, 2004)*. The regulation states:

> Employees in the financial services industry generally meet the duties requirements for the administrative **[*10]** exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b).

The Department of Labor explained that the new regulation was sparked by growing litigation in the area and contrasted two threads of case law. On the one hand, some courts found that "employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion" were exempt from overtime requirements. *69 Fed. Reg.. 22,122, 22,145 (Apr. 23, 2004)*, citing *Hogan v. Allstate Ins. Co., 361 F.3d 621, 2004 WL 362378 (11th Cir. 2004)*; *Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997)*; *Wilshin v. Allstate Ins. Co., 212 F. Supp. 2d 1360 (M.D. Ga. 2002)*. On the other hand, the Department cited **[*11]** a Minnesota district court, which found that "employees who had a 'primary duty to sell [the company's] lending products on a day-to-day basis' directly to consumers" were not exempt. *69 Fed. Reg.. 22,122, 22,145 (Apr. 23, 2004)*, quoting *Casas v. Conseco Fin. Corp., No. Civ. 00-1512(JRT/SRN), 2002 U.S. Dist. LEXIS 5775, 2002 WL 507059, at *9 (D. Minn. 2002)*. The regulation thus helped to clarify the distinction between employees performing substantial and independent financial work and employees who merely sold financial products.

Opinion letters issued by the Department of Labor similarly recognize a variance in the types of work performed by employees within the financial industry, and explain why some financial employees are administrative while some perform production functions. In 2001, the Department stated that a loan officer who was responsible for creating a loan package to meet the goals of a borrower by "select[ing] from a wide range of loan packages in order to properly advise the client, . . . supervis[ing] the processing of the transaction to closing," and "acquir[ing] a full understanding of the customer's credit history and financial goals in order to advise them regarding the selection of a loan **[*12]** package that will fit their needs and ability" performed administrative work, although the opinion letter ultimately concluded that such loan officers were not exempt. Dep't of Labor, Wage & Hour Div., Op. Letter (Feb. 16, 2001), available at 2001 WL 1558764.

Crucially, the 2001 opinion letter clarified an opinion letter issued in 1999 after the Department received more information about the loan officer's duties. In 1999, the Department understood loan officers to develop new business for their employer, consult with borrowers to obtain the best possible loan package, work with a number of different lenders to select loan programs, and perform assorted services shepherding the loan to completion. See Dep't of Labor, Wage & Hour Div., Op. Letter (May 17, 1999), available at 1999 WL 1002401. With that understanding of the loan officers' duties, the Department concluded that the loan officers were "engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business" and were therefore not employed as administrative employees. See id. While the 2001 letter reconsidered the loan officers' employment and reached a different **[*13]** conclusion, the later letter noted that the reconsideration was "in light of the advisory duties [loan officers] perform on behalf of their employer's customers," which the employer clarified were the "primary duty" of a loan officer. See 2001 WL 1558764. The two letters read together thus provide a helpful point of reference, highlighting the importance of advisory duties as opposed to mere loan sales.

We thus turn to the job of underwriter at Chase to assess whether Whalen performed day-to-day sales activities or more substantial advisory duties. As an underwriter, Whalen's primary duty was to sell loan products under the detailed directions of the Credit Guide. There is no indication that underwriters were expected to advise customers as to what loan products best met their needs and abilities. Underwriters were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision. Their work is not related either to setting "management policies" nor to "general business operations" such as human relations or advertising, *29 C.F.R. § 541.2*, but rather concerns the "production" **[*14]** of loans -- the fundamental service provided by the bank.

Chase itself provided several indications that they understood underwriters to be engaged in production work. Chase employees referred to the work performed by underwriters as "production work." Within Chase, departments were at least informally categorized as "operations" or "production," with underwriters encompassed by the production label. Underwriters were evaluated not by whether loans they approved were paid back, but by measuring each underwriter's productivity in terms of "average of total actions per day" and by assessing whether the underwriters' decisions met the Chase credit guide standards.

Underwriters were occasionally paid incentives to increase production, based on factors such as the number of decisions underwriters made. While being able to quantify a worker's productivity in literal numbers of items produced is not a requirement of being engaged in production work, it illustrates the concerns that motivated the FLSA. The overtime requirements of the FLSA were meant to apply financial pressure to "spread employment to avoid the extra wage" and to assure workers "additional pay to compensate them for the burden **[*15]** of a workweek beyond the hours fixed in the act." *Overnight Motor Transp. Co., Inc. v. Missel, 316 U.S. 572, 577-78, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942)*, superseded by statute, Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84 (granting courts authority to deny or limit liquidated damages awarded for violations of the FLSA). While in the abstract any work can be spread, there is a relatively direct correlation between hours worked and materials produced in the case of a production worker that does not exist as to administrative employees. Paying production incentives to underwriters shows that Chase believed that the work of underwriters could be quantified in a way that the work of administrative employees generally cannot.

We conclude that the job of underwriter as it was performed at Chase falls under the category of production rather than of administrative work. Underwriters at Chase performed work that was primarily functional rather than conceptual. They were not at the heart of the company's business operations. They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business's overall efficiency or **[*16]** mode of operation. It is undisputed that the underwriters played no role in the establishment of Chase's credit policy. Rather, they were trained only to apply the credit policy as they found it, as it was articulated to them through the detailed Credit Guide.

Furthermore, we have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business. In Reich, for example, BCI Investigators "produced" law enforcement investigations. By contrast, administrative functions such as management of employees through a human resources department or supervising a business's internal financial activities through the accounting department are functions that must be performed no matter what the business produces. For this reason, the fact that Whalen assessed creditworthiness is not enough to determine whether his job was administrative. The context of a job function matters: a clothing store accountant deciding whether to issue a credit card to a consumer performs a support function auxiliary to the department store's primary function of selling **[*17]** clothes. An underwriter for Chase, by contrast, is directly engaged in creating the "goods" -- loans and other financial services -- produced and sold by Chase.

This conclusion is also supported by persuasive decisions of our sister circuits. In Bratt v. County of Los Angeles, the Ninth Circuit held that the "essence" of an administrative job is that an administrative employee participates in "the running of a business, and not merely . . . the day-to-day carrying out of its affairs." *912 F.2d 1066, 1070 (9th Cir. 1990)* (internal quotations omitted). The Department of Labor later quoted that same language approvingly. See Dep't of Labor, Wage & Hour Div., Op. Letter (Sept. 12, 1997), available at 1997 WL 971811. More recently, the Ninth Circuit expanded, "The administration/production distinction thus distinguishes between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1127 (9th Cir. 2002)*. The Third Circuit has also noted that production encompasses more than the manufacture of tangible goods. See *Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 903-04 (3d Cir. 1991)*. **[*18]** In that case, telephone salespersons were given a pricing matrix specifying price quotes for specific goods as offered to specific customers. The salespersons had some authority to deviate from the price quotes, and occasionally also called manufacturers to restock items, negotiating the price of acquiring the item with the manufacturer. The salespersons were paid a fixed salary, but were also paid incentives tied to their sales performance. The Third Circuit held that the salespersons were production employees because the goal of the salespersons was "to *produce* wholesale sales." *Id. at 903* (emphasis in original). Along similar lines, the First Circuit held that marketing representatives charged with cultivating and supervising an independent sales force were exempt administrative employees, as their primary duties of educating and organizing salespeople were "aimed at promoting . . . customer sales *generally*," not "routine selling efforts focused simply on particular sales transactions." *Reich v. John Alden Life Ins. Co., 126*

F.3d at 10 (emphasis in original).

A number of district court opinions have drawn a similar distinction. See, e.g., *Neary v. Metro. Prop. & Cas. Ins. Co., 517 F. Supp. 2d 606, 614 (D. Conn. 2007)* **[*19]** (finding that a claims adjuster did not perform administrative work because he did not perform "duties clearly related to servicing the business itself: it could not function properly without employees to maintain it; a business must pay its taxes and keep up its insurance. Such are not activities that involve what the day-to-day business specifically sells or provides, rather these are tasks that every business must undertake in order to function."); *Relyea v. Carman, Callahan & Ingham, LLP, No. 03 Civ. 5580(DRH)(MLO), 2006 U.S. Dist. LEXIS 63351, 2006 WL 2577829, at *5 (E.D.N.Y. 2006)* ("Like [escrow] closers . . . , Plaintiffs applied existing policies and procedures on a case-by-case basis. Their duties do not involve the crafting of those policies, but rather the application of those policies. As a result, Plaintiffs are better described as 'production,' rather than 'administrative' workers, and they are not exempt from FLSA."); *Casas, 2002 U.S. Dist. LEXIS 5775, 2002 WL 507059, at *9* (finding that loan originators for a finance company who were "responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer's financial needs" were "primarily involved with 'the day-to-day **[*20]** carrying out of the business' rather than 'the running of [the] business [itself]' or determining its overall course or policies" (quoting *Bratt, 912 F.2d at 1070*)); *Reich v. Chi. Title Ins. Co., 853 F. Supp. 1325, 1330 (D. Kan. 1994)* (finding escrow closers employed by a company engaged in the business of insuring title for real property to be engaged in a production rather than administrative capacity).

Other out-of-circuit cases similarly support the logic that context matters. An employee whose job is to evaluate credit who works in the credit industry is more likely to perform a production job. See *Casas, 2002 U.S. Dist. LEXIS 5775, 2002 WL 507059, at *9* (loan officers for bank are production); *Relyea, 2006 U.S. Dist. LEXIS 63351, 2006 WL 2577829, at *5* (loan closers are production); *Reich v. Chi. Title Ins. Co., 853 F. Supp. at 1330*. Employees who evaluate and extend credit on behalf of a company that is not in the credit industry -- extending credit in order to allow customers to purchase a tangible good that the employer manufactured, for example -- are generally considered administrative employees. See *Hills v. W. Paper Co., 825 F. Supp. 936 (D. Kan. 1993)* (employee extended credit to customers of company manufacturing paper); *Reich v. Haemonetics, 907 F. Supp. 512 (D. Mass. 1995)* **[*21]** (employee involved in extending credit to customers of company that sold equipment to hospitals). But in the context of such businesses, such employees provide adjunct, general services to the overall running of the business, while at Chase, underwriters such as Whalen are the workers who produce the services -- loans -- that are "sold" by the business to produce its income.

Chase offers a few out of circuit cases suggesting that underwriters are exempt administrative employees, but the cases are distinguishable on their facts. See, e.g., *Edwards v. Audobon Ins. Group Co., No. 3:02-CV-1618-WS, 2004 U.S. Dist. LEXIS 27562, 2004 WL 3119911, at *5 (S.D. Miss. Aug. 31, 2004)* (finding an underwriter who "decide[d] what risks the company would take and at what price" an exempt administrative employee); *Callahan v. Bancorpsouth Ins. Servs. of Miss., Inc., 244 F. Supp. 2d 678, 685-86 (S.D. Miss. 2002)* (finding manager responsible for overseeing all aspects of employer's operations, including marketing, billing and collections, and underwriting, was administrative employee); *Hippen v. First Nat'l Bank, Civ. A. No. 90-2024-L, 1992 U.S. Dist. LEXIS 6029, 1992 WL 73554, at *7 (D. Kan. Mar. 19, 1992)* (finding executive vice president of bank who described **[*22]** himself as "number two" in hierarchy and was member of board of directors to be administrative employee); *Creese v. Wash. Mut. Bank, No. B193931, 2008 Cal. App. Unpub. LEXIS 2060, 2008 WL 650766, at *8 (Cal. Ct. App. 2008)* (noting specifically that lower court determination as to class certification did not address the merits of whether underwriters seeking to challenge exempt classification were administrative employees). In virtually all of these cases, the employee in question exercised managerial tasks beyond assessing credit risk, or assessed risks in a firm whose primary business was not the extension of credit, and the result is therefore not in tension with the analysis offered here. In any event, to the extent that the reasoning, language, or result in any of these cases is not consistent with our analysis, we respectfully disagree.

Accordingly, we hold that Whalen did not perform work directly related to management policies or general business operations. Because an administrative employee must *both* perform work directly related to management

policies or general business operations *and* customarily and regularly exercise discretion and independent judgment, we thus hold that Whalen was not employed in a bona **[*23]** fide administrative capacity. We need not address whether Whalen customarily and regularly exercised discretion and independent judgment.

The judgment of the district court in favor of the appellee is REVERSED.

1 of 1 DOCUMENT

MANUEL BARBOSA, Plaintiff and Appellant, v. IMPCO TECHNOLOGIES, INC., Defendant and Respondent.

G041070

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2009 Cal. App. LEXIS 1911

November 30, 2009, Filed

PRIOR HISTORY: [*1]

Appeal from a judgment of the Superior Court of Orange County, No. 07CC08256, Charles Margines, Judge.

DISPOSITION: Reversed and remanded.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an employee's wrongful termination case, the trial court granted the employer's motion for nonsuit, finding that there was no public policy protecting a mistaken but good faith claim to overtime wages. The employer asserted that its reason for terminating the employee was that he falsified time cards. The employee, although conceding that he was mistaken in his claim to unpaid overtime, contended that the claim was based on a reasonable good faith belief that he was entitled to it. His evidence included that under a previous time clock system, mistakes in timekeeping had been made; a new system had been in place less than a month; and his co-workers convinced him the overtime was unpaid. He in turn convinced his supervisor. (Superior Court of Orange County, No. 07CC08256, Charles Margines, Judge.)

The Court of Appeal reversed the judgment and remanded the case for further proceedings. The court held that the public policy in favor of an employer's duty to pay overtime wages protects an employee from termination for making a good faith but mistaken claim to overtime. In the current case, the questions regarding the employee's good faith and the employer's reason for his termination were for the jury. The employee presented sufficient evidence to support both elements in his case-in-chief: a reasonable good faith belief he was entitled to overtime wages and that employer terminated him because he claimed overtime based on that reasonable good faith belief. If he proved he had a reasonable good faith belief, ipso facto he did not attempt to cheat the employer. (Opinion by Sills, P. J., with Rylaarsdam and Moore, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Employer and Employee § 9--Wrongful Discharge--Public Policy Exception to At-will Rule.--The common law recognizes the right of an at-will employee to bring an action in tort against his or her employer for termination of employment that violates a fundamental public policy. The employer is not so absolute a sovereign of the job that there are not limits to his or her prerogative. To maintain a wrongful discharge action, however, the employee must have been wronged in a way that affects more than his or her immediate

interest. Determining whether a claim involves a matter of public policy as opposed to an ordinary dispute between the employer and employee depends on whether the matter affects society at large, whether the policy is sufficiently clear, and whether it is fundamental, substantial, and well established at the time of the termination.

(2) Employer and Employee § 9--Wrongful Discharge--Public Policy Exception to At-will Rule--Overtime Wages.--The duty to pay overtime wages is a well-established fundamental public policy affecting the broad public interest. California courts have long recognized wage and hours laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare. One purpose of requiring payment of overtime wages is to spread employment throughout the work force by putting financial pressure on the employer. Thus, overtime wages are an example of a public policy fostering society's interest in a stable job market. Furthermore, the Legislature's decision to criminalize certain employer conduct reflects a determination the conduct affects a broad public interest. Under *Lab. Code, § 1199*, it is a crime for an employer to fail to pay overtime wages as fixed by the Industrial Welfare Commission. If an employer discharges an employee for exercising his right to overtime wages, the employee will have a viable cause of action for wrongful termination.

(3) Employer and Employee § 9--Wrongful Discharge--Public Policy Exception to At-will Rule--Overtime Wages--Good Faith But Mistaken Claim--Elements.--The public policy in favor of an employer's duty to pay overtime wages protects an employee from termination for making a good faith but mistaken claim to overtime. Therefore, in a wrongful termination action by an employee who asserted such a mistake, the employer's nonsuit should not have been granted. To make his case, the employee would have to prove that he had a reasonable good faith belief that he was entitled to overtime wages and that the employer terminated him because he claimed overtime based on that reasonable good faith belief. He presented sufficient evidence to support both elements. If he proved he had a reasonable good faith belief in his right to overtime, ipso facto he did not attempt to cheat the employer.

[*Levy et al., Cal. Torts (2009) ch. 40A, § 40A.12.*]

COUNSEL: Gould & Associates, Aarin A. Zeif and Michael A. Gould for Plaintiff and Appellant.

Brian G. Saylin and Marvin D. Mayer for Defendant and Respondent.

JUDGES: Opinion by Sills, P. J., with Rylaarsdam and Moore, JJ., concurring.

OPINION BY: Sills

OPINION

SILLS, P. J.--Manuel Barbosa appeals from the adverse judgment on his complaint for wrongful termination after the superior court granted the motion for nonsuit by defendant IMPCO Technologies, Inc. He contends the trial court improperly found there was no public policy protecting a mistaken but good faith claim to overtime wages. We agree. The public policy in favor of the employer's duty to pay overtime wages protects an employee from termination for making a good faith but mistaken claim to overtime. The case must be reversed and remanded for a jury determination of the questions of Barbosa's good faith and IMPCO's reason for his termination.

FACTS

Barbosa started working at IMPCO as a carburetor assembler. At the time of his termination, in June 2007, he worked as a "cell leader" supervising up to eight other carburetor assemblers. He was paid by **[*2]** the hour; sometimes he and the other employees worked overtime.

Barbosa testified that in June 2007, two of the employees in his cell told him they were missing two hours of overtime. After he talked with them, he thought he also was missing two hours of overtime, "[b]ecause some employees coming to me, and they told me they're missing two hour overtime starting Tuesday, [May 29]." The payroll administrator testified Barbosa came to her department on June 8 and told her that "he worked overtime, and four or five of his other employees also worked overtime, and he believe[d] that clock was wrong, and that's maybe the reason they did not get paid overtime." The payroll administrator looked at the timecard report and saw that it did not reflect any unpaid overtime. She told Barbosa, "No one has complained about the time clock being wrong. So please make a copy, go to the supervisor, and tell him to approve the

overtime."

Barbosa spoke to his supervisor, Jaime DeSantos, and told him he and the other employees in his cell were each missing two hours of overtime. DeSantos said he would approve the missing hours because he "just trusted [Barbosa's] call at that time." The payroll administrator [*3] got DeSantos's verbal approval and paid all the employees in Barbosa's cell for two extra hours of overtime.

The payroll administrator thought "something doesn't make sense" because "no one complained about the time clock" and "we never had [a] problem." The company had had occasional problems with a prior timeclock system, but a new system was installed at the beginning of May and it had been working correctly with no complaints. So the payroll administrator spoke to the human resources manager, who ran the report from the scans at the security entrance gate and compared that report with the timecard report. The gate report showed Barbosa and the others could not have worked the overtime that Barbosa claimed.

One of the employees in Barbosa's cell, Bertha Sattarzadegan, testified Barbosa came to her and said that two other employees in their cell claimed they worked overtime on May 29 and 30. Barbosa told her to review her check to make sure the hours were correct. They had all worked the same hours, and Sattarzadegan did not think they had worked extra overtime. She went to the human resources manager and told her she should not be paid for the extra overtime because she had not [*4] worked those hours.

On June 13, Barbosa was called to a meeting with DeSantos, the payroll administrator, the human resources manager, and the operations manager, Arshad Atlaf. Atlaf asked Barbosa if he was sure he and his cell worked overtime as he claimed; Barbosa said yes. Fifteen minutes later, Atlaf met with Barbosa again and showed him the gate report. Barbosa then said, "Well, I confuse. And sorry, you know, it's for the people coming to me and told me that I confuse."

When Barbosa got the paycheck that included the extra overtime, he went to the payroll department and offered to pay the money back. The payroll administrator told him she could not change anything and sent him to human resources, where he again offered to pay the money back. Barbosa was terminated on June 19, 2007. He testified Atlaf told him he was terminated for cheating the company. The payroll administrator testified Barbosa was terminated for falsifying time records. None of the other employees in Barbosa's cell was terminated; the overtime money was "eventually taken back" from them.

After Barbosa rested, IMPCO moved for nonsuit. The trial court initially denied the motion, finding there was a public policy [*5] that protected an employee from making a good faith claim for time he believed he had worked. IMPCO then called the human resources manager, who had previously been called on behalf of Barbosa, and she testified in more detail about the first meeting Barbosa had with her, the payroll administrator, DeSantos, and Atlaf. She testified that Atlaf asked Barbosa, "[I]f we have evidence to show that you didn't work the overtime, are you still claiming that you worked the overtime?" Barbosa said yes, without any doubt or hesitancy. Atlaf then reminded Barbosa "that the company does not tolerate any stealing from the company. And claiming you worked overtime when you didn't is stealing from the company." Atlaf asked again, "Are you sure you worked the overtime?" Barbosa responded yes. After the human resources manager completed her testimony, the court recessed for the weekend.

On Monday morning, the court told counsel it had "strong second thoughts" about its ruling on the nonsuit motion. After extensive discussion with counsel, the court changed its mind and granted the nonsuit. "I will accept plaintiff's version. It still comes down to a question of law. Good faith belief turns out to be [*6] wrong; termination thereafter of an at-will employee." The court continued, "We know the employer promptly paid the claim, thereafter, did an investigation, found out [Barbosa] was wrong. [¶] I don't see that there's a public policy that requires the employer to then make a determination whether this was good faith, not good faith, and require[s] the employer then to continue to employ this employee, who from [its] perspective made an unjustified claim for monies."

DISCUSSION

Barbosa concedes he was mistaken about his claim to unpaid overtime but contends the claim was based on a reasonable good faith belief that he was entitled to it. He argues he presented sufficient evidence to support his claim and the jury should be able to decide whether his claim was made in good faith and whether IMPCO

terminated him for making that claim or for falsifying timecards. We agree.

After the plaintiff has completed the presentation of his case, the defendant may move for nonsuit. (*Code Civ. Proc., § 581c, subd. (a).*) The motion shall be granted if the court determines that the plaintiff's evidence is insufficient to support a jury verdict in his favor. (*Stonegate Homeowners Assn. v. Staben (2006) 144 Cal.App.4th 740, 746 [50 Cal. Rptr. 3d 709].*) **[*7]** But a trial court must proceed with caution when making that determination because a nonsuit precludes the jury's consideration of the case. (*Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 838 [206 Cal. Rptr. 136, 686 P.2d 656].*) When we review the granting of a motion for nonsuit, we must view the evidence in the light most favorable to the plaintiff, resolving all presumptions, inferences and doubts in his favor. (*Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291 [253 Cal. Rptr. 97, 763 P.2d 948].*) After having done so, we will not sustain the judgment for the defendant unless it is required as a matter of law. (*Ibid.*)

We cannot say that IMPCO was entitled to judgment as a matter of law at the end of Barbosa's case. As we explain, public policy protects Barbosa from being terminated for making a good faith claim to overtime. And he presented evidence sufficient to support a jury finding that the claim was made in good faith.

(1) The common law recognizes the right of an at-will employee to bring an action in tort against his employer for termination of employment that violates a fundamental public policy. "In the last half century the rights of employees have not only been proclaimed by a mass of legislation touching upon almost every **[*8]** aspect of the employer-employee relationship, but the courts have likewise evolved certain additional protections at common law. The courts have been sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment whether it be by the all-powerful union or employer. [Citations.] This development at common law shows that the employer is not so absolute a sovereign of the job that there are not limits to his prerogative." (*Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 178 [164 Cal. Rptr. 839, 610 P.2d 1330].*)

To maintain a wrongful discharge action, however, the employee must have been wronged in a way that affects more than his immediate interest. "Determining whether a claim involves a matter of public policy as opposed to an ordinary dispute between the employer and employee depends on whether the matter affects society at large, whether the policy is sufficiently clear, and whether it is fundamental, substantial, and well established at the time of the termination. [Citation.]" (*Scott v. Phoenix Schools, Inc. (2009) 175 Cal.App.4th 702, 708 [96 Cal. Rptr. 3d 159].*)

(2) The duty to pay overtime wages is a well-established fundamental public policy affecting the broad public interest. **[*9]** "California courts have long recognized wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.' [Citation.] ... [O]ne purpose of requiring payment of overtime wages is ""to spread employment throughout the work force by putting financial pressure on the employer ... ."" [Citation.] Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market. [Citation.] Furthermore, ... the Legislature's decision to criminalize certain employer conduct reflects a determination the conduct affects a broad public interest. ... Under *Labor Code section 1199* it is a crime for an employer to fail to pay overtime wages as fixed by the Industrial Welfare Commission." (*Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal.App.4th 1137, 1148-1149 [37 Cal. Rptr. 2d 718].*) If an employer discharges an employee for exercising his right to overtime wages, the employee will have a viable cause of action for wrongful termination. (*Ibid.*)

An employee's good faith but mistaken belief is protected from employer retaliation in the whistleblowing context. In *Collier v. Superior Court (1991) 228 Cal.App.3d 1117 [279 Cal. Rptr. 453],* **[*10]** an employee alleged he suspected that other employees were illegally shipping valuable promotional products to unauthorized recipients in exchange for bribes or kickbacks. He reported his suspicions to the employer several times. He was fired shortly thereafter, purportedly for inadequate job performance. The employee alleged a cause of action for wrongful termination, claiming he "actually was terminated in retaliation for checking on, trying to prevent, and reporting possible illegal conduct to" his employer. (*Id. at pp. 1120-1121.*) The trial court sustained the employer's demurrer to the complaint. Reversing, the court of appeal found reports "about reasonably based suspicions of ongoing criminal conduct by coworkers" was in the public interest; thus, the

retaliatory discharge of an employee for making such reports was the proper basis for a wrongful termination cause of action. (*Id. at p. 1125.*)

Citing *Collier*, the Supreme Court held in *Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66 [78 Cal. Rptr. 2d 16, 960 P.2d 1046]* that a plaintiff's failure to prove an actual violation of law by his employer did not defeat the wrongful termination cause of action. "[A]n employee need not prove an actual violation of law; it **[*11]** suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Id. at p. 87.*) The Supreme Court's view was underscored by *Freund v. Nycomed Amersham (9th Cir. 2003) 347 F.3d 752*, which involved an employee who was fired for reporting perceived health and safety violations in the workplace. The employee brought a wrongful termination action based on *Labor Code section 6310*, which prohibits employer retaliation against an employee who complains about conditions affecting employee safety or health. "The public policy behind *§ 6310* is not merely to aid the reporting of actual safety violations ... ; it is also to prevent retaliation against those who in good faith report working conditions they believe to be unsafe. ... As long as the employee makes the health or safety complaint in good faith, it does not matter for purposes of a wrongful termination action whether the complaint identifies an actual violation of other workplace safety statutes or regulations." (*Freund. at p. 759.*)

It follows that the same result should obtain when an employee exercises his statutory right to overtime wages out of a reasonable good faith belief he is entitled to **[*12]** it, notwithstanding the later discovery that he is wrong. Any other conclusion would open the door to employee intimidation and chill the exercise of statutory rights.

Barbosa presented evidence that he had a reasonable good faith belief he was entitled to overtime. Under the previous timeclock system, mistakes in timekeeping had been made; the new system had been in place less than a month. Barbosa's coworkers convinced him the overtime was unpaid, and he in turn convinced DeSantos. He testified he was confused. In fact, the trial court acknowledged Barbosa had presented sufficient evidence to support a good faith belief when it granted the nonsuit.

(3) IMPCO argues Barbosa cannot prove he was terminated for making a claim for overtime, asserting he was terminated for misrepresenting that he worked overtime when he did not. IMPCO contends it is not a violation of public policy to fire an employee for lying and cheating his employer. IMPCO misses the point. Barbosa must prove he had a reasonable good faith belief he was entitled to overtime wages and that IMPCO terminated him because he claimed overtime based on that reasonable good faith belief. If Barbosa proves he had a reasonable good **[*13]** faith belief in his right to overtime, ipso facto he did not attempt to cheat IMPCO. Because Barbosa presented sufficient evidence to support both elements in his case-in-chief, the case should have been allowed to progress to its conclusion and be submitted to a jury.

DISPOSITION

The judgment is reversed and the case is remanded for further proceedings.

Rylaarsdam, J., and Moore, J., concurred.

The New York Times

September 2, 2009

Low-Wage Workers Are Often Cheated, Study Says

By STEVEN GREENHOUSE

Low-wage workers are routinely denied proper overtime pay and are often paid less than the minimum wage, according to a new study based on a survey of workers in New York, Los Angeles and Chicago.

The study, the most comprehensive examination of wage-law violations in a decade, also found that 68 percent of the workers interviewed had experienced at least one pay-related violation in the previous work week.

"We were all surprised by the high prevalence rate," said Ruth Milkman, one of the study's authors and a sociology professor at the University of California, Los Angeles, and the City University of New York. The study, to be released on Wednesday, was financed by the Ford, Joyce, Haynes and Russell Sage Foundations.

In surveying 4,387 workers in various low-wage industries, including apparel manufacturing, child care and discount retailing, the researchers found that the typical worker had lost $51 the previous week through wage violations, out of average weekly earnings of $339. That translates into a 15 percent loss in pay.

The researchers said one of the most surprising findings was how successful low-wage employers were in pressuring workers not to file for workers' compensation. Only 8 percent of those who suffered serious injuries on the job filed for compensation to pay for medical care and missed days at work stemming from those

injuries.

"The conventional wisdom has been that to the extent there were violations, it was confined to a few rogue employers or to especially disadvantaged workers, like undocumented immigrants," said Nik Theodore, an author of the study and a professor of urban planning and policy at the University of Illinois, Chicago. "What our study shows is that this is a widespread phenomenon across the low-wage labor market in the United States."

According to the study, 39 percent of those surveyed were illegal immigrants, 31 percent legal immigrants and 30 percent native-born Americans.

The study found that 26 percent of the workers had been paid less than the minimum wage the week before being surveyed and that one in seven had worked off the clock the previous week. In addition, 76 percent of those who had worked overtime the week before were not paid their proper overtime, the researchers found.

The new study, "Broken Laws, Unprotected Workers," was conducted in the first half of 2008, before the brunt of the recession hit. The median wage of the workers surveyed was $8.02 an hour — supervisors were not surveyed — with more than three-quarters of those interviewed earning less than $10 an hour. When the survey was conducted, the minimum wage was $7.15 in New York State, $7.50 in Illinois and $8 in California.

Labor Secretary Hilda L. Solis responded to the report with an e-mail statement, saying, "There is no excuse for the disregard of federal labor standards — especially those designed to protect the neediest among us." Ms. Solis said she was in the process of hiring 250 more wage-and-hour investigators. "Today's report clearly shows we still have a major task before us," she said.

The study's authors noted that many low-wage employers comply with wage and labor laws. The National Federation of Independent Business, which represents small-business owners, said it encouraged members "to stay in compliance with state and federal labor laws."

But many small businesses say they are forced to violate wage laws to remain competitive.

The study found that women were far more likely to suffer minimum wage violations than men, with the highest prevalence among women who were illegal immigrants. Among American-born workers, African-Americans had a violation rate nearly triple that for whites.

"These practices are not just morally reprehensible, but they're bad for the economy," said Annette Bernhardt, an author of the study and policy co-director of the National Employment Law Project. "When unscrupulous employers break the law, they're robbing families of money to put food on the table, they're robbing communities of spending power and they're robbing governments of vital tax revenues."

When the Russell Sage Foundation announced a grant to help finance the survey, it said that low-wage workers were "hard to find" for interviews and that "government compliance surveys shy away from the difficult task of measuring workplace practices beyond the standard wage, benefits and hours questions."

The report found that 57 percent of workers sampled had not received mandatory pay documents the previous week, which are intended to help make sure pay is legal and accurate. Of workers who receive tips, 12 percent said their employer had stolen some of the tips.

One in five workers reported having lodged a complaint about wages to their employer or trying to form a union in the previous year, and 43 percent of them said they had experienced some form of illegal retaliation, like firing or suspension, the study said.

In instances when workers' compensation should have been used, the study found, one third of workers injured on the job paid the bills for treatment out of their own pocket and 22 percent used their health insurance. Workers' compensation insurance paid medical expenses for only 6 percent of the injured workers surveyed, the researchers found.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on December 22, 2009, declarant served the **SUPPLEMENTAL BRIEF (CAL. RULE OF COURT 8.520(D))** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this twenty-second day of December, 2009, at San Diego, California.

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