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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SANDRA D'AMATO FLORES,

Cross-complainant and
Appellant,

v.

OPUS BANK,

Cross-defendant and
Respondent.

2d Civil No. B277112
(Super. Ct. No. BC573070
consolidated w/ No. BC514928)
(Los Angeles County)

COURT OF APPEAL – SECOND DIST.

FILED

Jul 25, 2018

JOSEPH A. LANE, Clerk

Sherry Claborn Deputy Clerk

Sandra D'Amato Flores appeals from judgment after a bench trial in her individual wage and hour action against her former employer, Opus Bank (the Bank). Flores was the manager of the Bank's Pasadena branch. She contends she was misclassified as exempt because her time spent on business development was not exempt executive activity. Substantial evidence supports the trial court's determination that Flores was properly classified. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This is one of three appeals by Flores. The other two are from intermediate orders in her putative class action for wage and hour violations against the Bank on behalf of other managers (Los Angeles Superior Court Case No. BC573070; 2d Civil Case Nos. B269866 & B278309).

Flores was hired as Vice President and Retail Banking Manager for the Bank. She resigned 15 months later. The Bank sued her. She cross-complained for various wage and hour violations. The trial court granted her motion for summary judgment on the Bank's complaint. Her cross-complaint proceeded to trial.

After a bench trial, the court granted judgment for the Bank. It found that Flores was properly classified as an exempt employee under the executive exemption of Industrial Welfare Commission Wage Order 4-2001. (Cal. Code Regs., tit. 8, § 11040, subds. 1(A)(1) & 2(N).)

Specifically, the trial court found (1) her duties and responsibilities involved management because she was "in charge of [the Bank's] Pasadena branch" and "[f]or a time she likewise was in charge of the South Pasadena branch"; (2) she customarily and regularly directed the work of two or more other Bank employees; (3) the Bank "gave particular weight to [her] suggestions and recommendations about hiring, firing, and raises"; (4) she customarily and regularly exercised discretion and independent judgment because "[s]he alone decided where and how to spend her day. In terms of hours and locale, she was her own boss. She decided which prospects to investigate and pursue. Her latitude was not unlimited, but that is true for most executives"; (5) she was primarily engaged in duties which met

the test of the exemption; and (6) her salary satisfied the requirement for exempt status.

There was evidence that Flores spent the majority of her time on business development. The court rejected her contention that those activities were not exempt. It noted that she was not selling “hair brushes and vacuums,” but was reaching out to prospects who were entrepreneurs, business owners, professionals, and managers, and that many executives engage in “rainmaking” activities.

DISCUSSION

Flores omitted the trial court’s statement of decision (and many other significant records) from her initial designation of the record, and from her first augmentation in August 2017. It was not until November 2017, after the Bank filed its respondent’s brief, that she again augmented the record to include the statement of decision. We could disregard her opening brief on this basis. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) We nevertheless consider her contentions and conclude they are without merit.

We review the entire record to determine whether there is substantial evidence to support the trial court’s determination. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.) Substantial evidence is of ponderable legal significance; it is evidence that is reasonable, credible, and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) We resolve conflicts in the evidence in favor of the judgment. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.) Our review is not de novo as Flores urges; she relies for that standard on *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1008 (*UPS Wage & Hour Cases*), in

which the court reviewed an order granting summary judgment, not judgment after trial.

Workers employed in an executive, administrative or professional capacity are exempt from provisions of the law concerning overtime compensation, meal and rest periods, and related recordkeeping requirements. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A).) These exemptions are narrowly construed. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.) It is the employer's burden to prove an employee is exempt. (*Id.* at pp. 794-795.)

An executive employee is exempt from wage and hour rules if all of six facts are true: (1) her "duties and responsibilities involve the management of the enterprise"; (2) she customarily and regularly directs the work of two or more other employees; (3) she has authority to hire or fire, or her "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"; (4) she customarily and regularly exercises discretion and independent judgment; (5) she is primarily engaged in exempt activities, i.e., "more than one-half" the time; and (6) she earns at least twice the minimum wage. (Cal. Code Regs., tit. 8, § 11040, subds. 1(A)(1) & 2(N).) Exempt executive duties relate to the "actual management of the department and the supervision of employees therein." (*UPS Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1018; see 29 C.F.R. § 541.108(a).) The job title is not determinative. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 565.)

Substantial evidence supports the trial court's finding on each element of the exemption. Flores's duties

involved management, as established by the testimony of the Bank's human resources director and its chief banking officer that Flores was the person responsible for managing a newly opened Pasadena branch and, for several months, was also responsible for managing the South Pasadena branch.

Flores regularly directed the work of two or more employees. The director of human resources testified that it was Flores's job to open the new branch, "oversee the integrity of the operations of the Branch . . . hir[e] employees, mak[e] sure that they were trained," "negotiate rates with clients," and "make [the Bank's] name known in the communities that she served." She was "to ensure that her staff was mentored and trained and available to meet the needs of the clients that came in the door." She oversaw the South Pasadena branch operations before it closed and managed employee and customer concerns regarding the closure. Although she spent much or most of her time outside the branch, there was testimony that she could be reached to resolve any operational issues. The chief banking officer (Jill Barnes) testified that the majority of Flores's work time was spent on these exempt duties. Flores delegated work to the assistant manager (Leslie Roberts) who testified she was able to handle most things without contacting Flores, but there is substantial evidence that Flores supervised, trained, and managed her assistant.

Flores's authority over hiring and firing was established by testimony that she, in coordination with the human resources department, had authority to hire, discipline and terminate employees and determine their compensation. The Bank hired an operations manger that only Flores interviewed. And it hired, disciplined, and increased pay for

other individuals based upon her recommendations. That her recommendations were not always followed is immaterial. An “[e]xempt executive employee need not be a final decision maker.” (*UPS Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1027, italics omitted.)

Flores regularly exercised discretion and independent judgment, as shown by testimony that she had discretion to determine her work hours and location, how to meet her duties and goals, and which duties to delegate to those under her supervision. She managed branch expenses, and prepared the business plan for the new branch which included a goal to develop \$15-20 million in new business. She was the “face of the bank” in the community and had discretion over multi-million dollar banking relationships. She designed her own presentations for customers. She was recognized as one of Pasadena’s top 50 businesswomen of the year. She offered evidence that she was disciplined for some of her decisions, but discretion and independent judgment do not imply unlimited authority and absence of review. (*UPS Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1027.)

It was undisputed that Flores’s compensation of \$101,000 in her 15 months with the Bank, was sufficient to meet exemption salary requirements.

Flores contends she was primarily engaged in business development which, she contends, is not exempt under the executive exemption. She testified that she spent 70 to 80 percent of her time outside the branch developing business. Barnes testified that Flores was expected to “tap[] into her existing network. So to the extent that she has business contacts, prospects, centers of influence in the city or in the

market, she would reach out and talk to those individuals to grow the business” and “begin business development.” Flores was expected to “retain 90 percent of the deposits” from the South Pasadena branch when it closed and to “do a lot of handholding and cajoling of customers who were threatening to leave.” Flores points out that selling products and services is listed as an exempt activity under the outside sales exemption (Cal. Code Regs., tit. 8, § 11040, subd. 2(M)) but not under the executive exemption.¹

But employees who perform a combination of exempt duties under various exemptions may qualify for exemption, and business development is exempt under the administrative exemption.² (See 29 C.F.R. § 541.708 [“Employees who perform a

¹ “[M]anagement’ includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.” (29 C.F.R. § 541.102.)

² The administrative exemption applies to employees who spend more than 50 percent of their time on duties which include

combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption”].) “The Division of Labor Standards Enforcement construes state law, like federal law . . . , to permit the so-called ‘tacking’ of one type of exempt work with another type, so that, for example, an employee who spends more than 50% of his worktime performing exempt managerial and exempt administrative work would meet the ‘primarily engaged’ test.” (DLSE Opinion Letter 2003.05.23, p. 5.)

The record does not support Flores’s contention that the Bank forfeited reliance on the administrative exemption. The Bank’s answer did not specify the exemption upon which it relied. It raised the affirmative defense that Flores was “exempt from coverage under the California Labor Code provisions and Wage Order .”

Moreover, Barnes testified that although Flores was often out of the office developing business, she was “overseeing the office at all times.” Barnes said, “[whether] she’s in the banking center or not she’s managing the office. So if there’s a problem, an overdraft, or if they need to reach her, she needs to be reachable. So I would say she’s overseeing the office at all times.” Barnes testified, “On a daily basis she would either be in the banking center directly coaching and teaching them business

advising management, planning, negotiating, representing the company, promoting sales, and researching business opportunities, and who—like Flores—perform work related to management, work under only general supervision, regularly exercise discretion and independent judgment, and earn twice the minimum wage. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2).)

development or if she was out on business development calls then I would expect that she would be available via cell phone or e-mail if they had a problem or a question. So if you're asking what I observed, either she was in the office working with her team, and if she wasn't, I knew she was reachable." Barnes said, "the majority of her time has to be spent on managerial duties, even when she's out doing business development. Again, I look at the managers [like Flores] to run the 58 offices. So [the employees] don't call me if they have a problem, they call the manager."

Flores challenges the credibility and weight of Barnes's testimony by pointing out that Barnes did not identify any particular calls or e-mails from employees to Flores, that the Bank did not do an observational study of Flores's activities, and that the human resources director (Kim Luce) did not know how much time Flores spent directing other employees. We do not reweigh the credibility of the evidence. The testimony of a single witness is sufficient to support the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Substantial evidence supports the trial court's determination that Flores's business development activities were part of her management and oversight of the success and growth of her branch and she was properly classified as exempt.

DISPOSITION

The judgment is affirmed. Opus Bank is awarded its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

John Shepard Wiley, Jr., Judge
Superior Court County of Los Angeles

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