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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SUSAN LEE,

Plaintiff and Appellant,

v.

SANGSIN BRAKE et al.,

Defendants and Respondents.

B262527

(Los Angeles County  
Super. Ct. No. BC474552)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.  
Henry M. Lee for Plaintiff and Appellant.  
Ashton R. Watkins for Defendants and Respondents.

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Plaintiff Susan Lee appeals from a judgment entered against her after a bench trial in this action for unpaid overtime and other employment claims. She contends the trial court erroneously found she failed to establish her claims by a preponderance of the evidence. We affirm.

### **BACKGROUND**

We take the facts from the trial court's statement of decision. In 2010, Hae Jeong Song hired Lee as a salesperson for Sangsin Brake, which sells auto parts. The employment agreement provided that Lee would receive \$4,500 per month for a six-month probationary period, and \$5,000 per month thereafter, plus a 1.5 percent commission on any sales she generated. Sangsin Brake's written employment policy stated that Lee would not be offered overtime and was therefore not authorized to work more than eight and a half or nine hours a day, depending on whether she took 30 minutes or an hour for lunch.

Over the next 15 months, Lee worked approximately eight hours a day, five days a week, but made no sales and brought in no new customers.

Sangsin Brake terminated Lee's employment in August 2011, at which time it paid her severance of \$13,645.77, which was equivalent to three months' salary and benefits.

Lee sued Sangsin Brake, Sangsin Brake USA, Sangsin Brake America, Inc., and Song (collectively Sangsin) for violation of Business and Professions Code section 17200, failure to pay overtime, failure to provide meal or rest breaks, violation of Labor Code sections 203 and 226, wrongful termination in violation of the Fair Employment and Housing Act and in violation of public policy, unlawful discrimination,

misrepresentation of the terms of employment, and breach of contract. The matter was tried to the court.

Six witnesses testified at trial.

Lee testified that normal office hours were 9:00 a.m. to 6:00 p.m., and although “[i]t varied during the day,” she “tried to be there until 6:00 p.m.” She then generally worked at home from 8:00 p.m. until midnight, communicating with suppliers and corporate principals located in Korea, and also worked at home in the early morning for an additional two and a half hours in order to contact buyers on the East Coast. Lee testified Song must have known she was working overtime because he was copied on emails that she sent outside normal business hours. In support of her testimony, Lee offered 150 of these emails. Lee estimated she normally worked about 14 hours per day, five days a week, plus two to three hours on Sundays. She also took some business trips, during which she worked more than eight hours per day meeting with several clients per trip, although she was generally unable to recall details concerning the meetings or attending more than one or two meetings per trip. Lee testified she received meal breaks, but they were always interrupted by emails and phone meetings, and she never took an uninterrupted 30-minute meal break or 10-minute rest break while working for Sangsin. Lee testified she brought several new clients to Sangsin, and had earned commissions that were never paid.

Lee produced no documents or phone records indicating she worked more than eight hours a day or 40 hours in a week.

Jennie McNulty, an accounting consultant, testified that according to Lee’s testimony, Lee worked 21 hours of overtime each week, plus seven and a half hours of double time, and never took an uninterrupted lunch or rest break. Therefore, McNulty

calculated, Lee should have earned \$62,775 to \$69,750 more per year than she was paid, plus \$13,500 to \$15,000 per year in meal and break period penalties. McNulty also testified that assuming all of Lee's representations regarding her sales activities were true, Lee was owed between \$246,236 and \$549,050 in commissions.

Song testified Lee worked a 40-hour workweek, with flexible hours, never working overtime. Although she may have worked beyond 6:00 p.m. occasionally, she had discretion to come in late, and she never informed him she was working overtime. Lee generated no sales, brought in no new customers, and was terminated because her performance was poor, she did not work well with others, she endangered the company's main account, and she criticized Song when he was away on business trips. During Song's business trips with Lee, she never worked more than eight hours per day, including flight time.

Holly Kim, a project manager for Sangsin, testified the company had no meal or rest break policy. Kim testified Lee worked 9:00 a.m. to 5:00 p.m., although sometimes she would leave the office after 5:00 p.m., and she frequently took rest and meal breaks.

Gerard Crnkovich, a salesman with Sangsin, testified he and Hoon Sung (David) Jung were Sangsin's only salesmen, and Lee was a sales assistant who did not understand the business and was not entitled to commissions on his accounts.

Jung, another salesman with Sangsin, testified the office environment at Sangsin was flexible, employees were not prevented from taking rest breaks, and he sometimes went out to lunch with Lee.

The trial court issued a statement of decision in which it found defendants' witnesses—Song, Kim, Crnkovich, and Jung—were “credible,” and Lee’s evidence was essentially “little more than [her] own testimony that she” had generated sales for Sangsin. The court found Lee “failed to produce documentary evidence that she was responsible for any sales” or “a single witness from any of the claimed clients who could testify that [she] was responsible for [any client] purchasing a single product from defendants.” Accordingly, the court found “[t]here was simply no persuasive evidence that [Lee] made any sales,” and she therefore “failed to meet her burden that she was responsible for *any* sales during her period of employment.”

The court found the evidence that Lee worked overtime was unpersuasive, as she had been told not to work overtime, she never informed anyone she was working overtime, and no evidence other than her testimony substantiated her claim of having worked overtime. Although Lee produced 150 emails sent after work hours, these amounted to approximately three emails per week over the course of her employment, which did not establish “the sizable amount of overtime hours” she claimed. The court found Lee’s credibility on the issue of meal and rest breaks was “particularly suspect,” as she was aware that Sangsin permitted meal and rest breaks, the informal setting in the office permitted them, and her coworkers testified she took them. The court found Lee’s claim for waiting time penalties failed because she was paid \$13,645.77 upon her termination, which was equal to three months’ pay plus benefits. Finally, the court found that no evidence supported Lee’s causes of action for violation of Business and Professions Code section 17200, violation of Labor Code sections 203 and 226, wrongful termination, unlawful

discrimination, misrepresentation of the terms of employment, or breach of contract.

After Lee objected to the statement of decision, the trial court entered a “final” statement of decision, in which it said its prior statement “was based to a large extent on a finding that it did not find [Lee] to be a credible witness.” Therefore, the court stated, to the extent Lee’s evidence consisted primarily of her own testimony with little if any corroborative evidence, it resulted in a failure of proof.

Judgment was entered for defendants, and Lee timely appealed.

## **DISCUSSION**

Lee challenges the judgment only insofar as it denies her claims for failure to pay overtime wages and to provide meal and rest periods, “and accompanying penalties under Labor Code Sections 226 and 203.” She contends the trial court reached factual conclusions for which there was no substantial evidence, and found evidence in her favor absent in key areas in which there was such evidence. Further, Lee contends the court’s failure to determine whether she was exempt from overtime law is reversible per se.

### **I. Standard of Review**

“Where findings of fact are challenged on a civil appeal, we are bound by the ‘elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its

favor in accordance with the standard of review so long adhered to by this court.” (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

“Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) An employer that “fails to provide an employee a meal or rest recovery period in accordance with state law” must “pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” (Lab. Code, § 226.7, subd. (c).) Any “employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” (Lab. Code, § 1194, subd. (a).)

Here, substantial evidence supports the trial court’s findings that Lee failed to establish that Sangsin failed to pay her overtime or provide meal or rest breaks. Song testified Lee worked no more than eight hours per day and 40 hours in a week. Lee was instructed not to work overtime, and she never told Song she had worked overtime. (See *Jong v. Kaiser Foundation Health Plan* (2014) 226 Cal.App.4th 391, 396 [where an employer has no knowledge that an employee is engaging in overtime work, the employer’s failure to pay overtime does not violate the Labor Code].) Song further testified that during business trips, Lee never worked more than eight hours per day, including travel

time. And it was undisputed that Sangsin permitted rest and meal breaks, and Kim and Jung both testified that Lee frequently took these breaks. This evidence amply supported the trial court's findings.

Lee argues her own testimony and emails proved she worked overtime and was not provided rest or meal breaks. She is incorrect. Lee's evidence satisfied only her burden of producing evidence. (Evid. Code, §§ 110 ["Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue"], 550, subd. (b) ["The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact"].) Her burden of *proof* was to "establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) Accordingly, it was Lee's burden to present evidence sufficient not only to support her position, but also to persuade the court that her position was correct. She failed to carry this second burden, as the trial court found her testimony was not credible, and defendants' testimony to the contrary was. To the extent Lee relies on facts that defendants dispute, California law has long dictated that this court may not reweigh either the trial court's credibility findings or the evidence. (*Estate of Teel* (1944) 25 Cal.2d 520, 527.)

Lee argues that Sangsin's failure to keep adequate records regarding overtime hours created a rebuttable presumption that she worked those hours, thus shifting the burden of proof to Sangsin. (*Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 748.) Assuming she is correct, the point is of no moment because the trial court here expressly found that Sangsin carried any



such burden of proof, thus rebutting any presumption in Lee's favor.

Lee argues that evidence showing she worked outside normal business hours established she worked overtime hours. She is incorrect. The overtime laws do not prescribe "normal" working hours, only normative *numbers* of hours. Although she may at times have worked early or late on a given day, and on some weekends sent an occasional email, given that her schedule was flexible, this did not by itself establish that she worked more than eight hours a day, more than 40 hours in a week, or more than six days straight.

Lee argues that the only permissible way Sangsin could have shown how many hours she worked would have been to produce written records "of the *precise* amount of work" she performed. We disagree. Song testified the normal workday was eight and a half to nine hours long—depending on whether an employee took half an hour or an hour for lunch—no employee was authorized to work more, Lee did not in fact work more, and Lee's schedule was flexible, such that her sending an early or late email would not establish that she worked more than eight hours in a day. This evidence sufficed to establish that Lee did not work overtime hours.

Citing to a snippet of testimony, Lee argues she was not provided accurate wage statements. The argument is without merit. In the testimony, Song stated Sangsin maintained no records reflecting Lee's daily work hours, i.e., her start time and end time. Failure to maintain records reflecting a start and end time does not necessarily mean a wage statement is inaccurate. The evidence established that Lee worked no more than eight hours per day, which was reflected on her wage statement.

Finally, Lee argues that the trial court's failure to determine whether she was exempt from the overtime laws is reversible error per se. No principle or authority supports the argument. Where the evidence establishes that an employee worked no overtime, it is irrelevant whether she was exempt from overtime laws.

**DISPOSITION**

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.