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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re UNITED PARCEL SERVICE WAGE AND HOUR CASES _____ OSCAR ELLIS, Plaintiff and Appellant, v. UNITED PARCEL SERVICE, INC., Defendant and Respondent.	B234604 JCCP No. 4606 (Los Angeles County Super. Ct. No. BC395552)

APPEAL from the judgment of the Superior Court of Los Angeles County, Carl J. West, Judge. Affirmed.

Furutani & Peters and John A. Furutani for Plaintiff and Appellant.

Paul Hastings, George W. Abele and Jessica Pae Boskovich for Defendant and Respondent.

* * * * * * * * * *

Plaintiff and appellant Oscar Ellis brought an action against his former employer, defendant and respondent United Parcel Service, Inc. (UPS), seeking recovery of unpaid overtime compensation, penalties for missed meal and rest periods and other related claims.[1] UPS moved for summary adjudication of its 17th affirmative defense based on the federal Motor Carrier Act, contending the federal law barred Ellis's first cause of action for overtime compensation. Ellis concurrently filed a motion for judgment on the pleadings seeking to dispose of UPS's 17th affirmative defense. The trial court denied Ellis's motion and granted UPS's motion. UPS then moved for summary judgment on Ellis's complaint. UPS's primary contention was that, under state law, Ellis was a management-level employee, exempt from the overtime provisions and other benefits afforded nonexempt employees. The trial court granted UPS's motion for summary judgment and entered judgment in its favor.

Ellis contends the court erred in concluding the federal Motor Carrier Act applied to bar his overtime claim, and that there were triable issues of material fact as to whether he was misclassified as an exempt executive or administrative employee under California law. We conclude the trial court correctly granted summary judgment in favor of UPS on the grounds Ellis was an exempt executive employee under state law and affirm on that basis. Therefore, we need not consider here, or add to, the considerable authority that Ellis's overtime claims were barred by the federal Motor Carrier Act, nor do we consider his other claims of error. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 513; *Coalition for L.A. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 246.)

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[1] Ellis is a former class member of the federal class action entitled *Marlo v. United Parcel Service, Inc.* (C.D. Cal. 2008) 251 F.R.D. 476 which was decertified. This individual action was then filed in Los Angeles Superior Court as case No. BC395552. The action was deemed an "included action" in the coordinated proceeding entitled *In re United Parcel Service Wage and Hour Cases*, Judicial Council Coordination Proceeding No. 4606. The Second District was designated the court having jurisdiction for intermediate appellate review of the coordinated proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the material facts pertinent to an understanding of the executive exemption which we find dispositive, keeping in mind our standard of review and accepting Ellis's evidence and UPS's undisputed evidence as true. (*Raghavan v. Boeing Co*. (2005) 133 Cal.App.4th 1120, 1125.) We reserve a more detailed statement of the relevant evidence to the analysis of the disputed executive exemption elements in the Discussion part below.

UPS is an international shipping company providing transportation of packages throughout California, the United States and the world. UPS is certified as a motor carrier by the United States Department of Transportation (DOT).

Ellis began working for UPS in 1969 and retired at the end of 2005. He first held a supervisory position in 1985. During the time period from 1999 through 2005,[2] Ellis held only one position at UPS, full-time On Road Supervisor (ORS). During that time, Ellis worked out of the Santa Monica Center, one of numerous package distribution centers in California. Shortly before his retirement, the Santa Monica Center was renamed the Ocean Center, and its west Los Angeles service area was expanded.

Ellis supervised numerous hourly, nonexempt employees (primarily drivers) in his capacity as an ORS. Ellis was responsible for supervising a team of drivers serving a specific geographic region. The driver team consisted of both regular drivers and utility drivers, and they were responsible for the same defined service routes in the package center. When the service area for the Santa Monica Center was enlarged and the center was renamed Ocean, Ellis became responsible for supervising administrative clerks and the customer counter, in addition to an expanded driver team serving west Los Angeles.

All routes delivered intrastate and interstate packages, as well as packages with foreign destinations. UPS does not maintain separate routes for purely in-state or

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2 Ellis alleged an expanded period of potential liability based on tolling of the statute of limitations due to the pendency of the federal class action.

domestic deliveries. During the period from 1999 through 2005, a majority of the package volume in UPS's Santa Monica/Ocean package center was interstate packages.

Ellis regularly worked in excess of eight hours a day, often as many as 12 hours. Ellis was not paid overtime compensation for any days he worked more than eight hours as an ORS. Ellis often felt compelled, due to his heavy workload, to skip meal and rest breaks. His position as an ORS was a salaried position, always paying more than double the state minimum wage.

In May 1999, Ellis earned approximately $5,125 per month, and at the time of his retirement, his monthly salary had increased to $6,125. As an ORS, Ellis received annual Management Incentive Program awards consisting of stock. His annual stock "awards" between 2000 and 2005 ranged in value from $18,523 to $20,230. Ellis also received annual monetary bonuses equal to a half-month's salary. Nonexempt hourly employees at UPS, like package car drivers, are not eligible to receive stock awards through the Management Incentive Program or the half-month annual bonuses.

The UPS package distribution system is highly integrated, and UPS maintains numerous procedures and policies to ensure efficiency and the timely delivery of packages. Ellis knew that each unit of the distribution system was dependent on every other unit, such that a problem or delay in one unit could cause "a snowball effect" throughout the system. As an ORS, Ellis believed his job required him to do "whatever it took" to get the job done efficiently, even if that meant driving a package car to deliver packages when necessary. When an emergency occurred, like a driver being sick or involved in an accident and there was no utility driver available, or there was unanticipated excess package volume, Ellis drove and made deliveries. This happened as often as 80 to 90 days per year.

Ellis filed a complaint against UPS alleging six causes of action: failure to pay overtime (Lab. Code, §§ 510, 1194), failure to provide meal and rest breaks (Lab. Code, §§ 226.7, 512), failure to maintain wage statements (Lab. Code, §§ 226, 226.3), conversion, waiting time penalties (Lab. Code, §§ 201-203), and unfair competition (Bus. & Prof. Code, § 17200). All of Ellis's claims were based on his alleged misclassification

as an exempt employee and the denial of overtime compensation and related benefits afforded nonexempt employees. UPS answered, asserting numerous affirmative defenses, including the applicability of state law exemptions and a federal law exemption pursuant to the federal Motor Carrier Act.

UPS filed a motion for summary adjudication of its 17th affirmative defense, based on the federal exemption, arguing it barred Ellis's first cause of action for overtime as a matter of law. Ellis opposed and also concurrently filed a motion for judgment on the pleadings arguing the federal exemption did not apply as a matter of law. The trial court granted UPS's summary adjudication motion and denied Ellis's motion.

UPS then filed a motion for summary judgment seeking to dispose of Ellis's entire complaint, primarily arguing that Ellis, in his position as an ORS, was a management-level exempt employee under state law and not entitled to any of his claimed damages or penalties. After briefing and argument, the court granted UPS's motion. The court thereafter entered judgment in UPS's favor. This appeal followed.

DISCUSSION

1. Standard of Review

"The standard of review of an order granting summary judgment is well established. Our review is de novo. [Citation.] We independently review the entire record, except as to evidence to which objections were timely made and sustained, in the same manner as the trial court. [Citation.] First, we review the issues framed by the operative pleadings to determine the scope of material issues. We then determine if the moving party has discharged its initial movant's burden of production. If we determine the moving party made the requisite prima facie showing of the nonexistence of a triable issue of fact, we then review the opposing party's submissions to determine if a material triable issue exists. [Citations.] 'In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing [defendant's] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.' [Citations.] 'The trial judge's stated reason for granting summary judgment is not binding on us

because we review its ruling, not its rationale.' [Citation.]" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1008-1009 (*Taylor*).)

2. Statutory and Regulatory Background

Both Congress and the California Legislature have enacted statutes governing wages and working conditions for employees. (See, e.g., Lab. Code, § 1171 et seq.; 29 U.S.C. § 201 et seq.) Federal and state wage and hour laws reflect the strong public policy favoring protection of workers' general welfare and "society's interest in a stable job market." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148; see also *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 296.) The Fair Labor Standards Act (FLSA) does not preempt state law and "explicitly permits greater employee protection under state law." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795 (*Ramirez*); see also 29 U.S.C. § 218; 29 C.F.R. § 778.5 (2010).)

Generally speaking, California workers are statutorily entitled to overtime compensation for working in excess of a 40-hour work week or in excess of an eight-hour work day, unless they are properly classified as falling within one of the narrow exemption categories. (See Lab. Code, §§ 510, 515, subd. (a).) Regulations or "wage orders" promulgated by the Industrial Welfare Commission (IWC)[3] set forth the rules pertaining to overtime compensation, minimum wages, meal and rest breaks, reporting requirements and the like. The IWC wage order pertinent to this action is Wage Order No. 9-2001, codified at California Code of Regulations, title 8, section 11090 (Wage Order 9), which governs workers employed in the transportation industry.

Workers employed in an executive, administrative or professional capacity are exempt from sections 3 through 12 of Wage Order 9. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A).) "[U]nder California law, exemptions from statutory mandatory overtime

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3 The Legislature defunded the IWC in 2004, but its wage orders remain in full force and effect. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, fn. 4.)

provisions are narrowly construed." (*Ramirez, supra,* 20 Cal.4th at p. 794.) They are applied only to those employees "plainly and [unmistakably] within their terms and spirit." (*Bothell v. Phase Metrics, Inc*. (9th Cir. 2002) 299 F.3d 1120, 1125 (*Bothell*); accord, *Nordquist v. McGraw-Hill Broadcasting Co*. (1995) 32 Cal.App.4th 555, 562.) Moreover, exemptions are affirmative defenses and therefore, *the employer bears the burden of proving an employee is properly designated as exempt.* (*Ramirez, supra,* at pp. 794-795; accord, *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196.)

3. The Summary Judgment Motion

UPS's motion primarily contended the executive and administrative exemptions set forth in Wage Order 9 were a complete bar to all of Ellis's claims. A moving defendant may properly meet its burden on summary judgment by conclusively establishing a complete defense to the claim. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.)

The evidence in support of UPS's motion for summary judgment consisted largely of Ellis's deposition testimony, as well as numerous declarations from other UPS personnel. In opposition, Ellis admitted that a majority of the material facts were undisputed and relied exclusively on his own supporting declaration. Ellis also requested the court to take judicial notice of opinion letters from the California Department of Labor Standards Enforcement (DLSE). The court granted Ellis's request. UPS submitted written objections to Ellis's declaration, some of which were sustained by the court. Ellis does not challenge on appeal the court's evidentiary rulings.

In granting summary judgment in favor of UPS, the court ruled that UPS established as a matter of law that Ellis was an exempt executive employee and an exempt administrative employee while working for UPS as an ORS. All six causes of action were based on the failure to pay overtime and other benefits which accrue to nonexempt employees, as well as civil penalties related thereto. The trial court's determination that Ellis was properly classified as exempt under state law disposed of the entire complaint. We conclude Ellis was properly classified as an exempt executive employee while working as an ORS.

4. The Executive Exemption

In order to discharge its burden to show Ellis was exempt as an executive employee pursuant to Wage Order 9, UPS was required to demonstrate the following: (1) Ellis's duties and responsibilities involved management of the enterprise or a "customarily recognized department or subdivision thereof"; (2) he customarily and regularly directed the work of two or more employees; (3) he had the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status were given "particular weight"; (4) he customarily and regularly exercised discretion and independent judgment; (5) he was primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary was equivalent to no less than two times the state minimum wage for full-time employment. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1).) Because the exemption uses conjunctive language, UPS was required to establish *all* of the elements. (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1372; accord, *Bothell*, *supra*, 299 F.3d at p. 1125; see also *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.)

Analysis of each of the required exemption elements is a fact-intensive inquiry. The propriety of any employee's classification as exempt or nonexempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that "[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work*, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . . ." (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)(e), italics added; see also *Ramirez*, *supra*, 20 Cal.4th at p. 802.) "No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles." (*Taylor*, *supra*, 190 Cal.App.4th at p. 1015.) "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the

requirements of the regulations . . . ." (29 C.F.R. § 541.2 (2010); see also *Ramirez, supra*, at p. 802 [determination based on job title alone would allow employer to improperly exempt employees by creating idealized job title or job description not reflective of actual work performed].)

Federal law may inform our analysis. Indeed, federal law interpreting components of the FLSA exemptions that are *similar* to state law exemptions is properly considered as persuasive authority, even if *not binding* on this court. (*Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550; see also *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658.) Wage Order 9 expressly provides that "activities constituting exempt work and non-exempt work *shall be construed in the same manner as such items are construed in the following regulations under the* [*FLSA*] effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116." (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)(e), italics added.) The effective date of Wage Order 9 was January 1, 2001. As such, we may properly consider federal decisions interpreting the FLSA and the federal Department of Labor's implementing regulations as set forth in the Code of Federal Regulations that were in effect as of January 1, 2001 (before the 2004 amendments to the federal provisions).

With the foregoing in mind, we turn to the three individual elements of the executive exemption which Ellis contends are disputed: (1) whether he was in charge of a customarily recognized department or subdivision of UPS; (2) whether he customarily and regularly exercised discretion and independent judgment; and (3) whether he was primarily engaged in duties that meet the test of the exemption.[4]

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[4] We do not discuss the remaining three elements as Ellis does not raise them on appeal. In the trial court, Ellis admitted he made the requisite salary and always supervised at least two or more employees. As to the hiring and firing element, Ellis did not offer any material evidence to refute UPS's evidence that his recommendations were given "particular weight" within the meaning of Wage Order 9.

a. Customarily recognized department or subdivision

Ellis contends there is a triable issue as to whether or not he was in charge of a recognized UPS department. Ellis argues he was not, that he was merely a supervisor who often performed similar tasks to the nonexempt employees under his supervision. He asserts he was never in charge of a UPS package center and always reported to the package center manager.

The federal regulation expressly incorporated into Wage Order 9 defines the phrase "customarily recognized department or subdivision" as distinguishing "between a mere collection of men assigned from time to time to a specific job or series of jobs and *a unit with permanent status and function*." (29 C.F.R. § 541.104(a) (1988), italics added.)[5] An exempt executive must be more than "merely a supervisor [who] merely participates in the management of the unit. He [or she] must be in charge of and have as his [or her] primary duty the management of a *recognized unit which has a continuing function*." (*Ibid*., italics added.) And, while not dispositive, "a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit." (§ 541.104(c).)

In *Taylor*, we held that "a shift of specific workers, performing the same primary function as a permanent unit operating within a larger organizational structure, and recognized and supervised as such within that organization, constitutes a customarily recognized 'department or subdivision' within the meaning of Wage Order 9." (*Taylor, supra,* 190 Cal.App.4th at p. 1017.) Several federal cases have held that similar facts meet the definition of a "customarily recognized department or subdivision." (See *West v. Anne Arundel County, MD.* (4th Cir. 1998) 137 F.3d 752, 763 ["station or a shift constitutes a recognized department or subdivision" of fire department]; *Scherer v. Compass Group USA, Inc.* (W.D.Wis. 2004) 340 F.Supp.2d 942, 949-950 [food preparation or kitchen staff supervised by chef and operated separately from service staff

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[5] Hereafter, all citations to the Code of Federal Regulations, unless otherwise indicated, are to the pre-2004 version, revised as of July 1, 1988.

properly deemed to be subdivision of larger catering department]; *Joiner v. City of Macon* (M.D.Ga. 1986) 647 F.Supp. 718, 722 [day and night shift bus drivers occupied "permanent and continuous position" within larger transit system and deemed part of recognized unit].)

Ellis admitted in deposition that as an ORS he was in charge of a designated driver team, which consisted of a specific set of drivers, including route drivers and utility drivers, covering a permanent and specific geographic area and performing the same operational functions every day. He thought of his team as an identifiable "unit." There is no evidence showing that UPS driver teams under the supervision of an ORS were, or are, temporary in nature or otherwise function other than as a permanent unit, with assigned employees performing regular and specific tasks in the same location on a daily basis as part of the overall UPS package delivery system.

Ellis's effort to minimize his admissions by way of a conclusory declaration containing the statement that he was only a supervisor who reported to the manager of the package center, and that he was not given a separate budget for his unit, is insufficient to raise a triable issue on this element. The declaration is largely without evidentiary facts, in contrast to his detailed responses to deposition questions and his admissions in the opposition separate statement. Even with the deferential standard of review for opposing evidence, we glean no material triable issue as to whether Ellis was in charge of a recognized UPS department. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 227, p. 668 ["A common defect of . . . declarations is the recital of legal conclusions or ultimate facts, instead of statements of evidentiary facts"].)

b. Exercised discretion and independent judgment

Ellis also contends there was a material disputed fact as to whether he customarily and regularly exercised the requisite discretion and independent judgment in discharging his duties as an ORS. Ellis argues his evidence showed he did not, that the UPS work environment is highly regimented, and that he simply applied his knowledge of UPS's numerous protocols and procedures in performing his job.

In the pertinent federal regulations, the phrase "exercise of discretion and independent judgment" is defined as generally involving "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." (29 C.F.R. § 541.207(a).)[6] The requirement that discretion be exercised with respect to "matters of significance" means the decision being made must be relevant to something consequential and not trivial. (§ 541.207(d).) For instance, a bookkeeper who determines which accounts to post first is technically exercising some level of discretion as to the appropriate discharge of his or her job duties, but not as to matters of significance within the meaning of the exemption. (*Ibid*.) And the exercise of discretion must be more than occasional. The "phrase 'customarily and regularly' signifies a frequency which must be greater than occasional but which, of course, may be less than constant." (§ 541.207(g).)

Ellis argues all of his decisionmaking was dictated by stringent UPS procedures and methods, including a "daily operating plan," "loop principles" and UPS's "340 delivery methods." We recognize the federal regulations warn of misclassifying employees on this basis. (29 C.F.R. § 541.207(c)(1).) And, we agree an employee constrained by stringent protocols mandating a particular outcome to routine tasks would not be exercising discretion of the type contemplated by Wage Order 9. However, merely because an employer requires adherence to regulations, guidelines or procedures does not mean an executive-level employee cannot, or does not, exercise the requisite degree of discretion and independent judgment.

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6 The pre-2004 federal regulations implementing the FLSA use the phrase "discretionary powers" with respect to the executive exemption (29 C.F.R. § 541.107), reserving "exercise of discretion and independent judgment" for the administrative exemption. (§ 541.207(a).) However, Wage Order 9 expressly includes the phrase "exercise of discretion and independent judgment" for both exemptions, and therefore we look to section 541.207 for interpretative guidance.

As we explained in *Taylor*: "[W]here government regulations or internal employer policies and procedures simply *channel* the exercise of discretion and judgment, as opposed to *eliminating* it entirely or otherwise constraining it to a degree where any discretion is largely inconsequential, the executive exemption may still apply. Supervisors and managers are not rendered mere automatons because they must navigate each workday mindful of regulations and internal policies governing their work environment and the employees they oversee. Such an interpretation of the language of Wage Order 9 would render the exemptions virtually nugatory—inapplicable to any employee save for the uppermost tier of corporate officers or high-level management. Our charge to construe exemptions narrowly is not a directive to render them nonexistent." (*Taylor, supra,* 190 Cal.App.4th at p. 1026.)

Ellis's opposition, at best, showed only that UPS imposed some internal guidelines and methods that provided a framework for the decisions Ellis was called upon to make, but nothing eliminated or materially constrained his discretion and judgment in discharging his duties. (See, e.g., *Haywood v. North American Van Lines, Inc.* (7th Cir. 1997) 121 F.3d 1066, 1073 [customer service representative for shipping company exercised discretion despite having to use company guidelines to resolve damage claims and other complaints by customers].) His conclusory declaration did not provide any material facts indicating, for instance, that in adhering to the daily operating plan, he was thereby constrained or limited to one course of action in making a decision. (6 Witkin, Cal. Procedure, *supra,* § 227, at p. 668.)

The only reasonable conclusion arising from the evidentiary record is that Ellis was regularly called upon to exercise his discretion and independent judgment on matters of consequence to UPS. Ellis testified there was no such thing as a "typical day" at UPS. He was familiar with UPS's policy book, but called it a "guideline" that he did not consult on a daily basis. Ellis's description of his daily responsibilities revealed that significant flexibility was required and expected of an ORS to respond to changing circumstances and make quick decisions, under significant time pressures. Ellis explained that because of UPS's integrated package delivery system, "[o]ne late

operation naturally affected the next step in the operation, which could cause a snowball effect." Decisions affecting the efficiency of that system obviously involve matters of consequence to UPS's operation and customer goodwill.

Ellis described a number of discretionary decisions he made on a regular basis, including: attempting to resolve employee problems within his unit before seeking involvement of higher-level management; assessing the need for employee discipline and selecting an appropriate response, relying on UPS's disciplinary "guidelines" which directed supervisors to consider the circumstances of an employee's conduct and allowed supervisors to determine when to involve upper management in the process; assessing training and recertification needs for new and existing drivers and instructing them on the UPS methods, basing his instruction approach on the individual driver's needs; reviewing the morning reports and checking the driver sick log to assess coverage needs and determining, based on the specific routes involved, which available utility driver was the best driver to provide coverage; reviewing the daily analysis report to check his unit's operational statistics and determine his "least best" driver, then advising on ways to improve and determining whether it was necessary to accompany the driver on the route to better assess problems; attending daily management meetings with other management-level employees to assess safety, performance and dispatch issues and to "brainstorm" on how to resolve any problems; responding to and resolving customer complaints; deciding whether to split a given driver route between two drivers due to package volume; deciding whether to authorize a driver to complete a route with overtime hours or send a second driver to assist; and investigating driver accidents, including going to the scene with a UPS safety department representative to determine the cause of the accident and whether any disciplinary action was warranted.

The fact that Ellis reported to the manager for the package center does not show there is a material dispute as to whether he exercised the requisite discretion. "Nothing in the plain language of Wage Order 9 indicates the exemption applies only to the most senior management of an enterprise or the person with whom the proverbial 'buck' stops." (*Taylor*, *supra*, 190 Cal.App.4th at p. 1027.) To the contrary, the federal

regulations instruct that an exempt executive employee need *not* be the final decision maker. (29 C.F.R. § 541.207(e) [decisions by exempt employee need not have the finality associated with unlimited authority; employee may still exercise requisite discretion even where decisions are subject to review and occasionally revised or reversed].)

Based on the evidence presented, we conclude as a matter of law that Ellis was customarily and regularly called upon to exercise discretion and judgment in matters of significance within the meaning of Wage Order 9. (*Combs v. Skyriver Communications, Inc*. (2008) 159 Cal.App.4th 1242, 1267 [employee primarily responsible for troubleshooting network issues for internet service provider engaged in work of significance to entity]; *Perine v. ABF Freight Systems, Inc*. (C.D.Cal. 2006) 457 F.Supp.2d 1004, 1016 [dispatcher at one facility of shipping company responsible for assigning and coordinating drivers engaged in work significant to overall operations]; *Piscione v. Ernst & Young, L.L.P*. (7th Cir. 1999) 171 F.3d 527, 537 [staff consultant analyzing benefit plans and also responsible for supervising and developing junior employees exercised requisite level of discretion].)

c. Primarily engaged in exempt duties

Ellis also argues there is a triable issue as to whether he was primarily engaged in exempt management duties. He contends he was not, that due to chronic understaffing, he was regularly directed to engage in the manual work of his hourly employees, like driving a UPS package car to make deliveries. He also argues he did not make any financial or budget decisions, and did not enter into vendor contracts or similar such management-level work.

Under California law, the phrase "primarily engaged" means "more than one-half of the employee's worktime" is spent performing duties that qualify as exempt. (Lab. Code, § 515, subd. (e); Cal. Code Regs., tit. 8, § 11090, subd. 2(J).) Exempt management work includes not only the "actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of . . . such managerial and supervisory functions or responsibilities. The

supervision of employees and the management of a department include a great many *directly and closely related tasks* which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible." (29 C.F.R. § 541.108(a), italics added.)

Ellis's principle job duties as an ORS were to "manage and supervise a defined unit of employees—classic nonmanual management duties." (*Taylor*, *supra*, 190 Cal.App.4th at p. 1018.) Ellis admitted a significant portion of his job duties included: attending daily management meetings to assess safety and performance issues and to assist in dispatch decisions; reviewing morning reports and driver sick logs to assess coverage needs; updating driver performance profiles; responding to customer complaints; accompanying his "least best" drivers on deliveries to personally assess training needs and help improve performance; training new drivers and recertifying existing drivers; conducting formal employee performance evaluations on a quarterly basis; completing driver audits to ensure compliance with UPS policies and procedures; ensuring his driver team complied with federal DOT regulations, health and safety regulations, hazardous materials regulations and other applicable laws; participating in the development and implementation of "action plans" to promote efficiency in his unit and the package center generally; providing input to upper management about whether a new driver should be made permanent; administering disciplinary procedures and involving upper management as necessary; reviewing monthly cost statements to ensure operational expenditures were within budget; and building and maintaining good relationships with union officials.

Such work consists of precisely the types of responsibilities identified as "management duties" by the DLSE, the state agency charged with enforcing the IWC wage orders. "Some examples of management duties which DLSE will accept include: [¶] Interviewing and selecting employees; training employees; setting of rates of pay and hours of work; directing the work of employees; maintaining production or sales records; appraising work performance; recommending changes in status; handling complaints;

disciplining employees; planning work schedules; determining techniques to be used; apportioning work among workers; determining the type of materials, supplies, machinery or tools to be used; controlling the flow and distribution of materials, merchandise or supplies; controlling revenue and expense; and providing for the safety of employees and property. [¶] The above list is not inclusive or exclusive." (Cal. Dept. of Industrial Relations, DLSE, Opn. Letter (July 6, 1993), p. 5; see also *Morillion v. Royal Packaging Co*. (2000) 22 Cal.4th 575, 584 [agency advice or opinion letters may be considered persuasive]; accord, *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815.)

Ellis's opposition fails to present facts raising a material triable issue that he regularly engaged in *nonexempt* duties for *more than half* of his work time. His testimony that, in addition to the above duties, he was occasionally called upon to drive a package car and make deliveries is insufficient to raise a triable issue. Ellis estimated this may have occurred 80 to 90 days per year. The defense evidence showed significantly fewer days involved, between 2 and 34 days per year, during the relevant time period. Even if Ellis's testimony is accepted as true, it is inadequate to create a material dispute. The fact that Ellis, as a responsible supervisor, filled in for his drivers under emergency circumstances does not transform the essential character of Ellis's job. Ellis explained that as an ORS, he did "whatever it took to get the job completed." Ellis admitted that he preferred, and endeavored, to find another driver or other option that did not require him to be out of the office. However, as a last resort, he would fill in and make the deliveries. In light of the uncontradicted evidence that the majority of Ellis's work did not consist of this type of emergency fill-in driving, we conclude this evidence is insufficient as a matter of law to raise a triable issue on this element.

The only other evidence Ellis offered was his conclusory declaration reciting a litany of management-level duties he did *not* perform as an ORS (e.g., financial planning, negotiating or setting salary or pay rates, making significant purchasing decisions, entering into vendor contracts). However, "[t]here is no requirement that in order to be properly classified, an executive must carry out every conceivable function that can be

classified as an exempt duty." (*Taylor, supra*, 190 Cal.App.4th at p. 1021.) Evidence that Ellis did not perform some traditional management duties does not demonstrate there is a triable issue as to whether or not he was "primarily engaged" in management duties within the meaning of Wage Order 9. Ellis's own admissions that the work he regularly performed as an ORS establish as a matter of law that more than half of his regular work duties qualified as management or supervisory duties or work directly related thereto.

Finally, the expectation of supervisors is relevant to the "primarily engaged" inquiry. Wage Order 9 expressly provides that the employer's "realistic expectations" of what work will be performed is part of the analysis. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)(e).) The declaration of Ellis's supervisor, Phillip Thompson, corroborated Ellis's testimony describing the managerial nature of his regular work duties. The only reasonable inference from the record is that Ellis was a management-level employee "primarily engaged" in exempt supervisory and management-related duties within the meaning of Wage Order 9. Summary judgment was properly entered based on the executive exemption.

DISPOSITION

The judgment is affirmed. Respondent UPS shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.