Filed 2/20/13 Aguirre v. Cooley CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ARMANDINO AGUIRRE, Plaintiff and Appellant, v. VIRGIL COOLEY et al., Defendants and Respondents.	B238393 (Los Angeles County Super. Ct. No. VC057385)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Law Offices of J. John Oh and J. John Oh for Plaintiff and Appellant.

Law Offices of Schiada & Caballero and John H. Caballero for Defendants and Respondents.

* * * * * * *

We affirm the summary judgment entered in favor of defendants and respondents Virgil Cooley and Parts Expediting and Distribution Company (Pedco), which Cooley previously owned. Plaintiff and appellant Armandino Aguirre failed to raise a triable issue of material fact on any of his causes of action, and summary judgment was therefore properly entered.

FACTS AND PROCEDURE

Plaintiff worked at Pedco from 1975 to 2009, when Pedco was purchased by Ironman Renewal (Ironman). Plaintiff continued working at Ironman until May 31, 2011, when he resigned. Although he started as a driver, plaintiff eventually assumed the responsibilities of plant manager and made over $6,000 monthly. In 2007, Cooley, sought to sell Pedco's assets to Ironman but needed plaintiff's promise to remain as an employee after the sale as a condition for Ironman to complete the sale. Craig Phillips, the president of Ironman, averred that Ironman's ability to hire Pedco's employees, including plaintiff, was a "key part of completing the transaction . . . ."

On August 23, 2007, Cooley wrote plaintiff a proposal promising to pay plaintiff $1 million if plaintiff continued to work for 10 years (Proposal). The handwritten Proposal stated, "Stay with Pedco as the team leader and player you've been and be the protector of everyone's interest for the next 10 years and I will owe you $1,000,000. . . . So, on September 1, 2017 you will receive $1,000,000 or [$]5,000 interest payment monthly until or unless you receive one million dollars before that date. [¶] If you leave Pedco all deals are off, null, and void." The beginning of the Proposal states that a "larger company can best secure all 26 or so employees will receive better medical 401k, wages, and benefits." The parties dispute whether plaintiff accepted the Proposal. Plaintiff did not sign the Proposal and no formal agreement was signed by the parties, though plaintiff requested one from Cooley.

In explaining the Proposal, plaintiff recognized that he "was going to create this new sale for" Cooley and that Cooley was offering him "a package [he] could not refuse to be employed by Ironman." Plaintiff knew he was a "key part of making this deal [with Ironman] go." According to plaintiff, "Cooley realized that he could not sell Pedco or its

assets to any buyer unless [plaintiff] stayed with the company to help the buyer following the sale." Cooley stated in his declaration that the Proposal was drafted to effectuate the 2007 sale of Pedco to Ironman.

On August 27, 2007, the asset purchase transaction between Pedco and Ironman was cancelled. In 2009, Pedco and Ironman entered a new asset purchase transaction that was $2,000,000 less than the 2007 price.

On October 14, 2010, plaintiff sued Cooley and Pedco asserting causes of action for breach of contract (based on the alleged repudiation of the Proposal), failure to pay overtime compensation, and unfair business practices (based on the alleged failure to pay overtime compensation). On July 12, 2011, Cooley and Pedco moved for summary judgment, which the trial court granted. This appeal followed.

DISCUSSION

"The standard of review for an order granting or denying a motion for summary judgment or adjudication is de novo. [Citation.] The trial court's stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. [Citation.] [¶] A party moving for summary adjudication 'bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law' on a particular cause of action. [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] 'A defendant bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. [Citation.]' [Citation.]" (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356.)

We first consider plaintiff's argument that defendants were procedurally barred from raising affirmative defenses in their motion for summary judgment because they were not raised in defendants' answer. We then consider whether the trial court properly granted summary judgment on plaintiff's contract and statutory causes of action.

1. No Procedural Bar Operates in this Case

Defendants sought summary judgment on plaintiff's overtime claim, arguing that plaintiff was an exempt employee. Defendants did not raise that affirmative defense in their answer. (See *United Parcel Service Wage & Hour Cases* [*Taylor*] (2010) 190 Cal.App.4th 1001, 1010 (*Taylor*) [exemptions from overtime law are affirmative defenses].) Generally, a defendant cannot raise an affirmative defense on summary judgment if the defendant failed to raise the affirmative defense in the answer, because summary judgment is framed by the pleadings. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) However, recognizing the futility of remanding the case for a defendant to simply amend an answer, courts have created an exception to this general rule when the plaintiff suffers no prejudice. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 75.) As explained by one court: " 'Given the long-standing California court policy of exercising liberality in permitting amendments to pleadings at any stage of the proceedings . . . a party should be permitted to introduce the defense . . . in a summary judgment' " motion. (*Ibid.*, citations omitted.)

Here, plaintiff claims no prejudice from defendants' failure to raise the affirmative defense until summary judgment. Plaintiff had a sufficient opportunity to respond to the motion and responded by filing a declaration providing evidence on the elements relevant to the affirmative defense. Therefore, the trial court properly allowed defendants to raise the exemption in their motion for summary judgment.

Assuming that defendants were also required to plead the existence of a condition precedent to the Proposal—i.e., the sale of Pedco to Ironman—the same reasoning applies. Plaintiff suffered no prejudice from defendants' failure to raise this issue earlier and plaintiff had notice and a sufficient opportunity to respond to the motion. Finally, even though plaintiff argued to the trial court that the affirmative defenses had been waived, plaintiff did not seek a continuance to conduct any additional discovery. Thus,

contrary to plaintiff's argument, the motion for summary judgment may be considered on the merits.[1]

2. Breach of Contract

Defendants advanced the following theory in support of summary adjudication of the breach of contract cause of action, which the trial court accepted: summary adjudication is warranted because the $1 million payment was contingent on the sale of Pedco to Ironman in 2007. The court also found the Proposal contained no integration clause, was not signed by plaintiff, and was not a final and exclusive expression of the parties' agreement.

Although, the Proposal does not expressly state it is contingent on the sale of Pedco to Ironman, *all* of the evidence showed that both Cooley and plaintiff understood the Proposal was contingent on the 2007 sale. The following evidence supports this conclusion: Cooley averred that the Proposal was prepared in an effort to salvage the 2007 transaction with Ironman. In his deposition, plaintiff admitted he knew that Cooley was attempting to sell Pedco to Ironman by September 1, 2007. Plaintiff threatened to terminate his employment with Pedco/Ironman if he did not receive an offer in writing to work for Ironman. Plaintiff understood that Cooley was trying to get him to work for Ironman so that the transaction between Pedco and Ironman could be completed.

Although plaintiff purports to dispute this "fact," he cites *no* evidence supporting an inference that the Proposal was viable absent the 2007 sale. Plaintiff's deposition statement that the Proposal was Cooley's effort to "take care" of plaintiff "because I was going to create this new sale for [Cooley]"—the only evidence plaintiff cites—supports only the inference that the parties understood the Proposal was contingent on the sale. It shows plaintiff understood that he was assisting Cooley in effectuating the sale of Pedco to Ironman, and in return Cooley was promising to "take care" of plaintiff. Plaintiff's

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[1] There is no merit to defendants' argument that plaintiff waived this issue, as plaintiff argued at the hearing on the motion that defendants' claims were waived because defendants failed to raise them in their answer.

continued deposition testimony further demonstrates this as plaintiff explained that Cooley "offered me a package to come along with Ironman. They were going to offer me a package I could not refuse to be employed by Ironman. They both did that. The reason being is that they both felt that I was a key part of making this deal go." Plaintiff's deposition does not support plaintiff's theory that the Proposal was effective regardless of the sale.[2] Because it is undisputed the 2007 sale was not completed, the trial court properly summarily adjudicated plaintiff's breach of contract cause of action.

Finally, in construing the Proposal we have relied on parol evidence rejecting plaintiff's theory that it is an integrated agreement. "To the extent a contract is integrated, the parol evidence rule precludes the admission of evidence of the parties' prior or contemporaneous oral statements to contradict the terms of the writing, although parol evidence is always admissible to interpret the written agreement." (*Ebsensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 636-637.) "Evidence of related oral understandings, however, is admissible to prove additional terms of the contract not inconsistent with the express language of the writing." (*Id*. at p. 637.) In contrast if the proposal is fully integrated, parol evidence is inadmissible to add any terms. (*Ibid*.)

The handwritten Proposal is not an integrated contract. It contains no integration clause, was not signed by plaintiff, and even plaintiff requested something more "formal." According to plaintiff, on August 24, 2007, he asked Cooley for a more formal contract because the handwritten proposal "probably would not stand if [he] ever had to use it." The language of the Proposal is reasonably susceptible to the construction that it was contingent on the 2007 sale because it mentions a larger company ensuring the employee's wages. The contingency does not contradict any term in the Proposal.

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[2] The trial court improperly excluded plaintiff's deposition testimony. Assuming Code of Civil Procedure section 2025.620 applies to summary judgment motions, it permitted plaintiff to introduce his deposition after defendants introduced portions thereof. (*Id*., § 2025.620, subd. (e) ["Subject to the requirements of this chapter, a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced."].)

Therefore, the trial court properly relied on extrinsic evidence in considering plaintiff's breach of contract cause of action.

3. Failure to Pay Overtime and Unfair Business Practices

Defendants contended plaintiff's statutory claims were not viable because plaintiff was a management-level employee exempt from the wage order provisions, like overtime compensation. Defendants bore the burden of proof of establishing the applicability of the exemption as an affirmative defense. (*Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785, 794-795 (*Ramirez*); accord, *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197.)

In order to establish plaintiff was an exempt executive employee, defendants were required to present evidence that: (1) plaintiff's duties and responsibilities involve management of the enterprise or a "customarily recognized department or subdivision thereof"; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given "particular weight"; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(1), or Wage Order 4.)[3] Because the exemption uses conjunctive language, defendant was required to establish *all* of the elements in order to shift the burden of proof to plaintiff. (*Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363, 1372; see also *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.)

It was undisputed plaintiff earned a salary in excess of twice the state minimum wage (approximately $6000/mo). Other evidence is cited and included in the motion and defendant's separate statement concerning the balance of the exemption elements

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[3] The parties do not dispute that Wage Order 4, governing professional, technical, clerical, mechanical, and similar occupations, applies to this case.

demonstrating plaintiff's exempt status. Much of the evidence on which defendant relied is from plaintiff's own deposition testimony, which plaintiff seeks to discredit or explain away in his opposing declaration.

"*It is well established that 'a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses*.' [Citations.] In determining whether any triable issue of material fact exists, the trial court may give 'great weight' to admissions made in discovery and 'disregard contradictory and self-serving affidavits of the party.' [Citation.] Our Supreme Court has explained that such admissions 'have a very high credibility value,' particularly when they are 'obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts.' (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 [] [*D'Amico*].) 'Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of fact (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits.' (*Ibid*.) Where a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and ' "conclude there is no substantial evidence of the existence of a triable issue of fact." ' [Citation.]" (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087 (*Whitmire*), italics added & omitted; accord, *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860-861.)

Plaintiff's deposition took place over two sessions in April and May, 2011. During his deposition, plaintiff was asked about his role and job duties at Pedco. Plaintiff was clear and confident in testifying about the importance of his work in the management and operation of the company. He understood that Cooley, as well as Craig Phillips of Ironman, considered plaintiff to be a key employee, and that Phillips did not want to buy Pedco unless plaintiff agreed to stay on and work for Ironman. Plaintiff explained that after 32 years of working for Pedco, he was of "worth" to the company, he was needed "to be there to continue the company, to keep the customers happy . . . . I was a key

person to that company. I am a key person still to that company." Plaintiff testified that the purchase of Pedco by Ironman "depended" on him agreeing to stay with the company and run the business. Plaintiff did not equivocate in describing himself acting in a managerial capacity, and that he took the initiative to assume additional responsibilities in running Pedco after Bob L'Homedieu (who had shared plant manager responsibilities with plaintiff) left the company.

As explained below, plaintiff's deposition testimony, combined with the other supporting evidence and inferences, and the lack of credible contrary evidence, is sufficient to show that plaintiff failed to raise a triable issue as to any of the elements of the exemption defense.

a. Plaintiff's involvement in management of Pedco

The determination of whether an employee is engaged in management of the enterprise within the meaning of Wage Order 4[4] is dependent on the evidence of the actual work duties performed by the employee; a job title alone is never determinative of exempt status. (29 C.F.R. § 541.2; see also *Ramirez, supra*, 20 Cal.4th 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].)

Here, plaintiff unequivocally referred to himself during his deposition as operating in a managerial capacity (Plant Manager) and stated that all of Pedco's employees answered to him. Plaintiff testified that he was a signatory on the corporate account and

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[4] California's wage orders, including Wage Order 4, expressly provide 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 Fair Labor Standards Act* effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116." (See e.g., Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(1)(e), italics added.) The effective date of Wage Order 4 was January 1, 2001. As such, federal decisions interpreting the Fair Labor Standards Act 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 (prior to the 2004 amendments to the federal provisions) may be relied upon in determining the applicability of an exemption.

signed checks on behalf of Pedco. His duties as plant manager included "[j]ob production, sales, parts sales, shipping, receiving, every hat in the house." He explained that he, "as a manager," disseminated a document, which he prepared, to all employees explaining that work quality was down, which was hurting business, and advising all employees that they needed to "get our act together."

Additionally, Cooley stated in his moving declaration that plaintiff "managed the work flow and work assignments" of all of the employees and was his "second in command." (CT 35-36) The evidence solidly supported that plaintiff was engaged in the management of Pedco. Plaintiff's opposition declaration, containing largely generalized statements, fails to materially contradict this evidence. (*D'Amico*, *supra*, 11 Cal.3d at p. 22; *Whitmire*, *supra*, 184 Cal.App.4th at p. 1087.)

b. Customarily supervises two or more employees

Plaintiff unequivocally stated in his deposition that all of the company's employees reported directly to him, that he determined their work schedules, and that the employees came to him about days off and vacation—all classic roles of a supervisor. The record also shows there were in excess of 20 employees of Pedco. Plaintiff's effort, in his opposition declaration, to explain away this testimony is unconvincing and fails to raise a material dispute as to this element.

c. Authority to hire or fire

In order to satisfy this element of the executive exemption, the managerial or supervisory employee need not have final authority to hire or fire. It is sufficient if his or her "*suggestions and recommendations* as to hiring or firing and as to advancement and promotion or any other change of status of the employee who he supervises will be *given particular weight*." (29 C.F.R. § 541.106, italics added; Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(1)(c).) Cooley's declaration states that he considered plaintiff his "second in command" and that plaintiff made "meaningful recommendations" regarding hiring and firing employees; although Cooley concedes he made the ultimate decision.

In his deposition testimony, plaintiff testified he never hired any employees but he fired one. He does not equivocate in that regard. In his opposition declaration, he

explains the one firing was done solely at Cooley's direction. However, in his declaration, plaintiff also expressly concedes he did in fact make recommendations regarding personnel, but speculates that Cooley "never listened." However, the issue is not whether plaintiff's recommendations were followed, or that he made the ultimate decisions. The issue is whether his suggestions regarding personnel were given "particular weight." The evidence here, with reasonable inferences arising therefrom, is sufficient to establish this element, given plaintiff's failure to present any other credible, contrary evidence.

d. Primarily engaged in exempt duties

Under California law and specifically Wage Order 4, 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, § 11040, subd. 2(N).) 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).)

Plaintiff's deposition testimony, and all reasonable inferences arising therefrom, establish that plaintiff successfully took the initiative for running Pedco, assigning employees' work, motivating the employees to improve the quality of their work, and, as he admitted, wearing "every hat" in order to keep the operation running smoothly and customers happy.

Further, the expectation of employers is relevant to the "primarily engaged" inquiry. Wage Order 4 expressly provides that the employer's "realistic expectations" of what work will be performed is part of the analysis. (Cal. Code Regs., tit. 8, § 11040,

subd. 1(A)(1)(e).) As already noted, Cooley attested in his declaration that he considered plaintiff his second in command, that he handled numerous supervisory matters and "basically managed the relationship" with all of Pedco's employees. Plaintiff's generalized assertion in his opposition declaration that he spent 80 percent of his day on sales is particularly disingenuous and properly disregarded.

e. Customarily exercises discretion

For all of the evidence and reasons discussed above, this final element was also adequately established. Nothing in plaintiff's self-serving opposition declaration raises a triable issue that he simply performed rote, manual tasks without exercising any independent judgment or discretion during the work day. And, simply because plaintiff reported to Cooley, the owner of the company, does not mean he did not exercise the requisite discretion. Nothing in the plain language of Wage Order 4 indicates the exemption applies only to "the person with whom the proverbial 'buck' stops. To the contrary, the federal regulations instruct that an exempt executive employee need *not* be a final decision maker. The requirement that an executive exercise discretion and independent judgment 'does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment . . . .' (29 C.F.R. § 541.207(e)." (*Taylor*, *supra*, 190 Cal.App.4th at p. 1027.) The executive exemption was established by defendants, warranting entry of judgment as a matter of law.

DISPOSITION

The judgment is affirmed. Defendants and respondents Virgil Cooley and Parts Expediting and Distribution Company shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

FLIER, J., Concurring and Dissenting

I concur in the majority opinion except for part 3 of the Discussion. I respectfully dissent from part 3 because the summary adjudication of the causes of action for statutory overtime pay and unfair business practices must be reversed. Plaintiff Armandino Aguirre raised triable issues of material fact as to the executive exemption, the only basis for granting summary adjudication of these two causes of action.

1. Standard of Review

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when "all the papers submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." We review the entry of summary judgment de novo. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We must "'view the evidence in the light most favorable to plaintiff[] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant[s'] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.) A reviewing court must draw reasonable inferences in favor of the nonmoving party. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470.)

Although we review the evidence in the light most favorable to the nonmoving party, a court should not treat "affidavits repudiating previous testimony as not constituting substantial evidence of the existence of a triable issue of fact." (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 549.) The theory behind the rule is that "'a clear and unequivocal admission by the plaintiff'" has "very high credibility value" and therefore should be accorded great deference. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.) *D'Amico* "bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522.) But the rule is limited to instances when "'credible [discovery] admissions . . . [are] contradicted *only* by self-serving declarations of a party.' [Citations.] In a nutshell, the

rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Id*. at pp. 1521-1522.)

2. Defendants Virgil Cooley and Pedco Were Required to Demonstrate All Elements of the Exemption

In their motion for summary judgment, defendants, for the first time, argued that between October 1, 2007, and September 30, 2009, plaintiff was an exempt employee. Because showing an employee is exempt constitutes an affirmative defense, defendants bore the burden of proof. (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356; *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1010.) "Because the exemption uses conjunctive language, [defendants were] required to establish *all* of the elements." (*United Parcel Service Wage & Hour Cases,* at p. 1014.) Thus, defendants were required to show that plaintiff was an employee:

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

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

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

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

"(e) Who is primarily engaged in duties which meet the test of the exemption. . . .

"(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. . . ." (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(1).)[1]

Defendants failed to make that showing.

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[1] All further section references are to the California Code of Regulations, title 8.

3. Plaintiff Raised Triable Issues of Material Fact

As explained below, plaintiff raised triable issues of material fact under section 11040, subdivision 1(A)(1)(c), (d), and (e) of the exemption.

A. Section 11040, Subdivision 1(A)(1)(c) -- Authority to Hire and Fire

Subdivision 1(A)(1)(c) requires plaintiff's recommendations regarding hiring and firing to be given "particular weight." In their separate statement, defendants stated, "Although it was ultimately Cooley's decision regarding hiring and firing of employees, Plaintiff made meaningful recommendations regarding the hiring and firing of PEDCO's employees." (Capitalization omitted.) Cooley never stated he considered plaintiff's recommendations regarding hiring and firing and provided no example of a single recommendation plaintiff made that Cooley adopted. Plaintiff disputed Cooley's statement regarding meaningful recommendations with his testimony that Cooley never listened to plaintiff's recommendations. Plaintiff also stated in his declaration, "Between October 1, 2007 and September 30, 2009, I did not fire any employees. I only fired an employee once, at the direction of Cooley, back in 1992."

Plaintiff's declaration raised a triable issue of fact because if credited it showed that his suggestions on hiring and firing were not given any weight. Plaintiff's evidence contradicted Cooley's declaration, in which he stated that plaintiff made "meaningful recommendations." Because the parties provided conflicting evidence regarding whether plaintiff's recommendations on hiring and firing were "given particular weight," that is an issue that cannot be summarily adjudicated. Plaintiff's declaration further indicated that in the relevant time period, he had no authority to hire or fire, a "fact" defendants do not challenge.

The majority's reliance on Cooley's declaration describing plaintiff as making "meaningful recommendations" ignores the appropriate standard of review on summary judgment that demands this court to view the evidence in the light most favorable to plaintiff, the party opposing summary judgment. (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at pp. 96-97.) The majority's conclusion that plaintiff failed to present evidence contradicting Cooley's declaration simply ignores plaintiff's declaration, which should have been considered. Plaintiff's declaration was

his first opportunity to present evidence concerning whether his recommendations on hiring and firing were considered, as no one questioned him about his recommendations on hiring and firing at his deposition.

B. Section 11040, Subdivision 1(A)(1)(d) -- Customarily Exercises Discretion

Defendants also were required to demonstrate plaintiff customarily exercised discretion and independent judgment. "[T]he 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.' [Citation.] 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 merely trivial." (*United Parcel Service Wage & Hour Cases*, *supra*, 190 Cal.App.4th at p. 1024.) "The 'phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant.' [Citation.]" (*Ibid*.)

Defendants' separate statement contains no "fact" showing that plaintiff customarily exercised discretion and independent judgment. The only evidence in the record bearing on this "fact" is plaintiff's declaration stating, "During my employment, I did not have the authority or power to make decisions regarding Pedco without immediate direction from Cooley with respect to matters of significance." Even the majority fails to identify any evidence presented by defendants demonstrating that plaintiff customarily exercised discretion. Because defendants presented no evidence that plaintiff customarily exercised discretion and independent judgment, they failed to carry their burden to establish the element that plaintiff regularly exercised discretion and independent judgment.

C. Section 11040, Subdivision 1(A)(1)(e) -- Primarily Engaged in the Duties That Meet This Exemption

Defendants' separate statement contains no "fact" stating that plaintiff was primarily engaged in the duties that meet the overtime exemption. Defendants therefore have not demonstrated that their affirmative defense can be established.

Plaintiff's declaration stating that he spent 80 percent of his day conducting sales raises a question of material fact regarding whether he was primarily engaged in duties meeting the exemption. This evidence is not inconsistent with his earlier deposition, in which plaintiff stated that he determined employees' work schedules, participated in "job production, sales, part sales, shipping, receiving, every hat in the house." Plaintiff could have had numerous other duties and still spend 80 percent of his time on sales. That simply would mean the other duties combined occupied only 20 percent of plaintiff's day. Moreover, plaintiff was not asked in his deposition to describe the amount of time he spent on each task and therefore could not have provided testimony inconsistent with his later declaration. The majority's reliance on Cooley's declaration that he considered plaintiff his second in command and their disregard of plaintiff's contrary evidence ignores the appropriate standard of review on summary judgment. (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 470 ["because this is an appeal from a grant of summary judgment in favor of defendants, a reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party"].)[2]

FLIER, J.

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[2] As the majority concludes, plaintiff failed to raise a triable issue of material fact that his duties involved the management of the enterprise. Plaintiff admitted in his separate statement that he "acted as PEDCO's general manager and basically managed the relationship between PEDCO and it[s] employees, including work flow and work assignments." The same admission showed plaintiff failed to raise a triable issue of material fact on whether he customarily directs the work of two or more employees. Additionally, plaintiff did not dispute that he earned at least two times the state minimum wage, as section 11040, subdivision 1(A)(1)(f) requires.