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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

XIANGLIE JIN,

Plaintiff and Appellant,

v.

SOON POONG, INC.,

Defendant and Respondent.

B278074

(Los Angeles County  
Super. Ct. No. BC563768)

APPEAL from judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge (Ret.).

Affirmed.

Peter Beck, for Plaintiff and Appellant.

Woods & Yoo, Kenneth K. Yoo and Daniel Y. An, for  
Defendant and Respondent.

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Plaintiff and appellant Xianglie Jin appeals from a portion of a judgment following a bench trial in an overtime compensation lawsuit against his employer, defendant and respondent Soon Poong, Inc. Jin contends the trial court erred in finding him to be an hourly employee rather than a salaried employee. We conclude that substantial evidence supports the trial court's finding and affirm the judgment.

### **FACTS<sup>1</sup>**

On August 7, 2012, Poong hired Jin as a restaurant cook. The parties discussed a “monthly wage,” and Jin agreed to \$3,200 monthly in wages in exchange for working five 12-hour shifts and an additional 7-hour shift for a total of 67 total hours each week. Each pay check was based on a regular and overtime hourly rate. Jin was paid \$1,600 twice per month. Jin understood that hours missed during a particular work week would “just [be] deduct[ed]” from his pay.

An employee handbook stated that nonexempt employees generally worked from 11:00 a.m. to 10:00 p.m. Monday through Saturday, and 4:00 p.m. to 10:00 p.m. on

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<sup>1</sup> In accordance with the applicable standard of review, we liberally construe the facts to support the judgment. (See *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).)

Sunday. The employees would “also receive double the employee’s regular rate of pay” for hours worked in excess of 12 hours in any given day and for all hours in excess of eight hours on the seventh consecutive day of work in a week.

Poong utilized an employee time clock throughout Jin’s employment, but Jin refused to enter his time. Poong did not keep itemized time records until September 17, 2013.

Between November 30, 2012, and September 30, 2013, Jin was paid a gross total of \$1,600 per pay period without any hourly deductions. Between October 2013 and May 2014, Jin’s paystubs referenced an hourly rate (\$9.67) and overtime rate (\$14.51). Jin’s pay was reduced at varying rates between 2013 and 2014 for coming in late, leaving early, and missing days of work. Jin’s employment ended on May 16, 2014.

## **PROCEDURAL HISTORY**

Jin filed a complaint against Poong for (1) failure to pay overtime compensation (Lab. Code, §§ 510, 1194),<sup>2</sup> (2) failure to provide accurate itemized wage statements (§ 226), and (3) waiting time penalties (§§ 201–203). The trial court entered judgment following a two-day bench trial. It found that Jin was “paid an hourly rate and was properly compensated for his scheduled 27 overtime hours each

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<sup>2</sup> Further statutory references are to the Labor Code unless otherwise specified.

week.” The monthly payment of \$3,200 was based upon an hourly rate of \$9.67 and overtime rate of \$14.51. The reductions in pay correlated to working less hours, which “disqualifie[d Jin] from salary classification.” During the time Poong maintained time records, Jin was paid 27 hours in overtime wages. Because Jin’s weekly compensation was equivalent during the unrecorded and recorded time period, the court found he was paid for 27 hours in overtime wages during the unrecorded period.

The court found that Jin worked “an average of three (3) extra overtime hours each week” during the unrecorded time period because it was reasonable to infer that he would occasionally work past his scheduled time. The court ruled in favor of Jin for unpaid overtime wages, waiting time penalties, and reasonable attorney fees. The court awarded Jin \$2,050, equivalent to \$50 for the initial pay period in which a violation occurred, plus \$100 for each violation in a subsequent pay period. (See § 226.)<sup>3</sup> Jin filed a timely notice of appeal from the judgment.

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<sup>3</sup> The court approximated Jin’s unpaid hours to be three hours per week during the unrecorded period, which lasted 41 weeks. The principal amount of \$1,784.73 was calculated by multiplying the overtime rate (\$14.51) times the total number of uncompensated overtime hours (123 hours, equivalent to 3 hours per week times 41 weeks, the exact amount of weeks during the unrecorded period). The court added a 10% interest rate for a total of \$1,963.20 in

## DISCUSSION

### *Standard of Review*

“Arguments should be tailored according to the applicable standard of appellate review.’ [Citation.]” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) The parties have not discussed the applicable standard of review. We must determine this threshold issue on our own. (See *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500.)

“We independently review the construction of statutes [citation] and begin with the text. If it “is clear and unambiguous our inquiry ends.” [Citation.] . . .’ Where the relevant facts are not in dispute, we face a question of law and are not bound by the trial court’s findings. [Citations.] When factual findings are challenged on appeal, we review the findings for substantial evidence.” (*Stoetzel v. State* (2017) 14 Cal.App.5th 1256, 1269.) “Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court’s factual determinations. [Citations.] Substantial evidence is evidence of ponderable legal significance, reasonable in

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actual damages. This calculation is lower than the alternative calculation listed above. (See § 226, subd. (e)(1).)

nature, credible, and of solid value.” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501; accord, *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal.App.4th 1243, 1249 [substantial evidence applied to review whether employer failed to pay a certain amount in wages].))

“A single witness’s testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility.” (*Thompson, supra*, 6 Cal.App.5th at p. 981.)

***Substantial Evidence Supports the Trial Court’s Finding That Jin Earned an Hourly Wage***

Jin contends the trial court erred in finding that he was paid an hourly wage instead of a salary. We disagree.

“California courts have recognized that California’s wage laws are patterned on federal statutes . . . .’ [Citations.]” (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 817.) California case law utilizes the “salary basis” test codified in the Code of Federal Regulations to determine if an employee is paid a salary rather than an hourly wage. Under this test, an employee is considered to be paid a salary if the employee receives a predetermined amount on a weekly or less frequent basis which is all or part of the employee’s compensation, and is not subject to reduction because of variations in the quality or quantity of the employee’s work. (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 398.) Subject to

exceptions, “an [] employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” (*Ibid.*; accord, *Kettenring v. Los Angeles Unified School Dist.* (2008) 167 Cal.App.4th 507, 513–514; *Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal.App.4th 260, 266–267 (*Conley*).)

There is ample evidence to support the trial court’s finding that Jin earned an hourly wage. Jin negotiated a monthly wage premised upon a regular and overtime rate. These varying rates appeared on Jin’s pay checks and in an employee handbook. Incremental deductions were made from Jin’s pay during one year of his employment. Jin recognized these deductions were based on him missing hours or days of work, and the reductions were based on his regular or overtime rate. As a nonexempt employee, Jin was owed overtime pay for the hours he worked in excess of statutorily defined hours which he was not otherwise paid. (*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 816; see § 510.) The court determined that Jin was generally paid overtime in accordance with his compensation agreement, but awarded him \$2,050 in unpaid overtime for three hours per week that the court found Jin stayed late. The court’s finding is supported by substantial evidence, and Jin does not challenge this amount he received in damages.

Jin contends the trial court should not have relied on the “salary basis” test in *Conley, supra*, 131 Cal.App.4th 260, to determine whether he was an hourly, as opposed to salaried, employee. Specifically, Jin asserts the “salary

basis” test used in *Conley* only applies to determine whether an employee should be classified as exempt under section 515. Jin provides no legal authority to rebut the trial court’s findings in this case. The only authority Jin relies upon to substantiate his position that he is a salaried employee is an exemption statute (section 515, subdivision (d)(2)), and a Division of Labor Standards Enforcement Policies and Interpretations Manual section (49.2.1.1) that construes an exemption statute.

The *Conley* court found that employees must “meet both a salary basis test and a job duties test” to be classified as exempt under section 515. (*Conley, supra*, 131 Cal.App.4th at p. 266.) The test for whether an employee is salaried is relevant in this case regardless of whether the court is required to reach a determination on exemption. Given the ample evidence supporting the trial court’s finding, we decline to reweigh the evidence as Jin suggests. (*Thompson, supra*, 6 Cal.App.5th at p. 981.)<sup>4</sup>

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<sup>4</sup> Because substantial evidence supports the finding that Jin was paid hourly wage, we need not consider Poong’s alternative argument that section 515, subdivision (d)(2), does not retroactively apply in this case.



## **DISPOSITION**

The judgment is affirmed. Respondent Soon Poong, Inc. is awarded its costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.\*

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\* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.