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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

CODY FOGH, Plaintiff and Respondent, v. LOS ANGELES FILM SCHOOLS, Defendant and Appellant.	B230920 (Los Angeles County Super. Ct. No. BC414706)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Richard Fruin, Judge. Affirmed and remanded.

Parcells Law Firm, Dayton B. Parcells III; Lee Litigation and Lisa Lee for Defendant and Appellant.

James H. Cordes and Steven M. Rubin for Plaintiff and Respondent.

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In this wage and hour case, appellant Los Angeles Film Schools, LLC dba the Los Angeles Film School (School) appeals from the trial court's judgment finding respondent Cody Fogh an administratively nonexempt employee entitled to unpaid overtime of $13,972 plus interest. The School also appeals from the trial court's postjudgment order awarding Fogh $96,800 in attorney fees. We affirm. We are satisfied that substantial evidence supports the trial court's nonexempt finding and that the trial court did not abuse its discretion in declining to consider an informal settlement offer in determining the reasonableness of attorney fees. We remand the matter to the trial court for a determination of appellate costs and attorney fees to be awarded to Fogh.

FACTUAL AND PROCEDURAL BACKGROUND

The School is a private postsecondary educational institution that trains students for employment in the film industry. Fogh was employed by the School as an admissions representative (AR) from November 16, 2004 through April 24, 2009, when his employment was terminated. His job required him to contact prospective students or "leads" identified by the School and to encourage them to apply for admission. During his tenure, the School had approximately 30,000 leads a year.

About a month after he lost his job, Fogh sued the School. He later filed a first amended complaint (FAC) alleging causes of action for failure to pay overtime wages, failure to provide meal breaks, failure to provide rest breaks, failure to pay wages due upon termination, failure to provide accurate wage statements, and unfair business practices.[1] In its answer, the School asserted the affirmative defense that Fogh was an exempt employee not entitled to any additional pay because he was employed in an administrative capacity.

The case proceeded to a bench trial and the court framed the issues as (1) whether Fogh was an exempt employee; and (2) if not, whether he was entitled to additional

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[1] In response to a demurrer, Fogh voluntarily dismissed three additional causes of action for wrongful termination in violation of public policy, defamation and false light.

compensation for overtime, meal breaks and rest breaks. The trial lasted four days and three witnesses testified.

The first witness was Rita Sawyer, the vice-president of admissions while Fogh was employed by the School and his direct supervisor. She identified AR's as "inside reps" or "inside sales reps." The School required each AR to complete two weeks of training, during which he or she was instructed on the correct answers to questions frequently asked by prospective students. An AR was then tested on what had been taught. The School set numerous guidelines for an AR to follow and minimum performance standards, including making at least 400 telephone contacts per month. An AR was required to work 45 hours per week, and to host an open house at the School one Saturday per month for which no additional payment was received. Sawyer testified that Fogh did not supervise other employees. He did not create the School's marketing materials, enrollment applications or financial aid applications, and he did not make any financial aid decisions. An AR could not submit an incomplete application for processing. Sawyer also testified that an AR's recommendation regarding whether an applicant should be admitted or rejected was always followed.

Fogh testified that he "was responsible for getting students to sign up and enroll in the film school," and that he was required to "bring in as many people" as possible. From the School's marketing department he received approximately 100 leads a week or 20 per day. Of those leads, about half remained interested after he contacted them. Fogh contacted prospective students primarily by telephone and e-mail and provided them with information about the School's programs, tuition and financial aid, job opportunities and potential salaries. After this initial contact, the mailroom would send a packet to the prospective student within 24 hours, which included an application, and Fogh would follow up two weeks later. He tried to arrange visits to the School and conduct an interview during the visit. Once he received an application, he would make sure it was completely filled out before passing it on to Sawyer. Fogh did not exercise discretion to stop the application process if he had a feeling that a particular prospective student should not apply. Instead, he would write "interview requested" on the application, which was a

code phrase meaning that a student was not a good fit. During his four years of employment, Fogh recommended that "maybe ten" prospective students be interviewed. He received a bonus if a certain number of his leads enrolled in the School and stayed for at least 90 days. Fogh recorded his contacts on daily "call sheets" he took to a meeting with Sawyer each morning to document his productivity.

Diana Derycz Kessler, the School's chief executive officer, testified as the person most knowledgeable about Fogh's claim that he was an exempt employee. She was unaware of the amount of time Fogh spent "recommend[ing] applicants to go forward or not." Of the 30,000 leads per year that were narrowed down to about 500 enrolled students, she was unaware of how many had been rejected by or were the responsibility of Fogh. She was also unaware of how much time Fogh spent in making a determination about whether a candidate was suitable for the School.

The trial court found that Fogh was a nonexempt employee entitled to unpaid overtime, but found against him on his other causes of action. The trial court issued a lengthy statement of decision detailing its legal and factual findings. The court found that Fogh's "principal task" was "to provide information to the thousands of leads that were generated by the School's marketing efforts," and that he had "a sales position." The court found that Fogh acted as an "admissions officer" only for the "minority of prospects who did submit an application" by promoting the preparation of the application, arranging a school visit and conducting an interview at the visit, providing advice about financial aid and encouraging enrollment to those accepted. In the court's view, "for most of his time, Fogh acted as an information provider," and exercised discretion and independent judgment only with respect "to a statistically small number of leads (10%) who submitted an application." The court also found that Fogh did not perform work along specialized or technical lines requiring special training, experience or knowledge, and that he was not primarily engaged in administrative duties.

Following the judgment, Fogh filed a motion seeking $218,967 in attorney fees. The trial court reduced the amount to $88,000 based on the existence of "claims on which plaintiff did not prevail," the time Fogh's attorneys spent "communicating with each

other" and performing concurrent work, and the lack of contemporaneous records. The court used a 1.1 multiplier, "because plaintiff's counsel prosecuted the action on a contingency basis," bringing the total award of fees to $96,800. This appeal followed.

DISCUSSION

I. Substantial Evidence Supports the Finding That Fogh Was a Nonexempt Employee.

The School contends there was insufficient evidence to support the trial court's finding that Fogh was a nonexempt employee. We disagree.

A. Standard of Review

When a factual finding is challenged on the ground there is no substantial evidence to support it, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874, italics omitted.) We 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. (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.) "'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.' [Citation.]" (*Ibid.*) We do not evaluate the credibility of the witnesses, but defer to the trier of fact on issues of credibility. (*Id.* at pp. 514–515.) The testimony of a single witness may provide substantial evidence. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767–768.) Furthermore, "[w]here [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable

inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) "Defendants raising a claim of insufficiency of the evidence assume[] a 'daunting burden.' [Citation.]" (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

When an appellant challenges the sufficiency of the evidence, the opening brief must set forth "*all* the material evidence on the point" and not merely state facts favorable to the appellant. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) An appellant fails to meet this requirement when it "cites the evidence in its favor, points out the ways in which (it contends) it controverted or impeached plaintiffs' evidence, and interprets the evidence in the light most favorable to itself." (*Stewart v. Union Carbide Corp*. (2010) 190 Cal.App.4th 23, 34.) A party must present a "fair summary" of all the evidence and "'cannot shift this burden onto respondent'" nor can it require the appellate court to "'undertake an independent examination of the record.'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) When an appellant fails to set forth all of the material evidence, the claim of insufficient evidence is waived or forfeited. (*Arechiga v. Dolores Press, Inc*. (2011) 192 Cal.App.4th 567, 571–572; *Myers v. Trendwest Resorts, Inc*. (2009) 178 Cal.App.4th 735, 749, fn.1; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

Fogh argues that the School failed to present all the material evidence in its opening brief and urges us to find that it has forfeited its challenge to the sufficiency of the evidence. While we agree that the School largely presented the facts in its favor, it did set forth the bases for the trial court's rulings. We therefore do not find the presentation of evidence to be so one-sided as to preclude our review of the claim of error. But we do not condone the practice of failing to present *all* the material evidence in the opening brief.

B. Applicable Law

Labor Code section 1173 authorizes the Industrial Welfare Commission (IWC) to issue regulations concerning wages and hours for all employees in California. (*Industrial*

Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 701.) Effective January 1, 2001, the IWC promulgated Wage Order 4-2001 (Wage Order 4), applicable to "professional, technical, clerical, mechanical, and similar occupations." (Cal. Code Regs., tit. 8, § 11040.) Wage Order 4, subdivision 3(A)(1) provides that employees "shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek." (Cal. Code Regs., tit. 8, § 11040(3)(A)(1).) As Labor Code section 90.5, subdivision (a) specifies, "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation . . . ."

Wage Order 4 provides an exemption for overtime wages for "persons employed in administrative, executive, or professional capacities." (Cal. Code Regs., tit. 8, § 11040(1)(A).) As relevant here, a person employed in an administrative capacity is exempt under the following four conditions: (1) The employee's duties and responsibilities involve the "performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers"; (2) the employee "customarily and regularly exercises discretion and independent judgment"; (3) the employee "performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge"; and (4) the employee "is primarily engaged in duties that meet the test of the exemption." (Cal. Code Regs., tit. 8, § 11040(1)(A)(2)(a-f).)

Each element listed must be established for the administrative exemption to apply. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 828–829.) The employer has the burden of proving that an employee is exempt. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *Nordquist v. McGraw-Hill Broadcasting Co*. (1995) 32 Cal.App.4th 555, 562.) Statutory provisions regulating wages that are enacted to protect employees are liberally construed with "'an eye to promoting such protection.'" (*Ramirez, supra*, at p. at 794.) "Exemptions are narrowly construed against the employer

and their application is limited to those employees plainly and unmistakably within their terms." (*Nordquist*, *supra*, at p. 562.)

C. Fogh Was Not Employed in an Administrative Capacity

1. Office work directly related to management policies or general business operations of the employer

Wage Order 4 expressly incorporates certain federal regulations, including 29 Code of Federal Regulations, part 541.201. (Cal. Code Regs., tit. 8, § 11040(1)(A)(2)(f).) Regarding the first requirement for exemption that an employee's office work be "[d]irectly related to management or general business operations," the federal regulations provide: "The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or *selling a product* in a retail or service establishment." (29 C.F.R. § 541.201(a), italics added.) The first requirement is met "if the employee engages in 'running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of the business' affairs." (*Bothell v. Phase Metrics, Inc*. (9th Cir. 2002) 299 F.3d 1120, 1125.)

The federal regulations provide examples of work directly related to management policies or general business operations: "[W]ork in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." (29 C.F.R. § 541.201(b).)

The School argues that Fogh's job duties fell within the areas of "quality control, marketing, research, and similar activities." The School relies on the testimony of Rita Sawyer that Fogh's job "was to evaluate and select the right students for the school from

lists of prospective students provided to him," he had complete discretion to determine which prospective students to pursue and recommend for admission, and his recommendations were followed one hundred percent of the time. Even assuming, without being convinced, this evidence was sufficient to support the School's position that Fogh was an exempt employee, the School misunderstands our role on appeal. The determination we must make is not whether there is evidence to support the School's position, but whether there is substantial evidence to support the trial court's ruling. In effect, we look only at the evidence supporting the successful party and disregard the contrary showing. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 925–926; *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

The trial court's findings that Fogh's principal task was to provide information about the School and that he held a "sales position" are supported by substantial evidence. Over his four years of employment, Fogh received thousands of leads generated by the School's marketing efforts. He contacted the leads by telephone and e-mail and documented his activities on call sheets he took to a meeting each day with his supervisor Sawyer to demonstrate his productivity. He discussed the School's programs, tuition and financial aid with prospective students and answered their questions. For those prospective students who remained interested in the School, he tried to arrange a visit to the School and conduct an interview, promoted their preparation of an application and encouraged those who were accepted to enroll. There was no evidence presented at trial that Fogh assisted in the administration of the School. Sawyer testified that Fogh did not create the School's marketing materials, enrollment applications or financial aid applications, and he did not make any financial aid decisions. Moreover, Sawyer testified that she called the School's AR's "inside sales reps." The School's advertisement for Fogh's replacement sought persons with sales experience. Fogh also testified that he was "selling the school" and running "a sales mill."

As the trial court noted, the facts here are similar to those in *Nielsen v. DeVry Inc.* (2003) 302 F.Supp.2d 747. Although the *DeVry* court was addressing exempt sales employees under the "outside sales exemption" contained in the federal Fair Labor

Standards Act (29 U.S.C. § 213(a)(1)) which is not applicable here, the case is instructive in its description of the functions performed by the sales employees. Like the School, DeVry employed field representatives "whose job is to identify potential students, persuade them to apply, and follow through with them to ensure they ultimately pay tuition and begin classes." (*Nielsen, supra,* at p. 750.) Once hired, the representatives underwent a month of training, where they learned about DeVry's educational programs and services, and techniques for finding potential students and getting them to enroll. The field representative would assist the students "in completing an application, collects a $100 application fee, reviews financial aid procedures with the family, instruct the student to contact the campus, and discuss succeeding steps the student must take to attend DeVry." (*Id*. at p. 751.) The representatives would also stay in contact with accepted students to make sure they began classes and paid tuition. The representatives were also required to submit daily and weekly activity and progress reports to supervisors. (*Ibid*.) Other courts have found that inside salaried salespersons are entitled to overtime pay and not subject to the administrative exemption. (See *Reiseck v. Universal Communs. of Miami, Inc.* (2nd Cir. 2010) 591 F.3d 101, 107; *Martin v. Cooper Elec. Supply Co.* (3rd Cir. 1991) 940 F.2d 896, 903.)

We are satisfied that substantial evidence supports the trial court's finding that the first requirement for the administrative exemption was not met.

2. Customarily and regularly exercises discretion and independent judgment

Federal regulations incorporated into Wage Order 4 provide the following regarding the second requirement for exemption that the employee exercise "discretion and independent judgment":

"In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." (29 C.F.R. § 541.202(a).) Factors to consider include "whether the employee has authority to formulate, affect,

interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances." (29 C.F.R. § 541.202(b).)

"The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." (29 C.F.R. § 541.202(c).) "The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." (29 C.F.R. § 541.202(e).) "An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." (29 C.F.R. § 541.202(f).)

The trial court found that Fogh did not customarily and regularly exercise discretion and independent judgment in performing his job. The record contains substantial evidence to support this finding.

The evidence shows that Fogh received two weeks of training at the beginning of his employment directed toward identifying "frequently asked questions" and responding with the correct answer. Fogh was tested and graded on his ability to provide information

about the School, and he used the information he was taught to perform his job. Fogh did not formulate or create management policies. His job was to recruit qualified students based on the leads provided by the School. His individual work did not affect business operations to a substantial degree; he primarily provided information to prospective students, the vast majority of whom did not end up applying to the School. Fogh had no authority to commit the School in matters having significant financial impact because he did not ultimately approve admissions or make financial aid decisions. Fogh had no authority to waive or deviate from established policies and admissions procedures. There was no evidence presented that Fogh had the authority to negotiate and bind the School on significant matters, that he provided consultation or expert advice to management, that he was part of the management team, or that he represented the School in handling complaints or arbitrating disputes resolving grievances.

Instead, Fogh spoke with literally thousands of individuals who responded to the School's advertisements. Fogh attempted to turn as many of these individuals into applicants for enrollment. Although his recommendations regarding admission were always followed, the ultimate acceptance decision still rested with Sawyer.

3. Special training, experience or knowledge

The third requirement for the administrative exemption applicable here is that the employee "performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge." The trial court's finding that this requirement was not met is supported by substantial evidence.

The School did not require its AR's to have any specialized training for hire. Rather, the School trained its AR's about the School's educational programs, and Fogh applied this training to perform his job in answering frequently asked questions by prospective students and encouraging them to apply and enroll in the School. Federal guidelines provide that an employee who merely applies his knowledge in following prescribed procedures is not exercising discretion and judgment of the independent kind associated with administrative work. (See 2 Division of Labor Standards Enforcement,

Operations and Procedures Manual (1989) § 10.62 (DLSE Manual).) In *Nordquist v. McGraw-Hill Broadcasting Co., supra*, 32 Cal.App.4th at page 574, the court found that the employee's "talent" for putting together an entertaining sports newscast came from his skillful application of station guidelines and various techniques which were standard in the industry, and that he was not an exempt administrative employee. Likewise, Fogh skillfully applied his on-the-job training to perform his job duties.

Federal regulations describing administratively exempt employees provide useful analogies. For example, while human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption, personnel clerks who "'screen'" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. (29 C.F.R. § 541.203(e).) Similarly, employees usually called examiners and graders, like an employee who grades lumber, generally do not meet the duties requirements for the administrative exemption because such employees usually perform work involving the comparison of products within established standards that are often catalogued.

4. Primarily engaged in administrative duties

Finally, Wage Order 4 provides that in determining whether an employee is "primarily engaged in duties that meet the test of the exemption," the 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 in determining whether the employee satisfies this requirement." (Cal. Code Regs., tit. 8, § 11040(1)(A)(2)(f).) Citing this provision, the trial court found that Fogh was not primarily engaged in administrative duties. This finding is supported by substantial evidence.

Wage Order 4 defines "primarily" as "more than one-half the employee's work time." (Cal. Code Regs., tit. 8, § 11040(2)(N).) The School's "person most knowledgeable," Diana Kessler, testified that she did not know whether Fogh spent more or less than half his time exercising discretion and independent judgment as to whether a prospective student was suitable for the School—Fogh's allegedly sole exempt function.

Not only did the School fail to meet its burden on this final element, but as demonstrated above, the evidence showed that Fogh did not meet the other required elements. He did not perform work directly related to the management or general business operations of the School, his primary duties did not involve the exercise of discretion and independent judgment on matters of significance, and he did not perform work that required specialized knowledge or training. Because the failure of any one of these requirements defeats the exemption, we are satisfied the trial court did not err in finding that Fogh was a nonexempt administrative employee entitled to unpaid overtime wages.

II. No Abuse of Discretion in Award of Attorney Fees.

A. Standard of Review

An award of attorney fees is reviewed under the abuse of discretion standard. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 [the "trial court has its own expertise" to determine the value of legal services].) "The '"experienced trial judge is the best judge of the value of professional services rendered in his court . . . ."'" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) Because the trial judge is in a "better position than an appellate court to assess the value of the legal services rendered" in the case, the trial judge's decision should only be disturbed where "it is manifestly excessive in the circumstances." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 782.) In other words, the appellant demonstrates an abuse of discretion when the

award of fees "shocks the conscience." (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549–550.) As set forth below, no such abuse occurred here.[2]

B. Informal Settlement Offer

The School contends the trial court abused its discretion by not taking into consideration its oral settlement offer of $20,600.24 in determining the reasonableness of the fee award. The School reasons that because its offer exceeded the overtime pay of $13,972 ultimately awarded by the court, any attorney fees expended after the offer was made were not reasonable. We reject this contention for two reasons.

First, the offer is subject to the mediation privilege and cannot be considered. Evidence Code section 1119, subdivision (a) provides that "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled . . . ." In anticipation of an informal mediation scheduled for July 31, 2009, the parties executed a written "Confidentiality Agreement," which provided that the mediation process "is to be considered settlement negotiations for the purpose of all state and federal rules protecting discussions made during such process from later discovery and/or use in evidence." The agreement expressly incorporated Evidence Code sections 1115 to 1128. Because the offer was made on July 31, 2009, it is subject to the confidentiality agreement.

Second, even if the offer were admissible, the trial court reasonably ignored it in determining the reasonableness of the fee award, in light of the circumstances surrounding the offer. The record discloses that the School made the offer during the

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[2] The School concedes its original contention that the trial court abused its discretion by not offsetting the attorney fees it incurred in successfully defending against Fogh's causes of action for failure to provide meal and rest breaks under Labor Code section 226.7 is now moot in light of our Supreme Court's recent decision that neither party is entitled to recover attorney fees in the prosecution or defense of Labor Code section 226.7 claims alleging the failure to provide statutorily mandated meal and rest periods. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1248.)

confidential mediation on a "take-it-or-leave-it" basis with a five-day deadline; the offer was never reduced to writing; the School refused to provide any documentation supporting the amount of the offer in response to Fogh's requests, including Fogh's payroll records and personnel file in violation of Labor Code sections 226, subdivision (b) and 1198.5; and the offer was revoked via e-mail on August 6, 2009. Under these circumstances, in which Fogh lacked sufficient information and time to consider the offer's merit, it can be said that the offer was not made in good faith.

In *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 425–426, the reviewing court concluded that settlement offers not made pursuant to Code of Civil Procedure section 998 cannot be considered in reducing a fee award. In reaching this conclusion, the *Greene* court specifically disagreed with the only case cited by the School to support its position, *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, which held that a trial court could reduce the lodestar figure by the amount of fees incurred by the plaintiff after he declined an informal settlement offer. The *Greene* court reasoned that "the *Meister* court's holding ignores the procedural protections afforded recipients of statutory section 998 offers," and that the "punitive provisions" of section 998 would "frustrate the public policy favoring settlement that is served by mediation." (*Greene*, *supra*, at p. 425.) The *Greene* court also noted that several federal courts have concluded that a trial court "is not justified in reducing an otherwise appropriate fee award simply because the party declined an informal settlement offer which exceeded his ultimate recovery." (*Id*. at pp. 425–426.)

Some of the procedural protections of Code of Civil Procedure section 998 include that an offer be made in good faith and that it have a reasonable prospect of acceptance. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.) The reasonableness of a section 998 offer depends upon the information used to evaluate it. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699; *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 877.) These factors are missing here. We are satisfied the trial court did not abuse its discretion in declining to consider the School's informal settlement offer in determining the reasonableness of attorney fees.

DISPOSITION

The judgment and postjudgment attorney fees order are affirmed. Fogh is entitled to recover his costs and attorney fees on appeal. The matter is remanded to the trial court for a determination of costs and attorney fees to be awarded to Fogh.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST