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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JORDAN BESEISO, Plaintiff and Appellant, v. ORACLE AMERICA, INC., Defendant and Respondent.	B337224 (Los Angeles County Super. Ct. No. 19STCV38034)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, William F. Highberger, Judge. Affirmed.

Law Offices of Rami Kayyali, Rami Kayyali, for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Barbara J. Miller, Alexander L. Grodan, and Karen Y. Cho, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Jordan Beseiso appeals from a summary judgment in favor of his former employer, defendant Oracle America, Inc., on his wage and hour class action. He contends there were triable issues of fact on whether he was a nonexempt employee subject to the wage and hour provisions of the Labor Code.[1] He also argues that the trial court abused its discretion by denying his motion for leave to amend and excluding the declaration of a coworker. We affirm.

II. BACKGROUND[2]

Defendant is a computer technology company that develops and sells customized software for business applications. On November 1, 2016, defendant hired plaintiff as a "Principal Internet Sales Consultant" (sales consultant). That position required a technical background and "a deep knowledge" of defendant's products, as well as other applications and software that customers used. As a sales consultant, plaintiff was expected to and did perform duties that would classify him as a "computer software professional" within the meaning of

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

[2] Because this is an appeal from a trial court's grant of summary judgment, we liberally construe the opposing party's evidence and strictly scrutinize that of the moving party, resolving evidentiary doubts or ambiguities in the opposing party's favor. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499–500 (*Patterson*).)

Industrial Welfare Commission (IWC)[3] wage order No. 4-2001. (Cal. Code of Regs., tit. 8, § 11040; Wage Order No. 4.)

At the outset of his employment, plaintiff received a section 2810.5 notice from defendant advising that he would be paid hourly, his regular hourly rate would be $55.29 an hour, and his overtime rate would be $82.94 an hour.[4] He also received defendant's offer letter which provided that: he would "be paid a weekly base salary of $2,211.60 which represent[ed] a regular hourly rate of $55.29;" he would "be eligible for overtime pay of not less than $82.94 per hour of overtime worked;" and his "actual overtime pay rate may vary, if during the period [he] work[ed] overtime, [he had] earnings in addition to [his] base salary." Plaintiff was required to submit time sheets specifying 40 work hours and to include a daily one-hour lunch break, regardless of whether he actually took or worked through his lunch period.

Throughout his tenure at defendant, plaintiff worked a substantial amount of overtime and double-time hours but was not permitted to claim those hours on his time sheets. His wage statements were based on an hourly rate of pay, specified 40 hours per week, and stated that his regular hours and bi-monthly pay were calculated based on his regular hours inserted in his time sheets. Plaintiff estimated that defendant owed him

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[3] As explained below, the IWC promulgated wage orders that provided various exemptions from California's overtime requirements.

[4] Plaintiff attached a copy of the section 2810.5 notice he received at the outset of his employment and a copy of his offer letter as an exhibit to his opposition declaration.

$155,366.52 in unpaid overtime for the period from November 1, 2016, through April 30, 2019. Plaintiff's employment with defendant terminated on April 30, 2019.

III. PROCEDURAL BACKGROUND

A. *Complaint*

On October 24, 2019, plaintiff filed a class action complaint against defendant asserting 10 claims based on Labor Code violations and one claim for violation of Business and Professions Code section 17200 et seq. (UCL). Specifically, plaintiff alleged violations of: (1) sections 510 and 1198 for unpaid overtime; (2) sections 226.7 and 512 for unpaid meal premiums; (3) section 226.7 for unpaid rest period premiums; (4) sections 1194, 1197, and 1197.1 for unpaid minimum wage; (5) sections 201, 202, and 203 for unpaid final wages; (6) section 204 for untimely payment of wages during employment; (7) section 226, subdivision (a) for failure to provide accurate wage statements; (8) section 1174, subdivision (d) for failure to keep accurate payroll records; (9) section 2802, subdivision (a) for failure to reimburse for business expenses; (10) the UCL; and (11) section 2699, et seq. (Labor Code Private Attorneys General Act of 2004 (PAGA)).

In its September 1, 2021, answer, defendant asserted, among other defenses, an affirmative defense entitled, "Exempt Status," which alleged: "[p]laintiff's claims and the claims of some or all of the proposed class members and aggrieved employees are barred, in whole or in part, because some or all of the proposed class members were exempt from the California wage-and-hour laws on which their claims are based, including

but not limited to because they qualified for the professional exemption."

B. *November 1, 2023, Status Conference*

Following discovery, the trial court set a status conference for November 1, 2023. In the parties' joint status conference statement, plaintiff advised the court that Code of Civil Procedure section 583.310 required that the case be set for trial within five years of February 20, 2020. Plaintiff also advised that, if defendant filed a motion for summary judgment on his individual claims,[5] he would file a motion for leave to amend to allow him to add a new plaintiff, Brian Cripe, and to assert causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Defendant requested that the court set dates and deadlines for hearings on defendant's anticipated summary judgment motion and a class certification motion.

At the November 1, 2023, status conference, the trial court set December 11, 2023, as the hearing date for plaintiff's motion for leave to amend; February 26, 2024, for the hearing date on defendant's summary judgment motion; April 9, 2024, for the hearing on the class certification motion; and October 14, 2024, for a jury trial.

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[5] Defendant' had previously informed the court during a June 2023, hearing of its intent to file a summary judgment motion on the grounds that plaintiff was an exempt employee not subject to the wage and hour provisions on which his individual claims were based.

C. *Motion for Leave to Amend*

On November 13, 2023, plaintiff filed his motion for leave to amend, explaining that the motion was necessary "as a defensive measure" because defendant indicated it would file a summary judgment motion. Plaintiff attached his proposed amended complaint, which included two new contract-based causes of action and new allegations relevant to proposed plaintiff Cripe.

On November 28, 2023, defendant filed its opposition to the motion, arguing, among other things, that plaintiff had all the information necessary to plead his contract-based claims when he filed his complaint in October 2019, yet offered no excuse for the four-year delay in asserting those claims. Defendant also asserted that it would be prejudiced by the new claims and the new party because it would need to engage in additional law and motion practice and reconvene the depositions of both plaintiff and Cripe on the new claims.

At the December 11, 2023, hearing on the motion, the trial court took the matter under submission and then issued an order the next day denying the motion. On the request to add the two contract-based claims, the court explained: "Adding these new theories would require [d]efendant to take a new deposition of [p]laintiff to question him about his employment contract and would require additional dispositive motion practice, which would obviously frustrate the current summary judgment, class certification, and trial schedule. The [c]ourt finds that allowing [p]laintiff to amend to add the proposed contract causes of action this late in the litigation would prejudice [d]efendant. [Citations.] The [c]ourt 'refus[es] to broaden the issues in the

case under the circumstances presented' in this four-year-old case and denies the motion. [Citation.]"

On plaintiff's request to add Cripe, the court reasoned: "Adding Cripe would be prejudicial to [d]efendant because it would enlarge the issues in the lead up to trial, particularly as he is alleged to have had a different job title ('Senior Sales Consultant' versus [plaintiff's] position as 'Principle [*sic*] Sales Consultant'). For this reason, the motion is also denied as to Cripe, albeit without prejudice to Cripe filing his claims as his own, separate action and without prejudice to any arguments [d]efendant might make defending itself against Cripe."

D. *Summary Judgment Motion*

On December 1, 2023, defendant filed its summary judgment motion, arguing, among other things, that its evidence showed plaintiff's job duties met all the requirements for the exemption under Wage Order No. 4 governing "'professional, technical, clerical, mechanical and similar occupations,' which includes 'computer programmers and operators.'" According to defendant, because its evidence established all the elements of its professional exemption defense, plaintiff "was exempt from the overtime, meal, and rest break requirements" upon which his wage and hour claims were based, including his derivative claims for failure to timely pay wages due and at termination, wage statement and record keeping violations, and unfair business practices.

In his opposition, plaintiff argued there was a triable issue of fact as to whether he was a nonexempt employee based on three facts: (1) at the outset of plaintiff's employment, defendant

sent him a section 2810.5 notice specifying that he was to be paid hourly at a regular hourly rate of $55.29 and an overtime rate of $82.94; (2) at the outset of Cripe's employment, defendant sent him a section 2810.5 notice specifying that he was to be paid hourly at a regular hourly rate of $50.48 and an overtime rate of $75.72; and (3) defendant's person most knowledgeable (PMK) testified that plaintiff was hired as an hourly nonexempt employee. According to plaintiff, "[t]here is no case law interpreting . . . [s]ection 2810.5 and, certainly none which supports the proposition that an employer may re-designate a nonexempt employee as exempt, after the fact, for purposes of avoiding liability for failure to pay [overtime]" and otherwise deprive an employee of all of his rights under Wage Order No. 4. Plaintiff therefore maintained that, "at best, there is a dispute of a material fact which precludes summary judgment or adjudication on the issue of whether [d]efendant hired [p]laintiff as a nonexempt employee."

Following defendant's reply, the trial court held a hearing on defendant's summary judgment motion on February 16, 2024, and took the matter under submission. That same day, the court issued a minute order granting the motion.

The trial court began its analysis by addressing the parties' requests for judicial notice and evidentiary objections, including defendant's objections to Cripe's declaration which the court sustained "in full," finding "[h]is personal circumstances of employment irrelevant to merits of named plaintiff's claims."

On the motion relating to plaintiff's exempt status, the trial court explained: "The case as pled alleges violations of the Labor Code and Wage Orders promulgated thereunder under the necessary premise that [p]laintiff . . . was a [nonexempt]

employee. Whether [d]efendant told [plaintiff] that it would pay him as an hourly employee or pay him extra compensation as overtime is not relevant to whether he was a [nonexempt] employee for purposes of the Labor Code. His offer letter . . . refers to his employment as based on a 'weekly base salary of $2,211.60 which represents a regular hourly rate of $55.20. You will be eligible for overtime pay of not less than $82.94 per hour of overtime worked.' This does not characterize him as being '[nonexempt],' as such. Defendant has shown without dispute that [p]laintiff qualified at all times as an exempt Software Professional (Wage Order [No.] 4, § 1(A)(3)(h); see also . . . § 515.5), and as such, not covered by most of the statutes invoked."[6]

On March 11, 2024, the trial court entered a judgment in favor of defendant from which plaintiff timely appealed.

IV. DISCUSSION

A. *Summary Judgment Ruling*

1. Burdens of Proof and Standard of Review

The standards governing our review of an order granting summary judgment are well settled. "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a

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[6] The trial court also granted the motion as to plaintiff's claim for reimbursement of expenses but, as noted, plaintiff does not challenge that ruling on appeal.

shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850–851, fns. omitted.) As the moving party, "[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." (*Id*. at p. 850.)

"In reviewing a grant of summary judgment, we independently evaluate the record, liberally construing the evidence supporting the party opposing the motion, and resolving any doubts in his or her favor. [Citation.]" (*Patterson, supra*, 60 Cal.4th at pp. 499–500.) In conducting our de novo review, we consider "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

2. Legal Principles

Labor Code section 1173 granted the IWC a broad mandate to regulate the working conditions of employees in California, including the setting of standards for minimum wages and maximum hours. (*Industrial Welfare Com. v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 701–702.) "'[W]age and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18

wage orders, adopted by the IWC.' (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026 . . . .) 'The IWC's wage orders are to be accorded the same dignity as statutes. They are "presumptively valid" legislative regulations of the employment relationship [citation], regulations that must be given "independent effect" separate and apart from any statutory enactments . . . .' (*Id.* at p. 1027.) Wage orders take precedence over the common law to the extent they conflict. [Citation.]

"'When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. [Citations.] Time and again, [our Supreme Court has] characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code. [Citations.] In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees. [Citations.]' [Citation.]" (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839.)

Defendant moved for summary judgment citing Wage Order No. 4, which governs the wages and hours of "all persons employed in professional, technical, clerical, mechanical, and similar occupations . . . ." Section 1(A) of Wage Order No. 4 provides that certain portions of the order—including provisions relating to overtime pay, meal and rest periods and wage statements—do not apply to "persons employed in administrative, executive, or professional capacities." (Wage Order No. 4, § 1(A).)

Among other professional exemptions, Wage Order No. 4 exempts computer software professionals, including those paid on

an hourly basis. (Wage Order No. 4, subd. 1(A)(3)(h) ["[A]n employee in the computer software field who is paid on an hourly basis shall be exempt, if *all* of the following apply . . ."].)[7] In addition to describing the specific qualifications and job duties of

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[7] The computer software professional exemption from the statutory mandatory overtime provisions is codified in section 515.5 which provides, in pertinent part: "(a) Except as provided in subdivision (b), an employee in the computer software field shall be exempt from the requirement that an overtime rate of compensation be paid pursuant to Section 510 if all of the following apply: [¶] (1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment. [¶] (2) The employee is primarily engaged in duties that consist of one or more of the following: [¶] (A) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications. [¶] (B) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications. [¶] (C) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems. [¶] (3) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering. A job title shall not be determinative of the applicability of this exemption. [¶] (4) The employee's hourly rate of pay is not less than thirty-six dollars ($36.00) or, if the employee is paid on a salaried basis, the employee earns an annual salary of not less than seventy-five thousand dollars ($75,000) for full-time employment, which is paid at least once a month and in a monthly amount of not less than six thousand two hundred fifty dollars ($6,250)," subject to annual adjustment.

a computer software professional, the regulation provides that the employee must earn a minimum hourly rate of pay. (*Ibid.*)

Exemptions from statutory mandatory overtime provisions are affirmative defenses, so an employer bears the burden of proving that an employee is exempt. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794–795 (*Ramirez*).) "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. '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*, [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].)" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1015.)

3. Analysis

We conclude that defendant satisfied its initial burden of demonstrating the existence of an affirmative defense to plaintiff's wage and hour claims.[8] The 28 facts submitted in

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[8] Plaintiff does not dispute that the trial court's finding he was exempt from the Labor Code provisions governing minimum wage, overtime, meal breaks, and rest periods was sufficient to defeat all of his claims, including those based on the provisions governing timely payment of wages, wage statements, payroll records, as well as those based on the UCL and PAGA.

support of that defense showed plaintiff's job duties and hourly rate satisfied each of the requirements of section 1(A)(3)(h) of Wage Order No. 4 and section 515.5. Indeed, in the trial court, plaintiff's counsel conceded that plaintiff's job met all the criteria of the computer software professional exemption. And, on appeal, plaintiff acknowledges the concession, stating that, "while it is undisputed that [plaintiff] may have qualified as an exempt employee, [defendant] never availed itself of this opportunity . . . ."

Plaintiff contends, however, that his opposition evidence raised triable issues as to whether he was exempt, arguing that the admission by defendant's PMK concerning plaintiff's nonexempt status, the section 2810.5 notice he received at the beginning of his employment, and the wage statements he received supported an inference that he was nonexempt.[9] We disagree.

The PMK's admission that defendant hired plaintiff as a nonexempt employee does not raise a factual dispute about the duties he actually performed or whether he was paid more than the specified minimum wage. Moreover, the operative complaint did not allege a claim that would have required defendant to pay

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[9] Plaintiff also cites extensively to Cripe's declaration but, as explained below, we conclude the trial court did not err in excluding that testimony in its entirety and therefore do not consider it on appeal.

plaintiff in accordance with that misclassification, such as, for example, promissory estoppel.[10]

Similarly, the section 2810.5 notice plaintiff received did not raise a factual dispute concerning any of the requirements of the computer software professional exemption or the amount of plaintiff's hourly rate. Other than restating the regular and overtime hourly rates in his offer letter, the notice did not set forth any qualification for the sales consultant position or describe any duties plaintiff was expected to perform which would have suggested he was nonexempt.

Finally, that plaintiff was paid hourly during his tenure and promised overtime as part of his compensation did not support an inference he was nonexempt. The exemption contemplates that software professionals will be paid hourly. (Wage Order No. 4, § 1(A)(3)(h)(iv) ["The employee's hourly rate of pay is not less than . . ."]; section 515.5, subd. (a)(4) ["The employee's hourly rate of pay is not less than . . ."].) And, the fact that plaintiff's offer letter stated that he would be eligible for overtime compensation, in addition to his regular pay, did not nullify his status as an exempt software professional. (See *Boykin v. Boeing Co*. (1997) 128 F.3d 1279, 1281 [Interpreting the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-09, and holding that "overtime compensation, by itself, does not spoil exempt status"]; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1461 ["In arguing that IKON could be liable without regard to the work the account managers performed, [the appellant employees] assume that an employer is liable if it

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[10] Plaintiff does not argue that, at the time he was hired, defendant informed him that he would be treated as a nonexempt employee or that he relied to his detriment on that information.

classifies employees without regard to the law or investigating what work they do, even if the employees were, in fact, subject to the exemption. While such action on the part of an employer may be 'deliberate' and 'willful,' it is not 'misclassification'"].)

Defendant also suggests that the trial court erred as a matter of law by misinterpreting the legal import of section 2810.5. According to plaintiff, "when an employer provides an employee with a . . . section 2810.5 [notice], specifying that the employee is [nonexempt], plainly, as a matter of law, that employee is [nonexempt] until his status is formally changed to exempt." We disagree.

Plaintiff offers no authority for the proposition that section 2810.5 was intended to limit or modify the exemptions established under the IWC's wage orders. To the contrary, that section is a notice statute which, by its express terms, does not apply to exempt employees. (§ 2810.5, subd. (c)(2) ["For purposes of this section, 'employee' does not include any of the following: [¶] . . . [¶] An employee who is exempt from the payment of overtime wages by statute or the wage orders of the [IWC]"].) Because plaintiff's job position qualified at the outset of his employment as an exempt position, defendant was under no legal obligation to send the section 2810.5 notice to plaintiff, and he had no legal entitlement to receive it. The fact that the notice was sent, by mistake or otherwise, thus had no legal effect on plaintiff's status as an exempt employee under the applicable Labor Code provisions and regulations and did not operate to convert his exempt job position to nonexempt status.

B. *Ruling on Leave to Amend*

Plaintiff next contends that the trial court abused its discretion when it denied his motion for leave to add new, contract-based claims. According to plaintiff, the proposed contract-based claims were "based upon the same facts alleged in support of the Labor [Code] causes of action. There was no departure from the general area of the cause set up in the pleadings."

1. Standard of Review

"We review a denial of leave to amend for abuse of discretion." (*Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739.) "Generally, leave to amend should be liberally granted. However, unwarranted delay justifies denial of leave to amend. [Citations.] And the liberal policy favoring leave to amend 'applies "'only "[w]here no prejudice is shown to the adverse party."'"' [Citation.] Prejudice exists where the proposed amendment would require delaying the trial, resulting in added costs of preparation and increased discovery burdens. [Citation.]" (*Ibid*.)

2. Analysis

At the time of the hearing on plaintiff's motion, his action had been pending for over four years and dates had been set for defendant's summary judgment motion, a class certification motion, and trial. Written discovery and depositions on the merits of the claims pleaded had already taken place and

defendant had filed its summary judgment motion. Plaintiff provided no excuse for the delay, arguing only that the amendments were necessitated by defendant's summary judgment motion. As the trial court noted, granting leave at that point would disrupt the motion and trial schedule because additional discovery on the new claims would have been required, resulting in further motion practice and a delay in the hearing on the potentially dispositive summary judgment motion, the certification of the class, and trial.[11] It was therefore reasonable for the court to conclude that defendant would be prejudiced by the amendments. Accordingly, there was no abuse of discretion.

C. *Ruling on Objections to Cripe Declaration*

Plaintiff contends that the trial court erred by sustaining defendant's objection to Cripe's declaration testimony as irrelevant to the merits of plaintiff's individual claims. According to plaintiff, Cripe's testimony would have served to corroborate plaintiff's declaration testimony.

1. Standard of Review

We generally review evidentiary rulings in the context of a summary judgment motion for abuse of discretion. (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 52; but see

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[11] As explained, the court set trial for October 14, 2024, and, as plaintiff calculated in his status conference statement, the Code of Civil Procedure section 583.310 mandatory five-year limit within which to bring the matter to trial was set to expire on or about February 20, 2025.

Reid v. Google, Inc. (2010) 50 Cal.4th 512, 535 [declining to decide governing standard for review of evidentiary objections in summary judgment proceedings].) But even under a de novo standard of review, we would find no error in the trial court's ruling.

2. Analysis

The issue before the trial court on summary judgment was whether the duties that plaintiff was required to perform for defendant and his hourly rate qualified his job position as exempt. Cripe's declaration described *his position* with defendant, which was different from plaintiff's job position. Thus, the court did not err by concluding that Cripe's declaration testimony was irrelevant to whether the position in which plaintiff performed was exempt.

Moreover, the fact that Cripe's testimony may have corroborated plaintiff's testimony did not warrant its admission on summary judgment. Such corroborating evidence would have gone to the weight and credibility to be accorded plaintiff's testimony, neither of which was at issue on the motion.

Finally, even if the trial court erred by concluding the testimony was irrelevant, plaintiff has failed to show how he was prejudiced by the error. (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447 ["Claims of evidentiary error under California law are reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . , that is embodied in article VI, section 13 of the California Constitution"].) Other than suggesting that Cripe's testimony about his job position would

have corroborated plaintiff's testimony, plaintiff makes no attempt to show how the introduction of Cripe's testimony would have resulted in a more favorable outcome on the motion.

V. DISPOSITION

The judgment is affirmed. Defendant is awarded costs on appeal.

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KIM (D.), J.

We concur:

HOFFSTADT, P. J.

MOOR, J.