

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2607-10T2

E. MICHELLE ANDERSON, ANNIE  
OLANDRIA, ROSA NEWCOMBE and  
TASWIYAH RAOOF, Individually  
and on Behalf of All Others  
Similarly Situated, As Class  
Representatives,

Plaintiffs-Appellants,

v.

PHOENIX HEALTH CARE, INC.,  
KATHLEEN CARROLL and STEVEN  
CARROLL,

Defendants-Respondents.

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Submitted September 13, 2011 - Decided November 16, 2011

Before Judges Fisher and Nugent.

On appeal from the Superior Court of New  
Jersey, Law Division, Essex County, Docket  
No. L-5282-08.

Blau Brown & Leonard, LLC, attorneys for  
appellants (Shelly A. Leonard, on the brief).

Fox Rothschild LLP, attorneys for  
respondents (Mark E. Tabakman, of counsel;  
Mr. Tabakman and Keith A. Reinfeld, on the  
brief).

PER CURIAM

Plaintiffs are registered nurses formerly employed by defendants Phoenix Health Care, Inc., Kathleen Carroll and Steven Carroll. In this appeal, we consider -- and reject -- plaintiffs' argument that, as registered nurses, they were entitled overtime compensation pursuant to the New Jersey Wage and Hour Law (NJWHL), N.J.S.A. 34:11-56a1 to -56a30.

Plaintiffs' claims were first asserted in 2007 when they filed a civil action in the United States District Court for the District of New Jersey. Plaintiffs alleged, on their own behalf as well as others similarly situated, an entitlement to relief pursuant to the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219, the NJWHL, and common law principles. A federal district judge dismissed without prejudice the NJWHL claim, and on June 27, 2008, plaintiffs filed this action seeking relief based on the NJWHL.<sup>1</sup>

When plaintiffs moved for class certification and an extension of the discovery end date, defendants cross-moved for summary judgment, arguing that nurses are exempt from the NJWHL's overtime requirements and asserting that their claims

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<sup>1</sup>Defendant served an offer of judgment on plaintiff Anderson in the amount of \$14,400 in the federal action. Anderson rejected the offer but by way of a later motion, the district judge dismissed the action on mootness grounds, holding that the offer conveyed constituted full relief for the damages she sought. Defendant thereafter conveyed \$14,400 to plaintiff Anderson.

were otherwise barred by the NJWHL's good faith defense. For reasons expressed in a written decision dated December 15, 2010, the trial judge granted defendants' cross-motion and as a consequence, denied plaintiffs' motion on mootness grounds.

Plaintiffs appealed, arguing that the trial judge erred in interpreting the overtime statute, N.J.S.A. 34:11-56a4, as well as the statute that creates "a complete bar" to such an action when an employer acts

in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the Department of Labor and Industry<sup>[2]</sup> or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged.

[N.J.S.A. 34:11-56a25.2.]

In addition, plaintiffs argue that the judge should not have deferred to the opinion of Michael McCarthy, the Director of the Division of Wage and Hour Compliance,<sup>3</sup> as to the manner in which the overtime regulations have been applied for many years. And

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<sup>2</sup>The Department of Labor and Industry is now known as the Department of Labor and Workforce Development, N.J.S.A. 34:1A-1.2, and will be referred to in this opinion as the Department.

<sup>3</sup>Although the NJWHL refers to the Wage and Hour Bureau and the record at times refers to the Division of Wage and Hour Compliance, we assume that these terms refer to the same division of the Department.

plaintiffs lastly assert that the \$14,400 payment to Anderson resulting from the federal proceedings did not fully compensate her and that her claim for additional damages should be reinstated. We find no merit in these arguments and affirm.<sup>4</sup>

In considering whether summary judgment was properly entered, we initially observe there are no disputed questions of material fact. The matter in controversy turns on a question of law: whether the applicable statute and regulation supported plaintiffs' claim to overtime. As a general matter, the NJWHL requires that employers pay one-and-one-half times an employee's regular hourly wage for each hour worked in excess of forty hours a week; excepted from this are individuals employed in bona fide executive, administrative or professional capacities. N.J.S.A. 34:11-56a4. N.J.A.C. 12:56-7.3(a) further defines a professional as including, among others, employees whose primary duty consists of work "[r]equiring knowledge of an advanced type

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<sup>4</sup>In a section of their brief entitled "Issues on Appeal," plaintiffs additionally assert that we should determine whether the judge erred in denying their motion for class certification and an extension of discovery. Those issues were not briefed and we consequently decline to consider them. See Mid-Atlantic Solar Energy Indus. Assoc. v. Christie, 418 N.J. Super. 499, 508 (App. Div.), certif. denied, 207 N.J. 190 (2011); N.J. Citizens Underwriting Reciprocal Exch. v. Kiernan Collins, D.C., 399 N.J. Super. 40, 50 (App. Div.), certif. denied, 196 N.J. 344 (2008). In any event, because we conclude that plaintiffs' NJWHL claim is without merit, the judge was correct to conclude that these other issues were moot.

in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes," and "[w]ho is compensated . . . on a salary or fee basis . . . at a rate of not less than . . . \$400.00 per week effective April 1, 1992."<sup>5</sup> Plaintiffs concede they both performed the work of "professionals" and earned the minimum salary required for exemption. These undisputed facts favor a conclusion that plaintiffs were exempt. On the other hand, inuring in plaintiffs' favor, is the undisputed fact that they were paid on an hourly not salaried basis. In short, the viability of

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<sup>5</sup>N.J.A.C. 12:56-7.3 was superseded by regulations adopted on August 15, 2011. The new regulation retains the exemption for "bona fide executive, administrative, professional or outside sales capacity," but "defin[es] and delimit[s]" those exempted, and declares that "the provisions of 29 CFR Part 541 are adopted herein by reference." 43 N.J.R. 2353. Among other things, the federal regulations referred to in the new state regulation expressly direct that "[r]egistered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption" but "[l]icensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations." 29 C.F.R. § 541.301(e)(2). In any event, the parties have not argued that the regulations adopted by the Department a few months ago have application here, so we need not determine whether nurses similarly situated as plaintiffs will in the future be entitled to overtime compensation.

plaintiffs' NJWHL action for overtime compensation turned on defendants' contention that registered nurses fall within the professional exemption even when paid on an hourly basis so long as their weekly compensation, at their hourly rate, exceeded the weekly minimum contained in N.J.A.C. 12:56-7.3(a)(5).

We agree with the trial judge that although the regulation does not expressly exempt professionals paid on an hourly basis, the NJWHL was not intended to permit overtime to such employees when they are compensated at least as much as the weekly minimum referred to in N.J.A.C. 12:56-7.3(a)(5). This result is consistent with the manner in which the Department has interpreted and applied these laws for many years. In support of their motion for summary judgment, defendants submitted a 1975 opinion letter of the Director of what was then referred to as the Wage and Hour Bureau dealing with this precise issue:

The fact that the employee is paid on an hourly basis would not cancel this exemption if the employee is receiving at least the minimum weekly amount provided in our regulations for the week.

Thirty-three years later, Michael McCarthy, the current Director of the Division of Wage and Hour Compliance, who has been affiliated with the Department for nearly forty years, gave the following similar opinion:

Bonafide [sic] professionals, including a registered nurse, who meet all other

criteria contained in this regulation and whose weekly gross compensation does not fall below \$400.00 per week (regardless of salary/fee/hourly rate) may qualify for this exemption.

This enforcement policy has been consistently administered by the New Jersey Division of Wage and Hour Compliance for the past forty years.

When interpreting a statute or regulation that an agency is charged with enforcing, we will give "substantial deference to the agency's interpretation which 'will prevail provided it is not plainly unreasonable.'" In re Raymour and Flanigan Furniture, 405 N.J. Super. 367, 376 (App. Div. 2009) (quoting Merin v. Maglaki, 126 N.J. 430, 437 (1992)). We reject plaintiffs' contention that this longstanding interpretation of the regulation, which is entirely consistent with the legislation upon which it is based, is unreasonable. The critical question is whether the employee is a professional, not whether that professional's compensation is determined by reference to an hourly rate instead of a salaried rate. This well-established interpretation is entitled to our deference. If there is to be any change, it must come either through an amendment of the applicable regulation or the legislative process.


Even if it was reasonable to interpret the statute in some other manner, defendants were entitled to the application of the

good faith exception, N.J.S.A. 34:11-56a25.2, because they conformed to the agency's longstanding interpretation that registered nurses are not entitled to overtime so long as they are compensated in excess of the weekly minimum.

For these reasons, and finding insufficient merit in all plaintiffs' other arguments to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), we affirm the order dismissing the complaint.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION