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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TERRY HEAD et al.,

Plaintiffs and Appellants,

v.

COSTCO WHOLESALE
CORPORATION,

Defendant and Respondent.

B222841

(Los Angeles County
Super. Ct. No. BC409805)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Emilie H. Elias, Judge. Affirmed.

Hagens Berman Sobol Shapiro, Steve W. Berman, Lee M. Gordon and Reed R.
Kathrein; Rehwald Glasner & Chaleff and Daniel Chaleff for Plaintiffs and Appellants.

Seyfarth Shaw, David D. Kadue, James M. Harris and Aaron Lubeley for
Defendant and Respondent.

INTRODUCTION

We must determine if the evidence presents a factual dispute as to whether Costco Wholesale Corporation (Costco) miscalculated the regular rate of pay in computing overtime for its salaried, nonexempt ancillary managers after reclassifying them from salaried exempt to salaried nonexempt. Costco used a conversion formula, which reduced these ancillary managers' salary for a 40-hour workweek, and based upon the reduced salary, determined the regular rate of pay for purposes of calculating overtime compensation. We conclude Costco's use of the reduced base salary in determining these managers regular rate of pay, rather than the rate listed in Costco's internal personnel form, did not violate the Labor Code. Since the regular rate of pay was properly calculated, and it is undisputed these ancillary managers were paid overtime compensation at the premium rate, we affirm the final class judgment entered following the trial court's order granting summary judgment.

UNDISPUTED FACTS

In 2001, Costco reclassified its ancillary managers from salaried exempt to salaried nonexempt. Costco used a conversion formula to ensure that these ancillary managers' income would remain the same after reclassification. Costco prepared a memorandum explaining the conversion formula and communicated the conversion formula to ancillary managers.

1. *Conversion Formula From Salaried Exempt To Salaried Nonexempt*

Before conversion, ancillary managers were expected to work 45 hours per week. Upon reclassification, the expectation was the ancillary managers would work the same hours, with a minimum of five hours of overtime per week.

Costco's conversion formula established the ancillary manager's salary based upon a 40-hour workweek. Costco's formula to obtain the new salary was to divide the annual salary before reclassification by 2,470. Two thousand four hundred seventy represented 40 hours per week for 52 weeks (2,080), plus the anticipated five hours of overtime per week for 52 weeks (260), plus 2.5 hours (the overtime premium) per week for 52 weeks (130).

After reclassification, an ancillary manager who worked 45 hours (40 regular and 5 overtime) would receive the same pay he or she received before reclassification. But, if an ancillary manager worked less than or more than 45 hours, the salary would remain the same, but overall compensation would fluctuate.

Costco also converted vacation pay to the equivalent of a 45-hour workweek, which represented the equivalent of a week's pay after reclassification.

2. *Pay Rates In Costco's Internal Personnel Forms*

For a period of time after reclassification, Costco did not revise its Employee Information Change (EIC) form to reflect the new compensation method. The EIC form instead listed an employee's "current rate," and "new rate." The EIC form also referred to "salary class," and had a box to check either "hourly," or "salary." During the class period, ancillary managers' EIC form listed the "current rate," and "new rate," as annual compensation. As noted, after reclassification, the rate listed in the EIC form included a minimum of five hours of overtime at the premium rate.

The company's computer system tracks "pay rate history," which is identical to the rate in the EIC forms.

In 2005, Costco revised the EIC form to list the "annual expected rate of pay (assuming 45 hours per week)," which was the equivalent of "current rate," "base salary (assuming 40 hours per week)," hourly rate, and overtime rate of pay. The change in the EIC form did not affect the method of compensating ancillary managers.

3. *Wage Statements Reflect New Regular Rate Of Pay*

Costco's wage statements list the regular rate of pay for 80 hours and overtime pay at one and one-half times the regular hourly rate of pay. The overtime hours on the submitted wage statements vary.

SUMMARY JUDGMENT MOTIONS

The ancillary managers' miscalculation claim is the remaining claim of a previously filed class action, *Randall v. Costco Wholesale Corporation*, Los Angeles Superior Court case No. BC296369. After class certification, the parties settled the *Randall* action.

The restyled class action complaint alleges Costco violated Labor Code section 515, subdivision (d)¹ following reclassification by miscalculating overtime compensation. Subdivision (d) of section 515 states: “[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee’s regular hourly rate shall be 1/40th of the employee’s weekly salary.” Based upon this statutory violation, the complaint also alleges a violation of the unfair competition law. (Bus. & Prof. Code, § 17200 et seq.)

Costco and plaintiffs filed summary judgment and summary adjudication motions following the trial court’s order adopting the class certification ruling in *Randall*. The trial court granted Costco’s motion and denied plaintiffs’ motion, concluding Costco did not violate the Labor Code. The trial court rejected the arguments that (1) Costco could not reduce salaries upon reclassification, and (2) Costco miscalculated the overtime pay because the regular rate of pay should have been calculated from the rate reflected in the EIC form, which plaintiffs contended was their annual salary.

The trial court entered its final class judgment, and plaintiffs timely appealed from the judgment entered after the order granting Costco’s motion for summary judgment.

DISCUSSION

Plaintiffs’ contention on appeal restates their position in the trial court, that is, Costco violated the Labor Code because after reclassification it should have calculated the regular rate of pay from what they characterize as the “reported salary” listed in the EIC form. Plaintiffs contend the wage statements inaccurately reflect a reduced base salary which contradicts the EIC form. In other words, Costco was not permitted to reduce the base salary after reclassification. We reject this contention and conclude Costco was not required under the Labor Code to pay ancillary managers the same hourly rate after reclassification, and Costco gave ancillary managers sufficient notice of their recalculated base salary. Therefore, it is undisputed that after reclassification, the use of “current rate” in the EIC form did not reflect a “base salary,” and Costco’s wage

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

statements listing the regular rate of pay and overtime rate of pay comply with the Labor Code.

1. *Summary Judgment Standard Of Review*

On appeal, we review de novo an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)). The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, at p. 843.) In making this determination, we view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the opposing party. (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, at p. 843.) Costco has the burden of producing evidence showing that one or more elements of the plaintiffs' cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, at pp. 849, 850-851, 854-855.) The burden then shifts to the plaintiffs to produce specific facts showing a triable issue as to the cause of action or the defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at pp. 849, 850-851.) Despite the shifting burdens of production, Costco, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. (*Aguilar*, at p. 850.)

In reviewing the propriety of an order granting summary judgment, we apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether Costco has established facts that justify a judgment in its favor. The final step is to determine whether the plaintiffs demonstrate the existence of a triable, material factual issue. (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1279, superseded by statute on another point, as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4.) We find no triable, material factual issue presented here.

2. *Costco's Method Of Calculating Regular Rate Of Pay For Overtime Compensation Does Not Violate The Labor Code*

Overtime calculations are based upon an employee's regular rate of pay. The regular hourly rate of a nonexempt full-time salaried employee is 1/40th of the employee's *weekly salary*. (§ 515, subd. (d).) Overtime compensation is paid at one and one-half times the employee's regular hourly rate. (§ 510, subd. (a).) There is no dispute Costco's ancillary managers were paid at this premium rate; the dispute is the regular hourly rate of pay.

Appellants contend "weekly salary" as used in section 515, subdivision (d), should have been derived from taking the current rate in their EIC form and dividing it by 52 weeks (assuming a 40-hour workweek). In reading wage statutes, "words are to be given their plain and commonsense meaning." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) We also recognize that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. (*Ibid.*; see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Section 515, subdivision (d) is not ambiguous; nor does the statutory language completely resolve this dispute.

"Salary" is not defined in the Labor Code. We must determine the usual and ordinary meaning of "salary." (See *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1103; see also *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1142.) "Salary" is defined as a "fixed compensation paid regularly (as by the year, quarter, month, or week) for services[.]" (Webster's 3d New Internat. Dict. (unabridged ed. 1971) p. 2003; see *California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist.* (2002) 95 Cal.App.4th 183, 194; *Proctor v. S.F. Port Authority* (1968) 266 Cal.App.2d 675, 680; see also 29 C.F.R., § 541.602(a) (2004) [federal regulation implementing federal Fair Labor Standards Act of 1938 (FLSA) defines "salary basis" as a "predetermined amount"].) The Legislature's use of *weekly salary* in section 515, subdivision (d) is consistent with the commonsense meaning of fixed compensation.

By contrast, a “rate” is “a fixed or established portion or measure[.]” (Webster’s 3d New Internat. Dict., *supra*, at p. 1884.) Section 515, subdivision (d) uses “rate” in this manner, by referring to “overtime rate,” and “regular hourly rate.” (See § 515, subd. (d); see also § 226, subd. (a) [itemized wage statements must list all “applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee”].) Thus, the use of “rate” and “salary” in section 515, subdivision (d) is not interchangeable.

The dispute here, however, is Costco’s, not the Legislature’s use, of the word “rate.” Appellant contends Costco’s use of “rate,” in the EIC form means salary. Upon reclassification, Costco took the “current rate” as reflected in the EIC form and calculated a weekly salary (fixed compensation for 40-hour workweek) as reflected in the wage statement. As noted, the conversion formula assumed five hours of overtime at the premium rate in an attempt to compensate ancillary managers after reclassification at the same “current rate” reflected in the EIC form. After reclassification, the “current rate” no longer represented fixed compensation. If an ancillary manager worked more or less than five hours of overtime, he or she would not be paid the “current rate” reflected in the EIC form. Thus, the undisputed evidence establishes after reclassification only the wage statement accurately reflected the ancillary manager’s salary.²

Appellants refer to the “current rate” in the EIC form as the “reported salary,” which they contend was an agreement between the ancillary managers and Costco, and could not be reduced after reclassification. We disagree.

After reclassification, Costco was free to set the base salary at any amount subject to the minimum wage laws. Nothing in the Labor Code required Costco to use the

² The trial court granted Costco’s request to take judicial notice of a claim filed by an ancillary manager with the Department of Labor Standards Enforcement challenging Costco’s reduction in salary in connection with the reclassification. The Deputy Labor Commissioner rejected the claim, stating Costco did not violate the Labor Code and properly compensated the claimant for overtime compensation. We independently reach the same conclusion based upon the evidence presented in support of and in opposition to the motion for summary judgment.

“current rate” in the EIC form as the equivalent of a 40-hour workweek.³ To accept appellants’ position would mean ancillary managers after reclassification would be paid overtime upon overtime. An employer of an at-will employee can unilaterally modify the compensation agreement, and an employee who receives notice of the modification impliedly accepts it by continuing employment after the modification. (See *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 636-639.) As one class representative testified, his claim was based upon the lower base salary paid after reclassification, not a violation of the overtime laws.

Appellants also contend there are indicia that the “current rate” actually was the annual salary after reclassification based upon Costco’s decision to convert vacation pay to the equivalent of a 45-hour workweek and to use the current rate as the basis for a pay increase. This argument is primarily based upon a United States Supreme Court case, addressing the regular rate of pay where the employer paid its employees a lump-sum salary that included regular time and overtime compensation. (*Madison Ave. Corp. v. Asselta* (1947) 331 U.S. 199, 204, 205-208, 210.) In determining that the employer violated the FLSA, the court looked at certain indicia, including an employer’s practice of paying overtime when the employee was out sick, to determine if the lump-sum salary actually included overtime pay. (*Id.* at p. 205; see also *Marshall v. Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 801 [employer’s use of annual pay to determine pay raises indicated failure to comply with overtime laws].) These indicators are useful to determine whether the lump-sum salary actually includes overtime compensation. (See also *Brennan v. Elmer’s Disposal Service, Inc.* (9th Cir. 1975) 510 F.2d 84, 87-88 [fixed lump-sum salary for a six-day, 50-hour workweek violated the FLSA].) Since Costco did

³ Although not alleged in the complaint, appellants contend the reduction in salary violates subdivision (c) of section 511. Subdivision (c) of section 511 states: “An employer shall not reduce an employee’s regular rate of hourly pay as a result of the adoption, repeal, or nullification of an alternative workweek schedule.” This subdivision does not apply because this case does not involve an alternative workweek.

not pay a lump-sum salary (regular and overtime) regardless of actual hours worked, the indicators relied on in these cases are irrelevant.

For the same reason, appellants' reliance on state and federal cases addressing fixed-salary agreements to compensate for overtime are inapposite. (See *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1491-1492; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725-726; see also *Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal.App.4th 968, 974; *Marshall v. Chala Enterprises, Inc.*, *supra*, 645 F.2d at p. 801; *Brennan v. Elmer's Disposal Service, Inc.*, *supra*, 510 F.2d at pp. 86-87.) As noted, after reclassification, Costco did not pay its ancillary managers a fixed salary that included regular and overtime hours. Costco also did not need an explicit wage agreement to reduce the ancillary manager's weekly base pay after reclassification. Thus, as a matter of law, Costco did not violate section 515, subdivision (d).

DISPOSITION

The judgment is affirmed. Costco is entitled to costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.