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FILED
SUPERIOR COURT, METROPOLITAN DIVISION
COUNTY OF KERN

MAR 10 2016

TERRY McNALLY, CLERK
BY _____ DEPUTY

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF KERN
13

14 WARREN K. DAVIS,
15 Plaintiff,

16 v.

17 KOMOTO PHARMACY, INC., a
18 California Corporation; MEDICAL
19 PHARMACY, business form unknown; and
20 DOES 1 through 100, inclusive,
21 Defendants.

CASE NO: S-1500-CV-278546
[Assigned: Hon. David R. Lampe, Dept.
11]

**[PLAINTIFF'S SECOND PROPOSED]
STATEMENT OF DECISION**

Complaint Filed: January 23, 2013
Trial Date: April 15, 2015

22 The court renders judgment for the Plaintiff and against the Defendant upon the First
23 Cause of Action of the Complaint for unpaid wages for unpaid overtime. The court renders
24 judgment against the Plaintiff upon the other causes of action.

25 Judgment for awardable costs incurred, if any, shall be apportioned according to law.

26 This case turns upon credibility and the burden of proof.

27 Davis was an employed pharmacist with the defendant for approximately 10 years. His
28

1 employment was terminated on November 6, 2012. Komoto considered Davis part of its
2 "management team." He was paid a salary. His hours were not accounted for by the defendant,
3 and he was not paid overtime. Davis had considerable management duties. He was responsible
4 for overseeing the day-to-day operations of the medical pharmacy. He directed and supervised
5 the pharmacy staff. He attended management and policy meetings. He was responsible for
6 purchasing and securing the pharmaceutical medicines and had responsibility to help ensure
7 the efficient and profitable operation of the medical pharmacy. The defendant contends that
8 Davis is an exempt employee, and therefore not entitled to overtime.

9 Davis argues that the "exempt employee" exception is an affirmative defense not
10 pleaded, and therefore not available to the defendant at trial. The court finds that the answer in
11 this case is sufficient to put exempt status at issue. The answer raises the affirmative defense of
12 lawful payment of wages. The "exempt status" exception is in the nature of a traverse of the
13 complaint. While not artfully or expressly pleaded, it is enough, and there is no surprise or
14 prejudice.

15 That said, the employer nevertheless bears the burden of proving exempt status.
16 Defendant has failed to meet its burden that more than 50% of Davis's time was engaged in
17 exempt duties. The defendant's witnesses conceded that Davis performed nonexempt duties
18 such as filling and checking prescriptions, answering phones, attending to ordinary customer
19 service, and the like. A task is either exempt or nonexempt. The defendant has the burden of
20 quantifying the exception, and has not done so here. (*Heyen v. Safeway, Inc.* (2013) 216
21 Cal.App.4th 795.) The defense witnesses also conceded that Davis worked sometimes more
22 than eight hours in a day and more than 40 hours in a week. The court also finds it to be true
23 that frequently Davis worked less than eight hours in a day and less than 40 hours in a week.
24 However, the facts and law do not support that Davis's overtime was offset by compensating
25 time off, since this was not a policy of the company and there was no such agreement in
26 writing.

27 Davis is therefore entitled to some overtime pay which he did not receive.

28 On the other hand, Davis is not a credible witness. He dissembles from the witness

1 stand. He evades direct answers. He calculates his testimony to his own advantage, rather than
2 offering the straightforward truth. He has a grudge, and his testimony exhibits the bias of that
3 grudge and desire to obtain a judgment from the company. The court disbelieves Davis's
4 testimony that 50.8 hours per week is an accurate estimate of his overtime based upon his
5 calendar entries. The court has examined Davis's calendar entries in detail. The court
6 completely discounts the entries for 2012, in that, by that time, Davis was well aware that his
7 employment was in jeopardy, and the court believes that he was constructing evidence for a
8 potential lawsuit at that time or after the fact. Resort to the other calendars is of little
9 assistance, because beginning and ending hours are, for the most part, with some exception,
10 not stated.

11 The court is therefore in the difficult position of finding that the plaintiff is entitled to
12 some overtime, but the court distrusts the evidence offered to support plaintiff's burden to
13 prove his damages. Nevertheless, in accord with *Hernandez v. Mendoza* (1988) 199
14 Cal.App.3d 721, the court has some duty to consider imprecise evidence of the employee
15 where the employer has failed to maintain records, and that the court must search the record to
16 draw whatever reasonable inferences it can from the employee's evidence. Here, although it is
17 extremely imprecise, Davis has demonstrated that he did spend some overtime in attending to
18 monthly "bubble wrap" sessions, employee evaluations, alarm responses, clean up, and other
19 duties. A review of the calendar entries from 2011 suggest to the court that, 15 hours of
20 overtime per month is a fair estimate, noting that this amount was likely accompanied by times
21 when the plaintiff worked less, which the court does not offset. The court awards this amount
22 to plaintiff for the claim period.

23 Plaintiff has not met his burden to prove uncompensated failure to provide lawful meal
24 periods. Plaintiff claims that Komoto's handbook fails to address a second meal period for
25 hours worked in excess of ten hours per day. Davis obviously had his own discretion to take
26 his ordinary meal periods, and, if he chose not to do so, Komoto is not liable. Here, Davis
27 offers no credible evidence that he ever worked more than ten hours in a day. That the court
28 has found some basis to award overtime under the standards of *Hernandez* cannot be

1 extrapolated to “presume” that those hours encompassed more than ten hour days.

2 Plaintiff has also not met his burden to prove that he was denied payment of earned
3 ETO in his final wages which he claims as an additional amount of damages pursuant to Labor
4 Code section 201.

5 Plaintiff has failed his burden to prove a willful failure to pay wages under Labor Code
6 section 203. Penalties under Labor Code section 203 are properly awarded when an employer
7 “willfully fails to pay” an employee all wages owed at the times specified in Labor Code
8 section 201 for discharged employees. (Lab. Code, § 203, subd. (a).) To be at fault within the
9 meaning of section 203, the employer's refusal to pay need not be based on a deliberate evil
10 purpose to defraud workmen of wages which the employer knows to be due. As used in
11 section 203, “willful” merely means that the employer intentionally failed or refused to
12 perform an act which was required to be done. A good faith belief in a legal defense will
13 preclude a finding of willfulness. (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.
14 App. 4th 36, 54.) Here, there was a good faith belief that Davis was employed under an
15 administrative or executive exemption from overtime. The defense may, in fact, be true. The
16 court has simply found that Komoto has not met its burden to demonstrate it quantitatively.
17 For the same reasons, Komoto is not liable under Labor Code section 226 for “waiting time”
18 penalties, because there is no evidence of a “knowing and intentional failure.”

19 The facts as determined by the court also do not support a finding of an unlawful
20 practice under Business and Professions Code section 17200. The cause of action is intended
21 to “borrow” the allegations of Labor Code violations under the “unlawfulness” prong of the
22 Unfair Competition Law in order to seek restitution which would “extend” the statute of
23 limitations from three to four years. However, the court finds that, although the definition of
24 “practice” under the Act is broad and may include a single act, the good faith failure to pay
25 overtime to the plaintiff under the potentially correct assumption that he was exempt is not a
26 “practice” envisioned by the Act, and is sufficiently compensated by resort to the Labor Code
27 violation as addressed in this Tentative Decision.

28 Plaintiff has failed to meet his burden of proof that he was discharged wrongfully in

1 violation of public policy. The plaintiff claims that he raised concerns about the manner in
 2 which Komoto and its sister wholesale pharmacy were, ordering restricted medications in short
 3 supply. He asserts that he raised concerns over the lawfulness of Komoto's practices under his
 4 authority as Pharmacist in Charge and his independent professional responsibilities. Whether
 5 these are the type of "public policies" that the law will recognize in the context of a "wrongful
 6 discharge" cause of action is moot, because the court finds that Davis was an at-will employee
 7 and that his discharge was completely unrelated to his complaints. There is no causation or
 8 nexus. Davis was discharged for legitimate business reasons. Plaintiff was difficult and short-
 9 tempered with subordinates under his supervision. He belittled them and mistreated them. He
 10 was warned and counseled about this behavior, and he was ultimately terminated when he
 11 could not adjust and reform his conduct.

12 The Court awards Plaintiff damages against Defendant as set forth below.

13 The Court finds that Plaintiff's regular hourly and overtime premium rates during the
 14 three-year period subject to his claim for violation of Labor Code section 510 were as follows,
 15 as determined using the methodology required by Labor Code section 515, subd. (d):

<u>Period Start</u>	<u>Period End</u>	<u>Yearly Salary</u>	<u>Weekly Salary</u>	<u>Regular Hourly Rate</u>	<u>Overtime Premium Rate</u>
<u>1/23/2010</u>	<u>12/31/2011</u>	<u>\$145,000.00</u>	<u>\$2,788.46</u>	<u>\$69.71</u>	<u>\$104.57</u>
<u>1/1/2012</u>	<u>12/31/2012</u>	<u>\$147,555.69</u>	<u>\$2,837.61</u>	<u>\$70.94</u>	<u>\$106.41</u>
<u>1/1/2013</u>	<u>11/6/2013</u>	<u>\$148,608.00</u>	<u>\$2,857.85</u>	<u>\$71.45</u>	<u>\$107.18</u>

21 The Court awards Plaintiff fifteen (15) overtime hours per month at the overtime
 22 premium rates of pay set forth in the foregoing chart. This amounts to an award of overtime
 23 premiums of \$54,045.38.

24 Pursuant to Labor Code sections 218.6 and 1194, Plaintiff is additionally awarded
 25 interest on his unpaid overtime at the legal interest rate of 10% per annum. (Lab. Code, §§
 26 218.6, 1194, subd. (a).) The total interest awarded as of February 29, 2016 is \$25,155.13, with
 27 an additional \$14.81 per day awarded for each day thereafter. The interest is calculated as of
 28 the date the unpaid wages became due each pay period, as required by Labor Code section

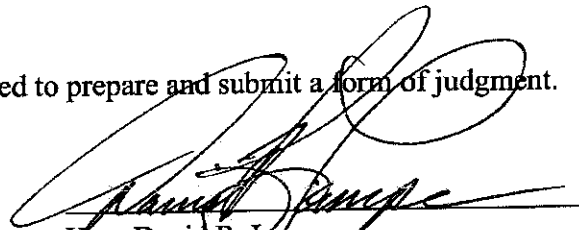
1 218.6.

2 By virtue of the foregoing, judgment is in favor of Plaintiff Warren K. Davis and
3 against Defendant Komoto Healthcare, Inc. the aggregate amount of \$ 79,341.32
4 (\$54,045.38 in overtime premiums, plus interest of \$25,155.13 through February 29, 2016 and
5 daily interest at the rate of \$14.81 per day for each day between March 1, 2016 through the
6 date of this Statement of Decision).

7 Counsel for Plaintiff is directed to prepare and submit a form of judgment.

8 Clerk to give notice.

9 Dated: 3-10-16


Hon. David R. Lampe
Judge of the Superior Court

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PROOF OF SERVICE

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2 I am a resident of the State of California, over the age of eighteen years, and not a party to the
3 within action. My business address is STRAUSS & PALAY, APC, 121 N. Fir Street, Suite F,
4 Ventura, California 93001. On March 7, 2016, I served the within documents:

[PLAINTIFF'S SECOND PROPOSED] STATEMENT OF DECISION

5
6 _____ by transmitting via facsimile the document(s) listed above to the email address(s) set
7 forth below on this date before 5:00 p.m.

8 X by placing the document(s) listed above in a sealed envelope with postage thereon
9 fully prepaid, in the United States mail at Ventura, California addressed as set forth
10 below.

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(Attorneys for Defendant KOMOTO PHARMACY, INC. a California Corporation)

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16 I am readily familiar with the firm's practice of collection and processing correspondence for
17 mailing. Under that practice it would be deposited with U.S. postal service on that same day with
18 postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the
19 party served, service is presumed invalid if postal cancellation date or postage meter date is more than
20 one day after date of deposit for mailing in affidavit.

21 X (State) I declare under penalty of perjury under the laws of the State of California that
22 the above is true and correct.

23 _____ (Federal) I declare that I am employed in the office of a member of the bar of this
24 court at whose direction the service was made.

25 Executed on March 7, 2016, at Ventura, California.



JACQUELINE VILLARREAL