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California Court Finds Professional Overtime Exemption Applies to Law Clerks

By Alan Levins, Kurt Bockes and Rachelle Wills

In *Zelasko-Barrett v. Brayton Purcell, LLP*, No. A130540 (Aug. 17, 2011), California's First District Court of Appeal affirmed the trial court's order granting summary judgment in favor of the employer, Brayton Purcell. The appellate court held that California's professional overtime exemption applied to the plaintiff during the period of time he was employed as a law clerk at Brayton Purcell and had not yet passed the California Bar Examination. Littler represented Brayton Purcell at the trial and appellate levels.

Background

The plaintiff worked as a law clerk at Brayton Purcell after graduating from law school. During this time, he performed work similar to the work performed by any junior attorney, including drafting pleadings, preparing discovery demands and responses, conducting legal research, drafting legal memoranda, drafting memoranda of points and authorities and supporting declarations, interviewing witnesses, and assisting in deposition and hearing preparation. Because the plaintiff was not yet licensed as an attorney, the plaintiff did not sign his name to pleadings and his work was supervised by a licensed attorney.

Unfortunately, the plaintiff struggled to pass the Bar Examination and did not successfully pass the Bar until approximately two years after he started working at the firm. When the plaintiff finally passed the Bar, Brayton Purcell immediately promoted him to the position of associate attorney. The plaintiff voluntarily resigned from Brayton Purcell a few months after his promotion. He filed a lawsuit against Brayton Purcell shortly thereafter alleging that, for the period of time he was employed as a law clerk, Brayton Purcell owed him overtime, missed meal and rest period penalties, waiting time penalties, and penalties for insufficient wage statements.

After discovery, Brayton Purcell moved for summary judgment on all of the plaintiff's claims and argued that the plaintiff's claims should be dismissed because he was exempt as defined under the "learned professional" exemption in California Wage Order 4-2001, section (1)(A)(3)(b). The plaintiff opposed Brayton's motion, and principally relied on a recent federal district court decision, *Campbell v. PricewaterhouseCoopers, LLP*.¹ In *Campbell*, the federal district court held that, as a matter of law, unlicensed "attest associates," who performed accounting functions, could not qualify under California's professional exemption because they were not licensed accountants. The

district court reasoned that applying the “learned professional” exemption in subsection (b) to the unlicensed attest associates would render subsection (a) (the enumerated professions) of the exemption superfluous. Subsection (a) of the exemption defines certain licensed professionals such as attorneys, accountants and doctors, as *per se* exempt.

Additionally, in his declaration in support of opposition to the summary judgment motion, the plaintiff made a number of conclusory statements to attempt to create a triable issue of material fact, including statements like he “was not in a professional capacity,” and that he “was not engaged in work covered by the professional exemption.” Brayton Purcell objected to such “evidence.” The trial court sustained Brayton Purcell’s objections to the plaintiff’s conclusory statements and granted Brayton Purcell’s motion for summary judgment on all of the plaintiff’s claims. The trial court found that the plaintiff qualified as a “learned professional” under subsection (b) of the exemption because he customarily and regularly exercised independent judgment and discretion when he performed his job duties and his job duties required knowledge of an advanced type. The plaintiff appealed. During the period of time the plaintiff’s appeal was pending and after the parties submitted their briefing, the Ninth Circuit Court of Appeals reversed the district court’s decision in *Campbell*.²

The Appellate Court’s Decision

The First District Court of Appeal recognized that the district court’s decision in *Campbell* arguably provided support for the plaintiff’s argument but stated that it concurred with the Ninth Circuit’s analysis reversing that decision. The court agreed that an employee’s job duties may satisfy either subsection (a) (the enumerated professions) or subsection (b) (the learned professional) of the professional exemption. The court further stated that, in 1989, when promulgating the learned professional exemption, the Industrial Wage Commission intended to expand the scope of the exemption. Contrary to the district court’s rationale in *Campbell*, the First District held that subsection (a) is not superfluous even if members of an enumerated profession may qualify under either subsection (a) or (b) of the exemption. Subsection (a) is simply easier for an employer to prove.

The court went on to hold that the plaintiff made no argument disputing the sufficiency of the evidence Brayton Purcell submitted establishing that the plaintiff’s responsibilities satisfied the “learned professional” exemption. The court, moreover, rejected the plaintiff’s argument that the trial court erred by sustaining Brayton Purcell’s objections to his conclusory statements that he performed non-exempt work. The court reasoned that those statements provided no specificity as to the work that the plaintiff actually performed and thus were insufficient to create a triable issue of material fact necessary to defeat a motion for summary judgment. In regard to the plaintiff’s assertion he lacked sufficient independent judgment and discretion, the court held that the fact the plaintiff was supervised by a licensed attorney did not defeat application of the “learned professional” exemption because the plaintiff still exercised a significant level of discretion when he collected and assimilated evidence, performed legal research and drafted legal memoranda.

The court also considered a decision by the California Labor Commissioner, in which a hearing officer found that another law clerk who was employed by Brayton was a professional exempt employee. While the court did not invoke the doctrine of collateral estoppel or in any way suggest that the Labor Commissioner’s decision was controlling, the court concluded that the reasoning was consistent with the wage order. The court made clear that current law applied in three important ways. First, this case confirmed the rationale that an unlicensed employee working in one of the fields enumerated in subsection (a) of the professional exemption may also qualify as a “learned professional” under subsection (b) of the exemption. Second, this court agreed that the mere fact an employee is subject to some supervision does not jeopardize application of the professional exemption provided that the employee performs job duties requiring that he or she exercise discretion and apply knowledge acquired through an advanced course of study. Last, the court made clear that a plaintiff’s conclusory statements regarding his or her job duties are wholly insufficient to create a triable issue of material fact necessary to survive summary judgment. A plaintiff must state, with specificity, tasks he or she performed that did not qualify as exempt.

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Alan Levins, a Shareholder in Littler Mendelson’s San Francisco office, was lead counsel in representing Brayton Purcell at the trial and appellate levels. Kurt Bockes, a Shareholder in the San Francisco office, and Rachelle Wills, an Associate in the Seattle office, served as co-counsel. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Levins at alevins@littler.com, Mr. Bockes at kbockes@littler.com, or Ms. Wills at rwills@littler.com.

¹ 602 F. Supp. 2d 1163 (E.D. Cal. 2009).

² See 642 F.3d 820 (9th Cir. 2011).