NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-06-1436-PaAK
MANUEL C. SANTOS and ROSARIO G. SANTOS,	Bk. No. LA 03-25686 SB
Debtors.	
MANUEL C. SANTOS; ROSARIO G. SANTOS,	
Appellants,	
v.	**M E M O R A N D U M**[1]
EMELITA PIAD; ROLANDO PIAD; MIGUEL CHAVEZ; SUSAN CHAVEZ,	
Appellees.	

Argued and Submitted on June 21, 2007
at Pasadena, California

Filed - July 11, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: PAPPAS, ALLEY[2] and KLEIN, Bankruptcy Judges

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] The Honorable Frank R. Alley, Bankruptcy Judge for the
(continued...)

This is an appeal from an order granting summary judgment and allowing the claims of appellees for unpaid wages in a chapter 13[3] case. We REVERSE the summary judgment and REMAND the action to the bankruptcy court for trial.

FACTS

Appellants, Manuel and Rosario Santos, operated the Santos Family Home ("SFH"), a residential care facility housing between five and six developmentally disabled, although ambulatory, male adults. Appellees Emilia and Rolando Piad were employed by SFH between 1999 and 2001,[4] and Appellees Miguel and Susan Chavez (collectively, "Appellees") were employed by SFH between 2001 and 2002. Appellees lived at the facility during their employment, and performed various duties relating to the care of the residents and SFH. There were no written employment agreements between Appellees and Appellants or SFH.

On May 7, 2002, Appellees filed a civil action in Los Angeles Superior Court, Piad v. Santos, no. BC 273511, seeking to recover unpaid minimum wages and overtime from Appellants and SFH, totaling approximately $280,000. Trial was scheduled to begin in

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[2](...continued)
District of Oregon, sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

[4] The precise dates of employment of the Piads are disputed by Appellants, but that dispute is not implicated in this appeal.

this action on June 12, 2003. The trial was stayed when Appellants filed a petition for relief under chapter 13 on June 11, 2003.

Appellants listed the alleged debts owed to Appellees as contingent, unliquidated and disputed in an amount not to exceed $100,000. On July 8, 2003, Appellees filed Proofs of Claim in the bankruptcy case in the total amount of $533,307, for unpaid wages, overtime, meals period penalties, penalties for continuing wage violations, employer's failure to keep records, liquidated damages, and prejudgment interest.[5]

Appellants objected to the Appellees' claims on October 1, 2003. Appellants alleged that, under the parties' oral employment agreements, Appellees had agreed to accept their living accommodations and salaries as full compensation for their services. Appellants argued that because SFH is a "residential care facility" as that term is used in California Industrial Welfare Commission Wage Order No. 5, that as live-in employees, federal labor law applies to their employer-employee relationship. 29 CFR § 785.23. Under that standard, employees need only be

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[5] Two proofs of claim were also filed by Robert R. Ronne, attorney for Appellees. Like the Appellees' claims, the Ronne claims were allowed by the bankruptcy court in a June 27, 2005 order that was appealed to this Panel. As discussed below, the Panel reversed the bankruptcy court's order allowing the Appellees' and Ronne's claims in our memorandum decision in Santos v. Piad, BAP No. CC-04-1594 (9th Cir. BAP, December 20, 2005). Regarding the Ronne claims, we ruled "[b]ecause Ronne's claim is dependent on allowance of Appellees' claims, its allowance must also be reversed." Id.

The Ronne claims are not before us in this appeal. However, we note that on May 3, 2007, the bankruptcy court awarded $270,548.75 to Appellees and Ronne for attorney's fees, which in Ronne's case included the amounts he had sought in his proofs of claim. Appellants have now appealed these awards of professional fees to the Panel, BAP No. CC-07-1186 (filed May 16, 2007).

compensated for "time spent carrying out assignments." Appellants submitted evidence concerning Appellees' duties, and the times established by the parties within which each task should be completed. Appellants also alleged that an oral agreement existed, that was later reduced to writing, under which the Piads accepted as compensation a credit for housing and board.

The claims objection hearing was initially scheduled for November 25, 2003, but was continued six times. Pre-trial conferences were held by the bankruptcy court on May 18, September 21 and October 19, 2004. A final pre-trial conference was scheduled and held on November 18, 2004. Before this hearing, on November 3, 2004, Appellants had filed a "Motion in Limine Re Applicability of Wage Order No. 5's Healthcare Industry Exception." The bankruptcy court agreed to hear the Motion in Limine on November 18 along with the pre-trial conference.

Appellants' motion asserted that the wage hour standard for staff employed by SFH was established by the California Industrial Welfare Commission in Wage Order No. 5, which governs persons employed in the public housekeeping industry. Wage Order No. 5 provides a special definition of "hours worked" that applies to the healthcare sub-industry within the public housekeeping industry. In other words, if SFH was a health care facility with live-in staff, Wage Order No. 5 would require the bankruptcy court to consider the wages and hours at issue in this case under special federal standards, rather than general California law.[6]

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[6] Attached to Appellants' Motion in Limine was the Declaration of Rosario Santos, in which she provided additional (continued...)

At the hearing on November 18, 2004, the bankruptcy court first took up the Motion in Limine. A fair reading of the transcript shows that the bankruptcy court was skeptical of Appellants' argument that Appellees were employed in the healthcare industry for purposes of applying the federal standards.[7] However, the court never explicitly ruled on the Motion in Limine.

At the end of the hearing, the court and Appellants' counsel engaged in a colloquy regarding Appellants' suggestion that the schedules they submitted of Appellees' working time were evidence of a reasonable agreement about hours worked.

> MR. CALSADA [Appellants' Counsel]: They're [Appellees] going to have to present evidence that – that there was something other than what these schedules show in terms of what hours actually worked are. We would be presenting –
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> THE COURT: And that's what the claims are, sir.
>
> MR. CASALDA: I understand. And so but I am – I do believe that you would be incorrect in simply just saying, well, if they worked two hours more than what the schedule shows, that he wouldn't be entitled to those two hours. If the reasonable – if the agreement reflects a reasonable approximation of these hours, even if two hours, three hours more, whatever it may have been, I . . . would think that the agreement would be binding as between the employer and the employee even if it ends up to be short in terms of the – as compared to

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[6](...continued)
information about operations of SFH and the terms of employment for Appellees. Appellees objected strongly to the bankruptcy court's consideration of the Santos Declaration, arguing that, in it, she repeatedly contradicted her prior deposition testimony. Although Ms. Santos' statements in her declaration may be subject to impeachment with reference to her prior deposition testimony, her statements did not appear to be inadmissible.

[7] The court repeatedly pressed Appellants' counsel whether a cook or a janitor employed by, for example, a hospital should be considered to be a "healthcare employee."

the hours actually worked.

The bankruptcy court then abruptly granted a summary judgment to Appellees:

> THE COURT: Okay. The claimants are entitled to judgment. That's not the law, and the Court finds that that's not the law, that they are entitled to be paid for hours actually worked. This is a case about hours actually worked. There is no defense that they didn't actually work the hours that they claimed to, and that disposes of the claim.

Tr. Hr'g 67:16 – 68:14 (November 18, 2004). The same day, the court issued a Minute Order with the single annotation, "Jgmt. For Claimants." The court entered a final Order Allowing Claims on June 24, 2005.

Appellants appealed the summary judgment to the Panel on November 29, 2004. On December 20, 2005, the Panel issued a memorandum decision, Santos v. Piad (In re Santos), (9th Cir. BAP), deciding that

> [b]ecause the order allowing claims was entered sua sponte, without advance notice to the Santos that factual issues beyond whether or nor their business was a health care facility might be decided summarily, they were denied an adequate opportunity to "ventilate" their claims objection issues. See Portsmouth Sq., Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985) (federal rule and due process considerations apply where court enters summary judgment sua sponte).
>
> Accordingly, we must reverse the [summary judgment for] allowance of the Employees' claims.

There is no indication in the record or docket that the bankruptcy court took any immediate action upon remand.[8] Then, on August 25, 2006, Appellees filed their Motion for Summary

[8] Confirmation of Appellants' Chapter 13 plan has been continued several times and the next scheduled hearing is October 2, 2007.

Judgment. Since the basis of their claims against Appellants were their assertions that they had worked hours for which they were not paid, and that some of those hours were overtime, Appellees argued that the only two material facts needed to be established to support a summary judgment were (1) the actual hours worked by the Appellees and (2) the "regular hourly rates" at which they were paid. Once those facts were established, in Appellees' view, the wage and overtime compensation owing to them may be determined as a matter of law based upon simple mathematical calculation.

Appellees submitted 23 exhibits to support their summary judgment motion, including declarations from all four Appellees describing their duties and compensation they had received. Each employee claimed to have worked an average in excess of 16 hours per day, seven days per week, but were paid for substantially less time. Appellees also submitted extensive excerpts from the deposition of Rosario Santos, which had been taken during the state court proceedings. In that deposition, Appellees argue, Rosario Santos admitted that she does not know, and cannot estimate, the hours or days worked by Appellees. In particular,

- She kept no record of the days and hours worked by claimants.
- She could not estimate the number of hours that each Employee worked during any workweek.
- The facility was obligated to be open 24 hours a day, seven days a week.
- She could not deny that two staff members were required to be present at the facility at all times when clients were present.
- Someone had to stay every night at the facility.

- When clients were sleeping at the facility, it was Appellants' policy to make sure the facility was staffed.
- Appellants expected that Appellees would be working when clients were present in the facility.

Appellants responded to the Summary Judgment Motion in an Opposition filed September 18, 2006. Appellants asserted that triable issues of material fact remained, including:

- the number of hours worked per Employee – Appellants allege that none of Appellees worked in excess of 7.5 hours per weekday, or 4 hours per weekend day;
- whether Appellees were "healthcare industry employees" and, if so, that Appellants should be permitted to introduce evidence as to the existence of certain "reasonable agreements" as to the hours and wages of Appellees;
- nature of the Appellees' work.

Appellants also raised burden of proof issues, and submitted three groups of exhibits including declaration of counsel, transcript excerpts, excerpts from depositions of Appellees, and documents relating to employment records.

Both Appellants and Appellees submitted and exchanged proposed Statements of Uncontroverted Facts and Conclusions of Law.

The hearing on the summary judgment motion was held before the bankruptcy court on October 3, 2006. Appellees argued that, based on a decision of a California appellate court, Hernandez v. Mendoza, 245 Cal. Rptr. 36 (Cal. Ct. App. 1988), Appellants had not submitted any admissible evidence contradicting the number of hours worked by Appellees, and as a result, summary judgment

should be granted to Appellees. Appellants responded that there remained numerous controverted material facts. After the court invited Appellants' attorney to explain his views on the Hernandez case, the court announced its ruling:

> Okay, I find that the language of the Hernandez -- that the Hernandez case is the controlling law and the language of the Hernandez case puts a substantial obligation on an employer.
>
> Imprecise evidence by an employee is sufficient to put the employer to proof. An employee has carried out his burden if he proves that he has, in fact, performed work for which he was improperly compensated, and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.
>
> The Court finds that the evidence by the Claimants here is sufficient to meet that standard. It's not a very high standard. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to the negative, the reasonableness of the inference to be drawn from the employee's evidence.
>
> The Court finds that the employer has not carried that burden. That is to say, that there is not sufficient evidence to -- for the Court to deny judgment to the Claimants based on the evidence they presented. When the burden shifted to the employer, the employer dropped it.

Tr. Hr'g 22:17 – 23:13 (October 3, 2006).

The bankruptcy court entered an order granting summary judgment and allowing Appellees' claims on December 1, 2006. Appellants filed a timely appeal on December 4, 2006.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction pursuant to 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court erred in granting summary judgment and allowing the claims of Appellees.

STANDARD OF REVIEW

The Panel reviews the granting of summary judgment de novo. Baldwin v. Kilpatrick (In re Baldwin), 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir. 2001).

DISCUSSION

A timely filed proof of claim is deemed allowed unless a party in interest objects. § 502(a). Garner v. Shier (In re Garner), 246 B.R. 617, 620-21 (9th Cir. BAP 2000). A proof of claim filed consistent with the Bankruptcy Rules constitutes prima facie evidence of the validity and amount of the claim. Rule 3001(f). Id. If an objection to the claim is made, the bankruptcy court must determine the amount of the claim as of the date the petition was filed, and "shall allow such claim . . . except to the extent that (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." § 502(b)(1).[9] Heath v. Am. Express Travel Related Serv. Co., Inc. (In re Heath), 331 B.R. 424, 432 (9th Cir. BAP 2005). Appellants, the objecting party in this claims dispute, have the burden of presenting evidence sufficient to overcome the prima facie validity of Appellees' claims. Litton

[9] Section 502(b) provides seven other exceptions to allowance of claims, none of which are relevant in this dispute.

Loan Servicing v. Garvida (In re Garvida), 347 B.R. 697, 706 (9th Cir. BAP 2006). If Appellants succeed, Appellees bear the burden of persuasion that the claims should be allowed. Id.

Summary judgment is available in bankruptcy proceedings under Rule 7056, applicable in contested matters under Rule 9014(c), and which incorporates Fed. R. Civ. P. 56: "A party seeking to recover upon a claim, counterclaim, or cross claim or to obtain a declaratory judgment may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." FED. R. CIV. P. 56(a). Fed. R. Civ. P. 56 places on the moving party the burden of demonstrating through admissible evidence the lack of genuine issues of material fact.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c). A fact is material if it may affect the outcome of litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In this appeal, Appellees filed claims for unpaid and overtime wages. Appellants objected to the claims, arguing that, according to various oral and implicit agreements, Appellees had been properly compensated. Appellees replied to the objection, providing sworn declarations concerning the services they provided, the number of hours they worked, and other evidence in support of their claims. Then, Appellants responded with their own declarations and evidence in support of their objection.

In evaluating the burden of proof, the bankruptcy court

properly looked to the law of California as the applicable law for wage disputes in that state. Johnson v. Righetti (In re Johnson), 756 F.2d 738, 741 (9th Cir. 1985) (validity of claim is determined under state law); Diamant v. Kasparian (In re S. Cal. Plastics, Inc.), 165 F.3d 1243, 1247-48 (9th Cir. 1999) (defenses to claims are determined by applicable state law); see also Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987)(setting of labor standards and settling of labor disputes is primarily within the police power of the states). The court determined that, under what it considered controlling law in Hernandez v. Mendoza, 245 Cal. Rptr. 36 (Cal. Ct. App. 1988), an employer has a statutory duty to maintain precise records of hours worked by its employees. CAL. CODE REGS., tit. 8, § 11070, ¶ 7, subd. (A)(3).[10] An employer who fails to maintain accurate records of an employee's hours must therefore bear the consequences of such failure in wage disputes with the employee. The bankruptcy court ruled that, in the face of Appellees' evidence that they worked a certain number of hours, Appellants were required to come forward with precise records to contradict that evidence. When Appellants could not, they failed to carry their burden of proof, and Appellees' were entitled to summary judgment for the amounts sought.

Hernandez concerned a dispute over unpaid wages and overtime between a butcher and his employer. The butcher attempted to prove the actual hours he had worked by presenting to the trial

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[10] Title 8 of the Code of Regulations governs employees in the mercantile industry, such as the butcher in Hernandez. An identical regulation governing the public housekeeping industry, and SFH, is found at CAL. CODE REGS., tit. 5, § 11050, ¶ 7, subd. (A)(3)

court a calendar of his work he had prepared almost a year after completing the employment. He constructed the calendar entirely from memory. While criticizing the butcher's evidence, the employer conceded that it had not kept accurate records of the employee's hours. The trial court determined that the butcher's calendar was not adequate evidence, and therefore found that the employee had not carried the burden of proving up his claim for damages.

The California Court of Appeals reversed, holding that the employer's failure to keep adequate time records was a violation of California wage and hour regulations, and thus shifted the burden of proof to the employer to demonstrate with evidence of the precise amount of work performed that the employee did not work the hours he claimed.

> Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation. . . . In such a situation we hold that an employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Hernandez, 245 Cal. Rptr. at 40.

Hernandez is unquestionably good law in California regarding

wage disputes, and establishes that an employer who fails to maintain accurate records required by statute has a great burden in attempting to prevail over the employee's records. In the 19 years since it was entered, Hernandez has been invoked by the state appellate courts for the proposition that, once a claimant submits evidence that he performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, the employer then has the burden to produce precise evidence in support of its position or demonstrate the unreasonableness of the claimants' inference. Monzon v. Schaefer Ambulance Serv., Inc., 273 Cal. Rptr. 615, 633 (Cal. Ct. App. 1990). Indeed, twice within the past two years the California Court of Appeals has invoked Hernandez to support that principle. Aguiar v. Cintas Corp. No. 2, 50 Cal. Rptr. 3d 135, 145 (Cal. Ct. App. 2006) (city failed its burden of proof when a contractor who commingled work records for multiple city projects could not isolate individual employee work records); Cicairos v. Summit Logistics, Inc., 35 Cal. Rptr. 3d 243, 253 (Cal. Ct. App. 2005) (disputed compensation for rest break time placed burden of proof on employer who was unable to document employee rest breaks). An oft-cited practitioner's guide also cites Hernandez for this proposition:

> If an employee [in an action to recover wages or overtime compensation] proves that he or she performed work for which he or she did not receive the proper minimum wage or overtime compensation and produces sufficient evidence to permit a reasonable inference as to the amount and extent of that work, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or to negate the inference drawn from the employee's evidence.

Richard P. Hill, 21-260 CAL. FORMS OF PLEADING & PRACTICE–ANNOTATED § 250.40 (2007).[11]

Interestingly, although the courts of California cite Hernandez for this proposition, the holding is not original to the Hernandez court. The text from Hernandez above is actually a quotation by the court from the United States Supreme Court decision in Anderson v. Mt. Clemens Pottery, 328 U.S. 680, 687 (1946).[12] Both the California courts and federal courts examining wage disputes in California have cited Mt. Clemens for the same proposition as Hernandez. Motion Picture Indus. Pension & Health Plans v. N.T. Audio Visual Supply, Inc., 259 F.3d 1063, 1065 (9th Cir. 2001) (once evidence is entered raising genuine questions about the accuracy of the employer's records, the burden shifts to the employer to show either precise evidence as to hours worked or to rebut the reasonableness of the inference of claimant's evidence); McLaughlin v. Seto, 850 F.2d 586, 588-89 (9th Cir.

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[11] Appellants do not challenge Hernandez as controlling law, but argue that the bankruptcy court misapplied Hernandez by over-generalization and not allowing them to present evidence regarding the alleged agreements between Appellants and Appellees. The cases cited by Appellants do indeed suggest development of labor law after Hernandez. Brock v. City of Cincinnati, 236 F.3d 793 (6th Cir. 2001) (a "broad zone of reasonableness" test for employment agreements); Shannon v. Pleasant Valley Cmty. Living Arrangements, 82 F. Supp. 2d 426 (W.D. Pa. 2000) (implied agreements satisfy test of § 785.23); Braziel v. Tobosa Developmental Servs., 166 F.3d 1061 (10th Cir. 1999) (implied agreements permissible under FLSA). However, those cases do not modify the central holding of Hernandez, that an employer who fails to maintain accurate records required by statute has a great burden in attempting to prevail over the employee's records.

[12] The California Supreme Court has ruled that when California's laws are patterned on federal statutes, including many of its labor laws, the California courts may look to federal court decisions for guidance. Bldg. Material & Constr. Teamsters Union, Local 216 v. Farrell, 41 Cal. 3d 651, 658 (1988).

1988) ("Where an employer failed to maintain accurate payroll records an employee carries his burden under the FLSA if he shows he performed work for which he was improperly compensated and produces some evidence to show the amount and extent of that work 'as a matter of just and reasonable inference.'"); Brick Masons Pension Trust v. Indus. Fence & Supply, Inc., 839 F.2d 1333, 1338 (9th Cir. 1988) ("An employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required."); Lynne Wang v. Chinese Daily News, Inc., 435 F. Supp. 2d 1042, 1061 (C.D. Cal. 2006) ("[W]here a company failed to keep records of hours worked, the presentation of evidence by the employees as to their own hours creates a rebuttable presumption that employees worked those hours."); Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 748 (Cal. Ct. App. 2004) (recognizing precedential authority of Mt. Clemens on California court's interpretation of FLSA).

Finally, a leading treatise on California labor law cites both Hernandez and Mt. Clemens:

> If an employer fails to keep required records or fails to keep accurate records, certain presumptions exist in favor of an employee bringing a claim for unpaid overtime or minimum wages. In such circumstances, if an employee can establish a right to certain wages, the inability to prove the exact amount with certainty will not bar recovery [citing to Mt. Clemens; elsewhere in treatise citing to Hernandez for the same principle].

Susan Spurlak, 1-7 CALIFORNIA EMPLOYMENT LAW § 7.02, 1-5 CALIFORNIA EMPLOYMENT LAW §§ 5.71, 5.81-82 (2006).[13]

[13] We present this discussion of Mt. Clemens here not only because it supports Hernandez, but also because we raise below the (continued...)

We agree with the bankruptcy court that, if Hernandez is applicable in this action, Appellees are entitled to a summary judgment. Simply put, under Hernandez, Appellants' proof is inadequate to overcome the presumption created by the combination of Appellees' evidence of hours worked, combined with Appellants' failure to keep precise records.

However, we conclude that the bankruptcy court erred in granting summary judgment to Appellees on the basis of Hernandez. This is because a significant question remains whether the Hernandez analysis applies under the facts of this case, or whether the issue of "hours worked" must be determined by standards established in the federal, not state, labor regulations.

The bankruptcy court should have decided whether the "healthcare exception" to California Industrial Welfare Commission ["IWC"] Order No. 5-98 Regulating Wages, Hours, and Working Conditions in the Public Housekeeping Industry applied in this instance. See CAL. CODE REGS. § 11050 (previously defined as "Wage Order No. 5").[14] This order regulates wages, hours and working

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[13](...continued)
question whether the bankruptcy court should have applied federal labor law as the "applicable" law which may render Appellees' claims unenforceable under § 502(b)(1). However, we determine that this is of no moment, because federal and state law speak with one voice on the issue.

[14] The IWC is authorized by statute to promulgate orders regulating wages, hours, and conditions of employment for employees throughout California. CAL. LAB. CODE §§ 1173, 1182; Ghory v. Al-Lahham, 257 Cal. Rptr. 924, 925 (Cal. Ct. App. 1989).

conditions for the Public Housing Industry[15] in California. It is uncontroverted that SFH's operation fell within the public housing industry, and was therefore subject to Wage Order No. 5.[16]

While Wage Order No. 5 applies generally to the public housing industry, the order contains an important exception to the general law in determining hours worked by those employed in the "healthcare industry," which the order defines as including "hospital[s], skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating 24 hours a day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis." Wage Order No. 5, Section 2K.

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[15] "Public Housekeeping Industry" means any industry, business or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations . . . ." Wage Order No. 5, I(C).

[16] At the November 18, 2004 hearing, counsel for Appellees agreed that Wage Order No. 5 applied to SFH and Appellees:

> THE COURT: I don't hear you addressing the issue of whether the Fair Labor Standards Act applies, sir.
>
> MR. RONNE [Appellees' counsel]: The -- we have to back up on that also. Industrial Welfare Commission Order 5, it's -- it's kind of an insurance policy. You have a coverage portion and an exclusion portion. Industrial Welfare Commission Order 5 applies to this facility and the employees in it, but then you then --
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> THE COURT: Okay. So I take it it is agreed, okay.
>
> MR. RONNE: Yes.
>
> THE COURT: Very good.
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> MR. RONNE: You must then decide which employees within that facility are subject to the Fair Labor Standards Act definition of hours worked for . . .

Tr. Hr'g 32:14-33:3 (November 18, 2004).

For employees in the healthcare industry, Wage Order No. 5 defines "hours worked" as "the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the [Federal] Fair Labor Standards Act["FLSA"]." Id. at 2L.

The U.S. Dept. of Labor has issued an interpretive regulation of FLSA[17] governing the hours worked by live-in staff:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

29 C.F.R. § 785.23, under authority FLSA, 29 U.S.C. §§ 201-216. Our court of appeals instructs us that we are to look to § 785.23 when examining the hours and compensation for live-in employees within the meaning of the FLSA. Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 935 (9th Cir. 2004).

Our Court of Appeals has also recently examined implications of FLSA and 29 C.F.R. § 785.23 in the case of a police officer who

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[17] "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). Most recently, in Long Island Care at Home, Ltd. v. Coke, 551 U.S. ____, 127 S. Ct. 2339 (2007), the Supreme Court specifically noted that the Secretary of Labor is authorized "to prescribe necessary rules, regulations and orders with regards to" the Federal Labor Standards Act. No. 06-593, slip op. at 5 (June 11, 2007) (quoting Fair Labor Standards Amendments of 1974, § 29(b), 88 Stat. 76).

was compensated for care of a police dog in his home. Leever v. City of Carson, 360 F.3d 1014) (9th Cir. 2004). The city paid the officer a flat fee of $60 biweekly for overtime associated with the care of the dog pursuant to its collective bargaining agreement with the police union. The city did not inquire into actual hours worked and made no effort to approximate the time involved. After a cursory examination of the collective bargaining agreement, the trial court granted summary judgment to the city. The focus of the circuit court's analysis on appeal was whether the collective bargaining agreement was in any way related to the actual number of hours worked.

> An agreement must take into account some approximation of the number of hours actually worked by the employee or that the employee could reasonably be required to work. The very purpose of an agreement pursuant to § 785.23 is to approximate the number of hours actually worked. Requiring parties to approximate the number of hours worked when forming an agreement pursuant to § 785.23 is consistent with the purpose of the FLSA, which is to ensure that employees are paid for "all hours worked."

Id. at 1019-20 (citations omitted).

In summary, SFH was subject to Wage Order No. 5. However, if SFH is a "residential care facility" for purposes of Wage Order No. 5, in determining the hours worked by its employees, California law defers to federal labor law. The pertinent federal regulations recognize that it is "difficult to determine the exact hours worked" for an employee who resides on his employer's premises, and that the trier of fact concerning an hours worked dispute must consider "any reasonable agreement of the parties which takes into consideration all of the pertinent facts . . . ." And twice within the last three years, in Brigham and Leever, our

court of appeals has struck down summary judgments in favor of employers in hours worked and overtime disputes where the trial court failed to examine carefully the agreements of the parties.[18] In this instance, if the FLSA standard of proof applies, Appellants' evidence of agreements between the parties governing the extent of Appellees' compensation raises an issue of fact for trial.

As early as the October 19, 2004, pre-trial hearing, the parties discussed the "health care exception" to the general California regulations on wages and hours. The bankruptcy court ruled at that hearing that the issue was not properly before the court. To get that issue decided, Appellants filed the Motion in Limine.

As discussed above, the bankruptcy court conducted a hearing on the Motion in Limine on November 18, 2004, the same date set for the continued pretrial conference. Counsel for Appellees and Appellants argued. In addition, Appellants retained special counsel, a specialist in labor law, who was heard and questioned by the court. Although the bankruptcy court appeared skeptical about the merits of the motion, it never ruled on the issue of whether Appellants' facility fell within the health care exception. Appellants again raised the health care exception in their opposition to the Summary Judgment Motion in 2006, but again the bankruptcy court made no ruling on the issue.

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[18] Unlike the present case, the trial courts in Brigham and Leever did examine the agreements between the parties. Nevertheless, the court of appeals found that the trial courts' analyses were flawed. Here, the bankruptcy court never examined the alleged agreements between Appellants and Appellees.

Appellants argue that, if SFH was a health care facility, they should have been allowed by the bankruptcy court to present evidence to establish the oral, written and other implied agreements of the parties concerning the extent of Appellees' hours worked under these circumstances. We agree. Until that determination was made, the bankruptcy court could not conclude which law, state or federal, was applicable to finding the number of hours worked by, and the amount of compensation required to be paid to, Appellees.

We take no position on the merits of whether SFH is a healthcare facility, and therefore, whether the federal labor regulations apply to resolution of the wage dispute.[19] However, we do observe that Appellants supported their argument with an opinion letter from the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, which classified a residential care facility comparable to SFH as a healthcare facility. Although such evidence is not necessarily dispositive, it is sufficient to show the existence of a material question of fact precluding entry of summary judgment.

The bankruptcy court has before it contradictory evidence material to the question of whether SFH is a healthcare facility. In addition to the opinion letter, the court has declarations from the parties differing on the nature of services provided by the employees, and whether medications were administered and by whom. Evaluating this evidence involves credibility determinations that

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[19] We could locate no case law interpreting, or providing any guidance concerning, the "healthcare exception" under Wage Order No. 5.

can only be made at trial. If the court at trial determines that Appellees were healthcare employees while working for Appellants, as those terms are used in Wage Order No. 5, the court should then turn to the issues of the amount of hours Appellees worked and the amount of compensation due to them from Appellants, which must be determined under standards established by the FLSA regulations.

CONCLUSION

We REVERSE the bankruptcy court's order granting summary judgment in favor of Appellees, and REMAND for trial pursuant to Rule 9014(d) on the issues of whether Appellees were healthcare workers and, if so, the hours worked and compensation due to them from Appellants.