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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEN LOPEZ,

No. C 08-05396 SI

Plaintiff,

ORDER RE: POST-TRIAL MOTIONS

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

The post-trial motions filed by plaintiff Ben Lopez and defendant United Parcel Service, Inc. came on for hearing on June 18, 2010. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court hereby rules as follows.

BACKGROUND

This litigation concerns a wage and hour dispute between plaintiff Ben Lopez and defendant United Parcel Service, Inc. (“UPS”). Plaintiff instituted this action on September 26, 2008, alleging that UPS misclassified him as an overtime-exempt employee and, as a result, failed to pay him overtime compensation in accordance with California law. Plaintiff’s claims pertain to five full-time supervisor positions he held between March 2001 and June 2008: Hub Supervisor, Preload Supervisor, On-Road Supervisor, Training and Retention Supervisor, and On-Job Supervisor. Further background regarding these positions is provided in the Court’s March 1, 2010 order granting in part and denying in part UPS’s motion for summary judgment. (Docket No. 123).

1 A jury trial of plaintiff's claims commenced on April 12, 2010.¹ The jury found that plaintiff
2 was properly classified as exempt in his positions as Hub Supervisor, Preload Supervisor, and Training
3 and Retention Supervisor. With respect to the On-Road Supervisor position, the jury found that
4 although UPS had not proved that plaintiff was properly classified as exempt, plaintiff failed to prove
5 that he worked any overtime hours or was denied any meal breaks.

6 Now before the Court are the post-trial motions filed by both parties. Plaintiff seeks judgment
7 as a matter of law as to each of the four positions, or in the alternative, a new trial. UPS seeks judgment
8 as a matter of law as to the jury's determination that it failed to prove plaintiff was exempt in the On-
9 Road Supervisor position.

11 LEGAL STANDARDS

12 I. Motion for Judgment as a Matter of Law

13 Pursuant to Federal Rule of Civil Procedure 50(a), a party may move for judgment as a matter
14 of law after the opposing party has been fully heard and before the case has been submitted to the jury.
15 If the court denies the motion and submits the case to the jury, the party may file a renewed motion
16 within 28 days of entry of judgment. Fed. R. Civ. P. 50(b). In ruling on a renewed motion for judgment
17 as a matter of law, the court must view the evidence in the light most favorable to the non-moving party
18 and draw all reasonable inferences in its favor. *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir.
19 2006). "The test applied is whether the evidence permits only one reasonable conclusion, and that
20 conclusion is contrary to the jury's verdict." *Id.* The court may not weigh the evidence or assess the
21 credibility of witnesses. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir.1984).

23 II. Motion for New Trial

24 Federal Rule of Civil Procedure 59(a) permits a party to move for a new trial on any "historically
25 recognized" ground, including "that the verdict is against the weight of the evidence, that the damages

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27 ¹ Only the claims concerning the Hub, Preload, On-Road, and Training and Retention
28 Supervisor positions were submitted to the jury. Plaintiff's claims concerning the On-Job Supervisor
position, brought under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*,
remain to be tried to the Court.

1 are excessive, or that, for other reasons, the trial was not fair to the party moving.” *Molski v. M.J.*
2 *Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007) (quotation marks and citation omitted). In determining
3 whether to grant a new trial, “a district court has the duty to weigh the evidence as the court saw it, and
4 to set aside the verdict of the jury, even though supported by substantial evidence, where, in the court’s
5 conscientious opinion, the verdict is contrary to the clear weight of the evidence.” *Tortu v. Las Vegas*
6 *Metro. Police Dep’t*, 556 F.3d 1075, 1087 (9th Cir. 2009) (quotation marks, alterations and citations
7 omitted). The decision whether to grant a new trial “is confided almost entirely to the exercise of
8 discretion on the part of the trial court.” *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir.
9 1990) (quotation marks and citation omitted).

10 11 **DISCUSSION**

12 **I. Plaintiff’s Renewed Motion for Judgment as a Matter of Law**

13 **A. Hub, Preload, and Training and Retention Supervisor Positions**

14 With respect to the Hub, Preload, and Training and Retention Supervisor positions, plaintiff
15 contends that UPS failed to present evidence supporting a finding of exempt status for the entire time
16 period at issue for each position. Plaintiff seeks judgment as a matter of law for (1) the entire time
17 period he worked as a Training and Retention Supervisor; (2) his work as a Preload Supervisor from
18 August 15, 2006 to October 22, 2006; and (3) his work as a Hub Supervisor from March 5, 2001 to June
19 2002, February 2003 to December 2003, January 2006 to July 31, 2006, and October 23, 2006 to
20 January 31, 2008.

21 22 **1. Rule 50 Requirements**

23 As a threshold matter, UPS contends that several of the time frames targeted in the present
24 motion must be disregarded because plaintiff did not raise them in moving for judgment as a matter of
25 law at trial. Specifically, UPS notes that, in his pre-verdict motion, plaintiff only challenged the
26 sufficiency of evidence pertaining to the time periods from August 15, 2006 to October 22 2006
27 (Preload), March 5, 2001 to May 2002 (Hub), and June 2003 to December 2003 (Hub).

28 It is well-established that “[a] party cannot raise arguments in its post-trial motion for judgment

1 as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.” *Freund*
2 *v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). The purposes of this rule are to “provid[e]
3 clear notice of claimed evidentiary insufficiencies and [to] preserv[e] the issue of the sufficiency of the
4 evidence on a particular matter as a question of law.” *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.3d
5 1426, 1429 (9th Cir. 1986). In view of these purposes, the Court agrees with UPS that plaintiff’s pre-
6 verdict motion was insufficient to preserve any challenges it did not specifically raise. Plaintiff’s pre-
7 verdict motion failed to provide notice of any challenge to the evidence presented with respect to the
8 Training and Retention Supervisor position. Additionally, the fact that plaintiff addressed certain
9 specific Hub and Preload Supervisor time frames in his pre-verdict motion suggested to UPS and to the
10 Court that plaintiff’s challenge was limited only to those time frames. To permit plaintiff to expand his
11 motion at this juncture would undermine the requirement that a party raise “any alleged deficiencies in
12 the evidence at a time when the opposing party still has an opportunity to correct them.” *Freund*, 347
13 F.3d at 761. Accordingly, in addressing plaintiff’s motion, the Court will consider the sufficiency of
14 the evidence only with respect to the following time periods: (1) March 5, 2001 to May 2002 (Hub); (2)
15 June 2003 to December 2003 (Hub); and (3) August 15, 2006 to October 22, 2006 (Preload).

17 2. Hub Supervisor Position

18 Plaintiff worked as a Hub Supervisor at various points between March 5, 2001 and January 31,
19 2008. He contends in this motion that UPS presented no evidence concerning the tasks he performed
20 for the time periods from March 5, 2001 to May 2002 and from June 2003 to December 2003. Plaintiff
21 further contends that, even for the time periods for which UPS did present evidence, it failed to prove
22 that plaintiff was exercising discretion and independent judgment – a necessary element of both the
23 executive and administrative exemptions.

24 UPS presented evidence from three employees who worked above plaintiff during his tenure as
25 a Hub Supervisor: Brandon Long, Robert Lawson, and Victor Neals. Mr. Long testified that he
26 instructed plaintiff to make decisions on his own to address any problems that arose in the Hub
27 operation, such as changing staffing according to fluctuating package volumes and disciplining
28 subordinate employees. Trial Transcript at 676:9-677:13, 681:5-10, 686:17-25. Mr. Long also stated

1 that, as a full-time supervisor, plaintiff was expected to “manag[e] the personalities” of his hourly
2 employees, including “motivating and leading people to get the job done every day.” *Id.* at 687:1-16.
3 Mr. Lawson testified that plaintiff had to “develop his own plan and his method . . . of achieving those
4 goals,” and was “charged with the responsibility of going out there and executing his plan and holding
5 his employees accountable.” *Id.* at 821:1-10. Mr. Lawson stated that plaintiff made staffing and
6 disciplinary decisions, and was generally “responsible for every aspect of his operation.” *Id.* at 821:15-
7 23. Finally, Mr. Neals testified that plaintiff was “in charge of the [Hub] operation” and “there to make
8 sure the operation was successful.” *Id.* at 860:5-7. Mr. Neals testified that he “would have to trust that
9 [plaintiff] or whoever was in charge would be responsible enough to make sure that everything that
10 needed to get done would get done in a timely and cost-effective manner.” *Id.* at 864:11-16. Like Mr.
11 Long, Mr. Neals also stated that “one of the hardest parts of the job is dealing with the attitudes in the
12 people each day. So, again, nothing was the same.” *Id.* at 866:5-9.

13 Viewed in the light most favorable to UPS, this testimony provided a reasonable basis for finding
14 that plaintiff exercised discretion and independent judgment in his role as a Hub Supervisor. The
15 essence of plaintiff’s argument is that UPS failed to meet its burden because it presented only
16 “generalized evidence” from high-level managerial employees who were not in frequent direct contact
17 with plaintiff. The jury could have inferred from the testimony given, however, that the managers had
18 infrequent contact with plaintiff precisely because he enjoyed discretion and independent judgment in
19 his position. As UPS points out, there is no evidence indicating that plaintiff’s role or responsibilities
20 differed significantly at any time during his term as a Hub Supervisor.² Absent evidence of variance,
21 it was reasonable for the jury to infer that the testimony given at trial was applicable to the entire period
22 in which plaintiff held the Hub Supervisor position. The Court cannot conclude that the evidence
23 presented at trial “permits only one reasonable conclusion, and that conclusion is contrary to the jury’s
24 verdict.” *Josephs*, 443 F.3d at 1062.

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27 ² The only instance identified by plaintiff during which his responsibilities changed is that “for
28 three months in 2005 he delivered a route every day.” Reply at 4. This variance does not affect the
jury’s conclusion with respect to plaintiff’s duties as a Hub Supervisor and Preload Supervisor, both of
which are positions he did not hold in 2005.

1 cannot now make a “renewed” motion for judgment as a matter of law on this issue.

2 Plaintiff’s renewed motion for judgment as a matter of law is therefore DENIED in full.

3
4 **II. Plaintiff’s Motion for a New Trial**

5 Plaintiff also seeks a new trial on the ground that the jury’s verdict was against the clear weight
6 of the evidence. Plaintiff asserts that the weight of the evidence proved that he was a non-exempt
7 employee while working as a Hub Supervisor, Preload Supervisor, and Training and Retention
8 Supervisor, and that his undisputed evidence established that he worked overtime hours as an On-Road
9 Supervisor. For the reasons stated in the foregoing discussion regarding plaintiff’s motion for judgment
10 as a matter of law, the Court does not believe that the clear weight of the evidence undermines the jury’s
11 conclusion that UPS proved plaintiff was exempt in the Hub Supervisor, Preload Supervisor, and
12 Training and Retention Supervisor positions.

13 With respect to the On-Road Supervisor position, the Court does not agree with plaintiff that he
14 presented such clear and “uncontroverted” evidence of his overtime hours that a new trial is warranted.
15 In his trial testimony, plaintiff stated that he did not keep a contemporaneous log of the hours he worked,
16 that his hours often varied, and that he could not “say with certainty” the hours he worked at any
17 particular time. Trial Transcript at 558:20-559:3. The only quantification of the hours plaintiff worked
18 was provided by his expert, Dr. Allman, who computed plaintiff’s damages based on the “assumption”
19 – grounded in information given to him by plaintiff and by plaintiff’s counsel – that plaintiff uniformly
20 worked between 10.5 and 14.5 hours every day. *Id.* at 629:6-9. The jury’s apparent rejection of this
21 evidence was not unreasonable. Plaintiff was not required to meet an exacting standard in proving
22 damages, and his evidence might have permitted the inference that he worked overtime hours. The jury
23 was entitled, however, to make credibility determinations and draw inferences from the evidence
24 presented, and the Court cannot say that its verdict was “contrary to the clear weight of the evidence.”
25 *Tortu*, 556 F.3d at 1087.

26 Plaintiff also argues that he is entitled to a new trial as to the On-Road Supervisor Position
27 because the jury’s verdict was based on legal error regarding allocation of the burden of proof.
28 According to plaintiff, because the jury found that UPS failed to prove that plaintiff was properly

1 classified as exempt, UPS was statutorily required to keep records of the hours plaintiff worked as an
2 On-Road Supervisor. Plaintiff argues that the consequence of UPS’s failure to keep records is that, once
3 plaintiff established his hours “as a matter of just and reasonable inference,” the burden shifted to UPS
4 to produce “evidence of the precise amount of work performed or with evidence to negative the
5 reasonableness of the inference to be drawn from [plaintiff’s] evidence.” *Hernandez v. Mendoza*, 245
6 Cal. Rptr. 36, 40 (Cal. Ct. App. 1988).

7 Plaintiff is correct that, under California law, an employer must maintain records of the hours
8 worked by a non-exempt employee. Cal. Labor Code § 226(a) (“Every employer shall . . . furnish each
9 of his or her employees . . . an accurate itemized statement in writing showing . . . total hours worked
10 by the employee, except for any employee whose compensation is solely based on a salary and who is
11 exempt from payment of overtime”). Plaintiff’s argument that UPS should have maintained such
12 records in this case, however, does not follow from the authorities he cites. In both of the cases relied
13 upon by plaintiff, *Hernandez* and *Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572 (Cal. Ct. App.
14 2008), there was no dispute that the plaintiff was non-exempt and therefore entitled to compensation
15 for any overtime hours worked. In the present case, by contrast, the issue of plaintiff’s classification
16 formed the primary basis for the lawsuit. UPS was not required to maintain records of plaintiff’s hours
17 under these circumstances, and shifting the burden to UPS to prove plaintiff’s hours at trial would not
18 have been appropriate. Plaintiff’s arguments to the contrary in his papers and at oral argument are
19 unconvincing.

20 Plaintiff’s motion for a new trial is therefore DENIED.

21
22 **III. UPS’s Renewed Motion for Judgment as a Matter of Law**

23 UPS moves for judgment as a matter of law concerning the jury’s finding that UPS did not meet
24 its burden of proving that plaintiff was exempt during his tenure as an On-Road Supervisor. UPS’s
25 motion is brought “as a protective cross-motion” in the event the Court finds that plaintiff proved his
26 damages. Having concluded that plaintiff is not entitled to judgment as a matter of law or to a new trial
27 on the issue of damages for the On-Road Supervisor position, the Court need not address the merits of
28 UPS’s motion. The motion is DENIED as moot.


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CONCLUSION

For the foregoing reasons, and for good cause shown, the Court hereby DENIES plaintiff's renewed motion for judgment as a matter of law and plaintiff's motion for a new trial, and DENIES as moot UPS's renewed motion for judgment as a matter of law. (Docket Nos. 233, 234, 229).

IT IS SO ORDERED.

Dated: June 18, 2010



SUSAN ILLSTON
United States District Judge