

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 LISA HOOPS,)
4)
5 Plaintiff,)
6 vs.)
7 ROBERT ROTH, MD,)
8 Defendant.)

Case No.: 2:15-cv-01421-GMN-CWH

ORDER

9
10 Pending before the Court is the Motion for Summary Judgment, (ECF No. 18), filed by
11 Defendant Robert Roth, MD (“Defendant”). Plaintiff Lisa Hoops (“Plaintiff”) filed a
12 Response, (ECF No. 21), and Defendant filed a Reply, (ECF No. 23).¹ For the reasons set forth
13 herein, Defendant’s Motion for Summary Judgment is DENIED.

14 I. BACKGROUND

15 This case arises out of an overtime compensation dispute between Plaintiff and her
16 former employer. (Compl., ECF No. 1). Defendant is a corporation that transacts business
17 under the trade name of Box Canyon Primary Care (“Box Canyon”). (Id. ¶ 9). Box Canyon is a
18 medical practice offering patient care in the area of general medicine. (Pl.’s Resp. 3:5–7, ECF
19 No. 21). Plaintiff worked at Box Canyon from 2007 to 2015 and was paid an hourly rate of
20 \$18.00. (Compl. ¶¶ 7, 9).

21
22 ¹ Plaintiff additionally filed a Motion to Strike Exhibit A to Defendant’s Motion for Summary Judgment and the
23 portions of Sharon Cagnina’s Declaration that rely on this document. (Mot. to Strike, ECF No. 22). Exhibit A
24 includes numerous pages of “Phone Records.” (Phone Records, Ex. A to Def.’s MSJ, ECF No. 18). According
25 to Plaintiff, this document is unauthenticated and therefore inadmissible for purposes of summary judgment.
(Mot. to Strike 3:10–12). In Response, Defendant filed a verification of authenticity from AT&T’s custodian of
record, as well as an affidavit from Sharon Cagnina attesting that her declaration was made based on her review
of the records. (ECF No. 24). Plaintiff did not file a reply challenging the sufficiency of this authentication.
Accordingly, and in accordance with the rules of evidence, the Court finds the phone records are properly
authenticated business records for purposes of this motion for summary judgment. Fed. R. Evid. 803(6). The
Court DENIES Plaintiff’s Motion to Strike.

1 During this time, Defendant started a 24/7 hotline, wherein certain MGM Direct Care
2 Plan and Humana Gold patients could call at any time to speak to a representative of Box
3 Canyon (the “24/7 Hotline”). (See Cagnina Decl. ¶ 2, Ex. 1 to Def.’s MSJ, ECF No. 18-1). As
4 the “Patient Coordinator,” Plaintiff was responsible for answering telephone calls that came in
5 on the 24/7 Hotline after ordinary business hours. (Pl.’s Resp. 3:14–19). While Plaintiff does
6 not dispute that Defendant paid her for overtime hours worked in the office, she alleges that
7 Defendant failed to compensate her for any hours worked outside of the office involving the
8 24/7 Hotline. (Compl. ¶ 20). In contrast, Defendant argues that it compensated Plaintiff
9 through agreed upon “surplus” payments stemming from the 24/7 Hotline Program. (See
10 Cagnina Decl. ¶ 4, Ex. 1 to Def.’s MSJ).

11 On July 28, 2015, Plaintiff filed a Complaint alleging two causes of action: (1) violation
12 of the Federal Labor Standards Act (“FLSA”), 29 U.S.C. § 207; and (2) violation of N.R.S.
13 608.040. (Compl. ¶¶ 6–22). Defendant filed an Answer on August 24, 2015, denying that it
14 owes Plaintiff any overtime compensation. (Answer, ECF No. 7). On May 5, 2016, Defendant
15 filed the instant Motion for Summary Judgment on both of Plaintiff’s claims. (ECF No. 18).

16 **II. LEGAL STANDARD**

17 The Federal Rules of Civil Procedure provide for summary adjudication when the
18 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
19 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
20 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
21 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
22 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
23 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if
24 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
25 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th

1 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
2 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
3 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

4 In determining summary judgment, a court applies a burden-shifting analysis. “When
5 the party moving for summary judgment would bear the burden of proof at trial, it must come
6 forward with evidence which would entitle it to a directed verdict if the evidence went
7 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
8 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
9 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
10 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
11 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
12 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
13 party failed to make a showing sufficient to establish an element essential to that party’s case
14 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–
15 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
16 the court need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*,
17 398 U.S. 144, 159–60 (1970).

18 If the moving party satisfies its initial burden, the burden then shifts to the opposing
19 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*
20 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
21 the opposing party need not establish a material issue of fact conclusively in its favor. It is
22 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
23 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
24 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
25 summary judgment by relying solely on conclusory allegations that are unsupported by factual

1 data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
2 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
3 competent evidence that shows a genuine issue for trial. See Celotex Corp., 477 U.S. at 324.

4 At summary judgment, a court’s function is not to weigh the evidence and determine the
5 truth but to determine whether there is a genuine issue for trial. See Anderson, 477 U.S. at 249.
6 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
7 in his favor.” Id. at 255. But if the evidence of the nonmoving party is merely colorable or is
8 not significantly probative, summary judgment may be granted. See id. at 249–50.

9 **III. DISCUSSION**

10 **1. The FLSA Claim**

11 The FLSA was created to provide a uniform national policy of guaranteeing
12 compensation for all work or employment covered by the act. Barrentine v. Arkansas–Best
13 Freight Sys., Inc., 450 U.S. 728, 741 (1981). The FLSA grants individual employees broad
14 access to the courts and permits an action to recover minimum wages, overtime compensation,
15 liquidated damages, or injunctive relief. Id. at 740. Under the FLSA, an employer must pay
16 overtime compensation to its employees unless one or more of the “exemptions” apply. See 29
17 U.S.C. § 213. Overtime compensation must be issued “at a rate not less than one and one-half
18 times the regular rate at which [a person] is employed.” 29 U.S.C. § 207(a)(1).

19 Here, Defendant does not claim that Plaintiff’s position was exempt from overtime pay
20 requirements. (Interrogatory No. 4, Ex. 4 to Pl.’s Resp., ECF No. 21-4). Rather, Defendant’s
21 Motion is based on two arguments: (1) Plaintiff worked far less overtime hours than she
22 represented in her Complaint; and (2) the \$34,425.15 Defendant provided to Plaintiff as
23 “Proceed Payments” covered any money owed to her for overtime compensation. (Def.’s MSJ
24 11:14–17).

1 a) Proceed Payments as Overtime Compensation

2 According to Defendant, “[Plaintiff] received adequate compensation for any and all
3 time she spent answering the 24/7 Hotline by way of the Proceed Payments.” (Id. 8:6–7).
4 Specifically, Defendant asserts that Plaintiff was paid “4% surplus quarterly payments” based
5 on the incentive bonus that Box Canyon received for running the 24/7 Hotline. (See id. 3:12–
6 15). In total, this scheme amounted to \$34,425.12 in “additional compensation” to Plaintiff.
7 (Id.). Defendant claims that Plaintiff agreed to this compensation as her full and final payment
8 for the work related to the 24/7 Hotline. (See Cagnina Decl. ¶ 5, Ex. 1 to Def.’s MSJ).

9 In contrast, Plaintiff asserts that the “Proceed Payments” were a discretionary bonus and
10 unrelated to any overtime compensation. (Pl.’s Resp. 13:6–8). According to Plaintiff, these
11 bonuses were sporadic and “not paid for certain quarters.” (Id. 12:19–20). Plaintiff contests the
12 existence of any agreement to accept the Proceed Payments in lieu of hourly overtime pay. (Id.
13 12:5–10).

14 Despite the above factual discrepancies, Defendant argues that it was entitled as a matter
15 of law to compensate Plaintiff through the Proceed Payments rather than hourly overtime pay.
16 (See Def.’s MSJ 8:5–7). As the sole basis for this argument, Defendant cites to a single District
17 Court case from Illinois, which allegedly found that “overtime pay can be paid in a variety of
18 ways, such as commission payments.” (Id. 9:9–10); see also *Barker v. Quick Test, Inc.*, 2016
19 WL 1019708 (N.D. Ill. Mar. 15, 2016). Defendant mischaracterizes the Illinois court’s ruling.
20 In *Barker*, the issue was whether commissions count towards an employee’s regular hourly
21 wage, thereby affecting the overtime compensation calculation. *Barker*, 2016 WL 1019708, at
22 *10. The *Barker* ruling did not comment on whether additional separate compensation negates
23 the requirement to pay hourly overtime wages.

24 As a general rule, the Supreme Court has noted that “FLSA rights cannot be abridged by
25 contract or otherwise waived because this would ‘nullify the purpose’ of the statute”

1 Barrentine, 450 U.S. at 740. The FLSA does, however, permit employers to credit certain
2 types of extra compensation toward overtime compensation. 29 U.S.C. § 207(h). Notably,
3 these include “premium hourly rates” paid to employees that exceed the required one and one-
4 half times rate. See 29 U.S.C. § 207(e). The FLSA makes no mention of ancillary agreements
5 in lieu of hourly overtime compensation.

6 Given the foregoing, Defendant’s argument based on the Proceed Payments falls well
7 short of its burden for summary judgment. In this case, there is a clear issue of material fact as
8 to whether Plaintiff agreed to accept the Proceed Payments in lieu of hourly overtime
9 compensation. See C.A.R. Transp. Brokerage Co., 213 F.3d at 480. Furthermore, even to the
10 extent this agreement did exist, Defendant has provided effectively zero legal authority to
11 support such an agreement’s validity under the FLSA. The Court therefore rejects Defendant’s
12 argument.

13 b) Amount of Overtime Hours

14 Defendant spends considerable time discussing the amount of overtime hours that
15 Plaintiff allegedly worked. Per the Complaint, Plaintiff estimates that she received 7,020
16 telephone calls outside of regular business hours and worked “not less than 1,755 hours”
17 responding to these calls. (Compl. ¶¶ 17, 18). Defendant, meanwhile, points to AT&T phone
18 records that indicate that Plaintiff received only 1,613 calls and worked roughly 80.65 hours.
19 (See Def.’s MSJ 4:8–14). In her response, Plaintiff asserts that the amount of time on the
20 phone does not reflect the amount of time actually worked. (Pl.’s Resp. 11:13–18).
21 Specifically, Plaintiff claims that she also “needed to call (and wait for a return call from) Dr.
22 Roth; research the patient’s history; research pharmaceutical reactions; call in prescriptions to
23 local pharmacies; prepare and/or amend patient charts; review lab tests and radiological tests;
24 and enter data into the company-issued laptop.” (Id.).

1 Here, the record clearly establishes that Plaintiff worked a non-zero number of overtime
2 hours. In fact, Defendant concedes as much in its Motion. (Def.’s MSJ 10:21–22) (“At most,
3 [Plaintiff] is only entitled to the amount of calls substantiated by the phone records and time
4 sheets produced by Box Canyon, which were paid by the Proceed Payments.”). The exact
5 number of overtime hours that Plaintiff worked raises a genuine issue of material fact to be
6 decided by a jury. Accordingly, the Court finds summary judgment on the FLSA claim to be
7 inappropriate.

8 **2. The N.R.S. 608.040 Claim**

9 Nevada law provides a penalty on employers for failing to pay a discharged or quitting
10 employee:

11 If an employer fails to pay: [o]n the day the wages or compensation is due to an
12 employee who resigns or quits, the wages or compensation of the employee continues at
13 the same rate from the day the employee resigned, quit or was discharged until paid or
for 30 days, whichever is less.

14 Nev. Rev. Stat. § 608.040(1)(b). Plaintiff alleges in her Complaint that because Defendant
15 “failed to properly compensate [her] for all overtime work as required by law, [Defendant] did
16 not pay [Plaintiff] all of the wages and compensation due and owing” upon cessation of her
17 employment. (Compl. ¶ 28).

18 Here, Defendant raises the same arguments in favor of summary judgment as discussed
19 above. Plaintiff’s Nevada law claim is clearly tied to the success of her first claim. Because
20 the Court found that a genuine issue of material fact remains as to Plaintiff’s first claim, there
21 can be no resolution at this time as to Plaintiff’s second claim.

22 **IV. CONCLUSION**

23 **IT IS HEREBY ORDERED** that Defendant’s Motion for Summary Judgment, (ECF
24 No. 18), is **DENIED**.

