

THE SOUND AND THE FURY

By Vanessa Willis

The California Court of Appeal in *Furry v. East Bay Publishing* held that if an employer fails to keep accurate records of an employee's work hours, even "imprecise evidence" by the employee "can provide a sufficient basis for damages." *Furry v. East Bay Publishing* (A151986, Filed 12/12/18)

Plaintiff Terry Furry sued his former employers, East Bay Express and East Bay Publishing, LLC for unpaid overtime wages, meal and rest break compensation, and statutory penalties for inaccurate wage statements. He worked regular business hours at the office. But he also worked at night and on weekends, and attended events outside work hours and was due overtime for that work.

Furry's compensation was a base salary, plus commissions, bonuses, and vacation pay. Each employee of East Bay received a commission breakdown for each pay period. Furry's wage statements, however, did not break down the information in terms of hours worked, his hourly rate, his overtime rate, his double time rate, or the amount of any overtime worked. East Bay did not keep track of the hours that Furry worked.

The appeals court agreed with Furry that a relaxed standard of proof applied due to East Bay's failure to keep records of Plaintiff's hours, and his testimony regarding work performed was sufficient to meet that relaxed burden. The court also reasoned that the assertion of an exemption from the overtime laws is considered to be an affirmative defense; therefore, the employer bears the burden of proving the employee's exemption. Citing to *Hernandez v. Mendoza* (1988) Cal.App.3d 721, 727, the appeals court found that the consequences of the employer's failure to keep records required by statute should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages.

The appeals court found that the detail provided in Furry's testimony was sufficient to shift the burden to the employer to provide specific detail on the amount of overtime or to disprove what was not correct with the employee's figures.

This decision demonstrates the importance of keeping and maintaining accurate time and payroll records. Employers should have policies requiring employees to accurately track and record work time on their timesheets and to enforce those policies. This case also highlights the danger of misclassification.