

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

MARIA PELLEGRINO et al.,

Plaintiffs and Respondents,

v.

ROBERT HALF INTERNATIONAL,
INC.,

Defendant and Appellant.

G039985

(Super. Ct. No. 06CC04518)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on January 28, 2010, be modified as follows:

On page 43, after the paragraph ending “to focus on making sales” that continues from page 42, add the following three new paragraphs:

RHI argues in its petition for rehearing that the trial court and this court erred in determining plaintiffs were not exempt by applying an incorrect legal standard and failing to analyze the exemption’s fourth criterion, namely, whether plaintiffs spent more than 50 percent of their time engaged in

exempt duties as discussed in *Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th 785. RHI's arguments are without merit.

Before ruling on the motion for judgment, the trial court carefully considered the evidence, weighed the credibility of the trial witnesses, noting it "found many, if not all, of the witnesses on [RHI]'s side to suffer serious credibility issues," and applied the correct legal principles in accordance with *Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th 785 and *Eicher v. Advanced Business Integrators, Inc.*, *supra*, 151 Cal.App.4th 1363. In *Eicher v. Advanced Business Integrators, Inc.*, *supra*, 151 Cal.App.4th at page 1372, the trial court concluded the defendant employer failed to carry its burden of establishing the administrative exemption because it did not prove the first criterion of the five-part test; the court did not consider the other criteria. The appellate court affirmed, holding the exemption did not apply based on the failure of proof of the first criterion, stating the plaintiff "was an employee who engaged in the core day-to-day business of [the defendant]. He had no personal effect on the policy or general business operations of [the defendant] or its customers." (*Id.* at p. 1375.)

Here, as in *Eicher v. Advanced Business Integrators, Inc.*, *supra*, 151 Cal.App.4th at page 1375, the trial court found RHI did not carry its burden of proving the first criterion of the exemption that plaintiffs performed work directly related to management policies or general business

operations of RHI or its customers. Substantial evidence supports the trial court's findings.

This modification does not effect a change in the judgment.

Appellant argues its petition for rehearing must be granted pursuant to Government Code section 68081 because our decision was based on issues not briefed or proposed by any party. Section 68081 requires rehearing when an appellate court “renders a decision in a proceeding . . . , based upon an issue which was not proposed or briefed by any party to the proceeding.” Section 68081 concerns issues—not specific arguments or authorities. The parties do not have a right “under section 68081 to submit supplemental briefs or be granted a rehearing each time an appellate court relies upon authority or employs a mode of analysis that was not briefed by the parties. The parties need only have been given an opportunity to brief the issue decided by the court, and the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of section 68081.” (*People v. Alice* (2007) 41 Cal.4th 668, 679.) When a party has had an opportunity to brief an issue, the party also is deemed to have had the opportunity to brief issues fairly included within that issue. (*Id.* at p. 677.)

None of the appellate briefs in this case argued that the trial court issued a statement of decision. Nevertheless, in its petition for rehearing, appellant argues for the first time that the trial court's oral explanation of its ruling on the motion for judgment should be construed as a statement of decision. Appellant already had the opportunity to raise this issue on appeal as it is fairly included within appellant's challenges to the court's order granting the motion for judgment.

In addition, in rehashing many of its arguments, appellant cites evidence it claims supports its side of the case. In so doing, appellant seriously misconstrues the

substantial evidence rule: That rule focuses on whether substantial evidence supports the judgment.

Appellant's petition for rehearing is DENIED.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.