

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1161-2003
OF ERIC B. BAKER,)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
MTB MANAGEMENT INC., a Montana)	
Corporation, d/b/a Taco Bell,)	
Respondent.)	

I. INTRODUCTION

On January 7, 2003, Eric B. Baker filed a claim with the Department of Labor and Industry contending that MTB Management Inc. (MTB) had failed to pay him \$1,406.00 in wages, \$11,900.00 in overtime, \$733.00 in vacation wages, and \$3,880.00 in bonus wages. The Wage and Hour Unit determined that he had been properly compensated, and dismissed his claim. Baker appealed. On May 30, 2003, the case was transferred to the Department's Hearings Bureau for hearing.

On June 20, 2003, the Hearing Officer conducted a scheduling conference in the case. During the conference, the parties agreed to a schedule of proceedings, and discussed the information necessary to prepare for hearing. The Hearing Officer ordered the parties to exchange certain information in order to prepare for hearing. In particular, over Baker's objection, the Hearing Officer required that Baker provide MTB with information concerning his previous Taco Bell employment, including the store number, address, city, and dates of employment of the Taco Bell store in which Baker last worked prior to his employment with MTB.

On July 24, 2003, Baker had not complied with the order to provide the information and failed to attend a prehearing conference to discuss the status of the case. On July 28, 2003, the Hearing Officer issued an order to Baker to provide the information by August 8, 2003, or show cause why he should not be sanctioned for failure to comply with the order to provide the information. The order notified Baker that an appropriate sanction would be to deem MTB to have established its defense that Baker was an exempt employee, not subject to overtime.

Baker did not comply with the order. On August 22, 2003, the Hearing Officer issued a sanctions order holding that, for purposes of this proceeding, Baker was deemed a bona fide management employee, exempt from the provisions of state and federal laws requiring overtime compensation. As a result, the claim for overtime compensation was barred. The Hearing Officer

ordered that the case would go forward on Baker's claims that MTB owed him regular wages, vacation wages, and bonus wages.

The hearing was conducted by telephone on October 21, 2003. Baker was present and testified. Margaret Sample, MTB Management Inc. president, was present on behalf of MTB and presented testimony. Stephanie Carter and Lee Pedersen also testified in the case. Documents from the investigative file compiled by the Wage and Hour Unit numbered 1, 6-8, 9-12, 13-19, 31, 34-35, 36, 37-39, 41-61, 62, 66, 68, 69, 71, 75, 77, 85-88, 133, 138, 141, 146-148, 174-175, 178, 179, 180, 181, 182, 208, 220, 221, 223-224, 225-228, 229, 230, 232-256, 257-258, 259-260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 278-279, and 282 were admitted into evidence without objection.

Based upon the testimony and exhibits in the case, the Hearing Officer makes the following:

II. FINDINGS OF FACT

1. MTB Management Inc. hired Eric B. Baker as a restaurant manager of its Reserve Street Taco Bell restaurant in Missoula, Montana beginning December 26, 2001. His initial salary was \$35,000.00 annually. In April, 2002, MTB raised his salary to \$38,150.00 annually. His employment terminated on December 5, 2002.
2. Baker was a bona fide management employee.
3. In the letter confirming his hire, ⁽¹⁾ Margaret Sample, MTB president, told Baker that the benefits of the position included:
 - o a bonus plan to be implemented after 90 days of employment based on a percentage of Baker's salary
 - o 10 days paid vacation per year
 - o 3 sick days
4. The letter did not set forth the terms of the bonus plan. It did set forth certain expectations MTB had for Baker, including increasing sales to \$1 million per year, fully staffing the restaurant with trained, efficient people, meeting expectations of food and labor costs, and Champs scores in line with corporate expectations. ⁽²⁾
5. In January 2002, after Baker commenced employment, MTB presented the bonus plan for 2002 to the managers. Baker was present. The bonus plan had several components:
 - Food costs of 29% or less (worth 15% of bonus total)
 - Labor costs of 26% or less (worth 15% of bonus total)
 - Cash over/short within 1% (worth 15% of bonus total)
 - Champs check score of 90% or better (worth 50% of bonus total)
 - Turnover rate of 12.5% or less (worth 5% of bonus total)

The plan provided that a manager had to meet the food and labor goals in order to qualify for any bonus. Under the plan, the standard bonus was 10% of a manager's salary. However, based on a store's overall sales, management could increase the amount of the

available bonus an additional 5 to 10%. Therefore, a manager with a salary of \$35,000.00 who was eligible for the standard bonus was theoretically eligible for a bonus of \$291.67 in each of the 12 bonus periods established by the employer ($\$35,000 \times .10 \div 12$ periods).⁽³⁾ If the employee met all five of the goals, the total bonus would be \$291.67. If the employee met only the goals for food and labor costs, the bonus would be 30% of \$291.67, or \$87.50. However, if the employee did not meet both the food and labor cost goals, the employee was not eligible for any part of the bonus.

6. Baker was initially very successful in his management of the Reserve Street Taco Bell store. On April 22, 2002, Sample wrote Baker a letter increasing his salary to \$38,150.00 annually, due to the progress he had made during his 90 day probationary period in customer service and sales. The letter stated:

Your customer service skills have more than exceeded my expectations and have become a standard by which I am able to measure all stores. Your focus on cleanliness has raised the bar in all other stores. CHAMPS has consistently improved under your guidance and leadership. I truly believe that constant scores of 100 on CHAMPS is well within your grasp. A review of sales leads me to conclude that the Reserve Street Taco Bell has even greater potential with you at the helm than I ever anticipated.

7. Based upon store sales with Baker as manager, Sample determined that Baker would be eligible for bonuses based on 20% of his salary, rather than the 10% standard bonus. Therefore, in each of the bonus periods, he was eligible for a bonus of \$635.83 ($\$38,150 \times .20 \div 12$ periods).
8. Baker did not qualify for a bonus prior to the employer's 5th period for 2002 (April 17 to May 14, 2002). The record is unclear whether this was because he was still a probationary employee, or because he did not meet the required food and labor cost goals. However, he did not meet both food and labor cost goals during any of the periods before the 5th period.
9. Baker met the goals for food and labor costs and cash control during the 5th period. He had food costs of 27.9%, labor costs of 24.9%, and cash short of \$42.00. His Champs check score was 82% and his turnover rate was 29%. Based on these criteria, he qualified for 45% of his available bonus, or \$286.13 ($\$635.83 \times .45$). MTB paid him a bonus of \$286.13 on June 4, 2002.
10. Baker met the goal for food costs in the 6th period, May 15 to June 11, 2002. His labor costs were slightly above the goal of 26% (26.2%). He did not qualify for any of the other components of the bonus. His cash was short \$154.55, his Champs check score was 82.5%, and his turnover rate was 27%. Sample made an exception on his labor costs and qualified him for a bonus in the 6th period. His bonus was 30% of his available bonus or \$190.75 ($\$635.38 \times .30$).
11. In the 7th period, June 12 to July 9, 2002, Baker had food costs of 26.8% and labor costs of 25.7%. He therefore qualified for a bonus. His cash was short \$131.22, his Champs

check score was 88.5%, and his turnover rate was 4%. Based on meeting the food and labor costs and turnover goals, he qualified for a bonus of 35% of his available bonus or \$222.54 ($\$635.38 \times .35$). MTB paid Baker the bonuses for the 6th and 7th periods on July 22, 2002.

12. Baker did not meet the criteria to qualify for a bonus again during the rest of his employment. In the 8th and 12th periods, he met the goal for food costs, but not labor costs. In the 9th and 10th periods, he met the goal for labor costs, but not food costs. In the 11th period, he did not meet either goal. In periods 9 to 12, his Champs check scores always exceeded 90%, but he did not qualify for that component of the bonus because of food and labor costs. In the 13th period, Baker's employment terminated.
13. MTB paid employees on a bi-weekly basis. The last day of each pay period was Tuesday. MTB paid employees on the following Tuesday for the two-week period. Baker's normal days off were Sunday and Monday of each week.
14. Baker took vacation leave on February 22, February 23,⁽⁴⁾ and July 24⁽⁵⁾ to August 3, 2002, a total of 11 days. He did not work on September 4, 2002 due to illness. Baker did not work at all during the pay period September 18, 2002 through October 1, 2002, due to a workplace injury.
15. Baker's initial bi-weekly salary was \$1,346.16 ($\$35,000.00 \div 26$). His bi-weekly salary increased to \$1,467.31 ($\$38,150.00 \div 26$) after the raise in April 2002. MTB paid Baker this biweekly amount every two weeks of his employment, except for three pay periods: 1) the pay date of September 10, 2002; 2) the pay period September 18, 2002 through October 1, 2002; and 3) his final paycheck.
16. Baker's first paycheck was dated January 15, 2002, and included pay for the period from December 26, 2001 until January 8, 2002.
17. In the September 10, 2002 paycheck, MTB docked Baker's pay for one day (September 4, 2002).
18. MTB did not pay Baker at all for the period September 18, 2002 through October 1, 2002, because he was off work due to a workplace injury.⁽⁶⁾ Baker filed a workers' compensation claim in connection with the injury.
19. Baker's final check included pay for one full week (ending December 3, 2002), two days of work in the second week of the pay period (December 4 and 5, 2002), and one day of sick pay.
20. MTB did not pay Baker for September 4, 2002, in his paycheck dated September 10, 2002. However, when Baker terminated employment, the employer determined that the failure to pay for that day had been an error, and paid Baker for one day of sick leave in his final check.
21. MTB did not have a compensatory time or other policy by which management employees who worked on scheduled days off could take other days off.

22. MTB paid Baker all of the wages he earned during his employment, and all of the vacation and sick leave to which he was entitled.

III. DISCUSSION AND ANALYSIS

Montana law requires that employers pay employees wages when due in accordance with the employment agreement, and in any event not more than 15 days following the separation from employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties.

Both state and federal law require employers to pay employees at least one and one-half times the employees' regular rate of pay for hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1) and Mont. Code Ann. § 39-3-405. Employees who are employed in a "bona fide executive, administrative, or professional" capacity are exempt from the FLSA's overtime premium compensation requirements. 29 U.S.C. § 213(a)(1) and Mont. Code Ann. § 39-3-406(1)(j).

In his wage claim, Baker sought \$1,406.00 in wages, \$11,900.00 in overtime, \$733.00 in vacation wages, and \$3,880.00 in bonus wages. As a sanction for failing to comply with an order to provide information sought by the employer for use in prehearing preparation, the hearing officer deemed Baker to be a bona fide management employee. The order imposing sanctions dated August 22, 2003, is incorporated by reference in this decision. As a bona fide management employee, Baker is a bona fide executive, and not entitled to overtime compensation. Therefore, his claim for overtime compensation is barred. He is not entitled to any overtime compensation.

The agreement between the parties in this case established that Baker was a salaried management employee. Baker claimed \$1,406.00 for unpaid wages, contending that MTB did not pay him for certain days that he worked. The basis of this contention is uncertain. At hearing, he contended that the pay was for hours worked on his days off. In a letter to the Employment Relations Division dated February 2, 2003, he contended that the claim was in part for work performed during the period December 26 to December 31, 2001. It is entirely unclear how he arrived at the amount claimed. Further, the evidence shows that he was paid for December 26 to December 31, 2001 in the paycheck dated January 15, 2002. As to his claims for days off on which he purportedly worked, Baker was a salaried management employee. Even though he worked on his days off, he was not entitled to additional compensation for those days.

Baker's claim for \$733.00 for vacation pay is based on a contention that MTB docked his pay for February 22, February 23, July 24, August 4, and August 5, 2002 when he took vacation. This claim is also not supported by the evidence. The employer's payroll records clearly establish that the only days for which MTB docked Baker's pay were September 4, 2002, and the two weeks at the end of September that he was off due to an injury. However, the employer agreed that it had been an error to dock his pay for September 4, 2002, and included the pay in Baker's final paycheck. Baker also presented evidence at hearing that he should have been paid for sick days. However, the only sick days for which he was not paid were those during the period of his workplace injury. At most, under the employment agreement he would have been eligible for

two additional days of sick leave. If he had been paid for sick leave on those days, he would not have had a total wage loss and would not have been eligible for some of the workers' compensation benefits he received.

Regarding the claim for bonus, Baker did not establish that he was entitled to any additional bonus beyond that paid by MTB during his employment. Baker's entitlement to a bonus must be based on his employment agreement with MTB. Although the letter offering him employment identified a bonus as a benefit of employment, any entitlement to the bonus was to be based on a plan to be implemented within 90 days of employment. Therefore, the letter did not establish a particular bonus entitlement because the terms were not specific. After Baker commenced employment, MTB implemented a well-defined plan incorporating clear goals which managers had to achieve to earn a bonus. It was this plan which governed Baker's entitlement to any bonuses, not the very general language of the offer of employment.

From the evidence, it is impossible to deduce how Baker calculated the \$3,880.00 he claimed to be owed in additional bonus. However, he had two basic contentions on the bonus issue. First, he claimed he was entitled to additional bonus amounts because of his success in improving sales in the store he managed. Second, he maintained that MTB's records of his food and labor costs were inaccurate. He contended that the records maintained in the store itself showed that he met the food and labor goals, but the corporate records varied from the records in the store.

Even though Baker succeeded in improving store sales, this factor alone did not entitle him to a bonus.⁽⁷⁾ He had to meet the conditions set in the bonus plan to qualify for a bonus. He did not meet them, except during two periods of his employment, the 5th and 7th periods of 2002. MTB paid him a bonus during those two periods. It also made an exception to the requirement that he meet labor costs in the 6th period and paid him a bonus for that period.

Baker did not prove that he was entitled to an additional bonus under the terms of the plan. He did not prove that MTB's records of food and labor costs were inaccurate or flawed. He presented his own testimony and the statements of several other store managers to the effect that the information in the store computers was always different from the corporate office computers. MTB presented the credible testimony of its accountant that the store computers did not include all information on food and labor costs because some costs were entered in the corporate office. However, Baker had the burden of proving that the employer owed him additional wages in accordance with the employment agreement. Even if Baker had established that the employer's records were wrong, he provided no evidence of what the correct figures were. As a result, it would be impossible to calculate any additional bonus entitlement under the employment agreement. Thus, the evidence does not support his claim for additional bonus compensation.

IV. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Eric B. Baker was a bona fide executive employee of MTB Management Inc. As such, he was not entitled to overtime compensation for hours worked in excess of 40 per week.

3. MTB Management Inc. paid Eric B. Baker all compensation, including regular salary, vacation pay, and bonus, to which he was entitled in accordance with his employment agreement.

V. ORDER

The wage claim of Eric B. Baker is dismissed.

DATED this 4th day of December, 2003.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE

Anne L. MacIntyre, Chief

Hearings Bureau

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

1. This letter is dated November 13, 1995. However, the evidence at hearing established that the date on the letter was a typographical error, and the correct date was November 13, 2001.

2. Champs is a quality program of Taco Bell, involving mystery shoppers who visit Taco Bell franchises and rate each restaurant on cleanliness, hospitality, accuracy, maintenance, product quality, and speed.

3. For purposes of evaluating manager performance to determine bonus eligibility, MTB divided the year into 13 4-week periods. In 2002, period 1 commenced on December 26, 2001. Bonuses could be awarded in each of the periods except period 1.

4. Baker contends that he actually worked on February 22 and 23, but he did not clock in as having worked those days. He left Missoula on February 23 at 2:35 p.m. on a flight to Florida, and returned on February 25 at 11:30 p.m. He entered a manual clock-in showing that he worked February 25 from 4:00 p.m. to 10 p.m. He could not account for this discrepancy at hearing.

5. Baker contends that he actually worked on July 24, 2002, prior to leaving on his vacation, but he did not clock in as having worked that day.

6. Montana law requires an injured worker to have 5 days of wage loss prior to being eligible for workers' compensation benefits. Mont. Code Ann. § 39-71-736. Because of this, MTB considers employees who have filed a workers' compensation claim ineligible to use sick leave. Baker received workers' compensation benefits for the second week he was unable to work because of his injury.

7. MTB took Baker's sales into consideration in setting the amount of available bonus at 20% instead of 10%