



Copper King, the Plaza Pub, Inc., d/b/a Miss T's. When Turk commenced working at the Copper King, Burke and Miss T's entered into an agreement by which Miss T's paid part of Turk's salary, by a check payable to Turk and delivered to Burke, for \$300.00 a month. Turk provided all non-payroll bookkeeping and financial reporting services for Miss T's. She considered Burke her employer, and understood Miss T's had an agreement with him, rather than continuing to be a client of hers.

3. Burke treated Turk as he treated the other Copper King department heads. She decided the hours she worked (she normally worked 8:00 a.m. to 5:00 p.m. and did additional work at home). She prioritized the work and made decisions about how to accomplish what needed to be done. Although she understood and agreed she was an exempt employee, Turk kept track of the time she spent working for Burke, from August 1, 2003, throughout her employment.

4. When she began work at the Copper King, Turk discovered that previous management of the business had removed all financial and personnel records from the Copper King. She started with nothing but "paper clips and rubber bands."

5. Turk selected and attempted to use Quick Books, an accounting software package, to develop a computerized accounting system. Burke provided her with the equipment she requested to perform her duties. Turk spent most of her work time collecting data, making data entries and also developing the requisite files and documents for the operation of the on-going business, including payroll records, personnel records, accounts payable and receivable records and generally all of the financial records. This limited the amount of time she spent on preparation and provision of financial reports and advice to Burke, although she was able to do some work on financial reports and to provide some financial analysis and advice to Burke.

6. Turk asked for help because of the heavy initial work-load. Burke provided assistance to her from employees in other departments, who worked around their normal duties. Burke never expressly authorized Turk to hire help to work in the accounting office. As time went by and Turk continued to report that she was overloaded and needed help, he consulted with an outside CPA firm, who gave him the impression that Turk should be able to handle the job without an additional employee. He did not share this impression with Turk.

7. Turk regularly worked more than 40 hours per week, despite Burke's policy that employees could not work more than 40 hours per week without his express authorization. Because she was an exempt employee, Turk neither notified Burke that she was regularly working more than 40 hours per week nor sought his permission for the extra hours of work.

8. Burke was absent from the Copper King in November 2003 through January 2004. He maintained telephone contact with Turk and other department heads at the Copper King. He relied upon Turk and the other department heads to run the Copper King, with his telephonic input, during his absence.

9. Turk found the continuing detail work, which she considered mere bookkeeping and clerical work, onerous and continually time-consuming. It was onerous and time-consuming, but it was not mere bookkeeping and clerical work. Turk needed her prior experience, training and formal education in accounting to create order out of the vacuum left by the former operator of the Copper King.

10. Turk continued to ask for more assistance. The assistance she wanted was an assistant under her supervision, so that she would be free to provide more advice and financial expertise to Burke, in a more purely managerial and professional mode. She never specifically said that to Burke.

11. Burke became more demanding, calling Turk at home and pressuring her to complete all of her work. Unable to meet the demands with the limited assistance she had, Turk felt increasing stress in her job. She feared that her continued inability to provide more financial reports and advice left her job in jeopardy. She continued regularly to work more than 40 hours per week to catch up past accounting work, while continuing to fall behind on the current accounting work.

12. In March 2004, Turk gave Burke a two week notice of her intention to quit her job with the Copper King. Her last day of work was March 31, 2004. When she left her job, Burke had the financial information he needed for both the 2003 calendar year financial statements and the timely preparation of tax documents, although the financial record keeping for 2004 was far behind.

13. Because of the disarray in which the previous operator of the Copper King left the business, Turk had to create the procedures by which she could pull together the existing accounting systems in the front desk computer, the paper coming in and going out related to accounts payable and receivable, the credit card transactions and problems and the personnel and payroll requirements of the business. She took the job envisioning that she would act as chief accountant in a business which had working systems and procedures in all these areas. That was not the situation. Much of her time, as she struggled to create a workable system, was spent on bookkeeping. She remained responsible during her entire employment for the creation and maintenance of the accounting system, reconciliation of that system with the existing computer and data entry systems at the business and all accounting and bookkeeping work directly related to Burke's general business operations. Her job required advanced knowledge of accounting and involved the consistent exercise of discretion and judgment, even while she addressed more mundane bookkeeping tasks. Without an assistant, those mundane tasks were directly and closely related to the performance of her primary duty as department head.

14. On April 13, 2004, Turk filed a claim for overtime wages, documenting it with her handwritten records of the hours she had worked. She named Ron Burke as her employer, and the Ramada Inn Copper King Lodge as the name of the business. The department's Employment

Relations Division notified Ron Burke and Frank K. Finneran of the claim by letter dated April 14, 2004, sent to the address appearing on the certificate of service for this decision. Receiving no written response, and apparently receiving a telephone call from Finneran asserting that he was no longer involved in the business, the department issued its investigative determination on May 13, 2004, naming "Ron Burk, d/b/a Ramada Inn Copper King" as the respondent and awarding Turk \$2,722.50 in wages, with a penalty of \$2,994.75. The department sent the respondent's copy of the determination to the same address appearing on the certificate of service for this decision. Burke received that initial determination and made a written request for redetermination on June 1, 2004, without any challenge to the propriety of the misspelling of his name.

15. On July 12, 2004, after receiving additional documentation from Turk and Burke, the department issued its redetermination, with the same award to Turk, mailing the respondent's copy to "Ron Burke, Finneran Hotel Company LLC, Ramada Inn Copper King," at the same address appearing on the certificate of service for this decision. The caption on the redetermination still misspelled Burke's last name as "Burk." Burke received the redetermination and appealed it on July 30, 2004, without any challenge to the misspelling of his name or the apparent misnaming (in the certificate of service) of his business.

16. With the commencement of these contested case proceedings in the department's Hearings Bureau by the September 24, 2004, "Notice of Hearing and Telephone Conference," the respondent has been consistently identified as "Ron Burke, d/b/a Ramada Inn Copper King," and all certificates of service have reflected mailing of Burke's copies of notices and orders to Ron Burke or Ron Burke "ATTN: Vicki Saari," to the same address appearing on the certificate of service for this decision. After Burke reported that he had not received Documents 1-48, the department sent another copy of those documents to the same address by certified mail, which was received on December 1, 2004. Until November 30, 2004, the original hearing date after at least two telephone conferences for scheduling, Burke did not raise any jurisdictional challenge based upon being named as the respondent.

#### **IV. Opinion**

Montana law requires employers to compensate employees for all hours worked. Mont. Code Ann. § 39-2-204(1). An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1½ times the hourly wage rate at which the employee is employed. Mont. Code Ann. § 39-4-405(1). The overtime pay requirement does not apply to an individual employed in a *bona fide* administrative or professional capacity, as those terms are defined by department regulations. Mont. Code Ann. § 39-4-406(1)(j).

There is a five part test to determine whether an employee works in an *bona fide* administrative capacity. Admin. R. Mont. 24.16.202 and 24.16.205. Turk was an exempt employee because (1) her primary duty consisted of the performance of office or nonmanual work directly related to the employer's general business operations; (2) she customarily and

regularly exercised discretion and independent judgment; (3) she regularly and directly assisted a proprietor or performed under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; (4) she did not devote as much as 40 percent of her hours worked in the workweek to activities which were not directly and closely related to the performance of her primary duty; and (5) she received a salary of at least \$150.00 per week in pay. In addition, since she received a salary of at least \$200.00 per week in pay and her primary duty consisted of the performance of office or nonmanual work directly related to the employer's general business operations which included work requiring the exercise of discretion and independent judgment, the regulations deem her to meet all of the requirements for the administrative exemption.

There is also a five part test to determine whether an employee works in a *bona fide* professional capacity. Admin. R. Mont. 24.16.203 and 24.16.206. Turk did work in such a capacity because (1) her primary duty consisted of the performance of work requiring advanced knowledge of accounting and (2) consistent exercise of discretion and judgment in its performance; (3) her work was predominantly intellectual and varied in character (rather than routine mental and manual work) which could not be standardized; (4) she did not devote more than 20 percent of her hours worked in the workweek to activities not essential to and necessarily incident to the work described in (1) through (3); and (5) she received a salary of at least \$150.00 per week in pay. In addition, since she received a salary of at least \$200.00 per week in pay and her primary duty consisted of the performance of work requiring advanced knowledge of accounting, which included work requiring the consistent exercise of discretion and judgment, the regulations deem her to meet all of the requirements for the professional exemption.

Accountants who are not certified public accountants are exempt professional employees if they, as Turk did, actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of a "professional" employee. Admin. R. Mont. 24.16.206(2)(f).

There is no credible evidence that Burke hired Turk knowing that the work she faced would require an inordinate amount of bookkeeping that would prevent her from performing her professional duties. Although Turk testified that this was what happened, the unrebutted testimony of Burke established that Turk actually had done much of the professional work required, although she was behind, when she quit. This is not a situation in which the employer hired a professional, as such, as a subterfuge for obtaining a bookkeeper to overwork. Burke met his burden of proof to establish that Turk was an exempt employee.

Burke also attempted to assert defenses of lack of proper notice and lack of jurisdiction. The facts established proper notice given and received by Burke. The facts also established that Burke responded and participated in the wage and hour investigation by the Employment Relations Division, without challenging either notice or jurisdiction, thereby submitting himself to the department's jurisdiction.

## V. Conclusions of Law

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

2. Pam M. Turk worked for Ron Burke, d/b/a/ Ramada Inn Copper King, in a *bona fide* administrative and/or professional capacity.

3. Ron Burke, d/b/a/ Ramada Inn Copper King, does not owe Pam M. Turk any unpaid wages.

## VI. Order

The wage claim of Pam M. Turk is dismissed.

DATED this 4<sup>th</sup> day of January, 2005.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ TERRY SPEAR  
Terry Spear  
Hearing Officer

**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 this decision. See also Mont. Code Ann. § 2-4-702.**

CERTIFICATE OF MAILING

The undersigned certifies that true and correct copies of the above document were today deposited in the U.S. Mail, postage prepaid, addressed as follows:

Pam Turk  
16 Cedar Hills Rd  
Whitehall MT 59759

Ron Burke ATTN: Vicki Saari  
Ramada Inn Copper King  
4655 Harrison Ave  
Butte MT 59701

DATED this 4th day of January, 2005.

/s/ SANDRA K. PAGE

Legal Secretary