

STATE OF MONTANA

DEPARTMENT OF LABOR AND INDUSTRY

HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 1078-2000

OF FRANK M. WINKLER,)

Claimant,)

vs.)

KEY WEST, INC.,)

a Montana corporation,)

Respondent.)

ORDER ON REMAND

I. INTRODUCTION

This case came before the Board of Personnel Appeals (Board) on February 15, 2001. The matter was before the Board for consideration of the appeal filed by John Frohnmayer, attorney for the Claimant, to the Findings of Fact, Conclusions of Law, and Order issued by Gordon D. Bruce, Hearing Officer, on September 22, 2000.

In the prior decision, the Hearing Officer determined that the Claimant was an exempt employee. After review of the record of the hearing and consideration of the arguments, the Board concluded that the Claimant did not customarily and regularly direct the work of two or more employees. Accordingly, the Board held that the Respondent failed to meet its burden of proving that the Claimant was an exempt employee. The Board further held that the Hearing Officer's Conclusion of Law #3 was legally incorrect. The Board reversed and remanded the case to the Hearing Officer with instructions to redraft the discussion portion of his ruling to reflect that the employer failed in its burden to prove the exemption. Finally, the Board ordered the Hearing Officer to calculate the overtime compensation due the Claimant.

The Hearing Officer held a telephone pre-hearing conference on March 22, 2001 to address the Board's order of remand. John Frohnmayer, attorney for Claimant, and Michael J. San Souci, attorney for Respondent, appeared to represent their respective clients. At the pre-hearing, and by written stipulation, the parties agreed that the Hearing Officer could proceed in accordance with the Board's Order of Remand on the basis of the existing record.

The parties filed post-hearing findings and briefs to address whether wages and penalties were owed, and, if so, in what amount. The record was deemed fully and finally closed on May 7, 2001, for decision on matters remanded pursuant to the Board's Order.

II. ADDITIONAL FINDINGS OF FACT CONCERNING OVERTIME CALCULATIONS

1. Frank M. Winkler was residing in Florida when he contacted one of Key West, Inc.'s principals, Paul Grossman, in late 1997 and early 1998 about the prospect of employment in one of the company's restaurants. Key West hired Winkler at \$525.00 per week, but he expected to be paid for overtime. (Tr. 13)
2. On February 15, 1998, Winkler commenced working for Key West in connection with Key West's anticipated opening of two new restaurants in the Bozeman area: Looie's Down Under and Jadra's (Undisputed Fact). Key West also had a restaurant in Livingston. (Tr. 71)
3. Key West hired Winkler as a sous chef. The parties understood that Winkler would receive a part-time salary of \$1,050.00 per month until the opening of Jadra's, after which Key West would increase his salary to the rate of \$2,100.00 per month. (Undisputed Fact)
4. Winkler determined his wages as sous chef should be \$2,100.00 per month and Grossman agreed to pay those wages. Grossman told Winkler that he would consider "some funds" for his moving expenses and told him that "he and the executive chef would decide on the hours necessary to insure the proper execution of [Winkler's] position." (Testimony of Grossman and Exhibit B)
5. Key West paid Winkler approximately \$775.00 for moving expenses, although his total cost was about \$2,000.00. (Tr. 14)
6. Winkler kept a rough log of his total hours worked. He worked a total of about 400 overtime hours. He had no set work hours, but usually started work between 9:00 a.m. and 10:00 a.m. each workday, and left work about 10:30 - 11:00 p.m. (Tr. 21) He kept a sketchy log of the hours he worked each week, and worked more than 60 hours, and often 65 to 70 hours per week. (Tr. 14-15 and Exhibits 1 & 2)
7. Key West did not require Winkler to keep a time card until he became an hourly employee on approximately September 17, 1998 (Undisputed fact and Tr. 16). Key West did not maintain payroll records as to the number of hours Winkler worked before September 17, 1998. (Tr. 220)
8. Key West did not pay Winkler overtime premium compensation for working more than 40 hours in any week. (Exhibit 11, Request for Admission No. 1). Winkler never told Key West he expected overtime pay. (Testimony of Winkler, Tr. 140).
9. Based on Winkler's \$2,100.00 per month salary, his hourly rate was \$13.12 and his overtime rate was \$19.68 (\$2,100.00 divided by 40 hours per workweek). (Exhibit 2)
10. Key West did not have reasonable grounds or a good faith reason for its belief that Winkler was exempt.

III. DISCUSSION

FLSA Coverage

Key West, Inc., owns multiple restaurants and has a gross income exceeding \$500,000.00. Both parties agreed in their joint pre-hearing order that the Department has jurisdiction over this matter under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. Winkler also contended that ARM 24.16.7561 and 24.16.7556 and other provisions of Montana law were applicable.

Bona Fide Executive Exemption

The general rule is that employees are to be paid overtime for hours worked in excess of 40 hours per week. Key West contends that Winkler was employed in a "bona fide executive capacity" and was exempt from the FLSA's minimum wage and overtime compensation requirements. 29 U.S.C. § 213(a)(1).

Employees are employed in an executive capacity under 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.119 if they are paid a salary of \$250.00 or more per week, if they customarily and regularly direct the work of two or more other employees, and if their primary duty is managing the enterprise in which they are employed, or managing a customarily recognized department or subdivision of the enterprise.

Key West paid Winkler a salary of more than \$250.00 per week. However, in accordance with the Board's decision, Key West failed in its burden of establishing an overtime exemption because Winkler did not customarily and regularly direct the work of two or more other employees. Winkler is not an exempt employee under 29 U.S.C. § 213(a)(1) and 29 CFR § 541.103.

Overtime

The Montana Wage Payment Act authorizes the Department to enforce wage claims based on the FLSA. *State v. Holman Aviation*, 176 Mont. 31, 36, 575 P.2d 925 (1978).

Key West did not preserve records of the hours Winkler worked and, thus, violated 29 U.S.C. § 211(c). If the employer fails to keep such records, it cannot complain that the employee's numbers lack exactness. *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). Exhibits 1, 2 and 2a adequately summarize Winkler's hours and establish that he worked 400 hours of overtime for which he was not compensated.

The FLSA requires that employees working overtime be compensated at not less than one and one-half the regular rate of compensation. 29 U.S.C. § 207(a)(1); *Local 246 Util. Workers Union v. Southern Cal Edison*, 83 F.3d 292, 295 (9th Cir. 1996).

Regular Rate

The regular rate is the hourly rate divided by a 40 hour working week. *Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). The rule does not change even if the claimant is compensated at a rate

above the statutory minimum. *Adair v. City of Kirkland*, 185 F.3d 1055, 1059-1060 (9th Cir. 1999).

Under Montana law, overtime is calculated in the same manner and the amount received is divided by 40. *Craven v. Waste Management Partners of Bozeman*, 265 Mont. 37, 874 P.2d 1, 4 (1994).

Key West argues that Winkler's overtime pay should be calculated by dividing the number of hours he agreed to work into the specified salary to determine his regular rate, and then multiplying that rate by one and one-half times any hours worked in excess of 40 hours, and cites *Conklin v. Joseph C. Hofgesang Co.*, 407 F.Supp. 1090, 1093 (W.D. Ky. 1975).

Here, however, Winkler did not agree to work any fixed number of hours for any workweek. His workweek hours fluctuated depending upon the time it took for him to complete his daily work, but he was not assigned and did not agree to work any particular number of hours. Thus, the regular rate must be based on a 40 hour week.

Fluctuating workweek

Key West argues that the parties had a "clear mutual understanding" that Winkler was being paid a fixed salary in payment for all hours, no matter how many. That implies that a fluctuating workweek agreement was applicable. Here, the record does not reflect that Winkler clearly understood nor agreed to a fixed amount of salary on a fluctuating basis and he expected to be paid overtime. *Flood v. New Hanover County*, 125 F.3d, 249, 252 (4th Cir. 1997).

Further, the Montana Supreme Court in *Lewis v. B & B Pawnbrokers, Inc.*, 292 Mont. 82, 968 P.2d 1145, 1151 (1998) emphasized that the fluctuating workweek cannot be used unless the employee clearly understands that the salary covers whatever hours the job may demand.

Conversely, where the employer and employee do not "mutually agree" to a fluctuating hours' salary, this fact alone is fatal to any allegation that [the employer's] pay scheme fit the requirements of section 24.16.2512(2)(e) A.R.M. 968 P.2d at 1151.

Key West's implication the regular rate should be determined under a fluctuating workweek method is erroneous because there was no clear agreement to do so.

Overtime Due Winkler

Using \$525.00 per week divided by a 40 hour workweek establishes Winkler's time and one-half rate at \$19.69 per hour and that amount multiplied by 400 overtime hours results in an overtime payment due of \$7,876.00.

Liquidated Damages

The FLSA provides for employees who are not paid overtime to recover liquidated damages in addition to the unpaid wages:

Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. 29 U.S.C. § 16(b)

For purposes of determining whether additional assessment of liquidated damages should be made for violation of the FLSA, presumption of willfulness of violation stands, absent positive and compelling proof of good faith. It is not enough for an employer to plead and prove ignorance of wage requirements. Knowledge will generally be imputed to the offending employer.

Key West argues that it should not have to pay liquidated damages because it believed he was an exempt employee and that pursuant to the Portal-to-Portal Act, 29 U.S.C. § 251, et seq., the law was enacted by Congress to "aid, protect, and foster commerce. . . ." Congress recognized that an employer should not be subject to "wholly unexpected liabilities, immense in amount and retroactive in operation" which may arise under the FLSA because of "long established customs, practices and contracts between employers and employees"

Based on the overall record, Key West failed to present sufficient evidence of

good faith and reasonable grounds to believe it did not violate the FLSA. Good faith is not satisfied by merely a subjective belief or ignorance, but requires the employer to affirmatively establish that he or she acted in good faith by attempting to ascertain and comply with the Act's requirements. *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121 (3rd Cir. 1984). Liquidated damages are appropriate in this matter. Key West did not produce evidence of good faith sufficient to reduce or eliminate damages. Winkler is entitled to liquidated damages in the amount of \$7,876.00.

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this complaint under § 39-3-216, MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).
2. Frank M. Winkler was not an executive exempt employee pursuant to 29 U.S.C. § 213(a)(1), and is entitled to overtime wages under the FLSA.
3. Key West, Inc., owes Frank M. Winkler \$7,876.00 in wages pursuant to 29 U.S.C. 201 et seq.
4. Key West, Inc., owes Frank M. Winkler \$7,876.00 in liquidated damages pursuant to 29 U.S.C. 216(b).

V. ORDER

It is hereby Ordered that Key West, Inc., tender a cashier's check or money order in the amount of \$15,752.00 as wages and liquidated damages, made payable to Frank M. Winkler and mailed

to the Employment Relations Division, Montana Department of Labor & Industry, P.O. Box 8011, Helena, MT 59604-8011.

DATED this 26th day of June, 2001.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GORDON D. BRUCE

GORDON D. BRUCE
Hearing Officer

NOTICE: You are entitled to review of this Order pursuant to §§ 39-3-216 and 39-3-217, MCA. Review may be obtained by filing a written notice of appeal postmarked no later than July 16, 2001 . This appeal time includes the 15 days provided for in § 39-3-216(3), MCA, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer. It must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518