STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF CANDACE S. REED,	)	**Case No. 706-2002**
Claimant,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND FINAL AGENCY DECISION**
LIVINGSTON AUTO CENTER, INC., a Montana Corporation d/b/a YELLOWSTONE COUNTRY, GMC, TRUCK, PONTIAC, BUICK, OLDSMOBILE,	)	
Respondent.	)	

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I. INTRODUCTION

Candace Reed (claimant) filed a complaint with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging that Livingston Auto Center, Inc., d/b/a Yellowstone Country GMC (respondent) owed her $3,230.51 in unpaid wages for overtime work and additional amounts for vacation pay. The respondent denied the allegations, asserting that applicable regulations exempted the claimant from the overtime payment requirements, that the claimant's asserted hours of overtime were not credible, and that even if she had worked the overtime she claimed she had been fully compensated.

After reviewing the documentation provided by the parties, the claims examiner for the Wage and Hour Unit found that the regulations did not exempt the claimant from the overtime payment requirements. The claims examiner, however, dismissed the claim, finding that the claimant had been paid all overtime wages due to her.

The claimant requested a formal hearing. Hearing Officer Gregory L. Hanchett conducted a contested case hearing in this matter on December 13, 2002. Geoffrey Angel, Attorney at Law, represented the claimant. Julie Lichte, Attorney at Law, represented the respondent. Candace Reed, Manny Goetz, and Treva Juhnke testified under oath at the hearing. Exhibits A through Y and Exhibits AA through EE, were admitted by stipulation of the parties. Exhibits 000159-000204, photocopies of the claimant's DayTimer log book, were admitted over the respondent's objection. Exhibit Z, a copy of the Wage and Hour Unit's spreadsheet showing hours worked was admitted over the claimant's objection.[(1)]

The hearing examiner held the record open to allow the parties to file proposed findings of fact and conclusions of law. The Hearings Bureau received the parties' proposed findings of fact and conclusions of law on January 27, 2003 and the hearing examiner then closed the record. Having heard the testimony and considered the arguments presented by the parties, the following findings of fact, conclusions of law, and final order are made.

II. ISSUE

Does the respondent owe the claimant wages for work performed and liquidated damages or penalty as alleged in the complaint filed by the claimant?

III. FINDINGS OF FACT

1. Respondent is an automobile dealership located in Livingston, Montana selling new and used automobiles. Manny Goetz is the general manager and sole shareholder of the respondent.
2. On October 23, 1999, Goetz hired the claimant to fulfill the duties of marketing manager. The claimant remained in this position until she resigned on October 26, 2001. During the claimant's employment, Goetz acted as her immediate supervisor.
3. The written job description for the claimant's position indicates that the claimant worked with the dealer and manager to develop advertising and negotiated advertising contracts on behalf of the respondent. In reality, the claimant had limited discretion and primarily proofread or reviewed advertisements to ensure that they had no errors. Many of the contracts for the advertising were already in place when the claimant was hired. The claimant regularly sought Goetz' approval before undertaking a particular marketing action. Much of her time was spent completing "customer call backs"- - calling customers on the telephone to follow-up on complaints and comments. In addition, the claimant performed basic tasks such as getting cookies for the staff at the beginning of each business day and running errands to obtain cleaning supplies and to transport automobile parts to other businesses. She also delivered automobiles and provided transportation for customers.
4. From the time the claimant began her employment until June 30, 2000, the claimant punched in and out on a time clock. During this time period, the claimant was paid $9.00 per hour. The claimant was paid $13.50 per hour if she worked overtime (in excess of 40 hours in one week).
5. Between the beginning of her employment and June 30, 2000, the respondent paid the claimant for all regular and overtime hours she worked.
6. Beginning July 1, 2000, Goetz switched the claimant to salary, paying the claimant $1,600.00 per month. Applying the requisites of 29 CFR, § 778.113 (a) and (b) to this monthly salary[(2)] establishes that the claimant received a regular hourly rate of $9.23 and an overtime hourly rate of $13.85.
7. The respondent instituted the July 1, 2000 compensation change believing that the claimant would in fact receive a greater rate of pay than she had previously been receiving as an hourly employee. Furthermore, the switch to salary was consistent with Goetz's plan, in place since the claimant had been hired, that the clamant would become a salaried employee. Goetz believed in good faith that the claimant's position was exempt

from overtime requirements because he believed the position consisted of office work directly related to management (marketing) and involved some discretion. Both Goetz and the claimant understood that if the claimant had continued to be treated as a non-exempt hourly wage employee, she would not have been entitled to compensation for personal absences (absences not related to work).

8. The claimant worked a total of 162.75 overtime hours between July 1, 2000, and October 26, 2001.[(3)] Multiplying the hourly rate times the number of hours of overtime worked (162.75 x $13.85) yields a total due of $2,254.09 for all of the overtime worked between July 1, 2000, and October 26, 2001.
9. During this same period, the total number of regular hours that the claimant could have worked would have been 2,712 hours. In fact, however, the claimant had numerous personal absences from work during that period. The claimant's absences were as follows:

For 2000, a total of 34 hours broken down as follows:

October 20, 2000	8 hours	December 11, 2000	8 hours
November 13, 2000	2 hours	December 12, 2000	8 hours
December 8, 2000	8 hours		

For 2001, a total of 195.5 hours broken down as follows:

January 22, 2001	4 hours	August 21, 2001	3.5 hours
January 25, 2001	8 hours	August 29, 2001	2 hours
March 7, 2001	4 hours	August 30, 2001	4 hours
March 8, 2001	8 hours	September 7, 2001	4 hours
April 18, 2001	8 hours	September 10, 2001	4 hours
May 10, 2001	8 hours	September 11, 2001	8 hours
June 1, 2001	8 hours	September 20, 2001	8 hours

June 13, 2001	8 hours	September 28, 2001	8 hours
June 14, 2001	8 hours	October 1, 2001	4 hours
July 5, 2001	6 hours	October 3, 2001	8 hours
July 6, 2001	8 hours	October 12, 2001	8 hours
July 7, 2001	8 hours	October 18, 2001	4 hours
July 13, 2001	8 hours	October 24, 2001	8 hours
July 20, 2001	4 hours	October 25, 2001	8 hours
July 25, 2001	4 hours	October 26, 2001	8 hours
July 26, 2001	4 hours		

10. The claimant missed 229.5 hours of work during this time period due to non-work related absences.
11. The respondent paid the claimant for all of these hours of missed work even though she would not have been entitled to any pay during these absences had she continued as an hourly employee. In addition, the respondent paid the claimant for October 29, 30, and 31, 2001, days on which the claimant did not work since she had already quit. The respondent thus paid the clamant for 253.5 hours that she did not work. (229.5+ 24 = 253.5). If respondent had paid the claimant as a non-exempt hourly employee, its policies--policies of which the claimant was fully aware and which she agreed to abide by--would have required claimant to use her vacation time or take leave without pay for those hours of missed work.
12. When the claimant terminated her employment, she was entitled to ten full days of vacation, a total of 80 hours. When the claimant's vacation days are netted against the hours for which the claimant was paid but did not work, claimant was paid for 173.5 hours for which she did not perform work and for which she was not entitled to be paid (253.5 - 80 = 173.5).
13. Reducing the total number of regular hours the claimant could have worked between July 1, 2000 and October 26, 2001 by the number of hours for which she was paid but for which she was not entitled to compensation nets a total number of regular hours for which she was entitled to compensation of 2,562.5 hours (2712 - 173.5 =2,562.5).

Compensation due to the claimant for these regular hours was $23,651.87 (2,562.5 hours x $9.23 = $23,651.87).

14. Combining the total amount due to the claimant for both overtime and regular hours worked ($2,254.09 for overtime + $23,651.87 for regular wages) results in total remuneration due to the claimant of $25,905.96.
15. The respondent paid the complainant $1,600.00 each month between July 1, 2000, and October 31, 2001, for a total amount of $25,600.00.[(4)] The difference between the amount due to the claimant for all regular and overtime hours worked between July 1, 2000 and October 26, 2001 and the amount she was actually paid during this time is $305.96.

IV. DISCUSSION

A. The Fair Labor Standards Act Applies To This Case

The parties presented no evidence at the hearing to show whether the employer was subject to the Fair Labor Standards Act (FLSA) or the Montana Minimum Wage and Overtime Act. The hearing examiner notes, however, that the claimant stated in her pre-hearing memorandum that the employer was subject to FLSA requirements. The Wage and Hour Unit found that this matter was subject to FLSA and the respondent made no argument to the contrary either in its pre-hearing statement or at the hearing. The Department of Labor and Industry is authorized to enforce the minimum wage and overtime provisions of the FLSA. *Hoehne v.Sherodd, Inc.*,(1983), 205 Mont. 365, 668 P.2d 232. Accordingly, the hearing examiner will apply FLSA standards to this proceeding.[(5)]

B. The Respondent Has Failed To Show That the Claimant Is Exempt From Overtime Requirements.

The first issue to be resolved in this matter is the respondent's contention that the claimant is exempt from the payment of overtime because she is an administrative employee. The respondent argues that the claimant is an exempt administrative employee because she developed marketing materials, had discretion in choosing which media to utilize for advertising, tracked customer complaints, and presented marketing ideas and customer information to other members of the management team. The claimant argues that she was primarily engaged in contacting customers for feedback and only minimally involved in securing advertising.

An employee employed in a bona fide administrative capacity is not entitled to overtime payment. 29 USC § 213(a)(1). The term "employee employed in a bona fide administrative capacity" means an employee:

> (a) Whose primary duty consists of either: (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, . . . and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) above, and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week . . . .

29 CFR § 542.1.

The burden of proving an exemption rests on the employer who asserts the exemption. *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 125, 783 P.2d 391, 393 ; *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222. Questions involving exemption from overtime are to be narrowly construed in order to carry out the purposes of the FLSA. *Reich v. Wyoming* (10th Cir., 1993), 993 F.2d 739, 741 . Cases involving exemptions from overtime requirements are primarily questions of fact. *Dennis v. Tomahawk Services, Inc*. (1988), 235 Mont. 378, 767 P.2d 346.

In *Dennis*, the Montana Supreme Court found that a dispatcher working for a trucking company met the test and was exempt as a bona-fide administrative employee. In reaching this conclusion, the court considered the facts that (1) the dispatcher gave input to his superiors regarding reprimands, hiring, and firing of drivers, (2) could decide whether or not to issue a fine to drivers for failing to complete a morning check call reporting their whereabouts, (3) decided whether or not to issue written reports on drivers who violated company policy, (4) monitored drivers' days off and mileage reports, (5) decided whether or not to issue or withhold reimbursement checks for driver's trip expenses, and (6) monitored drivers' health problems and truck reports for 40 trucks. *Id*. at 381, 767 P.2d at 348.

Unlike *Dennis*, the evidence in this case reveals an employee with very little independent judgment or discretion. The evidence shows that the claimant had little discretion with respect to advertising and marketing decisions. The advertising accounts were in place in many respects when the claimant began working for the employer. Her primary duty with respect to advertising appeared to be "babysit" the advertising accounts and ensure that the ads which were placed in various media were correct. She made telephone contact with customers, but her duties primarily involved serving as a conduit between customers and other

managers who would resolve the customers' concerns. The claimant also appears to have been involved in completing errands which involved no discretion, such as picking up or dropping off cars or bringing cookies in for meetings. She planned company parties, but those parties were not directly related to the management policies or general business operations of the employer. On balance, the evidence is insufficient to show that the claimant held an exempt administrative position.

C. The Respondent Owes the Claimant $305.96 in Overtime Wages.

Because the respondent did not show that the claimant was exempt, the FLSA overtime requirements are applicable to this case. FLSA prohibits employers to whom the act applies from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed.

29 U.S.C. § 207(a)(1). Because the claimant is not exempt, the respondent is required to compensate her at a rate of one and one-half of her regularly hour rate for all hours of overtime that she worked.

29 CFR § 778.113 (a) and (b) provide the means for determining the regular hourly rate and overtime hourly rate for a non-exempt employee who receives a salary. That section states:

> a) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.
>
> b) Salary for periods other than workweek. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above.
>
> Application the regulation to this case shows that the claimant is entitled to a regular hourly wage of $9.23 and an overtime hourly wage of $13.85.

The burden of proof regarding hours worked is on the employer, not the employee. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. If the employer fails to record the employee's hours, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise time records.

> Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).

The claimant has demonstrated that she worked 162.75 hours of overtime between July 1, 2000 and October 26, 2001 and that she is due $305.96 in overtime wages. The claimant asserts that in determining the amount due for overtime, the hearing examiner can not take account of the fact that the employer paid the claimant for an additional 173.5 hours of work which she did not complete and for which she was not entitled to pay. The claimant contends that to do so would be tantamount to imposing an impermissible offset against the wages due to the claimant. The claimant has cited no statutory language or case law that would compel the hearing officer to reach that conclusion.

In reality, the respondent is not seeking a set-off. Calculation of the amount due to the claimant for overtime is simply a matter of comparing the amount of wages owed to the employee against the amount of wages actually received by the employee. *Shultz v. Bradley*, 67 Lab. Cas. (CCH) P32,650 (E.D. Va. 1972). To fail to account for the pay given to the claimant for the 173.5 hours of missed work would improperly fail to take account of the wages actually paid to the claimant. This would not advance the policies embodied in the overtime payment regulations. To the contrary, the claimant would receive a windfall which neither the law nor common sense can justify.

Finally, the claimant also contends that the respondent owes her overtime compensation for the period between October 29, 1999 and June 30, 2000, when the respondent clearly considered her an hourly employee. The overtime hours claimed by the claimant between October 23, 1999 and June 30, 2000, are not credible in light of the claimant's own testimony and the time cards that were admitted into evidence (Exhibits A through H). The credible evidence shows that the employer paid the claimant all overtime she was owed during this period.

D. <u>Imposition of Liquidated Damages Is Not Appropriate.</u>

Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages which provision which states:

> Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216

However, the Portal to Portal Act alters the liquidated damages provision of the FLSA.

> In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

29 U.S.C. § 260. The court may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith.

To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [they] had reasonable ground for believing that [their] act or omission was not a violation of the [FLSA]." *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir.,1987). This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.*

In this case, the respondent had an honest subjective (though erroneous) belief (as evidenced by the consistent testimony of Goetz and Juhnke) that the claimant was an exempt employee and therefore not entitled to overtime compensation. The respondent's honest intention from the outset of the claimant's employment was to move the claimant into a management position and make the claimant an exempt employee. Furthermore, had the respondent believed that the claimant was a non-exempt employee, respondent would have undoubtedly paid her overtime in accordance with FLSA requirements as it did when the claimant was an hourly employee. The parties have presented no evidence to show that the respondent has ever engaged in or even been accused of failing to comport with FLSA requirements outside of this case. The respondent's conduct in this case was not an attempt to circumvent the FLSA requirements. Under the circumstances of this case, the respondent has met its burden and the imposition of liquidated damages is not appropriate.

E. <u>The Claimant Is Not Entitled To Attorney's Fees.</u>

The claimant also seeks attorney's fees on her claim. However, she is not entitled to attorney's fees because they are not available in this administrative proceeding. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Construction Co.* (1984), 208 Mont. 420, 680 P.2d 932 (attorney's fees are not recoverable at the administrative stage of a wage and hour claim).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the 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. The respondent is an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. The claimant is not an exempt administrative employee.

4. The employer violated 29 USC § 207(a)(1) by failing to pay the claimant $305.96 owed to her in overtime wages for the time period of July 1, 2000 to October 26, 2001.

5. The employer had a good faith basis for believing that it had not violated the prescriptions of FLSA and therefore liquidated damages should not be imposed in this case.

6. The claimant is not entitled to attorney's fees in this proceeding.

VI. ORDER

The respondent Livingston Motors, d/b/a Yellowstone Country, GMC, is ordered to tender a cashier's check or money order in the amount of $305.96, made payable to and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 2nd day of April, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

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.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce

this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

Claimant's counsel objected to the admission of Exhibit Z asserting that the document was not the "best evidence." Claimant's proposed findings of fact, page 1. The objection was misplaced for three reasons. First, in wage and hour hearings, a hearing examiner is not bound by the rules of evidence. Mont. Code Ann. § 39-3-216 (3). Second, the respondent offered the evidence for demonstrative purposes only. Third, even if the rules of evidence applied, the claimant did not contend that the original of that document was any different than the photocopy offered. Thus, Rules 1002 and 1003 (the rules which delineate the need to produce an original) would in no event have been called into question with respect to Exhibit Z.

The pertinent text of this regulation and the reasons for its application in this case are set out in Section IV C below.

In addition to being established by the facts adduced at the hearing, the claimant's attorney conceded during closing argument that the claimant was claiming only 162.75 hours of overtime between July 1, 2000 and October 26, 2001.

Respondent's counsel argued at the hearing and submitted a proposed finding of fact that Reed was paid $28,800.00 in salary during this time period. The evidence, however, does not reflect this. Exhibits J through Y, the actual pay stubs for wages paid to claimant for salary between July 1, 2000 and October 26, 2001, total $25,600.00.

Since the provisions relating to overtime requirements in both the FLSA and the Minimum Wage and Overtime Act contain identical language, there is no practical difference in analyzing this case under one or the other act with respect to whether or not an overtime violation has occurred.