

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 222-2005
OF DONNA C. SHOCKLEY,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
BIOSCIENCE LABORATORIES, INC.,)	
a Montana Corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, Respondent BioScience Laboratories, Inc. (BSLI), appeals the determination of the Wage and Hour Unit of the Department of Labor and Industry which found BSLI owed additional wages (both regular and overtime) to Claimant Donna Shockley. The determination resulted from Shockley’s complaint that she was due unpaid overtime wages from June, 2002 until her discharge from her BSLI employment on June 22, 2004. In the appeal, BSLI contends that Shockley was an exempt administrative employee and not entitled to the protections of the minimum wage and overtime statutes.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on March 14, 15, and 24, 2005. Rhett B. Nemelka, attorney at law, appeared on behalf of Donna Shockley. Daniel J. Roth, attorney at law, appeared on behalf of BSLI. Shockley, Erin Birdsley, Jeanie Arnold and Michael Douglas testified under oath on Shockley’s behalf. Marsha Paulson, John Mitchell, Mark Charnholm, and Amy Juhnke testified on behalf of BSLI. Documents 1 through 198, 201 through 213, and 215 through 221 contained in the Wage and Hour Unit file were admitted into evidence by stipulation. Shockley’s Exhibits A through C were admitted into evidence by stipulation. In addition, BSLI’s exhibits 1 through 7, 13 through 131, 135, 142 to 149, 150 to 154, and 251 through 254 were admitted into evidence. BSLI’s Exhibits 10 through 12 were admitted as summaries pursuant to Rule 1006, Montana Rules of Evidence. BSLI’s Exhibit 8 was utilized for

demonstrative purposes only. In addition, the parties stipulated that this matter falls within the Fair Labor Standards Act.

Based on the evidence and argument presented at hearing, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision in this matter.

II. ISSUE

Does BSLI owe wages as claimed in Shockley's complaint and penalties as provided by law?

III. FINDINGS OF FACT

1. BSLI is a Montana corporation located in Bozeman, Montana. BSLI is a testing laboratory, testing biological specimens and conducting other types of scientific analysis. Daryl Paulson is the president of the company. His wife, Marsha Paulson, is the vice-president.

2. BSLI is broken into different parts. There is a laboratory component of the company, a sales division, and a quality assurance component to the entity. Documents 39-46.

3. In 1999, BSLI hired Shockley. She first worked as the Director of Business Operations of BSLI. Later, her title was changed to Director of Accounting. Her job responsibilities, however, remained essentially unchanged throughout her tenure at BSLI. BSLI paid Shockley an annual salary of \$45,000.00. BSLI discharged Shockley on June 22, 2004. At no time during her employment was Shockley involved in the production work of BSLI; i.e., she did not undertake any scientific analysis, she did not engage in sales, and she did not engage in any of the company's quality assurance oversight related to the scientific testing.

4. Shockley's job position as of 2002 had a very detailed job description (Document 32). The description indicated that she held the position of Director of Business Operations. Her duties and responsibilities included: (1) assuring the financial requirements of the company were met; (2) accounts receivable, including initiating collections on past due accounts; (3) accounts payable, including approval of materials, requisition and purchase orders, approval of invoices submitted to the company, and payment of the invoices; (4) payroll, including maintaining time records, ensuring proper payroll deductions, and timely payment of quarterly payroll

taxes; (5) preparing and interpreting financial statements on monthly basis; (6) creating, monitoring, reporting and interpreting monthly and yearly company budgets; (7) preparing financial reports required for managing the company; (8) assuring that the properties of the company were adequately insured; and (9) monitoring employee bonus programs and sales commissions programs. In addition, the job description indicated that Shockley directly supervised both the secretary and receptionist.

5. Shockley and Marsha Paulson, vice-president, worked together to develop Shockley's job description. At the time of creating the job description, Paulson discussed with Shockley that Shockley would be managing other employees. Shockley wanted to have this management function. As shown by the findings of fact below, the duties that Shockley actually undertook in performing her job closely mirrored those contained in her job description.

6. Shockley had the responsibility of keeping BSLI fiscally solvent. She prepared projections of cash flows for the company. She had independent authority to authorize or reject requisitions of purchases and discretion as to which vendors' bills to pay first. If Shockley determined that the requisition was not within the budget, she had the authority to deny the requisition. For example, on one occasion, Mark Charnholm, manager of laboratory support and calibration, made a requisition for the purchase of calibration equipment. The cost of the item was \$7,000.00. Charnholm went to Shockley; Shockley approved the requisition. In fact, Shockley contacted the person selling the equipment and made arrangements to complete the transaction.

7. John Mitchell, the director of quality assurance for BSLI, interacted with Shockley on a daily basis. Mitchell obtained approval for purchases of equipment from Shockley. Shockley had independent authority to decide whether to approve Mitchell's requisitions. In one instance, two of Mitchell's subordinates ran into a problem regarding discrepancies with respect to their accrued vacation time. Mitchell went to Shockley in order to have the problem rectified. Shockley did not have to check with the BSLI owners before making adjustments to the two employees' accrued vacation time.

8. Shockley oversaw the financial aspects of BSLI and ensured that BSLI made money. Any pay raises for employees, even those directed by Marsha Paulson, had to be cleared with Shockley to ensure that the budget would permit the raise. Paulson would not give a pay raise to an employee unless Shockley indicated the raise would fit within the budget.

9. Shockley managed employees and participated in the hiring of employees. Shockley supervised Erin Birdsley and Amy Juhnke. Shockley actively participated in interviewing and hiring Amy Juhnke. During the interview, Shockley asked Juhnke about her experience, her strengths, weaknesses, and how she believed she would be an asset to BSLI. Juhnke reported to Shockley on a daily basis and Shockley served as Juhnke's direct supervisor. If Juhnke wanted time off, she made the request to Shockley. Shockley had the authority to approve not only Juhnke's requests for time off, but also requests by other employees. Shockley also completed in-depth performance reviews of Juhnke's work (see, e.g., BSLI Exhibit 261 through 264). In addition, Shockley disciplined Juhnke and Birdsley.

10. At one point, BSLI hired Windy Christie, a human resources consultant, to review job positions at the company to determine if employees were being properly compensated. Christie was brought in at Shockley's request because of Shockley's concerns about whether some personnel who were employed as salaried individuals should in fact be compensated on an hourly basis.

11. As a result of engaging the consultant, BSLI developed a new set of pay guidelines and policies for inclusion in the employee manual. Management personnel, including Shockley, met with Christie and reviewed and commented on the propriety of Christie's recommendations. Shockley worked closely with Christie to develop the new compensation guidelines and had direct input into revamping those policies and guidelines. At no time during this revamping of the compensation structure (nor, for that matter, at any time during her employment) did Shockley suggest that she herself was not being properly compensated.

12. During 2002 and 2003, BSLI managers attended a retreat at Flathead Lake open only to managers. The retreat was a brainstorming session to explore ways to keep BSLI profitable and to make the company more profitable. Shockley actively participated in the discussions, offering suggestions as to how to make the company more profitable.

13. Shockley also regularly attended Monday morning management meetings. During these meetings, the managers discussed business, the general direction that the company was taking, and whether the company was headed in the right direction. Shockley was an active participant in these discussions, sometimes engaging in heated discussion with both Paul and Marsha Paulson and other managers about the direction and management of the company.

14. After Paulson discharged Shockley, Paulson advertised for a bookkeeper at BSLI. The new position paid a salary of \$25,000.00, far less than the \$45,000.00 that Shockley had made.

IV. DISCUSSION AND ANALYSIS¹

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers 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. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt certain employees from the requirement for overtime premium pay. Mont. Code Ann. § 39-3-406(1)(j) and 29 U.S.C. § 213(a)(1) and (17). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Shockley contends that BSLI owes her overtime premium pay for her hours worked in excess of 40 per week. BSLI contends that Shockley is an exempt administrative employee.

The question of whether Shockley was an exempt employee not entitled to overtime premium pay is the key question in this case. If she is not exempt under the FLSA, then the remedies available under the FLSA govern her claim. Mont. Code Ann. § 39-3-408. If she is exempt under the FLSA, further analysis is necessary to determine if she is exempt under Montana law. *Id.* See also, *Babinecz v. Montana Highway Patrol*, 2003 MT, 315 Mont. 325, 68 P.3d 715. Her claim must first be analyzed under the FLSA.

The parties concede that this is an FLSA case. The FLSA exempts an employer from paying overtime premium pay to an “employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . .).” 29 U.S.C. § 213(a)(1). 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 .

¹Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

BSLI contends Shockley is exempt as a bona fide administrative employee under the provisions of 29 U.S.C. § 213(a)(1) and Montana law. Each of these contentions is addressed below.

A. Shockley Is A Bona Fide Administrative Employee Under FLSA.

The regulations adopted by the U.S. Department of Labor to “define and delimit” the term “bona fide administrative employee” state:²

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any 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 the 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) of the section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week . . . : Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week . . . and whose primary duty consists of the

²The U.S. Department of Labor adopted new regulations to define and delimit the terms bona fide administrative employee effective August 23, 2004, two months after Shockley’s employment with BSLI ended. 69 Fed. Reg. 22122 (April 23, 2004). Neither party has suggested that the new regulations should apply to Shockley’s claim, and the hearing officer is unaware of any basis to apply the new regulations retroactively.

performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.2 (effective May 7, 1973, amended effective February 19, 1975).

Because Shockley was compensated on a salary basis at a rate of at least \$865.00 per week (\$45,000.00 divided by 52 weeks equals \$865.00 per week), the proviso of 29 C.F.R. § 541.2(e), also known as the short test, applies to her claim. Under the short test, Shockley was an exempt administrative employee if her primary duty was the performance of office or nonmanual work directly related to management policies or general business operations of her employer or her employer's customers, and her work required the exercise of judgment and discretion.

The work Shockley performed as her primary duty was office and nonmanual work. The regulations of the U.S. Department of Labor also provide guidance on the meaning of the term "directly related to management policies or general business operations of her employer or her employer's customers." The regulations provide:

(a) The phrase "directly related to management policies or general business operations of her employer or her employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of her employer or her employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. . . .

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is

“directly related” to management policies or to general business operations include those [sic] work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. . . .

. . .

29 C.F.R. § 541.205 (effective May 7, 1973).

Although Shockley denied that she performed work which met the regulatory tests for the administrative exemption, the evidence presented by BSLI clearly established her as an exempt administrative employee under the FLSA. She did not perform any of the production work of the business which consisted primarily of testing and analyzing laboratory specimens and engaging in other scientific analysis. She engaged in far more than bookkeeping for BSLI. She was, in fact, the financial administrator and adviser for BSLI. She had independent discretion to authorize or reject requisitions for materials from peer managers and other employees. She prepared cash flow projections for the business. She actively participated in meetings and conferences that mapped out the direction and growth of the company. Under these circumstances, she clearly meets the exemption for administrative personnel under FLSA.

B. Shockley Is A Bona Fide Administrative Employee Under Montana Law.

As discussed above, because Shockley is exempt under the FLSA, it is also necessary to analyze whether she is exempt under Montana law. Under the facts of this case, the analysis of whether Shockley is exempt under the Montana statutes and rules is virtually identical to the analysis under FLSA. The Montana law governing overtime premium pay exempts from the requirement of overtime premium pay “an individual employed in bona fide executive, administrative, or professional capacity, as these terms are defined by regulations of the commissioner [of the department of labor and industry].” Mont. Code Ann. § 39-3-406(1)(j). The department has adopted administrative rules to define these terms at Admin. R. Mont. 24.16.201

through 24.16.206. The rules of the department defining these terms are identical to the rules adopted by the U.S. Department of Labor under 29 C.F.R. § 542.1.

Like the federal rules, the Montana rules also provide for the same short test that applies to the FLSA analysis. Admin. R. Mont. 24.16.202 (5). The burden of proving an exemption under the state regulation 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. 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.

Like the employee in *Dennis*, the evidence in this case reveals an employee who engaged in office work directly related to management policies of the business. Shockley had direct input in the hiring, firing and performance reviews of BSLI employees. Shockley monitored and was responsible for the general fiscal health of BSLI. She monitored financial situations of all departments. She decided the order in which vendors would be paid and whether or not the company budget could afford a proposed pay raise for an employee, even if the company vice president proposed the pay raise. In addition, she had absolute authority to approve requisitions, both large and small. Like the employee in *Dennis*, Shockley was an exempt administrative employee under Montana law.

V. 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. Shockley was a bona fide administrative employee as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(1) and (17). As such, she was an exempt employee not entitled to overtime premium pay when she worked more than 40 hours per week.

3. Shockley was a bona fide administrative employee as provided in the Montana minimum wage and overtime laws, Mont. Code Ann. § 39-3-406(1)(j). As such, she was an exempt employee not entitled to overtime premium pay when she worked more than 40 hours per week.

4. Because Shockley was exempt under both FLSA and the Montana Wage and Hour Act, BSLI does not owe her overtime premium pay, liquidated damages, or penalties for the hours she worked over 40 per week during the period June, 2002 through June 30, 2004.

VI. ORDER

For the reasons stated above, Shockley's claim is dismissed pursuant to Admin. R. Mont. 24.16.7541(3) .

DATED this 20th day of May, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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 the decision. See also Mont. Code Ann. § 2-4-702.

STATE OF MONTANA
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IN THE MATTER OF THE WAGE CLAIM) Case No. 222-2005
OF DONNA C. SHOCKLEY,)
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Claimant,)
) *Order Nunc Pro Tunc*
vs.)
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BIOSCIENCE LABORATORIES, INC., a)
Montana Corporation,)
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Respondent.)

* * * * *

The hearing examiner inadvertently omitted from his decision that BSLI exhibits 261 through 264 were admitted into evidence at the hearing. Accordingly, the final decision in this matter is amended *nunc pro tunc* to show that BSLI exhibits 261 through 264 were admitted into evidence.

DATED this 23rd day of May, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer