

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 476-2004
OF TIMOTHY W. KUNEY, )	
)	
Claimant, )	
)	<b>FINAL AGENCY DECISION</b>
vs. )	
)	
COMMUNICATIONS UNLIMITED INC., )	
a North Dakota corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

On September 2, 2003, Kuney filed a claim with the Department of Labor and Industry contending that Communications Unlimited, Inc. (CUI) owed him \$19,729.12, consisting of \$19,265.62 in overtime premium pay and \$463.50 in commissions. On October 9, 2003, CUI filed a response to the charge, contending that Kuney was an exempt employee for overtime purposes, and denying that it owed Kuney additional compensation.

On January 16, 2004, the Department's Wage and Hour Unit issued a determination finding that Kuney's claim for overtime premium pay was subject to the Fair Labor Standards Act (FLSA), that his claim for commissions was subject to the Montana Wage Payment Act, that CUI owed Kuney \$6,961.30 in overtime premium pay, \$463.50 in commissions, and a penalty of \$69.53 on the commissions. The determination also held that Kuney was not entitled to liquidated damages because there was no evidence that CUI failed to act in good faith. On February 3, 2004, CUI filed a request for redetermination.

On May 21, 2004, the Wage and Hour Unit issued a redetermination finding that CUI owed Kuney \$6,479.31 in overtime premium pay. It held that although the employer was subject to the FLSA, the FLSA exemption for employees in computer systems analysis and programming work was not applicable in the case because

Montana law contains no comparable exemption. It also held that Kuney was not entitled to commissions, penalty, or liquidated damages.

On June 9, 2004, CUI appealed the redetermination. Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on August 20, 2004.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on December 1 and 2, 2004. The claimant, Timothy W. Kuney, was present and represented himself. Mark E. Westveer represented the respondent, Communications Unlimited, Inc. (CUI). Its president, John Grabar, was present as CUI's representative. Timothy Kuney, John Grabar, Sonia Grabar, and Rob Brandt testified in person. Robin Hariper, Geri Frohlich, and Rose Hollan testified by videoconference. Trenton Evenson, Eric Hoetzer, and Tim Frederic testified by telephone. Exhibits 1, 7 to 9, 10 to 19, 21 to 23, 35 to 37, 38, 119 to 121, 122 to 132, 149, 150, 152, 153, 154 to 180, 200 to 204, 206, 209 to 209, 218, 226 to 227, 236 to 237, 240, 259 to 261, 263, 265 to 266, 268 to 274, 284 to 292, 296 to 362, 400 to 401, 402 to 403, 404 to 411, 412, 413 to 432, 438 to 445, C, G1 to G3, P, EE1 to EE2, FF, GG, HH, II, LL1 to LL3, AAA1 to AAA2, and BBB were admitted into evidence. Exhibits 243 to 257 were admitted for demonstrative purposes only. Exhibit 231 was excluded on hearsay grounds. Exhibits 433 to 437 were excluded on relevance grounds. Exhibit AAA7 was excluded on the grounds that it was not the best evidence. Exhibit JJ was proposed but then withdrawn.

The parties filed post-hearing arguments on January 11 and January 14, 2005 and the case was deemed submitted for decision.

## **II. ISSUE**

The issue in this case is whether Communications Unlimited, Inc., owes wages for work performed, specifically overtime premium pay and commissions, as alleged in the complaint filed by Timothy W. Kuney, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. CUI was engaged in the business of selling and servicing, among other types of products, computerized dictation and transcription systems in North and

South Dakota, Minnesota, Montana, and Wyoming. Its primary customers for the dictation and transcription systems were hospitals and medical clinics. It had a franchise for Lanier products, a major supplier of such systems. It also sold several other brands of computerized dictation and transcription products, including Winscribe and Dolby (DVI). CUI's headquarters was in Bismarck, North Dakota. Its president and principal shareholder was John Grabar. Sonia Grabar provided unsalaried management assistance to the company after marrying John Grabar in March 2001.

2. Timothy W. Kuney was employed by CUI beginning in April 2000 to August 22, 2003.

3. Kuney received an undergraduate degree in communication studies from the University of Montana in 1994. Prior to commencing work for CUI, Kuney was the Director of Information Systems for Great Harvest Franchising, a position he had held for approximately 3 years. In that position, he was responsible to lead all information technology functions for Great Harvest Franchising, manage the acquisition, implementation, and operation of new and existing computer technologies, supervise and train information computer technology staff, manage information technology functions from inception to implementation, and perform other related duties. He also had approximately 2 years experience as an information technologies/computer system support specialist and intern at the University of Montana and had worked for approximately 6 years as a private information technology consultant. He had completed training courses in Microsoft NT 4.0 Administration and Core Technologies, Microsoft Networking Essentials, and Novell 4.11 Administration, Advanced Administration, Install & Configuration, and TCP/IP.

4. Before working for CUI, Kuney had experience in migrating computer operating systems, implementing corporate intranet applications, supporting numerous users, installing, configuring, and maintaining enterprise servers, coordinating frame relay internet connections to include internet protocol address implementation and administration, designing and implementing local area networks, building computer workstations, creating and managing websites and intranets, managing the formulation, collation, implementation, communications and control of strategic information systems including internet/intranet, local area networking, e-mail, database and other information systems, designing, installing, configuring and

administering local area networks, managing e-mail systems, designing websites, managing client workstations, and training new and experienced computer users.<sup>1</sup>

5. CUI hired Kuney and assigned him primary responsibility for the setup, configuration, installation training, post-installation, and telephone software/hardware support of Lanier Cquence modules and related systems, and secondary responsibilities for development of general business network sales, hardware, and technical services in its western region, which included Montana and Wyoming. The work for which Kuney was hired and that he performed in the course of his employment required knowledge at a more advanced level than that performed by other CUI computer service employees who had degrees in computer science.

6. Kuney's initial base annual salary was \$51,000.00 plus overtime at time and a half, bonuses, and commissions. In 2001, CUI increased Kuney's annual base salary to \$55,000.00. He continued to be eligible for overtime, bonuses, and commissions. CUI guaranteed him an annual income of \$67,000.00 from all sources for 2001. CUI also provided Kuney with certain employee benefits such as health insurance, profit sharing and 401K plans, paid time off, a company vehicle, laptop computer, cell phone service and internet service. It paid his expenses for travel to perform CUI business.

7. When it hired Kuney, CUI was seeking to expand its operations in Montana and Wyoming. Kuney lived in Dillon, Montana. CUI anticipated he would move to Missoula, Montana, when he sold his home in Dillon. CUI had several large clients in Missoula and its sales manager for the western region was located there. CUI wanted Kuney to relocate to Missoula within 6 months of hire.

8. When CUI hired Kuney, it had two other employees in its western region. They were Chay Hughes, the sales manager for the region, and Deb Newlon, who provided sales technical support and training to customers. Both were located in Missoula. John Grabar visited customers and met with the employees in Montana infrequently. The western region was extremely important to CUI, with a critical service need much greater than the rest of CUI's territory and producing nearly twice the annual revenue from service work.

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<sup>1</sup>Kuney also knew how to program using a computer language called SQL and was able to program reports using a program called Crystalwriter. The record is not clear whether he had these skills when he commenced employment with CUI or attained them during his employment.

9. Kuney moved to Missoula, but then relocated to Helena, Montana, a distance of 115 miles from Missoula, in late 2001 or early 2002. He told John Grabar that he was having trouble finding affordable housing to purchase and that he had an opportunity to live in his grandparents' home in Helena. Grabar approved the relocation, believing it would give Kuney an opportunity to save money for the purchase of a home in Missoula. When he learned that Kuney had purchased a home in Helena, Grabar was surprised and irritated because of the travel time and travel costs required for Kuney to perform work in Missoula.

10. In 2002, CUI completed a salary review for Kuney's position. This review and the resulting changes to Kuney's compensation package came about following several negotiations and conference calls between Kuney and John Grabar. Kuney initiated the negotiations, at least in part, because Newlon was leaving the company and CUI had determined it did not have enough business to sustain a replacement in her position. Kuney believed the resulting increased responsibility warranted an increase to his base pay equal to 40% of her salary and a 15% commission based on all renewed Montana service agreements. In an e-mail message to Grabar on February 13, 2002, Kuney stated:

The 40 percent figure seems appropriate considering that I will be assuming well over 40 percent of Deb's responsibilities as well as somewhere between 50 - 80 percent of Lonny's responsibilities. Both of which I am willing to assume as long as the compensation package is adjusted accordingly. The commission part of this would add an element to my compensation package that comes closer to meeting my career goal of being more of a stakeholder in a company rather than just an employee. It also compensates me commensurate to the workload of an increasing number of service contracts with an increasing diversity of systems and equipment to support and no increase in man-hours to support those contracts. Adding a commission for me would also be an incentive to not only go the extra mile that I would typically do for our customers, but to go two. Under our current arrangement I will be honest in saying that I was somewhat glad to hear Great Falls and Kalispell wouldn't be renewing their contracts. Under the proposed arrangement I can assure you I would be actively doing whatever I could to prevent those kinds of losses.

11. Kuney prepared a document entitled "2002 Western Region Service Plan" dated February 28, 2002, which he submitted to CUI representing proposed goals and objectives for his position in the succeeding year. Key elements of the plan

included expanding the area of primary service responsibility to include all customers in Montana and Wyoming, assuming responsibility to develop and implement a company intranet, assisting with sales engineering and project management roles in upcoming sales and installations, working to make certain accounts remotely manageable, and negotiating and implementing a fair and mutually agreeable compensation package adjustment to include an increase in base pay and the addition of an equity percentage of certain renewed service agreements.

12. As a result of the negotiations which concluded on or about April 8, 2002, CUI and Kuney agreed to a revised compensation package for Kuney, effective April 15, 2002. The new package increased Kuney's base salary to \$65,000.00, plus certain bonuses and commissions. It provided that he would not be eligible for overtime pay except for on-call compensation. On-call compensation was defined as scheduled weekly call after hours or when an on duty on-call tech requested additional support when responding to a customer call. Overtime pay for weekday evenings was to be paid at time and one half; overtime pay for weekends and holidays was to be paid at double time. The agreement provided that Kuney would be responsible for the development and implementation of CUI's intranet dispatch and customer database program, that he would not be entitled to overtime associated with the program unless specifically approved, that he would be entitled to bonuses upon completing certain aspects of the program, and that on-going development and maintenance of it would be part of his general job responsibilities. The provisions of his compensation package applicable to commissions stated:

CUI will pay Tim commissions for selling customer training to existing medical customers, custom work sold, or new accounts sold general network equipment and billable hours. These are sales of services sold by Tim, any sales originating through Chay Hughes are not commissionable to Tim unless directed so by Chay. CUI only pays one commission. The object of paying commission is to promote new business outside of our normal sales channel.

1. Accounts with GMA's [guaranteed maintenance agreements] in place sold at \$105.00 per hour commission rate at 5% of invoice amount.
2. Non-GMA accounts sold at \$180.00 per hour commission rate at 20% of invoice amount.
3. Non-Hospital accounts sold at \$120.00 per hour commission rate at 10% of invoice amount. On product such as servers and pc's

sold by Tim we will pay 7% of the net profit assuming we have a 25% profit margin.

Kuney also agreed that he would not claim work time for travel between Helena and Missoula.

13. After the 2002 salary review, Kuney was CUI's highest paid computer service employee. The base salary of the next highest paid service employee during 2002 was \$57,632.00. The base salaries of other service employees during the 2002-2003 time frame were \$44,000.00, \$45,001.00, \$38,001.00, and \$43,000.00.

14. On or about April 1, 2003, CUI completed its salary review of Kuney for the employment year beginning April 15, 2003. The compensation package for 2003 was substantially unchanged from 2002. The on-call definition was modified by adding the following sentence: "On-call definition is anytime you are on-call normally Tuesday 8:00 am cst through Tuesday 7:59 am cst." Paragraphs 2 and 3 of the commission plan were modified to exclude commissions on accounts that called dispatch or the technician directly for the service of existing equipment.

15. The 2003 salary review included a job description listing Kuney's primary responsibilities as:

1. Systems setup, configuration, installation and training, post installation of the following product groups Kinetx, Lanier, DVI and Atis vendors.
2. Provide 24/7 on call response and after hours response where required and after hours response when possible when not on call.
3. Technical sales assistance as required.
4. The on going development and maintaining of CUI's Intranet Dispatch data base program. That includes updates, fixes and new required features.
5. Support, installation and design of VPN networks for voice over IP systems.

16. From June 2002 through the termination of his employment, Kuney submitted bi-weekly reports of the time he worked through CUI's intranet system, which Kuney had developed. Kuney did not maintain any other records of the hours he worked, except for information entered in CUI's work order system, which was a separate database. The time reporting system had columns for regular time (REG), overtime 1 (OT1), overtime 2 (OT2), paid time off (PTO), and holiday (HOL). The system also had an optional memo column. Kuney entered the hours he worked,

except for on-call time, in the REG column in the time reporting system. In many cases, the hours he entered in the REG column exceeded 40 per week. He used the OT1 column to report on-call time during the week for which he was entitled to time and one half under his compensation package, and the OT2 column to report on-call time on weekends and holidays, for which he was entitled to double time.<sup>2</sup> Kuney entered his location, if he was away from Helena, or details of his on-call time in the optional memo column. He did not make other entries in the memo column.

17. Although Kuney claimed overtime commencing April 2002, the evidence to support his claim consists of summaries printed from the time entry system documenting hours worked and pay stubs showing what he was paid commencing June 2, 2002. From June 2, 2002 through August 22, 2003, Kuney's time reports showed that he worked 2,777 hours that he reported as REG hours, 102 hours that he reported as OT1, and 100 hours that he reported as OT2. CUI paid Kuney for 2,403 REG hours,<sup>3</sup> 109 OT1 hours, and 81 OT2 hours. Sometimes CUI paid Kuney OT1 for time he had claimed as OT2, and vice versa. A few times, CUI did not pay Kuney OT1 or OT2 he had claimed, but then corrected for this in a subsequent pay period. For the pay period ending August 8, 2003, CUI did not pay Kuney for 20 hours of work he claimed as OT2 on July 26 and July 27, 2003 for working on a customer incentive reporting tool at John Grabar's request. CUI paid Kuney for these hours as OT1 in his final paycheck. CUI refused to pay Kuney for 12 hours of OT1 claimed on August 8, 2003 for a call to North Big Horn Hospital in Wyoming because it was incurred after Grabar told Kuney not to continue with his efforts to repair the system.<sup>4</sup>

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<sup>2</sup>The evidence was unclear as to how CUI intended employees to use the OT1 and OT2 columns in the time reporting system. Some employees reported overtime other than on-call time in the OT1 column and on-call time in the OT2 column. However, Kuney used both columns for on-call time.

<sup>3</sup>For reasons not explained in the record, CUI paid Kuney at his straight time rate for 13 extra hours in the pay period ending June 29, 2002, and for 8 extra hours in each of the pay periods ending July 27, 2002 and August 9, 2002. The pay stub for the period ending June 29, 2002 has a handwritten notation that Kuney requested the 13 extra hours be deducted the following pay period but there is no indication this was ever done.

<sup>4</sup>The combined OT1 and OT2 claimed by Kuney was 202 hours. The combined OT1 and OT2 paid by CUI was 190 hours. The difference between the two is 12 hours, which is equal to the amount of OT1 CUI refused to pay for the North Big Horn hospital call time.

18. CUI service employees also kept time records in a work order system. CUI's policy required employees to document all service work in the work order system. However, the hours documented on work orders did not directly correlate to the hours listed on time sheets for employees.<sup>5</sup> If the customer called CUI's dispatch center with an initial report of a problem, the dispatcher opened a work order, and the technician who completed the work had to enter information, including the number of hours worked, to close the work order. However, Kuney received many of his service calls directly from CUI's customers, and did not open work orders on calls he received directly from customers that had guaranteed maintenance agreements. As a rule, he opened work orders only for service work that had to be billed.

19. The work performed by Kuney from April 2002 through August 22, 2003, consisted of the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, and system functional specifications, and of the design, analysis, testing, and modification of computer systems or programs. The computer systems CUI sold to its customers were complex systems which had to be integrated into the purchasers' other information systems. In the western region CUI sold and supported dictation systems with transcription modules, also known as "typing packages". CUI had few transcription modules elsewhere in its sales and service area. A dictation system could have a variety of mechanisms for recording the dictation, including telephones, handheld devices, and personal computers. A transcription system required the ability to interface with databases and to send the completed document to print, fax, and file servers. Depending on the needs of the customer, the dictation and transcription systems could be interfaced with a variety of other systems, including the customer's existing computer network, mainframe, database system, filing systems, voice recognition, and medical records system. In addition, variations existed between the systems sold by the different vendors that CUI used. Installation of these systems required Kuney to design, program, implement, test, and change all aspects of the system and required from 6 weeks to 6 months of work. Kuney had the advanced knowledge and expertise to perform, and did perform, all of the aspects of such installations including the scope, design, and support of the systems in his work for CUI.

20. In addition to the customer installation and service work during the period of his claim, Kuney developed and implemented the company intranet and

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<sup>5</sup>This fact was the subject of a prehearing stipulation noted in a ruling on motions dated November 10, 2004.

worked on reporting systems and systems for enhancing remote support of CUI customers.

21. Kuney had substantial independence and exercised consistent discretion and independent judgment in the performance of his work for CUI. He worked in a remote location and had no direct supervision. John Grabar rarely visited the western region. Kuney did not regularly contact the office in Bismarck. Unlike other CUI service employees who received most, if not all, of their service assignments through the dispatch center, the customers in the western region often contacted Kuney directly, calling Bismarck only if unable to reach Kuney. Kuney was involved in determining the scope of the projects he worked on. He coordinated his projects with the customers, the vendors, and his own work. He was directly involved in determining whether he required vendor support and at what level.

22. One of CUI's western region customers was St. Patrick's Hospital in Missoula. In the latter part of 2002, CUI sold St. Patrick's Hospital a new Lanier transcription system. The hospital had a dictation system in place and the transcription system was a module being added to it. Commencing in early February 2003 and continuing until late July 2003, Kuney spent most of his time on the installation of the St. Patrick's system. During the installation, CUI assigned a second service employee, Rob Brandt, to assist Kuney in the western region. Brandt handled western region service calls to the extent of his ability and handled some service calls from the Bismarck area. However, he spent about 50% of his time on the St. Patrick's installation being available to assist Kuney and performing work that Kuney assigned to him. He observed that Kuney, not the Lanier technicians who came on-site, did the majority of the work on the installation.

23. The St. Patrick's installation was the most complex system that Kuney worked on for CUI. It took a long time to complete in part because of its complexity and in part because the original system sold to St. Patrick's was a different system that became obsolete during the installation. Kuney was well underway with the first installation when Grabar decided to install a different system. The system was new to Kuney. The installation was complicated beyond what he knew. Some of the software installations took days to complete. Although he had attended at least three Lanier training courses, he had no training for part of the system he was installing. He had to learn many new things as he went along in the process.

24. Between June 2, 2002 and August 22, 2003, Kuney worked 362 hours in excess of 40 per week for which he was not paid OT1 or OT2. For 31 of those hours, CUI paid him at an hourly rate of \$31.25. The majority of overtime he

worked, 256 hours according to his claim, was due to time spent on the St. Patrick's installation.

25. In October, 2002, Kuney developed a proposal to modify the Lanier transcription system that CUI had previously installed at Bozeman Deaconess Hospital. The modifications were to add functionality to the system. Chay Hughes had sold the original system to Bozeman Deaconess and remained the representative for the account. The total cost of the proposal was \$9,270.00. CUI invoiced the work and Bozeman Deaconess paid the invoice in late 2002, before any work had been completed on the modifications. When Kuney left his employment with CUI in August 2003, the modifications still had not been completed.

26. Kuney resigned on August 11, 2003, effective August 22, 2003. In his letter of resignation, he stated his decision was based primarily on the fact that he had not been compensated for "256+" hours of overtime. He also stated that it was based on the hardships placed on him and his family for the tons of extra effort put forth toward CUI and its customers with little in the way of reward. After leaving CUI, Kuney started his own computer service company in competition with CUI.

#### **IV. DISCUSSION AND ANALYSIS<sup>6</sup>**

##### **A. Kuney's Claim for Overtime Compensation**

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.

Kuney contends that CUI owes him overtime premium pay for 411 hours worked in excess of 40 per week. CUI contends that Kuney has failed to prove he

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<sup>6</sup>Statements 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.

worked the hours, and that he is an exempt employee. It also contends Kuney's claim is barred by waiver, estoppel, or laches.

### 1. Exempt Employee Status

The question of whether Kuney was an exempt employee not entitled to overtime premium pay is the key question in this case. It is a difficult one, due to the differences between state and federal law and the question of which law governs. If he is not exempt under the FLSA, then the remedies available under the FLSA govern his claim. Mont. Code Ann. § 39-3-408. If he is exempt under the FLSA, further analysis is necessary to determine if he is exempt under Montana law. *Babinecz v. Montana Highway Patrol*, 2003 MT, 315 Mont. 325, 68 P.3d 715. Thus, his claim must first be analyzed under the FLSA.

The initial step in analyzing the claim under the FLSA is to determine whether Kuney's employment was covered by the FLSA. The overtime provisions of the FLSA apply to enterprises engaged in commerce or the production of goods for commerce with a gross sales volume of \$500,000.00 or more. 29 U.S.C. § 203(s)(1)(A). They also apply to employers with individual employees engaged in commerce. 29 U.S.C. § 201(a)(1). Because there is no evidence of that CUI had gross sales volume of \$500,000.00, the evidence does not establish that CUI was an enterprise engaged in commerce. However, as a representative of an out-of-state company engaged in sales of information services, Kuney was clearly engaged in commerce. Therefore, his employment is covered by the FLSA.

The FLSA exempts from the requirement for the employer to pay overtime premium pay "any 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). It also exempts:

[A]ny employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

29 U.S.C. § 213(a)(17).

CUI contends Kuney is exempt as a bona fide administrative employee, as a bona fide professional employee, and as a highly skilled computer worker under the provisions of 29 U.S.C. § 213(a)(1) and(17) and Montana law. Each of these contentions is addressed below.

**a. Highly Skilled Computer Worker under the FLSA**

Kuney was an exempt employee under 29 U.S.C. § 213(a)(17). His work for CUI consisted of the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, and system functional specifications, and of the design, analysis, testing, and modification of computer systems or programs. Although he was not paid on an hourly basis, converting his annual salary to an hourly rate based on 2,080 hours per year results in an hourly rate of \$31.25 per hour, which exceeds the rate included in the FLSA of \$27.63 per hour.

**b. Bona Fide Administrative Employee under the FLSA**

Kuney was also exempt as a bona fide administrative employee under the FLSA. The regulations adopted by the U.S. Department of Labor to “define and delimit” the term “bona fide administrative employee” state:<sup>7</sup>

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:

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<sup>7</sup>The U.S. Department of Labor adopted new regulations to define and delimit the terms bona fide administrative employee effective August 23, 2004, one year after Kuney’s employment with CUI terminated. 69 Fed. Reg. 22122 (April 23, 2004). Neither party has suggested that the new regulations should apply to Kuney’s claim, and the hearing officer is unaware of any basis to apply the new regulations retroactively.

(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) of this 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 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 Kuney was compensated on a salary basis at a rate of \$1,250.00 per week, the proviso of 29 C.F.R. § 541.2(e), also known as the short test, applies to his claim. Under the short test, Kuney was an exempt administrative employee if his primary duty was 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 his work required the exercise of judgment and discretion.

The computer work Kuney performed as his 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 his employer or his employer's customers." The regulations provide:

(a) The phrase “directly related to management policies or general business operations of his employer or his 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 his employer or his 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. . . .

. . .

(7) In the data processing field some firms employ persons described as systems analysts and computer programmers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer’s customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under Sec. 541.2 the “management policies or general business operations” may be those of the employer or the employer’s

customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of Sec. 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

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

Although Kuney denied that he performed work which met the regulatory tests for the administrative exemption, the evidence presented by CUI clearly established him to be an exempt administrative employee under the FLSA.<sup>8</sup> More than 50% of the time, he performed work that was directly related to the general business operations of his employer or his employer's customers. Because it was more than 50% of the time, it was his primary duty. Kuney analyzed customer needs, developed solutions, and installed, configured and supported systems used by hospitals and clinics to document and maintain patient records. In the language of 29 C.F.R. § 541.205, the activity is related to the administrative operations of CUI's customers as distinguished from "production," which in the case of a medical provider would be the treatment of patients. He also performed system development work for CUI itself in the creation of the intranet and the development of remote support enhancements, which were the administrative operations of CUI.

Kuney's primary duty also required the exercise of judgment and discretion. He worked virtually without supervision.<sup>9</sup> In all of his work, he was required to plan,

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<sup>8</sup>In his testimony, Kuney consistently downplayed the complexity of his work, the degree to which he exercised discretion and independent judgment, and the level of his expertise. His testimony in this regard was not credible. His answers to respondent's questions in these areas were evasive. At times, as when he was questioned about the private consulting he listed on his resume, he was forced to concede that a proposition he had initially denied was actually true.

<sup>9</sup>Kuney proposed for admission, and the hearing officer admitted into evidence over CUI's relevance objection, documents 430 to 431, purporting to be a position description for Chay Hughes suggesting that Hughes was responsible to oversee and review Kuney's performance. However, CUI did not provide this document to Kuney and Sonia Grabar, the witness through whom Kuney proposed it for admission, could not authenticate it. It

schedule, and coordinate activities to develop systems for processing data to obtain solutions to complex business problems of his employer and his employer's customers. The planning, scheduling, and coordination related to his own activities, and those of other CUI employees, customer representatives, and vendors. He was directly involved in determining whether he required vendor support and at what level.

Kuney's work on the general business operations of CUI and its customers was of substantial importance and required the exercise of judgment or discretion. Kuney's duties were comparable to those of computer professionals found to be exempt administrators in *Horne v. Singer Business Machines* (W.D. Tenn. 1976), 413 F. Supp. 52, 78 Lab. Cas. (CCH) P33,350, and *Lawrence v. Carte Blanche Corp.* (C.D. Ca.), 1979 U.S. Dist. LEXIS 12224, 86 Lab. Cas. (CCH) P33,806. *See also Gorman v. Continental Can Co.* (N.D. Ill.), 1986 U.S. Dist LEXIS 30856. Kuney fits squarely within the administrative exemption under the FLSA.

### c. **Bona Fide Professional Employee under the FLSA**

The regulations adopted by the U.S. Department of Labor to "define and delimit" the term "bona fide professional employee" state:<sup>10</sup>

The term employee employed in a bona fide \* \* \* professional capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or . . .

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer

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therefore lacks foundation. Because it lacks foundation, even though it was admitted, document 430 to 431 is not substantial evidence for the proposition that Kuney was subject to supervision by Hughes.

<sup>10</sup>The U.S. Department of Labor adopted new regulations to define and delimit the terms bona fide professional employee effective August 23, 2004. See footnote 7, *supra*.

programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in Sec. 541.303; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week . . . : Provided further, 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 performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment . . . shall be deemed to meet all of the requirements of this section. . . .

29 C.F.R. § 541.3 (effective May 7, 1973, amended February 19, 1975 and October 9, 1992.)

Again, the so-called short test applies to this case because Kuney earned a salary of more than \$250.00 per week. Thus, the question is whether Kuney's primary duty required either (1) knowledge of an advance type customarily acquired through specialized instruction or study, or (2) theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering (applicable if Kuney was employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field), and required the consistent exercise of discretion and judgment.

The work performed by Kuney was highly complex. The installation and configuration of the systems sold by CUI that Kuney was responsible to install required between six weeks and six months. Although Kuney did not have an advanced degree in computer science, he performed work that required advanced knowledge customarily acquired through specialized intellectual instruction and

study. Three of the other four CUI computer service employees who testified in the hearing had college level instruction in computer science and did not consider themselves qualified to perform the work being performed by Kuney because it was more advanced. Kuney had not received specific training in how to perform much of the work required to install the system in St. Patrick's Hospital, yet had to apply his advanced knowledge to the work and learn what was required. This is the essence of professional work. Thus, his primary duty satisfies the requirements of 29 C.F.R. § 541.3(a)(1).

Based upon the evidence outlined in the findings, he also meets the requirements of 29 C.F.R. § 541.3(a)(4). The work Kuney was performing qualified as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. His primary duty required theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.

Kuney's work required the consistent exercise of judgment and discretion, as discussed above in the section on the administrative exemption. He is therefore exempt as a bona fide professional employee under the FLSA.

#### **d. Exemptions under Montana Law**

As discussed above, because Kuney is exempt under the FLSA, it is also necessary to analyze whether he is exempt under Montana law. The Montana law governing overtime premium pay is parallel to the FLSA in many respects. It 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. Except for certain distinctions discussed below, the rules of the department defining these terms are identical to the rules adopted by the U.S. Department of Labor.

The significant difference between the federal law and Montana law for purposes of this case is that Montana law contains none of the specific references to computer related occupations that are set out in either the federal statute or regulations. The state overtime statute contains no exemption comparable to 29 U.S.C. § 213(a)(17). The regulations adopted by the Montana Department of Labor and Industry, effective December 31, 1972, do not contain the language relating to computer occupations set out in 29 C.F.R. §§ 541.205(c)(7), 541.3(a)(4),

or 541.303. Therefore, for purposes of determining whether Kuney is exempt under Montana law, it is necessary to consider whether he meets the tests for the administrative or professional exemptions independent of the computer occupations language.

Although the provisions of the federal regulations related to computer occupations bolster the analysis that Kuney's position is exempt under the FLSA, they are not necessary to arrive at that conclusion. His position meets the elements of the federal administrative and professional exemptions even without reference to the computer occupations language. For purposes of Admin. R. Mont. 24.16.202, the administrative exemption, Kuney was compensated on a salary basis at a rate of more than \$200.00 per week, his primary duty was the performance of office or nonmanual work directly related to the general business operations of his employer and his employer's customers, and his work required the exercise of discretion and independent judgment. For purposes of Admin. R. Mont. 24.16.203, the professional exemption, Kuney was compensated on a salary basis at a rate of more than \$200.00 per week, his primary duty required knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, and his work required the consistent exercise of discretion and judgment. Therefore, Kuney meets the requirements of Montana law to be an exempt employee.

## 2. Hours Worked

Because Kuney was exempt, the issue of whether he worked the hours claimed is not material to this decision. However, the parties litigated the issue, and it seems important to resolve the questions raised concerning it. Accordingly, the evidence demonstrates that Kuney worked 362 hours in excess of 40 per week.

The responsibility of keeping records to establish the number of hours worked rests with the employer. *See Roan v. Rosebud County* (1980), 192 Mont. 252, 627 P.2d 1222. In this case, Kuney submitted time reports to CUI on a regular basis throughout his employment. Thus, the employer kept time records. Those time records establish that Kuney worked 362 hours in excess of 40 per week for which he did not receive any overtime premium. This is less than the number of hours claimed by Kuney, but still a significant number. Although CUI questioned the accuracy of the records, it had no substantial evidence to the contrary. It submitted an analysis comparing the number of hours claimed on time reports to the number of hours submitted on work orders, but then conceded that the hours documented on work orders did not directly correlate to the hours listed on time sheets for employees.

Further, even though hours documented on his work orders were only about 65% of hours claimed on his time reports, Kuney still submitted more hours on work orders than any other computer service employee in the same time period.

The other factor that might have affected the accuracy of the number of hours worked was the time Kuney spent commuting between Helena and Missoula. In general, home to work travel is not compensable work time. Admin. R. Mont. 24.16.1010 and 29 C.F.R. § 785.38. However, the evidence was inconclusive on the question of whether Kuney claimed commuting time in the hours he submitted on his time reports. The testimony established that Kuney and John Grabar agreed that Kuney would not submit hours spent traveling between Helena and Missoula, and Grabar testified he trusted Kuney not to claim them. Therefore, no basis exists to reduce the number of hours claimed by Kuney due to the travel.

### **3. Waiver, Estoppel, and Laches**

Because CUI has prevailed on the merits of the claim, its contention that the claim is barred by waiver, estoppel, or laches is moot and need not be addressed.<sup>11</sup>

#### **B. Kuney's Claim for Unpaid Commissions**

The commission component of Kuney's claim is governed by Montana law, which 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. "Wages" include any money due from an employer to an employee, including bonuses and commissions. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

Kuney contends that CUI owes him \$463.50 as a commission for the sale of work to modify the Bozeman Deaconess system, based on his employment agreement, which provided for a commission of 5% of the invoice amount of sales to

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<sup>11</sup>This argument has generally met with disfavor in overtime cases. *See, e.g., Lewis v. B&B Pawnbrokers, Inc.*, 1998 MT 302, ¶25, 292 Mont. 82, 968 P.2d 1145.

accounts with guaranteed maintenance agreements. CUI denies that it owes a commission to Kuney on the grounds, *inter alia*, that the commission for the work was due to Chay Hughes.<sup>12</sup>

Under the terms of his employment agreement, Kuney was not entitled to a commission for the sale to Bozeman Deaconess because the commission was due to Hughes. The agreement states that CUI will pay Kuney commissions for custom work he sells. It goes on to state, “Any sales originating through Chay Hughes are not commissionable to Tim unless directed so by Chay. CUI only pays one commission. The object of paying commission is to promote new business outside of our normal sales channel.” The Bozeman Deaconess account was an account that had originally been sold by Hughes. The work Kuney sold was to add functionality to the system Hughes sold to Bozeman Deaconess. Pursuant to the Western Regional Service plan, one of Kuney’s responsibilities was to assist with sales engineering, which is what the scope document he prepared represented. CUI paid the commission for the sale to Hughes. Although the phrase “sales originating through” in the agreement is ambiguous, it seems clear that the intent of the language was to deny commissions to Kuney when he did sales engineering work on Hughes’s accounts. He was not entitled to a commission for this work.

### C. Attorney Fees and Costs

CUI also seeks attorney’s fees and costs of defending this claim. Even though CUI is the prevailing party, attorney’s fees and costs 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 *and* *Thornton v. Commissioner* (1980), 190 Mont. 442, 621 P.2d 1062 (attorney’s fees are not recoverable at the administrative stage of a wage and hour claim but are available once the case is appealed to the district court).

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<sup>12</sup>CUI also contends that the commission was not due to Kuney because he did not complete the work involved prior to terminating his employment. Kuney contended that commissions were due on receipt of payment, rather than completion of the work. Because the issue is resolved by determining whether Kuney or Hughes was entitled to the commission under Kuney’s employment agreement, it is not necessary to address this conflict in the evidence.

## V. CONCLUSIONS OF LAW

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

2. Timothy W. Kuney, in his work for Communications Unlimited, Inc., between April 2002 and August 22, 2003, was a bona fide administrative employee, a bona fide professional employee, and a highly paid computer employee as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(1) and (17). As such he is an exempt employee not entitled to overtime premium pay when he works more than 40 hours per week.

3. Timothy W. Kuney, in his work for Communications Unlimited, Inc., between April 2002 and August 22, 2003, was a bona fide administrative employee and a bona fide professional employee as provided in the Montana minimum wage and overtime laws, Mont. Code Ann. § 39-3-406(1)(j). As such he is an exempt employee not entitled to overtime premium pay when he works more than 40 hours per week.

4. Because Timothy W. Kuney was exempt, Communications Unlimited, Inc., does not owe him overtime premium pay, liquidated damages, or penalties for the hours he worked over 40 per week during the period April 2002 through August 22, 2003.

5. Communications Unlimited, Inc., does not owe Timothy W. Kuney additional wages in form of a commission for the sale of custom work to Bozeman Deaconess in October 2002.

6. Communications Unlimited, Inc., is not entitled to attorney's fees or costs.

## VI. ORDER

The wage claim of Timothy W. Kuney for overtime premium pay and wages claimed as a commission is hereby **DISMISSED**.

DATED this 15th day of April, 2005.

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.

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