STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM OF PATTY R. CRAFT, | ) | Case No. 66-2005 |
| Claimant, | ) | **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER** |
| vs. | ) | |
| ET COMPANY d/b/a GOLD BAR, | ) | |
| Respondent. | ) | |

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## I. INTRODUCTION:

In this matter, Patty Craft appeals a determination of the Wage and Hour Unit that found that she was not entitled to additional wages as claimed in her complaint. This determination emanated from a decision that Craft was an exempt employee and therefore not entitled to the wage protections of the Fair Labor Standards Act (FLSA).

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on January 18, 2005. Patty Craft represented herself. Dan Johns, attorney at law, appeared on behalf of the respondent, ET Enterprises, d/b/a Gold Bar and Casino (Gold Bar). The parties stipulated that the hearing could be conducted by telephone. Claimant's exhibits 1 through 14 with the exception of Claimant's Exhibit 7, and Respondent's exhibits A through V were admitted by stipulation. In addition, the parties stipulated that Documents 1 through 283, contained in the Wage and Hour Unit file, could be admitted into evidence. At the hearing, Bonnie Nickel, Katy Slack, Lynette Wiebelhaus, Cheryl Hunter, Patty Kraft, Christie Bucher, Heather Shortell, Edith Hoover, and Lynn Lunda all testified under oath.

The parties were permitted to file post-hearing memoranda with respect to the issues pertinent to this case. Having considered the evidence presented at hearing as well as the arguments and the post-hearing memoranda, the hearing examiner makes the following findings of fact, conclusions of law, and order finding that Craft was an exempt employee under Fair Labor Standards Act.

## II. ISSUE

Was Craft an exempt executive employee while working in her capacity as manager of the Gold Bar?

## III. FINDINGS OF FACT

1. Edith and Tom Hoover are sole shareholders of ET Corporation d/b/a Gold Bar and Casino located in Kalispell, Montana.

2. Gold Bar Casino engages in interstate commerce in excess of the threshold amount required to find that the Fair Labor Standards Act applies to this case.

3. Gold Bar hired Craft to work as a part time bookeeper in 2000, paying her at an hourly rate of $10.00 per hour.

4. In September 2001, Gold Bar's existing manager decided to leave. Edith Hoover asked Craft if she would like to take over the position as manager of the Gold Bar. Craft agreed and the former manager spent approximately one month training Craft on managerial duties of the Gold Bar.

5. Craft and Gold Bar entered into an employment agreement (Exhibit D) whereby Craft agreed to act as manager of the Gold Bar. The agreement required Craft to "perform all duties . . . to manage the . . . business and be in charge of all business operations of Gold Bar." The agreement also provided, among other things, that Craft would have "full responsibility for all operations of the bar and casino and shall hire only persons who have first been approved by Employer." In addition, her employment agreement required her to be available to complete her management duties not only during normal business hours but at such time as the employer requested.

6. Craft's agreement provided that she would be compensated with an annual salary of $32,000.00. Later, Gold Bar raised Craft's annual salary to $37,000.00 per year. In comparison, other employees of the Gold Bar made much less and were compensated on an hourly basis. For example, casino "runners" were compensated at a rate of $7.00 per hour. Other workers earned only $10.00 per hour. There is no evidence that any employee, except Craft, received more than $10.00 per hour.

7. Craft on several occasions initiated and then carried out discipline of subordinate employees. Her discipline of subordinate employees included both oral and written corrections to employees. Craft did not engage in scheduling employees; because she did not want to carry out this task. Hoover asked Craft several times if she would take over the scheduling function, but Craft declined to do so. If the company bookkeeper needed to get an estimate on the number of hours an employee would be working during an upcoming week, she would turn to Craft to provide that information.

8. Consistent with her employment agreement, Craft acted as the primary "go to" person for the employees of Gold Bar. When employees needed something to be done or had a particular problem arise, they would go to Craft first to see if she could resolve the problem. For example, if an employee needed time off, they would ask Craft. Craft also provided some training to employees. Employees Heather Shortall, Lynn Lunda, and Christie Bucher considered Craft to be their manager and the person to whom they would turn to resolve

immediate and even more long term problems. In all, Craft managed between eight and ten persons whose combined working hours exceeded 80 hours per week.

9. Craft shared coequal responsibility for recognizing the need for and implementing employee discipline. She authored several disciplinary notes to employees. She also regularly left instructions for employees in the Gold Bar's logbook.

10. ET Corporation provided Craft an American Express card in her own name in order to enable her to make purchases on behalf of the establishment. She had discretion as to determining the need for supplies and the purchasing of supplies. Craft was listed as the manager on the establishment's beer and liquor license. Craft made the daily run to the bank to deposit money and was the only employee authorized to withdraw funds from the bank. When absent, Craft would leave explicit instructions on carrying out the management of the bar (e.g., ordering alcohol and business supplies) that even Edith Hoover was obliged to follow.

11. While employed as the manager of the bar, Craft, while not having unfettered discretion in hiring of employees, was unquestionably involved in the hiring of some of the employees. Craft, for example, participated in the interviewing and hiring of Heather Shortall.

12. Craft also had responsibility for collecting on insufficient funds checks presented by customers. Craft utilized a form letter and would attempt to collect on those bad checks on behalf of the establishment. Customers repaying on bad checks would make arrangements with Craft as to when, how much, and how often repayments would be made in order to collect the money due to Gold Bar.

13. Craft had responsibility for opening some and ensuring that all vendor accounts were maintained and timely paid. Craft decided how much if any supplies were needed and made those purchases.

14. Craft had the discretion to decide if the bar would close early. In addition, Craft gave her input into deciding during which, if any, holidays the bar would be open.

## IV. DISCUSSION[1]

The parties stipulated that the employer is subject to the Fair Labor Standards Act (FLSA). Among other things, FLSA requires employers to pay non-exempt employees at a rate of one and one half the employees regular rate of pay for all hours worked in excess of 40 hours per week. 29 U.S.C. §207 (a)(1). Bona fide executive employees are exempt from the overtime requirements imposed under FLSA. 29 U.S.C. §213(a)(1).

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

The burden of proving an exemption rests on the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. The employer bears the burden to show that an employee is exempt from the protections of FLSA. The employer must do so by presenting evidence to show that the employee falls "plainly and unmistakably within the exemption's terms." *Id.* at ¶16, 296 Mont. at 322, 989 P. 2d at 319, citing *Public Employees Ass'n v. Dept. of Trans.*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21. 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 .

29 CFR § 541.1 defines an exempt executive employee as a person

(A) whose primary duty consists of the management of the enterprise in which she is employed; and

(B) who customarily and regularly directs the work of two or more other employees therein; and

(C) who has the authority to hire or fire other employees or whose suggestions or recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(D) who customarily and regularly exercises discretionary powers; and

(E) who does not devote more than 20 percent of her hours of work in the workweek to activities which are not directly or closely related to the performance of the work described in A through E; and

(F) who is compensated for her services on a salary basis at a rate of not less than $155 per week.

An employee who makes at least $250.00 per week and who meets the criteria set out in 29 CFR § 541.1 subpart (a) (primary duty is management) and subpart (b) (supervises at least two full time employees or their equivalent on a regular basis) is deemed to be an exempt executive without considering subparts (c), (d), (e), and (f).[2] 29 CFR § 541.1(f).

The parties do not dispute that Craft's salary exceeded the $250.00 per week threshold for application of the short test. Rather, the parties' dispute focuses on whether Craft's duties were primarily management and whether she supervised two full time employees or their equivalent. Gold Bar contends that Craft was the manager of the bar on the same footing as the owners, having full authority to make important management decisions affecting all of the employees of the Gold Bar. Gold Bar further contends that Craft supervised several employees, far more than the equivalent of two full time employees. Craft argues that her duties were not primarily management and that because she was not physically present at that bar while other employees were working, she did not, therefore, meet the management requirement for the short test.

[2] This test is commonly referred to as the "short test" to determine exempt executive status.

FLSA requires consideration of five factors in order to determine whether an employee's primary duty is management: (1) time spent performing managerial duties, (2) the relative importance of the employee's managerial duties as compared with the employee's other duties, (3) the frequency with which the employee exercises discretionary powers, (4) the employee's relative freedom from supervision, and (5) the relationship between the employee's salary and the wages paid to subordinates for the non-exempt work performed by the employee. 29 CFR § 103; *Kemp*, 1999 MT ¶22, 296 Mont. at 323, 989 P. 2d at 320. In applying this test, time alone is not the sole test if the other four factors support the conclusion that the employee's primary duty is management. *Kemp, supra*. Here, while it appears that at all times during Craft's work she was "managing," even if her time spent managing was less than 50% of her work, the other four factors demonstrate that her primary duty was management.

First, the facts demonstrate that the Hoovers hired Craft and gave her employment tasks that were virtually free of any supervision on the part of the Hoovers. Second, Craft's employment contract gave her a starting salary that was almost twice that of the hourly wage of Craft's non exempt subordinates. Craft always exercised discretionary powers (such as when and if to discipline employees and determining dates that the casino would be open). Edith Hoover would gladly have permitted Craft to schedule all of the employees (as the previous bar manager did). Craft, however, preferred not to schedule the employees and wanted Hoover to do that task.

Perhaps most importantly of all, Craft shared coequal management power over the operation with the Hoovers. Craft was hired to act as a manager for the bar because the Hoovers did not want to do this task. While Craft engaged in some non-exempt duties, her duties were no different from those of a "working manager." *Kemp, supra*. *See also, Donovan v. Burger King Corp.*, (2nd Cir. 1982), 675 F.2d 516, 521; *Dalheim v. KDFW-TV*, (5th Cir. 1990), 918 F. 2d 1220, 1227 (Under the short test, the employee's primary duty will usually be what she does that is of principal value to the employer, not the collateral tasks that she may also perform, even if they consume more than half of her time.) As the contract and the testimony of Hoover, Nickel, Bucher, and Lunda show, Craft's primary duty in her job, and her principal value to the employer, was her management work.

The evidence further shows that Craft managed the equivalent of two full time positions. Craft contends that she cannot be found to have managed the requisite number of positions because she was not on premises at all times when the employees were working. No such requirement exists under the FLSA. *Baldwin v. Trailer Inns., Inc.* (9th Cir 2001), 266 F. 3d 1104, 1116-17( continuous simultaneous presence is not an essential requirement of supervision as long as the manager supervises other non-exempt employee's work in other ways). In *Baldwin*, two trailer park managers contended that they were not exempt employees under the short test. They argued that they did not supervise assistant managers because their employment agreement "did not require them to be onsite simultaneously with the assistant managers, the managers worked at non-overlapping times and that the real purpose of the assistant managers was to allow the managers to have some time off." In rejecting the managers' argument, the court noted that "continuous simultaneous physical presence with the assistant managers is not an essential requirement of

supervision as long as [the managers] supervised the assistant manager's work in other ways." 266 F. 3d at 1117. *See also, Sturm v. TOC Retail, Inc.*, (M.D. Ga. 1994), 864 F. Supp. 1346, 1354 (finding that convenience store manager need not be physically present to supervise other employees where the manager scheduled work shift of subordinates, was on-call to address problems, and reviewed the worker's shift performance.)

In this case, while Craft was not always physically present when employees were completing their shifts, it is abundantly clear that she always had management power and responsibilities over all the employees. Like the managers in *Baldwin*, Craft had supervisory powers over at least two full time equivalent positions.

Gold Bar has demonstrated through overwhelming evidence that Craft meets both prongs of the short term test. Craft, therefore, held an exempt executive position with Gold Bar and is not protected by the overtime provisions of the FLSA.

## 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. Gold Bar at all times material to this claim was an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. The claimant was an exempt executive employee in her position with Gold Bar under the FLSA and was not entitled to the overtime protections accorded by the Act.

4. Because Craft was an exempt employee, Gold Bar owes her no additional wages for overtime.

## VI. ORDER

Craft's claim is hereby dismissed.

DATED this 16th day of March, 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.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 16th day of March, 2005.

/s/ SANDRA K. PAGE

Craft FOF ghp