

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1785-2008
OF JOLEEN L. MANTEI,	)	
	)	
Claimant,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
vs.	)	<b>AND ORDER</b>
	)	
GLACIER KITCHENS,	)	
D/B/A GLACIER PITAS,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

Respondent Glacier Kitchens has appealed from a determination of the Wage and Hour Unit that found it had failed to pay wages due to Claimant Joleen Mantei and ordered payment of those wages.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on March 31, 2009. All parties agreed that the hearing could be held by telephone. Mantei represented herself. Anne Biby, attorney at law, represented the respondent. Mantei, Debbie McCully, Deborah Sisk, and Art Weaver all testified under oath. The parties stipulated to the admission of Documents 1 through 76. Based on the evidence and arguments presented at hearing, the Hearing Officer issues the following findings of fact, conclusions of law and final agency decision.

**II. ISSUES**

1. Did Mantei's employment agreement require that she be paid overtime in addition to her salary?
  
2. If Mantei's employment agreement did not call for her to be paid overtime in addition to her salary, is she exempt from the overtime requirements of the Montana Wage and Hour Act?
  
3. Is Mantei due additional regular wages for her work on April 6 and 7, 2008?

### III. FINDINGS OF FACT

1. Glacier Kitchens opened a new Pita Pit Sandwich shop in Kalispell Montana in January 2008. Prior to opening the shop, Glacier hired Mantei and three other persons as assistant managers. Mantei began working in her assistant manager position on January 28, 2009. Her last day of work as an assistant manager was April 17, 2008. She was hired at a starting salary of \$21,500.00 per year. Broken down to an hourly wage, this represented an hourly wage of \$11.19 per hour. See Document 70.

2. Prior to beginning work, Mantei spoke with Debbie McCully, Glacier's bookkeeper. Mantei asked whether she would receive overtime pay if she worked more than 45 hours per week. In response, McCully stated that Weaver was a fair man and that she was sure he would treat Mantei fairly.

3. Glacier Kitchens' proprietor is Art Weaver. Weaver, as store owner, was Mantei's only supervisor. Mantei shared management responsibilities with three other assistant managers, one of whom was Deborah Sisk. All four assistant managers were paid on a salary basis and there was no provision in any of the assistant managers' employment agreements that called for an assistant manager to be paid overtime. Weaver never paid any of the four managers overtime compensation.

4. Mantei's position description required that Mantei supervise all employees scheduled on her shift. She had responsibility for scheduling all employees during her shift and generally ensuring that all employees working under her during her shift performed their work as required. Exhibit 76. Shea also had the duty to monitor food inventory and the discretion to place orders with vendors to make sure inventories were kept at proper levels. She also monitored cash registers to ensure that no shortages occurred and to count out cash registers at the end of her shift. In addition, Mantei, as assistant manager, had the power to discipline any employee up to and including discharge of that employee if necessary. Mantei also had the ability to hire employees.

5. With the exception of discharging an employee (because the occasion never arose), Mantei while working as an assistant manager exercised all of the powers that she was endowed with as assistant manager. She scheduled employees. She trained employees. If an employee was ill during the shift that Mantei managed, that employee would call Mantei. Mantei had the power to send employees home from a shift if she felt the need to do so. Mantei participated in hiring employees that worked for her. Mantei assigned and directed her employees in their tasks on a daily basis. She handled customer complaints. Mantei ordered supplies from vendors and maintained cash counts. In addition, she counted the till at the end of her shift. She was involved in hiring employees.

6. There were multiple shifts that had to be covered at the Kalispell Pita Pit. The first shift was from 5:00 a.m. to 2:00 p.m.

7. The three assistant managers had the discretion to determine which shifts they would work. Mantei asked for and was given the 5:00 a.m. to 2:00 p.m. shift to cover.

8. During a substantial portion of her shift, Mantei usually managed at least six to seven people. During the first two or three hours of her shift, due to the early hour, only two or three people were scheduled. All the employees that Mantei supervised were paid at an hourly rate. Only the three assistant managers were salaried.

9. Mantei was the sole manager of the business during the hours between 5:00 a.m. and 8:00 a.m. Thereafter, a second assistant manager would usually arrive. Even with the presence of the second manager, however, Mantei still had several employees over whom she had management responsibility. In addition, Weaver would leave the store for extended periods of time during which Mantei and the other assistant managers were the only management of the store.

10. At some point during the time that Mantei was managing, the other three assistant managers became concerned about her ability to carry out her managerial duties. They felt that Mantei was unable to manage her employees. They spoke with Weaver about their concerns. Weaver in turn spoke to Mantei about his concerns about her inability to manage and asked her to correct those problems.

11. Mantei's management skills did not improve after her discussion with Weaver. As a result, the other two managers came to Weaver insisting that Mantei be removed from her assistant manager position. On April 5, 2008, Weaver relieved Mantei of her assistant manager duties. Weaver had, however, promised to pay Mantei as a manager through April 7, 2008.

12. Mantei worked as an hourly employee for a period of a few weeks and then quit. While working as a non-management hourly employee, Mantei received \$8.00 per hour.

13. On April 6 and 7, 2008, Mantei was paid only \$8.00 per hour, even though Weaver had agreed to pay her at her assistant manager's salaried rate during those two days. Her salaried rate equated to \$11.19 per hour. Mantei worked 16 hours on those two days and should have been paid a total of \$179.04. She was paid only \$128.00. She was thus shorted in pay by the amount of \$51.04. Penalty on that amount is \$28.07 ( $\$51.04 \times .55 = \$28.07$ ).

14. After quitting, Mantei approached Weaver about being paid for an additional 92 hours of work for which she felt she was due payment. Initially, Weaver issued her a check for those hours under the mistaken assumption that she had not been paid for all amounts due to her under the employment agreement she had with Weaver while she worked as an assistant manager. After learning that he had already paid her all hours due under the employment agreement, Weaver stopped payment on the check.

#### IV. DISCUSSION<sup>1</sup>

In this case, Mantei argues that her employment agreement with Glacier Kitchens included a provision to pay her overtime. Glacier contends that its employment agreement with Mantei never called for Glacier to pay her overtime. In addition, Glacier contends that Mantei was an exempt supervisory employee and therefore not entitled to the overtime protections of the Montana Wage and Hour Act. Glacier further argues that even if Mantei is not exempt, she did not work all of the hours she claims to have worked.

##### A. *Mantei's Employment Agreement Did Not Include Payment For Overtime In Addition To Salary.*

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. Mantei bears the burden of proving that she was not compensated in accordance with her employment agreement. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). Thus, Mantei must persuade the trier of fact that her employment agreement called for her to be compensated for overtime even though she was to be paid on a salaried basis.

In this case, the preponderant evidence does not support Mantei's argument that her employment agreement called for her to be paid overtime in addition to her salary in her position as an assistant manager. It makes no sense that Weaver would have hired four managers and of the four, only Mantei would have had an agreement with Weaver to be paid overtime in addition to her salary. Mantei had no special training, education or background that would have made her services so much more valuable that Weaver would have hired with such an overtime proviso. Perhaps Mantei believed she would be paid overtime as a result of her conversation with McCully. However, as McCully's testimony demonstrates, her mere statement that Weaver would be fair with her did not create an employment agreement between Weaver and Mantei that Mantei would be paid overtime in addition to her salary. Both in fact and law, Mantei's employment agreement with Weaver called for her to be paid a salary only in her position as an assistant manager.

##### B. *Mantei Is An Exempt Supervisory Employee.*

Although the employment agreement did not include Mantei being paid overtime in addition to her salary, the question still remains as to whether Mantei was or was not an exempt supervisory employee in her assistant manager position. If she is not an exempt employee, she

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<sup>1</sup>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.

must be compensated in accordance with overtime requirements of the Montana Wage Act. Glacier bears the burden of proving its contention that Mantei was an exempt supervisory employee. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, ¶16, 296 Mont. 319, 989 P.2d 317. To meet this burden, Glacier must present evidence to show that the employee falls “plainly and unmistakably within the exemption’s terms.” *Id.* at ¶16, citing *Public Employees Ass’n v. D. of T.*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21. Questions involving exemption from overtime are narrowly construed. *Reich v. Wyoming* (10<sup>th</sup> Cir., 1993), 993 F.2d 739, 741.

Montana law specifically exempts bona fide supervisory employees from the protections of the minimum wage and overtime act. Mont. Code. Ann. § 39-3-406(J), Admin R. Mont. 24.16.201. The applicable administrative rule provides a “short test” and a “long test” that establish, when either of their criteria are met, that an employee is an exempt supervisory employee. Admin R. Mont. 24.16.202(5). Under that short test, an employee is deemed to be exempt if she (1) is compensated at a rate of more than \$200.00 per week and (2) her primary duty consists of the management of the enterprise in which she is employed and those management duties include the customary and regular direction of two or more employees. *Id.*

*Kemp, supra*, is helpful in evaluating the facts of this case to determine whether Glacier has carried its burden of proof in attempting to prove that Mantei is an exempt employee. In *Kemp*, the issue was whether the restaurants head chef’s primary duty was to act as an exempt supervisory employee. While the claim involved whether the chef was an exempt employee for purposes of the Fair Labor Standards Act (FLSA) (the federal counterpart of the Montana Wage and Hour Act which applies to businesses involved in interstate commerce, i.e., having gross sales in excess of \$110,000.00 per year), the lessons are useful to this case because the language and principles behind the federal supervisory exemption and the Montana supervisory exemption are virtually identical. In *Kemp*, the chef had been hired first as an hourly employee and later was paid by salary. She was in charge of determining how much food was to be prepared, scheduling employees, keeping track of inventory, directing the work of other employees, and responding to customer complaints. The chef, however, did not have the ability to hire and fire other employees.

To determine whether the chef’s primary duty was management, the court resorted to five factors: (1) the amount of time spent engaging in managerial duties, (2) the relative importance of the employee’s managerial duties compared with other non-managerial employees’ duties, (3) the frequency with which the employee exercised discretionary powers, (4) the employee’s relative freedom from supervision, and (5) the relationship between the employee’s salary and that of other employees. ¶19. Under these circumstances, for purposes of the short test, the court found that the chef’s primary duties consisted of management notwithstanding the fact that she spent only 20 percent of her time managing and spent 80 percent of her time cooking and that the chef was an exempt supervisor. *Id.* at ¶24, ¶34.

The *Kemp* court relied on a federal court of appeals case, *Donovan v. Burger King*, 675 F.2d 516 (2<sup>nd</sup> Cir. 1982) to reach its conclusions. *Donovan* is a case that bears a striking factual

resemblance to the case before this hearing officer. In *Donovan*, each store was run by a manager and two assistant managers who were on duty at the same time. Like Mantei in her position as assistant manager, the assistant managers in *Donovan* bore the responsibility of checking tills, assigning hourly employees to their tasks, ensuring that hourly employees performed their tasks properly, scheduling employees, and ordering supplies to ensure that the operation ran smoothly. In the absence of the store manager, the assistant managers were the only management in the store, even though the manager was available by telephone. *Id.* at 521. Under these circumstances, the *Donovan* court found that the assistant managers who met the threshold weekly salary amount were exempt from the overtime provisions of the FLSA because their primary duty was management.

Applying the precepts of *Kemp* and *Donovan*, the evidence plainly establishes that Mantei's primary duty consisted of management of the operation. Mantei was at all times involved in managing the business while working as an assistant manager. Mantei directed the tasks of the employees on her shift, and except for the first hour of her shift when she had two or three people working under her, she had six or seven subordinates during her shift. Her management duties were vastly more important to the company than her non-management duties. Only she, as assistant manager, could carry out functions such as scheduling, delegation of tasks, handling of customer complaints and ordering of supplies. These functions were critical to running the store. She also bore responsibility for and in fact carried out the training of hourly employees and counting out tills at the end of her shift. She had responsibility for monitoring supplies and placing orders with vendors to ensure that the store was properly stocked. Weaver would leave the store for extended periods of time which had the effect of making Mantei the "boss" of the store in his absence. Mantei was the sole management of the company during the first three hours of her shift each day she worked. Her managerial functions, not her non-managerial functions, were what made her of value to the company and commanded her higher pay rate.

It is also clear that Mantei exercised her management power at all times while working. As an assistant manager, Mantei had very little if any supervision from Weaver. She had the discretion in delegating tasks, scheduling, disciplining of employees, and ordering supplies from vendors. Mantei was paid at a substantially higher wage on a per hour basis than her subordinates (her salary of \$21,500.00 per year which translates to \$11.19 per hour compared with \$8.00 per hour as a non-management employee, an almost 30% difference). Mantei's primary duty in fact consisted of management of the enterprise.

Mantei customarily and regularly supervised two or more employees. At a minimum, she supervised two to three employees. For much of her shift, she supervised six to seven employees. In addition, as the Wage and Hour Unit found, and Mantei does not contest, she was compensated at a rate of at least \$200.00 per week. Her annual salary translates to a weekly equivalent of more than \$413.00. Mantei's assistant manager position falls plainly and unmistakably within the short test exemption and she is not covered by the overtime provisions of the Montana Wage and Hour Act.

C. *Mantei Is Due Additional Wages For Her Work on April 6 and 7, 2008.*

One other issue that remains is Mantei's contention that she was not properly compensated for her work on April 6 and 7, 2008 as she worked as a non-managerial employee but was to be compensated at her higher assistant managerial rate. Weaver has not contested this facet of her claim. As her claim shows, she worked eight hours on both April 6 and 7, 2008 but was only compensated at a rate of \$8.00 per hour. She should have been compensated at a rate of \$11.19 per hour. She was thus underpaid by \$3.19 per hour for each of those 16 hours worked on those two days ( $\$11.19 - \$8.00 = \$3.19$ ). She is thus due an additional \$51.04. As this facet of the claim involves only a claim of a failure to pay regular hours, penalty on that amount (55%) is 28.07 ( $\$51.05 \times .55 = \$28.07$ ). Admin. R. Mont. 24.16.7566.

**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. Mantei's employment agreement did not call for her to be compensated for overtime in addition to her assistant manager's salary.

3. As an assistant manager, Mantei was exempt from the overtime protections of the Montana Wage and Hour statute. Admin. R. Mont. 24.16.201 (f).

4. Mantei is due an additional \$51.04 in unpaid regular wages and \$28.07 in penalty on those unpaid wages.

**VI. ORDER**

Glacier Kitchens d/b/a Glacier Pita Pit is hereby ORDERED to tender a cashier's check or money order in the amount of \$79.11, representing \$51.04 in unpaid regular wages and \$28.07 in penalty, made payable to Joleen Mantei, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Glacier Kitchens may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 29th day of May, 2009.

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.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

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