STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF LISA L. MULLANEY, Claimant, vs. SAMCO HOTELS, INC., a Montana Corporation, d/b/a BEST WESTERN GLENDIVE INN, Respondent.	)	Case No. 1590-2010 **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**

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I. INTRODUCTION

Claimant Lisa Mullaney appealed a determination of the Wage and Hour Unit that found she was executive exempt from the overtime wage and hour laws and denied her claim for overtime. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on September 17, 2010. Lisa Mullaney appeared on her own behalf. Albert Batterman, attorney at law, appeared on behalf of the respondent, SAMCO Hotels, Inc. Mullaney, Jamie Johnson, Leah Junneau, Steve Marks, and John Gaffney all testified under oath. The parties stipulated to the admission of ERD Documents 1 through 204. Based on the evidence and argument adduced at hearing, the hearing officer agrees with the respondent that Mullaney was executive exempt and professional exempt from the overtime provisions of the wage and hour act.

II. ISSUE

Is Mullaney exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) because she was employed either in a bona fide executive capacity or a bona fide professional capacity for the employer?

III. FINDINGS OF FACT

1. Mullaney has a four year bachelor's degree in accounting. In fact, Marks retained Mullaney to help him because he had previously retained her accounting firm to work on other interests Marks owned in Michigan.

2. SAMCO Hotels owns and operates the Best Western Glendive Inn located in Glendive, Montana. SAMCO Hotels' annual gross receipts make it subject to the Fair Labor Standards Act (FLSA).

3. Marks is the CEO of SAMCO Hotels. Marks recruited Mullaney to revamp the hotel's accounting processes and to act as general manager of the hotel. Initially, Marks and Mullaney agreed that Mullaney would receive $1,500.00 per week. Later, the parties agreed that Mullaney would earn $750.00 per week for her work. At no time during her employment was Mullaney paid less than $750.00 per week.

4. Mullaney began working for SAMCO on June 17, 2009. On June 22, 2009, she signed a letter acknowledging her verbal agreement with Marks that she would serve as SAMCO's voting member to Best Western Hotels and as "General Manager for the Best Western Glendive Inn and to be the General Manager for the Jordan Inn and restaurants and Jordan Entertainment Corp." Document 45.

5. As Mullaney herself noted in her pleadings, Marks "wanted me to secure all of the financial duties, from back financials to present, ... To do this, I had to revise the accounting system and get correct information for [withholding taxes, lodging taxes and income taxes]. This took up a majority of my time. I did these duties at the hotel and at my home in Michigan in between visits to the hotel. Mr. Marks and John Gaffney, CEO told me I was doing a great job and Mr. Marks wanted me to move to Glendive, Montana to do the financial management of the hotels, bar and casino."

6. Mullaney had the authority to hire and fire employees. To this end, she hired a chef for the kitchen and also hired her mother to come out and work at the hotel.

7. Jamie Johnson worked as a maintenance worker at the hotel. Mullaney managed the hotel and he took direction from her in his duties while Mullaney worked there. He reported to Mullaney about his daily activities and his primary reporting was to Mullaney.

8. Mullaney also supervised Leah Junneau in Junneau's duties. Junneau took direction from Mullaney whom Junneau perceived to be the acting manager. Gaffney

observed Mullaney supervising Junneau. In addition, it was Mullaney who offered Junneau an increase in wages to $12.00 per hour and in addition offered Junneau a guaranteed 20 hours of overtime per week. Document 71.

9. SAMCO employed more than 60 employees, far more than the two full time equivalent employees that the rule requires.

10. There were more than two full time employees in the housekeeping department at the time she was managing the department. As an example of her management over the department, on one occasion she became concerned with how the housekeeping staff was cleaning the hotel. She described how she corrected this problem in an e-mail she sent John Gaffney (Document 56). As she indicated:

> "Our housekeeping dept just doesn't believe in cleaning the hallways, even after I took one guy up there, cleaned it myself and told him to keep it up and showed him what needed to be done. So my next step in keeping them happy is to buy new pillows, they have been complaining about that a lot. I need to do something else fast. I did just have new mattress pads and comforters put on their beds and new valves in the shower heads. They are seeing progress and are happy that I am actually listening and doing what needs to be done."

Document 56.

11. Mullaney further noted to Gaffney that "Leah's doing a good job now that she is not doing waitressing or front desk shifts, she needs to understand and I am working on that with her. She did mess up my check register. She went and deleted checks after I did July statement. She does not have any accounting experience, so I turned off a lot of her user abilities so it would not happen again." Document 55.

12. Mullaney prepared and signed paychecks for employees, including herself. She had control (administrative rights) to the accounting system that the hotel used. In fact, she installed the system as part of the work she was hired by Marks to do.

13. Mullaney was a supervisor and as such is exempt from the overtime requirements of the FLSA. Even if Mullaney was not executive exempt, she would be professionally exempt under the FLSA.

IV. DISCUSSION[1]

A. *Mullaney's Attempt To Amend Her Complaint Is Untimely And Cannot Be Allowed.*

On October 7, 2010, some 20 days after the hearing in this matter had concluded and the case had been submitted for decision, Mullaney moved to amend her overtime complaint to allege a wage claim based on the respondent's reduction in her weekly salary from $1,500.00 to $750.00. Because of the prejudice that would be incurred by the respondent, her request is untimely and must be denied.

The Montana Supreme Court has held that it is not appropriate to permit an amendment to a complaint when the party opposing the amendment would incur substantial prejudice as a result. *Stundal v. Stundal*, 2000 MT 21, ¶12, 298 Mont. 141, 995 P.2d 420. In addition, where a party seeks an amendment to allege a new theory of recovery that should have been but was not plead and such an amendment would cause prejudice to the opposing party because it would involve different defenses, it is not inappropriate to deny the amendment. *Loomis v. Luraski*, 2001 MT 223, 306 Mt. 478, 36 P.3d 862.

Permitting Mullaney to amend her complaint at this late date would inflict insurmountable unfair prejudice on the respondent. Mullaney knew or should have known from at least the time her salary was lowered to $750.00 that she might have a cause of action. She never raised it in her complaint nor did she raise it at anytime during discovery or during the hearing in this matter. The respondent has had no opportunity to engage in discovery on the issue or event to properly defend against the claim. For that reason alone, the motion must be denied.

There is yet a second reason that it must be denied. The amendment cannot be permitted because it was never alleged in the complaint and this new complaint is beyond the statute of limitations. *Cf. Sprow v. Centech*, 2006 MT 27, ¶24, 331 Mont. 98, 128 P.23d 1036 (holding that it was error for hearings officer to permit modification of complaint to find discrimination with respect to full time employment where complaint alleged discrimination only in part time employment). In light of the above, Mullaney's request to amend her complaint is denied.

B. *Mullaney Was Executive Exempt And Professional Exempt.*

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

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[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.

one-half the employee's 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). Likewise, persons employed in a bona fide professional capacity are also exempt from the overtime requirements of the FLSA.

The employer bears the burden to show that an employee is exempt from the protections of FLSA. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. 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* 993 F.2d 739, 741 (10th Cir., 1993).

29 CFR § 541.100(a) defines an exempt executive employee as any employee:

(1) Compensated on a salary basis at a rate not less than $455.00 per week . . .

(2) Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) 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.

To determine whether an employee's "primary duty" is management as used in FLSA, five factors are considered: (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 541.700. *See also, Kemp,* 1999 MT ¶22. In applying the primary duty 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*.

The term "management" under 29 CFR 541.100 includes activities such as selecting and interviewing employees, settling and adjusting employees' rates of pay and hours of work, directing the work of employees, determining the type of materials, supplies, and merchandise to be bought, and planning and controlling the budget. 29 CFR 541.102. The term "two or more employees" under 29 CFR 541.100 means two full time employees or the equivalent of two full time employees. 29 CFR 541.104. In addition, an employee's recommendations are not deemed to be lacking "particular weight" simply because the employee does not have authority to make the ultimate decision. 29 CFR 541.105.

29 CFR 541.300 defines a professional exempt employee as an employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week; and
(2) Whose primary duty is the performance of work:
(I) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 CFR 541.301 states that:

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:
(1) The employee must perform work requiring advanced knowledge;
(2) The advanced knowledge must be in a field of science or learning; and
(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
(b) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

29 CFR 541.301(5) notes specifically that "Certified public accountants generally meet the duties requirements for the learned professional exemption. ***In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals.*** However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals." (Emphasis added).

The Montana executive exemption that existed during the operative time of this case is different than the FLSA exemption.[2] Under the Montana administrative

[2] Effective May 14, 2010, the Montana executive exemption was changed to adopt the language of the FLSA test as the language of the Montana exemption.

rule applicable to this case, the term "employed in a bona fide executive . . . capacity" means an employee:

a. whose primary duty consists of the management of the enterprise in which he is employed;

b. who customarily and regularly directs the work of two or more other employees therein;

c. who has the authority to hire or fire 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;

e. 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 of work in the work week to activities which are not directly and closely related to the performance of the work described in subsections (a) through (d) of this section . . .; and

f. who is compensated for his services on a salary basis at a rate of not less than $150.00 per week, exclusive of board, lodging or other facilities . . .

Admin. R. Mont. 24.16.201.

The Montana exemption further provided a "short test" for exemption wherein an employee will be deemed to be exempt under the above regulation when he (1) is compensated at a rate of more than $200.00 per week and (2) his primary duties consist of the management of the enterprise and includes the customary and regular direction of two or more employees in the enterprise will be deemed to be exempt. Admin. R. Mont. 24.16.201(f).

At the times pertinent to this case, there was also a "short test" learned professional exemption which was embodied in Admin. R. Mont. 24.16.203.[3] Under that rule, an employee (1) whose primary duty consisted of work requiring knowledge of an advanced type in a field of learning acquired through a prolonged course of specialized intellectual instruction and study and (2) whose work required the

[3] Like the exemption for bona fide executive employees, effective May 14, 2010, the Montana professional exemption was changed to adopt the language of the FLSA test as the language of the Montana exemption.

consistent exercise of discretion and judgment and (3) whose was compensated at a rate not less than $200.00 per week, exclusive of board, lodging and other facilities was deemed to be a professional exempt from the overtime compensation requirements of the Montana Wage and Hour Act.

The parties do not dispute that Mullaney was paid on a salary basis and that she was paid more than $455.00 per week. Mullaney argues that she had no management prerogatives and that her primary duty was not management of the enterprise. SAMCO, on the other hand, argues that Mullaney's duties were clearly executive exempt as she had virtually unfettered autonomy over management decisions and she exercised that management authority. SAMCO further argues that in any event, Mullaney was by her own admission a professional exempt employee.

Turning first to the FLSA executive exemption, Mullaney's primary duty was unquestionably management. At all times she acted as the general manager of SAMCO Hotels. She directed at least two full time equivalent positions as demonstrated by Documents 55 and 56 as well as testimony of Jamie Johnson, Leah Junneau, and John Gaffney. Her role as manager was at least as important as her role in restructuring the accounting systems at the hotel. She consistently exercised discretionary duties and she certainly had the authority at all times to exercise such discretion. She was comparatively free of supervision (as demonstrated by her hiring a chef and bringing her mother on board as a contractor on her own initiative). In addition, the comparative value of her wages to that of Leah Junneau (Mullaney's salary, broken down per hour, was at least $18.00 per hour, 33% larger than the salary provided to Leah Junneau).

Mullaney directed far more than the equivalent of two full time employees. SAMCO employed 60 employees in the divisions over which Mullaney acted as general manager. And Mullaney clearly had and exercised the authority to hire employees (an example being the chef from Michigan that she hired). SAMCO has plainly and unmistakably demonstrated that Mullaney was an executive exempt employee. *Kemp, supra*.

Mullaney also met the Montana Executive Exemption. She was compensated in excess of $200.00 per week and her primary duty was management as demonstrated above. As also discussed above, she customarily and regularly managed two or more full time employees. She is thus exempt as an employee employed in a bona fide executive capacity.

Even if, however, Mullaney was not an executive exempt employee, she was certainly employed in a bona fide professional capacity. She was hired to restructure the entire record keeping and financial management of SAMCO. By her own

admission, she spent 90% to 95% of her time doing this work. It was clearly work of an intellectual nature, involving designing a system of accounting which would correct accounting issues that the hotel faced. As the testimony of Marks proves, Mullaney was in this type of business prior to working at SAMCO as Marks had retained her to do similar work for other businesses that he owned. She utilized virtually unfettered discretion to develop the accounting system for the hotel. She had administrative rights to and control over the system. She unilaterally utilized her control over the system to limit Junneau's access to that system. Despite being fully aware of her conduct, no one, not even the CEO, challenged her decision to do so. Her ability to undertake this prolonged task came about through her specialized training as an accountant which included her four year degree in accountancy. She was not merely engaged in bookkeeping, she was responsible for designing and implementing an entire accounting system for the hotel. The respondent has proven that Mullaney served in a bona fide professional capacity for the employer and that she is exempt from the overtime protections of the FLSA.

Finally, Mullaney also plainly and unmistakably falls within the professional exemption under the Montana Wage and Hour Act. Her work for SAMCO in developing and implementing the new accounting system was, by her own account, almost entirely consumed (90% to 95% of her time) in rendering professional services in accounting. She had complete discretion as to the method of implementation and in the manner of carrying out her duties. Indeed, she was hired for her expertise in this area and it was the type of expertise gained through a prolonged course of study, her bachelor's degree in accounting. Finally, she was compensated on a salary basis far in excess of $200.00 per week. Thus, even under the Montana exemption that applied to this case, Mullaney was employed in a bona fide professional capacity and was exempted from the protections of the Montana Wage and Hour Act.

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. SAMCO Hotels at all times material to this claim was an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. Mullaney was an exempt executive employee and an exempt professional employee under the FLSA and is not entitled to the overtime protections accorded by the FLSA.

4. Mullaney was an exempt executive employee and an exempt professional employee under Montana administrative rules and therefore is not protected in her overtime claim by the Montana Wage and Hour Act.

5. Because Mullaney was an exempt employee, SAMCO Hotels owes her no additional wages for overtime.

VI. ORDER

Mullaney's claim is hereby dismissed.

DATED this 26th day of October, 2010.

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.