

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM )	Case No. 2110-2017
OF COURTNEY D. MILLER, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
ABEL PERSONNEL SERVICES, INC., )	
a Montana corporation d/b/a EXPRESS )	
EMPLOYMENT PROFESSIONALS, )	
)	
Respondent. )	

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**I. INTRODUCTION**

On June 28, 2017, the Claimant, Courtney D. Miller (Miller), filed a claim for unpaid wages with the Department’s Wage & Hour Unit alleging he was owed \$8,000.00 in unpaid wages from Abel Personnel Services, Inc. d/b/a Express Employment Professionals (Express). On April 10, 2018, the Wage & Hour Unit issued a redetermination finding that Miller was owed \$2,574.84 in unpaid wages and \$2,574.84 in liquidated damages pursuant to the Fair Labor Standards Act (FLSA). On or about April 20, 2018, Mary Brazill filed an appeal of the redetermination.

Miller had filed a complaint in Montana District Court which included this wage claim so no mediation occurred and the matter was ultimately transferred to the Office of Administrative Hearings on April 23, 2019.

Neither party was available for the scheduling conference, but an employee of the respondent indicated that the employer had an attorney. The Scheduling Order included language informing the respondent that it must have an attorney represent it. The hearing was set for September 4, 2019 in Billings, Montana. At the August 28, 2019 final pre-hearing conference, Miller failed to appear. Brazill only appeared after the Hearing Officer was able to obtain her cell phone number and call her for the conference. At the conference, the Hearing Officer learned that Express

had still not obtained the services of an attorney. Based on that and the employer's burden of proof, the case was changed to a telephone hearing so as to avoid the taxpayers' expense of sending the Hearing Officer to Billings for a hearing that may not occur. Neither party filed any pre-hearing disclosures identifying any witnesses or exhibits, so the Hearing Officer limited the testimony to Miller and Brazill and would only allow Documents 1-561 to be offered into the evidentiary record. The Order also notified Express that, should an attorney appear at the last minute, no continuance would be granted.

At the time of the hearing, Miller was available. Brazill was not at her office and had to be contacted by cell phone once again. When the Hearing Officer finally was able to reach her, he began making his opening remarks. Five minutes later Brazill informed him that she had been at the Board of Oil & Gas Conservation offices where the in-person hearing was originally scheduled. She then announced she had been there with her attorney. It is unclear if Brazill received the Order changing the hearing to a telephone hearing or whether she simply failed to read it. Nonetheless, after some wrangling with her attorney's secretary, the Hearing Officer was able to contact Tyler West, who informed the Hearing Officer that he was indeed representing Express. As expected he immediately asked for a continuance. His motion was denied, as Express was repeatedly informed it had to have an attorney represent it in these proceedings and that Express had known that for at least four months. When asked why Express had failed to obtain an attorney or file any pre-hearing disclosures, he simply said, "I'll take the blame for that." The Hearing Officer admires Mr. West falling on his sword for his client, but is not convinced the failures were his alone.

Miller appeared telephonically. Mary Brazill ("Brazill") and Tyler L. West, attorney at law, also appeared telephonically. At the hearing, Miller and Brazill testified under oath. Documents 1 through 561 were admitted into the record.

Based upon the evidence and arguments presented at the hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUE

The issue in this case is whether Abel Personnel Services, Inc., a Montana corporation d/b/a Express Employment Professionals, owes wages for work performed, as alleged in the complaint filed by Courtney D. Miller, and owes penalties or liquidated damages, as provided by law.

### III. FINDINGS OF FACT

1. Abel Personnel Services, Inc., a Montana Corporation, d/b/a Express Employment Professionals (“Express”) is a staffing agency located in Billings, Montana.

2. Courtney D. Miller (“Miller”) was employed by Express in March of 2016.

3. On June 1, 2016, Miller was assigned to be the branch manager of Express’s 16<sup>th</sup> Street office.

4. Miller generally worked Monday through Friday and his office hours were generally from 8:00 a.m. until 5:00 p.m.<sup>1</sup> Miller would work 3-4 days in the office managing the personnel, recommending hiring decisions, assessing employee productivity and efficiency, and marketing Express’s services to potential and existing customers. On days he was not in the office, he would check with clients to see how contracted employees were performing and making outside sales calls soliciting additional business for Express. Miller Test.; See also Doc. 320.

5. Miller’s management style resulted in some employees leaving and a disciplinary warning in November 2016. Doc. 323.

6. At some point after the November warning, perhaps early January 2017, Miller’s office manager duties were removed and he was reassigned to only outside sales with a goal of making 50 sales calls per week. Miller was also compensated by payment of commissions for sales calls that successfully obtained new clients for Express. Miller was expected to make 50 face-to-face outside sales calls per week. Brazill Test.; Docs. 284-285. Call records indicate that Miller would regularly make 10-15 face-to-face sales calls in a day. See Docs. 287-293.

7. Miller was paid a salary in the amount of \$36,000.00 per year and was paid bi-weekly. Miller was paid at least \$1,500.00 every two weeks. Docs. 527-528.

8. Miller was also paid commissions for sales that he made. Doc. 561; Miller Test.; Brazill Test. Miller also was given a company cell phone and two tanks of gas per month. *Id.*

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<sup>1</sup> Miller also responded to calls from Express’s answering service in the evenings. This work formed the basis for Miller’s wage claim, but because of the holding in this case, no facts about the nature of the calls and Miller’s duties with respect to them is necessary.

9. Express provided Miller a description of his administrative duties at the beginning of his employment. Doc. 561.

10. Express paid Miller a salary based upon legal advice from its national corporate office in an amount that falls within the standards for the Fair Labor Standards Act (“FLSA”) based upon Miller’s position with the company and the duties Miller’s position required.

#### IV. DISCUSSION

Montana has adopted the FLSA exemptions for administrative and outside salespersons by reference. Admin. R. Mont. 24.16.211. Accordingly, the discussion below cites to the specific FLSA regulations. Because the standards for these exemptions are now identical, determining whether Miller might be covered under Montana law as opposed to the FLSA is unnecessary because the result is the same.

##### A. *Burden Of Proof*

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Garsjo v. Department of Labor and Industry*, 172 Mont. 182, 562 P.2d 473 (1977). To meet this burden, the employee must produce evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 476-77 (citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan*, 359 Mich. 571, 103 N.W. 2d 494, 497 (1960)); *see also Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶ 13-14, 305 Mont. 419, 28 P.3d 494 (holding that the lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation’ . . . .” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477 (quoting *Purcell*, 359 Mich. at 576, 103 N.W. 2d at 497).

Miller testified for a total of 11 minutes, including both direct and cross examinations. He testified that he was the branch manager of the Express office from May 2016 to approximately December 31, 2016. He testified that he had business cards and a name tag identifying him as the branch manager. He further testified that he performed outside sales and that he made commission on those sales. Miller was not prepared to show the Hearing Officer which of the 561 pages of exhibits might show when he worked and how much he should be paid. He was happy to let the Hearing Officer plod through the record to figure that out.

However, it is not a court's obligation to conduct legal research on a party's behalf, guess at the party's precise position, or develop a legal analysis which may lend support to that position. See *Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (citing *State v. Carter*, 285 Mont. 449, 461, 948 P.2d 1173, 1180 (1997)); *State v. Fina*, 273 Mont. 171, 181, 902 P.2d 30, 38 (1995). Accordingly, Miller failed to prove he worked without proper compensation.<sup>2</sup>

*B. Miller Is An Exempt Administrative Employee Who Was Paid On A Salary Basis*

If Miller had made a prima facie showing that he was not paid for the on call time he worked, he would still have to overcome the employer's defenses that he was an employee exempt from the overtime laws.

The requirement to pay overtime does not apply to supervisory, executive, or administratively exempt employees. Mont. Code Ann. § 39-3-406(j); Admin R. Mont. 24.16.101. The burden of proving that an employee is exempt from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, ¶ 16, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer 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. Dept. of Transportation*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21). Questions involving exemption from overtime are narrowly construed to carry out the purposes of the FLSA. *Reich v. Wyoming*, 993 F.2d 739, 741 (10<sup>th</sup> Cir., 1993).

Montana has adopted, by reference, the federal regulations that define supervisory, executive, or administratively exempt employees. Admin. R. Mont.

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<sup>2</sup> It should be noted that counsel for Express failed to provide any citation to authority in his brief.

24.16.211(3)(a). 29 CFR § 541.200 defines an exempt administrative employee as a person:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities;

(2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Miller, as the branch manager, was paid a salary of \$1,500.00 every two weeks, plus any commissions he may have earned. Doc. 561. That would result in him being paid at least \$750.00 per week.

The term "management," as used in 29 CFR § 541.100 and 200, includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; *directing the work of employees; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; and providing for the safety and security of the employees or the property.* 29 CFR § 541.102 (emphasis added).

Duties in the performance of office or non-manual labor that are "directly related to management or general business operations" include work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; *advertising, marketing*; research; safety and health; *personnel management*, human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 CFR § 541.201 (*emphasis added*).

Miller testified that he managed the office's personnel, recommended hiring decisions, assessed employee productivity and efficiency, and marketed Express's services to potential and existing customers. On days he was not in the office, he would check with clients to see how contracted employees were performing. He

exercised such significant discretion and independent judgement that he was disciplined for abusing his discretion. Docs. 331-2. Miller's authority was ultimately subject to Brazill's ownership interests and his improper exercise of discretion led to the employer considering and ultimately ending his administrative duties. *See* Docs. 322, 518.

Because Miller plainly and unmistakably meets all the criteria for being an administratively exempt employee, he is not entitled to overtime under the FLSA.

*C. Miller Is Exempt From Overtime As An Outside Salesman*

In relevant part, the federal regulations state:

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

- (i) making sales within the meaning of section 3(k) of the Act, or
- (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

29 CFR § 541.500(a)-(b).

When Miller's administrative duties ended, he continued working for Express as an outside salesman. Miller was expected to make 50 face-to-face outside sales calls per week. Miller and Brazill's testimony, combined with the call logs, indicates

Miller made 10-15 outside sales calls day after day, and strongly indicates that he meets the criteria for an exempt outside salesman.

*D. Miller Is Exempt From Overtime Due To His Meeting The Criteria For A Combination Of Exemptions*

In relevant part, the federal regulations state:

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

29 CFR § 541.708.

The facts show that, for an uncertain period of time, Miller was clearly an administrator of Express's 16<sup>th</sup> Street office, and that later in his employment with Express, he was primarily an outside salesman. The facts of this case also clearly demonstrate that those two functions were Miller's primary duties. Such a situation could lead to difficulties in determining what an individual's primary duty was on any given workweek. The FLSA adopted the above rule to provide for just this type of situation. Accordingly, the fact that it is not known exactly when Miller transitioned from being the office manager who did some outside sales to strictly an outside sales position does not undermine the conclusion that he was an exempt employee who need not be paid overtime.

## **V. CONCLUSIONS OF LAW**

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

2. Montana has adopted the FLSA exemptions for administrative and outside salespersons by reference. Admin. R. Mont. 24.16.211.



3. Courtney D. Miller is exempt from overtime compensation due to his employment in an administrative capacity. 29 CFR § 541.200.

4. Courtney D. Miller is exempt from overtime compensation due to his employment as an outside salesman. 29 CFR § 541.500.

5. Courtney D. Miller is exempt from overtime compensation due to his employment in a position that combines multiple exempt duties. 29 CFR § 541.708.

## VI. ORDER

**IT IS THEREFORE ORDERED** that the above-captioned claim for unpaid wages filed by Courtney D. Miller, *Courtney D. Miller v. Abel Personnel Services, Inc., d/b/a Express Employment Professionals* (Case No. 2110-2017), is dismissed with prejudice.

DATED this 14th day of November, 2019.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry  
Wage & Hour Unit  
P.O. Box 201503  
Helena, MT 59620-1503