

FILED

MAY 03 2007

[Signature]
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICHELLE WARNER

Plaintiff,

vs.

GANNON, INC., d/b/a/ GANNON
BOOKKEEPING, CAROL GANNON
and VIRGIL GANNON.

Defendants.

CIV. 05-4127-KES

FINAL
INSTRUCTIONS
TO THE JURY

TABLE OF CONTENTS

FINAL INSTRUCTION	1
NO. 1 - INTRODUCTION & DEFINITIONS	1
NO. 2 - BURDEN OF PROOF	2
NO. 3 - IMPEACHMENT	3
NO. 4 - CORPORATIONS ACT THROUGH ITS EMPLOYEES	4
NO. 5 - CORPORATION AS A PARTY	5
NO. 6 - FAIR LABOR STANDARDS ACT CLAIM	6
NO. 7 - BONA FIDE EXECUTIVE EXEMPTION	8
NO. 8 - ADMINISTRATIVE EMPLOYEE EXEMPTION	11
NO. 9 - WAIVER	13
NO. 10 - WILLFUL VIOLATION	14
NO. 11 - FAIR LABOR STANDARDS ACT DAMAGES	15
NO. 12 - CONVERSION	17
NO. 13 - CONVERSION DAMAGES	19
NO. 14 - DUTIES DURING DELIBERATIONS	20

FINAL INSTRUCTION NO. 1 – INTRODUCTION & DEFINITIONS

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 - IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached" and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness's present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

**FINAL INSTRUCTION NO. 4 - CORPORATIONS ACT THROUGH
ITS EMPLOYEES**

Gannon, Inc., is a corporation. A corporation only acts through its agents or employees and any agent or employee of a corporation may bind the corporation by acts or statements made while acting within the scope of authority delegated to the agent by the corporation, or within the scope of his or her duties as an employee of the corporation.

FINAL INSTRUCTION NO. 5 – CORPORATION AS A PARTY

The fact that one of the parties to this action is a corporation is immaterial. In the eyes of the law, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 6 – FAIR LABOR STANDARDS ACT CLAIM

Warner's claim arises under the Fair Labor Standards Act, a federal law that provides for the payment of time-and-a-half overtime pay. Warner claims that Gannon, Inc., did not pay her the legally required overtime pay. Your verdict must be for Warner, and against Gannon, Inc., on Warner's Fair Labor Standards Act claim if all of the following elements have been proved by the greater convincing force of the evidence, and you find that Warner was not an exempt employee:

First and Second, Warner was employed by Gannon Bookkeeping during the time period involved, and Warner was an employee employed by an enterprise engaged in commerce;

The parties have stipulated, or agreed, to the first and second elements - that Warner was employed by Gannon Bookkeeping and that Warner was an employee employed by an enterprise engaged in commerce - and you should consider these elements as established.

And third, Gannon, Inc., failed to pay Warner overtime pay as required by the Fair Labor Standards Act.

The Fair Labor Standards Act requires an employer to pay its employees at a rate of at least one and one-half times their regular rate for time worked in any one work week over 40 hours. This is commonly known as time-and-a-half pay for "overtime" work.

The above paragraph does not apply to any employee employed in a bonafide executive, administrative, or professional capacity.

If you find that Warner has not proved all three elements by the greater convincing force of the evidence, then you must find in favor of Gannon, Inc., and against Warner and you need not further consider this claim. Additionally, if you find that Gannon, Inc., has proven by the greater convincing force of the

evidence that Warner was not covered by the Fair Labor Standards Act because she was an exempt employee, either a bona fide executive employee as explained in Final Instruction Number 7, or an administrative employee as explained in Final Instruction Number 8, you must find in favor of Gannon, Inc., and against Warner. If you find that Warner has proved all of the above elements by the greater convincing force of the evidence, and that Gannon, Inc., has failed to prove that Warner was an exempt employee, you must determine whether Gannon, Inc.'s violation was willful as explained in Final Instruction 10 and determine the damages Warner suffered as explained in Final Instruction 11.

FINAL INSTRUCTION NO. 7 – BONA FIDE EXECUTIVE EXEMPTION

Gannon, Inc., asserts that even if you find that Warner has proved all the necessary elements of her Fair Labor Standards Act claim, the Act does not apply because of an exemption from those requirements. One exemption claimed by Gannon, Inc., is the “bona fide executive” exemption. In order to receive the benefit of this exemption, Gannon, Inc., must prove by the greater convincing force of the evidence the following two elements:

First, that Warner’s primary duty consisted of the management of the enterprise in which she was employed, or a customarily recognized department or subdivision thereof; and

Examples of work such as the following are exempt work when it is performed by an employee in the management of a department or the supervision of the employees under her:

- Interviewing, selecting, and training of employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing their work;
- Maintaining their production or sales records for use in supervision or control;
- Appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status;
- Handling their complaints and grievances and disciplining them when necessary;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among th workers;
- Determining the type of materials supplies, machinery or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow of distribution of materials or merchandise and supplies; and
- Providing for the safety of persons and the property.

A determination of whether an employee has management as her primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of her time in management would have management as her primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of her time in managerial duties, she might nevertheless have management as her primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, her relative freedom from supervision, and the relationship between her salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

A job title alone is insufficient to establish the exempt status of an employee.

Second, that Warner customarily and regularly directed the work of two or more other full-time employees therein.

The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of her duties. The requirement is not met by the occasional exercise of discretionary powers.

The phrase "two or more other employees" means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees.

An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence, however, does not meet this requirement. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein."

FINAL INSTRUCTION NO. 8 – ADMINISTRATIVE EMPLOYEE EXEMPTION

In the alternative, Gannon, Inc., asserts that even if you find that Warner has proved all the necessary elements of her Fair Labor Standards Act claim, the Act does not apply because of the “administrative employee” exemption. In order to receive the benefit of this exemption, Gannon, Inc., must prove by the greater convincing force of the evidence the following two elements:

***First*, that Warner’s primary duty consisted of the performance of office or nonmanual work directly related to management policies or general business operations of her employer or her employer’s customers; and**

The phrase “directly related to the management policies or general business operations of her employer or her employer’s customers” describes those types of activities 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 her employer or her employer’s customers.

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. An employee performing such work is engaged in activities relating to the administrative operations of the business.

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 whose 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.

Second, that Warner's work included work requiring the exercise of discretion and independent judgment.

FINAL INSTRUCTION NO. 9 – WAIVER

An employer's obligation to pay overtime compensation is statutory and cannot be waived or substituted by an agreement by an employee to work for less.

FINAL INSTRUCTION NO. 10 – WILLFUL VIOLATION

If you find in favor of Warner under Instruction Number 6, then you must decide whether the conduct of Gannon, Inc., was “willful.” You must find Gannon, Inc.’s conduct was willful if you find by the greater convincing force of the evidence that, when Gannon, Inc., failed to pay Warner overtime wages, Gannon, Inc., knew the failure to pay overtime wage was in violation of the Fair Labor Standards Act mandating the payment of overtime, or acted with reckless disregard of that law.

FINAL INSTRUCTION NO. 11 – FAIR LABOR STANDARDS ACT DAMAGES

If you find in favor of Warner under Final Instruction Number 6, you must determine the damages she has suffered.

You should find as damages to be awarded in favor of Warner the amount of money that will compensate her for the difference between what Warner has been paid by Gannon, Inc., and what the Fair Labor Standards Act required Gannon, Inc., to pay Warner, as set forth in this instruction.

The Fair Labor and Standards Act states that no employer shall employ any of its employees who in any workweek is engaged in commerce for a workweek longer than forty (40) hours unless such employee receives compensation for her employment in excess of forty (40) hours at a rate not less than one and one-half (1 ½) times the regular rate at which she is employed.

An employee's regular rate is the basis for calculating any overtime pay due the employee. The regular rate for a week is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. The overtime rate, then, is one and one-half times that rate.

When determining damages, Warner has the burden to show the amount and extent of the work for which she was improperly compensated. Gannon, Inc., then has the burden to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from Warner's evidence. If Gannon, Inc., fails to produce

such evidence, you may then award damages to Warner, even though the result may be only approximate.

You have heard testimony that Warner received bonuses during the course of her employment. The Fair Labor Standards Act provides that the term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions; or payment as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." Such sums may not be credited toward overtime compensation due under the Act.

To qualify for an exclusion from the "regular rate," the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assured that the employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift.

If the bonus paid at Christmas or on other special occasions is a gift or in the nature of a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the accounts are not measured by or directly dependent upon hours worked, production, or efficiency.

FINAL INSTRUCTION NO. 12 – CONVERSION

Gannon, Inc., alleges that Warner converted its files, supplies, cash, and company funds from the Gannon Bookkeeping office.

Conversion is the unwarranted interference with or control over the property of another, which deprives its owner of his property. A conversion occurs whenever there is a serious interference with a person's rights in that person's property. The act constituting conversion must be an intentional act, but it does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.

Your verdict must be for Gannon, Inc. and against Warner, on Gannon, Inc.'s claim of conversion if all of the following elements have been proved by the greater convincing force of the evidence:

One, Gannon, Inc., owned or had a possessory interest in the files, supplies, cash, and company funds in question;

Two, Gannon, Inc.'s ownership or possessory interest in the files, supplies, cash, and company funds was greater than that of Warner;

Three, Warner exercised control over or seriously interfered with Gannon, Inc.'s interest in the files, supplies, cash, and company funds; and

Four, such conduct deprived Gannon, Inc., of its interest in the files, supplies, cash, and company funds.

Your verdict must be for Warner and against Gannon, Inc., on Gannon, Inc.'s claim of conversion if any of the elements of conversion were not proved by Gannon, Inc., by the greater convincing force of the evidence.

FINAL INSTRUCTION NO. 13 – CONVERSION DAMAGES

If you find in favor of Gannon, Inc., on the question of liability for conversion you must then fix the amount of money which will reasonably and fairly compensate Gannon, Inc., for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been caused by Warner's conduct, whether such loss or harm could have been anticipated or not, namely:

The fair market value of the property immediately before Warner took possession of the property at issue.

Whether any of these damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 14 – DUTIES DURING DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

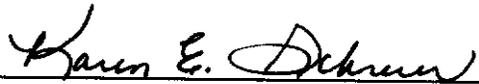
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign

and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated May 3, 2007



KAREN E. SCHREIER
CHIEF JUDGE