

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

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DARLENE KLOSTER,  
Plaintiff,

vs.

GOODWILL INDUSTRIES OF  
CENTRAL IOWA, INC.,  
Defendant.

No. 4:13-cv-00119

**ORDER**

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Plaintiff, Darlene Kloster, brought this action against her former employer, Goodwill Industries of Central Iowa, Inc., under the Fair Labor Standards Act (“FLSA”). Plaintiff claims that Defendant violated the FLSA when it classified her as an exempt employee and refused to pay her overtime wages. Defendant maintains that Plaintiff worked in an executive capacity during the relevant timeframe and therefore is not entitled to overtime pay under the FLSA.

This matter comes before the Court pursuant to Defendant’s October 14, 2014, motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff responded to this motion on October 30, 2014, and Defendant filed its final reply on November 19, 2014. In its motion for summary judgment, Defendant argues that no genuine issue of material fact exists as to whether Plaintiff constitutes an exempt employee, that Plaintiff is an exempt employee as a matter of law, and that Plaintiff is therefore not entitled to overtime pay.

**I. LEGAL STANDARD FOR SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56 provides that a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *see also Med. Liab. Mut. Ins. Co. v. Alan Curtis L.L.C.*, 519 F.3d 466, 471 (8th Cir. 2008); *Kountze ex rel. Hitchcock Found. v. Gaines*, 536 F.3d 813, 817 (8th Cir. 2008) (“[S]ummary judgment is appropriate where the pleadings, discovery materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law.”). In making this determination, the Court must examine the evidence in the light most favorable to the nonmoving party. *See HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 546 (8th Cir. 2007).

To survive a motion for summary judgment, a plaintiff must “set out specific facts showing a genuine issue for trial.” FED. R. CIV. P. 56(e). “[A]n issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury verdict for the nonmoving party.” *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. et al.*, 536 F.3d 939, 944 (8th Cir. 2008) (citation omitted). “A genuine issue of fact is material if it ‘might affect the outcome of the suit under the governing law.’” *Saffels v. Rice*, 40 F.3d 1546, 1550 (8th Cir. 1994) (citation omitted). “[T]he substantive law will identify which facts are material.” *Guinan v. Boehringer Ingelheim Vetmedica, Inc.*, 803 F. Supp. 2d 984, 993 (N.D. Iowa 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252.

Plaintiff “cannot create a dispute about a fact that is contained in deposition testimony by referring to a subsequent affidavit . . . contradicting the deponent’s prior testimony, for ‘it is well established that a genuine issue of fact is not created where the only issue of fact is to determine which of the two conflicting versions of a party’s testimony is correct.’” *Grace v. Family Dollar Stores, Inc.*, 637 F.3d 508, 512 (4th Cir. 2011) (citing *Erwin v. United States*, 591 F.3d 313, 325 n. 7 (4th Cir. 2010); see also *Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995) (“We have held that a party cannot avoid summary judgment by contradicting his own earlier testimony.”); *Wilson v. Westinghouse Elec. Corp.*, 838 F. 2d 286, 289 (8th Cir. 1988) (“While district courts must exercise extreme care not to take genuine issues of fact away from juries, ‘(a) party should not be allowed to create issues of credibility by contradicting his own earlier testimony.’” (citation omitted)). Plaintiff has provided an affidavit that contradicts much of what Plaintiff said in her earlier deposition. To the extent that Plaintiff’s contradictory statements alone create a question of fact, those questions do not defeat the instant summary judgment motion.

## **II. STATEMENT OF UNDISPUTED FACTS**

Goodwill operates multiple stores in Iowa. Because each Goodwill store sells merchandise acquired through donations, each store is responsible for pricing its own products. Appropriate pricing is crucial to a store’s profitability, and the store manager of any given Goodwill is responsible for ensuring products are priced appropriately. Plaintiff originally worked for Goodwill as a store clerk, but was promoted to a manager position at Goodwill’s Southern Des Moines store (“South store”) in 2007.

As a manager, Plaintiff took on more responsibility. Plaintiff was trained in areas that store clerks were not, including, but not limited to, safety inspections and drills, completing employee performance reviews, handling of disciplinary issues, and the new employee hiring process. As a manager, Plaintiff conducted employee reviews, trained employees, and gave them performance feedback. Plaintiff signed off on employee pay increases. Plaintiff was responsible for ensuring that her store met its sales goals and she was eligible for bonuses when her store exceeded performance standards. The bonuses available to Plaintiff were at least twice as much as those available to any other South store employee. Plaintiff created the weekly store schedule. Plaintiff could recommend discounts on certain items based on her knowledge of store inventory and demand.<sup>1</sup> Plaintiff also worked the cash register and performed other non-managerial tasks for varying lengths of time depending on need.

Plaintiff's immediate supervisor, Karen Tomlinson, worked outside the South store. Plaintiff communicated with Tomlinson via phone or email a few times a week. Tomlinson visited the store in person more than once a month but less than every week for an hour or an hour and a half. Plaintiff was the highest ranking employee in the South store, supervising ten or more employees at any given time. There was no one in the store who oversaw Plaintiff's performance or could discipline Plaintiff. Critiques of Plaintiff's performance as a manager were more focused on her leadership and less focused on the time Plaintiff spent performing clerk duties such as operating the cash register. Plaintiff's employment was terminated after various issues arose during her tenure as store manager, including Defendant's discovery that virtually all of the South store's employees were stealing from the store and that Plaintiff was failing to complete required paperwork. Plaintiff earned between \$550.38 and \$617.07 per week during the relevant limitations period. Store clerks earned between \$8.20 and \$9.24 per hour during the limitations period.

### **III. ANALYSIS**

Plaintiff seeks recovery of unpaid overtime wages under the FLSA. The FLSA requires that employers pay employees "not less than one and one-half times the regular rate" of an employee's standard hourly payment for any hours over forty worked in a single week. 29 U.S.C. § 207(a)(2). However, certain employees are exempt from this overtime pay requirement. 29 U.S.C. § 213. Courts must construe exempt categories narrowly, and the burden is on the employer

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<sup>1</sup> For example, if Plaintiff's store received a large book donation, Plaintiff could recommend that the South store put all books on sale in an effort to move excess inventory.

to establish that an employee falls within an exemption. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *DeWeese v. Git N’ Go Convenience Stores, Inc.*, No. 4:11-cv-00419, slip op., at 9–10 (S.D. Iowa Feb. 1, 2013). An employer must demonstrate that an employee “plainly and unmistakably” fits within an exemption’s “terms and spirit” to establish that an employee is exempt from FLSA overtime requirements. *Arnold*, 361 U.S. at 392.

Employees working in a “bona fide executive, administrative, or professional capacity” are exempt from the FLSA’s overtime requirements. 29 U.S.C. §213(a)(1). An employee works in a “bona fide executive capacity” when the employee is “(1) Compensated on a salary basis at a rate of not less than \$455 per week . . .; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (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 and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.” 29 C.F.R. § 541.100. An employer must establish each of these four elements to show that an employee is a “bona fide executive” and therefore exempt from the FLSA’s overtime provisions. *See, e.g., Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1112 (9th Cir. 2001); 29 C.F.R. § 541.100. Here, the parties agree that Plaintiff made more than \$455 per week and therefore do not dispute element one. Only elements two, three, and four are in dispute.

### **1. Primary Duty of Management**

The first factor in dispute is whether Plaintiff’s primary duty was management. The Court first addresses whether management was a part of Plaintiff’s duties at all. The Federal Regulations provide a non-exhaustive list of activities that constitute exempt “management” activities under the FLSA. Examples include

interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other change in status; handling employee complaints and grievances; disciplining employees; planning the work,

and more. 29 C.F.R. § 541.102. Plaintiff testified that she performs all of the above duties. *See, e.g.,* Kloster Depo. at P. 20 (Plaintiff trained on completing employee performance reviews, disciplining employees, and hiring employees); *Id.* at 29 (Plaintiff responsible for writing performance reviews); *Id.* at 30 (Plaintiff responsible for disciplining employees); *Id.* at 33 (human

resources prepares disciplinary forms based on Plaintiff's recommendations); *Id.* at 35 (Plaintiff counseled employees on a level not rising to discipline); *Id.* at 37 (Plaintiff signed off on status changes including pay raises); *Id.* at 46 (Plaintiff responsible for ensuring the South store met sales goals); *Id.* at 52 (Plaintiff completed preliminary review of applications, sent "good" applications to human resources, and participated in interviews); *Id.* at 55 (Plaintiff created weekly schedule). The record demonstrates that Plaintiff performed various management duties.

The Court now turns to the question of whether these management duties constitute Plaintiff's "primary duty." The Code of Federal Regulations defines "primary duty" as "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700(a). The Court's determination of an employee's primary duty "must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). The Federal Regulations list a number of factors to consider in evaluating an employee's primary duty, including, but not limited to, "[A] the relative importance of the exempt duties as compared with other types of duties; [B] the amount of time spent performing exempt work; [C] the employee's relative freedom from direct supervision; and [D] the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a). The Court considers each of these factors in turn.

#### *A. Relative Importance of Exempt Duties*

The first factor the Court considers in determining Plaintiff's primary duty is the relative importance of Plaintiff's exempt duties compared to her nonexempt duties. "Under this factor, courts must compare the importance of the plaintiff's managerial duties with the importance of her non-managerial duties, keeping in mind the end goal of achieving the overall success of the company." *Cort v. Kum & Go, L.C.*, 923 F. Supp. 2d 1173, 1178 (W.D. Mo. 2013) (quoting *Thomas v. Speedway SuperAmerica, L.L.C.*, 506 F. 3d 496, 505 (6th Cir. 2007) (internal quotation marks omitted)). To weigh the relative importance of Plaintiff's management duties, the Court looks to Plaintiff's "job description, performance review criteria, bonus plan, and training," as well as the management duties themselves. *Id.* (citing *Aschenbrenner v. Dolgencorp, Inc.*, 2011 WL 2200630, at \*11 (D. Neb. June 3, 2011)). The Court also looks to see which duties are more "critical to the operation of the store." See, e.g., *Moody v. Family Dollar Stores*, 2014 WL 1384576, at \*7 (W.D.N.C. April 9, 2014); *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d

Cir. 1982) (finding primary duties “in the sense of being most important or critical to the success of” the business”); *Jones v. Va. Oil Co., Inc.*, 69 F. App’x 633, 637 (4th Cir. 2003) (citing *Haines v. S. Retailers, Inc.*, 939 F. Supp. 441, 450 (E.D. Va. 1996)). Courts should ask how long Plaintiff’s store could last “if she only performed managerial duties versus manual labor.” *DeWeese*, 4:11-cv-00419, slip op., at 12.

Defendant argues that Plaintiff’s job description and evaluations establish that Plaintiff’s management duties were clearly the more important of her responsibilities. Motion for Summary Judgment (“Motion”) at 19. Plaintiff agrees that, as manager, she was trained on and responsible for tasks and procedures that store clerks were not. Kloster Depo. at P. 19. Plaintiff also agrees that Defendant’s job description accurately reflects her management duties. Kloster Depo. at P. 77. Plaintiff’s job description explains that Plaintiff

[w]ill train and supervise employee(s) and/or client(s); Manage store so that goals are met and growth is recorded annually; Provide good customer service and answer and/or reply to customer needs and ensure employees do the same; Operate cash register, prepare cash register forms; balance and record reports and ensure employees do the same; Order, receive, select, solicit and rotate merchandise per store quota; Dust, clean and align fixtures and merchandise and ensure employees do the same; Receive, sort, and process donated goods and ensure employees do the same; Direct, coordinate and monitor retail store activities and businesses; Adhere to Kaizen principles; and Adhere to safety and training requirements.

Deft. App’x at 31<sup>2</sup>; Kloster Depo. at P. 77. Plaintiff’s job description and evaluations include both management and non-management responsibilities. However, when evaluating Plaintiff, Defendant consistently focused on Plaintiff’s management abilities, even in the context of evaluating non-managerial functions. *See, e.g.*, Deft. App’x at 187 (noting that Plaintiff does not have confidence in what she is doing and asks for reassurance too often); *Id.* (“As the manager of the store, Darlene should be aware of what is happening in her store and be able to answer questions about it.”); *Id.* (“Darlene needs to take control of her store and create an environment where things are done the way the company wants, but with her own management style implemented.”) *Id.* at 166 (Plaintiff “lacking in ability to effectively manage the store”); *Id.* at 167 (“When things are not being completed correctly by staff, [Plaintiff] is not stern in telling them how it is expected to be done.”); *Id.* (“Meeting production is only a small part of what a well run

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<sup>2</sup> “Kaizen” refers to programming designed to continuously improve company processes. Defendant’s Statement of Facts (“DSOF”) at P.2 n.1.

store needs to have in check. Darlene is not being effective in how she manages the store. . . . Darlene has never taken full ownership of the store and all individuals that work for her realize this.”) *Id.* (“She should be able to look at the store, see where it is lacking and then come up with a plan for what to do to fix it.”); *Id.* (“Darlene does not take much independent action in her store.”); *Id.* at 168 (“Darlene does not seem to want to be the one making decisions for the store.”) *Id.* at 171 (“She is not good at controlling.”). Defendant’s evaluations of Plaintiff make it clear that Defendant evaluated Plaintiff as a manager and expected Plaintiff to perform critical management functions. Plaintiff’s job description and evaluations support Defendant’s contention that Plaintiff’s exempt duties were more important than her nonexempt duties.

Plaintiff’s opportunity for bonuses also supports Defendant’s contention that Plaintiff’s management duties took priority over her nonexempt duties. Plaintiff was eligible for bonuses based on the South store’s success and profitability. Kloster Depo. at P. 48. Plaintiff was eligible to receive at least twice as much of a bonus as any other employee at the South store. Deft App’x at PP. 78–79. Plaintiff controlled—or at the very least influenced—her eligibility for these bonuses through ensuring that her store performed well. Kloster Depo. at P. 48. Plaintiff’s increased opportunity for bonuses reflects Plaintiff’s increased responsibility for the South store’s success and demonstrates Defendant’s understanding of Plaintiff’s control over the store’s success.

The undisputed facts demonstrate that Plaintiff’s managerial responsibilities were critical to the success of the South store. In fact, when Plaintiff failed to adequately perform her management duties—namely by failing to supervise her employees—nearly all of her employees stole from the store. Viewing the facts in the light most favorable to Plaintiff, while Plaintiff performed some nonexempt duties as part of her job, the overall success of the business depended on Plaintiff adequately performing her exempt management tasks. *Cort*, 923 F. Supp. 2d at 1178 (quoting *Thomas*, 506 F. 3d at 505) (internal quotation marks omitted); *Murray v. Stuckey’s, Inc.*, 939 F.2d 614, 619 (8th Cir. 1991) (citing *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982) (“the [business] could not operate successfully unless the managerial functions of assistant managers . . . were performed.”)). Because Plaintiff’s “job description, performance review criteria, bonus plan, and training,” together with Plaintiff’s management duties themselves, demonstrate that Plaintiff’s management duties were comparatively more important to the operation of the South store than her non-management duties, this factor supports Defendant’s contention that Plaintiff’s primary duty was management. *Cort*, 923 F. Supp. 2d at 1178.

### *B. Amount of Time Spent Performing Exempt Work*

The amount of time spent performing exempt work can be useful in determining an employee's primary duty, but "[t]ime alone . . . is not the sole test." 29 C.F.R. § 541.700(b); *see Thomas*, 506 F. 3d. at 504 ("[W]here an employee manages while at the same time performing non-exempt tasks normally assigned to subordinate employees . . . we refuse to give undue weight to the time factor of the primary duty inquiry." (citations omitted) (internal quotation marks omitted)). The Federal Regulations do not require that an exempt employee spend more than 50 percent of her time performing exempt work to qualify as an executive employee. "Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." 29 C.F.R. § 541.700(b). Therefore, the amount of time Plaintiff spent performing non-managerial duties is not dispositive of whether Plaintiff's primary duty was management. "How an employee spends her time working is a question of fact, while the question of whether the employee's particular activities exclude her from the overtime benefits of the FLSA is a question of law." *Ravas v. Dolgencorp*, 766 F. Supp. 2d 631, 639 (E.D.N.C. 2011). In determining how much time an employee spends on management activities, the Federal Regulations dictate that "performance of . . . nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves." 29 C.F.R. § 541.106.

Plaintiff argues she never performed any management duties while she was performing non-management duties like assisting customers or running the cash register, and that therefore the Court should not apply the concurrent performance test of 29 C.F.R. § 541.106. Resistance at P. 12. However, Plaintiff's deposition testimony establishes just the opposite. Plaintiff testified that Plaintiff spent 15% of her time training and supervising employees and 15% of her time managing the store to meet goals and record annual growth. Kloster Depo. at PP. 78–80. Plaintiff therefore does not dispute that she spent at least 30% of her time performing management tasks. Plaintiff testified that she spent more than 10% of her time working on customer service and more than 5% of her time working the cash register, but did not provide a more accurate time estimate for either task. *Id.* at 80–81. Plaintiff also testified that at times when she was working in her office, she was unable to see employees on the sales floor. *Id.* at P. 131. However, in direct opposition to

Plaintiff's current argument, Plaintiff testified that while she was operating the cash register or helping a customer, she was still responsible for supervising the other staff, for ensuring production goals were met, that safety rules were followed, inventory goals were met, and disciplinary needs were addressed. *Id.* at 85–86. Plaintiff was the highest ranking employee at the South store. *Id.* at P. 21 “It cannot rationally be assumed that the store went without management” whenever Plaintiff was performing a nonexempt duty. *Grace*, 637 F.3d at 515.

Construing the facts in the light most favorable to Plaintiff, the record demonstrates that while Plaintiff may have spent over 50% of her time performing non-managerial tasks like operating the cash register, she was simultaneously responsible for the success of the store and supervision of the other employees. *See, e.g., Murray*, 939 F.2d at 618 (finding that managers spent 65–90 percent of their time on managerial duties not controlling); *Grace*, 637 F.3d at 515 (Plaintiff in charge of store “100% of the time, even while doing [non-managerial] jobs”). The amount of time Plaintiff spent performing management tasks therefore supports Defendant's argument that management was Plaintiff's primary duty.

### *C. Relative Freedom from Direct Supervision*

The parties dispute the extent of Plaintiff's freedom from supervision. “Relative freedom supervision does not demand complete freedom from supervision.” *Moody*, 2014 WL 1384576, at \*8. “[A]ctive supervision and periodic visits by a district manager do not eliminate the day-to-day discretion of the on-site manager.” *Gooden v. Dolgencorp, Inc.*, 2012 WL 1110085, at \*5 (D.S.C. April 3, 2012) (*quoting Murray v. Stuckey's Inc.*, 50 F.3d 564, 570 (8th Cir. 1995)). Plaintiff argues that whatever authority she had as a store manager was limited because her supervisor, Karen Tomlinson, supervised Plaintiff at the South store. Resistance at P. 15. Plaintiff argues that Tomlinson's supervision makes Plaintiff a “closely supervised” employee and therefore should weigh in favor of establishing Plaintiff as a non-exempt employee. *Id.* Plaintiff also argues that, because she was bound by corporate policies, she lacked the required discretion to give her exempt status. *Id.* at 14. Defendant argues that Plaintiff had virtually no direct supervision, and that Tomlinson's minimal level of supervision from afar does not alter Plaintiff's exempt status.

The undisputed facts establish that Plaintiff checked in with Tomlinson over the phone or via email several times a week and that Tomlinson visited Plaintiff's store in person a few times per month. Tomlinson's visits typically lasted an hour to an hour and a half. This amount of supervision is less than many cases where courts have found that retail store managers were not

exempt under the FLSA. *See Leonard v. Dolgencorp, Inc.*, 2011 WL 2009937, at \*8 (W.D. Ky. May 23, 2011) (reviewing cases).

Here, however, the number of Tomlinson's visits is not as informative as Plaintiff's evaluations. Plaintiff's employee evaluations repeatedly note that Defendant wanted Plaintiff to exercise more discretion and be more assertive in her day-to-day management of the store. *See, e.g.*, Deft. App'x at 187 ("Darlene needs to take control of her store and create an environment where things are done the way the company wants, but with her own management style implemented."). Plaintiff was clearly not utilizing the discretion with which she was vested. However, this does not mean Plaintiff wasn't able to and expected to exercise daily discretion in managing her store. Plaintiff exercised discretion in creating the schedule, assigning employees certain tasks, delegating certain management responsibilities, pursuing certain disciplinary actions, and more. Tomlinson encouraged Plaintiff to make more decisions on her own. "While her discretion was by no means unfettered and abounding, she exercised discretion over important managerial functions on a sufficiently frequent basis. . . ." *Thomas*, 506 F.3d at 507.

Plaintiff also argues that the existence of corporate policies and manuals so circumscribed her discretion that a fact issue exists as to the extent of her discretion. Defendant argues that these policies and manuals are insufficient to create a factual dispute about Plaintiff's discretion. The undisputed facts demonstrate that Plaintiff was responsible for the South store's day-to-day functioning. The store's proper functioning and continued success depended in large part upon appropriate pricing. Though Defendant's policies and manuals provide insight into the kind of merchandise Plaintiff should sell in the store, Plaintiff exercised discretion in deciding what items should be sold in the store and in pricing those items. *Kloster Depo.* at P. 9; *see Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1115 (9th Cir. 2001) ("[Plaintiff] had to adhere to company policies, record completed tasks on checklists, and were subject to performance reviews. . . However, in practice, the oversight was neither so rigorous nor so frequent as to undermine the undeniable fact that [Plaintiff was] substantially free from supervision, and the existence of checklists to monitor [Plaintiffs] work does not alter our conclusion."); *Cort*, 923 F. Supp. 2d at 1182 (finding relative freedom from supervision despite centralized computer management systems when Plaintiff remained responsible for ensuring results were consistent with Defendant's standards); *McAllister v. Trasamerica Occidental Life Ins. Co.*, 325 F.3d 997, 1001 (8th Cir. 2003) ("Just because [Plaintiff] was required to follow detailed manuals does not mean she did not exercise discretion

and independent judgment.”). As discussed, it was clearly Defendant’s intention that Plaintiff exercise discretion in implementing her own management style and make more independent decisions regarding the South store. The existence of some overarching corporate policy is not sufficient to establish that Plaintiff was not “relatively” free from supervision.

Whatever constraints bi-weekly visits from her supervisor and adherence to basic company policy placed on Plaintiff do not rise to the level of creating a genuine issue of material fact as to Plaintiff’s discretion. Plaintiff understood that Defendant wanted her to operate more independently. Kloster Depo. at P. 115. Plaintiff understood that it was her job to make decisions for the store. *Id.* Plaintiff “was the most senior employee at her [store]; no other employee was her equal. Thus, on a day-to-day basis, she generally operated without a supervisor looking over her shoulder or monitoring her every move.” *Leonard*, 2011 WL 2009937, at \*8 (noting that “weekly visits, frequent calls and emails, [and] constant availability” did not demonstrate that the Plaintiff did not have “relative freedom from direct supervision.”). This factor weighs in favor of Plaintiff’s primary duty being management.

#### *D. Relationship between Plaintiff’s Salary and Other Employees’ Wages*

The fourth factor the Court considers in determining Plaintiff’s primary duty is the relationship between Plaintiff’s salary and other employees’ wages. “No specific mathematical formula is prescribed for determining whether an allegedly exempt employee’s salary is higher than a [nonexempt employee’s] wage.” *Cort*, 923 F. Supp. 2d. at 1183 (citing *Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1278, 1279 (S.D. Fla. 2004)). Plaintiff argues that Plaintiff’s weekly salary should be converted into an hourly wage based on the average number of hours Plaintiff worked in a week, and that this calculated hourly wage should be compared to the hourly wages of lower level employees. Resistance at 15–16. Defendant does not argue for the same method of calculation, and instead notes that Plaintiff’s increased salary and bonus potential together demonstrate that this factor weighs in Defendant’s favor. Motion at 21.

The parties agree that Plaintiff made \$550.38–\$617.07 per week during the relevant limitations period. The parties also agree that store clerks made \$8.20–\$9.24 per hour during the relevant limitations period. The record demonstrates that in 2011, the only assistant store manager in the South store made \$12.18 per hour. Def’t. App’x. 69. During 2012, the assistant store manager at the South store made \$10.90 per hour. During 2011, assistant managers in all of Defendant’s stores made \$10.00–\$12.89 per hour. *Id.* at 66–71. During 2012, assistant managers in all of

Defendant's stores made \$9.79–\$14.45 per hour. *Id.* at 71–77. The complete range of assistant manager hourly wages in 2011 and 2012 was \$9.79–\$14.45.<sup>3</sup>

Under Plaintiff's proposed test, Plaintiff made \$12.51–\$14.02 per hour. More specifically, in 2011, Plaintiff made a yearly salary of \$28,619.62, making her hourly wage under Plaintiff's proposed test \$12.51. In 2012, Plaintiff made a yearly salary of \$32,087.57, making Plaintiff's hourly wage \$14.02. Plaintiff argues that Plaintiff's hourly pay range (\$12.51–\$14.02) should be compared with the pay ranges of store clerks (\$8.20–\$9.24) and assistant managers (\$9.79–\$14.45). Looking at these pay ranges as a whole, it is clear that Plaintiff made at least \$3.27 (or 35%) more per hour than any given store clerk,<sup>4</sup> while making perhaps as much as \$5.82 (or 70%) more per hour than any given store clerk.<sup>5</sup> This range of potential wage difference is sufficient to establish that Plaintiff made enough more per hour than store clerks to establish that Plaintiff was exempt. *See, e.g., Moore v. Tractor Supply Co.*, 352 F. Supp. 2d 1268, 1278 (S.D. Fl. 2004) (declining to perform “mathematical gymnastics” and noting more simple test of comparing manager's weekly salary to highest possible non-exempt weekly wage); *Thomas*, 506 F.3d 496, 509 (6th Cir. 2007) (30% more than hourly wages paid to other employees for nonexempt work significantly higher); *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903 (E.D. La. 2009) (finding this factor “neutral” when Plaintiff's salary approximately \$1 higher than associate managers).<sup>6</sup>

However, examining the wage ranges in this way does not paint an accurate picture of Plaintiff's wages in relation to lower level employees. Looking at each of the two relevant years individually, it is clear that Plaintiff at all times made approximately as much or more than all employees, including assistant store managers, in Defendant's stores. In 2011, Plaintiff made \$12.51 per hour under Defendant's proposed test. The range of hourly wages paid to assistant managers in 2011 spanned from \$10.00–\$12.89, with an average hourly wage of \$11.56. Deft.

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<sup>3</sup> Plaintiff contends that assistant store managers' hourly wages were between \$10.00 and \$12.89. This range is only an accurate reflection of assistant managers' wages in 2011 and does not include relevant information from 2012. Deft. App'x 66–77.

<sup>4</sup> The Court determined the wage differential and percentage change according to the following formula:  $(12.51 - 9.24) / 9.24$ .

<sup>5</sup> The Court determined the wage differential and percentage change by utilizing the following calculation:  $(14.02 - 8.20) / 8.20$ .

<sup>6</sup> Applying the same analysis to compare Plaintiff's wages with those of any given assistant manager yields different results. Looking at the range of potential wages made by assistant managers, it appears that if an assistant manager was making the highest possible assistant manager hourly wage at the time Plaintiff was making her lowest potential hourly wage, that assistant manager would have made \$1.94 more than Plaintiff per hour. Conversely, comparing Plaintiff's highest hourly wage with an assistant managers lowest potential wage demonstrates that Plaintiff may have made as much as \$4.23 more than a given assistant manager per hour.

App'x. 66–71. In 2012, Plaintiff made \$14.02 per hour, while the range of assistant manager wages spanned from \$9.79–\$14.45, with an average hourly wage of \$12.39. Deft. App'x. At 71–77. The Court finds that the most useful and accurate comparison here is to compare Plaintiff's average hourly wage to the average wage of an assistant manager, looking at 2011 and 2012 individually. In 2011, Plaintiff made, on average, \$0.95 (or 8%) more per hour than the assistant managers.<sup>7</sup> In 2012, Plaintiff made, on average, \$1.63 (or 13%) more per hour than assistant managers.<sup>8</sup> Finally, looking only at the South store, Plaintiff made more than any other employee at the South store at all times during the relevant timeframe. Deft. App'x. at PP. 66–71.

These wage comparisons between Plaintiff and lower-level employees do not end the Court's analysis. Under this factor, courts also look to whether the Plaintiff is a "profit center." *Moody*, 2014 WL 1384576, at \*9; *Grace*, 637 F.3d at 517. A manager is a "profit center" when she has "the ability to influence the amount of her compensation." *Grace*, 637 F.3d at 517. "[S]alary was not the totality of [Plaintiff's] compensation." *Ravas*, 766 F. Supp. 2d at 648. Plaintiff was eligible for bonuses based on her store's performance. Kloster Depo. at P. 48. The amount of the bonuses available to Plaintiff was at least twice as much as any other employee at the South store. Deft App'x at PP. 78–79. Plaintiff was able to control her eligibility for these bonuses through ensuring that her store performed well. Kloster Depo. at P. 48. Here, in addition to Plaintiff earning significantly more than any store clerk, more on average than any assistant manager, and more than any other South store employee, Plaintiff had the ability to supplement her income with up to \$325 per month in bonuses. Deft App'x at P. 79. Plaintiff was aware of this and worked to ensure her store met any goals necessary for Plaintiff to receive these bonuses. Kloster Depo. at P. 48. Plaintiff's salary combined with Plaintiff's bonus earning potential demonstrate that the pay differential between Plaintiff and other employees was sufficient to render Plaintiff exempt. *See, e.g., Thomas*, 506 F.3d at 508–09 (combining wages and bonus earning potential in analysis).<sup>9</sup>

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<sup>7</sup> Relevant to this discussion is the fact that Plaintiff's assistant manager in 2011 was a very experience employee who was paid a higher wage than other assistant managers were typically paid. Crooks Declaration at ¶ 10.

<sup>8</sup> The Court does not compare Plaintiff's salary with the average clerk's hourly wage because Plaintiff makes substantially more than any clerk even under Plaintiff's proposed test.

<sup>9</sup> Plaintiff argues that this factor cannot be decided on summary judgment because there is a statute of limitations issue related to whether Defendant's alleged FLSA violation was willful. Plaintiff has presented no evidence of willfulness. *See, e.g., Fenton v. Farmers Ins. Exchange*, 663 F. Supp. 2d 718, 728 (D. Minn. 2009). Furthermore, comparing Plaintiff's wages with those of lower level employees in 2010 does not change the Court's analysis. Defendant's Supplemental Appendix at P. 1.

The Court's determination of an employee's primary duty "must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). An analysis of each of the factors in the primary duty test, with an emphasis on the character of Plaintiff's job as a whole, demonstrates that Plaintiff's primary duty was management. Plaintiff concurrently performed management and non-management duties and exercised sufficient daily discretion in the South store while routinely making more money than other employees. Defendant has therefore demonstrated that Plaintiff's primary duty was management. Plaintiff has failed to raise a genuine issue of fact that would allow a reasonable jury to find in her favor on the first element of the exempt employee test.

## **2. Plaintiff Regularly Directs the Work of Two or More Employees**

The second element Defendant must prove in order to establish that Plaintiff is an executive employee under the FLSA and therefore exempt from overtime requirements is that Plaintiff "[c]ustomarily and regularly direct[s] the work of two or more other employees." 29 C.F.R. § 541.104(a). "The phrase 'two or more other employees' means two full-time employees or their equivalent." 29 C.F.R. § 541.104(a). This means that a manager must supervise 80 hours of employee work per week. A manager directs her subordinates work "customarily and regularly" if the frequency of direction is "greater than occasional . . . but may be less than constant." *Grace*, 637 F.3d at 513 (citing 29 C.F.R. § 541.701).

Plaintiff argues that, because she created a factual dispute as to whether her primary duty is management, there must be a factual dispute as to whether she directs or supervises employees. Resistance at P. 20. However, Plaintiff may still direct or supervise employees even if that is not her primary duty. Furthermore, as discussed above, there is no genuine issue of material fact as to whether management was Plaintiff's primary duty. Plaintiff further argues that the very nature of this element "requires a factual analysis that exceeds standard summary judgment review." Resistance at 20. This is plainly not the case, as many courts have addressed this element on summary judgment. *See, e.g., Barreto v. Davie Marketplace, L.L.C.*, 331 F. App'x 672, 676–77 (11th Cir. 2009) (discussing lower court's ruling on this element); *Wachenschwanz v. Dolgencorp, L.L.C.*, 2014 WL 907249, at \*11 (S.D. Ohio March 7, 2014).

Here, Plaintiff has raised no genuine issue of material fact as to her management of other employees. Plaintiff agrees that she supervised 30 employees during her tenure as store manager. Plaintiff agrees that the South store's typical payroll requires 9.3 full-time equivalent positions,

including an assistant store manager. Plaintiff agrees that she “supervised well over 80 hours per week.” Defendant’s Statement of Undisputed Facts (“DSOF”), ¶¶ 43–45; Plaintiff’s Response to Defendant’s Statement of Undisputed Facts (“PSOF”) at P. 2 (“41–45. Admitted.”). The undisputed facts further establish that Plaintiff was responsible for monitoring these employees, training employees, creating the schedule, assigning work to be done in the store, coaching employees to improve performance, disciplining employees when necessary, interviewing prospective employees, and signing off on pay raises. Plaintiff was the highest ranking employee in the store. If Plaintiff was not supervising the employees, no one else was. There is no genuine issue of material fact as to whether Plaintiff customarily and regularly supervised the equivalent of two or more full-time employees. *See, e.g., Baldwin*, 266 F.3d at 1117 (finding supervision when managers trained assistant managers, ensured assistant managers’ compliance with policies and procedures, evaluated assistant managers’ work, and recommended firing assistant managers in one instance); *Wachenschwanz v. Dolgencorp, L.L.C.*, 2014 WL 907249, at \*11 (S.D. Ohio March 7, 2014) (finding no genuine issue of material fact when plaintiff “fail[ed] to address this in any substantive manner, only citing it as something she considers to be an issue of material fact.”). Defendant has therefore established the second element of the exempt employee test and Plaintiff has failed to create a factual dispute as to this element that would preclude summary judgment.

### **3. Weight Given to Plaintiff’s Suggestions and Recommendations as to the Hiring, Firing, Advancement, Promotion, or any other Change of Status of Other Employees**

The final element in dispute in this case relates to Plaintiff’s role in hiring and firing lower level employees. Plaintiff does not have the sole authority to make hiring and firing decisions. Therefore, the inquiry under this element is whether Plaintiff’s suggestions are given particular weight.

To determine whether an employee’s suggestions and recommendations are given ‘particular weight,’ factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs.

29 C.F.R. § 541.105. An employee’s suggestions do not have particular weight when the employee gives only “occasional suggestion with regard to the change in status of a co-worker.” 29 C.F.R.

§ 541.105. However, an executive's suggestions or recommendations need not be the final say in order to be given particular weight; suggestions "may still be deemed to have 'particular weight' even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status." 29 C.F.R. § 541.105.

As a manager, Plaintiff participated in the hiring process. Kloster Depo. at PP. 51–53. Plaintiff conducted preliminary reviews of applications and would send applications she thought were worthy onto Goodwill's Human Resources department. *Id.* at 52. This means Plaintiff had initial applicant screening authority. *Cf. Madden v. Lumber One Home Center, Inc.*, 745 F.3d 899, 905, 906 (8th Cir. 2014) (finding this element not met when defendant did not present any evidence that "plaintiffs were involved in, for instants, screening applicants, conducting interviews, checking references, or anything else related to its hiring process). After choosing which applicants she would like to interview, Plaintiff would "call [Tomlinson] and say, 'Okay. I have this potential one. Can we set up an interview' for so-and-so." Kloster Depo. at P. 52. Plaintiff testified that Tomlinson or another supervisor would join her in interviewing applicants because "there had to be two" interviewers. *Id.* Plaintiff testified that she could not remember a time when she wanted to hire someone, the person's name was sent to human resources for final approval, and human resources refused to hire the person.<sup>10</sup> *Id.* at 54; *see also Ravas*, 766 F. Supp. 2d at 650 (finding authority to hire and fire when Plaintiff admitted "her recommendations with regard to terminating and promoting employees were almost always followed," and that she had terminated more than five and promoted more than ten employees); *Rainey v. McWane, Inc.*, 552 F. Supp. 2d 626, 632 (E.D. Tex. 2008) (finding authority when supervisors performed weekly evaluations that were relied upon in promoting and terminating employees and managers initiate the disciplinary process by filing an action with human resources). Therefore, Plaintiff's testimony established that she played an important role in the hiring process at the South store.

Furthermore, not only did Plaintiff sign off on employee status changes such as pay raises, Plaintiff testified that she was required to do so. Though Plaintiff noted that she did not control the amount of a given pay increase, when asked if Plaintiff had to sign off on the increase, she testified

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<sup>10</sup> Plaintiff further testified that it was her understand that if Human Resources did reject a candidate she wanted to hire, it would be because of a background check issue. Kloster Depo. at P. 54; *see also Lovelady v. Allsup's Convenience Stores, Inc.*, 304 F. App'x 301, 306 (5th Cir. 2008) (Plaintiffs' hiring recommendations almost always followed except when background check disclosed criminal record).

“I had to sign off, yes.” Kloster Depo. at P. 37. Plaintiff testified that she knew employee pay raises “had something to do with how [an employee] did on their review.” *Id.* Plaintiff was the person who conducted employee reviews and evaluations. *Id.* at 20 (Plaintiff was trained on conducting performance reviews); *Id.* at 29, 30 (Plaintiff responsible for writing employee’s performance reviews). Therefore, Plaintiff was aware that her employees’ pay raises were contingent on the evaluations she performed and was required to sign off on each pay raise. *See Gellhaus v. Wal-Mart Stores, Inc.*, 769 F. Supp. 2d 1071, 1082 (E.D. Tex. 2011) (finding employee “coaching” part of job duties and “some” recommendations followed sufficient when raises based in part on Plaintiff’s performance reviews). Similarly, Plaintiff testified that she prepared disciplinary checklists and “human resources prepares the form for disciplinary action based on [Plaintiff’s] recommendation in the disciplinary checklist.” *Id.* at 33.

The undisputed facts demonstrate that Plaintiff made more than an occasional suggestion regarding the hiring, firing, discipline, or change in status of the South store’s employees. Plaintiff managed all other South store employees and remained in charge of the store at all times. Kloster Depo. at P. 89. Plaintiff cannot identify a single situation in which her hiring or disciplinary recommendations were not followed. Defendant has established that Plaintiff’s suggestions were given particular weight and Plaintiff has failed to raise a genuine issue of material fact as to the weight given her personnel suggestions.

#### IV. CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has failed to “set out specific facts showing a genuine issue for trial.” FED. R. CIV. P. 56(e). Construing the FLSA’s overtime exemptions narrowly, Defendant has demonstrated that Plaintiff meets each element required for Plaintiff to constitute an executive employee exempt from the FLSA’s overtime pay provisions. Plaintiff fails to raise a genuine issue of material fact “sufficient to allow a reasonable jury verdict” in her favor. *Great Plains Real Estate Dev., L.L.C.*, 536 F.3d at 944 (8th Cir. 2008) (citation omitted). Based on Plaintiff’s job description and Plaintiff’s own testimony, combined with the undisputed facts in this case, it is clear that Plaintiff falls within the “terms and spirit” of the executive exemption. *Arnold*, 361 U.S. at 392.

Upon the foregoing,

**IT IS ORDERED** that Defendant’s motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**. The clerk shall enter judgment accordingly.

**DATED** this 2nd day of December, 2014.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA