

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 100-2016	
OF BOBBY C. POWELL,))	
)	
Claimant,))	
)	FINAL AGENCY DECISION
vs.))	GRANTING SUMMARY
)	JUDGMENT AND
P&H TRUCKING, LLC, a Montana))	DISMISSING CLAIM
limited liability company,))	
)	
Respondent.))	

* * * * *

Respondent, P&H Trucking, LLC (P&H), seeks summary judgment in this matter, alleging that the Claimant, Bobby C. Powell (Powell), is not entitled to bonuses for load quotas.

Powell did not submit a response to the motion. The Hearing Officer finds that summary judgment in favor of the Respondent is appropriate. The rationale for this decision follows.

I. PROCEDURAL BACKGROUND

1. On July 20, 2015, Powell filed a claim with the Wage & Hour Unit of the Department of Labor & Industry. In his claim, Powell alleged that P&H owed him \$30,500.00 for wages, overtime, commissions, and bonuses.

2. Based on the responses of the parties, the Wage & Hour Unit issued an initial determination on October 26, dismissing Powell's wage, overtime, and commission claims for Powell's failure to meet his burden of proof. The Wage & Hour Unit did find that Powell was due load bonuses in the amount of \$19,000.00, plus a statutory penalty.

3. On November 9, 2015, P&H timely requested a redetermination with the Wage & Hour Unit with respect to the load bonuses.

4. On January 12, 2016, a redetermination was issued dismissing the load quota bonus claim as the Respondent was able to rebut the initial determination that

Powell was due bonuses with evidence that Powell did not earn any load bonuses or that P&H's load bonus policy went into effect after Powell left P&H's employ.

5. Powell timely appealed the January 21, 2016 redetermination and following unsuccessful mediation efforts, this matter was transferred to the Office of Administrative Hearings (OAH) on March 16, 2016.

6. On April 1, 2016, OAH held a telephone scheduling conference with the parties. Powell appeared on his own behalf and Christopher Yochum, Managing Partner, appeared on behalf of P&H. Yochum was advised that as a Montana Corporation, P&H would have to be represented by an attorney licensed to practice law in Montana.

7. On April 29, 2016, Attorney Vicki McDonald appeared on behalf of P&H. Along with her Notice of Appearance, McDonald filed a Motion to Vacate the April 4, 2016 Scheduling Order setting the hearing date in this matter for July 6, 2016. This Motion to Vacate was based on conflicts in McDonald's schedule.

8. On May 3, 2016, the Hearing Officer granted P&H's Motion to Vacate the April 4, 2016 Scheduling Order.

9. On May 3, 2016, OAH contacted Powell via telephone to check his availability for a new scheduling conference. Sandy Duncan of OAH spoke to Powell and Powell indicated he would be available by telephone on May 12, 2106 at 9:00 a.m., MDT. Powell was sent notice of this telephone conference by OAH on May 3, 2016.

10. On May 12, 2016, at 9:00 a.m., the Hearing Officer held a telephone scheduling conference to set a new hearing schedule. McDonald participated on behalf of P&H. Powell was not available when called at the time of the scheduled telephone conference. The Hearing Officer left a message and re-attempted Powell after a 15 minute delay but Powell was still not available and did not participate in the conference.

11. At the May 12, 2016 conference, a schedule of proceedings was established. The Scheduling Order states in part:

“On or before August 31, 2016, the parties must also file any motions, together with briefs in support of the motions. Response briefs to any motions must be filed within 14 days after service of the motion, and in no event later than September 14, 2016.”

12. On May 27, 2016, P&H filed its Motion for Summary Judgment with OAH, along with a proof of service showing that the Motion and supporting documents were mailed to Powell on May 24, 2016.

13. On June 7, 2016, OAH sent Powell a “Notice to a Party Not Represented by an Attorney” with respect to Motions for Summary Judgment. This Notice states in part:

“If you do not respond to the motion for summary judgment on time with affidavits or other documentary evidence contradicting the material facts asserted by the opposing party, the Hearing Officer may accept those facts asserted as being true and enter judgment in favor of the opposing party without a hearing.”

14. On June 16, 2016, P&H filed its “Notice of Claimant’s Failure to Respond to Summary Judgment Motion and Request for Ruling.”

II. FACTS THAT ARE NOT IN DISPUTE¹

1. Bobby Powell began his employment with P&H in November of 2014 as a load hauler/driver.

2. On April 7, 2015, Powell voluntarily quit his position with no notice to P&H.

3. P&H did not promise or contract load bonuses to Powell or any other driver/hauler.

4. Due to employee attendance, P&H instituted individual bonuses to employees who had not missed a day of work on the previous haul period. This haul period was from April 6, 2015 until April 12, 2015. The bonus was paid to eligible employees on April 17, 2015.

5. Powell missed work on April 7, 2015 and was not entitled to a bonus for the April 6 through April 12 haul period.

6. A bonus was also paid to employees on June 26, 2015 to reward employees for making a concerted effort to increase production with minimal repairs from May 16, 2015 through the June 20, 2015 pay period. These bonuses ranged from

¹ Some of these facts are not in dispute because Powell failed to file a response to Respondent’s Summary Judgment Motion.

\$100.00 to \$500.00 per individual. Powell did not earn this bonus because he left employment.

III. DISCUSSION

A. Propriety of Summary Judgment in Administrative Proceedings.

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment are met. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, P18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16).

B. P&H’s Motion for Summary Judgment should be granted because Powell failed to respond.

Powell was properly served P&H’s Motion for Summary Judgment at the address OAH has used in these proceedings. Further, OAH sent Powell an additional notice with respect to his duties and obligations when receiving a summary judgment motion.

Powell did not file a response to the motion and was thus not in compliance with the Scheduling Order in this matter and therefore subject to sanction. Additionally, M. R. Civ. P. 56 (e) 2 provides:

...

If the opposing party does not so respond, summary judgement should, if appropriate, be entered against that party.

Thus, under the rules governing motions for summary judgment, Powell's failure to respond forms one basis for granting P&H's motion.

C. Powell is not entitled to the load quota bonus.

Even if Powell's failure to respond to Respondent's Motion for Summary Judgment was an insufficient basis to grant the Respondent's Motion, the undisputed facts demonstrate Respondent is entitled to summary judgment as a matter of law.

Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232. "Wages" include any money due from an employer to an employee, including bonuses. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. As part of this burden of proof, the claimant must prove that in fact an employment agreement for the compensation sought existed between him and the employer. 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." *Id.* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; see also, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded 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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Where a bonus is only payable in the sole discretion of the employer, it is in the nature of a gratuity, not recoverable in a wage claim under the Montana Wage and Hour Act. *Talon Plumbing and Heating v. Bears*, ¶31, 2008 MT 376,

346 Mont. 499, 198 P.3d 213. To be recoverable under wage payment laws, a bonus must have the character of compensation for work performed. See, e.g., *Pyle v. National Wine and Spirits Corp.*, 637 N.E. 2d 1298, 1300 (Ind. App, 1994) (a bonus can be considered a wage under the wage and hour laws if “it is compensation for time worked and is not linked to a contingency such as the financial success of the Company”); *State ex rel. Nilsen v. the Oregon State Motor Association* (1967), 248 Ore. 133, 432 P.2d 512. Moreover, the conditions for earning the bonus must be fulfilled or such bonus will not be recoverable under the wage and hour act. See, e.g., *Berry v. KRTV* (1993), 262 Mont. 415, 426-27, 865 P.2d 1105, 1101-02 (finding that while the employment agreement required the employer to pay the claimant a bonus if the employer’s television ratings were higher than those of its competitors, the claimant failed to prove that the employer’s ratings were in fact higher than those of its competitors and therefore the bonus was not due to the claimant).

In this matter, Powell has presented no material facts or evidence to show that P&H in fact promised load quota bonuses to its employees. The employer promised discretionary bonuses to employees with certain conditions, as incentive to get employees to come to work and increase their performance.

Because he left employment on April 7, 2015, Powell was not eligible for either bonus.

Powell has not shown a genuine issue of material fact of a substantial nature exists in this case. Powell has presented no genuine issues of material fact to show that he was entitled to such bonuses. To the contrary, the undisputed facts show that the Respondent did not promise load bonuses to Powell while he was employed, and the bonuses that were paid to employees occurred after Powell quit.

The Respondent’s motion for summary judgment is granted.

IV. 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* (1978), 176 Mont. 31, 575 P.2d 925.

2. There is no dispute of material fact in this matter and P&H Trucking, LLC is entitled to summary judgment as a matter of law.

3. No load or other bonuses are due Powell because the bonuses paid to other employees were discretionary and Powell did not meet the conditions to be paid such bonuses.

V. ORDER

IT IS THEREFORE ORDERED THAT:

This matter is DISMISSED as Respondent has been granted summary judgment as a matter of law.

DATED this 1st day of July, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: DAVID W. EVANS
DAVID W. EVANS
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.