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

IN THE MATTER OF THE WAGE CLAIM OF NICHOLAS J. MARKOVICH, Claimant, vs. HILL CREST, INC., a Montana corporation, d/b/a RIMVIEW INN, Respondent.	)	Case No. 1100-2018 **ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

On January 8, 2018, Nicholas J. Markovich filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Hill Crest, Inc. owed him $101,085.04 in unpaid overtime wages for time spent on call as a front desk clerk during the period of September 31(sic), 2015 through September 31(sic), 2017. Docs. 375-78.

On January 29, 2018, Art and Mary Kay Westwood, former owners of Hill Crest, Inc., filed a written response denying Markovich was owed any additional wages for work performed. Included with the written response were time card reports detailing the hours Markovich worked, as well as copies of pay stubs issued to Markovich, for the period of his claim. Docs. 17-20; 29-363.

On March 1, 2018, the Wage and Hour Unit dismissed Markovich's claim on the grounds that Hill Crest, Inc. had provided exact records showing Markovich had been paid for all hours worked during the period of his claim. On March 16, 2018, Markovich filed a timely request for an appeal. Docs. 3-7.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on May 15, 2018. On May 23, 2018,

OAH issued a Notice of Hearing and Telephone Conference[1] setting the date and time for a telephone scheduling conference.

On June 4, 2018, the Hearing Officer issued a Scheduling Order after conducting a telephone scheduling conference with Markovich and Elizabeth O'Halloran, attorney at law, who appeared on behalf of Hill Crest, Inc. The parties' agreed upon schedule of pre-hearing deadlines and hearing date were set forth in the Scheduling Order. The Scheduling Order provided, in pertinent part:

> On or before September 14, 2018, the parties must 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 28, 2018.

To date, nothing has been received from Markovich in response to Hill Crest's Motion for Summary Judgment.

II. FACTS ESTABLISHED BASED UPON THE ADMINISTRATIVE RECORD COMPILED BY THE WAGE AND HOUR UNIT

1. Nicholas J. Markovich worked as a Front Desk Clerk for Hill Crest, Inc., d/b/a Rimview Inn (Hill Crest) from September 2007 through December 15, 2017. Markovich's hourly wage during the period of his wage claim was $11.25. Docs. 15, 16; Doc. 374.

2. Markovich lived on the property for the last two years of his employment in an apartment owned by Hill Crest. Doc. 17. At the end of Markovich's employment, he was in arrears on his rent in the amount of $7,325.00. Docs. 15-16.

3. Hill Crest had an employee handbook, which was last provided to Markovich on January 4, 2008. Doc. 21.

4. Included in the employee handbook was Hill Crest's policy regarding Premium Pay, which provided:

> Premium pay for non-salaried employees will be paid for all hours worked over forty (40) hours in a work week. The premium rate is one

[1]No mailings sent to the parties by OAH have been returned by the USPS as undeliverable.

> and one-half (11/2) times the base rate of pay. All overtime MUST be approved in advance by your immediate supervisor.

Doc. 22 (emphasis in original).

5. The employee handbook also included Hill Crest's policy regarding Time Cards, which provided:

> All hours worked will be recorded by each employee on the electronic time machine provided by the company. Your time is computed from the time you punch in and out. You must sign your time sheet each pay period to verify your hours of work. Punching in or filling out someone else's time card is not permitted.

Doc. 23 (underscoring in original).

6. Markovich completed time sheets for each of the weeks during the period of his claim. Docs. 29-363.

7. Markovich reported working and was paid overtime on a number of occasions during this period. Docs. 43, 49, 51, 122, 127, 150, 154, 268, 270, 276, 285, 288, 299, 304, 321, 322, 326, 330, 331, 335, 346, 349, 358, and 360.

8. Markovich reported working and was paid for time worked during shifts that were beyond his typical work schedule. Docs. 48-49, 52, 80, 94, 107, 270, 276, 288, 335, 342, 349, and 354.

9. Time keeping records were corrected and marked with an "E" following the corrected entry to reflect actual time worked by Markovich. Docs. 41, 61, 73, 86, 94, 134, 176, 183, 288, 349, and 354.

10. Hill Crest also maintained a payroll summary and time records showing all employees' time worked during the period of Markovich's wage claim. Docs. 27-28; 29-363.

11. On or about November 17, 2017, Hill Crest owners advised Markovich and his co-workers that the business was to be sold and the employees' final day would be December 15, 2017. Docs. 17-20.

12. On November 30, 2017, Hill Crest paid Markovich his accrued vacation time in the amount of $470.00. Hill Crest later paid Markovich $940.00 as a severance payment. Doc. 19.

13. On January 8, 2018, Markovich filed his claim for unpaid wages with the Wage and Hour Unit alleging Hill Crest owed him $101,085.04 in unpaid wages and overtime. Docs. 375-76. Markovich claimed he was "on-call" for 104 weeks from 3:00 p.m. to 11:00 p.m., six nights per week. Doc. 377. Markovich wrote:

> I worked from 7-3, 5 days a week regular schedule. I was on call six days a week for 104 weeks which I claim is 48 overtime hours per week. I received my regular pay for 7-3 but no pay at all for the on call overtime. I hope this clears that up. I was basically working 16 hours a day for 5 days and 8 hours on the 6th day. Thanks for your time.

Doc. 372.

14. Markovich estimated that he worked a total of 2,600 hours during the period of his wage claim. Markovich calculated that his overtime wage should have been $16.87 for a total of $43,862.00. Markovich argued that, if he was not found to be entitled to the 4,992 hours in on-call pay, then he was owed $43,862.00 for 2,600 hours. Doc. 374.

15. Markovich contended he was able to produce time records, but, to date, has produced nothing in support of his claim. Doc. 375.

III. DISCUSSION[2]

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *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), M.R.Civ.P.

[2] Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

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. A "material" fact is one capable of affecting the substantive outcome of the litigation. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is "genuine" if there is enough evidence for a reasonable jury to return a verdict against non-movant. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The inquiry under Rule 56 is essentially "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. "[W]hen the moving party adequately supports a motion for summary judgment, the burden shifts to the opposing party to present the court with evidence sufficient to raise a genuine issue of material fact." *Payne v. Stratman* (1987), 229 Mont. 377, 380, 747 P.2d 210, 212, quoting *National Gypsum Co. v. Johnson* (1979), 182 Mont. 209, 212, 595 P.2d 1188, 1189; Rule 56(c), M.R.Civ.P.

Rule 56(e)(2), M.R.Civ.P. provides:

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

"[A] party who ignores the judicial system and slumbers on his rights, does so at his own peril." *Bedford v. Jorden* (1985), 215 Mont. 508, 511, 698 P.2d 854, 856. A tribunal must review the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor and without making findings of fact, weighing the evidence, choosing one disputed fact over another, or assessing the credibility of witnesses. *Fasch v. M.K. Weeden Const., Inc.*, 2011 MT 258, ¶¶ 16-17, 362 Mont. 256, 262 P.3d 1117. Summary judgment is proper if the opposing party fails to present a genuine issue of material fact of a substantial nature, not fanciful, frivolous, gauzy, or merely suspicious. *Cheyenne W. Bank v. Young v. Zastrow* (1978), 179 Mont. 492, 587 P.2d 401; ***see also*** *Kimble Properties, Inc. v. State* (1988), 231 Mont. 54, 750 P.2d 1095.

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. 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 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 v. Keegan*, supra, 359 Mich. at 576, 103 N.W. 2d at 497.

Assuming Markovich's claim for unpaid wages was sufficient to raise a reasonable inference that he was owed unpaid wages, Hill Crest has come forward with sufficient evidence to negate the reasonableness of the inference to be drawn from Markovich's evidence. In contrast to Markovich's evolving claim, Hill Crest produced time keeping records and payroll records that set forth in precise detail the hours Markovich worked and the wages he received during the period of his claim. Markovich has had a continuing opportunity to produce evidence in support of his claim. Specifically, Markovich had an opportunity to do so in response to Hill Crest's Motion for Summary Judgment. Markovich chose not to do so, which he did at his own peril. Viewing all available evidence in the light most favorable to Markovich and drawing all reasonable inferences in Markovich's favor, Hill Crest has shown it is entitled to judgment as a matter of law.

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

2. There is no genuine issue as to any material fact and Hill Crest, Inc., a Montana corporation, d/b/a Rimview Inn is entitled to judgment as a matter of law.

3. Hill Crest, Inc., a Montana corporation, d/b/a Rimview Inn does not owe Nicholas J. Markovich any additional wages for work performed under either the Montana Wage Protection Act or the Fair Labor Standards Act.

4. Due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute. *See In the Matter of Peila*, 249 Mont. 272, 280-281, 815 P.2d, 144 (1991).

V. ORDER

IT IS THEREFORE ORDERED that Hill Crest, Inc., a Montana corporation, d/b/a Rimview Inn's Motion for Summary Judgment is GRANTED and Markovich's claim is hereby DISMISSED.

DATED this 10th day of October, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 59624-1503