

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1416-2020
OF CHACE BINGHAM,)
)
Claimant,)
)
vs.) **FINAL AGENCY DECISION**
)
MELISSA DEMERS, individually, AND)
d/b/a MD GO GREEN CONSTRUCTION,)
)
Respondent.)

* * * * *

I. INTRODUCTION

On November 2, 2020, Hearing Officer Caroline A. Holien conducted a telephone hearing in this matter. The hearing officer called Melissa Demers, who has acted as Respondent's representative throughout the investigation conducted by the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) and while the matter was pending at the Office of Administrative Hearings (OAH), at her telephone number of record and was unable to leave her a voice mail message. The hearing was delayed for approximately ten minutes, at which time Demers was still unavailable when called. As a result, the hearing proceeded with only the participation of Chace Bingham.

Bingham testified under oath. Documents 1 through 72, as well as Bingham's Exhibits 100 and 101 were admitted into the record. Bingham declined to submit post-hearing briefing.

Based on the evidence adduced at hearing, the following hearing officer decision is rendered.

II. ISSUE

The issue in this case is whether Melissa Demers, individually and d/b/a MD Go Green Construction owes wages for work performed, as alleged in Chace Bingham's complaint, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

Procedural Background:

1. On November 29, 2019, Chace Bingham filed a claim with the Wage and Hour Unit alleging Melissa Demers, individually and d/b/a MD Go Green Construction (Demers) owed him a total of \$3,719.37 in unpaid regular and overtime wages for work performed during the period of July 31, 2019, through November 26, 2019.

2. On February 26, 2020, the Wage and Hour Unit issued a Report of Investigation finding Demers owed Bingham \$180.00 in unpaid regular wages and \$297.56 in unpaid overtime wages. Additionally, a penalty of 15% was imposed on the unpaid regular wages; and a penalty of 55% was imposed on the unpaid overtime wages. Demers timely requested a redetermination.

3. On May 21, 2020, the Wage and Hour Unit issued a Wage Claim Investigation and Redetermination finding Demers owed Bingham \$708.04 in unpaid regular wages and \$602.13 in unpaid overtime wages. Additionally, a penalty of 15% was imposed on the unpaid regular wages; and a penalty of 55% was imposed on the unpaid overtime wages, if the wages found to be owed were paid June 5, 2020. Demers did not submit payment in the amount found to be owed, and, instead, filed a timely appeal of the redetermination.

4. Following mediation efforts, the Wage and Hour Unit transferred the matter to OAH on June 25, 2020.

5. On July 6, 2020, OAH issued a Notice of Hearing and Telephone Conference setting the scheduling conference for July 17, 2020. Both parties participated in the scheduling conference.

6. On July 6, 2020, OAH issued a Notice of Hearing and Telephone Conference that included:

This hearing is being held because [Demers] appealed from a determination of the Department's Wage and Hour Unit that found wages are due the claimant. If [Demers] fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination, unless the opposing party seeks additional relief.

7. Demers received proper notice of and participated in the telephone scheduling conference held on July 17, 2020.

8. On July 20, 2020, the hearing officer issued a Scheduling Order that set forth (1) the date and time of the hearing, (2) the method for conducting the hearing, (3) the consequence of not participating in the hearing, and (4) the requirement of setting aside four hours to be available for the hearing. The Scheduling Order included the following:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

....

If the appellant fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination if the opposing party does not seek additional relief. If the opposing party has timely requested relief beyond that requested in the complaint, the hearing will proceed on that basis.

9. The Scheduling Order was mailed to the parties at the addresses of record. Neither mailing was returned as undeliverable.

10. The Scheduling Order set October 2, 2020 as the exchange deadline. Bingham timely filed his requests for relief, final contentions, lists of exhibits and witnesses, requests for issuance of subpoenas, and stipulated facts by the deadline set in the Scheduling Order. Demers filed nothing.

11. The Scheduling Order set the final pre-hearing conference date of October 9, 2020 at 11:00 a.m., MDT. Due to a scheduling conflict that had arisen

on the part of the hearing officer, the final pre-hearing conference was rescheduled to October 8, 2020 at 3:30 p.m., MDT.¹

12. On October 8, 2020, the hearing officer conducted a final pre-hearing conference in this matter. The hearing officer called Demers at her telephone number of record and left a voice mail message asking her to call OAH if she wished to participate in the conference. The hearing officer delayed the conference approximately ten minutes, at which time Demers was still unavailable. The hearing officer left Demers a second voice mail message informing her the conference would proceed in her absence and advised her to call OAH if she had any questions. The final pre-hearing conference proceeded with only Bingham's participation.

13. On October 14, 2020, the hearing officer issued a Pre-Hearing Order informing the parties that Demers would not be allowed to call witnesses or offer any exhibits in her case-in-chief beyond that which was included in the administrative record (Docs. 1 - 72) and included with the Notice of Hearing.

14. Despite having received proper notice of the pre-hearing deadlines and hearing date, Demers has failed to comply with any orders of the hearing officer.

15. On November 2, 2020, Bingham appeared for hearing and was prepared to proceed. Demers was contacted twice and was not available when called.

Bingham's Wage and Hour Claim:

16. Bingham began working as a laborer for Demers on July 31, 2019. Bingham's last day worked was November 26, 2019.

17. Pay periods began on Monday and ended Sunday. Demers typically paid employees weekly. Demers did not provide employees with pay stubs or any other records that could be used by the employee to ensure they were being properly paid.

¹ Attempts were made by OAH staff (by email and telephone/voice mail) to contact Demers about rescheduling the final pre-hearing conference. Demers did not respond to any contact attempts prior to the issuance of the rescheduling order on September 29, 2020. On October 1, 2020, Demers sent a text message to an OAH staff member's cell phone indicating she would not be available on October 8, 2020, and suggested her attorney was "supposed to be taking care of this." To date, no attorney has filed a Notice of Appearance on behalf of Demers.

18. Bingham and other employees were required to log in and out using TSheets, a timekeeping app. Bingham was not set up on the TSheets system for several days when he first started working for Demers. Bingham was required to get a new phone in mid-November 2019, and was unable to access the timekeeping app.

19. Demers and Bingham initially agreed Bingham's hourly wage would be \$17.50. Bingham's hourly wage increased to \$20.00 beginning the pay period of August 26, 2019 through September 1, 2019.

20. Demers did not pay Bingham his overtime rate for hours worked in excess of 40 hours in a single work week. Demers suggested to Bingham she would "bank" overtime hours so he could have paid time off in the future. Bingham did not sign any written agreement allowing Demers to "bank" his overtime hours or otherwise improperly avoid paying his overtime rate.

21. During the first few days of employment, Bingham was unable to log his hours in TSheets. As a result, he was only paid for 13.19 hours, when he actually worked 24.5 hours. Add. A; Doc. 52.

22. Bingham had to get a new phone in late October 2019, which caused him to be unable to log his hours in TSheets for approximately two weeks. As a result, he was only paid for 13.45 hours during the work week of October 28, through November 3, 2019. Add. A; Doc. 39.

23. Similarly, Bingham was unable to log his hours for the work week of November 4, through November 10, 2019. Bingham worked 25 hours that week. Add. A, Doc. 38.

24. Bingham worked a total of 628.25 hours for Demers, with 47.35 of those hours being overtime hours. Bingham earned a total of \$12,718.87 in wages. Add. A.

25. Demers issued Bingham a W-2 for work performed during the 2019 tax year. Demers reported Bingham's wages as being \$8,132.22. Ex. 100. The pay stubs submitted by Demers during the Wage and Hour investigation amount to \$9,462.71. Docs. 53-68.

26. Demers failed to submit pay stubs for the work weeks of October 28, through November 3, 2019, and November 18, through 26, 2019. Even with those missing weeks, Demers under-reported the amount of wages paid to Bingham.

27. Bingham is owed a total of \$3,281.46 in unpaid wages, which includes \$1,305.19 in overtime wages and \$1,976.27 in regular wages.

28. A penalty of 110% on the \$1,305.19 in unpaid overtime wages is proper and amounts to \$1,435.71, for a total of \$2,740.90.

29. A penalty of 55% is proper on the \$1,976.27 in unpaid regular wages and amounts to \$1,086.95, for a total of \$3,063.22.

IV. DISCUSSION AND ANALYSIS²

A. Demers is in Default Because she Failed to Appear for Hearing.

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 39 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing.

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "In a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1).

This case arose as a result of Demers' appeal in this matter. Demers has been on notice of this proceeding since it was certified for hearing on June 25, 2020, as evidenced by her handwritten letter to OAH received on July 2, 2020, and her participation in the scheduling conference on July 17, 2020. Despite Demers' representation that she was engaging counsel, no attorney has filed a Notice of Appearance on behalf of Demers.

² Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Demers failed to file her requests for relief, final contentions, lists of exhibits and witnesses, requests for issuance of subpoenas, and stipulated facts by the deadline set in the Scheduling Order. Demers failed to participate in the final pre-hearing conference. Demers further failed to appear at the hearing that was scheduled with her input and as a result of her request for an appeal. As of the date of this decision, Demers has had no contact with OAH.

Based upon Demers' repeated failures to comply with the orders of the hearing officer and to appear at hearing, it is therefore proper to find Demers in default on the issue of liability on Bingham's wage and hour claim. It is now necessary to determine the amount of wages owed to Bingham and the appropriate penalty.

B. Bingham has Shown he is Owed Unpaid Overtime and Regular Wages.

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. Unused paid-time-off (PTO) is "considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." See 23 Op. Att'y Gen. 151, 153 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P.2d 1169, 1173-1174.

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 the 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). As the Montana Supreme Court has long recognized, it is the employer's duty to maintain accurate records of hours worked, not the employee's. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶46, n.3, 351 Mont. 12, 209 P.3d 228.

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.

The Montana Supreme Court provided guidance as to the analysis required in a situation such as this where neither party has maintained adequate records of an employee's hours. In *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 (2015), the court held overtime hours claimed by an employee may be reduced to the extent supported by credible evidence offered by the employer but not reduced below the amount established by the employer. The court reasoned:

In short, when an employer has failed to maintain adequate records of an employee's hours, it is expected that the employee will not be able to offer convincing substitutes for the employer's records. Moreover, whatever evidence the employee does produce can be expected to be 'untrustworthy'. The solution in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

Arlington, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

1. *Demers' evidence is less credible than the sworn testimony of Bingham.*

Demers provided pay stubs and TSheets records to the Wage and Hour Unit during its investigation. Bingham testified he was never provided with a pay stub throughout his employment which is consistent with the fact that the cancelled checks submitted by Demers were written on a business account and not as a payroll check. Bingham further testified he was unable to verify the accuracy of the hours reported on the TSheets, and he denied the employer ever provided with him an accounting of his hours during his employment.

Given the appearance that the pay stubs were created only after Bingham filed his claim for unpaid wages, the pay stubs are considered less credible than Bingham's sworn testimony. Therefore, where Bingham's testimony diverged from the information included on the pay stubs, his testimony was relied upon by the hearing officer. Further, the hearing officer is left to rely upon the W-2 form, which includes the wages paid to Bingham that was reported by Demers to the IRS. Presumably, she provided accurate information when reporting Bingham's wages. Therefore, it is determined that, despite the total of the wages listed on the pay stubs, Demers paid Bingham wages for work performed for the period of his wage claim in the amount of \$8,132.22.

The evidence shows Bingham worked a total of 628.25 hours for Demers, with 47.35 of those hours being overtime hours. Bingham earned a total of \$12,718.87 in wages. *See* Add. A. Demers improperly paid Bingham his regular rate for hours worked in excess of 40 hours in a work week. Therefore, Bingham is owed \$1,305.19 in overtime wages and \$1,976.27 in regular wages for a total of \$3,281.46.

2. *Demers is not owed a credit for taxes paid on Bingham's wages.*

During the course of the Wage and Hour Unit's investigation, Demers argued she is entitled to a credit for the employer taxes paid on Bingham's wages.

FICA taxes are composed of the old-age, survivors, and disability insurance taxes, also known as Social Security taxes, and the hospital insurance tax, also known as Medicare taxes. Different rates apply for these taxes. Internal Revenue Service, *Topic 751 - Social Security and Medicare Withholding Rates*, <https://www.irs.gov/taxtopics/tc751.html> (last visited November 4, 2020). The current tax rate is 6.2% for Social Security and 1.45% for Medicare. *Id.* (IRS publication numbers omitted).

The FICA statutory scheme generally requires payment of taxes by employees on wages received and payment of taxes by employers on those same wages. *Xianli Zhang v. United States*, 640 F.3d 1358, 1360 (Fed. Cir. 2011). "The former are assessed under I.R.C. § 3101, the latter under I.R.C. § 3111. In each instance, the taxes are assessed on wages paid or received with respect to employment (as defined in section 3121(b))." I.R.C. §§ 3101, 3111. As used in this context, "employment" means "any service, of whatever nature, performed . . . by an employee for the person employing him, irrespective of the citizenship or residence of either, . . . within the United States." *Zhang*, 640 F.3d at 1360-1361.

The "employer share" of FICA taxes consists of two separate taxes -- the Social Security tax in the amount of 6.2% of wages (up to the Social Security wage base) and the Medicare tax in the amount of 1.45% of wages. The "employer share" is a match of the employee withholding rate. 26 U.S.C. § 3111(a) and (b) provides:

(a) Old-age, survivors, and disability insurance. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 6.2 percent of the wages (as defined in section 3121(a) [26 USCS § 3121(a)]) paid by the employer with respect to employment (as defined in section 3121(b) [26 USCS § 3121(b)]).

(b) Hospital insurance. In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 1.45 percent of the wages (as defined in section 3121(a) [26 USCS § 3121(a)]) paid by the employer with respect to employment (as defined in section 3121(b) [26 USCS § 3121(b)]).

Instructive in this case is the holding of the Sixth Circuit Court of Appeals in *In re Laub Baking Co.*, 642 F.2d 196 (6th Cir. Ohio Mar. 11, 1981). In that case, the court provided explanation as to the nature of the employer's FICA share. The court noted:

Unlike those withheld employee taxes, the taxes in issue in the present case are not "carved out" of employee wages. Rather, §§ 3111 and 3301 of the revenue code each impose an "excise tax" on employers with respect to having individuals in their employ. These taxes are taxes on the employer, not taxes on the employee that are withheld from the employee's wages and paid by the employer on behalf of the employee. The mere fact that computation of these employer taxes is based on the amount of wages that are paid to employees does not alter this fact.

Id. at 199.

The hearing officer has been unable to find any statutory authority or case law in support of the proposition that the employer is entitled to receive a credit for the "employer share" of FICA on a claim for unpaid wages. That is a burden to be borne by the employer and not the employee. It is therefore determined Demers is entitled to no credit for employer taxes on wages paid to Bingham.

C. Penalties on the Wages Found to be Owed is Appropriate.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For cases involving minimum wage and overtime claims, a penalty of 110% will be imposed where a determination has been made that overtime wages are owed and the employer fails to pay the amounts due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561.

In this case, the determination from which the respondent appealed found Bingham was owed both overtime and regular wages and ordered respondent to pay

the amount owed no later than June 5, 2020. Respondent failed to submit payment to the Wage and Hour Unit within the time provided and at any time prior to hearing in this matter. Pursuant to Admin. R. Mont. 24.16.7561, the hearing officer finds a penalty of 55% is appropriate on the unpaid regular wages and a penalty of 110% is appropriate on the unpaid regular wages.

V. CONCLUSIONS OF LAW

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

2. An employee may recover wages and penalties for a period of two years prior to the date of the employee's last date of employment. Mont. Code Ann. § 39-3-207(2).

3. Melissa Demers, individually and d/b/a MD Go Green Construction, owes Chace Bingham \$1,976.27 in unpaid regular wages. A penalty of 55% amounting to \$1,086.95 on the unpaid regular wages is required under Admin. R. Mont. 24.16.7561(1)(b).

4. Melissa Demers, individually and d/b/a MD Go Green Construction, owes Bingham \$1,305.19 in overtime wages. A penalty of 110% on the unpaid overtime wages amounting to \$1,435.71 is required under Admin. R. Mont. 24.16.7561(1)(b).

5. Melissa Demers, individually and d/b/a MD Go Green Construction, owes Bingham a total of \$5,804.12, which includes \$1,976.27 in unpaid regular wages; \$1,086.95 in penalty on those regular wages; \$1,305.19 in unpaid overtime wages, \$1,435.71 in penalty on those overtime wages.

VI. ORDER

Melissa Demers, individually and d/b/a MD Go Green Construction, is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,804.12, representing \$1,976.27 in unpaid regular wages; \$1,086.95 in penalty on those regular wages; \$1,305.19 in unpaid overtime wages; and \$1,435.71 in penalty on those overtime wages made payable to Chace Bingham, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision.

The Respondent may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portion representing liquidated damages or penalties.

DATED this 13th day of November, 2020.

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 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

ADDENDUM A

Pay Period	Hours Worked	Regular Wage	Regular Wages Owed	Overtime Wage	Overtime Hours Worked	Overtime Wages Owed	Wages Owed	Wages Paid
7/29 - 8/4/19	24.5	\$17.50	\$428.75	\$26.25	0	0	\$428.75	\$230.83
8/5 - 8/11/19	57.3	\$17.50	\$1,002.75	\$26.25	17.3	\$454.13	\$1,456.88	\$1,002.75
8/12 - 8/18/19	50	\$17.50	\$875.00	\$26.25	10	\$262.50	\$1,137.50	\$700.00
8/19 - 8/25/19	43.45	\$17.50	\$760.38	\$26.25	3.45	\$90.56	\$850.94	\$760.38
8/26 - 9/1/19	47.45	\$20.00	\$949.00	\$30.00	7.45	\$223.50	\$1,172.50	\$949.00
9/2 - 09/8/19	44.15	\$20.00	\$883.00	\$30.00	4.15	\$124.50	\$1,007.50	\$883.00
9/9 - 9/15/19	45	\$20.00	\$900.00	\$30.00	5	\$150.00	\$1,050.00	\$780.00
9/16 - 9/22/19	39.3	\$20.00	\$786.00	\$30.00	0	0	\$786.00	\$606.00
9/23 - 9/29/19	34.35	\$20.00	\$687.00	\$30.00	0	0	\$687.00	\$687.00
9/30-10/6/19	39.15	\$20.00	\$783.00	\$30.00	0	0	\$783.00	\$467.50
10/7 - 10/13/19	25.3	\$20.00	\$506.00	\$30.00	0	0	\$506.00	\$379.50
10/14 - 10/20/19	29.3	\$16.00	\$468.80	\$24.00	0	0	\$468.80	\$439.50
10/21 - 10/27/19	40	\$16.00	\$640.00	\$24.00	0	0	\$640.00	\$600.00
10/28 - 11/3/19	25	\$16.00	\$400.00	\$24.00	0	0	\$400.00	0
11/4 - 11/10/19	25	\$16.00	\$400.00	\$24.00	0	0	\$400.00	\$512.25
11/11 - 11/17/19	24	\$16.00	\$384.00	\$24.00	0	0	\$384.00	\$360.00
11/18 - 11/24/19	28	\$16.00	\$448.00	\$24.00	0	0	\$448	0
11/25 - 12/1/19	7	\$16.00	\$112.00	\$24.00	0	0	\$112.00	\$105.00
TOTALS	628.25	-	\$11,413.68	-	47.35	\$1,305.19	\$12,718.87	\$9,462.71