

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 623-2021
OF FRANK X. GAZELLA,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
LFI, LLC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In April 2020, Frank X. Gazella filed a wage claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging LFI, LLC (LFI) owed him an estimated amount of \$3,000.00 in unpaid wages for the period of November 1, 2019, through March 24, 2020.

On October 5, 2020, the Wage & Hour Unit issued a Wage Claim Investigation and Determination (determination) finding Gazella was owed no additional wages. Gazella timely appealed the determination.

Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on November 6, 2020. On November 23, 2020, OAH issued a Notice of Hearing and Telephone Conference.

On December 1, 2020, Hearing Officer Caroline A. Holien conducted a telephone scheduling conference in this matter. Ty Leary participated as LFI's designated representative. Gazella was not available when called and did not participate. A schedule of proceedings was also set in this matter including the date and time for the telephone hearing. On December 2, 2020, the Hearing Officer issued a Scheduling Order outlining the schedule of proceedings in this matter.

On March 11, 2021, the Hearing Officer conducted a final pre-hearing conference. Gazella and Leary both participated. After reviewing the proposed

exhibits submitted by Gazella, the parties were advised that Mont. Code Ann. § 39-51-110 provides that no finding of fact or law, judgment or conclusion, or final order in an unemployment insurance matter was conclusive or binding in the wage and hour proceeding. Leary was reminded that LFI needed to be represented by an attorney licensed to practice in the State of Montana pursuant to Admin. R. Mont. 1.3.231(2).

Both parties indicated they mailed additional documents to OAH prior to the conference. The Hearing Officer advised that there were no mailings in the hearing file and no indication that the mailings had been received. The parties were also advised that neither side would be able to call witnesses in their case-in-chief because they both failed to submit a list of witnesses.

On March 12, 2021, the Hearing Officer issued a pre-hearing order outlining what was covered during the final pre-hearing conference. Both parties indicated they intended to be represented by counsel. The parties were advised that counsel would have to file their respective Notice of Appearance no later than March 15, 2021.

On March 15, 2021, John P. Nesbitt, Attorney at Law, filed his Notice of Appearance on behalf of LFI. No attorney filed a Notice of Appearance on behalf of Gazella.

On March 18, 2021, the Hearing Officer conducted a telephone hearing in this matter. Gazella and Leary testified under oath. Nesbitt represented LFI. Documents 6 through 11; 13 through 19; 20, 21, 23 through 121; 125 through 140 of the administrative record compiled at the Wage and Hour Unit (Documents 1 through 140) were admitted into the record upon the agreement of the parties. The parties declined to submit post-hearing briefing.

Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether LFI, LLC, owes wages for work performed, as alleged in the complaint filed by Frank X. Gazella, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Frank X. Gazella (Gazella) began working for LFI, a lawn maintenance and snow removal company, on a seasonal basis as a sidewalk technician beginning in 2019. Gazella usually worked for LFI only during the winter months but did perform some landscaping work during the spring and summer months. Gazella's hourly wage was \$20.00.

2. Gazella and Ty Leary, LFI Owner/President (Leary), had a generally positive working relationship during the early months of Gazella's employment.

3. Leary or a foreman would typically notify employees the night before if their services were required the following day. Gazella usually called Leary or the foreman in the morning prior to starting work to confirm what work needed to be performed that day.

4. LFI ultimately assigned a route to Gazella in the Bozeman area that included the Law and Justice Center, Detention Center, several banks, and several large housing complexes. Gazella was responsible for the completion of the work at the locations included on his route.

5. Gazella reported his hours via text message to Leary and/or the foreman the days he worked. Gazella also wrote out his hours on Snow Removal Sheets used by LFI payroll to calculate Gazella's pay. Gazella reported his start and end time at each location or the total number of hours he spent at each location. *See Docs. 36-113.*

6. LFI uses two-week pay periods that begin on Sunday and end on Saturday.

7. In November 2019, LFI provided Gazella with an employment contract that outlined the terms and conditions of Gazella's employment. The contract was not signed by Leary or any other LFI representative. On or about November 11, 2019, Gazella signed the contract, which had an effective date of November 1, 2019. *Docs. 125-138.*

8. Leary agreed to the contract's terms and intended LFI, as the employer, to be bound by its terms. *Leary Hrg. Tes'y.*

9. The employment contract included the following:

2. Beginning November 1, 2019 and ending March 31, 2020, employee will be on-call scheduling status for 24 hrs a day, 7 days a week for work. Vacations and/or extended periods away from work that interfere with being on call will be discussed and approved only by Owner/Operator Ty Leary prior to leaving. Extended absences will be adjusted/prorated on salary wages.

3. The Employee's schedule of salary wage will be as follows:

\$2,000/Month (\$1,000/pay period). For hours exceeding 50 hr/pay period, \$20/hr will be added to pay base salary. Snow removal work outside the above dates (November 1, 2019 to March 31, 2020) will be \$20/hr.

Doc. 126.

10. The contract also included the following provisions:

47. Any amendment or modification of this Contract or additional obligation assumed by either party in connection with this Contract will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

58. This Contract constitutes the entire contract between the parties and there are no further items or provisions, either oral or written. The parties to this Contract stipulate that neither of them has made any representations with respect to the subject matter of this Contract except such representations as are specifically set forth in this Contract.

Doc. 135.

11. The term "extended absences" is not defined under the contract. *See* Docs. 136-137.

12. Gazella worked and received wages during the weeks as set forth below. *See* Docs. 36 through 113.

WEEK ENDING	HOURS WORKED	WAGES PAID	REGULAR ¹ RATE
10/12/2019	11.75	\$235.00	\$20.00
10/19/2019	0	0	N/A
10/26/2019	0	0	N/A
11/02/2019	10.75	\$625.00	\$58.14
11/09/2019	0	\$500.00	\$92.55
11/16/2019	5.5	\$500.00	\$142.86
11/23/2019	3.5	\$500.00	\$142.86
11/30/2019	27	\$500.00	\$18.52
12/07/2019	9.5	\$500.00	\$52.63
12/14/2019	0	\$500.00	N/A
12/21/2019	4.75	\$500.00	\$105.26
12/28/2019	6.67	\$500.00	\$74.96
01/04/2020	6.5	\$375.00	\$57.69
01/11/2020	8.75	\$375.00	\$42.86
01/18/2020	11.95	\$500.00	\$41.84
01/25/2020	4	\$500.00	\$125.00
02/01/2020	9.75	\$500.00	\$51.28
02/08/2020	35.75	\$500.00	\$13.99
02/15/2020	15.50	\$437.50	\$28.23
02/22/2020	10	\$437.50	\$43.75
02/29/2020	4	\$375.00	\$93.75
03/07/2020	0	\$375.00	N/A
03/14/2020	0	\$375.00	N/A
03/21/2020	6.5	\$375.00	\$57.69
03/28/2020	4	\$214.00	\$53.50

¹ The regular rate is determined by dividing the total wages paid by the total number of hours worked. Admin. R. Mont. 24.16.2512(1).

13. In late-December 2019 and early January 2020, Leary began prorating Gazella's salary due to his repeated absences and his failing to be on-call as required under the employment contract. Gazella's personal conduct during this period resulted in the Gallatin County District Court issuing an Order for Protection prohibiting Gazella from being on the property of the Law and Justice Center and the Detention Center. As a result, Gazella was unable to perform a large share of his assigned route.

14. LFI had work available for Gazella on December 29, 2019 and February 9, February 19, February 25, and March 8, 2020, which he either chose not to perform or was not in town and available to perform. Doc. 114.

15. Gazella was never paid less than \$20.00 per hour during those weeks in which he did not perform all available work offered by LFI.

16. Gazella's last day of work for LFI was March 24, 2020. Gazella worked a total of four hours that day and left work early without permission.

17. On April 15, 2020, Gazella filed a Wage Claim Form with the Wage and Hour Unit seeking approximately \$3,000.00 in unpaid wages. Gazella wrote, "I was salary and had certain amounts deducted at certain times and have yet to receive my final check. I have no idea what total amount. Estimated \$3,000.00 of salary owed." Gazella did not allege minimum wage or overtime wage violations. Docs. 139-140.

18. On May 4, 2020, LFI submitted Gazella's final paycheck to the Wage and Hour Unit in the gross amount of \$214.00 for the work Gazella performed on March 24, 2020. Docs. 119, 35.²

19. LFI paid Gazella for all work performed and does not owe him any additional wages under the employment contract. Once Gazella stopped being available when called upon as required under the employment contract, LFI was no longer bound to pay him a bi-weekly salary of \$1,000.00.

² The Wage and Hour Unit deposited the check issued in the net amount of \$194.62 in the Wage Trust Fund on June 25, 2020. The payment release date is listed as July 9, 2020. Doc. 20.

20. At all times material to Gazella's claim, LFI paid him more than the minimum wage at the time, which was \$8.50 through December 31, 2019, and \$8.65 beginning January 1, 2020.³

21. Gazella never worked more than 40 hours in any work week. Therefore, LFI does not owe Gazella any overtime wages.

IV. DISCUSSION

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). 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 parties offered no documentary evidence beyond that which was provided to the Wage and Hour Unit. Gazella is not arguing LFI failed to pay him either the minimum wage or the proper overtime wage. Instead, Gazella argues LFI agreed to pay him \$500.00 per week, or \$1,000.00 per two-week pay period, and failed to do

³ <https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage-history>

so for the weeks ending January 4, January 11, February 15, February 22, February 29, March 7, March 14, March 21, and March 28, 2020.

LFI counters that Gazella's conduct in his personal affairs made it impossible for him to perform some of his assigned work, and Gazella failed to report for work when called upon despite having agreed to be on-call during the period of the employment contract. Gazella denied having been absent on the dates noted by Leary in his documentation but offered no specific or credible evidence showing he worked on those dates or was otherwise prevented from doing so by LFI. Therefore, Gazella's vague denials that he missed work on the dates listed by LFI is deemed less credible than the evidence offered by LFI.

The issue essentially is whether LFI breached the terms of the employment contract by failing to pay Gazella the agreed upon salary for the work weeks ending January 4, January 11, February 15, February 22, February 29, March 7, March 14, March 21, and March 28, 2020.

In *Smith v. TYAD, Inc.*, 2009 MT 180, 351 Mont. 12, 209 P.3d 228, the Montana Supreme Court held that the department had jurisdiction to interpret a contract, in the context of a wage claim, between the claimants and their former employer. See also *America's Best Contrs., Inc. v. Singh*, 2014 MT 70, ¶ 22, 374 Mont. 254, 321 P.3d 95.

Courts must give effect to the manifest intent of the parties as it existed at the time of contract formation. If the language of a written contract is clear and unambiguous, "the duty of the court is to apply the language as written." *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 33, 392 Mont. 139, 424 P.3d 571 (internal citations omitted). "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." Mont. Code Ann. § 28-3-202. "The obligation to pay wages only exists to the extent agreed upon between the employee and the employer." *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶ 40, 373 Mont. 92, 314 P.3d 920.

The evidence shows that, in consideration for Gazella being on-call during the 2019-20 winter season, LFI agreed to pay him a salary of \$1,000.00 per two-week pay period, or \$500.00 per week. Reading the contract as a whole, the clear intent of the parties was to ensure Gazella maintained his on-call availability throughout the snow removal season in exchange for the bi-weekly salary. This intent is particularly clear given that the contract includes a provision allowing for the salary to be prorated in the event of "extended absences." In this case, Gazella was absent from

work, or otherwise unavailable for work when called upon, on December 29, 2019; February 9, 2020; February 19, 2020; February 25, 2020; and March 8, 2020.

While LFI unilaterally changed the pay agreement, it did so only after Gazella began missing work or being otherwise not available when called upon. Gazella argued LFI continued to owe him the bi-weekly salary of \$1,000.00 even if he was absent. However, the basis of the employment contract was to pay Gazella a set salary so he would be on-call during the snow removal season. Once Gazella failed to live up to his end of the bargain, LFI was no longer obligated to pay him the bi-weekly salary. “[I]t is a well-settled rule of contract law that a party who commits the initial breach cannot complain of a subsequent breach.” *Montana Bank, N.A. v. Ralph Meyers & Son*, 236 Mont. 236, 245, 769 P.2d 1208, 1214 (1989) (citing *Malloy v. Judge’s Foster Home*, 229 Mont. 317, 746 P.2d 1073 (1987)).

The statutes only obligate the employer to pay only those wages actually earned by the employee. Mont. Code Ann. § 39-3-201(6)(a) defines “wages” to include “any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly” Montana Code Ann. § 39-3-204(1), provides: “Except as provided in subsections (2) and (3), every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee” “As a general rule the term “hours worked” will include all time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed work place and all time during which an employee is suffered or permitted to work whether or not he is required to do so.” Admin. R. Mont. 24.16.2524(1).

Employers are required to pay each employee not less than the applicable minimum wage. Mont. Code Ann. § 39-3-404(1). Employers are required to pay overtime at a rate of not less than 1 and ½ times the hourly wage rate when a worker works more than 40 hours in one work week. Mont. Code Ann. § 39-3-405(1).

At no time did LFI pay Gazella less than the applicable minimum wage; nor did it ever fail to pay him the appropriate overtime wage. Further, Gazella was never paid less than \$20.00 per hour during those weeks in which he did not perform all available work offered by LFI. Gazella has failed to show he was not properly compensated for work he performed during the period of his wage claim. Therefore, LFI owes Gazella nothing by way of unpaid 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. Frank X. Gazella has not shown that LFI, LLC owes additional wages for work performed during the period of November 1, 2019, through March 24, 2020, therefore, Gazella's claim is dismissed.

VI. ORDER

Based upon the foregoing, the claim of Frank X. Gazella for additional wages for work performed during the period of November 1, 2019, through March 24, 2020, is dismissed.

DATED this 28th day of May, 2021.

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