

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

IN THE MATTER OF THE  
PREVAILING WAGE CLAIM OF  
MASON P. BAILLY,

Claimant,

vs.

FACILITY IMPROVEMENT  
CORPORATION,

Respondent.

Case No. 1701-2022

**ORDER ON RESPONDENT'S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION**

Respondent, Facility Improvement Corporation (FICO), filed a motion for summary judgment seeking dismissal of Mason Bailly's (Bailly) prevailing wage claim on July 14, 2022. Therein, FICO argued that Bailly's claim is time-barred and that it paid Bailly prevailing wages in accordance with Montana law. FICO also seeks an award of attorney's fees. On July 15, 2022, the Office of Administrative Hearings provided Bailly with a notice informing him of his obligations in responding to FICO's motion for summary judgment and advising him of the potential consequences of failing to respond. In spite of this warning, Bailly did not file a response brief, and the time to respond has since elapsed. Therefore, this matter is ripe for disposition.

**II. FACTUAL BACKGROUND**

Bailly began working for FICO on March 23, 2020 at the base hourly rate of \$15.25 per hour. Bailly's first paycheck reflects that FICO paid additional fringe benefits including health insurance, state pension, national pension, international training fund, and apprenticeship training fees. These fringe benefits were in addition to Bailly's hourly base rate of pay and totaled over \$13.00 per hour worked. These fringe benefits were denoted on each paycheck that Bailly received.

Upon his completion of training, Bailly's paychecks reflected an hourly base rate increase from \$15.25 to \$15.50 per hour. All of Bailly's paychecks show that union dues to Local 41 were paid out each pay period as well as apprentice fees. Bailly's last date of employment with FICO was October 21, 2020.

Bailly filed his prevailing wage claim on September 2, 2021. Bailly's wage claim was denied by ERD, and he appealed the denial of his claim to the Office of Administrative Hearings.

On May 26, 2022, the Hearing Officer held a telephonic scheduling conference, wherein the parties agreed to certain pre-hearing deadlines. More specifically, the scheduling order contains a provision that a party has 14 calendar days in which to file a response to any motion filed by a party.

On June 10, 2022, FICO served its discovery requests on Bailly. Included in FICO's discovery requests were certain requests for admissions, as follows:

**Request for Admission No. 1:** Please admit that after your last day of employment with Respondent Facility Improvement Corporation you have had no communications with Mr. Shane Jette, Ms. Jeanette Beagles, or Katie Brown about your prevailing wage claim.

**Request for Admission No. 2:** Please admit that on your last day of employment with Respondent Facility Improvement Corporation you reset your company-issued cell phone to factory settings.

**Request for Admission No. 3:** Please admit that you were an apprentice with Local Union 41 during the course of your employment with Facility Improvement Corporation.

**Request for Admission No. 4:** Please admit that Respondent Facility Improvement Corporation paid national union dues, local union dues and apprentice fees as were denoted on your paycheck stubs.

**Request for Admission No. 5:** Please admit that Respondent Facility Improvement Corporation paid health insurance benefits on your behalf as denoted on your paycheck stubs.

**Request for Admission No. 6:** Please admit that prevailing wage job salaries and/or wages governed by the Davis Bacon Act incorporate an

hourly wage rate as well as additional benefits, such as union dues, health insurance benefits, vacation, and other benefits including but not limited to retirement fund payments or union contributions.

**Request for Admission No. 7:** Please admit that you filed your wage and hour complaint with the Montana Department of Labor after you received your final determination from your Unemployment Insurance Complaint and Appeal with the Montana Department of Labor.

On June 20, 2022, counsel for FICO emailed Bailly to confirm that he received FICO's discovery requests. Bailly did not respond to FICO's counsel's June 20, 2022, email, and never responded to FICO's discovery requests, including the aforementioned requests for admissions.

On July 14, 2022, FICO filed its present motion for summary judgment. Bailly did not file a response brief to FICO's summary judgment motion, and more than 14 days have elapsed since FICO filed its opening summary judgment brief.

### III. SUMMARY JUDGMENT STANDARD

Summary judgment may be granted only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact. *LaTray v. City of Havre*, 2000 MT 119, ¶ 14, 299 Mont. 449, 999 P.2d 1010. To satisfy this burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is." *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993).

All evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment. *Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, ¶ 14, 343 Mont. 279, ¶ 14, 184 P.3d 1021.

Once the moving party meets its burden of demonstrating a complete absence of genuine issues of material fact, the burden then shifts to the non-moving party to set forth specific facts, not merely denials, speculation, or conclusory statements, in

order to establish that a genuine issue of material fact does indeed exist. Mont. R. Civ. P. 56(e); *LaTray*, ¶ 14. Finally, if no genuine issues of material fact exist, it must then be determined whether the facts actually entitle the moving party to judgment as a matter of law. Mont. R. Civ. P. 56(c).

While the failure to file a responsive brief is, generally, deemed an admission by the non-moving party that the motion is well-taken, that is not the case in motions for summary judgment. *Cole v. Flathead Co.*, 236 Mont. 412, 417, 771 P.2d 97, 100 (1989) (“[T]he essential question for the District Court in deciding a motion for summary judgment . . . is whether there exists a genuine issue of material fact. That inquiry does not admit of decision merely on a technical point, such as whether briefs have been filed on time.”). In instances where summary judgment response briefs are not filed by an opposing party, a determination is still required as to whether no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Chapman v. Maxwell*, 2014 MT 35, ¶ 11, 374 Mont. 12, 322 P.3d 1029.

#### IV. DISCUSSION

##### A. *Whether Bailly’s Wage Claim is Time-Barred.*

Title 39, Chapter 3, Part 2 of the Montana Code Annotated governs the payment of wages by an employer to an employee. Therein, Mont. Code Ann. § 39-3-204 states that “every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee . . . , and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable . . . .” Mont. Code Ann. § 39-3-204(1). Any employer who violates -204(1) is guilty of a misdemeanor, and must pay a penalty not to exceed 110% of the wages due and unpaid. *Id.*

Mont. Code Ann. § 39-3-207 provides the applicable statute of limitations in which a claimant has to file a claim for unpaid wages. Therein, it provides that “[a]n employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.” Mont. Code Ann. § 39-3-207(1). In interpreting this statute, the Montana Supreme Court has stated that a wage “claim accrues—and the clock begins to run—on the last date on which the employer fails to pay.” *Harrell v. Farmers Educational Co-Op Union*, 2013 MT 367, ¶ 29, 373 Mont. 92, 314 P.3d 920, 928 (citing *Jensen v. State*, 2009 MT 246, ¶ 11, 351 Mont. 443, 214 P.3d 1227).

Here, the undisputed facts show that Bailly's wage claim accrued, and the clock began to run, as of his last date of employment with FICO, and he failed to file his wage claim within 180 days of the accrual of his wage claim. Bailly admitted, in his complaint, that his last day working for FICO was October 21, 2020. Since October 21, 2020 was Bailly's last day, that was the day that his claim accrued because it is axiomatic that FICO could not have violated the wage statutes after Bailly's last day when FICO had no obligation to pay Bailly after that date. As such, the statute of limitations on Bailly's wage claim began to run on October 21, 2020.

Since Bailly's wage claim accrued on October 21, 2020, he had 180 days from that date, or April 20, 2021, to file his wage claim. Unfortunately, Bailly waited until September 1, 2021 to file his wage claim. Since the undisputed facts establish that Bailly waited more than 180 days to file his wage claim, his claim is time-barred, and FICO's motion for summary judgment must be granted in this respect.

*B. Whether FICO Paid Bailly Appropriately.*

Since the issue of whether Bailly's wage claim is time-barred is dispositive, the Hearing Officer need not address FICO's secondary issue addressing whether it paid Bailly appropriate prevailing wages.

*C. FICO's Request for Attorney's Fees.*

Finally, FICO requests an award of attorney's fees and costs in its favor. In support of this contention, FICO cites to Mont. Code Ann. § 39-3-214, which provides that "[w]henver it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney fee in favor of the successful party, to be taxed as part of the costs in the case." Mont. Code Ann. § 39-3-214(1).

However, this statute does not allow for an award of attorney's fees in an administrative proceeding. The Montana Supreme Court has explicitly held that an administrative hearing is not a "suit at law" and that a "determination" made by an administrative agency is not a judgment." *See Chagnon v. Hardy Const. Co.*, 680 P.2d 932 (Mont. 1984) (holding that it would be improper to award a party attorney's fees under § 39-3-214 for services rendered at the administrative agency level). Given this clear authority, FICO's request for attorney's fees and costs must be denied.

V. CONCLUSION

Based on the foregoing, FICO's Motion for Summary Judgment is hereby granted in part and denied in part.

DATED this 9th day of August, 2022.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JEFFREY M. DOUD  
JEFFREY M. DOUD  
Hearing Officer