

**IN THE COURT OF APPEALS OF IOWA**

No. 0-792 / 10-0225  
Filed November 24, 2010

**DAVID OLVER,**  
Plaintiff-Appellant,

**vs.**

**TANDEM HCM, INC., and  
VANTAGEIS, L.L.C.,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson,  
Judge.

David Olver appeals a district court judgment denying liquidated damages  
on his unpaid wages claim. **REVERSED AND REMANDED.**

Steven Gardner of Kiple, Deneffe, Beaver, Gardner & Zingg, L.L.P.,  
Ottumwa, for appellant.

Craig R. Foss of Foss, Kuiken, Gookin & Cochran, P.C., Fairfield, for  
appellees.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

**MANSFIELD, P.J.**

David Olver appeals a district court judgment denying liquidated damages on his unpaid wages claim under the Iowa Wage Payment Collection Law, Iowa Code chapter 91A (2007). Olver claims that his former employers, VantageIS, L.L.C. and Tandem HCM, Inc., intentionally failed to pay him wages and therefore he was entitled to those wages plus liquidated damages, court costs, and usual and necessary attorney fees. After a default was entered based upon the defendants' failure to comply with discovery, the district court held a trial on damages, at which it determined Olver failed to prove the wages were intentionally unpaid. On Olver's appeal, we conclude substantial evidence does not support this ruling, and therefore we reverse and remand for the district court to enter an award of liquidated damages as well as appellate attorney fees.

**I. Background Facts and Proceedings**

We summarize the evidence presented at the damages trial. VantageIS and Tandem HCM are companies located in Georgia that sell human resources and payroll software consulting services to national clients. According to Olver, VantageIS has a non-compete clause with a large national payroll software company, and therefore Tandem HCM was created as a sister company to handle any business that might implicate this clause.

In October 2005, Olver entered into a written employment contract with VantageIS to be director of professional services in the midwest region. The contract provided an annual compensation rate of \$100,000 payable in semi-monthly installments, a sales commission of five percent to be paid on a quarterly basis, and possible bonus opportunities. Olver began employment on January 1,

2006, and worked for VantageIS until March 31, 2006. At that time, Olver was laid off.

According to Olver, his layoff was a result of disagreements that had arisen among the owner of VantageIS, Michael Madryga, and Madryga's two business partners. On March 27, 2006, Olver signed a "General Release for Employment Termination" that provided him with two weeks of severance pay. However, Olver testified that around that same time he entered into an oral agreement with Madryga to keep providing services to VantageIS and Tandem HCM while the disputes among the partners were being ironed out. Under this oral agreement, Olver continued to work twenty hours a week for the companies, and was promised half his previous rate of compensation. A number of e-mails document Olver's ongoing work for the companies. Olver, however, was not actually paid for the work he performed from April 1, 2006 through August 1, 2006.

By August 2006, the litigation involving Madryga and his partners was concluding. Accordingly, on August 1, 2006, Olver entered into a written employment contract with Tandem HCM. Under this agreement, as under the prior written agreement, Olver was to be compensated at an annual rate of \$100,000 payable in semi-monthly installments, plus a five percent commission on all billable professional services. Yet this agreement also provided that Olver's compensation was subject to a short-term deferral through December 31, 2006, with payout of the deferred portion to occur no later than March 15, 2007. Although Olver received a deferred payment of the wages he earned in August 2006, he received no payment for his September to December 2006 wages.

Olver did receive his semi-monthly wages on the work he performed from January 2007 until being permanently laid off on June 15, 2007. However, Olver never received any commission payments on the work he performed from August 2006 until June 2007 under the second written employment agreement.

On September 25, 2007, Olver brought suit against VantageIS and Tandem HCM for the wages and commissions he claimed were due and owing. VantageIS and Tandem HCM were both properly served. Initially, VantageIS and Tandem HCM filed a motion to dismiss based on Georgia forum-selection clauses in the written employment agreements. The motion to dismiss was denied and so was an interlocutory appeal to our supreme court. Following the denial, the companies filed an answer, but subsequently failed to comply with court orders compelling discovery and failed to remain in contact with their attorney. Accordingly, in December 2009, Olver sought discovery sanctions and the companies' attorney filed an application to withdraw.

On December 29, 2009, the court held a hearing on the applications and determined Olver was entitled to judgment by default as a discovery sanction under Iowa Rule of Civil Procedure 1.517(2)(b)(3). Judgment was entered in favor of Olver for "unpaid wages, compensatory damages, liquidated damages, costs and reasonable attorney fees." The district court then set a trial date of January 10, 2010, for a determination of the amount of damages.

Olver was the only party to present evidence at the damages trial. He testified he was still owed \$16,666.66 for the work performed under the oral agreement from April 1, 2006, until August 1, 2006, as well as wages amounting to \$33,333.32 for his employment from September 1, 2006, until December 31,

2006. Olver also stated that he was still owed five percent commissions totaling \$22,994.75 for billable professional services from August 2006 until June 2007. Olver further testified that these wages and commissions were intentionally unpaid by VantageIS and/or Tandem HCM and there was no dispute as to the amount owing. He further testified:

Q. Did Mr. Madryga advise you that that money [April 1, 2006 to August 1, 2006 compensation] was owed to you? A. Yes.

Q. Did he advise you that he would pay that money? A. Yes, he did.

.....

Q. Did Mr. Madryga continue thereafter to promise you payment for the services you provided during that time frame [September 2006 to December 2006]? A. On multiple occasions.

Following the hearing, the district court awarded Olver wages and commissions totaling \$72,994.73. The district court also awarded court costs and attorney fees of \$15,287.35. However, the district court declined to award liquidated damages, stating:

The Court specifically finds that the evidence is insufficient to find that the wages were intentionally unpaid. Therefore, liquidated damages should not be awarded. [Citation omitted.] In addition, given the magnitude of the wages awarded, the Court finds that it would be inequitable to award liquidated damages.

Olver subsequently submitted a motion to enlarge and amend, arguing the “issue of intentional non-payment of wages was fully and finally adjudicated by way of the Default Judgment Entry” and that the proof presented at the damages trial “easily exceeds the requirement necessary for the non-payment of wages.” The district court denied the motion holding:

A default entry concerning whether wages were intentionally unpaid does not establish the level of proof necessary to entitle an award of liquidated damages of the magnitude requested. In addition, the

court has found that it would be inequitable to enter such an award, under the circumstances of this case.

Olver appeals the district court's refusal to award liquidated damages.

## **II. Standard of Review**

Our review is for correction of errors at law. *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999).

## **III. Analysis**

When an employer *intentionally* fails to pay an employee's wages, the employer shall be liable for the unpaid wages or expenses, plus liquidated damages, court costs, and "usual and necessary" attorney fees. Iowa Code § 91A.8; see also *Hinshaw v. Ligon Indus., L.L.C.*, 551 F. Supp. 2d 798, 816-18 (N.D. Iowa 2008); *Condon*, 604 N.W.2d at 597-98. It is the employee's burden to show his or her employer's failure to pay was intentional. *Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 216 (Iowa 1984).

Here, Olver raises two arguments: First, he contends the default judgment necessarily established the defendants' liability for liquidated damages. He points out that he pled in his petition that VantagelS and Tandem HCM intentionally failed to pay his wages. Upon an entry of default, "all the plaintiff's material allegations are taken as true and the determination of the amount of damages to be awarded is all that remains to be done." *Hallett Constr. Co. v. Iowa State Highway Comm'n*, 154 N.W.2d 71, 74 (Iowa 1967); see also 46 Am. Jur. 2d *Judgments* § 292, at 617-18 (2006) (setting forth the majority and minority rules); 49 C.J.S. *Judgments* § 273, at 273 (2009) ("[A] default admits the material facts that constitute a cause of action, and entry of default, when appropriately

made, conclusively determines the liability of the defendant.”). Thus, Olver contends the district court, having entered a default, could not subsequently find the defendants’ failure to pay wages was unintentional. All it could do was determine the amount of wages that were unpaid and calculate liquidated damages thereon.

Second, Olver contends the district court’s finding that nonpayment was unintentional is not supported by substantial evidence. In Olver’s view, the record overwhelmingly establishes that the defendants’ failure to pay was intentional within the meaning of Iowa Code section 91A.8.

Upon our review, we agree with Olver’s second argument and therefore do not reach the merits of his first contention. The unrebutted testimony established that Madryga knew the wages were due and owing, promised to pay them, did not dispute the amounts, and simply failed to make payment. This amounts to intentional nonpayment under the Iowa Wage Payment Collection Law. *See Condon*, 604 N.W.2d at 598. It would be speculative to find, on this record, that the nonpayment was due to either a good faith dispute that the wages were owed or an inadvertent failure to pay. *See id.* (identifying these as two situations where nonpayment will be considered unintentional). At the damages trial, VantageIS and Tandem HCM did not participate or offer any proof regarding causation or mitigation. *See Hallett*, 154 N.W.2d at 74 (stating the defaulting defendant has the right to be heard and participate, cross-examine witnesses, offer proof of mitigation, and challenge causation). Accordingly, we cannot sustain the district court’s finding that the failure to pay was unintentional.

In our view, the unchallenged proof at the damages trial entitled Olver to liquidated damages under Iowa Code sections 91A.2(6) and 91A.8.

We must also address the district court's conclusion that awarding liquidated damages would be "inequitable . . . under the circumstances." As enacted by the General Assembly, section 91A.8 is mandatory. Where an intentional failure to pay wages occurs, the employer "shall be liable" for liquidated damages. Iowa Code § 91A.8. Thus, in this instance, courts are not at liberty to weigh equitable considerations. "[W]e have determined the term 'shall' in a statute to create a mandatory duty, not discretion." *State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000); see also Iowa Code § 4.1(30) ("The word 'shall' imposes a duty.").

Finally, Olver requests appellate attorney fees. Iowa Code section 91A.8 provides that the employer "shall be liable for . . . any attorney's fees incurred in recovering the unpaid wages and determined to have been usual and necessary." The district court awarded Olver \$15,287.35 in attorney fees. Olver has requested an additional award to cover fees incurred in this appeal. Under the statute, the award of attorney fees to a successful litigant is mandatory. *Audus v. Sabre Commc'n. Corp.*, 554 N.W.2d 868, 874 (Iowa 1996). This includes appellate attorney fees where appropriate. *Runyon v. Kubota Tractor Corp.*, 653 N.W.2d 582, 588 (Iowa 2002). Since we have no record before us of those fees, we will remand the case to the district court for a determination of the usual and necessary fees incurred in this appeal. See *Gablemann v. NFO, Inc.*, 606 N.W.2d 339, 343-45 (Iowa 2000); *Maday v. Elview-Stewart Sys. Co.*, 324 N.W.2d 467, 471 (Iowa 1982).



**IV. Conclusion**

For the foregoing reasons, we reverse the judgment below and remand this case to the district court for entry of an award of liquidated damages and appellate attorney fees, in addition to the \$72,994.73 in unpaid wages and \$15,287.35 in trial court attorney fees and expenses already awarded. Costs are taxed to the appellees.

**REVERSED AND REMANDED.**